FOR RICHER, OR FOR POORER: HOW *OBERGEFELL V. HODGES* AFFECTS THE TAX-EXEMPT STATUS OF RELIGIOUS ORGANIZATIONS THAT OPPOSE SAME-SEX MARRIAGE

Herman D. Hofman

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INTRODUCTION

In its landmark ruling in *Obergefell v. Hodges*[1], the Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee the fundamental right of same-sex couples to marry.[2] Beyond its immediate ramifications, the Court's decision left a number of important questions unanswered.[3] These questions center on the consequences that should ensue for those holding fast to beliefs contrary to those espoused in *Obergefell*.[4]

Most of the resistance to *Obergefell* has originated from religious objections.[5] Some commentators have responded to this resistance by calling for the revocation of the tax-exempt status of organizations that continue to advocate against same-sex marriage.[6] Conversely, those objecting to *Obergefell* have been relegated to defending these organizations' tax-exempt status.[7]

While *Obergefell* lent new ammunition and context to the debate surrounding religious organizations and same-sex marriage, scholars on both sides of the issue had already grappled with this

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. *Id.* at 2604-05 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

3. *See id.* at 2622 ("One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people."); *see also id.* at 2625 ("Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . . .").

4. *See* Dennis Romboy, *A Look at the "12 Religious Freedom Grenades" Launched by the Supreme Court Decision On Marriage*, DESERET NEWS (Jul. 7, 2015), http://national.deseretnews.com/article/5096/a-look-at-the-12-religious-freedom-grenades8217-launched-by-the-supreme-court-decision-on-marriage.html.

5. *See* Elisha Fieldstadt, *Supreme Court's Ruling on Same-Sex Marriage Met With Resistance in Some States*, NBC NEWS (June 26, 2015, 4:38 PM), http://www.nbcnews.com/news/us-news/supreme-courts-ruling-same-sex-marriage-met-resistance-n382751.

6. *See, e.g.*, Felix Salmon, *Does Your Church Ban Gay Marriage? Then It Should Start Paying Taxes*, FUSION, (June 29, 2015), http://fusion.net/story/158096/does-your-church-ban-gay-marriage-then-it-should-start-paying-taxes/; Mark Oppenheimer, *Now's the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/.

7. *See* David Lauter, *Will a Religious Institution Lose Its Tax-Exempt Status for Refusing to Marry a Same-Sex Couple?*, L.A. TIMES, (Jun. 26, 2015), http://www.latimes.com/nation/nationnow/la-na-tax-exemptions-religious-20150626-story.htm; Denny Burk, *Ending Tax Exemptions Means Ending Churches*, THE FEDERALIST, (June 29, 2015), http://thefederalist.com/2015/06/29/ending-tax-exemptions-means-ending-churches/.

debate's contours.[8] Prior to *Obergefell*, this debate mostly addressed hypotheticals, considering that there was no national consensus on whether a right to same-sex marriage existed.[9] However, post-*Obergefell*, the federal government now indirectly supports religious organizations through grants of tax-exempt status[10] even though many of these organizations advance a cause at odds with *Obergefell*'s holding.[11]

Current federal income-tax law does not expressly prohibit discrimination by religious organizations.[12] The crux of the issue involves the interpretation of the public policy doctrine articulated by the Supreme Court in *Bob Jones University v. United States*,[13] which held that the Treasury Department (and by delegation, the Internal Revenue Service) may revoke the tax-exempt status of organizations whose actions violated "established public policy."[14] The question is therefore whether religious organizations that advocate and act on beliefs arguably contrary to *Obergefell* violate public policy such that the Treasury Department and the IRS could revoke the tax-exempt status of these organizations. This question is especially pressing given the *Bob Jones* Court's failure to delineate the contours of the public-policy doctrine and the *Obergefell* Court's decision to leave this question unanswered.

This Note argues that the Supreme Court should clarify the scope of the public policy doctrine established in *Bob Jones* by holding that fundamental public policy arises only in the context of a decades-long, concerted effort by all three branches of government to address an issue. This is supported by the disharmonious positions among the three branches of government on same-sex rights, the language and problem addressed in *Bob Jones*, and the historical

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8. *See* Austin Caster, *"Charitable" Discrimination: Why Taxpayers Should Not Have to Fund 501(C)(3) Organizations that Discriminate Against LGBT Employees*, 24 REGENT U. L. REV. 403, 403 (2011-2012); Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(C)(3) Exemption of Religious Organizations that Discriminate*, 17 WM & MARY BILL RTS. J. 715, 715 (2009); Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 43 B.C. L. REV. 781, 781 (2007).

9. *See supra* note 8 and accompanying text.

10. *See* Mirkay, *supra* note 8, at 715-717.

11. 135 S. Ct. at 2599.

12. *See* Nicholas Mirkay, *Is It "Charitable" to Discriminate? The Necessary Transformation of Section 501(c)(3) in the Gold Standard for Charities*, 2007 WIS. L. REV. 45, 51.

13. 461 U.S. 574 (1983).

14. *Id.* at 586.

justification for tax exemptions. The logical corollary of this argument is that *Obergefell*'s recognition of a fundamental right to same-sex marriage does not establish fundamental public policy granting the IRS power to revoke the tax-exempt status of religious organizations that oppose same-sex marriage.

Part I of this Note discusses the religious nature of marriage, explaining why religious institutions in particular hold strong views on the issue of same-sex marriage that are in tension with *Obergefell*.[15] Part II provides an overview of the tax-exemption process and the statutory and regulatory standards that an organization must satisfy in order to obtain tax-exempt status.[16] Part III discusses the Supreme Court's interpretation of Section 501(c)(3), focusing specifically on the Supreme Court's decisions in *Walz v. Tax Commission of the City of New York*[17] and *Bob Jones*.[18] Part IV analyzes the public policy doctrine in the context of same-sex rights, concluding that the Supreme Court, in the wake of *Obergefell*, should adopt a narrow interpretation of the public policy doctrine, holding the doctrine inapplicable to religious organizations that oppose same-sex marriage.[19]

I. RELIGIOUS INSTITUTIONS AND MARRIAGE

The definition of marriage is of particular importance to many religions because of the theological significance that the institution of marriage carries. For many religions, marriage is not merely a social institution, but a religious concept in and of itself and a core tenet of the belief system.[20] Thus, for many religious institutions, the defense of the traditional definition of marriage is a religious mission of the highest order.[21]

The largest religious institutions in the United States today all define marriage as a religious concept and a core tenet of their belief system. In the Roman Catholic Church,[22] for example, marriage is

15. *See infra* Part I.
16. *See infra* Part II.
17. 397 U.S. 664 (1970).
18. *See infra* Part III.
19. *See infra* Part IV.
20. Joel A. Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV. 195, 202.
21. *See* Rosemary Haughton, No. 23: The Theology of Marriage 41 (Edward Yarnold ed., 1971).
22. The Roman Catholic Church is the largest single religious denomination in the United States. *See, e.g.*, Richard John Neuhaus, *Columnists Say It . . . , First*

not only a religious concept, but one of the seven recognized sacraments.[23] And for Catholics, sacraments are divine in origin and are the primary means through which believers strengthen their faith and partake in spiritual growth.[24]

For most Protestant traditions, marriage is not considered a sacrament, but is viewed as a distinct religious covenant between God and the believers.[25] The Christian view on marriage is more than simply a particular view on sexual ethics; it derives its importance from its divine origins in the creation of the human order.[26] For many Protestants, marriage is not only God's view on the proper relationship between men and women, but an expression of a restored humanity in the image of God, which is not complete until the union between a man and a woman is achieved.[27] For many Christians, marriage is also a symbol of God's unbreakable covenant with believers and his love for them.[28] Further, marriage is the ideal environment for human reproduction, a context where husband and wife reflect God's image through the act of creating a child.[29] From there, the familial environment is the central place for the inculcation of the Christian faith to children.[30]

For the dominant religious traditions across the United States, marriage is a predominantly religious concept accorded high importance.[31] This explains not only why religious institutions have been at the forefront in defending the traditional definition of marriage,[32] but also why many of these institutions continue to resist the *Obergefell* Court's definition of marriage. Because of this, the beliefs of these institutions will run counter to the public policy

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Things, (Nov. 2, 2005), http://www.firstthings.com/onthesquare/2005/11/rjn-11205-columnists-say-it (specifying that the Roman Catholic Church's 66 million members make it the largest religious denomination in the United States).

23. CATECHISM OF THE CATHOLIC CHURCH § 1210 (2d ed. 1997).

24. *Id.* § 1131.

