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Paving a Path between the Campus and the Chapel: A Revised Section 501(c)(3) Standard for Determining Tax Exemptions

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PAVING A PATH BETWEEN THE CAMPUS AND THE CHAPEL: A REVISED SECTION 501(C)(3) STANDARD FOR DETERMINING TAX EXEMPTIONS

ABSTRACT

Section 501(c)(3) of the Internal Revenue Code grants an exemption from federal income taxes to organizations that are formed for religious purposes. While religious tax exemptions are a deep-rooted principle long embodied in U.S. tax law, issues can arise when a tax-exempt institution engages in discrimination which conflicts with national public policy. The most famous example of this is the case of Bob Jones University v. United States*, in which the Supreme Court revoked the tax-exempt status of a religious university for its racially discriminatory policies. The Court found that, because the government had expressed a unified opposition to race discrimination in education for a number of years, an institution that engaged in such discrimination conflicted with national public policy, such that it should not receive tax-exempt status. Now, in the wake of the Supreme Court ruling on the constitutionality of same-sex marriage in* Obergefell v. Hodges*, advocates for both religious freedom and LGBT rights are questioning whether this "public policy doctrine" could now apply to discrimination based on marital status, or even sexual orientation in general. However, legal scholars have shown that such an application of the doctrine may be problematic when implemented outside of race discrimination.*

Although the public policy doctrine's application is limited, the Supreme Court still correctly observed in Bob Jones *that discrimination of a minority group in education harms the overall educational process. This Comment argues that Section 501(c)(3) should be amended to require an institution filing for tax-exempt status to designate the "primary purpose" for which it is claiming an exemption. That primary purpose will then have priority over any secondary qualifying purpose for tax-exempt purposes. This would allow primarily "religious" institutions, such as churches and synagogues, to adhere to their religious beliefs regarding marriage and sexuality while retaining their exemption. Primarily "educational" institutions, however, would be unable to retain policies and practices that stifle discussion of homosexual identity and the ethics of same-sex marriage, as these practices do not further the purpose of an "educational" institution to provide a "full and fair exposition" of issues.*

INTRODUCTION

The Internal Revenue Code (the "Code") has long contained an internal tension that is rising to the surface again in dramatic form. On the one hand, organizations that are formed for religious purposes have always been granted an exemption from federal income taxes.[1] On the other, the Internal Revenue Service (IRS) and the Supreme Court have established that exemption can be lost when an institution engages in discrimination that conflicts with national public policy.[2] In the context of discrimination based on same-sex marriage and sexual orientation, this tension raises the issue of how the government, as the author and enforcer of the Code, balances two of its broadest commitments to its citizens: freedom to practice one's religion and freedom from discrimination. Because some religious organizations receiving tax exemptions espouse discriminatory views based on sexual orientation and marital status, the government is left caught between a rock and a hard place, forced to choose between enforcing its constitutional mandate to ensure equality for its citizens and its mandate to protect free speech, freedom of association, and freedom of religion.[3]

This issue has taken on a new urgency in the wake of the Supreme Court's 2015 decision in *Obergefell v. Hodges*.[4] In this landmark decision, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guaranteed same-sex couples the right to marry.[5] While the decision was heralded as the beginning of "a new era in human dignity,"[6] many in the legal field were quick to point out that the decision left many questions unanswered.[7] A significant one was how to reconcile federal tax benefits for organizations who continue to discriminate against same-sex marriage and

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[1] *See* Elizabeth A. Livingston, *A Bright Line Points Toward Legal Compromise: IRS Condoned Lobbying Activities for Religious Entities and Non-Profits*, RUTGERS J.L. & RELIGION, Spring 2008, at 1, 2 (noting that there is a "long tradition" of tax exemptions for religious or charitable institutions, stretching back to ancient Egypt, Sumeria, and Babylon).

[2] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983); Rev. Rul. 71-447, 1971-2 C.B. 230.

[3] *See* Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59, 59–60 (Douglas Laycock et al. eds., 2008).

[4] 135 S. Ct. 2584 (2015).

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

[6] *Prof. Geoffrey Stone: U.S. 'on Threshold of a New Era' with Same-Sex Marriage Case*, UCHICAGO NEWS (Apr. 28, 2015), https://news.uchicago.edu/story/prof-geoffrey-stone-us-threshold-new-era-same-sex-marriage-case.

[7] *See* Herman D. Hofman, *For Richer, or For Poorer: How* Obergefell v. Hodges *Affects the Tax-Exempt Status of Religious Organizations that Oppose Same-Sex Marriage*, 52 GONZAGA L. REV. 21, 22–23 (2016).

practices despite the Court's ruling.[8] Prior to the *Obergefell* decision, the discussion around the issue had been merely hypothetical, since there was no national consensus that same-sex marriage was a fundamental right.[9] Once *Obergefell* was decided, however, proponents of same-sex rights were given new foothold for their position that organizations discriminating based on same-sex marriage, or even sexual orientation more broadly, should not receive any kind of federal government benefit.[10]

The most famous example of public policy clashing with tax exemptions is *Bob Jones University v. United States*, where the Supreme Court determined that tax-exempt status was properly revoked when a religious educational institution implemented racially discriminatory policies and practices.[11] The Court held that the IRS may revoke the tax-exempt status of an organization if their actions violate "established public policy."[12] This revocation occurred even though the University's prohibition was based on its religious beliefs.[13] Now, in the wake of the Court's decision in *Obergefell*, advocates for the LGBT community are insisting that the "public policy doctrine" from *Bob Jones* should be applied to discrimination based on marital status and even sexual orientation generally.[14]

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[8] *Id.* at 22.

[9] *Id.* at 23 (citing 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); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1237 (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)).

[10] While *Obergefell*'s effect on this debate, if any, would almost certainly be limited to organizations that discriminate based on same-sex marriage rather than sexual orientation, scholars and proponents of religious freedom nonetheless feel that it would pave the way for a re-examination of tax exemptions for those opposed to homosexuality in general. *See, e.g.*, Carl R. Trueman, *Preparing for Winter*, FIRST THINGS (Jan. 15, 2018), https://www.firstthings.com/web-exclusives/2018/01/preparing-for-winter ("[T]he *Bob Jones* precedent could easily lead to the revocation of tax-exempt status for schools committed to traditional views of marriage and sexual activity."); *see also* Nicholas A. Mirkay, *Is It "Charitable" To Discriminate? The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, WIS. L. REV. 45, 52, 84 (2007) (noting that marital sexual orientation and marital status are "the bases on which charitable organizations most commonly discriminate").

[11] 461 U.S. 574, 595–96 (1983).

[12] *Id.* at 586.

[13] *Id.* at 580. The University had rules in place that "students who date outside of their own race" would be expelled, as would students who were part of groups that encouraged interracial dating. *Id*. at 581.

[14] *See* Timothy J. Tracey, Bob Jones*ing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 FLA. INT'L U. L. REV. 85, 135 (2015) (pointing out that, in light of EEOC interpreting sexual orientation discrimination as "sex" discrimination, preventing sexual orientation discrimination could soon constitute a "fundamental" interest for the government); Scott Jaschik, *The Supreme Court Ruling and Christian Colleges*, INSIDE HIGHER ED. (June 29, 2015), https://www.insidehighered.com/news/2015/06/29/will-supreme-court-decision-same-sex-marriage-challenge-or-change-christian-colleges (quoting scholars who anticipate changes to religious exemptions in the future based on *Obergefell*).

Conversely, many in religious organizations, particularly religious schools, are deeply unsettled by the decision and worry that the *Bob Jones* precedent could be used to revoke their tax-exempt status, as well as the corresponding tax deduction for charitable donors, if the IRS were to determine, in light of *Obergefell*, that sexual orientation discrimination violates national public policy.[15] This issue is even more pressing given the *Bob Jones* Court's failure to delineate any sort of test for what constitutes an "established public policy."[16] The *Obergefell* Court was clear that the decision would not infringe upon religious groups' right to adhere traditional views of marriage,[17] and the IRS Commissioner has released a statement since the decision that "[t]he IRS does not view *Obergefell* as having changed the law applicable to Section 501(c)(3) determinations or examinations."[18] But proponents on both sides of the issue are still preparing for the possibility that *Obergefell* is a sign of things to come, and that subsequent shifts in public perceptions of marriage and sexual orientation could lead to tax exemptions being revoked in the future.[19]

In the context of charitable deductions, this concern comes at a time when giving is more popular than ever. In 2017, charitable donations in the United States reached a record high for the third straight year, with over four hundred billion dollars being donated to charitable causes.[20] Giving to religious organizations, which have historically received the largest share of charitable donations, increased almost three percent; meanwhile, giving to educational institutions rose six percent.[21] A loss of tax exemptions and deductions for donors, even for a small number of these schools and other institutions, would mean an enormous loss to organizations that have traditionally counted on these

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[15] *See* Trueman, *supra* note 10 (arguing that replacing "racial" with "sexual" in a passage in the *Bob Jones* opinion makes it easy to apply the decision to schools that discriminate based on sexual orientation). Justice Alito also raised the issue during the oral arguments for the *Obergefell* decision. *See* Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

[16] *See* Hofman, *supra* note 7, at 24.

[17] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (emphasizing that religious groups "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned").

[18] Michael A. Lehmann & Daniel Dunn, Obergefell *and Tax-Exempt Status for Religious Institutions*, COLUM. J. TAX L. TAX MATTERS (Dec. 30, 2016), https://journals.cdrs.columbia.edu/wp-content/uploads/sites/10/2016/04/7-Colum.-J.-Tax-L.-Tax-Matters-7-Michael-Lehmann.pdf .

[19] *See* Mark Oppenheimer, *Now's the Time to End Tax Exemptions for Religious Institutions*, TIME, June 28, 2015, https://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/; Trueman, *supra* note 10.

[20] *Giving Statistics*, CHARITY NAVIGATOR (Dec. 12, 2017), https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=42.

[21] *Id.*

donations and benefits to keep their doors open.[22] The timing of this debate could not be more crucial.

