

# THE SEXUAL INTEGRITY OF RELIGIOUS SCHOOLS AND TAX EXEMPTION

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INTRODUCTION .....	256
I. <i>BOB JONES</i> AND THE PUBLIC POLICY DOCTRINE .....	267
II. WHY THE PUBLIC POLICY DOCTRINE SHOULD BE CONSTRUED NARROWLY .....	271
A. Appreciating the Fundamental Requirement .....	272
B. Promoting Fair Notice and Doctrinal Clarity .....	276
C. Limiting Administrative Discretion .....	285
D. Ensuring the Diversity of the Nonprofit Sector .....	292
E. Narrowly Formulating the Public Policy Doctrine to Safeguard Core Public Policy Objectives .....	294
III. WHY THE PUBLIC POLICY DOCTRINE DOES NOT JEOPARDIZE THE TAX EXEMPTION OF RELIGIOUS SCHOOLS AFTER <i>OBERGEFELL</i> .....	300
A. <i>Obergefell v. Hodges</i> .....	300
B. <i>Obergefell</i> and the Public Policy Doctrine Framework .....	305
C. The Broader Dissimilarities between <i>Obergefell</i> and <i>Bob Jones</i> .....	314
IV. CONCLUSION .....	319

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## INTRODUCTION

Do two decisions of the highest court in the land jeopardize the federal income tax exemption of private schools that adhere to canonical principles of sexual morality widely embraced for millennia in their religious traditions? Answering this question requires reflection on the scope of charity, principles of the rule of law, unfolding constitutional doctrine, and the competence of the agency charged with administering federal tax laws. Merely formulating an approach to answering this question has far-reaching implications for the law of tax-exempt organizations.

The two decisions that take center stage in the theatrical presentation of this question are *Bob Jones University v. United States*<sup>1</sup> and *Obergefell v. Hodges*.<sup>2</sup> The issue in *Bob Jones* was whether two schools were entitled to exemption from federal income taxation by virtue of being “organized and operated exclusively for religious, charitable . . . or educational purposes” under section 501(c)(3) of the Internal Revenue Code (“the Code”).<sup>3</sup> Each school maintained some type of racially discriminatory policy as to students. Bob Jones University prohibited interracial dating and marriage among its students and refused to admit applicants who had married interracially or who advocated interracial dating or marriage.<sup>4</sup> Goldsboro Christian Schools admitted only persons of Caucasian descent. The Internal Revenue Service (“IRS”) revoked the schools’ federal tax exemptions. Approving of the IRS’s position on racially discriminatory schools,<sup>5</sup> the Court held that neither school qualified for exemption from federal income taxation as an organization described in Code section 501(c)(3) because the racially discriminatory policy of each school violated established public policy.<sup>6</sup>

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

2. 135 S. Ct. 2584 (2015).

3. I.R.C. § 501(c)(3) (2015).

4. For many years prior to the adoption of the policy in issue, the university denied admission to African-Americans. See *Bob Jones*, 461 U.S. at 580–81.

5. The agency relied on its 1971 revenue ruling stating that a private school lacking “a racially nondiscriminatory policy as to students” fails to qualify as “charitable” because its activities are “contrary to Federal public policy.” Rev. Rul. 71-447, 1971-2 C.B. 230.

6. *Bob Jones*, 461 U.S. at 585–605.

In *Obergefell*, the Supreme Court held that the right to marry is a fundamental right inherent in the liberty of a person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment same-sex couples may exercise this fundamental right.<sup>7</sup> Accordingly, the Court invalidated state laws that excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.<sup>8</sup> Further, the Court held that a state may not refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.<sup>9</sup>

How do these two Supreme Court cases interrelate in evaluating the federal income tax exemption of charities, especially religious schools? The very question surfaced at oral argument in *Obergefell*, in the following exchange between Justice Samuel Alito and Solicitor General Donald B. Verrilli, Jr.:

JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or college if it opposed same sex marriage?

GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is going to be an issue.<sup>10</sup>

*"It is going to be an issue,"* proclaimed the United States Solicitor General.<sup>11</sup> This ominous concession of Solicitor General Verrilli is surely on the minds of the students, faculty, administrators, overseers, and other stakeholders of private religious schools. Based on Biblical teaching and its interpretation within their religious traditions, many of these schools have long believed that pre-marital and extra-marital sexual activity is sinful and that God's view of marriage requires a union between a biological male and a biological female. Numerous schools require students or faculty (or both) to adhere to a code of conduct that reflects this religious

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7. 135 S. Ct. at 2604–05.

8. *Id.* at 2605.

9. *Id.* at 2607–08.

10. Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-556q1\\_7148.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf), [<https://perma.cc/QPW6-N9QE>].

11. *Id.* (emphasis added).

conviction. Exactly how many private secondary schools, colleges, universities, and seminaries maintain such sexual conduct policies is unknown. That this number is high, however, finds support in recent disclosures by the United States Department of Education (“DOE”),<sup>12</sup> which has identified well over 200 religious colleges that have sought and received exemptions under Title IX of the Education Amendments of 1972.<sup>13</sup> The universe of educational institutions with such policies is likely much larger, for the DOE disclosures do not include institutions that receive no federal assistance (for example, private elementary and secondary schools).

Requests for Title IX exemption<sup>14</sup> made publicly available by the DOE reveal the seriousness with which many private schools hold their religious convictions on sexual conduct and marriage. Consider the exemption request submitted by the President of Covenant College.<sup>15</sup> The letter explains that the college is an

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12. See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, *Religious Exemptions Index Prior to 2009*, <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-pre-2009.html> [https://perma.cc/XZ5R-9F2M]; U.S. Dep’t of Educ., Office for Civil Rights, *Religious Exemptions Index 2009-2016*, <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html> [https://perma.cc/7YYU-F6M6]. See generally Fernanda Zamudio-Suaréz, *U.S. Publishes Details on Religious Colleges Seeking Title IX Waivers*, CHRON. HIGHER ED. (April 29, 2016).

13. 20 U.S.C. §§ 1681–89 (2012). Under the general rule, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” *Id.* § 1681(a). Title IX sets forth a number of exceptions to the general rule, including one stating that “this section shall not apply to any educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization . . . .” *Id.* § 1681(a)(3). Some schools presumably have sought exemption from Title IX in part as a precautionary measure because they acknowledge the risk that sex discrimination may eventually be recognized to include discrimination on the basis of sexual orientation. To date, only one court has viewed sexual orientation discrimination as a form of sex discrimination for purposes of Title IX. See *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1160 (C.D. Cal. 2015).

14. See 34 C.F.R. § 106.12 (2000) (“An educational institution which wishes to claim the exemption . . . shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.”).

15. Letter from J. Derek Halvorson, President, Covenant Coll., to Catherine Lhamon, Assistant Sec’y, U.S. Dep’t of Educ., Office for Civil Rights (May 28, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/covenant-college-request-05282015.pdf> [https://perma.cc/T5NZ-ZBMK] [hereinafter “Halvorson Letter”].

agency of the Presbyterian Church in America (PCA) and is governed by a board elected by the PCA's General Assembly. After affirming the college's adherence to the Bible and its doctrine as expressed in the Westminster Confession of Faith<sup>16</sup> and the Westminster Larger<sup>17</sup> and Shorter Catechisms,<sup>18</sup> the letter states that the college has developed a Statement on Sexual Identity and Conduct. The Statement posits that gender is a divine gift from the Creator, not a cultural construct, and that marriage between one man and one woman is "the only proper context for all sexual relations."<sup>19</sup> Actions inconsistent with this understanding, warns the Statement, "will result in disciplinary follow up."<sup>20</sup> The college sought acknowledgment of its exemption from Title IX to the extent that any DOE interpretations thereof would otherwise impede the college from responding in accordance with its theologically-grounded convictions to transgenderism or homosexual conduct.<sup>21</sup> The DOE's Office of Civil Rights promptly acknowledged the college's exemption from Title IX for the reasons requested.<sup>22</sup>

As of the publication of this Article, the DOE has not interpreted sex discrimination under Title IX to include disciplinary action for engaging in sexual relations outside the context of heterosexual monogamy.<sup>23</sup> Should the DOE's interpretation of sex discrimi-

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16. The Westminster Confession of Faith, [http://www.reformed.org/documents/wcf\\_with\\_proofs](http://www.reformed.org/documents/wcf_with_proofs) [<https://perma.cc/W44W-8QAS>].

17. The Westminster Larger Catechism, <http://www.opc.org/lc.html> [<https://perma.cc/6GFJ-DGJK>].

18. The Westminster Shorter Catechism, <http://www.opc.org/sc.html> [<https://perma.cc/K449-TTC8>].

19. Halvorson Letter, *supra* note 15.

20. *Id.*

21. *See id.*

22. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Dr. J. Derek Halvorson, President, Covenant Coll. (July 29, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/covenant-college-response-07292015.pdf> [<https://perma.cc/6YX8-4YTZ>].

23. During the administration of former President Barack Obama, the DOE interpreted Title IX generally to prohibit discrimination based on gender identity. *See, e.g.,* "Dear Colleague" Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/775Q-54BD>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS & ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES (Dec. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>

nation evolve to include such action, Title IX's religious exemption would surely protect those religious schools that qualify under its terms.<sup>24</sup> But whether Title IX's religious accommodation protects a school acting in accordance with its religious tenets from an IRS attack under the public policy doctrine of *Bob Jones* has not been tested in the courts. Additionally, as illustrated in the exchange between Justice Alito and Solicitor General Verrilli, courts must now think through *Obergefell's* implications for the tax exemption of religious schools.

The IRS is currently taking the position that *Obergefell* and *Bob Jones* do not in tandem jeopardize the federal income tax exemption of religious schools maintaining sexual conduct policies. In response to an inquiry from then-Oklahoma Attorney General Scott Pruitt,<sup>25</sup> IRS Commissioner John Koskinen ad-

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[<https://perma.cc/WSE2-MYD8>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS & ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

[<https://perma.cc/LK3H-UJYQ>]. In the early days of the administration of President Donald Trump, the DOE withdrew the guidance reflecting that interpretation of Title IX. See, e.g., "Dear Colleague" Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/lgbt.html> [<https://perma.cc/MX9L-VS48>].

24. Not all religious schools qualify for the exemption. Only those "controlled by a religious organization" may apply for exemption. 20 U.S.C. § 1681(a)(3) (2012). Administrative guidance interprets the statute as follows:

An applicant or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail: (1) It is a school or department of divinity; or (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof. The term "school or department of divinity" means an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects.

HEW Form 639A, 42 Fed. Reg. 15,141, 15,142-43 (Mar. 18, 1977).

25. Letter from E. Scott Pruitt, Att'y Gen. of Okla., to John Koskinen, Comm'r, Internal Revenue Serv. (July 13, 2015), <http://www.ok.gov/oag/documents/AG%20Pruitt%20Letter%20to%20IRS%207-13-2015.pdf> [<https://perma.cc/86ZX-7TQ6>].

dressed the impact of *Obergefell* on tax-exempt organizations.<sup>26</sup> According to Commissioner Koskinen, the IRS does not believe that *Obergefell* has “changed the law applicable to section 501(c)(3) determinations or examinations,” and thus the IRS will not “change existing standards in reviewing applications for recognition of exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations.”<sup>27</sup> Of course, the position of the IRS might change, as it did with respect to the admissions policies of schools such as Bob Jones University. Indeed, Chief Justice John Roberts anticipates that the Court will eventually face the issue of whether religious schools that oppose same-sex marriage can remain tax-exempt.<sup>28</sup> He is not alone.<sup>29</sup>

This Article thoroughly analyzes this important and timely issue.<sup>30</sup> In doing so, this Article reflects a conscious decision to

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26. Letter from John A. Koskinen, Comm’r, Internal Revenue Serv., to E. Scott Pruitt, Att’y Gen. (July 30, 2015), <http://www.ok.gov/oag/documents/IRS%20Response%20Letter%20Obergefell.pdf> [<https://perma.cc/M6SR-UF4Q>].

27. *Id.*

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting).

29. See Scott Jaschik, *The Supreme Court Ruling and Christian Colleges*, INSIDE HIGHER EDUC. (June 29, 2015) (citing law professors who speculate that *Obergefell*’s effect on the federal income tax exemption of evangelical colleges will be litigated); see, e.g., Michael A. Lehmann & Daniel Dunn, *Obergefell and Tax-Exempt Status for Religious Institutions*, 7 COLUM. J. TAX L.—TAX MATTERS 7, 8 (2016) (“[I]n the long run the Internal Revenue Service is likely to move in the direction of regarding *Obergefell* as in fact changing standards in reviewing applications for exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations and acting accordingly.”). The question of *Obergefell*’s impact on tax-exempt organizations is sufficiently pressing to have prompted four succinct entries in a recent issue of the *Columbia Journal of Tax Law*. See Glenn A. Adams, *Are Calls to Alter the Tax-Exempt Status of Organizations after Obergefell Premature?*, 7 COLUM. J. TAX L.—TAX MATTERS 3 (2016); Lehmann & Dunn, *supra*, at 7; Ray Wiacek et al., *Tax Exemptions and Same-Sex Marriage*, 7 COLUM. J. TAX L.—TAX MATTERS 14 (2016); Lawrence Zelenak, *Prompt on the Obergefell v. Hodges Case*, 7 COLUM. J. TAX L.—TAX MATTERS 1 (2016).

30. For additional commentary on this precise issue, see Adams, *supra* note 29, at 3; Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103 (Douglas Laycock et al., eds. 2008); Lehmann & Dunn, *supra* note 29, at 7; Timothy J. Tracey, *Bob Jonesing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 F.I.U. L. REV. 85 (2015); 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, *supra*, at 59, 62–69; Wiacek et al., *supra* note 29, at 14; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from*

limit the scope of its inquiries. First, this Article offers no independent analysis of the merits of *Obergefell*.<sup>31</sup> The Article takes *Obergefell* as the Supreme Court has handed it down, not as critics or supporters of the decision might have preferred the opinion to have been written. Accordingly, this article offers neither criticisms nor accolades of the *Obergefell* opinion and assumes for purposes of analyzing the issue under consideration that the majority opinion in *Obergefell* means what it says.

Second, this Article refrains from critiquing the premise of *Bob Jones* that the federal income tax exemption of every type of organization described in Code section 501(c)(3) and the charitable contributions deduction of Code section 170 constitute an indirect but purposeful governmental subsidy.<sup>32</sup> The premise is debatable.<sup>33</sup> However, because subsidy theories of Code sec-

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*the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra*, at 77, 86–90.

31. Commentary on *Obergefell* abounds. See, e.g., Helen M. Alvaré, *Marriage and Family as the New Property: Obergefell, Marriage, and the Hand of the State*, 28 REGENT U. L. REV. 49 (2015); Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3 (2015); Carl H. Esbeck, *A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable?*, CHRISTIAN LAW., Dec. 2015, at 3; Cynthia Godsoe, *Marriage Equality and The “New” Maternalism*, 6 CALIF. L. REV. CIRCUIT 145 (2015); Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIRCUIT 157 (2015); Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367 (2016); Joseph Landau, *Roberts, Kennedy, and the Subtle Differences that Matter in Obergefell*, 84 FORDHAM L. REV. 33 (2015); Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41 (2015); Peter Nicolas, *Obergefell’s Squandered Potential*, 6 CALIF. L. REV. CIRCUIT 137 (2015); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69 (2015).

32. See, e.g., *Bob Jones*, 461 U.S. at 588–92 (reasoning that, in enacting Code sections 170 and 501(3), “Congress sought to provide tax benefits to charitable organizations,” that the provisions are “intended to aid” charities, and that “the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors’”). One commentator argues that the *Bob Jones* Court “treated the religious exemption in Section 501(c)(3) as being constitutionally compelled, rather than as a matter of government subsidy.” Tracey, *supra* note 30, at 123. Professor Tracey reasons that, had the Court embraced the subsidy theory, “then the Court need not have considered” the schools’ Free Exercise claims insofar as the government need not subsidize the exercise of constitutional rights. *Id.* This argument probably assumes too much coherence in the Court’s analysis. As Professor Tracey notes in the same paper, “[a] review of the relevant Supreme Court cases shows that the Court’s treatment of religious tax exemptions has been, at best, erratic.” *Id.* at 103.

33. See, e.g., William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) (arguing that the charitable contributions deduction comports with a proper conception of income); Boris I. Bittker & George K.



tions 501(c)(3) and 170(c) are held by many,<sup>34</sup> including numerous academic commentators<sup>35</sup> and some United States Supreme Court Justices,<sup>36</sup> this Article analyzes the application of the

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Rahdert, *The Exemption of Nonprofit Organizations from the Federal Income Taxation*, 85 YALE L.J. 299 (1976) (advancing an “income measurement theory” to justify the exemption of many nonprofit entities from federal income tax); Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 I. CORP. L. 585 (1998) (arguing that section 501(c)(3) reflects a governmental recognition of a charity’s sovereign prerogative to operate free from governmental intrusion); Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005) (explaining that the charity income tax exemption and the charitable contributions deduction may reflect a decision not to tax income attributed to the community in general); John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 241–43 (1984) (discussing the “endogenous” argument that a charitable contribution enables a donor to deflect income to another); Tracey, *supra* note 30, at 120 (arguing that “religious tax exemptions are not subsidies, because they implement, rather than deviate from, the normative tax base”); Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 807 (2001) (“[T]ax exemption does not subsidize churches, but leaves them alone.”).

34. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) (“[G]overnment policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy . . .”); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) (“[T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations.”); Zelinsky, *supra* note 33, at 808 (“Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.”). For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1284–96 (2002).

35. See Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1351 (2015) (“[M]ost tax theorists consider sections 170(c) and 501(c)(3) subsidies for the charitable sector.”); see, e.g., Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991); Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981). Since publishing his altruism theory, Professor Rob Atkinson has now largely renounced it. See, e.g., Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite de Tocqueville’s Democracy?*, 6 WM. & MARY POL’Y REV. 1, 48–49 (2014) [hereinafter Atkinson, *Tax Favors*].

36. In addition to embracing subsidy theory in *Bob Jones*, the Supreme Court viewed federal income tax exemption as a form of subsidy in *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). In the latter case, the Court reasoned as follows:

public policy doctrine to religious schools under the assumption that a court examining the issue would embrace some type of subsidy theory.

Third, this Article abstains from disputing that Congress has the authority to condition federal income tax exemption on a charity's compliance with various statutory requisites.<sup>37</sup> Such conditions include those that limit the exercise of constitutional rights.<sup>38</sup> Even if the precise scope of the power of Congress to condition tax exemption on the non-exercise of certain rights is debatable,<sup>39</sup> the issue under consideration can be resolved without engaging in that debate. The issue discussed in this Article is whether a court should apply the public policy doctrine to deny or revoke a school's federal income tax exemption on account of its sexual

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Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

*Regan*, 461 U.S. at 544 (internal citations omitted).

37. However, this Article does not concede that Congress has the authority to condition tax exemption on compliance with whatever acts or omissions Congress may legislate.

38. See, e.g., *Regan*, 461 U.S. at 550 (holding that section 501(c)(3)'s prohibition against substantial attempts to influence legislation is constitutional).

39. Compare, e.g., Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 544–45 (2012) (arguing that the limitations on the political speech of charitable organizations under Code section 501(c)(3) "are grossly unconstitutional"), with Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 929 (2011) ("A direct attack on the constitutionality of the tax law prohibition on 501(c)(3) groups' political campaign activity is very unlikely to succeed.").

An interesting related question is whether certain statutory conditions for federal income tax exemption under Code section 501(c)(3) run afoul of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.* (2012). For a discussion, see Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. LEGIS. 145 (2006); Zachary Cummings, Note, *Prophetic Speech and the Internal Revenue Code: Analyzing I.R.C. § 501(c)(3) in Light of the Religious Freedom Restoration Act*, 20 REGENT U. L. REV. 151 (2008); see also Wiacek et al., *supra* note 29, at 16 ("An IRS ruling that purported to eliminate an institution's exemption because of its religious opposition to same-sex marriage would be subject to the RFRA.").

conduct policy. The premise that Congress could condition tax exemption on a charity's agreement to jettison its sexual conduct policy does not compel the conclusion that a court should impose the same condition in the absence of congressional action.<sup>40</sup> The two issues must not be confused.

Finally, this Article assumes that the religious schools in question maintain policies that address sexual *conduct*, not sexual orientation in general. Sexual conduct policies typically are grounded in a theological belief system surrounding the divine purposes for sex, marriage, and procreation.<sup>41</sup> They also typically apply to students regardless of sexual orientation. A school that would deny admission to a student merely because of the student's sexual orientation is not the type of school contemplated in this Article.

This Article proceeds as follows. Part I reviews *Bob Jones* and surveys the application of the public policy doctrine<sup>42</sup> by the

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40. Cf. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1927 (2006) (arguing that decisions of whether to extend public benefits to individuals and groups exercising constitutional rights "are discretionary choices for legislators, not judges").

41. See, e.g., Halvorson Letter, *supra* note 15.

42. Commentary on *Bob Jones*, the constitutional and statutory issues surrounding the case, and the public policy doctrine generally is extensive. See, e.g., David L. Anderson, *Tax Exempt Private Schools Which Discriminate on the Basis of Race: A Proposed Revenue Procedure*, 55 NOTRE DAME L. REV. 356 (1980); Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002) [hereinafter Brennen, *Charities*]; David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000) [hereinafter Brennen, *Treasury*]; Johnny Rex Buckles, *Bob Jones University v. United States*, in *LAW & RELIGION: CASES IN CONTEXT* 85 (Leslie C. Griffin ed., 2010); Johnny R. Buckles, *Do Law Schools Forfeit Federal Income Tax Exemption When They Deny Military Recruiters Full Access to Career Services Programs? The Hypothetical Case of Yale University v. Commissioner*, 41 ARIZ. ST. L.J. 1 (2009) [hereinafter *Law Schools*]; Johnny R. Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397 (2005) [hereinafter Buckles, *Reforming*]; John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 853–55 (1993); Wilfred F. Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463 (1979); Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291 (1984); Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353 (1983); Olatunde Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in *STATUTORY INTERPRETATION STORIES* 127 (William N. Eskridge, Jr., et al. eds., 2011) [hereinafter Johnson, *The*

IRS and the courts following *Bob Jones*. Part II develops the argument that, regardless of the factual context of a controversy in which the IRS seeks to invoke *Bob Jones* to deny or revoke federal income tax exemption, the public policy doctrine should be narrowly construed. Part II.A identifies and explains the concept of the “fundament requirement” advanced in *Bob Jones*. Part II.B explores the lack of doctrinal clarity emerging from *Bob Jones* and explains why a broad, minimalist formulation of the public policy doctrine would raise vagueness prob-

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Story]; Lindsay Kreppel, *Will the Catholic Church's Tax Exempt Status Be Threatened under the Public Policy Limitation of § 501(c)(3) if Same-Sex Marriage Becomes Public Policy?*, 16 DUQ. BUS. L.J. 241 (2014); Jerome Kurtz, *Difficult Definitional Problems in Tax Administration: Religion and Race*, 23 CATH. LAW. 301 (1978); Douglas Laycock, *Observation, Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259 (1982); Paul S. Milich, *Racially Discriminatory Schools and the IRS*, 33 TAX LAW. 571 (1980); Nicholas A. Mirkay, *Globalism, Public Policy, and Tax-Exempt Status: Are U.S. Charities Adrift at Sea?*, 91 N.C. L. REV. 851 (2013) [hereinafter Mirkay, *Globalism*]; Nicholas A. Mirkay, *Is It “Charitable” to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45 [hereinafter Mirkay, *Transformation*]; Amy Moore, *Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference*, 56 S. TEX. L. REV. 117 (2014); Thomas Stephen Neuberger & Thomas C. Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979); Karla W. Simon, *Applying the Bob Jones Public-Policy Test in Light of TWR and U.S. Jaycees*, 62 J. TAX’N 166 (1985); Paul E. Truesch, *Bob Jones—Where Now?*, 62 TAXES 43 (1984); David Asaki et al., *Comment, Racial Segregation and the Tax-Exempt Status of Private Educational and Religious Institutions*, 25 HOW. L.J. 545 (1982); William Chamblee, *Case Note, IRS Acted Within Its Authority in Determining that Racially Discriminatory Non-Profit Private Schools Are Not “Charitable” Institutions Entitled to Tax-Exempt Status*, 15 ST. MARY’S L.J. 461 (1984); Robert J. Christians, *Note, The IRS, Discrimination, and Religious Schools: Does the Revised Proposed Revenue Procedure Exact Too High a Price?*, 56 NOTRE DAME L. REV. 141 (1980); Colleen K. Connell, *Comment, The Tax-Exempt Status of Sectarian Educational Institutions that Discriminate on the Basis of Race*, 65 IOWA L. REV. 258 (1979); William A. Drennan, *Note, Bob Jones University v. United States: For Whom Will the Bell Toll?*, 29 ST. LOUIS U. L.J. 561 (1985); Daniel L. Johnson, Jr., *Note, Federal Taxation—Bob Jones University v. United States: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C. L. REV. 1038 (1984); Joe W. Miller, *Note, Applying a Public Benefit Requirement to Tax-Exempt Organizations*, 49 MO. L. REV. 353 (1984); Richard S. Myers, *Note, The Internal Revenue Service’s Treatment of Religiously Motivated Racial Discrimination by Tax Exempt Organizations*, 54 NOTRE DAME L. REV. 925 (1979); Ricki J. Schweizer, *Comment, Federal Taxation—Exempt Organizations—Constitutional Law—First Amendment—Right to Free Exercise of Religion—Bob Jones University v. United States*, 30 N.Y. L. SCH. L. REV. 825 (1985); *Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378 (1979); Sherri L. Thornton, *Case Note, Taxation in Black and White: The Disallowance of Tax-Exempt Status to Discriminatory Private Schools—Bob Jones University v. United States*, 27 HOW. L.J. 1769 (1984).

lems and fail to provide fair notice to charities of what behavior is and is not consistent with maintaining tax exemption. Part II.C argues that a broad, minimalist formulation of the public policy doctrine would vest too much discretion in a single agency that lacks the expertise required to exercise such discretion. Part II.D suggests another reason to reject an expansive formulation of the public policy doctrine: to promote the beneficial diversity of the charitable sector. Part II.E then articulates and expounds upon a suggested framework for limiting the public policy doctrine in a sensible manner.

Having established a coherent justification for limiting the sweep of the public policy doctrine, this Article next applies the suggested refinement of the doctrine to the question at hand. Part III.A briefly reviews the Court's analysis in *Obergefell*. Part III.B argues that schools maintaining sexual conduct policies that prohibit sexual conduct inconsistent with their religiously informed, traditional view of marriage remain tax-exempt after *Obergefell*. This conclusion holds true under my proposed framework for applying the public policy doctrine and a more expansive version of the framework. Next, adopting an even broader perspective, Part III.C explains why *Obergefell's* analytical approach, language, and tone are inconsistent with applying *Bob Jones* to the disadvantage of religious schools that maintain sexual conduct policies of the type examined in this Article. Part IV concludes.

### I. *BOB JONES* AND THE PUBLIC POLICY DOCTRINE

Examining the rationale of *Bob Jones* is a predicate to ascertaining its essential meaning, force, and reach. The case required the Court to consider a nuanced interpretation of Code section 501(c)(3).<sup>43</sup> Code section 501(c)(3) describes the following organizations:

Corporations, and any community chest, fund, or foundation, [1] 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

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43. Code Section 501(a) exempts from federal income taxation organizations described in Code section 501(c).

for the prevention of cruelty to children or animals, [2] no part of the net earnings of which inures to the benefit of any private shareholder or individual, [3] no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and [4] which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.<sup>44</sup>

The *Bob Jones* opinion grapples with dimensions of the term “charitable” in the first bracketed phrase of Code section 501(c)(3) excerpted above. *Bob Jones* rests largely on the proposition that Congress exempted Code section 501(c)(3) “charitable” organizations from income tax to promote the growth of entities that serve a salutary public purpose.<sup>45</sup> The Court discerned this intent by invoking the statute’s “framework” and “the background of the congressional purposes.”<sup>46</sup> Noting parallels between Code sections 501(c)(3) and 170(c)<sup>47</sup> and observing that section 170 authorizes a deduction for “charitable contributions,” the *Bob Jones* Court found that, through section 501(c)(3), Congress sought to advantage only organizations serving “charitable” purposes—whether or not their precise charitable purposes are further specified in Code section 501(c)(3) (for example “educational” or “religious”).<sup>48</sup> Moreover, the relevant background of federal tax exemption for all section 501(c)(3) entities is the common law concept of charity,<sup>49</sup> which is limited to trusts

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44. I.R.C. § 501(c)(3) (bracketed numbers added for clarity).

45. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 588 (1983) (“Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.”).

46. *Id.* at 586.

47. Code section 170(a)(1) authorizes a deduction for a “charitable contribution,” which is defined in Code section 170(c). Under section 170(c)(2), a “charitable contribution” includes a gift to “[a] corporation, trust, or community chest, fund, or foundation” that satisfies certain requirements. I.R.C. § 170(c)(2). Such requirements include those set forth in Code section 501(c)(3). See *id.* § 170(c)(2)(A)–(D).

48. *Bob Jones*, 461 U.S. at 586–88.

49. For an insightful critique of the Court’s analysis of the common law of charitable trusts and its relationship to Code section 501(c)(3), see Galston, *supra* note 42, at 297–308.

that benefit the community.<sup>50</sup> The Court observed that at common law, “the purpose of a charitable trust may not be illegal or violate established public policy.”<sup>51</sup>

The Court concluded that an educational institution maintaining racially discriminatory policies as to students violates this public policy stricture that inheres in the term “charitable.” Beginning with *Brown v. Board of Education*,<sup>52</sup> preeminent authorities of every branch of the federal government “attest a firm national policy to prohibit racial segregation and discrimination in public education. . . . An unbroken line of cases following *Brown v. Board of Education*” establish the Supreme Court’s judgment that “racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”<sup>53</sup> By enacting Titles IV and VI of the Civil Rights Act of 1964,<sup>54</sup> Congress likewise affirmed “that racial discrimination in education violates a fundamental public policy.”<sup>55</sup> The Court sought further confirmation of public policy from the Executive Branch, which through its Executive Orders has consistently sought to eradicate racial discrimination.<sup>56</sup> The Court concluded that racially discriminatory schools do not exercise “beneficial and stabilizing influences in community life”<sup>57</sup> and should not be promoted “by having all taxpayers share in their support by way of special tax status.”<sup>58</sup> Consequently, such institutions “cannot be viewed as conferring a public benefit within the ‘charitable concept’” or within the legislative intent of Code section 501(c)(3).<sup>59</sup>

Judicial and administrative application of the public policy doctrine following the decision in *Bob Jones* has been scant and far

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50. *Bob Jones*, 461 U.S. at 588–89. Further, the legislative history of sections 170 and 501(c)(3) reveals lawmakers’ remarks that assume the public usefulness of charities. *See id.* at 589–90.

51. *Id.* at 591.

52. 347 U.S. 483 (1954).

53. *Bob Jones*, 461 U.S. at 593–94 (citing *Norwood v. Harrison*, 413 U.S. 455, 468–69 (1973); *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

54. 42 U.S.C. §§ 2000c–2000c-9, 2000d–2000d-4 (2012).

55. *Bob Jones*, 461 U.S. at 594.

56. *Id.* at 594–95.

57. *Id.* at 595 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970)).

58. *Id.*

59. *See id.* at 595–96.

from illuminating.<sup>60</sup> Courts have found violations of the doctrine by organizations that operate illegally<sup>61</sup> or that promote illegal activity.<sup>62</sup> Similarly, the IRS has invoked the doctrine to deny exemption to entities that violate federal law<sup>63</sup> or promote the violation of state law.<sup>64</sup> The IRS has also applied the doctrine to deny exemption to a racially discriminatory testamentary trust<sup>65</sup> and has suggested that acting illegally under foreign law may disqualify an organization from federal income tax exemption.<sup>66</sup> The IRS may even have toyed with denying exemption to an organization that operates in a manner deemed inconsistent with the then-presidential administration's policies directly affecting Israel.<sup>67</sup> In

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60. For a discussion, see Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. (forthcoming 2017) (manuscript at 16–18, 43–45) (on file with author).

61. See, e.g., *Church of Scientology v. Comm'r*, 83 T.C. 381, 466, 503–09 (1984) (upholding the revocation of an entity's tax exemption on numerous grounds, including that it committed a criminal offense by impeding the collection of taxes by the IRS), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

62. See, e.g., *Mysteryboy, Inc. v. Comm'r*, 99 T.C.M. (CCH) 1057 (2010) (finding an organization not to qualify for exemption when it was formed to legalize sex between adults and children; stating, without citing *Bob Jones*, that “petitioner proposes to operate in a manner that promotes activities which are prohibited by Federal and State laws, violate public policy as reflected in those laws, and tend to promote illegal activities”).

63. See, e.g., I.R.S. Priv. Ltr. Rul. 201615018 (Jan. 15, 2016) (determining, without citing *Bob Jones*, that an organization is non-exempt because it distributes cannabis in violation of federal law); I.R.S. Priv. Ltr. Rul. 201333014 (May 20, 2013) (same, but relying in part on *Bob Jones*); I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22, 1991) (advising that a hospital jeopardizes its federal income tax exemption by violating legislation designed to curb Medicaid and Medicare fraud and abuse; opining, without citing *Bob Jones*, that all charities “are subject to the requirement that their purposes or activities may not be illegal or contrary to public policy”).

64. See, e.g., I.R.S. Priv. Ltr. Rul. 201323025 (Mar. 14, 2013) (ruling an entity non-exempt for promoting polygamy, which violates state law); I.R.S. Priv. Ltr. Rul. 201310047 (Dec. 11, 2012) (same).