25. *See, e.g.*, DOUGLAS J. BROUWER, BEYOND "I DO": WHAT CHRISTIANS BELIEVE ABOUT MARRIAGE 21-23 (2001) (defining a "covenant" as an unbreakable, enduring bond between members).

26. HENRY A. BOWMAN, A CHRISTIAN INTERPRETATION OF MARRIAGE 19 (1959).

27. *See* CHARLES P. KINDREGAN, A THEOLOGY OF MARRIAGE 14-15 (1967).

28. MATTHIAS J. SCHEEBEN, MYSTERIES OF CHRISTIANITY 601-02 (1946).

29. *See* Bowman, *supra* note 26, at 22.

30. *See* Second Vatican Ecumenical Council, Gravissimum Educationis [Declaration on Christian Education] art. 3 (1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm.

31. *See supra* notes 23-30 and accompanying text.

32. *See supra* note 5 and accompanying text.

dictated by government bodies.[33] Inevitably, one point of conflict will occur at the intersection of religious institutions and the government, in the tax arena.

II. THE TAX EXEMPTION STATUTE: AN OVERVIEW

Tax-exempt status is crucial to the ability of religious organizations to engage in charitable work because of the benefits it provides. This is supported by the scope of charitable giving in the United States. In 2011, charitable giving in the United States amounted to $174.5 billion, with an average charitable deduction per return of $1,201.[34] Forty-five percent of American households that gave to charitable causes directed this giving to religious organizations.[35] The average donation to religious organizations for that year was $1,703.[36]

The tax-exempt status of religious organizations is deeply rooted in America's history and traditions. In 1798, Congress for the first time recognized state-conferred exemptions of churches from real estate and certain other taxes.[37] Legislation enacted in the wake of the ratification of the Sixteenth Amendment expressly provided that religious organizations would be exempt from federal income taxes.[38] Since 1894, individual contributions made to organizations that operate exclusively for religious purposes are also eligible for a deduction.[39] Subsequent federal income tax legislation incorporated similar provisions.[40] This policy of exempting religious organizations has continued to the present.[41]

Title 26 of the Internal Revenue Code governs tax exemptions. Section 501 details the requirements that an organization must meet to qualify as exempt from federal income entity taxation. Section 170

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33. *See supra* notes 10-11 and accompanying text.

34. *Charitable Giving in America: Some Facts and Figures*, NAT'L CTR. FOR CHARITABLE STAT. (2011), http://nccs.urban.org/nccs/statistics/Charitable-Giving-in-America-Some-Facts-and-Figures.cfm.

35. *Id.*

36. *Id.*

37. Walz v. Tax Comm'n of N.Y., 397 U.S. at 677-78 & n.5 (1970).

38. *Id.* at 676 n.4.

39. Tariff Act, ch. 349, § 32, 28 Stat. 509, 556 (1894).

40. Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913); Revenue Act of 1916, ch. 463, § 11(a)(6), 39 Stat. 756, 766 (1916); Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1057, 1076 (1918).

41. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 330, 431 (2d ed. 2000).

specifies which taxpayer contributions to section 501 organizations receive preferential treatment.

Section 501 enumerates eight categories of organizations that are presumptively exempt from taxation unless sections 502 or 503 deny such exemption.[42] One category includes organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."[43] An organization is "organized and operated" for one or more of these purposes if it demonstrates that both its organization (organizational test) and operation (operational test) qualify it as an exempted entity.[44] The organizational test is met if the organization's founding documents limit it to exempt purposes.[45] Conversely, the operational test is met if the organization shows that its operation substantially revolves around achieving the tax-exempt purposes for which it was organized.[46]

Although section 501(c)(3) requires that an organization's purpose be limited to those delineated in the statute, an organization may still engage in incidental, non-exempt activities without violating the Code.[47] However, if any of the non-exempt purposes are substantial in nature, the organization's tax-exempt status is extinguished.[48] This is the case even if the organization also engages in a number of exempt purposes.[49]

Section 170 governs contributions to organizations that may qualify for a deduction under the Code. To qualify as a "charitable contribution" under section 107, the contribution must be a "contribution or gift to or for the use of" a government unit, a 501(c)(3) organization, a veteran's aid group, fraternal society, or non-profit cemetery company.[50] Further, the contribution must meet several timing requirements, and the percentage of income that an

42. 26 U.S.C. § 501(a) (2015).
43. *Id.* § 501(c)(3).
44. *See* Treas. Reg. § 1.501(c)(3)-1(a)(1) (2002).
45. *See id.*
46. *See id.*
47. *See* Church of Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) ("Courts have . . . interpreted the word 'exclusively' to mean 'substantially.'").
48. *See* Better Bus. Bureau v. United States, 326 U.S. 279, 283 (1945).
49. *See id.*
50. 26 U.S.C. § 170(c) (2015).

individual may deduct per year is limited.[51] Generally, individuals may deduct donations to 501(c)(3) organizations of up to one-half of their adjusted gross income.[52]

Federal tax-exempt status provides a myriad of other benefits. First, all income generated by 501(c)(3) organizations that is related to the exempt purposes of the organization is exempt from taxes.[53] Second, federal tax-exempt status further promotes contributions by donors, who receive a deduction for their donations.[54] Third, federal tax-exempt status often also exempts 501(c)(3) organizations from property taxation by a state.[55] Additionally, organizations that qualify for 501(c)(3) status are exempt from federal unemployment taxes.[56]

Although it is relatively easy for an organization to qualify for tax-exempt status under section 501(c)(3), an organization's activity is restricted in numerous ways once the status is conferred. For example, members of 501(c)(3) organizations may not benefit in their individual capacity from the organization's activities or property.[57] Exempt organizations are also prohibited from attempting to influence, promote, or oppose pending legislation[58] or to participate overtly in election campaigns of political candidates.[59] Additionally, in 1977, the IRS required that exempt organizations must exhibit a sincere belief in their doctrines.[60]

The statutory restrictions imposed on exempt organizations, however, are not the only limitations on the activities of these

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51. *Id.*
52. *See id.* § 170(b)(1)(A).
53. *Id.*
54. *See generally id.* § 170.
55. *See, e.g.*, ARIZ. REV. STAT. §§ 42-11109, -11114-16, -11120-21 (2016) (exempting 501(c)(3) organizations from property taxes); CAL. REV. & TAX. CODE § 214 (Deering 2016) (same); CONN. GEN. STAT. § 12-81(7), (75) (2015); D.C. Code. Ann. § 47-1010.01 (2016); Mich. Comp. Laws § 205.94 (2012); MINN. STAT. § 272.02 (2015); MISS. CODE ANN. § 27-31-1 (2016); N.J. STAT. ANN. § 54:4-3.65 (West 2015).
56. 26 U.S.C. § 3306(c)(8) (2015).
57. *See id.* § 501(c)(3) (authorizing exemption only if "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual").
58. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972) (holding that nonprofit religious organization's support of restoration of prayer in public schools violated requirements for tax-exempt status).
59. *See* § 501(c)(3) (prohibiting tax-exempt organizations from "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office").
60. *See* FISHMAN & SCHWARZ, *supra* note 41, at 441 (quoting I.R.S. Gen. Couns. Mem. 36,996 (Feb. 3, 1977)).

institutions. Arguably, the Supreme Court imposed the most controversial restriction on these organizations' activity, which is discussed in Part III below.

III. THE PUBLIC POLICY DOCTRINE

The Supreme Court's interpretation of Section 501(c)(3) has been guided by two seminal cases: *Walz v. Tax Commission of New York*[61] and *Bob Jones University v. United States*.[62] First, in *Walz*, the Court examined whether a state property-tax exemption of churches violated the Establishment Clause. In so doing, the Court discussed what it considered to be the primary justifications for government's tax exemption of religious organizations. Second, in *Bob Jones*, the Court enunciated the public policy restriction on tax exemption of religious organizations.[63]

A. *Walz v. Tax Commission of New York*

In *Walz v. Tax Commission of New York*, the Supreme Court upheld New York's grant of a statutory property-tax exemption to religious organizations.[64] First, the Court considered the justifications for a state's decision to grant tax exemptions to religious organizations.[65] Although it recognized the valuable social benefits generated by the work of religious organizations,[66] the Court held that the provision of social benefits alone is an insufficient justification for tax exemption because of the variety, nature, and scope of social services that religious organizations provide.[67] Rather, the Court reasoned that tax exemptions for religious organizations are justified based on the pluralism and diversity that religious organizations offer to American society.[68] Further, the Court found that the history and tradition of the receipt of tax exemptions by

61. 397 U.S. 664 (1970).
62. 461 U.S. 574 (1983).
63. *Id.*
64. *Walz*, 397 U.S. at 689 (Brennan, J., concurring).
65. *Id.* at 673 (majority opinion).
66. It is undisputed that many religious organizations contribute substantially to charity. Catholic charities are "the largest provider of social services after the federal government." Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y, 206, 224 (2010).
67. *Walz*, 397 U.S. at 673.
68. *Id.* at 689 (Brennan, J., concurring).

religious organizations was a powerful justification for continued receipt of those benefits.[69]

B. *Bob Jones University v. United States*

The public policy doctrine originated in *Bob Jones*. To understand the Court's holding in that case, however, it is important to realize the context of the Court's decision. *Bob Jones* dealt with racial discrimination in education. The Supreme Court's holding in that case, however, reflected a long history of executive, legislative, and judicial efforts to address this issue. Therefore, the *Bob Jones* holding must be viewed through the lens of the history that preceded it.