This Comment will examine current doctrine and theories on both religious and educational tax exemptions and argue that, in light of the *Obergefell* decision and the opportunity it provides for debate and discussion on issues of same-sex marriage and sexual orientation in the public forum, Section 501(c)(3) should be amended to strike a more appropriate balance between the public benefit offered by religious schools and protecting against discrimination based on sexual orientation. Part I will briefly examine the history and ambiguities of religious tax exemption and Section 501(c)(3), as well as the debate over the proper definition of a "charitable" organization for the purposes of the statute. Part II will summarize the decision in *Bob Jones* and discuss why it is an inappropriate precedent for a religious school that discriminates based on sexual orientation. Part III will outline the solutions that have been posited so far and show why each is inadequate, then propose a modified version of Section 501(c)(3) that will require organizations filing for an exemption to designate a "primary" purpose for filing the exemption and any "secondary" purposes that also qualify for tax-exempt status. An organization would then be prohibited from enforcing a secondary purpose to the detriment of its primary purpose. Under this requirement, an organization that is exempt primarily for "educational" purposes, which requires it to present a "full and fair exposition"[23] on issues, would be in danger of losing its exemption if it fails to facilitate such a full and fair discussion.

At the outset of this discussion, it is important to clarify what is meant by "discrimination" for the purposes of this Comment. Discrimination on its face is not necessarily a practice that can or should be prohibited.[24] Religions, in particular, often distinguish between the faithful and the unfaithful, or the pure and the impure; "discrimination is at the heart of many faiths."[25] However, as one law dictionary points out, "the dictionary sense of 'discrimination' is neutral

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[22] *See* 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, 715–16 (2009); *see also* Glenn A. Adams, *Are Calls to Alter the Tax-Exempt Status of Organizations After Obergefell Premature?*, 7 COLUM. J. TAX. L. TAX MATTERS 3, 5 (Apr. 2016) (on file with *Emory Law Journal*) (suggesting that using *Obergefell* as a "sword" to deny tax exemptions may be premature based on the services and aid many religious organizations provide to the poor).

[23] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (2018).

[24] *See, e.g.*, Felicia R. Lee, *Discriminating? Yes. Discriminatory? No.*, N.Y. TIMES, Dec. 13, 2003, at B7 (pointing out that "[s]ociety discriminates all the time," using the examples of drinking and voting age requirements, and observing that human beings "rely on generalizations").

[25] Turley, *supra* note 3, at 63.

while the current political use of the term is frequently non-neutral, pejorative."[26] This dictionary defines discrimination, in part, as "a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[27] This Comment will utilize this definition and in focusing on religious universities, concentrate particularly on schools that stifle debate and discussion about same-sex marriage and sexual orientation on their campuses. This silencing of viewpoints that are alternative to the religious university's position is fairly commonplace. At one religious college, for example, an alternative student newspaper was confiscated for its pro-LGBT viewpoints.[28] Another school prevented a bake sale on campus to raise funding and awareness for LGBT homeless youths.[29] A third school's administration prohibited students from utilizing an ordinarily public forum on campus to advocate for LGBT rights.[30] This refusal by an educational institution to treat all viewpoints and perspectives equally, and attempts to silence attempts at discussion or awareness of issues, will be the focal point of this discussion.

I. BACKGROUND OF 501(c)(3) TAX EXEMPTIONS

While tax exemptions are a principle of American tax law as old as the Internal Revenue Code itself, there is much debate as to how they should be implemented and the purpose they should serve in society. This Part will explore some of these issues. Section A discusses the history of Section 501(c)(3) exemptions, and the specific requirements an organization must meet to receive tax-exempt status. Section B highlights some of the ambiguities that commonly arise in the implementation of the statute. Finally, Section C examines the conflicting rationales for the function that charities should serve in their communities and argues that the public benefit rationale is the correct approach.

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[26] *Discrimination*, BLACK'S LAW DICTIONARY 534 (9th ed. 2009).

[27] *Id.*

[28] *See* Joanne Viviano, *Baptist-Aligned Cedarville University Beset by Conflicts*, COLUMBUS DISPATCH (June 2, 2014), https://www.dispatch.com/content/stories/local/2014/06/02/cedarville-campus-beset-by-conflicts.html.

[29] David R. Wheeler, *The LGBT Politics of Christian Colleges*, ATLANTIC (Mar. 14, 2016), https://www.theatlantic.com/education/archive/2016/03/the-lgbt-politics-of-christian-colleges/473373.

[30] *See* Nicole Marton, *The Sin of Silence*, BLOGS BY NICOLE (June 4, 2016), https://nicolemarton.wordpress.com/2016/06/14/the-sin-of-silence (detailing how a statue of the University's mascot, which is frequently spray-painted by a variety of student groups, was painted over several times by administration after students painted pro-LGBT rights messages on it).

A. History of Section 501(c)(3) Exemptions

Tax exemptions for charitable organizations is a concept that is "deeply rooted in America's history and traditions."[31] Since 1894, charities conducted solely for "charitable, religious, or educational purposes" have been exempt from income taxation.[32] This policy has continued up to the present.[33] Section 501(c)(3) of the Code exempts organizations from paying federal income taxes when the entity is "organized and operated exclusively" for eight general purposes, three of which are "religious, charitable, … or educational purposes."[34] The statute further prohibits organizations receiving these exemptions from "attempting[] to influence legislation" or expressing support or opposition for any political campaign.[35] The "principal benefit" of obtaining Section 501(c)(3) status is that the organizations may receive charitable contributions that are tax-deductible to the donor under Section 170(a)(1) of the Code.[36] Section 501(c)(3) organizations are, for the most part, the only organizations that can take advantage of this benefit.[37]

Obtaining an exemption is "no small task."[38] To receive tax-exempt status, an organization must file an application with the IRS under one of the eight categories specified in the statute, and meet both the "organizational" and "operational" tests.[39] An organization meets the requirements of the organizational test if it was exclusively established for at least one qualifying exempt purpose.[40] To determine the purpose of the organization, the IRS looks to its articles of organization.[41] Upon receiving the organization's application for an exemption, the IRS is required by federal law to review the organization's

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[31] Hofman, *supra* note 7, at 27.

[32] *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, 408 (2011) (quoting Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556).

[33] *See* Hofman, *supra* note 7, at 28.

[34] I.R.C. § 501(c)(3) (2012). The full texts of the statute exempts "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals." *Id.*

[35] *Id.*

[36] Mirkay, *supra* note 10, at 54; *see also* I.R.C. § 170(a)(1) ("There shall be allowed as a deduction any charitable contribution … payment of which is made within the taxable year.").

[37] Mirkay, *supra* note 10, at 54.

[38] David A. Brennen, *A Diversity Theory of Charitable Tax Exemption–Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX L. REV. 1, 21 (2006).

[39] *See* Caster, *supra* note 32, at 409; *see also* Treas. Reg. § 1.501(c)(3)-1(a)(1) (2018).

[40] Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(A).

[41] *Id.* § 1.501(c)(3)-1(b)(1)(i).

proposed structure and activities to determine if it meets the proper standards for an exemption.[42] If the IRS determines the organization does not adequately qualify, it has discretion, subject to judicial review, on whether to grant or deny tax-exempt status.[43]

The operational test exists to ensure that the organization's activities and resources are primarily devoted to its qualifying exempt purposes.[44] The test is further split into two components: the "primary-purpose-or-activity test" and the "private-inurement prohibition."[45] Under the primary-purpose-or-activity test, "an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)."[46] If "more than an insubstantial part" of the organization's activities is not furthering an exempt purpose, the organization will not pass this test.[47] As such, even after obtaining tax-exempt status the organization must annually submit information reports to the IRS concerning its activities and operations.[48] Under the private-inurement prohibition, an organization's net earnings may not "inure in whole or in part to the benefit of private shareholders or individuals.[49] Together, the organizational and operational tests constitute "the heart of the charitable tax exemption."[50]

Importantly, an organization determined by the IRS to be a "church" has much less stringent requirements under the Code.[51] Churches do not have to file an application with the IRS to receive tax-exempt status,[52] and they are not required to file annual reports to maintain their exemption.[53] Because of this very favorable treatment, the IRS is careful what it does and does not designate to be a "church" for tax purposes. In response to the difficulties that often arise from determining whether an organization qualifies as a church, the IRS has created a fourteen-point list for determining if an organization classifies as a church, with a fifteenth point being "other facts and circumstances."[54] The most

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42 *See* Brennen, *supra* note 38, at 21–22.

43 *Id.* at 22.

44 *See* Mirkay, *supra* note 10, at 55.

45 *See id.* (citing Treas. Reg. § 1.501(c)(3)-1(c)(1) to (2)).

46 Treas. Reg § 1.501(c)(3)-1(c)(1) (2018).

47 *Id.*

48 *See* Brennen, *supra* note 38, at 22. This report is filed on IRS Form 990 or 990T. *Id.* at n.83.

49 Treas. Reg. § 1.501(c)(3)-1(c)(2).

50 *See* Brennen, *supra* note 38, at 26.

51 I.R.C. § 508(c)(1)(A) (2012).

52 *Id.*

53 *Id.* § 6033(a)(3)(A)(i).

54 *See* ROBERT LOUTHIAN & THOMAS MILLER, I.R.S., DEFINING "CHURCH": THE CONCEPT OF A CONGREGATION (1994), https://www.irs.gov/pub/irs-tege/eotopica94.pdf.

important factor that separates churches from other religious organizations is the presence of a regular congregation.[55] The IRS's struggle to define a church for exemption purposes is just one of the complications that arise in granting and enforcing exemptions.

B. Tax Exemption Ambiguities

Though religious tax exemptions have been present throughout American history, they are not without their ambiguities.[56] One of these involves defining a "religious" organization for the purposes of Section 501(c)(3).[57] Due to the "vast panoply" of religious beliefs and institutions in the United States, attempting to formulate a concrete definition of "religion" or "religious purpose" is notoriously difficult.[58] As such, the IRS's current approach asserts that religion "cannot (or should not) be defined."[59] To the extent that religious organizations are defined, the IRS advises its agencies to adopt a broad definition that encompasses a variety of organizations in addition to churches or other traditional places of worship.[60] The general rule followed by the IRS is that "in the absence of a clear showing that the beliefs or doctrines under consideration are not sincerely held by those professing or claiming them as a religion, the Service cannot question the 'religious' nature of those beliefs."[61] This limitation on the IRS's discretion comports with the Establishment Clause of the First Amendment, since any attempt to define what is and is not a "religion" necessarily involves the government putting limitations on what can qualify as a religion.[62]

Another often confusing issue concerning tax exemptions is whether they are a right owed to the religious organization, or a privilege that the government extends as a matter of "legislative grace."[63] Some have argued that tax

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[55] *Id.*

[56] *See* Christine Roemhildt Moore, *Religious Tax Exemption and the Charitable Scrutiny Test*, 14 REGENT U. L. REV. 295, 305 (2002).