65. See, e.g., I.R.S. Tech. Adv. Mem. 89-10-001 (Nov. 30, 1988).

66. See, e.g., I.R.S. Priv. Ltr. Rul. 201405022 (Nov. 8, 2013).

67. For a discussion, see Mirkay, *Globalism*, *supra* note 42, at 853–58. The organization, Z Street, alleged that the IRS had delayed the processing of its application for exemption because it held political views on Israel that were inconsistent with those of the Obama administration. After the lawsuit by Z Street was allowed to proceed, see *Z Street v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015), the IRS determined that the organization was exempt from federal income taxation. See Jerry Gordon, *IRS Sent up a White Flag of Surrender on the Z Street v. Koskinen Case*, NEW ENGLISH REV. (Oct. 31, 2016), [http://www.newenglishreview.org/blog\\_direct\\_link.cfm/blog\\_id/65287/IRS-Sent-up-a-White-Flag-of-surrender-on-Z-Street-v-Koskinen-Case](http://www.newenglishreview.org/blog_direct_link.cfm/blog_id/65287/IRS-Sent-up-a-White-Flag-of-surrender-on-Z-Street-v-Koskinen-Case) [<https://perma.cc/5YPM-TMT7>].



short, authorities since *Bob Jones* have hardly clarified the public policy doctrine's scope.

## II. WHY THE PUBLIC POLICY DOCTRINE SHOULD BE CONSTRUED NARROWLY

The language of *Bob Jones* strongly suggests that the missile of the public policy doctrine should remain in the government's silo in most tax exemption battles. The Court expounded on the doctrine by announcing that a charitable organization's "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."<sup>68</sup> That comparative addendum to the general formulation of the doctrine itself suggests the extraordinary showing that the Court required as a prerequisite to applying the doctrine.<sup>69</sup> Further, the Court opined that an entity should fail the test of charitableness "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."<sup>70</sup> If one analogizes this threshold of "no doubt" to other common evidentiary burdens, such as that of proving the guilt of a criminal defendant "beyond a reasonable doubt,"<sup>71</sup> the hurdle for establishing a violation of the public policy doctrine is exceptionally high, indeed. The *Bob Jones* Court thus instructs the IRS not to invoke the public policy doctrine hastily. This Part argues that the *Bob Jones* Court correctly signaled that the public policy doctrine should be used parsimoniously.

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

69. Cf. Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities And Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 1012 (2010) (stating that the holding of *Bob Jones* "seems purposefully narrow").

70. *Bob Jones*, 461 U.S. at 592; see also Tracey, *supra* note 30, at 128 ("The Court [in *Bob Jones*] underscored the limited circumstances in which the IRS and the courts may even consider the effect of public policy.").

71. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

A. *Appreciating the Fundament Requirement*

*Bob Jones* deems an entity's violation of public policy incompatible with federal income tax exemption only if the organization has contravened "established"<sup>72</sup> or "fundamental"<sup>73</sup> public policy. This Article refers to the "fundamental" or "established" quality of the public policy that an entity must be shown to have violated as the fundament requirement. To formulate the public policy doctrine with this fundament requirement is to suggest the rarity of its applicability. Not just any violation of "public policy" triggers the doctrine. The violation apparently must contravene some core national objective plainly manifested in governmental actions.

Just how this national, governmental objective must be manifested is unclear, but one can readily deduce what the fundament requirement does not mean. The public policy doctrine on its face can apply to legal activities, a point logically flowing from *Bob Jones*' observation that charitable trust purposes "may not be illegal or violate established public policy."<sup>74</sup> Thus, the fundament requirement does not mean that an entity forfeits its federal income tax exemption under *Bob Jones* only if it directly violates the letter of public policies passed by Congress and signed by the President. An entity can be operating within the letter of non-tax law and still fail to qualify under Code section 501(c)(3).

To the question of what the fundament requirement affirmatively means, the opinion offers clues but no precise answers. *Bob Jones* fastidiously chronicles the consistent actions of all three branches of the federal government in advancing a national policy against racial discrimination in education over a significant period of time: "Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."<sup>75</sup> Specifically, the Court found the fundament requirement satisfied under the facts of *Bob Jones* by citing numerous sources of law and regulation and recognizing the contribution of all three branches of the federal government to the

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72. *Bob Jones*, 461 U.S. at 586, 591.

73. *Id.* at 592, 593, 594, 596 n.21, 598.

74. *Id.* at 591 (emphasis added).

75. *Id.* at 593.

public policy in question.<sup>76</sup> Also notable is the supremacy of the contributing authorities cited by the Court: the Supreme Court (not just lower courts);<sup>77</sup> federal statutory law (not just common law, and not state law);<sup>78</sup> and Congress and the President (not merely administrative agencies).<sup>79</sup> The Court further observed consistency in the public policy against racial discrimination, both within each branch of the federal government and among the various branches of the federal government.<sup>80</sup> Additionally, the Court noted the temporal length of the public policy against racial discrimination.<sup>81</sup>

Thus, if the analysis of *Bob Jones* provides a template for applying the public policy doctrine announced by the Court, one could reasonably interpret the fundament requirement to subsume the following elements: (1) the governmental policy in question has been advanced by the federal government, not merely state governments; (2) each branch of the federal government has advanced the public policy in question; (3) the manner in which each branch of the federal government has advanced the public policy in question is consistent, both within each branch and among the three branches; (4) the consistency with which the federal government has advanced the policy in question spans a significant period of time, that is, multiple decades; (5) the highest authorities within each branch of the federal government have advanced the public policy in question, that is, the Supreme Court, the United States President, and both houses of Congress; and (6) the public policy in question arises from the imperative of protecting a right guaranteed by the United States Constitution.

To interpret the fundament requirement in this manner is to understand the rationale of *Bob Jones* as setting forth a set of conditions for applying the public policy doctrine when an entity is properly found to have “violated” public policy. For ease of discussion, this Article refers to these six conditions as the “fundament factors.” Unfortunately for those who favor clarity, the *Bob*

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76. See *id.* at 592–96; Buckles, *Reforming*, *supra* note 42, at 433; Mirkay, *Transformation*, *supra* note 42, at 64–65.

77. *Bob Jones*, 461 U.S. at 593–94.

78. *Id.* at 594–95.

79. *Id.* at 594–96.

80. See *id.* at 593–95; Buckles, *Reforming*, *supra* note 42, at 433.

81. See *Bob Jones*, 461 U.S. at 593–95.

*Jones* opinion itself does not explicitly state whether the fundament factors are necessary for applying the public policy doctrine, sufficient for applying the public policy doctrine, or both necessary and sufficient for applying the public policy doctrine, when a violation of public policy has occurred.<sup>82</sup>

If the fundament factors are necessary but not sufficient conditions, then the fundament requirement is established only if the fundament factors are accompanied by additional compelling facts establishing the gravity of the public policy in question. For example, fostering discrimination-free public education may constitute a fundamental public policy because (1) the fundament factors are present and (2) vestiges of the nation's shameful history of slavery would exist if schools remained racially segregated. If the fundament factors are merely sufficient conditions, then the fundament requirement could be established if not all of the fundament factors are present.<sup>83</sup> Indeed, if the fundament factors are merely sufficient conditions, conceivably none of the fundament factors is essential; perhaps entirely different factors would suffice to satisfy the fundament requirement in other cases. If the fundament factors are necessary and sufficient conditions, then the fundament requirement is established if and only if the fundament factors are present; additional compelling facts establishing the gravity of the public policy in question need not be present.

If the fundament factors are necessary but not sufficient conditions, or if they are merely sufficient conditions, one is left with a host of additional, unanswered questions (depending on which understanding prevails). Which conditions carry the greatest weight in the analysis?<sup>84</sup> Which conditions are dispen-

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82. Nor does the opinion state whether any public policy of the United States other than prohibiting racial discrimination in education satisfies the fundament requirement.

83. For example, Professor Miriam Galston has opined that "a clearly defined public policy is manifest in legislative, constitutional and judicial declarations." Galston, *supra* note 42, at 316. Professor Karla Simon would look to recent congressional acts, all judicial decisions, and multiple federal agencies. See, e.g., Simon, *supra* note 42, at 166 ("The proper method of discerning whether there is a fundamental public policy in favor of or against particular actions is by analysis of recent legislation, court decisions on both the state and the Federal levels, and, to some extent, administrative interpretation by other agencies of laws they are required to enforce . . .").

84. For example, one may plausibly argue that longstanding, detailed federal legislation is entitled to the greatest weight, insofar as it is the product of the

sable entirely?<sup>85</sup> How does partial fulfillment of one or more conditions affect analysis?<sup>86</sup> What additional conditions are relevant?<sup>87</sup> Even if the fundament requirement is best interpreted to prescribe conditions that are both necessary and sufficient for applying the public policy doctrine when an organization has violated public policy, a nagging question remains: what actions short of illegality “violate” that policy?<sup>88</sup>

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branch of the federal government most directly responsible for declaring the nation’s public policy. *See, e.g.,* Wiacek et al., *supra* note 29, at 14.

85. To illustrate, if Congress has enacted a detailed statute that clearly articulates a federal policy, its constitutionality is so obvious that it has not been challenged judicially, and its language is so clear that all disputes about its meaning have been consistently resolved by the lower courts, it is difficult to discern why the policy should fail the fundament requirement merely because the Supreme Court has never ruled on the constitutionality or meaning of the statute.

86. For example, if federal legislation was enacted thirty years prior to the time that the Supreme Court upholds its constitutionality, would the policy satisfy the fundament requirement immediately after the Court hands down its decision? Or would it take another thirty years before the public policy is considered fundamental? Would a shorter lapse of time suffice?

87. For example, in *Bob Jones*, the nation’s appalling history of slavery and its vestiges—namely, racial segregation—was clearly on the minds of the justices. *See infra* notes 266–71 and accompanying text.

88. Professor Lawrence Zelenak’s questions in his recent *Prompt* illustrate that the concept of “violating” public policy lacks clarity in the aftermath of *Obergefell*:

If the IRS got it wrong, what sort of organizational behavior should lead to denial of tax-exempt status? Is mere expression of opposition to same-sex marriage enough? If not, what about a church that refuses to perform or recognize same-sex marriages? If that is still not enough, what about an organization that urges county clerks not to register same-sex marriages? What about an organization that declines to provide spousal benefits to the same-sex spouse of an employee? Or what about the married student housing and adoption agency hypotheticals of Chief Justice Roberts?

Zelenak, *supra* note 29, at 1–2. Decades earlier, other commentators made a similar point in critiquing the developing public policy doctrine:

The Supreme Court has declared that another public policy prohibits states from regulating abortions during the first trimester of pregnancy. Will the IRS seek to enforce this policy against religious schools that teach that abortion is morally wrong? Also, municipal ordinances have been passed banning discrimination on the basis of sexual preference, and litigation has been initiated seeking to have churches adhere to this public policy. If the IRS embraces a developing policy in this area not to discriminate against homosexual behavior, should it enforce this policy against religions that consider homosexuality sinful? Although the compelling state interest in racial harmony can outweigh religious claims to engage in racial discrimination, none of the above policies would be likely to survive the prohibitions of the religion clauses. . . .

One may advance arguments in favor of each of these alternative interpretations of the fundament requirement. Interpreting *Bob Jones* as specifying conditions that are necessary, or perhaps both necessary and sufficient, for applying the public policy doctrine when an organization has violated public policy has the advantage of reigning in a potentially sweeping, imprecise standard. Moreover, interpreting the fundament factors as necessary conditions, or perhaps even necessary and sufficient conditions, is faithful to the Court's admonition that the public policy doctrine should be applied "only where there can be no doubt" that the fundament requirement is satisfied.<sup>89</sup> Interpreting the fundament factors as merely sufficient conditions has the advantage of reinforcing public policies that appear firmly entrenched, notwithstanding that some of the highest levels of government have lacked an opportunity to affirm them.<sup>90</sup> But if the fundament factors are interpreted merely as sufficient conditions, we are left with very little doctrinal clarity under the public policy doctrine unless it is further limited. This Article suggests a principled manner to so limit the doctrine below.<sup>91</sup>

### B. Promoting Fair Notice and Doctrinal Clarity

The foregoing discussion exposes some of the vagueness of the public policy doctrine.<sup>92</sup> *Bob Jones* does not explicitly set forth a test for determining whether public policy is "established" or "fundamental," that is, whether the fundament requirement has been satisfied.<sup>93</sup> Not everyone may agree that the fundament requirement should be interpreted to require the presence of all fundament factors discussed in *Bob Jones*. But surely everyone will

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Neuberger & Crumplar, *supra* note 42, at 273 (footnotes omitted) (citations omitted).

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

90. See, e.g., *supra* note 85.

91. See *infra* Part II.E.

92. The void of clarity in the public policy doctrine has been observed by others. See, e.g., Brennan, *Treasury*, *supra* note 42, at 410; Colombo, *supra* note 42, at 855; Drennan, *supra* note 42, at 574-75, 578; Galvin & Devins, *supra* note 42, at 1373; Mirkay, *Transformation*, *supra* note 42, at 67-68; Schweizer, *supra* note 42, at 855-56; Simon, *supra* note 42, at 166; Truesch, *supra* note 42, at 52-53.

93. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 432-37.

agree that the fundament requirement must be interpreted.<sup>94</sup> That the Court sets forth the fundament requirement without clearly explaining when it is satisfied creates uncertainty.<sup>95</sup>

Moreover, several other issues raised but not resolved by *Bob Jones* contribute to the public policy doctrine's lack of clarity. I have previously discussed in depth a number of them<sup>96</sup> and will not here rehash them extensively. A brief review of several of the issues not yet specifically identified in this Article suffices.<sup>97</sup> First, the Court in *Bob Jones* did not settle even the basic issue of whether an organization's outright violation of non-tax law necessarily prevents it from qualifying under Code section 501(c)(3).<sup>98</sup> Second, when an organization's activities do not violate the letter of non-tax statutory law, it is unclear how analogous lawful but suspect behavior must be to behavior that plainly violates statutory law before a court will find the former to violate public policy under *Bob Jones*.<sup>99</sup> Third, and relatedly, it is unclear how similar the activities of an organization seeking federal income tax exemption must be to the activities proscribed by the Executive Branch before the organization is properly found to have contravened public policy. Fourth, and related to each of the previous two points, *Bob Jones* provides little guidance on how broadly or how narrowly "public policy" should be conceptualized<sup>100</sup> before a court analyzes whether that policy is fundamental, and then whether it has been violated.<sup>101</sup> Fifth, *Bob Jones* creates uncertainty as to whether

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94. See, e.g., *Church of Scientology v. Commissioner*, 83 T.C. 381, 466 (1984) ("This Court construed the public policy requirement to prohibit substantial activity in violation of well-defined public policy such as may be evidenced by a civil or criminal statute."), *aff'd*, 823 F.2d 1310 (9th Cir. 1987).

95. See Drennan, *supra* note 42, at 578 ("A great number of questions remain concerning the amount of support needed for a public policy to be fundamental or to be a form of a fundamental public policy.").

96. See Buckles, *Law Schools*, *supra* note 42, at 27–35; Buckles, *Reforming*, *supra* note 42, at 407–37.

97. For another list of issues raised by *Bob Jones*, see Truesch, *supra* note 42, at 52–53; Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 30, at 77, at 88–90 (discussing questions raised by the public policy doctrine).

98. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 409–15.

99. See *id.* at 415–18.

100. See Buckles, *Law Schools*, *supra* note 42, at 27–29.

101. To illustrate, in *Bob Jones*, the Court concluded that racial discrimination in education contravenes established public policy. The conclusion is consistent with the view that the public policy of the United States is to ensure that educational

constitutional norms limiting state action should to some degree govern the same action by would-be charitable organizations under the public policy doctrine.<sup>102</sup> Sixth, although the major thrust of *Bob Jones* ignores state law in determining whether an entity has violated established public policy, the opinion does not explicitly moot state law. For reasons I have explained elsewhere, one may argue that state law is at least minimally relevant under the public policy doctrine.<sup>103</sup> It is unclear, however, that the *Bob Jones* Court would agree.

The vagueness of the doctrine announced in *Bob Jones* and the resultant vacuum of notice given charities as to when they may run afoul of the doctrine are unacceptable.<sup>104</sup> Because of the opacity of the doctrine, charities do not have fair notice of when their existing or contemplated activities will be found inconsistent with the requirements imposed by Code section 501(c)(3). But deeply rooted in the values of a nation governed by the rule of law<sup>105</sup> is the conviction that the law must provide fair notice to those bound to obey it.<sup>106</sup> Fair notice requires clari-

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institutions do not discriminate on the basis of race. But the conclusion is also consistent with the view that the public policy of the United States is to ensure that (1) no charity engages in racial discrimination; (2) no educational institution engages in discrimination in various (but perhaps not all) forms, including race; or (3) no charity engages in discrimination in various (but perhaps not all) forms, including race. The rationale of *Bob Jones* focuses specifically on racial discrimination in education, and therefore the Court in *Bob Jones* appeared to narrowly define the public policy that the schools in issue had violated. But the doctrine announced in *Bob Jones* does not explicitly require courts to define public policy narrowly before determining (1) whether the policy is fundamental, and (2) whether the policy has been violated.

102. For a discussion, see Buckles, *Reforming*, *supra* note 42, at 418–22.

103. *See id.* at 426–32.

