

ENFORCING A TRADITIONAL MORAL CODE DOES NOT TRIGGER A RELIGIOUS INSTITUTION'S LOSS OF TAX EXEMPTION[†]

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INTRODUCTION

In the article to which this paper responds,¹ Mr. Austin Caster appears to make the following arguments²: First, tax-exempt, religious

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¹ Austin Caster, “Charitable” Discrimination: Why Taxpayers Should Not Have to Fund 501(c)(3) Organizations That Discriminate Against LGBT Employees, 24 REGENT U. L. REV. 403 (2012). By the editor’s agreement, this response is limited in page length to the companion article written by Mr. Caster. Therefore, some of the points raised by Mr. Caster must be addressed summarily. One such point is his claim that LGBT status is “immutable.” *Id.* at 403 & n.5. If such a claim were true, there would be no ex-gays. How many ex-African Americans or ex-Asian Americans are there? A second matter is Mr. Caster’s statement that tax-exempt status equates to “public funding.” *Id.* at 404. The Supreme Court, in *Walz v. Tax Commission*, distinguished between government funding of religion through transfer of public revenues and tax-exempt status that results in the church simply not supporting the state. 397 U.S. 664, 675 (1970) (“The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”). The third matter is Mr. Caster’s claim that the religious institutions that employed Mses. Naylor, Tadlock, and Howe were unjust in firing them. Caster, *supra*, at 404–06. In response, please note two points. First, there is no evidence that Ms. Naylor is a lesbian. Her employer, therefore, did not fire her for her sexual orientation but rather for her *public* disagreement with the position of her employer on gay marriage. Heterosexual employees of LGBT organizations that publicly disagreed with the LGBT position on Proposition 8 would, presumably, receive the same treatment as Ms. Naylor. Second, the events that triggered the termination of Mses. Tadlock and Howe were innocent enough—a wedding and birth announcement. Yet, they evidenced a profound disagreement with a moral teaching of Christianity that has existed for centuries. *See, e.g., Leviticus* 20:13; *Romans* 1:27; *1 Corinthians* 6:9–10. If their religiously affiliated employers misled them by claiming that they would not enforce this doctrine then, presumably, they could use remedies like promissory estoppel. Without such representations or a state statute protecting them, the claims of Mses. Tadlock and Howe would suffer the same fate (dismissal) as Alicia Pedreira in *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 186 F. Supp. 2d 757, 759, 762 (W.D. Ky. 2001), *aff’d in part, rev’d in part*, 579 F.3d 722, 734 (6th Cir. 2009), *cert. denied*, 131 S. Ct.

organizations that terminate the employment of LGBT workers on the basis of sexual orientation violate public policy and, therefore, should lose their tax exempt status;³ second, the constitutional protection provided to religious organizations is limited and should be balanced against equal protection guarantees for LGBT employees;⁴ third, it is a fundamentally unfair public policy to provide a social benefit to organizations that advocate positions contrary to a segment of taxpayers;⁵ and finally, the United States should follow the example of other nations in protecting the employment of LGBT persons.⁶ The following Part addresses the first three arguments.

2091 (2011), *and* 131 S. Ct. 2143 (2011) (dismissing Pedreira's discrimination claim against a former employer when the employer discovered her lesbian lifestyle, which was contrary to its employment policy as a religious organization).

² In all good "debates," there are many points on which the "debaters" agree. For instance, this author agrees with Mr. Caster that the church and its affiliated organizations do much good in providing social services such as food pantries, shelter, and medical care for the poor. Caster, *supra* note 1, at 410. This author also generally agrees with the short history provided by Mr. Caster with respect to Sections 501(c) and 107 of the Internal Revenue Code. *See id.* at 408–10. We also generally agree that absent coverage for sexual orientation in Title VII of the Civil Rights Act (for which there is none), or in state or local laws (which are growing in number), the general "employment at will" doctrine allows employers to fire, and employees to resign, for any reason. *Id.* at 406. Finally, we agree that "only recently has protection for the LGBT community evolved." *Id.* at 407. This point of agreement in particular has huge implications as noted in Part I of this Article.

³ *See id.* at 411–14.

⁴ *See id.* at 414–20.

⁵ *See id.* at 420–26.

⁶ Although Mr. Caster titles his fifth section as a comparative view of how other nations handle conflicts between equality and religious liberty, his primary focus is on other nations' protection of LGBT employment rights. For instance, he notes the number of nations that prohibit employment discrimination against LGBTs (54 according to his source, but does that mean that the remaining 139 members of the United Nations do not?). *Id.* at 426. He also notes that our neighbor to the north has taken similar and additional action to protect LGBT rights, and that England has adopted the European Convention of Human Rights, Article 8(2) of which was used to strike down Northern Ireland's law against sodomy. *See id.* at 427–30. He concludes that the United States should "[adopt] the human rights norms followed in much of the rest of the world." *Id.* at 431. With respect to relying on foreign law, this author prefers the approach of Justice Scalia in his dissent in *Roper v. Simmons*, where he observed that those Justices relying on foreign law to establish a minimum age of eighteen to invoke the death penalty had failed to follow foreign law in establishing the right to an abortion on demand up to the point of viability (making the United States one of only six countries to do so), and had also failed to follow foreign precedent regarding public funding of religious schools (Netherlands, Germany, and Australia allow direct government funding of religious schools). 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting).

I. RELIGIOUS ORGANIZATIONS THAT DISCRIMINATE ON THE BASIS OF
SEXUAL ORIENTATION SHOULD NOT LOSE THEIR TAX-EXEMPT STATUS.

Relying on *Bob Jones University v. United States*,⁷ Mr. Caster argues that nonprofit organizations discriminating against LGBT employees should lose their tax-exempt status.⁸ Yet, after reviewing the context of the *Bob Jones* case and its language severely limiting the propriety of tax-exempt status revocation,⁹ it is little wonder why neither the Internal Revenue Service (“IRS”) nor the Supreme Court has extended the sanction beyond private educational institutions that discriminate on the basis of race.

The balance of this Part briefly reviews the context and language of the *Bob Jones* decision. It then considers other areas of discrimination (gender, age, and disability) that Congress has prohibited for nearly fifty years but that neither the Court nor the IRS has declared a violation of “national fundamental public policy” for purposes of triggering revocation of tax-exempt status. This Part concludes that it will be decades, if ever, before the prohibition of sexual-orientation discrimination will constitute “national fundamental public policy” for revoking the tax-exempt status of those religious institutions that follow orthodox Christian principles with respect to sexual morality.

A. *Bob Jones Must Be Applied Very Narrowly in Light of the Unique Treatment Afforded Discrimination Against African Americans in Education by All Three Branches of Government over Three Decades.*

Given the space limitations of this response, a full recitation of the circumstances leading up to the extraordinary remedy in *Bob Jones University v. United States* is beyond the scope of this Article. Such an examination would reveal that after the seminal case of *Brown v. Board of Education*,¹⁰ the Court’s authority in ordering racial desegregation of public education was repeatedly challenged.¹¹ Confrontations in Little Rock, Arkansas were followed by closing public schools in the South to prevent integration, leasing and selling public school buildings to newly created private schools, inducing public school teachers to leave their

⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

⁸ Caster, *supra* note 1, at 403–04, 423–24.