[57] *Id.*

[58] *Id.* (quoting JAMES J. FISHMAN & STEPHEN SCHWARTZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 330 (2d ed. 2000)); *see also* Mirkay, *supra* note 22, at 726 (explaining why the IRS advises its agencies to opt for a broad definition of a "religious" organization).

[59] Moore, *supra* note 56, at 306.

[60] *See* Mirkay, *supra* note 22, at 726.

[61] Gen. Couns. Mem. 36993 (Feb. 3, 1977); *see also* Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 668 (N.Y. 1982) ("It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is. The courts are obliged to accept such characterization…unless it is found to be insincere or [a] sham.").

[62] *See* Gen. Couns. Mem., *supra* note 61.

[63] *See* Moore, *supra* note 56, at 312 (first quoting Vill. of Schaumburg v. Citizens for a Better Env't, 444

exemptions, particularly those for religious organizations, are a right.[64] Proponents of this view point to the historical reluctance of governments to tax churches, as well as the constitutional requirement of separation of church and state.[65] The Supreme Court, however, has consistently rejected this argument.[66] The Court has held that the Free Exercise Clause of the First Amendment protects the *beliefs* of religious organizations from government discrimination, not necessarily all impediments upon religion.[67] The government may override an infringement on religious liberty with a showing that it "is essential to accomplish an overriding government interest."[68] Thus, tax exemptions are not considered by the Court to be a right owed to religious and other charitable organizations, and their revocation does not generally infringe on the organizations' constitutional rights.[69]

Further, the Court has historically also held that revoking tax exemptions does not pose an unconstitutional burden on the religious organization's ability to function. This is seen most clearly in *Branch Ministries v. Rossotti*.[70] In that case, the plaintiff was a church that lost its tax-exempt status by posting advertisements in the local paper urging readers not to vote for Bill Clinton in the 1992 presidential election.[71] This activity by the church violated Section 501(c)(3)'s prohibition against opposing a political candidate.[72] The church argued that its free speech and exercise rights had been violated under the Free Exercise Clause and the Religious Freedom and Restoration Act (RFRA) of 1993.[73] The Court found that the church's loss of tax exemption did not pose an unconstitutional burden on the exercise of its religion; this would only be true, said the Court, if "the receipt of the privilege (in this case tax exemption) is conditioned 'upon conduct proscribed by religious faith, or … denie[d] … because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[74] The Court concluded that the revocation would only decrease the amount of money

U.S. 620, 643 n.2 (1980) (Rehnquist, J., dissenting); and then quoting Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 854 (10th Cir. 1972)).

64 *Id.*

65 *Id.*

66 *Id.* at 309; *see also, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972); Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

67 *See* Moore, *supra* note 56, at 309.

68 United States v. Lee, 455 U.S. 252, 257–58 (1982).

69 *See* Moore, *supra* note 56, at 309–10.

70 211 F.3d 137, 142 (D.C. Cir. 2000).

71 *Id.* at 140.

72 *Id.* at 141–42; *see* 26 U.S.C. § 501(c)(3) (2012).

73 *Branch Ministries*, 211 F.3d at 140–41.

74 *Id.* at 142 (quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391–92 (1990)).

available to the church for its religious activities and practices, and that this burden is "'not constitutionally significant.'"[75] Thus, the Court seems to hold the view that revoking tax exemptions will not result in an unconstitutional burden that would allow the organization to claim its First Amendment rights have been violated.[76] This, combined with the fact that the government and the courts do not tend to see tax exemptions as a right, creates little opportunity for charitable organizations to contest a revocation of their tax exemptions, if such a revocation were ever to occur. Tax exemptions are thus generally considered to be a privilege, and tax-exempt organizations are typically unable to claim that their revocation imposes an unfair burden on their religious beliefs.[77]

C. The Conflicting Rationales of "Charities"

One of the most difficult questions surrounding charitable tax exemptions is what role religious and other charitable organizations are supposed to play in our society.[78] While discussing this issue involves a small diversion into legislative and judicial history, it is nonetheless helpful when examining the present tax-exempt status of religious organizations, particularly those that take discriminatory action against LGBT rights advocates. There are two pervading schools of thought on the meaning of a "charitable" organization and the benefit of charities to our society: One is the public benefit that these entities provide to taxpayers, and the other is the promotion of a healthy diversity of views in a pluralistic society.[79] This Comment will refer to these schools of thought as the "public benefit rationale" and the "diversity rationale." Though a given charity can often account for both rationales, the two approaches diverge on how to treat charities with discriminatory policies or practices.

The public benefit rationale focuses on the benefit that tax-exempt organizations provide to society at large.[80] This concept of "charity" was adopted from English common law of "charitable trusts," which existed for the purposes of aiding the poor, advancing education, and promoting religion, among other purposes.[81] The legislative history of tax laws provide support for

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[75] *Id.*

[76] *Id.* at 144.

[77] *See* Moore, *supra* note 56, at 312.

[78] *See* Mirkay, *supra* note 10, at 56.

[79] *See* Moore, *supra* note 56, at 296–98. Moore also notes two other, less popular rationales for the exemption's existence: One is "the premise that churches cannot afford to be taxed" and thus require tax exemptions to exist, and the other is that tax exemptions are an "inalienable right, a constitutional guarantee provided to secure freedom of exercise of religion." *Id.* at 297–98.

[80] *Id.* at 296–97.

[81] *See* Mirkay, *supra* note 10, at 56–57.

the notion that tax-exempt organizations must provide some public benefit.[82] When Congress enacted the companion provision to Section 501(c)(3) that is now Section 170(c)(2), it stated that a charitable deduction "passes beyond individuals and strikes at America's whole organization for social progress and education, the relief of distress, and the remedy of evils."[83] A 1939 report from the House of Representatives states that charitable tax exemptions are based on the theory that "the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of general welfare."[84] In other words, when private efforts benefit the community at large, the government experiences a savings; thus, tax exemptions function as a partial return of the savings to encourage similar future endeavors by charitable organizations.[85] Notably, however, Congress did not directly endorse this common-law definition of "charitable" in enacting 501(c)(3).[86] Some have concluded that setting a concrete definition of what is charitable would be a mistake since charitable activity "constantly changes" and the question of what is charitable arises in "a number of different contexts."[87] Perhaps for this reason, "no established benchmark exists to determine what purposes" are of substantial enough interest to the community to qualify as charitable; "the interests of the community vary with time and place."[88] Some consider this pliability of the public benefit rationale to be its "fatal flaw."[89]

An alternative theory often advanced for the purpose of charities receiving tax exemptions is the diversity rationale, which emphasizes the historical importance of a plurality of diverse viewpoints and perspectives within American culture.[90] Promoting this diversity ensures that the government is not the sole influence on the flow of ideas in the lives of citizens, and perpetuates the country's "pluralistic spirit."[91] This position has been advocated by multiple Justices in key Supreme Court decisions regarding tax-exempt status.[92]

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[82] *See* Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353, 1365 (1983); Mirkay, *supra* note 10, at 58–59.

[83] Galvin & Devins, *supra* note 82, at 1366 (quoting 55 CONG. REC. 6728 (1917) (statement of Senator Hollis)).

[84] Mirkay, *supra* note 10, at 58–59 (citing H.R. REP NO. 75-1860, at 19 (1938)).

[85] *See* Moore, *supra* note 56, at 297.

[86] *Id.* at 318 n.144.

[87] Mirkay, *supra* note 10, at 57 (quoting John P. Persons et al., *Criteria for Exemption under 501(c)(3), in* 4 RESEARCH PAPERS 1909, 1934–35 (1977)).

[88] *Id.* at 57–58.

[89] *Id.* at 73–74.

[90] *See* Moore, *supra* note 56, at 297.

[91] *Id.*

[92] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 609 (1983) (Powell, J., concurring) (arguing

Advocates for this rationale argue that a public benefit theory would encourage a tax policy that would grant exemptions "only to those organizations that pander to community or majority sentiment."[93] This is similar to the current system for receiving federal grants, in which the governmental benefit is conditioned on assenting to majority views.[94] However, proponents of the diversity rationale argue that this type of system would suppress pluralistic and conflicting views in our society, preventing a multitude of organizations from expressing their viewpoints while retaining their tax exemptions.[95] This would run contrary to the diversity of viewpoints and opinions that are the bedrock of American law and philosophy.[96]

A related question is whether to group federal tax exemptions under the umbrella of "government subsidies," along with other subsidies such as federal grants, or whether tax exemptions stand in a category of their own.[97] Many courts and academics have supported treating tax exemptions as a form of government subsidy.[98] After all, organizations receiving a tax exemption are the beneficiaries of "indirect" government support—in the form of more usable income not being given to the IRS—in the same way that grants and other subsidies provide "direct" government support.[99] However, others point out that if the diversity rationale is the correct approach to tax exemptions, then the exemptions are the most efficient way for the government to further its goal of "fostering public participation in associations and groups regardless of their inherent views or policies."[100] While tax exemptions are seen as a way for the government to promote free speech for all while remaining neutral, federal subsidies are often viewed as the government financially supporting the views of certain groups.[101] If exemptions are viewed as a subsidy, then the government

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that the majority opinion "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints"); Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (noting that "private, nonprofit groups … receive tax exemptions … [because] each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society").

93 Galvin & Devins, *supra* note 82, at 1370.

94 *Id.*

95 *Id.*

96 *See* Moore, *supra* note 56, at 297.

97 Turley, *supra* note 3, at 64 ("Underlying the imposition of a nondiscriminatory condition is a view of tax exemption as essentially the same as a direct subsidy or grant.").