104. *Cf.* Galvin & Devins, *supra* note 42, at 1367 (“[T]he vagueness of both the common community conscience and the public benefit standards creates the danger that the IRS may overzealously enforce the standards, resulting in unwanted social homogeneity.”). *But cf.* Simon, *supra* note 42, at 166 (stating that, although a “more concrete standard” might be superior, “there should be no mystery about the meaning of the public policy test of *Bob Jones*”).

105. *See* Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1990 (2015) (“The rule of law retains a place at the center of our political morality; it is an ideal, like democracy, that sits among a small cluster of our most basic commitments.”).

106. *See id.* (reviewing the principles of the rule of law and stating that “law should give private parties adequate notice and be of a form that they can make sense of so that they can conform their conduct to its requirements”); *id.* at 1992 (“Many of the most commonly identified features of the rule of law pertain to a cluster of characteristics that help to ensure that law has the capacity to be practi-



ty,<sup>107</sup> and fair notice is imperative in applying federal income tax exemption law, just as it is in applying other law. The principle of fair notice is especially compelling when constitutional values are at stake.

A case that illustrates this point is *Big Mama Rag, Inc. v. United States*.<sup>108</sup> Big Mama Rag was a nonprofit that claimed exemption from federal income tax as an educational organization described in Code section 501(c)(3). Maintaining what the court characterized as a “feminist orientation,” Big Mama Rag published a monthly newspaper containing articles, editorials, calendars of events, and other information. The IRS denied its application for federal income tax exemption.<sup>109</sup> When Big Mama Rag sought declaratory relief in the United States District Court for the District of Columbia, that court upheld the adverse IRS determination upon the grounds that the organization did not satisfy the definition of “educational” under the relevant section of the United States Treasury regulations.<sup>110</sup>

The key regulatory section at issue in the case defines “educational” under Code section 501(c)(3) as relating to “[t]he instruction or training of the individual for the purpose of improving or developing his capabilities,” or, in the alternative, “[t]he instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>111</sup> The regulations permit educational organizations to “advocate[] a particular position or view-

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cal in the sense of providing guidance to an individual’s actions and allowing individuals to plan with some knowledge of the law.”).

107. *See id.* at 1992 (“The principles of publicity, clarity, consistency, prospectivity, and stability are among the most important of these [rule of law] values.”).

108. 631 F.2d 1030 (D.C. Cir. 1980). For a discussion of *Big Mama Rag*, see Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849 (1980).

109. *Big Mama Rag*, 631 F.2d at 1033. The entity’s application for federal income tax exemption was initially denied by the IRS District Director, and this denial was upheld by the IRS National Office on three separate grounds: (1) the commercial nature of the newspaper; (2) the political and legislative commentary found throughout the newspaper; and (3) the articles, lectures, editorials, and other activities of the entity that promoted lesbianism. The District Director then issued a final determination letter denying tax exemption because the newspaper’s content was not educational, and the manner of its distribution was that of commercial publishing organizations. *See id.*

110. *See Big Mama Rag, Inc. v. United States*, 494 F. Supp. 473, 478–81 (D.D.C. 1979).

111. Treas. Reg. § 1.501(c)(3)–1(d)(3)(i) (1959).

point,"<sup>112</sup> but only if it "presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."<sup>113</sup> The regulations further state that an entity fails to be educational "if its principal function is the mere presentation of unsupported opinion."<sup>114</sup> According to the district court, Big Mama Rag failed the test of "educational" under the regulations because it had "adopted a stance so doctrinaire" that it fell short of the "full and fair exposition" standard of the regulations.<sup>115</sup>

The United States Court of Appeals for the District of Columbia Circuit reversed.<sup>116</sup> Holding the Treasury regulation unconstitutionally vague,<sup>117</sup> the court first observed that "tax law and constitutional law are not completely distinct entities."<sup>118</sup> The court then sounded a note in constitutional originalism by recounting one evil that the First Amendment was intended to check: imposing "taxes on knowledge."<sup>119</sup> Those taxes were designed "to limit the circulation of newspapers and therefore the public's opportunity to acquire information about governmental affairs."<sup>120</sup> The framers had experienced these taxes and grasped that "(t)he power to tax the exercise of a privilege is the power to control or suppress its enjoyment."<sup>121</sup> The D.C. Circuit acknowledged that the government need not subsidize First Amendment activities.<sup>122</sup> Nonetheless, just as "the discriminatory denial of tax exemptions can impermissibly infringe free speech,"<sup>123</sup> "regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials."<sup>124</sup> According to the court, the "full and fair exposition" test set forth in

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Big Mama Rag*, 494 F. Supp. at 479.

116. *Big Mama Rag v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980).

117. *Id.* at 1034–35, 1039–40.

118. *Id.* at 1034.

119. *Id.*

120. *Id.* (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 246–49 (1936)).

121. *Id.* (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943)).

122. *See id.*

123. *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

124. *Id.*

the Treasury regulations' definition of "educational" "is so vague as to violate the First Amendment."<sup>125</sup>

A detailed examination of the D.C. Circuit's analysis of the vagueness doctrine in *Big Mama Rag* is instructive. The court recognized two reasons for rejecting vague laws under the vagueness doctrine. First, and most obviously, "the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning."<sup>126</sup> I will refer to this purpose simply as the "fair notice function." Second, the vagueness doctrine provides "officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement."<sup>127</sup> I will refer to this purpose as the "principled enforcement function" of the vagueness doctrine.

The court next articulated the legal standards for applying the vagueness doctrine. According to the court, the vagueness doctrine invalidates laws that are "wholly lacking in 'terms susceptible of objective measurement.'"<sup>128</sup> Further, the vagueness doctrine requires greater specificity when a law's uncertain meaning may suppress the exercise of First Amendment rights.<sup>129</sup> This specificity is necessary because vague laws overly restrict the governed by compelling them to behave in a way that is so plainly within the realm of lawfulness that nobody could plausibly challenge them.<sup>130</sup> A clear law, in contrast, can afford actors greater latitude in exercising constitutional rights because the boundary of lawfulness is easy to perceive. They can exercise their rights to the maximum degree by fully approaching, but not crossing, the legal boundary.<sup>131</sup>

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125. *Id.* Since losing in *Big Mama Rag*, the IRS has promulgated a "methodology test" for determining whether an organization is educational. *See, e.g.*, Rev. Proc. 86-43, 1986-2 C.B. 729.

126. *Big Mama Rag*, 631 F.2d at 1035 (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

127. *Id.* (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Goguen*, 415 U.S. at 572-73; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

128. *Id.* (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)).

129. *See id.* (citing *Hynes*, 425 U.S. at 620; *Goguen*, 415 U.S. at 573; *NAACP v. Button*, 371 U.S. 415, 432-33 (1963)).

130. *See id.*

131. As Professor Jeremy Waldron observes:

There may be no escaping legal constraints in the circumstances of modern life, but freedom is nevertheless possible if people know in advance how the law will operate, and how they must act to avoid its

The court in *Big Mama Rag* then held that the Treasury regulation at issue violated the vagueness doctrine. The regulation's "full and fair exposition" test, held the court, fails the vagueness doctrine because (1) it does not sufficiently identify which applicant organizations are subject to the test; and (2) the test's substantive requirements lack clarity.<sup>132</sup> As to the former deficiency, the court noted that the full and fair exposition test applies only to an organization that "advocates a particular position or viewpoint,"<sup>133</sup> and that the Treasury regulations are unclear as to which organizations so qualify.<sup>134</sup> Further, the Treasury Department's Exempt Organizations Handbook has interpreted this language<sup>135</sup> to apply to an entity advocating a "controversial" position.<sup>136</sup> But determining what is "controversial" is so subjective that it cannot withstand First Amendment scrutiny.<sup>137</sup> Consequently, the Treasury regulation defining "educational" is unconstitutionally vague in that it "does not clearly indicate which organizations are advocacy groups and thereby subject to" the full and fair exposition test.<sup>138</sup>

As to the second deficiency of the regulation, the court opined that it offers no clue for interpreting the test. The court pondered the following questions:

What makes an exposition "full and fair"? Can it be "fair" without being "full"? Which facts are "pertinent"? How does one tell whether an exposition of the pertinent facts is "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion"? And who is to make all of these determinations?<sup>139</sup>

The court especially objected to the regulation's inquiry into whether an organization's speech would "permit an individual

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having a detrimental impact on their affairs. Knowing in advance how the law will operate enables one to plan around its requirements.

Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008).

132. *Big Mama Rag*, 631 F.2d at 1036 (1980).

133. *Id.* (analyzing Treas. Reg. §§ 1.501(c)(3)-1(d)(2), 1.501(c)(3)-1(d)(3)(i)).

134. *See id.*

135. *See* 3 Int. Rev. Manual-Admin. (CCH) pt. 7751, § 345.(12), at 20,572 (Apr. 28, 1977).

136. *Big Mama Rag*, 631 F.2d at 1036.

137. *Id.*

138. *Id.* at 1037.

139. *Id.* at 1037.

or the public to form an independent opinion or conclusion."<sup>140</sup> That determination "is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public."<sup>141</sup>

Further, the regulation cannot be salvaged by reading it to distinguish fact from opinion,<sup>142</sup> or "appeals to the emotions" from "appeals to the mind."<sup>143</sup> Such distinctions are not supported by the language of the regulations, and even if they were, distinguishing the two types of appeals would be difficult.<sup>144</sup> Moreover, even if one could make such distinctions, they "would be inadequate definitions of 'educational' because material often combines elements of each."<sup>145</sup> The regulations are therefore unconstitutionally vague, ruled the court.<sup>146</sup>

*Big Mama Rag* should impel courts to interpret the public policy doctrine narrowly. To see why this is so, imagine that the Treasury regulations were rewritten to state that any organization formed for purposes described in Code section 501(c)(3) must "not be contrary to established public policy," and that an organization ceases to be described in that section when "there is no doubt that the organization's activities violate fundamental public policy." The quoted language is lifted directly from *Bob Jones*.<sup>147</sup> One can easily imagine a court reciting verbatim the language of *Big Mama Rag* excerpted above and substituting the skeletal, formulaic test of *Bob Jones* to strike down the test on vagueness grounds, as follows:

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140. Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

141. *Big Mama Rag*, 631 F.2d at 1037. Adding to the vagueness problem was that the relationship between the two sentences comprising the "full and fair exposition" test is unclear. *Id.*

142. The court also rejected the position of the IRS, accepted by the district court, that the full and fair exposition test was "capable of objective application" because "it asks only whether the facts underlying the conclusions are stated." *Id.* at 1038. The appellate court countered that distinguishing fact from opinion is hardly an objective way to ascertain whether a position is educational. *See id.*

143. *Id.* at 1038–39.

144. *See id.* at 1039.

145. *Id.* The court was unimpressed with the argument of the IRS that one could approach the distinction between fact and opinion, or emotional appeals and appeals to the mind, quantitatively. The Treasury regulations supply no quantitative test, and even if they did, it is unclear how much factual content or appeals to the mind would be required, or who would apply the test. *See id.*

146. *See id.*

147. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 598 (1983).

What makes a [public policy] ["fundamental" or "established"]? Can it be "[established]" without being "[fundamental]"? Which [remote uncertainties, if any] are [consistent with having "no doubt"]? How does one tell whether "[activities violate fundamental policy]"? And who is to make all of these determinations?<sup>148</sup>

To these questions, framed in the rhetoric of *Big Mama Rag*, one may add a litany of others catalogued in the beginning of this Part.

My argument is not that *Bob Jones University* advances a doctrine that, were it set forth explicitly in the Treasury regulations, would necessarily fail under *Big Mama Rag* on vagueness grounds. Rather, my point is that the public policy doctrine announced in *Bob Jones* should be interpreted in such a way that it survives scrutiny under the vagueness doctrine. The bare, skeletal formulation of the public policy doctrine—that a charity must “not be contrary to established public policy,” and that a charity forfeits exemption when there is “no doubt that the organization’s activities violate fundamental public policy”—is devoid of meaningful content.<sup>149</sup> This minimalist formulation provides a charity with no clear notice of whether, or at what point, a contemplated course of action will be found to violate the doctrine. It thus fails to serve the fair notice function of the vagueness doctrine. This state of affairs is especially problematic when a charity’s activity involves the exercise of First Amendment rights,<sup>150</sup> including freedom of speech, the free exercise of religion, and freedom of intimate and expressive association.

Interpreting the fundament requirement of *Bob Jones* as specifying conditions that are both necessary and sufficient for applying the public policy doctrine would help the doctrine survive scrutiny under the vagueness doctrine. Even interpreting the fundament requirement of *Bob Jones* as specifying conditions that are merely sufficient for applying the public policy doctrine could alleviate vagueness concerns if the doctrine is further limited by a concrete standard consistent with the rationale of *Bob Jones*. But either of these approaches does not

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148. *Big Mama Rag*, 631 F.2d at 1037.

149. The same objection applies to the Court’s “common community conscience” dictum. See Galvin & Devins, *supra* note 42, at 1373 (characterizing this standard as “open-ended and beclouded”).

150. See *Big Mama Rag*, 631 F.2d at 1035.

alone suffice. When the fundament requirement is established, one must still determine whether an organization has “violated,” or whether it is “contrary to,” the public policy found to be fundamental. Because *Bob Jones* contemplates that an organization’s actions may “violate” public policy even when the charity has not transgressed the law, articulating the conditions that must be present before the public policy doctrine is applied is important. Anything less hardly serves fair notice.

In conclusion, in order to comport with the clarity of law that is constitutionally required, especially in the case of laws that potentially hinder the exercise of First Amendment rights, the public policy doctrine should be interpreted with much more specificity than that which inheres in its skeletal formulation.

### C. Limiting Administrative Discretion

The preceding discussion raises additional concerns with the public policy doctrine. *Bob Jones* requires the IRS, or, perhaps more generally, the Treasury Department, to exercise discretion in ascertaining the existence and prominence of public policies. This discretion is required even when Treasury and IRS agents and officials have little or no expertise in either advancing the public policies at issue or determining what public policies are fundamental. This section explains why the doctrine announced in *Bob Jones* is thus problematic on two distinct grounds: (1) it confers unusual discretion upon revenue agents and officials; and (2) it relies on an administrative agency to apply the public policy doctrine in the first instance, notwithstanding that the agency lacks the competence to do so.

That the public policy doctrine confers discretion on the Treasury Department (and the IRS specifically) strikes many observers as abundantly apparent.<sup>151</sup> The Treasury is charged with publishing regulations under the Code,<sup>152</sup> and the IRS

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151. See, e.g., Colombo, *supra* note 42, at 855; Drennan, *supra* note 42, at 591–92, 596; Galvin & Devins, *supra* note 42, at 1372–73; Mirkay, *Transformation*, *supra* note 42, at 68; cf. Brennen, *Treasury*, *supra* note 42, at 407 (discussing how Treasury might apply the public policy doctrine to affirmative action). For a discussion of the deference that a court would likely extend to the IRS in its exercise of discretion in applying the public policy doctrine, see Moore, *supra* note 42, at 139–55.

152. Under Title 26 of the United States Code, “the Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any altera-

administers and interprets the Code and regulations published under the Code.<sup>153</sup> Of special relevance, the IRS decides whether to grant or deny recognition of federal income tax exemption to applicants, and whether to revoke favorable determination letters previously issued.<sup>154</sup> Who else, then, bears primary responsibility for ensuring that organizations claiming exemption under Code section 501(c)(3) satisfy its every condition, including the mandate that they not “violate fundamental public policy?”<sup>155</sup> The point that the doctrine conveys considerable discretion on the Treasury Department and the IRS nonetheless merits elaboration, if for no reason other than that the *Bob Jones* majority was reluctant to admit it.

In his concurring opinion in *Bob Jones*, Justice Powell wrote of his unwillingness “to join any suggestion that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions.”<sup>156</sup> The majority responded by asserting that Justice Powell “misreads” its opinion, which “does not warrant” his interpretation of its notion of the authority with which the IRS is vested.<sup>157</sup> It is difficult to fathom just how Justice Powell misread the majority’s opinion, but perhaps the majority’s perspective hinges on the meaning of the term “decide.” In explaining its objection to Justice Powell’s characterization of the decision, the majority opinion observes that Justice Powell recognized the fundamental national policy against racial discrimination in education, as well as congressional acquiescence in the position of the IRS.<sup>158</sup> On whether the policy against racial discrimination in education is fundamental, Justice Burger’s majority opinion basically reasons that the policy’s fundamental nature is self-evident. Justice Burger’s rejoinder to Justice Powell may mean

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tion of law in relation to internal revenue.” I.R.C. § 7805(a) (2012). The “Secretary” of the Treasury includes his or her delegate. See I.R.C. § 7701(a)(11)(B) (2012).

153. For a discussion of the myriad forms of guidance published by the IRS, see Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239.

154. See Treas. Reg. § 601.201(n) (1969); Rev. Proc. 2017-5, 2017-1 I.R.B. 230.

155. See Simon, *supra* note 42, at 166 (stating that *Bob Jones* does not clarify “how the IRS, whose job it is to grant or deny exempt status, should go about” determining fundamental public policy).

156. *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring in part and concurring in the judgment).

157. *Id.* at 598 n.23 (majority opinion).