⁹ Mr. Caster provides a glimpse of the extraordinary circumstances necessary for revoking the tax-exempt status of charitable institutions when he notes that this sanction is limited, according to the Court, to where there is “no doubt that the activity involved is contrary to a *fundamental public policy*.” *Id.* at 424 (emphasis added) (quoting *Bob Jones*, 461 U.S. at 592).

¹⁰ 347 U.S. 483 (1954).

¹¹ For a history of the resistance to *Brown* in the South, see Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1436–40 (1973).

schools and teach in private schools, and adopting “freedom of choice” plans under which parents could choose which school in the district their children should attend (not surprisingly, few parents chose to send their children to the school predominated by the other race).¹² As a result of these and other efforts, Southern public schools remained segregated for a decade after *Brown*,¹³ leading to more vigorous Court action.¹⁴

Improvement¹⁵ was achieved not only through the efforts of the judiciary,¹⁶ the executive branch,¹⁷ and Congress,¹⁸ but also, ironically, through opponents of school desegregation who left the Southern public schools en masse for private schools.¹⁹ Many of these schools were

¹² *Id.*

¹³ See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9–10 (1994) (noting that the 1964 Civil Rights Act, passed ten years after *Brown*, was the more significant motivator for schools to desegregate).

¹⁴ Throughout this period, the Supreme Court was relentless in achieving and improving racial balance in public schools. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–41 (1968) (holding that school choice plans are unconstitutional if they prolong segregation and, most importantly, confirming that school boards have an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch” (emphasis added)); *Rogers v. Paul*, 382 U.S. 198, 199 (1965) (holding that assigning African American students to a “Negro high school” on the basis of their race is unconstitutional); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 231 (1964) (holding that closing public schools to avoid integration is unconstitutional); *Goss v. Bd. of Educ.*, 373 U.S. 683, 686–88 (1963) (holding that permitting students to transfer after desegregation is unconstitutional if it perpetuates school segregation). The vigor of the Court’s effort to achieve racial integration in public education reached its zenith in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). In *Swann*, the Court declared that federal district courts possessed broad authority to fashion remedies in desegregation cases, including altering attendance districts for schools and ordering busing where needed. *Id.* at 30–31.

¹⁵ Racial balance in the South was measurably advanced by 1973, when ninety-one percent of Southern schools were desegregated. Hafter & Hoffman, *supra* note 11, at 1436.

¹⁶ See discussion *supra* note 14.

¹⁷ In the 1960s, the executive branch issued the following orders to combat racial discrimination: Exec. Order No. 11,063, 3 C.F.R. 652 (1959–1963), *reprinted in* 42 U.S.C. § 1982 (2006) (instituting a policy of equal opportunity in federal housing); Exec. Order No. 11,197, 3 C.F.R. 278 (1964–1965) (establishing the President’s Council on Equal Opportunity); and Exec. Order No. 11,478, 3 C.F.R. 133 (1969), *reprinted as amended in* 42 U.S.C. § 2000e (2006) (instituting a policy of equal employment opportunity in the federal government).

¹⁸ Perhaps the greatest influence for desegregation was Congress. In 1964, Congress enacted the Civil Rights Act, Title VI of which prohibited racial discrimination in schools receiving federal funds. Civil Rights Act of 1964, § 601, Pub. L. No. 88-352, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d (2006)). This provision became increasingly important to public schools as federal funding mushroomed, starting with the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

¹⁹ Authors who chronicled the “white flight” from Southern public schools to private schools noted that the “flight” “began when unitary school systems became required under *Green*’s affirmative duty to desegregate.” Hafter & Hoffman, *supra* note 11, at 1441. In the

affiliated with Protestant churches, thereby obtaining use of tax-exempt church buildings.²⁰ They also individually benefited from state and federal tax exemptions,²¹ which the IRS prior to 1970 freely granted to schools that discriminated in admissions on the basis of race.²²

With this background, the Supreme Court granted certiorari to consider whether nonprofit private schools that discriminate on the basis of race should be tax-exempt.²³ Given the fact that one of the schools in the *Bob Jones* case had maintained a racially discriminatory admissions policy from its incorporation in 1963,²⁴ the outcome of the issue was hardly in doubt. Thirty years of judicial struggle dictated a result in which racial desegregation in education would be, in the eyes of the majority of the Supreme Court, a compelling state interest and thereby pass the strict scrutiny test required for the deprivation of religious free exercise.²⁵

The Court's language exhibited the extraordinarily limited nature of the sanction it employed: Nonprofit organizations otherwise entitled to tax-exempt status will lose their privileged status "only where there can be *no doubt* that the activity involved is contrary to a *fundamental* public policy."²⁶ Regarding racial discrimination in education, Chief Justice Burger wrote, "[T]here can no longer be *any doubt* that racial

mid-1960s before *Green*, there were roughly 25,000 students in these new private schools. This number grew exponentially to 535,000 by 1972. *Id.* The same study noted, "While direct and indirect state assistance to [private] schools was significant in facilitating their formation and maintenance, the central reason for their growth was not the availability of state support but rather the determination of white parents to avoid desegregation at any cost." *Id.*

²⁰ *Id.* at 1447.

²¹ *See id.* at 1445–46.

²² *Bob Jones Univ. v. United States*, 461 U.S. 574, 577–78 (1983). In 1970, a federal district court preliminarily enjoined the IRS from granting tax-exempt status to Mississippi private schools that discriminated with respect to race in admissions. *Id.* at 578 (citing *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom.* Cannon v. Green, 398 U.S. 956 (1970)). Subsequently, the IRS determined that it could "no longer legally justify allowing tax-exempt status . . . to private schools which practice racial discrimination," or "treat gifts to such schools as charitable deductions for income tax purposes." *Id.* (quoting IRS News Release (July 10, 1970)). The IRS then formally revised its policy on tax exemption for racially discriminatory schools in Revenue Ruling 71-447, in which the IRS stated, in part, that based on the "national policy to discourage racial discrimination in education," the IRS would not consider a private school "charitable" within the meaning of Sections 501(c)(3) and 170 of the Internal Revenue Code. *Id.* at 579 (citing Rev. Rul. 71-447, 1971-2 C.B. 230).

²³ *Id.* at 577.

²⁴ *Id.* at 583.

²⁵ *Id.* at 604.

²⁶ *Id.* at 592 (emphasis added); *see also id.* at 598 ("We emphasize . . . that these sensitive determinations [regarding withdrawal of recognition of tax exempt status] should be made *only* where there is *no doubt* that the organization's activities violate *fundamental public policy*." (emphasis added)).

discrimination in education violates *deeply and widely accepted* views of *elementary* justice.”²⁷ The Court determined that “[a]n unbroken line of cases following *Brown v. Board of Education* establishe[d] *beyond doubt* . . . that racial discrimination in education violates *a most fundamental national* public policy,”²⁸ a position shared by both Congress and the executive branch.²⁹ From this language, it is clear that a nonprofit organization that otherwise meets the criteria for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code can lose its tax-exempt status if it adopts and follows an otherwise legal policy,³⁰ which, without doubt, violates fundamental national public policy as repeatedly demonstrated over decades by the executive branch, Congress, and the judiciary.³¹

As explained in further detail below, the formidability of these criteria are best evidenced by the fact that neither the IRS nor the courts have ever revoked the tax exemption of nonprofit organizations which discriminate on the basis of gender, age, or disability—all of which are protected under Title VII of the Civil Rights Act of 1964,³² the Age Discrimination in Employment Act of 1967,³³ or the Americans with Disabilities Act of 1990.³⁴

²⁷ *Id.* at 592 (emphasis added).