98 *See id.* ("Many academics agree with the view that there is no cognizable difference between not taxing an organization and giving money directly to that organization."); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1920 (2006) (describing tax exemptions as "tantamount to a matching grant").

99 *See* Mirkay, *supra* note 10, at 53 n.37.

100 Turley, *supra* note 3, at 64.

101 *Id.*; *see also* Rumsfield v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 48 (2006) (holding that

crosses over from being a "facilitator" of free speech by a plurality of viewpoints and beliefs, and becomes instead a "regulator" of what beliefs and groups are appropriate and inappropriate for the purposes of Section 501(c)(3).[102]

Historically, courts have grappled with how to reconcile the public benefit and diversity rationales when faced with an issue of an organization's tax exemption, especially when that organization is involved in or associated with some type of discrimination.[103] Even the Supreme Court has struggled with how to approach tax exemptions, leading to conflicting opinions within a relatively small time frame.[104] Though various interpretations were implemented by the Court over the twentieth century, the issue came to a head in a case in which a university sought to retain its tax-exempt status while maintaining a racially discriminatory policy. That case was *Bob Jones University v. United States*.[105]

II. *BOB JONES* AND ITS INAPPLICABILITY TO SEXUAL ORIENTATION DISCRIMINATION

The Supreme Court's holding in *Bob Jones* remains one of the more polarizing opinions in the history of the Court's jurisprudence. The decision birthed the "public policy doctrine," which still serves as a limitation on an organization's ability to receive a tax exemption.[106] The case itself dealt with racial discrimination in education; however, in light of the Court's holding in *Obergefell*, many scholars and leaders of religious organizations now worry that the doctrine the Court laid out in *Bob Jones* could apply to organizations that discriminate based on sexual orientation.[107] This Part will argue that *Bob Jones* should not be extended to this context. Section A highlights the changes in national policy and IRS legislation that led to *Bob Jones* being before the Court. Section B discusses the *Bob Jones* decision itself and its establishment of the national public policy doctrine. Section C discusses the problems in applying

Congress could condition federal funds to require organizations receiving them to allow military recruiters on their campuses).

102 Turley, *supra* note 3, at 64–65.

103 *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983) (holding that "underlying all relevant parts of the [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."); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (finding it "unnecessary" to justify tax exemptions based on the public benefit rationale).

104 *See Bob Jones Univ.*, 461 U.S. at 586; *Walz*, 397 U.S. at 673 (both cases are discussed herein).

105 461 U.S. 574 (1983).

106 *See* Hofman, *supra* note 7, at 30–31.

107 *See, e.g.*, Tom Gjelten, *Christian Colleges Are Tangled in Their Own LGBT Policies*, NPR (Mar. 27, 2018), https://www.npr.org/2018/03/27/591140811/christian-colleges-are-tangled-in-their-own-lgbt-policies; Trueman, *supra* note 10.

that doctrine to organizations that discriminate based on sexual orientation and same-sex marriage and argues that the *Bob Jones* doctrine should not be used to revoke these organization's exemptions.

A. Circumstances Leading to Bob Jones

For much of American history there were no restrictions to obtaining tax-exempt status, aside from the requirements in Section 501(c)(3) itself.[108] Indeed, prior to 1970, there was a "reasonable assumption" that tax exemptions were equally available to all organizations that qualified as "charitable," regardless of their specific views.[109] In 1970, however, a fundamental shift took place in the view of tax exemptions with a federal district court's decision in *Green v. Kennedy*.[110] In that case, the court enjoined the IRS from granting tax-exempt status to organizations that had racially discriminatory policies.[111] The decision came down in the wake of the *Brown v. Board of Education* decision eliminating racial segregation in public schools, at a time when many white parents were enrolling their children in private schools to avoid desegregation.[112] At the time, the IRS only refused tax exemptions to segregated private schools that were "sufficiently entangled" with the state; insitutions that lacked such entanglement were still free to discriminate.[113] In the wake of the *Green v. Kennedy* decision, however, the IRS in a 1971 Revenue Ruling adopted the position that all charitable organizations are "subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy."[114] The adoption of this policy as a "touchstone" of tax exemptions set the government on an inevitable collision path with religious organizations, entities whose very nature entails some level of discrimination between people who choose their faith and those who do not.[115]

In the same year as the *Green* opinion, the Supreme Court handed down *Walz v. Tax Commission of the City of New York.*[116] The case dealt with a New York statute granting property tax exemptions to religious organizations.[117] The Court examined whether the statute violated the Establishment Clause and, in so

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108 *See* Turley, *supra* note 3, at 62.
109 *Id.*
110 309 F. Supp. 1127, 1140 (D.D.C. 1970).
111 *Id.*
112 *See* Hofman, *supra* note 7, at 31; *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
113 *See* Hofman, *supra* note 7, at 32.
114 Rev. Rul. 71-447, 1971-2 C.B. 230.
115 *See* Turley, *supra* note 3, at 63–64.
116 397 U.S. 664 (1970).
117 *Id.* at 666–67.

doing, thoroughly examined the justification for granting tax exemptions to religious groups.[118] The majority opinion acknowledged the public social benefits offered by these organizations; however, it maintained that these benefits alone are not adequate justification for granting them tax exemptions.[119] The majority pointed out that religious organizations "vary substantially" in the service they provide, and that "the extent of social services may vary, depending on whether the church serves an urban or rural, a rich or poor constituency."[120] To base exemptions on such a fickle aspect of religious organizations was, according to the Court, an inappropriate "yardstick" to determine worthiness for an exemption.[121] Instead, the Court adopted the diversity rationale discussed above, determining that religious groups should have tax exemptions based on their promotion of national diversity and a plurality of viewpoints.[122] The Court also noted that the history and tradition of churches and other religious institutions being exempt from income taxes is a strong justification for their continued tax-exempt status, and a practice that "is not something to be lightly cast aside."[123]

While the *Walz* opinion appeared to reinforce the historic legitimacy of religious tax exemptions, a year later the Revenue Ruling of 1971 raised new issues of whether these exemptions could be reconciled with the practice of racial discrimination in education[124], a practice which the government and the courts had been fighting tooth and nail to stamp out since the *Brown v. Board* decision.[125] This issue was finally addressed by the Supreme Court twelve years later in *Bob Jones*.[126]

B. Bob Jones University v. United States

Following the district court's holding in *Green v. Kennedy*, the IRS formally notified private schools of their change in policy, approximately nine months before the Revenue Ruling prohibiting racial discrimination for tax exemption

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118 *Id.* at 673.

119 *Id.* at 674.

120 *Id.*

121 *Id.*

122 *Id.* at 673. Justice Brennan agreed with this rationale in his concurrence, noting that "government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities." *Id.* at 689 (Brennan, J., concurring).

123 *Id.* at 678.

124 *See, e.g.*, Paul B. Stephan III, Bob Jones University v. United States: *Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33.

125 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593–94 (1983).

126 *Id.* at 574.

purposes was issued.[127] Schools that did not comply with the new policy were thus subject to having their exemption from federal taxes revoked.[128] Bob Jones University was, at the time, a South Carolina institution which emphasized in its curriculum "the Christian religion and the ethics revealed in the Holy Scriptures."[129] The professors at the University were "required to be devout Christians," and incoming students were "screened" on their religious beliefs prior to enrollment.[130] Initially, the University forbade the enrollment of African-American students; however, following the Fourth Circuit's 1975 decision in *McCrary v. Runyon*, the University changed its policies to allow African-Americans to enroll.[131] However, the University maintained a strict policy against any type of interracial dating, as the University's sponsors believed that the Bible forbade it.[132] After the IRS revoked the University's tax-exempt status under 71-447, the University sought recovery of the unemployment tax they were forced to pay and the reinstatement of their tax-exempt status.[133] The University claimed the revocation violated the Free Exercise Clause of the First Amendment.[134] The Supreme Court granted certiorari to resolve this issue.[135]

The Court first acknowledged the canon that "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute."[136] Section 501(c)(3) must, therefore, be construed in light of "the framework of the Internal Revenue Code" and "the background of the congressional purposes."[137] In examining this background, the Court uncovered the common-law standards of charity that any organization seeking tax-exempt status must adhere to: namely, "serv[ing] a public purpose and not be[ing] contrary to established public policy."[138] This stems from the concept, derived from English common law, that exemptions for charitable organizations are "based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be

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127 *Id.* at 578.
128 *Id.*
129 *Id.* at 580.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.* at 581–82.
134 *Id.* at 582.
135 *Id.* at 585.
136 *Id.* at 586.
137 *Id.*
138 *Id.*

met by appropriations from other public funds."[139] Thus, the Court concluded, the purpose of a charitable trust must not be illegal or violate public policy.[140]

The Court then noted a substantial number of cases stemming from the *Brown v. Board* decision that establish "racial discrimination in education violates a most fundamental national public policy."[141] The Court further pointed out that this policy has been embraced by the other two branches of government: Congress adheres to it in Titles IV and VI of the Civil Rights Act of 1964, and the Executive Branch has "consistently placed its support behind eradication of racial discrimination."[142] The majority concluded that the position of all three branches of government on this matter is "unmistakably clear": A racially discriminatory private school is not "charitable" within the meaning of 501(c)(3).[143] This conclusion was further supported by the fact that, though at least thirteen bills were introduced into Congress to overturn the IRS's interpretation of 501(c)(3) following the Revenue Ruling, Congress did not act on any of them.[144] Congress' inaction indicated that it "acquiesced in the IRS rulings of 1970 and 1971."[145]

The Court acknowledged the plaintiff's Free Exercise Clause argument; however, it maintained that "[not] all burdens on religion are unconstitutional …. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[146] There are some instances where even religious-based conduct can be regulated.[147] This, according to the Court, was one such instance: While denial of tax exemption would undoubtedly impact the operation of private schools, it would not directly prevent them from espousing their religious tenets.[148] The Court appears to conduct a "balancing" test, weighing the burden that revoking the tax exemption would impose against the governmental interest in promoting nondiscriminatory education policies.[149] The Court found that the governmental interest outweighs the burden.[150]