1. *Racial Discrimination in Education Prior to* Bob Jones

After the Supreme Court held the "separate but equal" doctrine unconstitutional in 1954,[70] many white parents enrolled their children in private schools, where the employment of a racially discriminatory admission system was permitted because the schools were not state actors for purposes of the Fourteenth Amendment.[71] Congress subsequently passed the Civil Rights Act in 1964.[72] Soon thereafter, the IRS refused to process exemption applications for segregated private schools.[73] In 1967, the IRS determined that it would no longer grant tax exemptions to racially discriminatory private schools that were sufficiently entangled with the state.[74] Private schools that lacked such entanglement, however, were still given tax-exempt status by the IRS.[75]

A group of African-American parents challenged this policy by suing the IRS to enjoin it from granting tax-exempt status to racially discriminatory private schools.[76] After the district court granted their

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69. *Id.* at 681 ("History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation.").

70. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

71. *See* Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 YALE L. J. 1436, 1436-40 (1973).

72. Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2006)).

73. Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C. 1970).

74. *See id.*

75. *See id.*

76. *See id.* at 1129.

injunction,[77] the IRS reviewed each of its previous grants of tax-exempt status in an effort to revoke the exemption of any private schools that discriminated on the basis of race.[78] Various private schools appealed the district court's injunction, leading to the Supreme Court's grant of certiorari.

The specific facts giving rise to *Bob Jones*[79] involved a private, religious university that refused to admit students who were married to or dating someone of a different race. Based upon this policy, the IRS revoked the school's tax-exempt status.[80] The university sued, arguing that the IRS's decision violated its right to free exercise of religion under the First Amendment.

2. *The Supreme Court's Holding in* Bob Jones

As it had in *Walz*, the Court in *Bob Jones* emphasized the social benefits that religious organizations provide to society. The Court further emphasized that the legislative history behind section 170 and section 501(c)(3) demonstrated that Congress wanted to provide tax benefits to institutions that served productive purposes.[81] However, unlike in *Walz*, the Court failed to even mention the role that public institutions could have in providing for pluralism and diversity. Rather, the Court wholly ascribed Congress's favorable tax treatment of religious institutions to the public benefits these organizations provide to society and the community at large.[82]

77. *See id.* at 1140.

78. I.R.S. News Release (July 10, 1970), *reprinted in* 7 Standard Fed. Tax Rep. (CCH) ¶ 6,790.

79. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

80. Earlier, the IRS had publicly announced in a news release that it would revoke the tax-exempt status of racially discriminatory schools and it had enacted Revenue Ruling 71-447.31. Revenue Ruling 71-447 stated: "All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." Rev. Rul. 71-447, 1971-2 C.B. 230. The IRS based its position on the Restatement of Trusts, which provided: "[a] trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid." *Id.*

81. *Bob Jones*, 461 U.S. at 587-88 ("[I]n enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.").

82. *Id.* at 591.

Ultimately, the Court held that religious organizations must meet certain public policy requirements to obtain tax-exempt status.[83] Because the tax-exempt status of 501(c)(3) organizations is premised on the public benefit they confer on society, the Court reasoned that these organizations must comply with public policy to qualify for tax benefits.[84] In other words, an organization would not be fulfilling its function of providing a public benefit if it failed to comply with public policy.

The Court justified its conclusion by looking beyond the plain language of the statute, finding that the objective behind the law was solely to provide benefits to those organizations that served "charitable purposes."[85] Further, citing to testimony in the congressional record, the Court found that one reason behind section 501(c)(3)'s enactment was to reward those organizations that provided benefits to society.[86] Importantly, however, a charitable organization only failed the public policy requirement "where there [could] be *no doubt* that the activity involved [was] contrary to a fundamental public policy."[87]

After establishing the public-policy requirement in sections 170 and 501(c)(3), the Court considered whether an "established" public policy prohibited racial discrimination, particularly in admissions in an educational setting.[88] The Court held that such a public policy existed based on judicial, legislative, and executive actions prohibiting racial discrimination.[89] In the judicial arena, the Court relied on its ruling in *Brown*, that the "separate but equal" doctrine[90]

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83. *Id.* at 586 ("[U]nderlying all relevant parts of the [Tax] Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.").

84. *See id.* at 592 (stating that a charitable organization's "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.").

85. *See id.* at 586.

86. *See id.* at 587-88.

87. *See id.* at 592 (emphasis added).

88. *See id.* at 593-95.

89. *See id.* ("Over the past quarter of a century, every pronouncement of this Court and myriad acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.").

90. Under this doctrine, separate but equal facilities were upheld as constitutional as long as they were substantially equal to each other. *See, e.g.*, McCabe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151, 161-62 (1914).

violated the Equal Protection Clause.[91] Further, in *Cooper v. Aaron*, the Court had broadened this rule, holding that racial segregation also violated the Due Process Clause.[92] Regarding legislative statements, the Court relied on the Civil Rights Act of 1964, which prohibited racial discrimination in education, voting, and housing.[93] Regarding executive decisions, the Court highlighted a series of executive orders beginning in the 1940s under President Truman, which prohibited racial discrimination in federal employment.[94] The Court also noted President Eisenhower's use of the military to desegregate schools nationwide, and that President Kennedy had described federal support of racially discriminatory housing policies as "inconsistent with . . . public policy."[95]

The Court weighed the government's interest in eradicating racial discrimination in education with the university's right to operate its school in accordance with the free exercise of its religious beliefs. The Court held that the government's interest substantially outweighed the burdens imposed on the university by the revocation of its tax-exempt status. As such, the university's free exercise claim failed.

Justice Powell, in his concurring opinion, sharply diverged from the Court's holding on this point.[96] He reasoned that the holding injected an element of coercion into the IRS's determination of tax-exempt status, potentially forcing organizations to conform to the government's view of "the public interest."[97] Justice Powell would

91. *See Bob Jones Univ.*, 461 U.S. at 593.

92. *See* Cooper v. Aaron, 358 U.S. 1, 19 (1958) ("The right of a student not to be segregated on racial grounds in schools ... is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.").

93. *See* Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-6, 2000d (2012) (prohibiting racial discrimination in education); Voting Rights Act of 1965, 42 U.S.C. § 1971 (2012) (prohibiting racial discrimination in voting); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 (2012) (prohibiting racial discrimination in housing).

94. *See Bob Jones Univ.*, 461 U.S. at 594 ("Several years before this Court's decision in Brown v. Bd. of Education, . . . President Truman issued Executive Orders prohibiting racial discrimination in federal employment decisions, Exec. Order No. 9980, 3 C.F.R. § 720 (1943-1948 Comp.).").

95. *Id.* at 594-95 (quoting Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963)) (prohibiting racial discrimination in housing).

96. *Id.* at 608-09 (Powell, J., concurring).

97. *Id.* (finding the majority's holding "troubling" because of its emphasis on "conformity").

have justified tax exemption based on an organization's contribution to a diversification of activities and viewpoints.[98]

3. *Federal Courts and the Public Policy Doctrine*

Although the *Bob Jones* Court explained why it violated fundamental public policy for a religious organization to discriminate on the basis of race, it did not provide any explicit guidance regarding other practices that might violate fundamental public policy.[99] As a result, the IRS has been hesitant to exercise its power to revoke tax exemptions based on public policy grounds, exercising that power only in cases of racial discrimination[100] and illegality.[101] Further, since *Bob Jones*, federal courts have done little to clarify the scope of the public policy doctrine.