²⁸ *Id.* at 593 (emphasis added).

²⁹ *Id.* at 594–95 (“Congress, in Titles IV and VI of the Civil Rights Act of 1964 . . . clearly expressed its agreement that racial discrimination in education violates a fundamental public policy. . . . The Executive Branch has consistently placed its support behind eradication of racial discrimination.”). The Court went on to conclude,

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

Id. at 598.

³⁰ The IRS can also refuse to grant tax-exempt status, or can revoke it, if the mission or actions of a nonprofit organization are illegal. *See Church of Scientology v. Comm’r*, 83 T.C. 381, 443 (1984), *aff’d*, 823 F.2d 1310 (9th Cir. 1987).

³¹ *Bob Jones*, 461 U.S. at 593 (“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. An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court’s view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.” (emphasis added)).

³² Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

³³ Age Discrimination in Employment Act of 1967, § 4(a), Pub. L. No. 90-202, 81 Stat. 602, 603 (codified at 29 U.S.C. § 623(a) (2006)).

³⁴ Americans with Disabilities Act of 1990, § 102(a), Pub. L. No. 101-336, 104 Stat. 327, 331–32 (codified as amended at 42 U.S.C. § 12112(a) (2006 & Supp. III 2009)).

B. Prohibiting Gender Discrimination Is Not a “Fundamental Public Policy” That Triggers Revocation of Tax-Exempt Status.

If there is any subgroup of the population that has suffered discrimination somewhat comparably to African Americans, it is women.³⁵ In fact, “although blacks were guaranteed the right to vote in 1870,” women were forced to wait until 1920, when the Nineteenth Amendment passed.³⁶

Using the tri-branch analytical approach followed by the Court in *Bob Jones*, the federal branch that led the movement against gender discrimination was Congress, which passed the Equal Pay Act in 1963 requiring that women receive equal pay for equal work in the workforce.³⁷ A year later, Congress enacted Title VII of the Civil Rights Act of 1964, which, of course, prohibits discrimination on the basis of sex in employment.³⁸ In 1978, Congress enacted the Pregnancy Discrimination Act, which amended Title VII to prohibit discrimination based on childbirth, pregnancy, or similar medical conditions.³⁹ Finally, in 1993, Congress added the Family and Medical Leave Act, which relieved females of the burden of taking time off work for family needs.⁴⁰

With respect to education specifically, Congress addressed gender discrimination by enacting Title IX of the Education Amendments of 1972, which required that no person be excluded on the basis of sex from participation in educational programs or activities receiving federal financial assistance.⁴¹ When the Supreme Court in *Grove City College v.*

³⁵ As noted by Justice Brennan in *Frontiero v. Richardson*,

[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

411 U.S. 677, 685 (1973).

³⁶ *Id.*

³⁷ Equal Pay Act of 1963, § 3, Pub. L. No. 88-38, 77 Stat. 56, 56–57 (codified at 29 U.S.C. § 206(d)(1) (2006)).

³⁸ Civil Rights Act of 1964, § 703(a), Pub. L. No. 88-352, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

³⁹ Pregnancy Discrimination Act of 1978, § 1, Pub. L. No. 95-555, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2006)).

⁴⁰ Family and Medical Leave Act of 1993, § 102(a), Pub. L. No. 103-3, 107 Stat. 6, 9 (codified at 29 U.S.C. § 2612(a) (2006)); *see also* Nevada Dep’t of Human Servs. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding the constitutionality of the Family and Medical Leave Act).

⁴¹ Education Amendments of 1972, § 901(a), Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. § 1681(a) (2006)). Please note, however, in this regard that the exceptions to Title IX include single-gender institutions; educational institutions controlled by a religious organization, if the provisions in Title IX are inconsistent with the

Bell narrowed the applicability of Title IX to those school programs funded specifically by the federal government,⁴² Congress overrode a presidential veto to pass the Civil Rights Restoration Act of 1987, which broadened the scope of Title IX.⁴³

Regarding the judicial branch, someone arguing that prohibiting gender discrimination is a “fundamental national public policy” would undoubtedly start with *Roberts v. United States Jaycees*.⁴⁴ In that case, the Court overrode the non-expressive⁴⁵ associational freedom of an all-male members club⁴⁶ by declaring that it “plainly serves compelling state interests of the highest order” to prohibit gender discrimination in private clubs where business contacts are made and deals are done.⁴⁷ Aside from private clubs, however, the Court has at times upheld laws that discriminate on the basis of gender. For instance, the Court upheld a federal law that requires men, but not women, to register for the draft.⁴⁸ Similarly, the Court upheld a statutory rape law that punishes a man for having sex with a woman under eighteen, but not punishing a woman for having sex with a man younger than eighteen.⁴⁹

Fittingly for the *Bob Jones* precedent, some nonprofit, tax-exempt colleges continue to admit exclusively either women or men, and yet their tax-exempt status remains secure. The fact is that the Court treats cases involving race discrimination differently than gender

institution’s religious tenets; educational institutions training individuals for military services; and certain fraternities or sororities. *Id.* § 1681(a)(3)–(6).

⁴² 465 U.S. 555, 572–74 (1984).

⁴³ Civil Rights Restoration Act of 1987, § 3(a), Pub. L. No. 100-259, 102 Stat. 28, 28–29 (codified as amended at 20 U.S.C. § 1687 (2006)); 134 CONG. REC. 4633, 4699, 4716, 4791 (1988).

⁴⁴ 468 U.S. 609 (1984).

⁴⁵ This factor distinguishes *Jaycees* from *Boy Scouts of America v. Dale*, 530 U.S. 640, 661 (2000) (holding that Congress cannot compel an organization to accept members when doing so “would derogate from the organization’s expressive message”); *see also Jaycees*, 468 U.S. at 638 (O’Connor, J., concurring) (recognizing that expressive associational freedom is entitled to greater protection than non-expressive associational freedom).

⁴⁶ *Jaycees*, 468 U.S. at 613 (majority opinion).

⁴⁷ *Id.* at 623–26. In other cases, the Court had already upheld local and state laws prohibiting gender discrimination in private clubs that were considered places of public accommodation. *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 4–5, 8 (1988); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 539, 549 (1987).

⁴⁸ *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (“[W]e conclude that Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act.”).