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139 *Id.* at 589–90 (quoting H.R. REP. NO. 1860-75, at 19 (1938)).
140 *Id.* at 591.
141 *Id.* at 593.
142 *Id.* at 594.
143 *Id.* at 598.
144 *Id.* at 600.
145 *Id.* at 601.
146 *Id.* at 603 (quoting United States v. Lee, 455 U.S. 252, 257–58 (1982)).
147 *Id.*
148 *Id.* at 603–04.
149 *Id.* at 604.
150 *Id.*

Though the *Bob Jones* decision took place just thirteen years after *Walz*, it represents a radical shift in the Court's ideology on religious tax exemption.[151] Where the *Walz* Court rejected a public benefit rationale and instead used the diversity rationale to permit tax exemptions, the *Bob Jones* majority did the opposite, rejecting the diversity rationale as sufficient for granting a tax exemption and instead using the public benefit rationale to form its analysis and its creation of a limitation on Section 501(c)(3) exemptions.[152] Chief Justice Burger, writing for the *Bob Jones* majority, plainly states 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."[153] This clashes directly with the opinion he wrote in *Walz*, in which he stated that "we find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others."[154] The fact that both opinions were written by Chief Justice Burger makes their divergence all the more bizarre. It is apparent, however, that the *Bob Jones* opinion is absent of any language that society benefits from the plurality of viewpoints that religious entities purportedly offer; the *Walz* rationale was "completely abandoned" by the Court in *Bob Jones*.[155]

The *Bob Jones* majority also established a completely new doctrine to serve as a limitation on an organization's ability to receive a tax exemption under Section 501(c)(3)—namely, the "public policy" doctrine.[156] The Court explained that the purpose of a charitable organization "must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred" and noted that an organization would fail this test "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[157] The Court did highlight some of the factors that caused it to conclude that Bob Jones University had met this "no doubt" standard.[158] It discussed an "unbroken line of cases following *Brown v. Board*

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151 *See* Moore, *supra* note 56, at 314–15.

152 *Id.*

153 *Bob Jones Univ.*, 461 U.S. at 586.

154 Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

155 *See* Moore, *supra* note 56, at 315. Justice Powell recognizes the enormity of the difference between these two rationales in his concurrence: "The Court asserts … that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, … sharply conflicting, activities and viewpoints." *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring).

156 *Bob Jones Univ.*, 461 U.S. at 592.

157 *Id.*

158 *Id.* at 593.

[that] establishe[d] beyond doubt [the] Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[159] This position, said the majority, was shared by both the Executive and Legislative Branches; thus, the Court concluded that:

> On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear … [Revenue Ruling 71-447] is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970.[160]

The Court saw a few factors that caused it to designate eliminating racial discrimination as an "established public policy."[161] One was "an unbroken line of cases" that reinforced the Court's emphasis on eliminating race discrimination in education.[162] Another is a unified front from all three branches of government in working toward the common policy goal.[163] These factors, then, serve as a "starting point" to any inquiry into whether an established public policy exists for the purposes of Section 501(c)(3).[164]

C The Difficulty in Applying Bob Jones *to Sexual Orientation Discrimination*

It is not difficult to understand religious organizations' worry regarding their sexual orientation-based discrimination following *Obergefell v. Hodges*. For the decades following *Bob Jones*, discussions of its application in other contexts were merely theoretical, since the Court did not dictate any other applications of the public policy doctrine.[165] In the wake of *Obergefell*, however, many suddenly saw a landmark case, similar to *Brown v. Board*, that could persuade the IRS to issue a Revenue Ruling declaring the prevention of sexual orientation discrimination to be national public policy, or the Supreme Court to use *Obergefell* as a bridge to apply the public policy doctrine to religious organizations that discriminate in this manner.[166] As one author points out, "the key passage" of *Bob Jones* reads: "The Government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their

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159 *Id.*
160 *Id.* at 598.
161 *See id.* at 593.
162 *Id.* at 593.
163 *Id.* at 598.
164 *See* Hofman, *supra* note 7, at 38.
165 *See* Caster, *supra* note 32, at 403.
166 *See, eg.*, Trueman, *supra* note 10.

religious beliefs."[167] Replace "racial" with "sexual" in that passage, and the point becomes apparent: "In an era where a close analogy is assumed between civil rights regarding race and civil rights regarding sexual identity, the *Bob Jones* precedent could easily lead to the revocation of tax-exempt status for schools committed to traditional views of marriage and sexual morality."[168] Adding to this worry is the fact that several courts have already drawn parallels between race discrimination and sexual orientation discrimination.[169] One example is *Goodridge v. Department of Public Health*, in which the Massachusetts Supreme Judicial Court equated the two types of discrimination to hold that the Massachusetts Constitution required it to recognize same-sex marriage.[170] It thus seems likely, and perhaps even inevitable, that the Supreme Court will one day draw the same or a similar parallel, which could be very problematic for organizations that strictly adhere to traditional views of marriage and sexual relations and also rely on federal tax exemptions.

Despite this worry, an examination of the Court's rationale in formulating the public policy doctrine in *Bob Jones* reveals that its application to sex discrimination in *Obergefell* is not as simple as it might seem. Indeed, many scholars who compare sexual orientation and race discrimination are also careful to point out the differences between the two.[171] In the wake of *Obergefell*, several authors and scholars have conducted in-depth analyses of the comparison as it pertains to tax exemptions and have concluded that sex discrimination would not fall under the *Bob Jones* public policy doctrine for various reasons.[172]

In general, the *Bob Jones* doctrine is vague and not clearly articulated, making its application outside of the specific facts of that case difficult.[173] The discussion in the case fails to provide any sort of framework for when a particular policy is considered "established" or "fundamental," such that the

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[167] *Id.*

[168] *Id.*

[169] *See* Hofman, *supra* note 7, at 53.

[170] *See* 798 N.E.2d 941, 958 (Mass. 2003). The *Goodridge* Court did not, however, go so far as to say that the government had a responsibility to eradicate sexual orientation discrimination, even at the expense of religious freedom, as the Supreme Court did in *Bob Jones*. *See id*.

[171] *See* Hofman, *supra* note 7, at 53–54.

[172] *See, e.g.*, Samuel D. Brunson & David J. Herzig, *A Diachronic Approch to* Bob Jones*: Religious Tax Exemptions After* Obergefell, 92 IND. L.J. 1175, 1180 (2017); Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y 255, 267 (2017) (arguing that "*Obergefell*'s analytical approach, language, and tone are inconsistent with applying *Bob Jones* to the disadvantage of religious schools that maintain sexual conduct policies); James A. Davids, *Enforcing A Traditional Moral Code Does Not Trigger A Religious Institution's Loss of Tax Exemption*, 24 REGENT U. L. REV. 433, 435 (2011); Hofman, *supra* note 7, at 49.

[173] *See* Brunson & Herzig, *supra* note 172, at 1206; Buckles, *supra* note 172, at 276.

doctrine would trigger a loss of tax-exempt status.[174] The *Bob Jones* Court indicated that an organization would violate the doctrine only where there is "no doubt" that its activity violates national public policy;[175] this standard is "exceptionally high" and has led some scholars to conclude that the doctrine should either be applied sparingly or fleshed out further by the Court.[176] Without any further guidance, judges applying the doctrine would necessarily have to exercise their own moral judgments to determine whether an issue constitutes a national public policy.[177] This is especially true in the context of an issue as hotly contested as same-sex marriage and relations.[178] Without further instruction on how to apply the doctrine, it is certainly conceivable that one judge may determine that discrimination based on sexual orientation does violate public policy, while another may reach the opposite conclusion.

Some have attempted to glean specific requirements from *Bob Jones* for reaching "national public policy" status; however, even these "requirements" do not apply to discrimination based on same-sex marriage and sexual orientation.[179] One identified requirement is an "unbroken line" of cases clearly establishing a policy of eliminating sexual orientation discrimination.[180] However, the cases that are the best candidates for such a policy, such as *Romer v. Evans*[181] and *Lawrence v. Texas*,[182] do little to indicate that the Court sought to establish such a policy.[183] In both cases, the Court did not find that homosexual persons were a protected class or that homosexuality was a constitutional right; instead, it conducted a rational basis review and found that the state had no legitimate basis to deny homosexual persons a political process available to everyone else.[184] Further, the Court shifted its ideology frequently

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174 Buckles, *supra* note 172, at 276.

175 Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983).

176 *See* Brunson & Herzig, *supra* note 172, at 1206 ("[I]n *Bob Jones* … the Supreme Court created a vague standard that is not eligible for consistent application by the IRS, other courts, or taxpayers."); Buckles, *supra* note 172, at 294 (discussing a version of the doctrine that avoids the vagueness issues); Hofman, *supra* note 7, at 51 ("Because of its narrow holding and unique context, *Bob Jones* has been labeled an outlier.").

177 *See* Brunson & Herzig, *supra* note 172, at 1205.

178 *See* Buckles, *supra* note 172, at 304 (observing that "*Obergefell* … conceded that various religious perspectives of marriage may differ from the sentiments of those whose constitutional right to marry is recognized by the Court").

179 *See* Buckles, *supra* note 172, at 273–74 (describing the six "fundament factors," which he pulls from *Bob Jones*, to determine whether a policy is a national public policy); Hofman, *supra* note 7, at 37.

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

181 517 U.S. 620 (1996).

182 539 U.S. 558 (2003).

183 Hofman, *supra* note 7, at 39–40; Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaign Against Religion*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103, 110 (Douglas Laycock et al. eds., 2008).

184 *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

during this period, ruling in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*[185] and *Boy Scouts of America v. Dale*[186] that the First Amendment right to freedom of association protected private groups' discriminatory decisions and policies.[187]

Even in the *Obergefell* decision itself, in which the Court ruled that same-sex couples have a fundamental right of marriage, the majority only held that same-sex marriage is a right guaranteed to couples by the Fourteenth Amendment.[188] As with the previous cases, the Court did not designate same-sex couples as a protected class or hold that homosexual activity was a fundamental right.[189] Further, the majority specifically addresses those who hold to traditional views of marriage based on their religious tenets in the opinion, stressing that "religions, 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."[190] Thus, *Obergefell* establishes that those who are opposed to homosexual marriage and behavior, especially religious groups, may continue to adhere to their beliefs despite the majority's decision.[191] Even though *Obergefell* represents a key victory to advocates of same-sex rights, it appears doubtful that the Court is now bent on eliminating sex discrimination everywhere, and especially not where it clashes with religious views. The judicial imperative which was so clearly present in the *Bob Jones* issue is not present here.