158. See *id.*



only that the IRS does not “decide” fundamental public policy in the sense that the agency lacks the power to infuse a public policy with fundamental status, to elevate the significance of a relatively minor policy. Instead, *Bob Jones* tasks the agency with recognizing the intrinsically fundamental nature of certain public policies in administering tax exemption.

This reading of the majority opinion in *Bob Jones* explains why it can claim not to vest the IRS with authority to elevate minor public policies to fundamental status. However, Justice Powell’s essential protest remains powerful. In the first instance, the agency administering the Code must determine whether an ostensibly charitable entity claiming tax exemption violates fundamental public policy.<sup>159</sup> That this determination takes the form of declaring a pre-existing essence, rather than elevating otherwise mundane public policies to fundamental status, in no way negates the vast discretion that the IRS possesses under the skeletal formulation of the public policy doctrine. When an applicant for exemption conducts activities that some bureaucrats might think “controversial” or inconsistent with the perspective of the public good embraced as orthodoxy under the then-current presidential administration, the IRS stands as initial magistrate on the question of whether the organization is violating fundamental public policy.

The type of discretion that the IRS exercises under the skeletal formulation of the public policy doctrine—determining whether an entity “is contrary to established public policy” or “violates fundamental public policy”—fares poorly under the rationale of *Big Mama Rag*. As observed in *Big Mama Rag*, the vagueness doctrine serves not just the fair notice function, but also the principled enforcement function. With respect to the latter, the vagueness doctrine ensures that government officials are bound by “explicit guidelines in order to avoid arbitrary and discriminatory enforcement.”<sup>160</sup> The general formulation of

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159. See Drennan, *supra* note 42, at 591 (“[W]hile it is true that the pronouncements of the legislative, judicial, and executive branches will determine public policy, the IRS will weigh these pronouncements and decide when a particular public policy is fundamental.” (internal citations omitted)); cf. Galvin & Devins, *supra* note 42, at 1354 (stating that *Bob Jones* “assigns to the IRS primary authority to develop rules governing the implementation of the tax exemption laws and assigns to the courts and Congress secondary authority to oversee the IRS.”).

160. *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (citing *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Smith v. Goguen*, 415

the public policy doctrine is wanting under these standards.<sup>161</sup> It provides the IRS with no “explicit guidelines” in recognizing the fundamental nature of public policies, or in ascertaining when they have been violated. As a result, when the agency invokes the public policy doctrine (1) to deny an applicant’s request for a determination of exempt status, or (2) to revoke a charitable entity’s existing federal income tax exemption, nobody knows for certain whether the IRS has acted arbitrarily or in a discriminatory manner.<sup>162</sup>

Consider, for example, a homeless shelter that has frequently violated a public health law. Another charity, a charitable hospice, has repeatedly failed to comply fully with laws governing the use of medical marijuana. The IRS revokes the tax exemption of the homeless shelter, but not the hospice, purportedly because only the former has violated “fundamental” public policy. The vagueness of the skeletal formulation of the public policy doctrine enables the IRS to exercise discretion in reaching these determinations, and it may do so without any clear evidentiary trail determining whether the IRS has acted arbitrarily or in a discriminatory fashion. Perhaps the IRS agents disliked the political perspective of the outspoken executive director of the homeless shelter and favored the libertarian motivations of the hospice administrator. The absence of clear guidance on what it means to violate fundamental public policy fosters the type of administrative misfeasance that *Big Mama Rag* contemplates in articulating the principled enforcement function of the vagueness doctrine.

One partial solution to this problem is to restrict the procedural manner in which the government administers tax exemptions after *Bob Jones*. One could imagine a system under which the IRS does not decide whether a specific charity has violated fundamental public policy entirely on a case-by-case, *ex post* basis. Rather, before denying exemption to any charity on the basis of *Bob Jones*, the IRS could first do what it did in the actual

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U.S. 566, 572–73 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

161. See Drennan, *supra* note 42, at 595 (“A major problem with granting the IRS the authority to perform the *Bob Jones* test is that the IRS may apply the rule selectively—only revoking the exempt status of politically unpopular organizations.”).

162. Cf. Galvin & Devins, *supra* note 42, at 1372 (“The [*Bob Jones*] majority’s interpretation, however, poses several problems. First, the danger exists that the Service may selectively enforce its regulations.”).

*Bob Jones* controversy—publish a revenue ruling stating exactly what course of conduct will henceforth be deemed to violate fundamental public policy in a circumscribed context. A revenue ruling setting forth a set of factual prerequisites for invoking the public policy doctrine in specific contexts could provide fair notice to charities and limit the discretion of agents reviewing individual tax exemption cases following the promulgation of the ruling.<sup>163</sup>

Although this method of applying *Bob Jones* would address one type of problem relating to administrative discretion, case-by-case arbitrariness, it would not solve another. Specifically, it would not allay the concern of Justice Powell in *Bob Jones* that the doctrine announced in the case requires the IRS to identify which public policies meet the fundamental requirement. Public policies run the gamut of substantive content, addressing such matters as the war on terror, urban stability, immunization, access to justice, funding of pre-natal decisions, prison reform, agricultural subsidies, global warming, and immigration (to name a few). Identifying which of the policies addressing these issues are “fundamental” subsumes no small exercise of discretion. So does the task of deciding whether an organization’s conduct, even lawful activity, “violates” the policy identified as “fundamental,” such as in the case of a private university’s declaration that it is a “sanctuary” for persons residing in the United States illegally. Even if the IRS must issue a revenue ruling before applying the public policy doctrine against a would-be tax-exempt charity, the process of deciding which policies justify such a ruling, and which private actions violate the policies so identified, involves the exercise of discretion on a grand scale.

Also stretching the imagination is *Bob Jones*’s assumption that an agency is capable of reliably weighing the gravity of a violation of public policy against the public benefit that the offender otherwise provides. According to the majority opinion, an “institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that

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163. Cf. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1481 (1992) (“By informing the public how the agency intends to carry out an otherwise discretionary task, publication rulemaking permits important efficiencies to those who must deal with government.”).

might otherwise be conferred.”<sup>164</sup> By “undermine,” the court apparently intended to denote “outweigh.” The Court opined that “racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public.”<sup>165</sup> The import of deeming Bob Jones University not to confer a public benefit reduces to the following: the Court surmised that the negative externalities of maintaining a racially discriminatory admissions policy outweigh whatever positive externalities the school’s operations generated.<sup>166</sup> The Court contemplated the possibility that an entity could violate public policy and still provide a public benefit, but declined to explain how it would resolve such a case.<sup>167</sup> Precisely how the IRS can or should employ any element of this calculus in other factual contexts is a mystery.

That the agency conducting these policy assessments is the one responsible for administering revenue laws is nothing short of remarkable.<sup>168</sup> The Treasury Department generally, and the IRS specifically, lack the competence to make these difficult, often highly sensitive, judgment calls on fundamental public policy.<sup>169</sup> The tax collector lacks field-specific expertise in determining whether fundamental public policy has been violated when a charity operates on assumptions contrary to

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

165. *Id.* at 596 n.21.

166. See Atkinson, *Tax Favors*, *supra* note 35, at 66; cf. Drennan, *supra* note 42, at 577 (“The majority has adopted a balancing test—if the organization’s objectional acts are so substantial as to outweigh the benefits provided, the organization will be deemed not to confer a public benefit and will be denied exempt status.”). The Court’s calculus reflects a Kaldor-Hicks notion of efficiency. A charitable contribution exhibits Kaldor-Hicks efficiency when the net benefits of the donation exceed the amount of harm caused by the transfer. See McCormack, *supra* note 69, at 981. Most subsidy theories of the charitable contributions deduction rely on the Kaldor-Hicks concept of efficiency. See *id.*

167. See *Bob Jones*, 461 U.S. at 596 n.21.

168. Cf. Neuberger & Crumplar, *supra* note 42, at 275 (“The mandate of the Internal Revenue Service is to collect the tax revenues of the United States. To the extent it seeks to become the enforcer of a varying public policy against religious schools, it exceeds the scope of its authority and breaches the constitutionally protected religious freedom of American citizens.”).

169. Cf. Drennan, *supra* note 42, at 596 (“[T]he legislature is more qualified than the IRS to determine what policies are sufficiently fundamental to tip the scale.”); Moore, *supra* note 42, at 156 (“Instead of abandoning the public-policy doctrine entirely, it makes more sense to leave the finer points of what qualifies as a public policy and the weighing of interests to Congress, as opposed to leaving it to complete agency discretion.”).

those implicit in governmental initiatives relating, for example, to sex education, stem cell research, counseling women experiencing crisis pregnancies, drug addiction, healthcare for undocumented immigrants, adoption, marriage, and divorce.<sup>170</sup> One may advance rational arguments for congressional delegations of authority to discern fundamental public policy on a number of social issues to various agencies with relevant expertise.<sup>171</sup> But the tax collecting agency is not the one to which such authority is sensibly delegated on a broad scale.<sup>172</sup> As Justice Powell eloquently wrote in his concurrence in *Bob Jones*:

[The IRS's] business is to administer laws designed to produce revenue for the Government, not to promote "public policy." As former IRS Commissioner Kurtz has noted, questions concerning religion and civil rights "are far afield from the more typical tasks of tax administrators—determining taxable income." . . . This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be said to have expertise, and this concern applies with special force when the asserted administrative power is one to determine the scope of public policy.<sup>173</sup>

In summary, *Bob Jones* should not be read to import into the Code or Treasury regulations language vesting in the IRS broad discretion to revoke or deny federal income tax exemption whenever the IRS believes that an entity "is contrary to established public policy" or "violates fundamental public policy"—with no further limitation on the discretion that the IRS may exercise. Reading *Bob Jones* in that manner conveys too

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170. Cf. Galvin & Devins, *supra* note 42, at 1354 ("Congress is better suited than either the courts or the IRS to determine tax policy because it is institutionally organized to gather social and economic data, to define policy objectives, and to legislate to achieve these objectives, which often have repercussions beyond the circumstances of a particular case.").

171. One common argument supporting broad delegations of rulemaking power by Congress to agencies is the greater relative expertise of the latter. See, e.g., James R. Hines & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 241–43 (2015).

172. Cf. *id.* at 256 ("While the IRS is designed to police compliance with the tax code and to issue regulations to fill in gaps where the Code is ambiguous or unclear, it is not so well suited to make policy in the areas of research and experimentation, education, or health care.").

173. *Bob Jones Univ. v. United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring in part and concurring in the judgment) (footnote omitted) (citations omitted).

much discretion on a single agency, and one that utterly lacks the expertise to exercise such discretion. Instead, the opinion should be interpreted to limit the discretion of the IRS in some meaningful, principled fashion.

How to limit IRS discretion remains to be discussed. Before doing so, this Article offers yet another reason to reject a broad formulation of the public policy doctrine.

#### D. Ensuring the Diversity of the Nonprofit Sector

A final reason to apply the public policy doctrine sparingly is to preserve the salutary character of the charitable sector. Others have long recognized that the nonprofit sector is extremely diverse.<sup>174</sup> Diversity exists across many planes in the sector, with organizations differing in religious commitments, political philosophies, social priorities, scientific theories, economic assumptions, educational methods, medical approaches, and historical perspectives. Most recognize that this diversity is reason for celebration, not lamentation.<sup>175</sup> Diversity promotes experimentation, competition, testing of ideas, community, collaboration, a sense of individual and group meaning, and other virtues of civil society.<sup>176</sup>

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174. See, e.g., Elizabeth T. Boris, *The Nonprofit Sector in the 1990s*, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA 9 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999) ("The nonprofit sector is characterized primarily by the diversity of its more than one million organizations."); Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960) ("Wherever initiative of thought and action is valued, wherever a diversity of views and approaches is thought necessary, wherever experimentation in new untried ventures is sought, the many-centered, disorderly, and even 'irresponsible' private groups must be relied upon."); see also Peter J. Wiedenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85, 96 (1985) (noting that the charitable contributions deduction promotes pluralism).

175. See, e.g., Bittker & Rahtert, *supra* note 33, at 335; David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 14–15 (2006) ("This article asserts that diversity is also the driving force behind the charitable tax exemption. The diversity made possible by the charitable tax exemption breeds creativity, ingenuity, and other things that stimulate society and, in turn, market growth and development."); see also Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 407 (1998) ("[T]he tax deduction scheme leaves decisionmaking largely in the hands of a set of taxpayers, and the government may wish to encourage particular programs that these (otherwise trusted and encouraged) decisionmakers would be unlikely to identify on their own.")

176. For an overview of the benefits of the nonprofit sector's diversity, see Buckles, *Reforming*, *supra* note 42, at 464–65; Galston, *supra* note 42, at 304 ("Pluralism is desirable because it leads to a diversity of experiences, to experimentation, and to progress through the exchange of ideas."); Sacks, *supra* note 174, at 529, 531 (argu-

Applying the public policy doctrine broadly would jeopardize this beneficial diversity of the sector.<sup>177</sup>

To apply the public policy doctrine expansively is to pressure private charitable entities to conform to an administratively (or judicially) conceived notion of the public good—even when Congress has not seen fit to pursue that good by rendering the activity in question illegal, or even taxable.<sup>178</sup> Consistent with the court's discussion of the vagueness doctrine in *Big Mama Rag*, legal uncertainty, including that associated with the public policy doctrine, tends to promote conformity to behaviors that plainly comport with all plausible administrative interpretations of a vague rule. Failing to so conform risks governmental condemnation. The broad, skeletal formulation of the public policy doctrine thereby goads charities to mimic entities that have garnered IRS favor and to shun approaches that have not earned government endorsement. This impetus for conformity exists notwithstanding that charting an alternative course is legal, even when doing so is constitutionally protected. Such a system of regulating nonprofits through administrative tax law strongly discourages deviations from the norms embraced by the tax gatherer.

Dictum in *Bob Jones* magnifies the potential assault on diversity.<sup>179</sup> According to the opinion, a charitable organization's "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."<sup>180</sup> Invoking "the common community

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ing that diversity of thought and nonconformity to the approaches of government are important aspects of the role of philanthropy).

177. Cf. Colombo, *supra* note 42, at 855 (stating that *Bob Jones* "could reach organizations with unpopular ideas that contribute to diversity of viewpoint essential to a pluralistic society"); Galvin & Devins, *supra* note 42, at 1367 ("[T]he majority in *Bob Jones University* ignored the public benefits of a heterogeneous society.").

178. See Buckles, *Reforming*, *supra* note 42, at 463; cf. Drennan, *supra* note 42, at 588 (describing the "chilling effect" of *Bob Jones* and observing that "organizations seeking exempt status may be discouraged from engaging in controversial practices"); *id.* at 591 ("In light of the importance of obtaining exempt status, query whether controversial organizations would change their operations to curry the taxman's favor." (internal citation omitted)); Turley, *supra* note 30, at 69 (arguing that tax exemption poses a danger of "a forced acquiescence of diverse groups to follow majoritarian values").

179. See Galvin & Devins, *supra* note 42, at 1355 ("[M]ost significantly, the 'public benefit' and 'community conscience' standards may discourage organizations that provide a healthy diversity of views in a pluralistic society.").

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

conscience" as a touchstone not only approximates one defect of the regulations scorned in *Big Mama Rag*,<sup>181</sup> but also needlessly squelches diversity within the charitable sector.<sup>182</sup> As Justice Powell wrote in his *Bob Jones* concurrence, this and other language in the majority opinion in *Bob Jones* reflects a troubling "element of conformity" that "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."<sup>183</sup> Viewing an organization's operations in light of the "common community conscience" compromises the ability of the nonprofit sector to "limit[] the influence of governmental orthodoxy on important areas of community life" and tends to slight our nation's "tradition of pluralism."<sup>184</sup>

For the sake of preserving the diversity of the charitable sector, as well as for other reasons previously discussed, the public policy doctrine should be applied narrowly.<sup>185</sup> The question is how to do that. The next subpart discusses one suggested approach.

E. *Narrowly Formulating the Public Policy Doctrine to Safeguard Core Public Policy Objectives*

One way of remediating the problems of the policy doctrine is to nullify or limit it legislatively. But since this Article is written primarily for judges, lawyers, and scholars who must wrestle with *Bob Jones* until Congress statutorily supplants or clarifies it, I discuss an approach for applying the public policy doctrine in a sensible manner. This approach limits the public policy doctrine so as to avoid the worst of the problems it raises in its vague form, but remains sensitive to the context of *Bob Jones* and the governmental interests that the decision seeks to protect.

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181. See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1037 (D.C. Cir. 1980) (finding as vague certain language in the Treasury regulations that "is expressly based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public").

182. For a critique of this standard, see Galvin & Devins, *supra* note 42, at 1366–67, 1370.

183. *Bob Jones*, 461 U.S. at 609 (Powell, J., concurring in part and concurring in the judgment).

184. *Id.* at 609–10.

185. Cf. Drennan, *supra* note 42, at 596 ("Although the *Bob Jones* test could be used to start a witch hunt designed to purge all unpopular organizations from the ranks of the tax exempt, the IRS and the courts should resist this temptation.").