In the vast majority of cases in which courts mention the public policy doctrine, they do so only to note that it is a requirement for obtaining tax-exempt status.[102] In fact, even in cases involving controversial practices that clearly violate fundamental public policy, courts have been hesitant to base their holdings on the public policy doctrine. For example, in *Mysteryboy Incorporation v. Commissioner*, the Tax Court reviewed the IRS's denial of tax-exempt status to Mysteryboy, an organization formed to research "the pros and cons of decriminalizing natural consensual sexual behaviors between adults and underagers and decriminalizing what is

98. *See id.*

99. *See id.* at 592 (majority opinion).

100. Rev. Rul. 71-447, 1971-2 C.B. 230 (announcing that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in section 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax.").

101. *See, e.g.*, I.R.S. Gen. Couns. Mem. 39,862 (Nov. 21, 1991) (revoking tax-exempt status of hospital that violated the Medicare and Medicaid Anti-Fraud and Abuse Law); I.R.S. Priv. Ltr. Rul. 2013-33-014 (May 20, 2013) (revoking tax-exempt status of cooperative for the sale of marijuana in violation of federal law).

102. *See, e.g.*, Church of Scientology v. Comm'r, 823 F.2d 1310, 1315 (1987) ("Because we may affirm the Tax Court on this ground, we do not reach the questions of whether the Church operated for a substantial commercial purpose or whether it violated public policy."); Educ. Assistance Found. for Descendants of Hungarian Immigrants in Performing Arts, Inc. v. United States, 111 F. Supp. 3d 34, 39 (D.D.C. 2015) ("While not applicable in this case, the Court also notes that '[a]n organization that otherwise meets the statutory requirements will nevertheless fail to qualify for tax-exempt status if its exemption-related activities violate public policy.").

defined as child pornography."[103] The IRS had denied Mysteryboy's application for tax-exempt status on the basis that its purpose violated fundamental public policy.[104] Instead of affirming the denial on those same grounds, however, the Tax Court based its decision to uphold the IRS's holding on the fact that Mysteryboy was not organized and did not operate for permissible purposes.[105]

This shows that federal courts have been particularly hesitant to apply, much less extend, the public policy doctrine to areas outside of racial discrimination, even when extending the doctrine to those areas would be relatively uncontroversial. While *Bob Jones* is a seminal case whose holding has potential for a wide-ranging application to other areas of law, its holding has been mostly confined to the particular circumstances it dealt with, namely racial discrimination in education. Because of its effectiveness as a tool to silence institutional dissent, however, the potential of the extension of the *Bob Jones* doctrine to other areas always loom large in the background of debates regarding contentious social issues. One of these is the continuing debate about same-sex marriage.

IV. SEXUAL-ORIENTATION DISCRIMINATION AND THE PUBLIC-POLICY LIMITATION ON THE TAX-EXEMPT STATUS OF RELIGIOUS ORGANIZATIONS.

Although many scholars welcomed the Supreme Court's holding in *Obergefell*,[106] others feared that the many questions left unanswered by the Court could lead to severe repercussions for religious liberty.[107] The most pressing question involves whether religious organizations' advocating and acting on beliefs arguably contrary to *Obergefell* violates public policy such that the Treasury Department and the IRS can revoke the tax-exempt status of these organizations. Several reasons exist for the Supreme Court to refuse to extend the public policy doctrine to same-sex rights and cabin the doctrine to issues that all three branches of government have attempted to address through a decades-long, concerted effort. First,

103. T.C. Memo. 2010-13.

104. *Id.*

105. Mysteryboy Incorporation v. Comm'r, 99 T.C.M. (CCH) 1057 (2010).

106. *See* Maureen Truax Holland, *Equal Justice for Same-Sex Married Couples: Reflections by a Tennessee Lawyer Who Helped Achieve National Marriage Equality*, 46 U. MEM. L. REV. 175, 176 (2015); Jack B. Harrison, *At Long Last Marriage*, 24 AM. U.J. GENDER SOC. POL'Y & L. 1 (2015).

107. *See* Lauter, *supra* note 7; Burk, *supra* note 7.

this interpretation is supported by the disharmonious positions of the three branches of government on same-sex rights. Second, this interpretation is supported by the *Bob Jones* Court's holding and subsequent interpretation of that decision by federal courts. Third, this approach conforms with the Supreme Court's historic justification for tax exemptions, namely to promote a diversity of beliefs in both the religious and public spheres.

A. The Disharmonious Positions of the Three Branches of Government on Same-Sex Rights Support a Narrow Interpretation of the Public Policy Doctrine

In *Bob Jones*, the Supreme Court never explicitly held that a decades-long, concerted effort by all three branches of government was a necessary condition to establish fundamental public policy.[108] The Supreme Court did hold, however, that this was a sufficient condition.[109] Accordingly, the starting point to any inquiry into whether fundamental public policy exists with regard to a particular issue involves an analysis of the actions taken by the three branches on government with regard to that issue.

1. *The Judiciary's Pronouncements*

In *Bob Jones*, the Court pointed to "[a]n unbroken line" of eight Supreme Court cases to support its holding that racial discrimination in education violated national public policy.[110] To analyze whether the judiciary's determinations support holding that sexual orientation discrimination violates fundamental public policy, the Court would likely consider several cases.

a. Supreme Court Cases Pre-*Obergefell*

The search for a line of cases holding that sexual-orientation discrimination violates public policy would have to start after the Court's 1986 decision in *Bowers v. Hardwick*.[111] There, the Court upheld a Georgia statute that criminalized sodomy.[112] The Court held

108. Bob Jones Univ. v. United States, 461 U.S. 574, 594-95 (1983).
109. *See id.*
110. *Id.* at 593.
111. 478 U.S. 186, 187-89 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
112. *See id.* at 191-92.

that no fundamental right to engage in consensual sodomy existed.[113] Instead of such a right being rooted in the history and traditions of the nation, the *Bowers* Court found that since the nation's founding, both common law and the states largely criminalized sodomy.[114]

In *Romer v. Evans*, the Court reversed course, striking down a Colorado constitutional amendment that prohibited state and local governments from enacting legislation protecting homosexuals.[115] However, the Court refused to find that homosexuals were a protected class or that homosexual conduct was a fundamental right.[116] Rather, the Court invalidated the amendment under rational-basis review, finding that animus against a group of people was not a legitimate state interest.[117]

In addition to *Romer*'s failure to recognize a fundamental right to homosexual conduct, it did not initiate an "unbroken line of cases." Subsequently, the Court sustained policies of sexual-orientation discrimination by private organizations in two cases. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*[118] and *Boy Scouts of America v. Dale*,[119] the Court held that the First Amendment's guarantee of freedom of association protected the decisions of private groups to discriminate on the basis of sexual orientation.[120] As such, the respective state anti-discrimination statutes that prohibited discrimination based on sexual orientation could not be enforced against those groups.[121]

The only case that potentially initiated a line of judicial pronouncements prohibiting sexual-orientation discrimination is *Lawrence v. Texas*.[122] There, the Court overruled *Bowers v. Hardwick*, holding that the Constitution prohibits a state from criminalizing consensual sodomy.[123] The Court found that the Constitution provided for a fundamental right to engage in intimate

113. *See id.*
114. *See id.*
115. 517 U.S. 620, 624-25 (1996).
116. *See id.* at 625-26, 635-36.
117. *Id.* at 635 (majority opinion).
118. 515 U.S. 557 (1995).
119. 530 U.S. 640 (2000).
120. *See Hurley*, 515 U.S. at 580-81; *Boy Scouts of America*, 530 U.S. at 644, 661.
121. *See Hurley*, 515 U.S. at 580-81; *Boy Scouts of America*, 530 U.S. at 644, 661.
122. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
123. *Id.*

consensual sodomy.[124] However, the Court once again refused to find that homosexuals were a protected class or that there was a fundamental right to be free from discrimination on the basis of sexual orientation.[125] Instead, the Court applied rational-basis review, finding that traditional sexual morality is not a legitimate interest justifying an anti-sodomy state statute.[126] Thus, while *Lawrence* is undoubtedly a favorable decision for same-sex rights, it fails to qualify as a judicial pronouncement establishing that sexual-orientation discrimination violates fundamental public policy because it fails to even hold that homosexuality or homosexual acts are protected as fundamental rights.