The *Bob Jones* Court next turned to the legislature to determine whether racial discrimination was opposed by that branch as well.[192] Again, unlike in *Bob Jones* where there was a clearly demonstrable intent by Congress to eliminate race discrimination, no such support has been shown for eliminating discrimination based on sexual orientation.[193] Congress has never added sexual orientation to its Title VII list of prohibited categories for employment discrimination, and in the past it has blocked certain measures by the other

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185 515 U.S. 557 (1995).

186 530 U.S. 640 (2000).

187 *See* Hofman, *supra* note 7, at 39; *see also Boy Scouts*, 530 U.S. at 661; *Hurley*, 515 U.S. at 580–81.

188 Obergefell v. Hodges, 135 S. Ct. at 2584, 2604 (2015).

189 *Id.* at 2602–05; *see also* H.J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United State Supreme Court's Decision in* Obergefell v. Hodges, 49 IND. L. REV. 367, 377 (2016) (observing that Justice Kennedy "identified an interconnection between Due Process Clause and Equal Protection Clause," rather than designate same-sex couples as a protected class); Tracey, *supra* note 14, at 93.

190 O*bergefell*, 135 S. Ct. at 2607.

191 *See* Hofman, *supra* note 7, at 44.

192 Bob Jones Univ. v. United States, 461 U.S. 574, 594 (1983).

193 *See* Hofman, *supra* note 7, at 45; Davids, *supra* note 172, at 447.

branches to protect against sex discrimination.[194] At no time prior to or since the *Bob Jones* decision has Congress taken a unified stance against sexual orientation discrimination.[195]

The Executive Branch's position on LGBT issues has largely shifted with the political winds.[196] Presidents Clinton and Obama both signed executive orders preventing sexual orientation discrimination by federal government contractors.[197] President George W. Bush, however, did not advance any of President Clinton's efforts on this front.[198] Similarly, President Trump's administration has made efforts to reverse the Obama administration's implementation of LGBT protections.[199] Further, Trump has taken definitive measures opposing LGBT rights, including issuing a directive that expands federal contractors' ability to claim religious exemptions from LGBT discrimination charges[200] and allegedly proposing to amend the Department of Health and Human Service's definition of "sex," an amendment which would allow more opportunity to discriminate against LGBT persons.[201] The Executive Branch has not demonstrated a unified approval for making the eradication of sexual orientation discrimination a national public policy.[202]

Thus, there are serious issues with applying the public policy doctrine to sex orientation in light of *Obergefell*. The Supreme Court likely sees the flaws with applying the *Bob Jones* rationale outside of its context, as it has only applied the public policy doctrine in instances of racial discrimination or illegality.[203] Almost every time the *Bob Jones* decision is cited by a court, it is only to note

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194 Tracey, supra note 14, at 92–93. Congress opposed President Clinton's campaign to permit gays to serve openly in the military, and it passed the Capital Religious Liberty and Academic Freedom Act, allowing educational institutions to deny recognition to groups based on sexual orientation. Davids, *supra* note 168, at 447–48.

195 *See* Hofman, *supra* note 7, at 45–46.

196 *See* Davids, *supra* note 172, at 449–451.

197 Tracey, *supra* note 14, at 92.

198 *See* Hofman, *supra* note 7, at 47–48.

199 *See* Toluse Olorunnipa, *Trump, Who Cast Himself as Pro-LGBT, is Now Under Fire from Democrats for Rolling Back Protections*, Wash. Post (May 31, 2019, 6:00 AM), https://www.washingtonpost.com/politics/trump-who-cast-himself-as-pro-lgbt-now-under-fire-from-democrats-for-rolling-back-protections/2019/05/30/95c04e96-8306-11e9-95a9-e2c830afe24f_story.html.

200 *See* Jacqueline Thomsen, *Trump Expands Federal Contractors' Ability to Cite Religious Freedom in Discrimination Cases*, HILL (Aug. 17, 2018), https://thehill.com/regulation/labor/402386-new-trump-admin-directive-allows-federal-contractors-to-cite-religious.

201 *See* Mark Jospeh Stern, *How the Trump Administration's Radical New Definition of "Sex" Would Legalize Anti-LGBTQ Discrimination*, SLATE (Oct. 22, 2018), https://slate.com/news-and-politics/2018/10/trump-sex-definition-lgbtq-trans-discrimination.html.

202 *See* Davids, *supra* note 172, at 452.

203 *See* Brunson & Herzig, *supra* note 172, at 1189.

that, generally, compliance with public policy is required to obtain tax-exempt status.[204] Thus, while *Bob Jones* is a "seminal case" with a potentially expansive application to multiple public policies, its holding has been mostly confined to the circumstances of that specific case: namely, racial discrimination in education.[205]

Due to this limited application by the courts, *Bob Jones* has been labeled an outlier by some.[206] If the public policy doctrine were applied in other contexts, a court would have to give more clarity to the doctrine than what was given in *Bob Jones*.[207] It is unlikely, however, that any such clarity would give the doctrine application outside of the facts of *Bob Jones*, and it is especially unlikely that it would ever apply to sexual orientation discrimination, notwithstanding the outcome of *Obergefell*. Thus, if preventing sex discrimination is ever to be accounted for Section 501(c)(3) purposes, the public policy doctrine will have to be confined to its facts and set aside.

This does not mean, however, that the Court's rationale in *Bob Jones* cannot provide some insight into how to account for this type of discrimination, especially since Bob Jones University was a religious school claiming its religious tenets mandated racial discrimination. The Court's grappling with this issue in *Bob Jones* provides a helpful insight into how Section 501(c)(3) might confront discrimination in religious education. Part III of this Comment explores such an application.

III. ACCOUNTING FOR EDUCATION: A REVISED 501(c)(3) STANDARD

Bob Jones does not present an easy application to sexual orientation discrimination, as its bar is too high to apply to virtually anything outside of discriminating based on race.[208] Despite this, a large part of the legal community

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[204] *See* Hofman, *supra* note 7, at 36 (citing several cases in which the Court did not reach the question of whether the organization violated public policy); *see also, e.g.*, Church of Scientology v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987) ("[W]e do not reach the question of whether the Church … violated public policy."); Educ. Assistance Found. for Descendants of Hungarian Immigrants in Performing Arts, Inc. v. United States, 111 F. Supp. 3d 34, 39 n.4 (D.D.C. 2015) ("While not applicable in this case … an organization that otherwise meets the statutory requirements will nevertheless fail to qualify for tax-exempt status if its exemption-related activities violate public policy.").

[205] *See* Tracey, *supra* note 14, at 132.

[206] *See* Brennen, *supra* note 38, at 54 (noting that "contextual diversity would suggest that the public policy doctrine would be invalidated [by a future court]").

[207] *See, e.g.*, Buckles, *supra* note 172, at 285 (arguing that, to apply outside of racial discrimination, "the public policy doctrine should be interpreted with much more specificity than that which inheres in its skeletal formation").

[208] *See* Buckles, *supra* note 172, at 314.

and the public at large insists that protecting LGBT persons should be a high priority for the federal government, and that the government should not support, directly or indirectly, organizations who discriminate based on sexual orientation.[209] Many still see *Obergefell* as a prime opportunity to re-examine granting tax exemptions to organizations that discriminate,[210] and even the IRS has hinted at the possibility of expanding the public policy doctrine to other contexts.[211] Thus, even with the body of scholarship rejecting the use of *Bob Jones* to revoke tax exemptions, the issue is still a concern for LGBT advocates and religious charity administrators alike.[212] As discussed above, others have advocated why the public policy doctrine does not directly apply to religious charities discriminating based on sexual orientation.[213] However, the Court's rationale in *Bob Jones* can still provide insight into how Section 501(c)(3) might be amended to reflect the growing concern over preventing discrimination against LGBT persons.

This Comment will not attempt to propose any sweeping revisions of Section 501(c)(3). Rather, it will focus on an oft-overlooked aspect of the *Bob Jones* opinion, which is the fact that the Court found a national public policy in eliminating "racial discrimination *in education*."[214] In its analysis, the majority places special emphasis on the fact that discrimination has a seriously detrimental effect on the education process as a whole.[215] The mission of Bob Jones University, as laid out by the majority in the opinion, is "to conduct an *institution of learning* … giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures."[216] At least part of the Court's rationale, then, was the role that Bob Jones University's racial policies played in its overall function as an institution of higher learning. According to both the

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[209] *See, e.g.*, Susan M. Shaw, *Federal Funding Is Not a Form of Religious Liberty*, HUFFPOST (Dec. 17, 2016, 2:40 PM), https://www.huffpost.com/entry/federal-funding-is-not-religious-liberty_b_8813740. (arguing that receiving federal funding "implies a responsibility to meet federal laws" and that "the federal government should not be funding discrimination"); Julia K. Stronks, *After* Obergefell, INSIDE HIGHER ED (July 7, 2015), https://www.insidehighered.com/views/2015/07/07/essay-future-gay-rights-and-christian-colleges-wake-supreme-court-decision.

[210] *See* Oppenheimer, *supra* note 19.

[211] *See* I.R.S. Priv. Ltr. Rul. 8910001 (Nov. 30, 1988) ("Although applying on its face only to race discrimination in education, the [public policy power extends] … to any activity violating a clear public policy.").

[212] Buckles, *supra* note 172, at 257; *see also* Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556).

[213] *See supra* notes 167–207 and accompanying text.

[214] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983) (emphasis added).

[215] *Id.* at 593–94 (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)) ("[D]iscriminatory treatment exerts a pervasive influence on the entire educational process.").

[216] *Id.* at 579–80 (1983) (emphasis added).