On the latter point, *Bob Jones* may fairly be read to assume that, in certain circumstances, an organization that is engaged in an activity constituting a traditional government function should be subjected to legal constraints governing state actors and publicly funded private actors. Always subjecting a tax-exempt entity to restrictions on government bodies is foolish, however. Doing so would eviscerate the distinction between the nonprofit sector and government. There must be something more to justify treating private charities as though they were governmental units. Subjecting a tax-exempt charity to a regime governing state actors is most defensible when operating the charity in its desired manner both competes with the state and significantly precludes the state from advancing compelling governmental interests.

This insight finds affirmation in the historical context of *Bob Jones*. *Brown v. Board of Education*,<sup>186</sup> cited by *Bob Jones*<sup>187</sup> and central to its rationale, correctly identifies public education as an important government function.<sup>188</sup> Further, *Bob Jones* properly observes that government has sought diligently to eliminate racial discrimination and segregation in education.<sup>189</sup> If private schools could receive the benefits of tax exemption and yet discriminate on the basis of race, they might very well undermine the state's goals in public education.<sup>190</sup> The collection of tax-free tuition and receipt of tax-deductible contributions could swell the coffers of discriminatory schools established by financially secure, white parents entirely opposed to the government's effort to end segregation in public schools.<sup>191</sup> Such private

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186. 347 U.S. 483 (1954).

187. See *Bob Jones*, 461 U.S. at 593 (majority opinion).

188. See *Brown*, 347 U.S. at 493 ("Today, education is perhaps the most important function of state and local governments.").

189. See *Bob Jones*, 461 U.S. at 592-96.

190. See Galston, *supra* note 42, at 319 ("To the extent that granting tax-exempt status to private discriminatory schools will undermine this command to desegregate by enabling private schools to drain white students out of the public school system, racially discriminatory private schools should be precluded from gaining tax-exempt status on public policy grounds.").

191. Far from being idle speculation, the point is grounded in historical reality. Professor Atkinson has observed the following:

All across the South, in counties with white majorities and large African American minorities, a more or less similar pattern repeated itself. Affluent white parents formed private schools, leaving poorer whites and most African Americans in poorly funded public schools. The new

schools, especially in certain geographic regions of the country, could (and did) facilitate white flight from public schools so dramatically that public schools would (and did) remain largely segregated.<sup>192</sup> Permitting private schools with racist policies to qualify for tax exemption could thus incentivize behavior diametrically opposed to a compelling government interest.<sup>193</sup>

The public policy doctrine can be crafted to reflect this analysis. It should also be sculpted with an appreciation for the diversity of the charitable sector, the need for doctrinal clarity, the limited expertise of the IRS and the courts, and the preference of the *Bob Jones* majority for applying the doctrine only when it is certain that the doctrine should apply.

Moreover, the ability of the IRS and the courts to apply the public policy doctrine so as to penalize the exercise of constitutional rights should be strictly confined.<sup>194</sup> The public policies

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academies were often formally segregated, but not always; at most, the ones that were nominally non-discriminatory could expect to enroll a tiny handful of African American children from relatively affluent professional or entrepreneurial families.

Atkinson, *Tax Favors*, *supra* note 35, at 86–87.

192. See Johnson, *The Story*, *supra* note 42, at 131 (arguing that, because of white flight from public schools, the end of legal segregation did not end de facto school segregation).

193. Cf. Tracey, *supra* note 30, at 91 (“Denying tax-exempt status was the only way to curb the growth of these schools.”).

194. Denying an organization tax-exempt status for failure to comply with a governmental notion of normalcy, when the organization otherwise qualifies under a broadly worded exemption statute, is properly viewed as a form of penalty, even if one assumes that the broad exemption statute is the product of governmental magnanimity. Professor Douglas Laycock nicely makes this point in discussing a hypothetical organization that engages in discriminatory conduct:

The denial of tax exemptions to discriminatory churches is a penalty. The claim is not that churches have a free exercise right to general tax exemptions; the United States need not grant tax exemptions to churches at all. But once it chooses to do so, it must grant them neutrally; it cannot penalize or deter the free exercise of religion by denying exemptions only to those churches it disapproves. There can be no claim that denying generally available tax exemptions to a church that discriminates racially is a neutral attempt to reflect income more accurately. Plainly, it is a monetary penalty inflicted upon disfavored religious conduct.

Laycock, *supra* note 42, at 271 (footnote omitted). Professor Laycock wrote these words prior to the Supreme Court’s decision in *Bob Jones*, and well before the Supreme Court altered its free exercise jurisprudence in *Employment Division v. Smith*, 494 U.S. 872, 878–82 (1990) (holding that the Free Exercise Clause of the United States Constitution is not violated merely because a religiously motivated practice is burdened by the application of a neutral, generally applicable and oth-

underlying the United States Constitution are the most fundamental of all. True, private actions enjoying constitutional protection, for example, refusing to salute and pledge allegiance to the flag,<sup>195</sup> protesting military conscription,<sup>196</sup> and defying compulsory public education attendance mandates,<sup>197</sup> may undermine specific governmental objectives. But the right to engage in these protected activities is so fundamental that courts have held that the competing governmental interests advanced in state policies do not justify infringing these rights. Moreover, it is no objection that Congress has been held to have the power to withhold tax exemptions from organizations violating statutory limitations on activities that are constitutionally protected.<sup>198</sup> One may concede the existence of this power, and even agree with it, and still recognize the wisdom of limiting the application of the public policy doctrine when constitutional rights are at stake. The question is not whether Congress can expressly condition tax exemption on refraining from exercising constitutional rights. The issue is when, if ever, the courts and the IRS should find a violation of the public policy doctrine by an organization exercising constitutional rights in a manner that Congress has not expressly determined to disqualify the organization from tax exemption.<sup>199</sup> If Congress has not chosen to burden the exercise of constitutionally protected rights expressly through tax legislation, the default construction of tax exemption requirements should favor liberty, not its suppression.

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erwise valid law). Nonetheless, Professor Laycock's characterization of the ad hoc denial of tax exemption as a penalty remains appropriate.

195. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

196. See *Cohen v. California*, 403 U.S. 15 (1971). For a discussion of major Supreme Court cases construing legislative accommodations for conscientious objectors to military service, see Johnny R. Buckles, *Military Conscientious Objection Legislation/Cases*, in 4 *ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES* 1516 (George T. Kurian & Mark A. Lamport eds., 2016).

197. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). For a discussion, see Johnny R. Buckles, *Pierce v. Society of Sisters*, in 4 *ENCYCLOPEDIA OF CHRISTIANITY IN THE UNITED STATES* 1800 (George T. Kurian & Mark A. Lamport eds., 2016).

198. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding that section 501(c)(3)'s prohibition against substantial attempts to influence legislation is constitutional).

199. Other scholars have recognized the distinction between the desirability of enacting legislation to achieve a desired policy goal and the advisability of expanding the public policy doctrine to achieve that goal. See, e.g., Mirkay, *Transformation*, *supra* note 42, at 73–74, 83–88.

To these ends, and as I have argued elsewhere,<sup>200</sup> the public policy doctrine should be construed to distinguish between activities and purposes that are constitutionally protected from outright governmental prohibition and those that are not. For these purposes, an activity is “constitutionally protected from outright governmental prohibition” if it consists of the exercise of constitutional rights by a private organization that the government cannot forbid under the applicable standard of constitutional review.<sup>201</sup> Such rights include the right to free speech, including both discourse and expressive association; the right of intimate association; and the right to the free exercise of religion. Hence, under my proposal, as a threshold test, if the government’s attempt to prohibit the exercise of these rights would fail under the appropriate standard of constitutional review, the public policy doctrine should not apply to deny tax exemption to an organization on account of its having engaged in such constitutionally protected activities.<sup>202</sup>

If its legal activity<sup>203</sup> does not involve the exercise of constitutional rights, or if its constitutionally protected legal activity could actually be prohibited under my threshold test of hypothetical constitutional review, an otherwise charitable entity should fail the test of federal income tax exemption under the

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200. See Buckles, *Reforming*, *supra* note 42, at 468–77.

201. See *id.* at 475.

202. *Bob Jones* does not clearly answer whether the federal government’s direct prohibition of discrimination against students on the basis of race would violate the schools’ rights to engage in the free exercise of their religion. The opinion arguably suggests that the Court regarded the governmental interest to be so compelling that even the direct prohibition of the racist activities in question would have been constitutional under the free exercise jurisprudence of the day. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (explaining that some governmental interests are so compelling that regulations prohibiting religiously motivated conduct may survive constitutional challenge). If so, the case unremarkably holds that engaging in an activity that would not find protection under my threshold test of hypothetical constitutional review may violate the public policy doctrine. However, *Bob Jones* also noted that denying tax benefits to private religious schools would not prevent them “from observing their religious tenets.” *Id.* at 603–04. This observation arguably implies that the Court was willing to find a violation of the public policy doctrine regardless of whether the schools were engaging in behavior that Congress could not constitutionally preclude. The most reasonable assessment is that *Bob Jones* does not decide when, if at all, an activity that Congress cannot constitutionally prohibit nevertheless may run afoul of the public policy doctrine.

203. For a discussion of how to address illegal activities and purposes, see Buckles, *Reforming*, *supra* note 42, at 468–73.

public policy doctrine only when the following two conditions exist: (1) the organization carries out the activities in issue within a sphere of operations that substitute for state-operated or state-funded programs; and (2) the organization's continued engagement in these activities, considered not in isolation, but along with the operations of other organizations that may behave likewise, significantly undermines the ability of the federal government to advance its compelling interests through such state-operated or state-funded programs.<sup>204</sup>

The suggested approach for limiting the application of the public policy doctrine is faithful to the historical context of *Bob Jones* and deferential to its rationale. It also focuses analysis on what public policies are fundamental, and what private actions violate them. Public policies are considered fundamental only if they advance compelling government interests, as evidenced by the factors relied upon in *Bob Jones*, and only when they pertain to state-operated or state-funded programs. An organization will be deemed to have violated these policies only when it and other organizations following suit both engage in activities that substitute for state-operated or state-funded programs, and act so as to significantly undermine the government's ability to advance its compelling interests.<sup>205</sup>

This refinement of the public policy doctrine obviously requires the exercise of judgment in applying the threshold test of hypothetical constitutional review and in determining when an entity's activities significantly undermine the ability of the federal government to advance its compelling interests.<sup>206</sup> Un-

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204. *See id.* at 473–75. In determining whether a compelling government interest exists, courts should consider the conditions discussed in Part II.A, *supra*, that are relevant in establishing the fundament requirement.

205. Professor Laycock proffered a similar analysis before the Supreme Court decided *Bob Jones*:

[A]s the church schools enroll an increasing share of the student population, they take over more and more of the public education function. If they preclude the state from offering a desegregated public education, church schools become more than just an option; they become the only possible source of a desegregated education. A church that thus exclusively takes over a state function should become subject to the state's obligation not to discriminate on the basis of race.

Laycock, *supra* note 42, at 275.

206. My proposal requires the IRS to apply constitutional standards of review initially. The agency is not especially well-suited to this task. *See* Brennan, *Charities*, *supra* note 42, at 822–25 (arguing that the IRS lacks the expertise “to make

der my approach, the IRS and the courts must evaluate the impact of a charity's activities upon government programs and analyze the gravity of the relevant governmental interests. It provides a standard, rather than a bright-line rule, that is informed by the fundamental factors of *Bob Jones*. Moreover, the proposal invites the type of analysis that courts frequently employ and focuses the attention of the IRS and courts alike on what it means to violate fundamental public policy in a way that is sensible under the facts and rationale of *Bob Jones*. It gives substance to the skeletal formulation of the public policy doctrine in *Bob Jones*, thereby adding clarity and serving the purposes of the vagueness doctrine (fair notice and principled enforcement). The suggested refinement of the public policy doctrine also prevents organizations from receiving the benefits of tax exemption when they hinder the ability of the federal government to implement important goals. The suggested approach possesses these virtues without decimating the diversity of the charitable sector. In sum, this proposed refinement of the public policy doctrine avoids the worst of the problems presented by the doctrine's expansive, general formulation, but remains faithful to the rationale of the Supreme Court decision that embraced it.

### III. WHY THE PUBLIC POLICY DOCTRINE DOES NOT JEOPARDIZE THE TAX EXEMPTION OF RELIGIOUS SCHOOLS AFTER *OBERGEFELL*

#### A. *Obergefell v. Hodges*

In *Obergefell v. Hodges*,<sup>207</sup> members of same-sex unions sought to marry their partners or to receive state recognition of the lawfulness of their same-sex marriages on the same grounds applicable to marriages between opposite-sex persons. The pe-

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proper constitutional law determinations about racial discrimination"). However, my proposed approach is more administrable than commissioning the IRS to determine the nation's "established public policy" or "fundamental public policy" without additional qualification. See Buckles, *Reforming*, *supra* note 42, at 477. Moreover, the conditions that must be established under the proposal to justify denial or revocation of tax exemption will likely exist so rarely that the IRS should be expected to seldom invoke the doctrine. See *id.* Furthermore, the courts routinely apply constitutional standards of review, and they will ultimately judge whether the IRS has applied the suggested test properly. See *id.*

207. 135 S. Ct. 2584 (2015).

tioners resided in states with laws defining marriage as a union between one man and one woman. The Court framed the controversy as presenting two issues. The first was whether the Fourteenth Amendment requires a state government “to license a marriage between two people of the same sex.”<sup>208</sup> The second was whether the Fourteenth Amendment compels a state “to recognize a same-sex marriage licensed and performed in a State which does grant that right.”<sup>209</sup>

In a majority opinion written by Justice Kennedy, the Court concluded that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex [sic] may not be deprived of that right and that liberty.”<sup>210</sup> The Court held invalid the state laws in question “to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”<sup>211</sup> Because of its holding that same-sex couples in all states may exercise the right to marry, the Court further held that a state may not “refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>212</sup>

To reach its decision, the Court cited “four principles and traditions” that “demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>213</sup> According to the majority opinion, the first premise of relevant Supreme Court precedent “is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>214</sup> The Court cited *Loving v. Virginia*<sup>215</sup> as recognizing the “abiding connection between marriage and liberty,”<sup>216</sup> and noted the intimacy that inheres in marital and family life and the freedoms experienced through

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208. *Id.* at 2593.

209. *Id.*

210. *Id.* at 2604.

211. *Id.* at 2605.

212. *Id.* at 2608.

213. *Id.* at 2599.

214. *Id.*

215. 388 U.S. 1 (1967). The *Loving* Court invalidated a state law prohibiting interracial marriage as a violation of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *See id.* at 2, 11–12.

216. *Obergefell*, 135 S. Ct. 2584, 2599 (citing *Loving*, 388 U.S. at 12).

marriage.<sup>217</sup> A second principle emerging from prior decisions, reasoned the Court, “is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>218</sup> On this point, the opinion discusses the intimate association, sacredness, dignity, companionship, and security that marriage offers.<sup>219</sup> The third basis cited by the Court for its decision is that the right to marry “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>220</sup> Here the opinion focuses on the “recognition,” and “stability and permanency” marriage offers families, thereby benefiting the children of same-sex couples.<sup>221</sup> Fourth, the Court invoked both precedent and tradition to argue that “marriage is a keystone of our social order.”<sup>222</sup> Characterizing marriage as “a building block of our national community,”<sup>223</sup> *Obergefell* opines that state governments “have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities.”<sup>224</sup> By doing so, reasoned the Court, states have “contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”<sup>225</sup> The Court concluded that statutes limiting marriage to a man and woman are inconsistent “with the central meaning of the fundamental right to marry,” and found that “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”<sup>226</sup>

*Obergefell* clearly sought to protect the marital rights of individuals against governmental infringement. After observing the “decent and honorable religious or philosophical premises”<sup>227</sup> of many proponents of traditional marriage, the Court reasoned that when “sincere, personal opposition becomes en-

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217. *See id.*

218. *Id.*

219. *See id.* at 2599–2600.

220. *Id.* at 2600.

221. *Id.*

222. *Id.* at 2601.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 2602.

227. *Id.*



acted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."<sup>228</sup> The opinion thus focused on the "legal treatment"<sup>229</sup> of same-sex partners desiring to be married, including the extension of government benefits to them.<sup>230</sup> It is this force of law—this action by the state—that drove the Court to extend recognition of the fundamental right to marry to same-sex couples.<sup>231</sup> *Obergefell* views the denial of the right to marry *by the state* as a deprivation of individual dignity. Underpinning this point is the Court's concern with the power of the state: "[T]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power."<sup>232</sup> This power of majoritarian government is limited by constitutional protections of individual rights, which are vindicated by the Court.<sup>233</sup>

Even as *Obergefell* expanded the scope of the constitutional right to marry to persons of the same sex, the opinion expressed an awareness of religious perspectives on marriage, and spiritual purposes for marriage. In reviewing the history of marriage, *Obergefell* observed that "[m]arriage is sacred to those who live by their religions."<sup>234</sup> The opinion spoke of marriage as providing a bond by which "two persons together can find other freedoms," including "spirituality."<sup>235</sup> It cited *Griswold v. Connecticut*<sup>236</sup> for the latter's description of marriage as "intimate to the degree of being sacred."<sup>237</sup> The opinion recognized that "religious doctrines" and

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228. *Id.*

229. *Id.*

230. *See id.* at 2604.

231. *See id.* at 2606 ("The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.").