⁴⁹ *Michael M. v. Superior Court*, 450 U.S. 464, 466, 475–76 (1981). California’s “statutory rape” law upheld in *Michael M.* was later amended to prohibit sexual intercourse with any minor, whether male or female. CAL. PENAL CODE § 261.5 (West 2008 & Supp. 2012).

discrimination.⁵⁰ Even Congress has not consistently barred all gender discrimination when it had an opportunity to do so.⁵¹ Therefore, even with a long history of prohibiting gender discrimination, neither the IRS nor the courts have found the eradication of gender discrimination to be, *without doubt*, a *fundamental national policy* as repeatedly demonstrated over decades by the executive branch, Congress, and the judiciary.

C. Prohibiting Age Discrimination Is Not a “Fundamental Public Policy” That Triggers Revocation of Tax-Exempt Status.

Elder Americans have not endured the same discriminatory treatment as African Americans and women in terms of voting, owning property, jury service, and other incidents of civil life in America. Elder Americans have, however, suffered discrimination in employment, which Congress addressed in the Age Discrimination in Employment Act of 1967 and its subsequent amendments.⁵² Congress has also addressed inequitable treatment of federal assistance to the elderly.⁵³ Finally, Congress has passed numerous other laws benefiting the elderly, but these have not been in the nature of prohibiting discrimination.⁵⁴

In spite of this attention by Congress, it is again doubtful that the prohibition of age discrimination is a “fundamental national public policy” because of the lack of judicial support. In *Massachusetts Board of Retirement v. Murgia*, an otherwise fit and healthy policeman challenged, on the basis of equal protection, a Massachusetts statute mandating police retirement at age fifty.⁵⁵ The plaintiff sought, among other things, a declaration by the Court that the Massachusetts law created a suspect class, thereby triggering strict judicial scrutiny of the statute.⁵⁶ The Court declined this request and chose instead the much

⁵⁰ See generally *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that classifications based on race, national origin, or affecting fundamental rights are given the most exacting scrutiny, while discriminatory classifications based on sex or illegitimacy are subject to less scrutiny); see also *United States v. Virginia*, 518 U.S. 515, 532 n.6 (noting that the Court reserves “the most stringent judicial scrutiny” for race and national origin, rather than sex).

⁵¹ Congress permitted gender as a bona fide occupational qualifications, along with religion and national origin. 42 U.S.C. § 2000e-2(e) (2006).

⁵² Age Discrimination in Employment Act of 1967, § 4, Pub. L. No. 90-202, 81 Stat. 602, 603–04 (codified as amended at 29 U.S.C. § 623 (2006 & Supp. III 2009)).

⁵³ See Age Discrimination Act of 1975, § 303, Pub. L. No. 94-135, 89 Stat. 728 (codified at 42 U.S.C. § 6102 (2006)).

⁵⁴ See *Historical Evolution of Programs for Older Americans*, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. ON AGING (Nov. 15, 2011, 7:15 AM), http://www.aoa.gov/AoA_programs/OAA/resources/History.aspx.

⁵⁵ 427 U.S. 307, 308–11 (1976).

⁵⁶ *Id.* at 309–10.

less rigorous rational basis standard because elderly Americans have not “experienced a ‘history of purposeful unequal treatment’ [like African Americans] or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”⁵⁷ The Court further stated that age is not immutable like race, since “even old age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process.’ Instead, it marks a stage that each of us will reach if we live out our normal span.”⁵⁸

*D. Prohibiting Discrimination on the Basis of Disability Is Not a
“Fundamental Public Policy” That Triggers Revocation of Tax-Exempt
Status.*

Other than perhaps race, there is no clearer example of congressional intent to eliminate discrimination than in the area of disability. Efforts began in 1948 when Congress passed a law prohibiting the U.S. Civil Service from employment discrimination based on physical handicap.⁵⁹ From that time forward, Congress has been consistently proactive in protecting the rights of the disabled.⁶⁰ Laws enacted by Congress to end disability discrimination include the Architectural Barriers Act,⁶¹ the Rehabilitation Act of 1973,⁶² the Education of the Handicapped Act—now known as the Individuals with Disabilities Education Act (“IDEA”),⁶³ the Developmental Disabilities Assistance and

⁵⁷ *Id.* at 312–14.

⁵⁸ *Id.* at 313–14 (citation omitted); *see also* *Vance v. Bradley*, 440 U.S. 93, 95–98, 111–12 (1979) (using, once again, the rational basis test to uphold a federal law that mandated retirement at age sixty for workers employed in the Foreign Service).

⁵⁹ Act of June 10, 1948, ch. 434, 62 Stat. 351 (current version at 5 U.S.C. § 7203 (2006)).

⁶⁰ The information in this Section draws heavily upon the following sources: U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, A GUIDE TO DISABILITY RIGHTS LAWS (2005) and Michael Hatfield et al., Bob Jones University: *Defining Violations of Fundamental Public Policy* 52–62, in 6 TOPICS IN PHILANTHROPY (2000).

⁶¹ Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4156 (2006)) (mandating that all federal buildings and all those financed by the federal government provide access to the physically handicapped).

⁶² Rehabilitation Act of 1973, § 501, Pub. L. No. 93-112, 87 Stat. 355, 390–91 (codified as amended at 29 U.S.C. § 791 (2006)) (prohibiting federally funded programs or federal agencies from discriminating against the handicapped, including in employment issues such as hiring, placement, and promotion).

⁶³ The law, originally passed in 1970, the Education of the Handicapped Act, § 601, Pub. L. No. 91-230, 84 Stat. 121, 175 (1970) was strengthened in 1975 and renamed the Education for All Handicapped Children Act (“EAHCA”), Pub. L. No. 94-142, 89 Stat. 773 (1975). After further revisions in 1991, it is now known as the Individuals with Disabilities Education Act (“IDEA”), Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1482 (2006 & Supp. IV 2010)); *see also* 137 CONG. REC. 22,630–31 (1991).

Bill of Rights Act,⁶⁴ the 1984 Voting Accessibility for the Elderly and Handicapped Act,⁶⁵ the Air Carriers Access Act of 1986,⁶⁶ the 1988 amendment to the Fair Housing Act (amending Title VIII of the 1968 Civil Rights Act),⁶⁷ the Americans with Disabilities Act of 1990,⁶⁸ and the Telecommunications Act of 1996.⁶⁹

Yet, as in the case of age discrimination, the lack of judicial support casts doubt on the proposition that prohibiting disability discrimination is a “fundamental national public policy.” In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court determined that claims for disability discrimination are subject only to the lowest level of judicial review: rational basis scrutiny.⁷⁰ In part, the Court founded its rationale on the fact that law-making bodies had already taken proper steps to protect the rights of the disabled.⁷¹ The Court reaffirmed in *Heller v. Doe*⁷² and *Board of Trustees v. Garrett*⁷³ that only rational basis review is available for disability discrimination claims.

⁶⁴ Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 95-602, 92 Stat. 3003 (1978) (codified as amended at 42 U.S.C. §§ 6000–6083 (1994)) (repealed 2000). Before being repealed in 2000, Congress had expanded this code section in 1986 to include the mentally ill via the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478.

⁶⁵ Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. §§ 1973ee to ee-6 (2006)).

⁶⁶ Air Carriers Access Act of 1986, § 2(a), Pub. L. No. 99-435, 100 Stat. 1080 (codified as amended at 49 U.S.C. § 41705(a) (2006)) (prohibiting discrimination against individuals with a physical or mental impairment in providing air transportation).