University's mission and the Court's analysis, this educational function preceded, in both order and importance, its religious purpose and tenets.[217] Thus, there appears to be a distinction to be made between institutions that function *primarily* as religious institutions, such as churches and other religious organizations, and entities like schools and universities whose religious doctrines and policies are ultimately subordinate to their goal of educating. This Part will use this distinction, supported by the Treasury regulations, to propose a modification to Section 501(c)(3) that requires a charity to choose the primary category under which it is claiming an exemption. Section A will identify other solutions proposed to address the issue of exemptions and note why each is problematic. Section B will then propose a revised "primary purpose" requirement to receive tax-exempt status, such that religious universities and similar institutions, tasked with providing a "full and fair exposition" of issues, would be treated differently than strictly religious entities for tax exemption purposes. Section C will discuss potential issues that this proposal might raise.

A. Other Proposed Solutions

In light of the difficulties in applying the *Bob Jones* public policy doctrine to marital status and sexual orientation discrimination, other potential solutions to the issue have been proposed by legal writers and scholars. Some same-sex rights advocates believe that all religious institutions, including churches, should lose their tax-exempt status altogether.[218] One reason offered for this solution is that eliminating religious exemptions would require religious organizations, some of whose headquarters or places of worship sit on extremely valuable tracts of land, to pay property taxes, freeing ordinary taxpayers from subsidizing these properties.[219] This course of action seems extremely unlikely to occur anytime in the near future. Religious tax exemptions have existed in the United States since its inception;[220] and further, it is not at all certain that eliminating exemptions entirely will address the issue of religious organizations discriminating based on sexual orientation.

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[217] *See id.*; U.S. COMM'N ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS 15 (1982) ("*Bob Jones* … involve[s] the issue of whether Federal income tax exemptions should be granted to … religiously affiliated institutions performing a secular function—providing educational instruction, though with a religious orientation.").

[218] *See* Oppenheimer, *supra* note 19.

[219] *Id.*

[220] *See* Livingston, *supra* note 1, at 3 ("[T]he American tradition of tax exemption for religious institutions most directly grew out of its parent/child relationship with England and the English method of exempting charitable organizations from taxation.").

Other proposed solutions are more feasible. Nicholas Mirkay, for example, advocates for a "broad and well-defined nondiscrimination requirement" in Section 501(c)(3) that includes sexual orientation and marital status.[221] This requirement would send the message to charitable organizations that discriminatory policies of any kind are wholly inconsistent with the purpose of a charity, which is to provide a public benefit.[222] Organizations whose policies or practices violate this requirement would lose their Section 501(c)(3) tax-exempt status; however, the organization may still qualify for a tax exemption under Section 501(c)(4) as a "social welfare organization."[223] Mirkay's nondiscrimination requirement also includes an exception for churches due to First Amendment concerns, and he proposes revising the definition of "church" to exclude entities like schools and mission societies that are directly supervised and controlled by that church.[224] Another author has proposed a similar solution in which churches could receive exemptions under Section 501(c)(7) as clubs "organized for pleasure, recreation, and other nonprofitable purposes."[225] These types of tax-exempt organizations, however, do not have the benefit of the charitable contributions tax deduction provided for in Section 170; this deduction is reserved exclusively for Section 501(c)(3) charities.[226]

These solutions are a step in the right direction. They address the issue of allowing a "charitable" organization to receive tax exemptions while discriminating against an often-mistreated group, while also recognizing, in line with the *Bob Jones* opinion, that strictly religious organizations need some ability to discriminate to fulfill their religious purposes, leading to an exception for churches. Nonetheless, such a sweeping revision of Section 501(c)(3) would likely receive strong opposition and would be difficult to effectuate. Instead, there is a simpler solution, specifically pertaining to educational institutions, that involves a comparatively simple revision to the statute governing tax exemptions.

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221 *See* Mirkay, *supra* note 22, at 721.

222 Mirkay, *supra* note 10, at 85 ("[N]ondiscriminatory practices and policies comport with the commonly accepted notion of being 'charitable' and conferring public benefit.").

223 *Id.* Section 501(c)(4)(A) provides a tax exemption for organizations "operated exclusively for the promotion of social welfare … the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." I.R.C. § 501(c)(4)(A) (2012).

224 *See* Mirkay, *supra* note 10, at 100. Mirkay specifically proposes amending Sections 508 and 6033 of the Code so that the definition of church lines up more closely with the fifteen-point test the IRS uses, discussed in Part I. *Id*.

225 I.R.C. § 501(c)(7); *see also* Moore, *supra* note 56, at 325.

226 *See* Mirkay, *supra* note 10, at 88; Moore, *supra* note 56, at 325.

B. A Revised Standard: The Modified "Primary Purpose" Requirement

As many as 20% of colleges and universities in the United States, approximately 980 institutions, have a religious affiliation.[227] These universities have a unique position in the context of tax exemptions: They qualify for a Section 501(c)(3) exemption under both the "religious" and "educational" categories.[228] Under the current system, religious universities are not required to specify the category under which they are filing for an exemption; they are free to file under either or both categories.[229] While this method streamlines the process of granting exemptions to these institutions, it also fails to recognize that religious universities stand at the intersection of two very different tax-exempt entities. While the function of religious organizations for exemption purposes may be somewhat debatable,[230] the function of educational institutions is not.[231] For religious universities, especially those that are primarily educational institutions with a secondary religious affiliation, the Code and the regulations should be amended to reflect this distinction.

Like religious organizations, educational institutions have historically always received tax exemptions under the Internal Revenue Code.[232] While the Treasury regulations do not provide a definition of a "religious" organization, for the reasons discussed above regarding the difficulty of the government defining "religious," the regulations do provide a definition for an "educational" institution.[233] An educational organization, for tax exemption purposes, is one that instructs either an individual or the public in subjects "useful to the individual and beneficial to the community."[234] An organization may still qualify as educational if it "advocates a particular [belief] or viewpoint;" however, that organization must present "a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an

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[227] *See Colleges and Universities with Religious Affiliations*, ENCYC. EDUC. (2002), https://www.encyclopedia.com/education/encyclopedias-almanacs-transcripts-and-maps/colleges-and-universities-religious-affiliations.

[228] *See* I.R.C. § 501(c)(3) (2012).

[229] *See id.*; *see also IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, INTERNAL REVENUE SERV. (Dec. 2017), https://www.irs.gov/pub/irs-pdf/f1023.pdf ("Section 501(c)(3) requires that your organizing document state your exempt purpose(s), such as charitable, religious, educational, and/or scientific purposes.").

[230] *See* Moore, *supra* note 56, at 305.

[231] *See* Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (2018) (discussed herein).

[232] *See* WARD L. THOMAS & ROBERT FONTENROSE, EDUCATION, PROPOGANDA AND THE METHODOLOGY TEST, 83 (1997), https://www.irs.gov/pub/irs-tege/eotopich97.pdf.

[233] *See* Treas. Reg. § 1.501(c)(3)-1(d)(3).

[234] *Id.* § 1.501(c)(3)-1(d)(3)(i)(b).

independent opinion or conclusion."[235] The regulations further specify that an organization will not qualify as educational if "its principal function is the mere presentation of unsupported opinion."[236]

It is apparent from the language of this statute that educational organizations receive tax-exempt status due to their ability to provide a variety of viewpoints on a particular subject; thus, institutions of higher learning that fail to present a "full and fair exposition" of issues are not adequately performing the function for which they are receiving an exemption. These organizations should not be tax-exempt, regardless of whether the reasoning behind this failure is to adhere to religious tenets. Therefore, when educational institutions silence alternative viewpoints and discussions of same-sex rights and marriage, the institutions' function primarily as an educational entity providing "full and fair exposition" on controversial topics fundamentally clashes with its method of implementing its religious principles. The Code should not allow organizations functioning in this way to continue receiving tax exemptions.

Congress should amend Section 501(c)(3) so that the categories that qualify an organization for tax exemption are no longer mutually exclusive. Instead, an organization that wishes to file for tax exemption must designate the specific statutory category under which they are filing an exemption, subject to review by the IRS. An organization may certainly still have multiple "purposes" under 501(c)(3) which qualify for an exemption; however, in that case, the entity must specify in its articles of organization the "primary purpose" for which it is applying for an exemption. Any other purposes specified in the articles would then be deemed "secondary purposes." The primary purpose requirement would chiefly function as an amendment to the current operational requirement for obtaining a 501(c)(3) exemption. Accordingly, where the current regulation reads:

> An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.[237]

The language would be amended to read:

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235 *Id.*

236 *Id.*

237 Treas. Reg. § 1.501(c)(3)-1(c)(1).

> An organization will be regarded as operated exclusively for one exempt purpose only if it engages primarily in activities which accomplish its designated exempt purpose specified in section 501(c)(3). Organizations filing under more than one exempt purpose must designate the "primary purpose" under which they are filing for an exemption, as well as any "secondary" exempt purposes. An organization will not meet this requirement if more than an insubstantial part of its activities is not in furtherance of an exempt purpose. Similarly, an organization with more than one exempt purpose will not meet this requirement if more than an insubstantial part of its activities further any secondary purpose to the detriment of its primary purpose.[238]

As with the current requirements, the IRS would evaluate the information provided on the organization's application to determine if its proposed purposes and practices qualify for an exemption under Section 501(c)(3), and the IRS would have the power, subject to judicial review, to grant or deny the organization tax-exempt status *and* determine the organization's "primary purpose" for an exemption.[239]

Under the amended statute, once the organization's exemption is approved, activity by that organization that contradicts with the primary category under which the exemption was filed puts the organization in danger of losing its tax-exempt status; in other words, an "educational" organization under the statute would be required to have practices in place that are, above all, consistent with its statutory educational purpose. Under this new "primary purpose" requirement, religiously affiliated colleges that exist primarily for the purpose of secular higher education would not be eligible to discriminate based on sexual orientation or marital status. Because these types of discrimination do not further, and even arguably inhibit, the purpose of providing a full and fair exposition on issues to students, discriminating in this way could lead to the IRS revoking the school's exemption. Meanwhile, primarily religious organizations, such as churches, synagogues, and seminaries, would be able to continue to adhere to their religious tenets without being in danger of losing their exemptions.

The proposed test is largely derived from the principles of tax exemptions discussed in Part I. First, establishing that educational organizations should not

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[238] Of course, the operational test is not the only part of the Section 501(c)(3) regulations that would need to be amended. The language of other sections, such as the organizational test, would need to be modified as well to reflect the change shown here. This proposed amendment is meant only as an example of how principles discussed here would function within the statutes.