232. *Id.* at 2605 (quoting *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014)).

233. *See id.* at 2605–06 ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" (quoting *W. Va. Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943))).

234. *Id.* at 2594.

235. *Id.* at 2599.

236. 381 U.S. 479 (1965). In *Griswold*, the Court held a state ban on the use of contraceptives an unconstitutional invasion of privacy. *See id.* at 485–86.

237. *Obergefell*, 135 S. Ct. at 2599 (quoting *Griswold*, 381 U.S. at 486).

views of “divine precepts” bear upon the question of same-sex marriage.<sup>238</sup> And in discussing deliberations on same-sex marriage in the public square, *Obergefell* posited that “many of the central institutions in American life,” including “religious organizations,” have focused on the issue.<sup>239</sup>

*Obergefell* also conceded that various religious perspectives of marriage may differ from the sentiments of those whose constitutional right to marry is recognized by the Court. After acknowledging “untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths,”<sup>240</sup> the Court deemed it “fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”<sup>241</sup> But the Court did not condemn these religious perspectives. Immediately after recognizing the traditional understanding of the nature of marriage, the opinion states that the traditional view “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”<sup>242</sup> The Court also wrote that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”<sup>243</sup> Further, the Court took pains to recognize the constitutional rights of those who embrace a traditional view of marriage as a union of one man and one woman:

[I]t must be emphasized 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. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>244</sup>

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238. *Id.* at 2607.

239. *Id.* at 2605.

240. *Id.* at 2594.

241. *Id.*

242. *Id.*

243. *Id.* at 2602.

244. *Id.* at 2607.

B. *Obergefell and the Public Policy Doctrine Framework*

Under the formulation of the public policy doctrine advanced in this article—the basic framework of which I proposed for the first time just over a decade ago<sup>245</sup>—schools maintaining sexual conduct policies that prohibit sexual conduct inconsistent with their religiously informed, traditional view of marriage remain tax-exempt after *Obergefell*. Any attempt by the IRS to revoke such a school's federal income tax exemption or deny such a school's application for exemption would fail at every major analytical step.

My proposed threshold test asks if the government's attempt to prohibit the conduct in question directly, rather than through revoking tax exemption, would fail under the appropriate standard of constitutional review. If so, the public policy doctrine should not apply to deny tax exemption to an organization on account of its having engaged in such constitutionally protected activities. On this question, the Supreme Court has already spoken, in an opinion joined by Justice Kennedy, the author of the majority opinion in *Obergefell*. In *Boys Scouts of America v. Dale*,<sup>246</sup> the Court struck down a New Jersey public accommodations law interpreted by a state court to require Boys Scouts of America ("BSA") to readmit an adult scoutmaster whom BSA had expelled on account of his open homosexuality. BSA asserted inconsistency between homosexual conduct and the values BSA seeks to instill in youth.<sup>247</sup> Concluding that BSA engages in expressive association,<sup>248</sup> the Court held that applying the state law to require readmission "would significantly burden the organization's right to oppose or disfavor homosexual conduct."<sup>249</sup> This burden infringed BSA's First Amendment right to freedom of expressive association.<sup>250</sup> Because New Jersey's interests embodied in its public accommodations anti-discrimination statute "do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive

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245. See Buckles, *Reforming*, *supra* note 42, at 468–77.

246. 530 U.S. 640 (2000).

247. *See id.* at 659.

248. *See id.* at 648–53.

249. *Id.* at 659.

250. *See id.* at 656, 659.

association,"<sup>251</sup> BSA could not constitutionally be compelled to readmit the expelled scoutmaster.<sup>252</sup>

Under *Dale*, any attempt by the IRS to invoke the public policy doctrine to deny tax exemption to private religious schools maintaining a sexual conduct policy of the type discussed in this Article would likely fail the proposed threshold test of hypothetical constitutional review.<sup>253</sup> To enjoy the protection of the First Amendment's expressive associational right, *Dale* first requires an organization to engage in "expressive association."<sup>254</sup> Religious schools that publish sexual conduct policies and enforce them consistently would surely satisfy this criterion. Scores of religious schools seek to inculcate values at least to the same degree as does BSA, and making students, faculty members, and others aware of the schools' policies is more expressive than what BSA did in *Dale*.<sup>255</sup> *Dale* also requires a showing that the state has infringed the right of expressive association. According to *Dale*, forcing inclusion of someone in a group infringes the group's freedom of association if the person's presence significantly affects "the group's ability to advocate public or private viewpoints."<sup>256</sup> The court must give deference to the institution's assessment of "what would impair its expression."<sup>257</sup> For many religious schools, the conduct of one's life speaks as loudly as, or even more loudly than, the words

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251. *Id.* at 659. The Court recognized that the freedom of expressive association is not absolute. *See id.* at 648. It may be infringed upon "to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

252. *See id.* at 659.

253. I emphasize that this prong of my framework invites only an analysis of *hypothetical* constitutional review of an outright prohibition against exercising the right in question. To resolve the inquiry in favor of an organization under my framework is not to assume that a congressional decision to tax the organization for exercising the right in question would necessarily violate the organization's constitutional rights.

254. *Id.* at 648.

255. In *Dale*, the BSA's general mission statement was somewhat unclear as to the organization's view of homosexual conduct. Clarity appeared in sources unlikely to be reviewed by local troops, including position statements provided to BSA's Executive Committee and assertions made in litigation. *See id.* at 651–53.

256. *Id.* at 648.

257. *Id.* at 653.

from one's mouth.<sup>258</sup> A religious school that expects the members of its community to "practice what it preaches" in order to maintain a credible witness of its values has a strong claim that admitting students or professors who violate its sexual conduct policy impairs the school's expression. Indeed, the school's claim is probably stronger than that of the BSA's in *Dale* insofar as many schools typically strive for a transformative authenticity of faith that impacts every aspect of the lives of their students and those who mold them.<sup>259</sup>

Resolution of the threshold test against the government ends the inquiry under the public policy doctrine under my proposed framework. But because my suggested approach for applying the public policy doctrine is just that—suggested—it is instructive to examine how religious schools would fare under additional steps in the analysis. Again, my conclusion is that they would prevail against any attempt by the government to deny them exemption.

If the government prevails under the threshold test, I have argued that a charitable entity should fail to qualify for exemption under the public policy doctrine only when the following two conditions exist: (1) the organization carries out the activities in issue within a sphere of operations that substitute for state-operated or state-funded programs; and (2) the organization's continued engagement in these activities, considered not in isolation, but along with the operations of other organizations that may behave likewise, significantly undermines the ability of the federal government to advance its compelling interests through such state-operated or state-funded programs. The first condition is satisfied because, like Bob Jones University, a religious school offers a program of education that substitutes for that of-

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258. Cf. *Matthew* 7:21–23 (New Am. Standard) ("Not everyone who says to Me, 'Lord, Lord,' will enter the kingdom of heaven; but he who does the will of My Father, who is in heaven. Many will say to Me on that day, 'Lord, Lord, did we not prophesy in Your name, and in Your name cast out demons, and in Your name perform many miracles?' And then I will declare to them, 'I never knew you; DEPART FROM ME, YOU WHO PRACTICE LAWLESSNESS.'").

259. See Neuberger & Crumplar, *supra* note 42, at 260 (quoting *Meek v. Pittinger*, 421 U.S. 349, 366 (1975) for the proposition that many religious schools exist "to provide an integrated secular and religious education," and that "the teaching process is, to a large extent, devoted to the inculcation of religious values and belief").

ferred by state-run and state-funded schools. But the second condition of my proposed framework is not satisfied.

To justifiably limit the public policy doctrine, I have recommended that courts look to the fundament factors<sup>260</sup> to establish the presence of a compelling government interest.<sup>261</sup> If the fundament factors are analyzed in the case of religious schools maintaining sexual conduct policies in the same manner that the factors were analyzed in *Bob Jones*, religious schools remain exempt from tax. The United States lacks long-standing, consistent policies announced by the highest institutions and offices of the three branches of the federal government that attempt to stamp out efforts by schools to discourage pre-marital sex or to promote traditional marriage.<sup>262</sup>

Let us first consider the judiciary. Only one court, a federal district court, has interpreted sex discrimination to include distinctions based on sexual orientation-related sexual conduct for purposes of Title IX.<sup>263</sup> The question has never even

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260. See *supra* Part II.A.

261. See *supra* Part II.E.

262. See Kmiec, *supra* note 30, at 109 (stating that the consistent efforts to eradicate racial discrimination cited in *Bob Jones* have no parallel in the context of same-sex marriage); cf. Kreppel, *supra* note 42, at 262 (“[I]n order for same-sex marriage to become well-established public policy, there must be judicial, legislative, and executive statements of laws prohibiting the refusal to recognize same-sex marriages.”); Mirkay, *Transformation*, *supra* note 42, at 74 (reasoning, pre-*Obergefell*, that attempting to apply the public policy doctrine to marital-status or sexual-orientation discrimination “is futile because such discrimination does not violate any ‘established’ public policy”); Tracey, *supra* note 30, at 92 (“Nor have ‘all three branches of the Federal Government’ been ‘unmistakably clear’ in condemning sexual orientation discrimination.”); *id.* at 133 (“No similar unanimity exists within the three branches of the federal government with regard to sexual orientation discrimination in education.”). This observation does not ignore the legal trend of eliminating governmental discrimination based on sexual orientation in various contexts. For a discussion of this trend prior to *Obergefell*, see Moore, *supra* note 42, at 154–55.

263. See *Videckis v. Pepperdine Univ.* 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015). As for the analogous context of employment, decisions of the United States Courts of Appeals, with one exception, have thus far rejected the view that Title VII prohibits harassment or discrimination because of sexual orientation. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (*per curiam*). The exception is *Hively v. Ivy Tech. Cmty. Coll.*, 2017 U.S. App. LEXIS 5839 (7th Cir. 2017). For a discussion of district courts reaching conclusions contrary to the weight of authority in the courts of appeals, see *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, at 10

been considered by the Supreme Court. As for the Executive Branch, the DOE has not (or not yet) interpreted Title IX to equate sex with sexual orientation.<sup>264</sup>

Most significant is the failure of the legislative branch to advance a policy that jeopardizes the tax exemption of religious schools.<sup>265</sup> Congress has never amended Title IX to expressly equate sex with sexual orientation or sexual conduct correlating with sexual orientation.<sup>266</sup> Further, even if Congress were to do so, a continuing statutory exemption from the general rule for certain religious schools<sup>267</sup> strongly indicates that religious schools with traditional sexual conduct policies do not contravene established public policy. The same conclusion holds if, in the absence of legislative action, the DOE and the Supreme Court eventually interpret Title IX generally to prohibit educational institutions receiving federal funding from discouraging

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n.10 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/VHY2-L8SU>].

264. The Obama administration's position under Title IX should be contrasted with its position in certain other contexts. The Equal Employment Opportunity Commission has opined that sexual orientation-based employment discrimination is unlawful. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015), <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/VHY2-L8SU>]. The ruling concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Id.* at 6. Moreover, like former President Clinton, former President Obama used executive action to prohibit the federal government and its contractors from engaging in sexual orientation discrimination. See Tracey, *supra* note 30, at 92 & n.45.

265. Other commentators have made essentially the same point:

As a threshold matter, there can be a public policy justifying denial of a tax exemption only if a statute duly enacted by Congress establishes such a policy. When the Supreme Court in *Bob Jones* inferred a public policy against racial discrimination in private education, it did not rely on its own or the Internal Revenue Service's beliefs about the evils of racism, but instead rested on congressional enactments such as the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965.

Wiacek et al., *supra* note 29, at 14 (citation omitted); see also *id.* at 15 ("[T]here are no congressional enactments establishing a public policy against private opposition to same-sex marriage. In fact, Congress has never enacted any law specifically prohibiting discrimination on the basis of sexual orientation in education, employment, housing, public accommodation, or similar areas.").

266. Cf. Mirkay, *Transformation*, *supra* note 42, at 82 (observing that current civil rights laws do not address actions based on sexual orientation); Tracey, *supra* note 30, at 92–93 ("Congress has repeatedly declined to pass the Employment Non-Discrimination Act (ENDA), which would ban discrimination on the basis of sexual orientation in employment nationwide.").

267. See 20 U.S.C. § 1681(a)(3) (2012).

or disciplining pre-marital sex or sex between members of the same sex. One reason for this conclusion is obvious: if Congress continues to treat the educational programs of religious schools maintaining sexual conduct policies as worthy of public funding, the plain implication is that these schools are on balance serving public purposes, not contravening them.<sup>268</sup>

Concededly, not all courts may embrace my preference for examining the fundament factors relied upon in *Bob Jones*. They may be willing to apply the public policy doctrine more expansively, notwithstanding the many reasons for constraining its application.<sup>269</sup> Thus, for the sake of discussion, I will relax the feature of my proposed test that looks to the fundament factors to determine the presence of a compelling government interest. I will further assume, under an extension of the rationale of *Obergefell*, that at some point in the future a court applying my framework will find the government to have a compelling interest in ensuring that all persons, regardless of their sexual conduct, have equal access to public education.<sup>270</sup> But even under these relaxed assumptions, religious schools maintaining sexual conduct policies prohibiting sex outside of heterosexual, monogamous marriage should remain exempt because they would not significantly undermine the ability of the federal government to advance any such compelling interest.

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268. Further, it is not at all clear that a school's failure to conduct operations in a manner that entitles it to receive federal funding triggers the revocation of federal income tax exemption under the public policy doctrine. I have developed this point previously in the context of the practices of law schools that disqualified them from receiving federal funds under the Solomon Amendment. See Buckles, *Law Schools*, *supra* note 42, at 34–35.

269. See *supra* Part II.A–E.

270. *Obergefell* does not go this far. Cf. Hermann, *supra* note 31, at 396 (“[T]he opinion in *Obergefell* provides no explicit authority for further claims to rights by homosexuals (gays and lesbians). There was little attention to establishing a class subject of discrimination thus eligible to make claims for other rights or protections.”); Landau, *supra* note 31, at 38 (stating that neither of Justice Kennedy’s “majority opinions in *Windsor* nor *Obergefell* addresses (let alone resolves) the question whether governmental distinctions based on sexual orientation trigger heightened judicial scrutiny or are subject to existing sex discrimination protections”); Nicolas, *supra* note 31, at 138 (“Yet, despite having the opportunity in each of the four preceding gay rights cases, Justice Kennedy declined to declare sexual orientation a suspect or quasi-suspect classification.”); Tracey, *supra* note 30, at 93 (observing that *Obergefell* “did not hold that sexual orientation is a suspect or quasi-suspect class”).



In thinking through the proper scope of the public policy doctrine, the courts should take judicial notice of one solemn fact. The history of race-based slavery in this country, and the pattern of systematic racial discrimination that followed formal emancipation systematically and with official sanction in public institutions, including schools, have no true parallel.<sup>271</sup> This observation does not minimize the severity of the pain inflicted on gays and lesbians who have been ostracized, demeaned, bullied, mocked, or otherwise mistreated. Nor does the observation imply approval of either such reprehensible conduct or subtle tolerance of such behavior by government agents who engage in it or fail to stop it.<sup>272</sup> But the widespread system of state-sponsored racial segregation in vast regions of this country, a blight that persisted for much of the nation's history, thoroughly corrupted numerous enterprises, including public education.<sup>273</sup> It is no wonder that the *Bob Jones* Court hearkened back to the discredited "separate but equal" doctrine of a bygone era in analyzing whether the schools in issue violated fundamental public policy.<sup>274</sup> Even decades after *Brown v. Board*, private schools maintaining racially discriminatory policies undermined the goal of providing a racially integrated education for American youth.<sup>275</sup> The policy concern was not

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271. Cf. Adams, *supra* note 29, at 4 ("By 1983, racial discrimination in an educational setting was of the utmost importance to the *Bob Jones* court and, arguably, at the present time, a religious or other organization's failure to condone same-sex marriage is not analogous."); Tracey, *supra* note 30, at 133 (observing that religious colleges were not formed to segregate homosexuals from heterosexuals).

272. Cf. Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999) ("We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium.").

273. As Professor David Brennan observes,

[W]hen faced with the issue of the permissibility of invidious racial discrimination by tax-exempt charities, a careful consideration of the context of this type of racial preference reveals that mere racial preference was not the problem in *Bob Jones University v. United States*. The problem, as Critical Race Theory teaches us, was a problem of unjustified inequality—the continued racial subordination of blacks long after the end of legalized slavery.

Brennan, *supra* note 175, at 19.

274. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 592–93 (1983) ("Prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson* . . .").