Prior to *Obergefell*, no unbroken line of cases exists that collectively prohibit sexual-orientation discrimination. In fact, until 2013, most states still denied the fundamental right to marry to same-sex couples. *Obergefell* therefore provided a key opportunity for the Supreme Court to elaborate on this issue.

b. *Obergefell v. Hodges*

Obergefell presented two questions for the Supreme Court: (1) whether "the Fourteenth Amendment require[s] a state to license a marriage between two people of the same sex," and (2) whether "the Fourteenth Amendment require[s] a state to recognize a same-sex marriage lawfully licensed and performed out-of-state."[127] The Court framed the issue as whether the exclusion of same-sex couples from the fundamental right of marriage was sufficiently justified by a state interest. Ultimately, the Court held that same-sex couples have a fundamental right to marry, and that states may not define marriage so as to exclude same-sex couples.[128]

The Court based its decision primarily on the view that marriage is a fundamental right that cannot be denied to same-sex

124. *See id.*

125. *See id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'").

126. *See* Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1236 (11th Cir. 2004) (finding that the *Lawrence* Court used rational basis review); Arizona v. Fischer, 199 P.3d 663, 669 (Ariz. Ct. App. 2008) (noting that the *Lawrence* Court applied rational basis review).

127. Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

128. *Id.* at 2607-08.

couples because no justifiable basis for such denial exists.[129] As its basic premise, the Court held that the Due Process Clause protected certain fundamental liberties beyond those enumerated in the Bill of Rights.[130] The Court found that the judiciary's role was to consider history and tradition for guidance in identifying these rights, and to use "reasoned judgment" to ensure that these rights were protected by the states.[131]

The Court found guidance for identifying a fundamental right to marriage in its precedents. Most significantly, the Court discussed *Loving v. Virginia*, which held that the right to marriage could not be denied to interracial couples.[132] The Court further supported its holding that marriage is a fundamental right by pointing to *Turner v. Shafley*, which held that prisoners could not be denied the right to marry.[133] Lastly, the Court mentioned *Zablocki v. Redhail*, which held that the right to marry could not be denied to fathers who were behind on child support payments.[134]

Although the Court acknowledged that these decisions were limited to establishing the right of opposite-sex couples to marry, it cited *Lawrence v. Texas* for the proposition that same-sex couples had the same right as opposite-sex couples to engage in intimate association.[135] The Court elaborated on four principles that it viewed as further supporting its holding that marriage as a fundamental right has equal significance for same-sex couples.[136] The Court found that for both categories of couples, marriage expressed (1) a personal choice in intimate association through which an individual could shape one's identity and find security, safety, and connection; (2) an association involving a union expressing commitment and intimacy through which couples could dignify themselves by defining their mutual commitment; (3) a legal structure which safeguarded families and children by providing structure, permanency, and stability for family life; and (4) a foundation of the social order.[137] Additionally, the Court noted the legal characteristics of marriage, including

129. *Id.* at 2604-05.

130. *Id.* at 2597 ("In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define a person's identity and beliefs.").

131. *Id.* at 2589.

132. Loving v. Virginia, 388 U.S. 1 (1967).

133. Turner v. Shafley, 782 U.S. 78, 95-96 (1987).

134. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

135. *Obergefell*, 135 S. Ct. at 2599-600.

136. *See id.* at 2600-03.

137. *See id.*

taxation, insurance, medical decision-making, inheritance, child custody, support, and visitation.[138] Based on these principles, the Court concluded that no material differences existed between same-sex and opposite-sex couples with regard to the meaning and importance placed on marriage. Accordingly, same-sex couples, just like opposite-sex couples, had a fundamental right to marriage.[139]

Significantly, the Court found that procreation was not a significant aspect of marriage.[140] The Court alluded to its precedent protecting the right to contraception and abortion as supporting the proposition that procreation was not essential to marriage.[141] Additionally, the Court noted that sterile individuals and women past child-bearing age may marry.[142] Because of this, the Court saw procreation as only one of the incidents of marriage.[143]

Central to the Court's holding was the historical change in national attitudes toward homosexuality. The Court noted that while homosexuality had formerly been seen as immoral, and even criminal, it was now viewed as "both a normal expression of human sexuality and immutable."[144] The Court traced a similar evolution of the status of homosexuals under the Constitution.[145] Although at first the Court upheld state laws criminalizing sodomy in *Bowers v. Hardwick*,[146] the Court overruled this decision a decade later in *Romer v. Evans*, holding that a state could not prevent the enactment of laws protecting gays and lesbians.[147] Further, in *Lawrence v. Texas*, the Court held that state laws criminalizing sodomy were unconstitutional.[148]

The Court noted a similar trend in the interpretation of state constitutions by state courts. It identified *Baehr v. Lewin*, in which the Supreme Court of Hawaii held that a state's restricting marriage

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138. *See id.* at 2601.

139. *See id.* at 2602 ("[S]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.").

140. *See id.* at 2601.

141. *See id.* ("In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or States have conditioned the right to marry on the capacity or commitment to procreate.").

142. *See id.*

143. *See id.* ("The constitutional marriage right has many aspects, of which childbearing is only one.").

144. *See id.* at 2596.

145. *See id.* at 2596-97.

146. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

147. Romer v. Evans, 517 U.S. 620, 635-36 (1996).

148. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

to opposite-sex couples was subject to strict scrutiny under the Equal Protection Clause, as the earliest state court decision addressing same-sex marriage.[149] Then, in *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court became the first state supreme court to recognize the right of same-sex couples to marry.[150]

The Court acknowledged that on the federal level, Congress passed the Defense of Marriage Act (DOMA) as a reaction to the efforts to redefine marriage to include same-sex couples.[151] It emphasized, however, that it had invalidated that part of DOMA in *Windsor v. United States*. In that case, the Court held that DOMA "impermissibly disparaged those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'"[152]

The Court also analyzed the questions presented before it under the Equal Protection Clause of the Fourteenth Amendment.[153] Importantly, the Court did not conduct a traditional equal protection analysis by defining homosexuals as a protected class or specifying characteristics that would justify a heightened level of scrutiny of laws that infringed their rights.[154] Rather, the Court focused on the interconnectivity of the Due Process Clause and the Equal Protection Clause, which it viewed as strengthening the claim to fundamental liberties.[155] Further, while the violation of equal protection occurred primarily in gays and lesbians being denied equal access to the benefits of marriage, this denial was inextricably related to the denial of the right to marriage itself.[156] From these principles, the Court concluded that:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of

149. 74 Haw. 530 (1993).

150. Goodridge v. Dep't of Health, 798 N.E.2d 941, 961 (2003).

151. *Obergefell*, 135 U.S. at 2597 (citing 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013)).

152. *See id.* (quoting *Windsor*, 133 S. Ct. at 2689).

153. *See id.* at 2602-05.

154. *See id.* at 2584.

155. *Obergefell*, 135 U.S. at 2603 ("Rights implicit in liberty and right secured by equal protection . . . [in some instances] may be instructive as to the meaning and reach of the other," although either clause "may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge.").

156. *See id.* at 2604.

> that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.[157]

The Supreme Court's decision in *Obergefell* fails to establish the judiciary's recognition for a fundamental public policy prohibiting sexual-orientation discrimination. In *Obergefell*, the Supreme Court utilized an analysis similar to that employed by the *Lawrence* Court. As in *Lawrence*, where the Court held that no justifiable basis exists for prohibiting same-sex intimate conduct, the *Obergefell* Court held that no justifiable basis exists for denying marriage to same-sex couples.[158] As in *Lawrence*, the Court failed to designate homosexuals as a protected class or hold that homosexual conduct was a fundamental right. Rather, the Court held that same-sex couples had a right to engage in the fundamental right to marry based on the Due Process and Equal Protection Clauses.[159]

Most importantly, however, the Court itself acknowledged that:

> [R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[160]

This shows that the Court recognized that others, particularly religious groups, could continue to advocate contrary to the Court's opinion. Unlike in *Bob Jones*, where the Court recognized the eradication of racial discrimination in education as a compelling government interest that trumped even religious beliefs, the *Obergefell* Court explicitly allowed for the promotion of religious beliefs contrary to the Court's opinion. As such, *Obergefell* fails to establish that prohibiting sexual orientation discrimination is a compelling government interest, much less fundamental policy.

Based on the forgoing analysis of case law, it is clear that a line of Supreme Court cases exists on the rights of same-sex couples, culminating in the establishment of the recognition of the right to same-sex marriage in *Obergefell*. In *Bob Jones*, after examining its own precedent, the Supreme Court then turned to congressional views on the issue.[161] As discussed below, fewer legislative

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157. *Id.* at 2604-05.
158. *Obergefell*, 135 S. Ct. at 2604-05.
159. *Id.* at 2604-05.
160. *Id.* at 2607.
161. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

pronouncements supporting same-sex rights exist than judicial pronouncements.