[239] Brennen, *supra* note 38, at 22.

discriminate based on sexual orientation aligns with the public benefit rationale for the charitable tax exemption. If Section 501(c)(3) organizations are granted tax-exempt status for the public benefit they provide, then it stands to reason that educational organizations, whose public benefit is providing an opportunity for higher learning, should not engage in discrimination that fails to promote an equal opportunity to obtain an education.[240] Second, because tax exemptions are considered a privilege rather than a right owed to charitable organizations, revoking the tax exemptions of secondarily religious organizations that discriminate would not be an unconstitutional burden on their freedom of speech.[241] Finally, the primary purpose test is the best way for the government to "facilitate" speech without "regulating" it. It allows primarily religious organizations, whose tenets mandate discriminating based on sexual orientation, to continue to adhere strictly to traditional views of marriage and sexuality. In educational settings, however, where the best "facility" of speech is one where divergent viewpoints can be expressed and debated, the government will not provide exemptions to organizations who discriminate in spite of this purpose.

This solution also emerges in large part from the *Bob Jones* decision itself. In asserting the compelling governmental interest in the public policy doctrine, the majority in *Bob Jones* pointed out that "[w]e deal here only with religious schools—not with churches or other purely religious institutions."[242] The Court noted that racially discriminatory schools have a "'pervasive influence on the entire educational process,' outweighing any public benefit that they might otherwise provide."[243] While race discrimination is almost universally maligned, regardless of the discriminatory organization's purpose, the *Bob Jones* Court was concerned specifically with the discrimination's effect on education. Based on the Court's reasoning, certain activities by a school can have a more detrimental impact on education than others, and sexual orientation discrimination is similar to race discrimination in this regard. While entities organized primarily for "religious" purposes may have well-founded reasons for discriminating based on sexual orientation, this type of discrimination does not further the educational goal of furthering robust discussion and debate for the benefit of students.

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[240] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 587–88 (1983) ("In enacting both 170 and 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind."); Brennen, *supra* note 38, at 22–23 ("Indeed, the reason charities are eligible to receive tax deductible contributions that they are required to use their monies for charitable purposes.").

[241] *See* Branch Ministries v. Rossotti, 211 F.3d 137, 140–41 (D.C. Cir. 2000).

[242] *Bob Jones Univ.*, 461 U.S. at 604 n.29.

[243] *Id.* (quoting Norwood v. Harrison, 413 U.S. 455, 469 (1973)).

In practice, this rule works to provide much-needed clarification to the issues discussed above and to the application of the *Bob Jones* public policy doctrine. Under the new requirement, the IRS will review an organization's application for a 501(c)(3) exemption and determine its "primary" purpose for an exemption and any "secondary" purposes it may have, in the same manner that it currently reviews applications for authenticity.[244] Once the IRS approves the organization's application, the organization receives a tax exemption so long as, among the other statutory requirements, its policies and practices do not further a secondary purpose to the detriment of its primary purpose.[245] Thus, a religious college or university that has discriminatory policies based on sexual orientation would be in violation of the primary purpose requirement, and the IRS would notify the school that it would lose its tax exemption if its policies did not change. This decision by the IRS would, of course, be subject to judicial review.[246]

When faced with the loss of their tax exemption, the educational institution would have several possible courses of action. One, of course, is continuing to discriminate and forgoing its tax-exempt status; in fact, some religious schools have already chosen this option in anticipation of losing their exemptions in the future.[247] The entity may also have the option, as Mirkay suggests, of reforming as a social welfare organization under Section 501(c)(4), a "constitutional safety hatch" for organizations in danger of losing tax-exempt status.[248] These organizations do not receive charitable contribution deductions under Section 170, but they can still be exempt from paying federal income taxes.[249] Finally, the organization could simply amend its policies so that it no longer discriminates based on sexual orientation. This would enable the organization to maintain its 501(c)(3) exemption and help to foster a national environment where a variety of viewpoints and schools of thought are represented, in both higher education and charities more broadly.

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244 *See* Brennen, *supra* note 38, at 21–22.

245 *Id.* at 22.

246 *Id.*

247 *See* Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253.

248 Mirkay, *supra* note 10, at 91.

249 I.R.C. § 170(a)(1), (c)(1)–(2) (2012).

C. Potential Issues

The primary purpose requirement, like many solutions proposed before it, is not without its share of issues that would make its application to the current system of exemptions difficult. Ultimately, the purpose of the requirement is to generate discussion about the issue and offer one possible solution that would strike a more proper balance between religious freedom and the prohibition of discrimination, especially in the wake of cases like *Obergefell*.[250] One critique of this approach is that it could severely diminish charitable contributions to schools with religious affiliations. The new requirement would force these universities to either abandon their discriminatory policies, which could cause reduced donations, or lose their charitable contributions deduction, which could also lead to a drop in charitable giving. However, the Supreme Court found in *Branch Ministries* that a drop in available funding from a loss of tax-exempt status is "not constitutionally significant" to an organization.[251] This is further supported by the rationale that tax exemptions are a matter of legislative grace and not a right.[252]

Another possible issue could be created by schools that are considered to be "equally" religious and educational, such as a seminary, divinity school, or other institution that exists primarily for religious education. It would be difficult for these schools to identify on their application for exemption whether they are primarily a "religious" or "educational" organization. In practice, it may not be problematic for these institutions to identify as primarily educational, as diverse interpretations of sacred texts and discussions with a plurality of viewpoints are often welcome at these institutions.[253] However, if certain institutions have difficulty identifying their primary purpose under the requirement, then the IRS

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[250] *See* Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 64 (2006) ("[M]y primary goal in this piece is simply to argue that this conflict needs to be *acknowledged* in a *respectful* manner by *both* sides, and then *addressed* through the legislative process of our democratic system."); Mirkay, *supra* note 10, at 88 ("[The solution proposed in the article] should not preclude necessary discussion of the real problem of discrimination by charitable organizations.").

[251] Branch Ministries v. Rossotti, 211 F.3d 137, 140–41 (D.C. Cir. 2000) (quoting Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990)).

[252] *See* Moore, *supra* note 56, at 312 (quoting Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 643 n.2 (1980) (Rehnquist, J., dissenting)).

[253] Indeed, theological seminaries are often at the forefront of the debate about the theological and ethical questions surrounding sexual orientation. *See, e.g.*, Calvin College, *LGBT+ Students and Homosexuality FAQ*, https://calvin.edu/events/sexuality-series/lgbt-homosexuality-faq.html (last visited Oct. 23, 2019) ("We recognize the complexity of current issues around homosexuality, same-sex marriage, and gender identity. The college desires to engage these conversations with courage, humility, prayerfulness, and convicted civility.").

could review these applications on a case-by-case basis and make this determination for the institution.[254]

Finally, universities with religious affiliations will undoubtedly raise Establishment Clause issues to the primary purpose requirement. The IRS instructing schools to designate a primary purpose for their tax exemption, schools will argue, comes dangerously close to the government choosing what is and is not a "religious" institution, and forces a university to modify or ignore its religious beliefs. However, the granting of an exemption from federal income taxes requires the IRS to make some designation between different entities with various religious affiliations. As discussed in Part I, the IRS already distinguishes between "churches" and other religious organizations using its fifteen-criterion checklist.[255] Distinguishing between primary purposes would similarly be a task for the IRS to undertake. Further, the proposed amendment would not affect religious universities' beliefs and missions; it only serves to limit the *actions* that organizations receiving tax exemptions engage in. As the Supreme Court stated in *Cantwell v. Connecticut*[256], "the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[257] Similarly, religious universities can and should maintain their religious beliefs and values, but actively stifling alternative views on their campuses and questions raised by their students fails to facilitate the public benefit those institutions are supposed to provide: a plurality of viewpoints and a venue for deliberation of conflicting ideas.

CONCLUSION

The concept of exempting certain organizations from federal income taxes is deeply woven into American society and law. Exemptions give these organizations the funding they need to supply goods and services that the government could not supply on its own,[258] including both religious services and private education. While these exemptions are important for creating a feasible market for nonprofit organizations and for encouraging charitable donations, they should not come at the expense of a specific group's sincere beliefs and

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254 This is the criterion the IRS currently uses for determining if an institution qualifies as a "church," in addition to the fifteen-item checklist discussed in Part I. *See* LOUTHIAN & MILLER, *supra* note 54.

255 *See id.*

256 310 U.S. 296 (1940).

257 *Id.* at 303–04.

258 *See* Brennen, *supra* note 38, at 41.

message. The solution proposed here would take a step towards reconciling religious freedom and discriminatory practice based on sexual orientation. It would allow institutions of higher learning to focus on achieving the best version of the public benefit they provide, which is a learning environment that encompasses a plurality of views and encourages disagreement. In a 1920 memorandum, the Solicitor General of the Internal Revenue stressed that "I believe it was Congress' intention, when providing for the deduction of contributions to educational corporations … to foster education in its true and broadest sense, thereby advancing the interest of all, over the objection of none."[259] At religious universities, this is the primary public benefit warranting an exemption, and schools that choose instead to stifle alternative viewpoints and punish those who question the university's beliefs should not receive this exemption. Making this change will begin to cultivate an environment on university campuses in which each side of this ethical and religious debate is heard and respected. Pope Francis, while visiting the United States two months after the *Obergefell* decision, cautioned the faith community that "a truly tolerant and inclusive society respects … the right to religious liberty" while simultaneously rejecting "every form of unjust discrimination."[260] College and university campuses, religious or secular, are the best platforms to begin creating such a society, and the American system of tax exemptions should reflect that sentiment.

JOHN B. PARKER[*]

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[259] *See* Ward L. Thomas & Robert Fontenrose, *supra* note 232 (quoting Memorandum from the Solicitor General of the Internal Revenue (1920)).

[260] Carol E. Lee et al., *Pope Francis Takes on Climate Change, Religious Freedom and Other Big Issues*, WALL ST. J. (Sept. 23, 2015), https://www.wsj.com/articles/white-house-ready-to-welcome-pope-francis-1443001033 (quotations omitted).

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