⁶⁷ Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3602, 3604–3606 (2006)).

⁶⁸ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)); see also U.S. DEPT OF JUSTICE, *supra* note 60, at 1 (“The ADA prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.”).

⁶⁹ Telecommunications Act of 1996, §§ 251(a)(2), 255, Pub. L. No. 104-104, 110 Stat. 56, 61–62, 75–76 (codified at 47 U.S.C. §§ 251(a)(2), 255 (2006)) (requiring manufacturers of telecommunications devices and providers to design equipment and services to accommodate people with disabilities).

⁷⁰ 473 U.S. 432, 441–42 (1985).

⁷¹ *Id.* at 443–45.

⁷² 509 U.S. 312, 321 (1993).

⁷³ 531 U.S. 356, 367–68 (2001).

E. Prohibiting Discrimination on the Basis of Sexual Orientation Is Not a "Fundamental Public Policy" That Triggers Revocation of Tax-Exempt Status.

1. Supreme Court

In *Bob Jones*, the Supreme Court was guided by “[a]n unbroken line of cases following *Brown v. Board of Education* [that] establishe[d] beyond doubt [the] Court’s view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.”⁷⁴ This unbroken line consisted of at least eight cases spanning from the 1954 *Brown* decision to the 1983 *Bob Jones* decision.⁷⁵

Any search for a similar “unbroken line of cases” prohibiting sexual-orientation discrimination must come after the 1986 decision of *Bowers v. Hardwick*, where the Court, in a five-four decision, upheld the constitutionality of a Georgia anti-sodomy statute.⁷⁶ In *Bowers*, the issue presented was “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,”⁷⁷ a right arguably within the penumbra of the right to privacy line of cases.⁷⁸ The Court determined that there was no such right, declaring that consensual sodomy was neither “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed,”⁷⁹ nor “deeply rooted in this Nation’s history and tradition.”⁸⁰ In fact, according to the Court, deeply rooted in the nation’s history and tradition was the proscription of sodomy, which was illegal at common law and in either all or most of the states when they ratified the Bill of Rights and the

⁷⁴ *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

⁷⁵ *Id.* at 593–94. As part of this “unbroken line of cases,” the Court in *Bob Jones* cited *Runyon v. McCrary*, 427 U.S. 160 (1976); *Norwood v. Harrison*, 413 U.S. 455 (1973); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964); and *Cooper v. Aaron*, 358 U.S. 1 (1958). Other cases establishing this view include *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968); *Rogers v. Paul*, 382 U.S. 198 (1965); and *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963).

⁷⁶ 478 U.S. 186, 187–89 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁷⁷ *Id.* at 190.

⁷⁸ *Id.* at 190–92.

⁷⁹ *Id.* at 191–92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

⁸⁰ *Id.* at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)) (internal quotation marks omitted).

Fourteenth Amendment.⁸¹ Finally, the Court rejected the argument that a sexual moral code could not serve as the state's reason for a law.⁸²

Certainly an important case for the advancement of LGBT interests was *Romer v. Evans*, which addressed a challenge to the constitutionality of a Colorado constitutional amendment that prohibited all state and local government action designed to protect homosexuals.⁸³ Plaintiffs challenged the law on equal protection grounds, claiming that the amendment should be subject to strict scrutiny because it infringed on the right of gays and lesbians to participate in the political process.⁸⁴ The Court agreed that the amendment was unconstitutional but refused to find that homosexuality or homosexual behavior were fundamental rights.⁸⁵ Instead of finding homosexuality to be a protected class requiring strict judicial scrutiny, the Court applied the rational basis test, concluding that the constitutional amendment lacked a rational basis since there was no legitimate reason to deny LGBT persons the use of the political process available to everyone else.⁸⁶

The Court in *Romer* did not, however, initiate an "unbroken line of cases" which, over twenty-five years, would help establish a fundamental national public policy prohibiting sexual-orientation discrimination. In fact, the advancement of LGBT interests suffered two setbacks after *Romer* when the Supreme Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*⁸⁷ and *Boy Scouts of America v. Dale*⁸⁸ ruled that expressive freedom of association under the First Amendment protected the right of organizations to exclude LGBT persons *even when* this exclusion violated a state anti-discrimination statute.

The only candidate for initiating the potential quarter-century unbroken line of cases necessary for establishing a national fundamental public policy may be *Lawrence v. Texas*, which overruled *Bowers v. Hardwick*.⁸⁹ The *Lawrence* Court's five-Justice majority held that a state cannot prohibit consensual sodomy if done in the privacy of a bedroom.⁹⁰

⁸¹ *Id.* at 192–93. Much of the historical record upon which Justice White relied in *Bowers* was subsequently refuted by Justice Kennedy in *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

⁸² *Bowers*, 478 U.S. at 196 ("The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.")

⁸³ 517 U.S. 620, 624–25 (1996).

⁸⁴ *See id.* at 625.

⁸⁵ *Id.* at 625–26, 635–36; *see also id.* at 640 n.1 (Scalia, J., dissenting).

⁸⁶ *Id.* at 635 (majority opinion).

⁸⁷ 515 U.S. 557, 580–81 (1995).

⁸⁸ 530 U.S. 640, 644, 661 (2000).

⁸⁹ 539 U.S. 558, 578 (2003).

⁹⁰ *Id.*

That is, the right to privacy as guaranteed by the Due Process Clause protects the right of same-sex consenting adults to engage in sexual conduct in the privacy of their bedroom without government intervention.

In Justice Kennedy's opinion for the Court, he failed to find that LGBTs are a protected class such that there is a fundamental right to same-sex behavior. In addition, while the Court relied on privacy cases that applied strict scrutiny, it once again applied the rational basis test,⁹¹ this time finding (contrary to *Bowers*) that a traditional sexual moral code is not an adequate reason for an anti-sodomy statute.⁹²

Mr. Caster cites favorably the recent five-four decision in *Christian Legal Society v. Martinez*,⁹³ claiming that this case stands for the proposition that universities can withhold benefits from student organizations that commit sexual-orientation discrimination.⁹⁴ A closer look at the case, however, reveals that this was not the issue addressed by the Court.

The *Martinez* case involved one of the local chapters of the Christian Legal Society ("CLS") on the campus of the University of California, Hastings College of the Law. CLS requires its members and officers to sign a "Statement of Faith" and follow Judeo-Christian moral principles, one of which is to limit sexual activity to marriage between a man and a woman.⁹⁵ CLS interpreted this requirement as excluding from membership any person involved in "unrepentant homosexual conduct."⁹⁶ In the opinion of the Hastings Law School administration, this conflicted with the school's requirement that official student organizations not discriminate on the basis of religion or sexual orientation.⁹⁷ Hastings interpreted its non-discrimination requirement as mandating acceptance by official student organizations of "all

⁹¹ See *id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'"); see also *Williams v. Att'y Gen. of Alabama*, 378 F.3d 1232, 1236 (11th Cir. 2004) (interpreting *Lawrence* as using rational basis review); *Arizona v. Fischer*, 199 P.3d 663, 669 (Ariz. Ct. App. 2008) (noting the application of the rational basis test in *Lawrence*).