2. *Legislative Pronouncements*

The congressional record also fails to reflect support for a fundamental public policy prohibiting sexual orientation discrimination. Until recently, Congress has done little to protect against sexual-orientation discrimination. For example, Congress has never added sexual orientation to the list of prohibited categories of employment discrimination. Such protections from discrimination on the basis of race, gender, age, and disability have existed for over forty years.[162] The Employment Non-Discrimination Act ("ENDA"), which would have added sexual-orientation discrimination to the list of prohibited discrimination by employers, has repeatedly failed to pass Congress.[163]

In fact, several instances exist where Congress blocked efforts by other branches to protect against sexual orientation discrimination.[164] Congress opposed President Clinton's efforts to allow gays to serve openly in the military, which ended in the "Don't Ask, Don't Tell" compromise that President Clinton signed into law.[165] Congress overrode the District of Columbia's Domestic Partners Act, which would have provided benefits to couples living together.[166] Further, in response to the District of Columbia Circuit Court's holding that Georgetown University was required to allow a homosexual student organization, Congress passed the Nation's Capital Religious Liberty and Academic Freedom Act, which permitted religious educational institutions to deny recognition to groups based on sexual orientation.[167]

In 1994, Congress provided tacit support for ending violence based on sexual orientation when it designated crimes against people based on their sexual orientation as a "hate crime" under the Violent

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162. JODY FEDER & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2011).

163. *See id.*

164. Michael Hatfield et. al., Bob Jones University: *Defining Violations of Fundamental Public Policy*, *in* 6 TOPICS IN PHILANTHROPY 52-62 (2000).

165. *Id.* at 85.

166. *See id.*

167. *Id.* at 85-86.

Crime Control and Law Enforcement Act of 1994.[168] Soon after, however, Congress enacted, and President Clinton signed, the Defense of Marriage Act (DOMA),[169] which defined marriage as between one man and one woman for purposes of federal law.[170] Although the Supreme Court held DOMA unconstitutional in 2013, its enactment demonstrates a lack of support in the congressional record for a fundamental public policy in support of prohibiting sexual-orientation discrimination.

During the Bush (41) administration, Congress showed little support for legislative initiatives targeting sexual orientation discrimination. Bills repealing "Don't Ask, Don't Tell" and DOMA failed to gain traction.[171] Further, ENDA failed to pass both houses of Congress,[172] and Congress failed to enact the Mathew Shepard Local Law Enforcement Hate Crimes Prevention Act.[173]

During the first two years after President Obama was elected, Democratic majorities in both Houses of Congress provided ample support for legislation aimed at protecting homosexual rights. Congress repealed the "Don't Ask, Don't Tell" policy[174] and enacted the Mathew Shepard Local Law Enforcement Hate Crimes Prevention Act.[175] The 2010 elections, however, significantly changed the party composition in Congress,[176] and bills aimed at protecting homosexual rights have failed to proceed in Congress during the remainder of President Obama's tenure. As such, in its current state, the congressional intent to prohibit sexual-orientation

168. *Id.* at 86.

169. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 1738C (2006) (held unconstitutional by *United States v. Windsor*, 133 S. Ct. 2675, 2693-96 (2013)).

170. *See id.*

171. *See* H.R. 1246, 110th Cong. § 3 (2007); *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 598 Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (noting that the 2011 hearing was the "first ever Congressional hearing examining a bill to repeal . . . DOMA").

172. *See supra* note 128 and accompanying text.

173. *See* S. 1105, 110th Cong. § 4(a) (2007); H.R. 1592, 110th Cong. § 4(a) (2007).

174. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

175. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

176. Kara Rowland, *Obama Concedes 'Shellacking'*, WASH. TIMES (Nov. 3, 2010), http://www.washingtontimes.com/news/2010/nov/3/obama-concedes-shellacking/?page=all.

discrimination by private actors, including religious organizations, is dubious at best.

3. *Executive Pronouncements*

Finally, the Executive Branch's record on same-sex issues fails to provide support for a fundamental public policy prohibiting sexual orientation. At best, that record is mixed. The Executive Branch only started supporting same-sex rights under President Clinton, and since then its actions on same-sex rights have largely depended on the ideological leaning of the president.

President Clinton signed three executive orders relating to sexual-orientation discrimination.[177] In 1995, he prohibited agencies from considering sexual orientation in deciding a person's eligibility to access confidential information.[178] In 1998, he enacted an executive order prohibiting sexual orientation discrimination in federal employment.[179] Finally, in 2000, he enacted an executive order prohibiting sexual orientation discrimination in education and training programs and activities.[180] In addition to these executive orders, President Clinton advanced homosexual rights by supporting the failed ENDA bill, appointing homosexuals to federal offices, and recognizing June as the Gay and Lesbian Month.[181]

Although President Bush chose not to rescind any of President Clinton's executive pronouncements, he shifted course in several ways.[182] Bush refused to enact any executive orders protecting homosexuals. He supported passage of the Federal Marriage Amendment, the ratification of which would have prevented federal courts from recognizing a right to same-sex marriage.[183] Further, he opposed the enactment of laws that would have classified a crime

177. *See infra* notes 143-145 and accompanying text.

178. Exec. Order No. 12968, 3 C.F.R. § 391 (1995).

179. Exec. Order No. 13,087, 3 C.F.R. § 191 (1998).

180. Exec. Order No. 13,160, 3 C.F.R. § 279 (2000), *reprinted in* 42 U.S.C. § 2000d (2006).

181. *See* Hatfield et al., *supra* note 164, at 88-89.

182. *See* DAVID FRUM, THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH 103 (2003).

183. Ian David, *The Ten Worst LGBT Moments of George W. Bush's Presidency*, DEMOCRATIC UNDERGROUND.COM (Sept. 22, 2011, 6:20 AM UTC), http://www.democraticunderground.com/discuss/duboard.php/en.wikipedia.org/wiki/duboard.php?az=view_all&address=221x185887.

committed because of the sexual orientation of the victim as a "hate crime," even threatening to veto them if passed by Congress.[184]

President Obama, however, resumed the Executive Branch's support for homosexual rights. Most importantly, he amended Executive Order 11246, which prohibited federal contractors from discriminating on the basis of sexual orientation.[185] He appointed numerous openly gay individuals to federal positions.[186] He also supported passage of the Don't Ask, Don't Tell Repeal Act of 2010 and the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which he ultimately signed into law.[187] President Obama also supported the repeal of DOMA[188] as well as the enactment of ENDA[189] and the Domestic Partnership Benefits and Obligations Act.[190]

For opposition to same-sex marriage to violate fundamental public policy, each branch of government would have to recognize that the eradication of such opposition is a compelling government interest. Currently, post-*Obergefell*, however, all branches of government, have never held that homosexuals are a protected or even semi-protected class or that the eradication of sexual-orientation discrimination is a compelling government interest.[191] Rather, the records of the judicial, congressional, and executive branches on same-sex rights is mixed, with the branches of

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184. *See id.*

185. David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, THE WHITE HOUSE, (July 21, 2014, 3:00 PM ET), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers .

186. *Obama Administration Policy and Legislative Advancements on Behalf of LGBT Americans*, HUMAN RTS. CAMPAIGN, http://www.hrc.org/resources/obama-administration-policy-legislative-and-other-advancements-on-behalf-of (last visited Feb. 18, 2016).

187. *See supra* notes 174-175 and accompanying text.

188. David Najamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, THE WASHINGTON POST (July 19, 2011), https://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html.

189. Employment Non-Discrimination Act of 2009: Hearing on H.R. 2017 Before the H. Comm. on Educ. and Labor, 111th Cong. 12 (2012) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission) (statement on behalf of Obama administration in support of ENDA).

190. Remarks on Signing a Memorandum on Federal Benefits and Non-Discrimination, 2009 DAILY COMP. PRES. DOC. 475 (June 17, 2009).

191. *See id.*

government supporting same-sex rights at times, but opposing those rights in other instances.

Thus, while public opinion, case law,[192] and government institutions' pronouncements may be trending toward establishing a federal public policy against sexual-orientation discrimination,[193] there is currently no such policy.[194] And no such policy can emerge until all three government branches engage in a decades-long, concerted effort to eradicate sexual orientation discrimination. As such, sexual orientation discrimination does not violate fundamental public policy for purposes of granting tax-exempt status to religious organizations that oppose same-sex marriage.