275. See Johnson, *The Story*, *supra* note 42, at 131–32 (describing the proliferation of white, segregated southern schools after the enactment of Title VI); Laycock, *supra* note 42, at 265 (stating that "many private schools were established for the

simply that the private schools operated in a “politically incorrect” manner. Rather, allowing private schools to maintain racially discriminatory policies and simultaneously receive the benefits of tax exemption, at least in some geographic areas, would have been tantamount to a government-fostered race to the bottom in education. Private schools would have received tax benefits for subverting the racially diverse public schools that the country had battled mightily to foster.<sup>276</sup>

Private religious schools that maintain sexual conduct policies reflecting traditional views of marriage and sexuality do not pose a comparable threat to the achievement of government interests in public education.<sup>277</sup> There is no credible risk of massive “heterosexual flight” from public schools to private schools that expect students to remain celibate unless and until they marry someone of the opposite sex.<sup>278</sup> Nor do sexual conduct policies otherwise meaningfully undermine government interests that find support in *Obergefell*. *Obergefell* requires states to issue marriage licenses to married same-sex partners; the sexual conduct policies of private religious schools have little or nothing to do with that process.<sup>279</sup>

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express purpose of creating a segregated alternative to forcibly integrated public schools”); Neuberger & Crumplar, *supra* note 42, at 231 (stating that, simultaneously with public school desegregation, “an increasing number of private schools have been established by parents of white children for the purpose of providing education in an all-white school environment”); Tracey, *supra* note 30, at 124 (“In the aftermath of *Brown*, thousands of white children in the South fled the newly integrated public schools.”).

276. Cf. Laycock, *supra* note 42, at 274 (“If segregated church schools draw so many whites from the public schools that meaningful desegregation of the public schools becomes impossible, then the church schools have inflicted real harm on outsiders.”); *id.* at 276 (“[W]hen private schools drain off most of the whites in a school system, as has happened in some cities, they preclude any meaningful public school desegregation.”).

277. Commentators observe that *Bob Jones* “rested on the unique history of race discrimination in American education” and that “[t]here is not now a comparable ‘fundamental, overriding interest’ in prohibiting private opposition to same sex marriage.” See Wiacek et al., *supra* note 29, at 16.

278. Cf. Tracey, *supra* note 30, at 92 (“Unlike the history that gave rise to *Bob Jones*, thousands of private schools did not spring up as a means to avoid attending school with gays and lesbians. In fact, many private schools actively recruit gay men and lesbians.”). Frankly, and at the risk of sounding flippant, unless students seriously share the moral values of a religious institution maintaining a sexual conduct policy, one would expect heterosexual flight *away from* these schools.

279. As one commentator writes:

Our government should be able to continue to allow religious and other organizations which may not condone same-sex marriage to qualify for

Similarly, *Obergefell* seeks to ensure that government benefits given to opposite-sex married persons are not withheld from same-sex married persons. The policies of private religious schools do not impair the ability of government to extend public benefits to all married persons.

Nor are sexual conduct policies that reflect traditional, religious understandings of marriage inconsistent with *Obergefell*'s emphasis on the dignity of all Americans under the law. The legal status of adherents to different religions illustrates this point well. A church does not forfeit tax exemption by accepting as members only those who adhere to its doctrine. For example, an orthodox church that requires a prospective member to confess the divinity<sup>280</sup> and resurrection of the Lord Jesus Christ<sup>281</sup> does not forfeit federal income tax exemption by denying membership to a practicing Muslim who insists that Jesus was merely a human prophet. The church's exclusion of a Muslim from membership is entirely consistent with the Muslim's equal dignity under the law. The same is true in the case of a Christian school.<sup>282</sup> *Obergefell* no more compels a religious or-

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tax-exempt status when they otherwise meet the requirements of Internal Revenue Code section 501(c)(3). This policy does not have to be contrary to the right of same-sex couples to marry legally under the laws of our government.

Adams, *supra* note 29, at 6. Some conflate the practice struck down in *Obergefell*—withholding the issuance of marriage licenses by state governments to same-sex couples—with refusals by churches to perform same-sex weddings. See, e.g., Lehmann & Dunn, *supra* note 29, at 8. This conflation ignores the distinction between state action and private action. By the same logic, a church could not teach Calvinism as truth and remain tax-exempt merely because the government is prohibited from promoting Calvinism. That view is mistaken. See Wiacek et al., *supra* note 29, at 16 (“[C]onstitutional rules that restrict state action do not translate into public policies restricting private action.” (emphasis omitted)); cf. Galston, *supra* note 42, at 311 (“If . . . it is conceded that taxation does not transform a private organization into a public one, then the proponents of the legality standard could argue that tax exemption does not affect such a metamorphosis, since the Supreme Court itself declared that tax exemption entails less government involvement than does taxation.”). Nor can it be argued persuasively that a couple is deprived of the franchise of marriage if a church refuses to bless their union. State actors can do the job just fine.

280. See, e.g., *John* 1:1, 4; *Colossians* 1:15–17; *Hebrews* 1:1–13; *2 Peter* 1:1.

281. See, e.g., *Matthew* 28:1–10; *John* 20:1–29; *Acts* 2:22–36; *1 Corinthians* 15:1–8; *Ephesians* 1:18–23.

282. Professor Laycock argued similarly over three decades ago. Although he was offering a constitutional analysis, albeit prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), the more general policy preference remains the same:

ganization to accept prevailing cultural norms concerning premarital sex, divorce, or same-sex marriage against its tenets than the Constitution requires a Christian church or school to accept the tenets of Islam. Both the Muslim and the person who disagrees with the religious entity's view of sex and marriage have full dignity under the law. Their dignity co-exists with the dignity of persons who insist upon living their lives authentically by their faiths. Once again, this analysis resolves the inquiry under the public policy doctrine, even under a more expansive version of my framework, in favor of religious schools.

C. *The Broader Dissimilarities between Obergefell and Bob Jones*

Even if one remains unconvinced that any version of my proposed framework is the best way to apply the public policy doctrine announced in *Bob Jones*, the better view is that *Obergefell* does not support extension of *Bob Jones* to schools on account of their sexual conduct policies.<sup>283</sup> As discussed above, *Obergefell* speaks deferentially and respectfully of those whose religious views lead them to understand marriage as a union of one man and one woman. *Obergefell* considers these people "reasonable and sincere," and recognizes the "good faith" with which they hold their views.<sup>284</sup> Moreover, *Obergefell* opines that the religious premises of those embracing the traditional understanding of marriage are "decent and honorable."<sup>285</sup> The Court appreciates the meaningfulness of the principles of marriage that inform their views by speaking of these principles as "fulfilling" and "central to their lives and faiths."<sup>286</sup> The opinion even assures the

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The goal is to protect schools that are so religious that attending them is constitutionally equivalent to joining the church. If a school requires certain religious beliefs as a condition of admission, or gives preference to persons with those beliefs, or if it makes a concerted effort to integrate religious instruction into the entire curriculum, the persons who apply for admission submit themselves to the school's religious authority and cannot complain if they are discriminated against.

Laycock, *supra* note 42, at 269–70.

283. See Adams, *supra* note 29, at 4 (surveying the language of *Obergefell* and stating that, "when read in conjunction with *Bob Jones*, *Obergefell* does not require or even allow the IRS to deny tax-exempt status to religious or other institutions which do not condone same-sex marriages, including those which might refuse to perform same-sex marriages").

284. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

285. *Id.* at 2602.

286. *Id.* at 2607.

reader that the Court's decision does not disparage these religious views or the people who hold them dear.<sup>287</sup> *Obergefell* also observes that the First Amendment protects "religious organizations and persons" as they "teach the principles" of marriage that are central to "their own deep aspirations to continue the family structure they have long revered."<sup>288</sup>

*Obergefell's* language, so respectful of the perspectives of religious people and so cognizant of their First Amendment rights to contend for their religiously informed, traditional view of marriage,<sup>289</sup> is hardly indicative of a Court eager to impose any particular view of marriage on religious organizations, or anyone else for that matter. This observation is important for at least two reasons.

First, and probably most significantly, *Obergefell* is about limiting the monopoly power of the state in its regulation of marriage, not bestowing monopoly power on the state to define marriage.<sup>290</sup> *Obergefell* prevents government from limiting the franchise of civil marriage, and its associated governmental benefits, to heterosexual couples. *Obergefell* recognizes individual rights without imposing a conception of marriage on anyone, including religious organizations. The case essentially vests in every adult individual the right to compel the government to recognize his or her choice of a spouse—whether or not that spouse is of the same sex as the individual in question—once the government has decided to confer marriage with legal status.<sup>291</sup>

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287. See *id.* at 2602.

288. *Id.* at 2607.

289. See *id.*

290. Cf. Esbeck, *supra* note 31, at 5 ("*Obergefell* is a Fourteenth Amendment case. It operates only against the government.").

291. See Hermann, *supra* note 31, at 379 ("[I]f the state creates an institution such as marriage with its many legal entitlements, it must extend access to that institution to all citizens unless it has a compelling justification for excluding a class of citizens from that institution or denying them its benefits."); *id.* (stating that *Obergefell* "implicitly found no compelling justification to exclude same-sex couples from the benefits of marriage"). It does not follow, however, that *Obergefell* requires the government to license marriages. See Leib, *supra* note 31, at 43 ("[T]he Court ultimately comes shy of establishing that states have a constitutional obligation to provide some package of relational privileges and burdens called marriage, which is another way to understand what it would really mean for each individual to have a fundamental right to marriage." (emphasis omitted)).

To assert that *Obergefell* is grounds for extending the public policy doctrine to disqualify religious schools from tax exemption on account of maintaining policies reflecting traditional views of marriage and sexuality is to betray the analysis of *Obergefell*. *Obergefell* provides a shield to individuals against state aggression, not a sword<sup>292</sup> to the government to attack individuals and groups who hold to a traditional view of marriage and sexuality.<sup>293</sup> *Obergefell* does not purport to vest in any individual or government the right to compel private organizations and persons to conform their religiously informed views and conduct to the contrary perspectives of those whose rights are protected under *Obergefell*. *Obergefell* respects the rights of both.<sup>294</sup> The decision respects the rights of same-sex couples to marry, as well as the rights of individuals and organizations that embrace a traditional view of marriage to teach, advocate and live their convictions. Any attempt by the IRS to use the public policy doctrine to punish religious schools for their deeply held religious convictions on marriage and sexuality would contravene the language of *Obergefell*, which plainly recognizes both the right to embrace and live out traditional views of marriage, and the decency of those who hold them.<sup>295</sup>

*Obergefell*'s respect for the perspectives of those who hold to a traditional view of marriage, its recognition of their constitutional right to advance their religious views and its attribution of good faith to such religious people are noteworthy for a second reason. It is unthinkable that the Supreme Court, for at

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292. Cf. Adams, *supra* note 29, at 5 (“[A]lthough some individuals may wish to alter the tax-exempt status of religious or other organizations that do not condone same-sex marriage, it is premature to use *Obergefell* as a ‘sword’ to revoke or deny the tax-exempt status of an organization that otherwise meets the requirements of Internal Revenue Code section 501(c)(3).”).

293. See Wiacek et al., *supra* note 29, at 15 (stating that *Obergefell* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), “are about restricting state action,” and that they “do not preclude private entities—such as churches and religious universities—from opposing same-sex marriage” (emphasis omitted)).

294. This respect for the rights of those holding opposing views of marriage is legally coherent. See Esbeck, *supra* note 31, at 5 (“The civil law can protect the right of same-sex couples to marry while at the same time safeguard the right of religious persons and organizations not to recognize these marriages.”).

295. See Wiacek, et al., *supra* note 29, at 15 (stating that, given the language of *Obergefell* that respects the rights of those who disagree with same-sex marriage, “it would be erroneous for the IRS to conclude that *Obergefell* either compels or permits it to deny tax exemptions to private organizations on the basis of their opposition to same-sex marriage for ‘religious’ or ‘other’ reasons”).

least the past four decades, would shower such gracious words on private parties who practice or advocate racial discrimination. For example, one will search the *Bob Jones* opinion in vain for any suggestion that the Court considered any aspect of the admissions policy at issue as noble, meaningful, or potentially fulfilling. Perhaps the reason is that the members of the Court silently suspect pretext in the case of various forms of racial discrimination, but recognize the sincerity of those holding religious, race-neutral convictions about sexual conduct. Or perhaps the Court properly views actions motivated by racial bias as particularly harmful because of the nation's odious history of slavery and state-sanctioned segregation. Conceivably, the Court appreciates the distinction between race-neutral policies based primarily on a person's conduct, such as engaging in sex or entering into a sexual union, and policies based primarily on biological characteristics, such as racial phenotypes.<sup>296</sup> Whatever the explanation, the tone of *Obergefell* towards those who hold religious views about sex and marriage that differ from the views of those whose rights *Obergefell* vindicates is a far cry from the tone of the *Bob Jones* Court toward schools that maintain racially discriminatory admissions policies.

Finally, it is illuminating to observe the case relied upon in *Obergefell* that did not directly influence the *Bob Jones* Court's determination that racially discriminatory admissions policies violate established public policy. That case is *Loving v. Virginia*.<sup>297</sup> The Court in *Loving* struck down a state law criminalizing interracial marriages involving a white person as a violation of the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>298</sup> In so holding, the Court characterized the law as the product of "invidious racial discrimination,"<sup>299</sup> and observed that penalties for miscegenation "arose as an incident to slavery."<sup>300</sup> Notwithstanding *Loving's* strong condemnation of governmentally

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296. The admissions policy of Bob Jones University was both conduct- and status-related. Because of the history of race-based oppression and segregation in the United States, and the effort that many have expended to preserve race-based distinctions, it is no wonder that the courts have viewed the suppression of interracial association as a form of racial discrimination.

297. 388 U.S. 1 (1967).

298. *See id.* at 11–12.

299. *Id.* at 11.

300. *Id.* at 6.

imposed bans on interracial marriage, *Bob Jones* cites *Loving* only for the proposition that “discrimination on the basis of racial affiliation and association is a form of racial discrimination.”<sup>301</sup> *Bob Jones* did not include *Loving* in the string of cases establishing that racial discrimination in education violates fundamental public policy.<sup>302</sup>

The reason for this lack of reliance on *Loving* by *Bob Jones* in ascertaining fundamental public policy is plain enough. *Loving* is about a state limitation on marriage, but not in an educational context.<sup>303</sup> That distinction is important, for the same is true of *Obergefell*. If the *Bob Jones* Court did not include *Loving* as a source of judicial authority establishing the fundamental public policy that Bob Jones University was held to violate, it is difficult to invoke *Bob Jones* for the proposition that *Obergefell* establishes a fundamental public policy that tax-exempt religious schools violate by maintaining sexual conduct policies. Given *Bob Jones*’s non-reliance on *Loving* as a source establishing fundamental public policy, attempting to somehow marry *Bob Jones* and *Obergefell* would produce something far less than a legal match made in heaven.

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301. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

302. See, e.g., *id.* at 593–94. This point is easily underappreciated. One commentator, then a law student (now a law professor) who generally offers an excellent analysis of *Bob Jones*, remarks as follows:

[I]n holding that Bob Jones’ practice after May 1975 of expelling students who engaged in interracial dating, or who were partners of an interracial marriage, violated a fundamental public policy, the majority relied on two cases that considered the constitutionality of state statutes calling for imprisonment of the partners to an interracial marriage.

Drennan, *supra* note 42, at 594. However, *Bob Jones* did not rely on decisions striking down state anti-miscegenation statutes as sources directly bearing on whether racial discrimination in education violates fundamental public policy. The decisions were relied upon only for the ancillary proposition that discrimination based on racial affiliation and association constitutes a type of racial discrimination. Professor Drennan appreciates the broader point that *Loving* should not have any bearing on an organization’s tax-exempt status. See *id.*

303. Cf. *id.* at 594 (“[I]n *Loving v. Virginia*, it is unlikely that the Supreme Court intended a private school to lose its tax-exempt status when it held Virginia’s miscegenation statute, which called for imprisonment of one to five years, unconstitutional.” (footnote omitted)); Tracey, *supra* note 30, at 132 (observing that the federal government’s interest in *Bob Jones* “was specific as to education”).



## IV. CONCLUSION

*Obergefell* begins with these words: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”<sup>304</sup> Religious schools that require members of their community to adhere to standards of sexual conduct based strictly on their faith are exercising this liberty. They seek to avail themselves of the right “to define and express their identity.”<sup>305</sup>

The public policy doctrine of *Bob Jones* should not be extended to impair the exercise of this liberty by religious schools. Sound reasons counsel against applying the public policy doctrine expansively. These reasons are grounded in the language of *Bob Jones* itself, the imperative of providing fair notice to charities of the sphere of lawful activity, the need to channel the discretion of an administrative agency with limited expertise, and the value of ensuring a diverse charitable sector.

A framework that I proposed several years prior to *Obergefell* is faithful to the *Bob Jones* decision and consistent with the reasons for narrowly construing the public policy doctrine. Under this framework as proposed, and even as relaxed, *Obergefell* does not support the extension of the public policy doctrine to deprive private schools of tax exemption merely on account of their decision to adopt sexual conduct policies upholding their traditional religious convictions about sexuality and marriage. Indeed, more generally, to deny or revoke the tax exemption of these private schools would contravene the thrust and rationale of *Obergefell*. Unless and until Congress addresses this issue legislatively, the IRS and the courts should leave the matter of sexual conduct policies solely to the private religious schools that care about them, free from any threat by the state to influence their religious positions through taxation.

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304. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

305. *Id.* Indeed, Professor Carl Esbeck similarly observes that “Justice Kennedy has characterized religious liberty in terms strikingly similar to his description of gay rights.” Esbeck, *supra* note 31, at 4 (comparing *Obergefell*’s language with that of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).