⁹² *Lawrence*, 539 U.S. at 577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting) (footnote omitted) (citations omitted)).

⁹³ 130 S. Ct. 2971 (2010). The five-Justice majority decisions in *Lawrence* and *Martinez* are in marked contrast to the near unanimous decisions in the eight Supreme Court cases that constitute the "unbroken line of cases" relied upon in *Bob Jones*. See *supra* notes 74–75 and accompanying text.

⁹⁴ Caster, *supra* note 1, at 403–04, 425–26.

⁹⁵ *Martinez*, 130 S. Ct. at 2980.

⁹⁶ *Id.*

⁹⁷ *Id.* at 2979–80.

comers,” allowing any student to participate regardless of status or beliefs.⁹⁸ Failure to admit “all comers” resulted in the loss of certain benefits, including funding from mandatory student-activity fees.⁹⁹

The issue before the Court, therefore, was whether “a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students.”¹⁰⁰ This issue, involving an “all-comers” policy which the Court found to be reasonable and viewpoint neutral,¹⁰¹ is far different from the issue of whether the state can deny benefits to a religious organization that restricts its membership to heterosexuals.¹⁰²

2. Congress

Unlike in the areas of race, gender, age, and disability discrimination, Congress has done little to advance the LGBT agenda until recently. Whereas for over forty years Congress has prohibited employment discrimination based on race, gender, age, and disability, it has failed to add a prohibition of sexual-orientation discrimination to Title VII.¹⁰³ The Employment Non-Discrimination Act (“ENDA”), which as H.R. 1397¹⁰⁴ and S. 811¹⁰⁵ would add sexual orientation to the list of prohibited employment discrimination, is languishing in Congress again this year just as it has done since 1994.¹⁰⁶

Attorneys Hatfield, Milgram, and Monticciolo report that in the 1990s Congress actually *hindered* LGBT progress. They cite, for example, Congress’s opposition to President Clinton’s desire to end sexual-orientation discrimination in the military, resulting in the “Don’t

⁹⁸ *Id.* at 2979.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2978.

¹⁰¹ *Id.*

¹⁰² CLS, in fact, urged the Court to review the Hastings policy *as written* (prohibiting religious and sexual-orientation discrimination) and not as Hastings interpreted it (the “all-comers” requirement). The Court specifically refused to do so. *Id.* at 2982–84; *see also* Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 795 (9th Cir. 2011) (noting that the Supreme Court in *Martinez* declined to address the constitutionality of membership restrictions based on race, gender, religion, and sexual orientation), *cert. denied*, 80 U.S.L.W. 3381 (U.S. Mar. 19, 2012).

¹⁰³ *See* 42 U.S.C. § 2000e-2 (2006) (failing to make sexual-orientation discrimination an unlawful employment practice).

¹⁰⁴ H.R. 1397, 112th Cong. § 4 (2011).

¹⁰⁵ S. 811, 112th Cong. § 4 (2011).

¹⁰⁶ JODY FEDER & CYNTHIA BROUGH, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2011); *see also* Hatfield et al., *supra* note 60, at 84 n.389.

Ask, Don't Tell" compromise.¹⁰⁷ Using its appropriation power, Congress also prevented the District of Columbia from enforcing its Domestic Partners Act, which would have extended health care and other benefits to unmarried adults living together.¹⁰⁸ Finally, in reaction to a District of Columbia court ruling that forced Georgetown University to accept a homosexual student group, Congress enacted the Nation's Capital Religious Liberty and Academic Freedom Act that permitted "religiously affiliated educational institutions to deny benefits and endorsement based on sexual preference."¹⁰⁹

The LGBT movement made minor progress in 1994 when Congress designated "hate crimes" to include crimes against persons because of their sexual orientation for purposes of the Violent Crime Control and Law Enforcement Act of 1994.¹¹⁰ The movement suffered a major blow, though, when Congress in 1996 passed, and President Clinton signed, the Defense of Marriage Act ("DOMA").¹¹¹ DOMA has two basic provisions: First, it relaxed the Full Faith and Credit Clause so that states are not required to give effect to same-sex marriages;¹¹² and second, it limited the terms "marriage" and "spouse" for purposes of federal law to a legal union between one man and one woman as husband and wife.¹¹³

During the George W. Bush administration, Congress did little to aid or hinder LGBT rights. Congress failed to pass ENDA, as noted above,¹¹⁴ and it failed to enact the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act.¹¹⁵ It also failed to repeal "Don't Ask, Don't Tell"¹¹⁶ and DOMA.¹¹⁷ On the other hand, Congress

¹⁰⁷ Hatfield et al., *supra* note 60, at 85.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 85–86.

¹¹⁰ *Id.* at 86.

¹¹¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)). For a comprehensive review of the law and its history, see Joshua Baker & William C. Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1 (2011).

¹¹² 28 U.S.C. § 1738C (2006).

¹¹³ 1 U.S.C. § 7 (2006).

¹¹⁴ See *supra* note 106 and accompanying text.

¹¹⁵ This Act would have authorized the Justice Department to investigate and prosecute violent crimes where the victims were selected because of their perceived race, color, religion, national origin, disability, gender, sexual orientation or gender identity. See S. 1105, 110th Cong. § 4(a) (2007); H.R. 1592, 110th Cong. § 4(a) (2007); see also Carter T. Coker, Note, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271, 282 (2011) (noting the defeat of the legislation in 2007 due to President Bush's threatened veto).

¹¹⁶ See H.R. 1246, 110th Cong. § 3 (2007).

¹¹⁷ See S. 598, *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing on S. 598 Before the S. Comm. on the Judiciary*, 112th Cong. 1

also failed to pass the Federal Marriage Amendment, which would have defined marriage as the union of a man and a woman, and would have prohibited the courts from ruling otherwise.¹¹⁸

During the first two years of the Obama administration when the Democrats controlled both houses of Congress, bills supported by LGBTs advanced. Congress passed the Don't Ask, Don't Tell Repeal Act of 2010¹¹⁹ and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.¹²⁰ The LGBT legislative agenda remains full,¹²¹ but its progress during the remainder of the 112th Congress is doubtful given the current composition of the House of Representatives.

3. Executive Branch

In reviewing executive branch actions for evidence of a fundamental national policy against race discrimination, the Court in *Bob Jones* looked almost exclusively at executive orders.¹²² The Chief Justice cited two executive orders ("EOs") by Presidents Truman and Nixon, and one each by Presidents Eisenhower, Kennedy, Johnson, and Carter as evidence of the executive branch "consistently plac[ing] its support behind eradication of racial discrimination."¹²³ This consistency is missing with respect to EOs protecting LGBT rights.

Presidents prior to Bill Clinton generally did not advance LGBT issues. During President Clinton's term, he signed three EOs pertaining to LGBTs, the first being in 1995, which stated that agencies determining eligibility for access to confidential information must not make any inferences based on a person's sexual orientation.¹²⁴ In 1998, President Clinton signed a second EO, this time prohibiting discrimination in federal employment on the basis of sexual

(2011) (statement of Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary) (noting that the 2011 hearing was the "first ever Congressional hearing examining a bill to repeal . . . DOMA").