B. *Bob Jones* and its Progeny Support a Narrow Interpretation of the Public Policy Doctrine

As discussed above, Section 501 of Title 26 of the Internal Revenue Code, which provides for the regulation of religious tax exemptions, does not prohibit discrimination by religious organizations.[195] The only possible restriction on the ability of tax-exempt religious organizations to oppose same-sex marriage therefore lies in the public policy doctrine enunciated by the Supreme Court in *Bob Jones University*.[196] And several reasons, explicit both in the *Bob Jones* opinion and its context, support a narrow interpretation of the Court's holding in that case. First, the *Bob Jones* Court's use of limiting language in articulating the public policy doctrine, and lower courts' hesitancy to apply the doctrine supports a narrow interpretation of the doctrine. Second, the unique context of the *Bob Jones* case itself, namely the decades-long fight to eradicate institutional racial discrimination, suggest that its holding was narrowly tailored to remedy that problem.

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192. *See* Gay Rights Coal. Of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 38-39 (D.C. Ct. App. 1987).

193. *See* Bruce R. Hopkins, The Law of Tax-Exempt Organizations § 6.2(d) (9th ed. 2007) ("It may also be quite validly asserted that there is a federal public policy, either presently in existence or in the process of development, against other forms of discrimination, such as discrimination on the basis of marital status, national origin, religion, handicap, sexual preference, and age.").

194. *See* Hatfield et al., *supra* note 164, at 86-87 (finding that there is no "fundamental national public policy against sexual orientation discrimination").

195. *See supra* notes 42-53 and accompanying text.

196. *See* Mirkay, *supra* note 8, at 738.

1. Bob Jones*'s Limiting Language and its Outlier Status*

The *Bob Jones* Court never clearly defined what constituted "established public policy," or even what sources of law and policy the IRS should consider in determining whether an established public policy exists on an issue.[197] That is why Chief Justice Roberts (in his dissent in *Obergefell*)[198]—and Justice Alito (during oral arguments in that case)[199] wondered what implications the Court's opinion ruling in favor of same-sex marriage would have for the tax-exempt status of religious organizations that opposed the decision. Although *Bob Jones* provides some guidance as to what constitutes "established public policy" in the context of illegality and racial discrimination, it fails to provide a clearly delineated process for revoking the tax-exempt status of religious organizations outside of that context. Most likely as a result of the Supreme Court's lack of clarity, the IRS itself has never clarified the contours of the public policy doctrine either.[200] Instead, the IRS has relied heavily on constitutional law principles in formulating the public policy doctrine.[201]

Despite its lack of clarity, the Supreme Court's language in *Bob Jones* indicates that its holding was a narrow one. Organizations could only lose their tax-exempt status "where there can be no doubt that the activity involved is contrary to a fundamental public policy."[202] The Court reached its holding only after determining that

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197. *See* David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA TAX. REV. 779, 802 (2002).

198. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (Roberts, C.J., dissenting) ("[T]he tax exemptions of some religious institutions would be in question if they opposed same-sex marriage.").

199. Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574).

200. Another reason that the IRS is unlikely to insert itself into this controversy is the significant public backlash it will likely engender. A recent example of this backlash occurred where the IRS made a policy decision in delaying the granting of exemptions to conservative social welfare organizations. Stephen Dinan, *Tea Party Targeting Accusations, Legal Issues Persist For IRS After Justice Ends Probe*, WASH. TIMES (Oct. 25, 2015), http://www.washingtontimes.com/news/2015/oct/25/irs-tea-party-targeting-accusations-legal-issues-p/?page=all.

201. *See* Brennen, *supra* note 197, at 805.

202. Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983); *see also id.* at 598 ("We emphasize . . . that these sensitive determinations [regarding withdrawal of recognition of tax exempt status] should be made only where there is no doubt that the organization's activities violate fundamental public policy.").

"[a]n unbroken line of cases following *Brown v. Board of Education* establishe[d] beyond doubt . . . that racial discrimination in education violates a most fundamental national public policy,"[203] a position shared by both Congress and the executive branch.[204] Additionally, the Court specifically limited its holding, emphasizing that it "deal[s] only with religious schools—not with churches or other purely religious institutions."[205] This shows that the *Bob Jones* Court recognized that it was addressing a very specific problem in rendering its decision—racial discrimination in education.

Because of its narrow holding and unique context, *Bob Jones* has been labeled an outlier.[206] Although the public policy requirement is alive and well, it has rarely been cited for the proposition that religious organizations must comply with established public policy.[207] *Bob Jones* has been cited over 350 times in published opinions,[208] but only a small minority of these opinions reference it in applying the public policy requirement to religious organizations.[209] Instead, *Bob Jones* is most commonly cited for the proposition that when engaging in statutory interpretation, courts should look beyond the legislative text to comply with Congress's legislative intent.[210]

The Court's enunciation of the public policy doctrine in *Bob Jones* should be construed narrowly because it represents an outlier interpretation of the public policy doctrine.[211] Although the contours of the doctrine are unclear, *Bob Jones* explicitly held that its decision

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203. *Id.* at 593.

204. *Id.* at 594-95 ("Congress, in Titles IV and VI of the Civil Rights Act of 1964 . . . clearly expressed its agreement that racial discrimination in education violates a fundamental public policy . . . . The Executive Branch has consistently placed its support behind eradication of racial discrimination.").

205. *Id.* at 604 n.29.

206. David A. Brennen, *A Diversity Theory of Charitable Tax Exemption-Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 54 (2006).

207. *See* Christine Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 323 (2003).

208. *See id.*

209. *See* Te-Ta-Ma Truth Found. v. World Church of the Creator, 297 F.3d 662, 664 (7th Cir. 2002) (discussing the revocation of the tax-exempt status of the World Church of the Creator because of its racist views); Church of Scientology v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987) (applying the charitable purpose requirement to the Church of Scientology); Synanon Church v. United States, 579 F. Supp. 967 (D.D.C. 1984) ("Even a bona fide church that failed the . . . *Bob Jones* test would not be eligible for tax exemption.").

210. *See* Moore, *supra* note 207, at 323.

211. *See supra* note 206 and accompanying text.

was restricted to a narrow set of circumstances: racial discrimination in education.[212] Federal courts and the IRS itself have adhered to this interpretation by refusing to apply the public policy doctrine outside of the context of racial discrimination and illegality.[213] Further, the problem addressed by *Bob Jones*—racial discrimination in education—has a unique nature that suggests the doctrine cannot easily be applied to other contexts.

2. *The Unique Problem Addressed by* Bob Jones

The context of *Bob Jones* supports the argument that the Supreme Court's holding largely stems from the unique circumstances it was dealing with in that case.[214] To date, the only organizations that have lost their tax-exempt status under the public policy doctrine are organizations that discriminated on the basis of race, advocated for civil disobedience, or engaged in blatantly illegal activity.[215]

In *Bob Jones*, the Court addressed a problem of historic proportions. It is undisputed that racial discrimination occupies a uniquely invidious position in our nation's history.[216] In fact, Presidents have used military force to eliminate racial discrimination.[217] Further, with regard to racial discrimination in education specifically, schools across the South remained segregated for decades after the Court's *Brown v. Board of Education*[218] decision.[219] After government-enforced desegregation of public schools, white parents left these schools for private schools to continue segregated education.[220] Many of these schools were affiliated with Protestant churches, which allowed them to benefit from tax-exempt status as well.[221] It was against this background that the *Bob Jones* Court granted certiorari to decide whether private,

212. Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.29 (1983).
213. *See supra* notes 200, 209 and accompanying text.
214. *See Bob Jones*, 461 U.S. at 604 n.29.
215. *See* David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 391 (2000).
216. *See* Berg, *supra* note 66, at 235.
217. *See* Cooper v. Aaron, 358 U.S. 1 (1958).
218. 347 U.S. 483 (1954).
219. *See* Hafter & Hoffman, *supra* note 71, at 1436-40.
220. *Id.* at 1441.
221. *Id.* at 1447.

religious schools could have tax-exempt status while simultaneously discriminating based on race.[222]

Undoubtedly, several courts have drawn parallels between racial discrimination and sexual orientation discrimination. For example, in *Goodridge v. Department of Health*, the Massachusetts Supreme Court equated racial discrimination with sexual-orientation discrimination.[223] Importantly, however, the *Goodridge* court failed to go as far as the *Bob Jones* Court and state that it was the government's responsibility to eradicate sexual orientation discrimination even at the price of substantially burdening religious exercise.[224] This is because government has pursued, and still does pursue, the eradication of racial discrimination with a singular purpose, but has not engaged in the same practice with regard to sexual-orientation discrimination.[225]

Additionally, while several scholars have supported the analogy between racial discrimination and sexual-orientation discrimination,[226] others have been careful to point out the differences.[227] Both sides agree, however, that if the Supreme Court were to hold that the eradication of sexual-orientation discrimination is a fundamental public policy, religious objectors would receive

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222. Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983).

223. *See, e.g.*, Goodridge v. Dep't of Health, 798 N.E.2d 941, 958 (2003) ("In this case, as in *Perez* and *Loving* [which overturned interracial marriage bans], a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.").

224. This question was also not before the *Goodridge* court.

225. For example, although courts review all other restrictions on the rights of prisoners under a very deferential standard of review, separation of prisoners on the basis of race received strict scrutiny review. Johnson v. California, 545 U.S. 162, 168 (2005).

226. *See, e.g.*, John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1164 (1999) (arguing that the "analogy [between same-sex marriage and interracial marriage] is powerful and persuasive"); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 120 (2006) (arguing that "[j]ust as we do not tolerate private racial beliefs that adversely affect African-Americans . . . even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect [the ability of] LGBT people [to live in the world].").

227. Fredric J. Bold, Jr., Note, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 201 (2009); *See* Berg, *supra* note 66, at 234-35.

only the narrowest accommodations, if any at all.[228] And this would run counter to the historic justification for the government's grant of tax-exempt status to religious organizations, which is to promote a diversity of religious beliefs and provide for a pluralistic society.[229]

C. The Supreme Court's Historic Justification for Tax Exemptions Supports a Narrow Interpretation of the Public Policy Doctrine

Historically, the Supreme Court has justified granting tax-exempt status to religious organizations because of the diversity and pluralism of beliefs these institutions provide.[230] A narrow interpretation of the public policy doctrine will strengthen this justification by allowing religious organizations to contribute to diversity of thought in cases when this is most important, such as expressing dissent from unjust or unfair government policies. This would prevent the public policy doctrine from morphing into a cudgel with which the government could force belief systems to conform to its dictates.[231] Extending the *Bob Jones* holding to other areas of public policy opens up potential for the misuse of the public policy doctrine, threatening the character and spirit of charities in the United States.[232]

Walz v. Tax Commission of New York[233] is the seminal case in which the Supreme Court laid out the constitutional justification for tax exemption of religious organizations.[234] Importantly, the Court held that tax exemptions for religious organizations are justified based on the fact that religious organizations encourage and provide a diversity of belief systems and pluralism of thought throughout the

228. Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 413 (2010).

229. Walz v. Tax Comm'n of N.Y., 397 U.S. 664 (1970).

230. *Id.*

231. Bob Jones Univ. v. United States, 461 U.S. 574, 608-09 (1983) (Powell, J., concurring) (finding the majority's holding "troubling" because of its emphasis on "conformity").

232. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 KAN. L. REV. 397, 398 (2005) (describing the public policy doctrine as "[a]n obscured doctrine of federal income tax law [that] has the potential to coerce private institutions serving a public purpose into compliance with administrative and judicial notions of appropriate behavior, without any explicit grounding in federal tax statutes.").

233. 397 U.S. 664 (1970).

234. *Id.* at 689 (Brennan, J., concurring).

nation.[235] The Court recognized the additional valuable social benefits provided by religious organizations,[236] but ultimately expressly held that the provision of social benefits alone is an insufficient justification for tax exemption because of the variety, nature, and scope of social services that religious organizations provide.[237]

The Supreme Court's justification for granting tax-exempt status to organizations is evident in practice. A search of the IRS's Exempt Organization Select Check Database reveals that a diversity of organizations enjoy tax-exempt status.[238] Thousands of organizations are present on this list, ranging from the National Right to Life Committee to Planned Parenthood, the National Organization for Women to the National Center for Men, Atheists United and the Muslim Foundation.[239] The government's decision to provide tax-exempt status to organizations promoting religious, social, and political views has thus undoubtedly contributed to the expression of a diversity of views and a pluralistic society.

Although *Bob Jones* rests heavily on the fact that religious organizations that discriminate on the basis of education fail to provide social benefits, this rationale is limited to its context in racial discrimination. This nation's unique struggle with racial discrimination in education shows that any social benefits provided by racially discriminatory private schools are outweighed by the harms caused by racially discriminatory admissions systems.

In the context of religious organizations' opposition to same-sex marriage, however, the calculus is different. Religious organizations' adherence to sincere beliefs regarding the sanctity of traditional marriage represents an important contribution to diversity of religious beliefs and to a pluralistic society. Nondiscrimination statutes are based on the premise that discrimination occurs because

235. *Id.* at 689 ("[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.").

236. It is undisputed that many religious organizations contribute substantially to charity. Catholic charities are "the largest provider of social services after the federal government. *See* Berg, *supra* note 66, at 224.

237. *Walz*, 397 U.S. at 673.

238. *The Exempt Organizations Select Check Database*, IRS, https://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-Select-Check (last updated April 25, 2016).

239. *Id.*

of animus.[240] For dominant religions in the United States, however, opposition to same-sex marriage does not stem from animus, but from the sincere belief that marriage represents a religious sacrament[241] or a distinct religious covenant between God and believers.[242]

Unlike racial discrimination, opposition to same-sex marriage for many religious organizations is not simply a selfish goal. In fact, most religious institutions readily provide services to homosexuals in a variety of ways and only object to directly facilitating same-sex marriage.[243] This is because, for many religious institutions, participating in a marriage is not simply a service, but an expression of faith and a profession of devotion to God.[244]

Extending the public policy doctrine to include a prohibition on opposing same-sex marriage will force religious organizations to face tremendous penalties. For many religious organizations, loss of tax-exempt status would be a staggering financial loss.[245] Further, the possibility of the loss of tax-exempt status will erode traditional deference to religious institutions, threatening them with litigation.[246] This would further increase financial losses for religious

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240. *See, e.g.*, 42 U.S.C.A. § 2000a (West, Westlaw through 2014) (prohibiting discrimination in "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station" on the basis of race, color, religion, or national origin).

241. Catechism of the Catholic Church § 1210 (2d ed. 1997).

242. *See* Brouwer, *supra* note 25, at 21-23 (defining a "covenant" as an unbreakable, enduring bond between members).

243. *See* Robin Fretwell Wilson, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485, 493 (2014).

244. *See id.*

245. *See supra* notes 34-36 and accompanying text (describing the figures associated with tax-exempt charitable giving in the United States).

246. *See* Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939, 957 (2007). As Severino shows, suits over religious speech are no longer hypothetical. In *Bryce v. Episcopal Church in the Diocese of Colorado*, a lesbian youth minister sued her church for sexual harassment based on statements that homosexuality is a sin. 289 F.3d 648, 653 (10th Cir. 2002). These statements were made in the context of a parish meeting called in response to discovery of the youth minister's recent civil commitment ceremony with her homosexual partner. *Id.* Although the district court granted the church's motion for summary judgment and the Tenth Circuit affirmed, this example shows that churches are now facing the prospect of lawsuits over religious statements affirming their beliefs.

organizations.[247] And the IRS, in many cases, would not even need to take overt action. The mere potential of losing tax-exempt status would be sufficient to ensure that many religious institutions conform to government dictates.[248] This day is not yet here, and it shouldn't be, because the lack of clear agreement by all three branches of governments on same-sex rights fails to establish a fundamental public policy prohibiting sexual orientation discrimination.

CONCLUSION

Although *Obergefell* itself said nothing about taxes, its ruling holds tremendous potential in the area of tax exemptions for religious organizations. On both sides of the same-sex marriage issue, scholars saw the opportunity that the public-policy doctrine articulated in *Bob Jones* provides for silencing institutional dissent. And while it is same-sex marriage today, it will be an issue of an entirely different character tomorrow. Thus, because of the potential for its misuse as a tool to bring about conformity to government dictates, a broad interpretation of the public-policy doctrine runs directly counter to the very purpose of tax exemptions, that of providing for an institutional diversity of beliefs. The Supreme Court should therefore use this opportunity to clarify the doctrine, by narrowing its interpretation to issues where the three branches of government have adopted a decades-long, concerted effort to remedy a societal ill and refusing to extend its application to same-sex rights.

247. *See id.*

248. Richard A. Epstein, Letter to the Editor, *Same-Sex Union Dispute: Right Now Mirrors Left*, WALL ST. J., July 28, 2004 at A13 ("[P]rivate churches losing their tax exemptions for their opposition to homosexual marriages ... are among the very dangers from the left against which I warned.").