¹¹⁸ S.J. Res. 40, 108th Cong. (2004). Although a majority of the House voted in favor of the Federal Marriage Amendment, it lacked the two-thirds approval required for a constitutional amendment. Likewise, the Senate had insufficient votes to invoke cloture. See Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 14, 2004, at A1.

¹¹⁹ Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

¹²⁰ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

¹²¹ See *Federal Legislation*, HUMAN RIGHTS CAMPAIGN, www.hrc.org/issues/pages/federal-legislation (last visited Apr. 6, 2012).

¹²² See *Bob Jones Univ. v. United States*, 461 U.S. 574, 593-95 (1983).

¹²³ *Id.* at 594-95.

¹²⁴ Exec. Order No. 12,968, 3 C.F.R. 391 (1995); see also Hatfield et al., *supra* note 60 at 88.

orientation.¹²⁵ Two years later, he signed a third EO to “achieve equal opportunity in Federally conducted education and training programs and activities,” specifically including sexual orientation as one of the categories covered by this non-discrimination policy.¹²⁶ President Clinton signed no additional EOs regarding LGBTs, and neither did President Bush nor has President Obama.

As indicated above, soon after his inauguration, President Clinton promised to end sexual-orientation discrimination in the military, but congressional opposition resulted in the compromise “Don’t Ask, Don’t Tell” policy.¹²⁷ President Clinton also started policy changes to end sexual-orientation discrimination in the executive branch.¹²⁸ Other actions taken by President Clinton on behalf of LGBT persons include the following: (1) supporting ENDA;¹²⁹ (2) creating advisory posts on HIV/AIDS;¹³⁰ (3) appointing LGBTs to federal posts;¹³¹ (4) and declaring by presidential proclamation the first Gay and Lesbian Pride Month.¹³²

President George W. Bush did not dismantle the LGBT changes that President Clinton put in place.¹³³ But generally, he worked against the LGBT agenda by the following actions: (1) supporting the Federal Marriage Amendment;¹³⁴ (2) opposing the *Goodridge* decision by which the Massachusetts Supreme Judicial Council legalized same-sex marriages in the state;¹³⁵ (3) opposing the extension of hate crime laws

¹²⁵ Exec. Order No. 13,087, 3 C.F.R. 191 (1998).

¹²⁶ Exec. Order No. 13,160, 3 C.F.R. 279 (2000), *reprinted in* 42 U.S.C. § 2000d (2006).

¹²⁷ See *supra* note 107 and accompanying text; see also Mark Thompson, *Don't Ask, Don't Tell Turns 15*, TIME (Jan. 28, 2008), <http://www.time.com/time/nation/article/0,8599,1707545,00.html>.

¹²⁸ See Hatfield et al., *supra* note 60, at 87 & n.400.

¹²⁹ *Id.* at 88.

¹³⁰ *Id.* at 89.

¹³¹ *Id.*

¹³² Proclamation No. 7316, 3 C.F.R. 92 (2000).

¹³³ President Bush kept the Office of National AIDS Policy started by President Clinton. See DAVID FRUM, *THE RIGHT MAN: THE SURPRISE PRESIDENCY OF GEORGE W. BUSH* 103 (2003); Mike Allen, *Bush Acts to Quell Flap on AIDS, Race: White House Says Chief of Staff Erred on Status of Two Offices*, WASH. POST, Feb. 8, 2001, at A1. He also did not revoke the EO adding sexual-orientation discrimination to the list of prohibited federal employment acts. See Sheryl Gay Stolberg, *Vocal Gay Republicans Upsetting Conservatives*, N.Y. TIMES, June 1, 2003, at 26. Finally, he did not repeal “spousal” benefits that President Clinton had started for LGBT federal employees. See FRUM, *supra*, at 104.

¹³⁴ Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 113, 117 (Feb. 2, 2005) (“Because marriage is a sacred institution and the foundation of society, it should not be redefined by activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage.”).

¹³⁵ After *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003) was decided, President Bush immediately announced his opposition to its outcome.

and threatening a veto if passed by Congress;¹³⁶ and (4) advocating abstinence-only programs which teach that “heterosexual marriage is the expected standard.”¹³⁷

President Obama has been much more receptive to LGBT issues than President Bush. The Human Rights Campaign, a leading advocate of LGBT issues in Washington, has listed seventeen administrative actions initiated by the Obama administration on behalf of the LGBT community.¹³⁸ In addition, President Obama has appointed more than one hundred openly-LGBT persons to administrative positions (some quite prominent).¹³⁹ He also restarted declaring June as LGBT Pride Month,¹⁴⁰ initiated adding the United States to a UN General Assembly statement calling for an end to criminal sanctions for sodomy,¹⁴¹ and held a summit on bullying of LGBT youth at the White House.¹⁴² Perhaps most significantly, he advocated for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and the Don’t Ask, Don’t Tell Repeal Act of 2010 and signed both bills into law.¹⁴³ His administration supported ENDA,¹⁴⁴ the Domestic Partnership Benefits and Obligations Act,¹⁴⁵ and the Respect for Marriage Act, which would

See KARL ROVE, *COURAGE AND CONSEQUENCE: MY LIFE AS A CONSERVATIVE IN THE FIGHT* 374–76 (2010).

¹³⁶ Coker, *supra* note 115, at 282; see also Michael Jones, *The Ten Worst LGBT Moments of George W. Bush’s Presidency*, CHANGE.ORG (Jan. 17, 2009, 10:20 UTC), <http://news.change.org/stories/the-ten-worst-lgbt-moments-of-george-w-bushs-presidency>.

¹³⁷ Jones, *supra* note 136.

¹³⁸ *Obama Administration Policy and Legislative Advancements on Behalf of LGBT Americans*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/obama-administration-policy-and-legislative-advancements-on-behalf-of-lgbt> (last visited Apr. 6, 2012); see also Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (listing the actions taken by the Obama administration on behalf of LGBT issues).

¹³⁹ HUMAN RIGHTS CAMPAIGN, *supra* note 138; see also Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011); Proclamation No. 8387, 3 C.F.R. 81 (2009).

¹⁴⁰ Proclamation No. 8387, 3 C.F.R. 81, 82 (2009); Proclamation No. 8529, 75 Fed. Reg. 32,079 (May 28, 2010); Proclamation No. 8685, 76 Fed. Reg. 32,853 (June 7, 2011).

¹⁴¹ Press Release, U.S. Dep’t of State, UN Statement on “Human Rights, Sexual Orientation, and Gender Identity” (Mar. 18, 2009), <http://www.state.gov/r/pa/prs/ps/2009/03/120509.htm>; Letter Dated Dec. 18, 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations Addressed to the President of the General Assembly, U.N. Doc. A/63/635 (Dec. 22, 2008).

¹⁴² Proclamation No. 8685, 76 Fed. Reg. 32,853 (June 7, 2011).

¹⁴³ See *supra* notes 119–20 and accompanying text.

¹⁴⁴ *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 12 (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission) (testifying on behalf of the Obama Administration in support of ENDA).

¹⁴⁵ Remarks on Signing a Memorandum on Federal Benefits and Non-Discrimination, 2009 DAILY COMP. PRES. DOC. 475 (June 17, 2009).

repeal DOMA.¹⁴⁶ The Obama administration also issued a memorandum directing the Secretary of Health and Human Services to begin rulemaking that requires hospitals receiving Medicare or Medicaid funds to not deny visitation privileges on the grounds of sexual orientation.¹⁴⁷ Finally, the Obama administration's leadership in the Department of Justice has informed Congress that the Department will no longer defend lawsuits challenging DOMA,¹⁴⁸ and the administration has issued a memorandum to department heads on international initiatives to advance the cause of LGBTs.¹⁴⁹

Although the Obama administration may be the *beginning* of a consistent pattern of executive branch actions to counter LGBT discrimination, to date, the executive branch has demonstrated no such consistency. The executive branch's actions over the past twenty-five years do not evidence a commitment to eradicating LGBT discrimination necessary to achieve a "national fundamental public policy," the violation of which would result in revocation of tax-exempt status on "public policy" grounds under *Bob Jones*.¹⁵⁰ Establishing a national fundamental public policy requires the active participation of all three branches of the federal government. Congress must participate through legislation that spans decades. The Supreme Court must participate through an unbroken line of near unanimous cases. Finally, presidents must participate through one or more executive orders spanning decades.

Given the constant political winds blowing through each of the federal government's branches, it is readily understandable why the incredibly high "national fundamental public policy" barrier is so difficult to overcome. To date, the Court has found only one national fundamental public policy interest worthy of revoking tax-exempt status—race discrimination in education.¹⁵¹ Although our nation has prohibited employment discrimination based on gender, religion, age, and disability for almost fifty years, neither the Court nor the IRS has

¹⁴⁶ David Nakamura, *Obama Backs Repeal of Marriage Law*, WASH. POST, July 20, 2011, at A3.

¹⁴⁷ Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies, 2010 DAILY COMP. PRES. DOC. 267 (Apr. 15, 2010).

¹⁴⁸ Letter from Eric H. Holder, Jr., Att'y Gen. of the U.S., to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011); Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

¹⁴⁹ Memorandum on International Initiatives To Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons, 2011 DAILY COMP. PRES. DOC. 933 (Dec. 6, 2011).

¹⁵⁰ *Bob Jones Univ. v. United States*, 461 U.S. 574, 597–98 (1983).

¹⁵¹ See *supra* Part IA–E.1.

ever found discrimination in these areas to be against national fundamental public policy.

4. Conclusion

The nation is currently very uncertain over what protection and benefits, if any, LGBT persons should receive over comparable members of society. This is demonstrated in each branch of government. The “unbroken line” of eight nearly unanimous Supreme Court cases over almost thirty years on the issue of race discrimination in education should be compared to the five-Justice majority opinion in the 2003 *Lawrence v. Texas* decision.¹⁵² The extensive congressional record combatting race discrimination should be compared to the very ambiguous congressional record on LGBT issues.¹⁵³ Finally, the consistent presidential actions (as demonstrated most notably by EOs) in eradicating racial discrimination should be compared to the relative inaction by presidents other than Bill Clinton and Barack Obama on LGBT issues.¹⁵⁴

In summary, prohibiting discrimination on the basis of sexual orientation does not enjoy the same status as prohibiting discrimination on the basis of gender, age, or disability. None of these three latter categories yet enjoy the distinction of a national fundamental public policy. All-male and all-female colleges are not in danger of losing their tax-exempt status, and neither is the Roman Catholic Church with its all-male priesthood. Accordingly, it is extraordinarily remote in the foreseeable future that the IRS or the judiciary would revoke, on the grounds of a national fundamental public policy, the tax-exempt status of those religious institutions that adhere to orthodox Christian beliefs on sexual morality and thereby treat conduct by LGBT employees differently.

II. THE FIRST AMENDMENT AND TWO FEDERAL STATUTES PROTECT THE EMPLOYMENT DECISIONS OF RELIGIOUS INSTITUTIONS.

Mr. Caster in Part III of his article acknowledges the First Amendment rights of religious organizations, but he claims that such rights are limited and should be balanced against the equal protection rights of LGBTs.¹⁵⁵ Since Mr. Caster implicitly recognizes the need for state action when making an equal protection claim, he asserts that tax-exempt status results in religious organizations becoming state actors

¹⁵² See *supra* Part I.E.1.

¹⁵³ See *supra* Parts I.A, I.E.2.

¹⁵⁴ See *supra* note 17 and Part I.E.3.

¹⁵⁵ Caster, *supra* note 1, at 414–15.

for equal protection purposes.¹⁵⁶ This painfully short (at least painful for this constitutional law teacher and enthusiast!) rebuttal in summary form addresses these issues.

A. First Amendment and Equal Protection Defenses for the Employment Decisions of Religious Institutions

The First Amendment's religion clauses protect not only citizens but also religious institutions from government interference.¹⁵⁷ As Mr. Caster observes, the free exercise rights of religious institutions are, however, not without limit.¹⁵⁸ Before 1990, the general rule in free exercise cases was that strict scrutiny applied if the governmental law or benefit *either* intentionally discriminated against religion *or* had a disparate impact on religion, meaning that the impact was disproportionately adverse to members of a religious group.¹⁵⁹ In *Employment Division v. Smith*, the Court changed this rule by eliminating a prima facie case based on disparate impact, holding that a neutral law of general applicability does not violate the Free Exercise Clause.¹⁶⁰

As a reaction to *Employment Division v. Smith*, Congress passed the Religious Freedom Restoration Act ("RFRA"), which restored strict scrutiny for disparate impact cases.¹⁶¹ The Supreme Court in *City of Boerne v. Flores* ruled RFRA unconstitutional as applied to the states;¹⁶² however, RFRA remains applicable to actions taken by the federal government.¹⁶³

RFRA's continued viability for federal action means, of course, that any federal action directed at a person's or institution's free exercise of religion would ultimately require that the government prove it has a

¹⁵⁶ *Id.* at 419–20.

¹⁵⁷ 1 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 59 (4th ed. 2006).

¹⁵⁸ Caster, *supra* note 1, at 414.

¹⁵⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 218, 220 (1972) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). Under strict scrutiny, the state must prove it has a compelling state interest, and the means it has employed is the least restrictive on religious freedom.

¹⁶⁰ 494 U.S. 872, 883–85 (1990). The Court subsequently held that strict scrutiny still applies in cases of intentional religious discrimination. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

¹⁶¹ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

¹⁶² 521 U.S. 507, 536 (1997).

¹⁶³ *See, e.g.*, *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 859 (8th Cir. 1998).

compelling state interest that overrides the practice based on religion, and that the means employed by the government is the least restrictive available to achieve its compelling state interest.¹⁶⁴ The *Bob Jones* Court determined that the IRS had satisfied this standard when it revoked the tax-exempt status of educational institutions that discriminated on the basis of race.¹⁶⁵ As discussed above, however, given the extraordinary history and context of racial segregation in education, the likelihood of the Court finding a similar compelling interest in areas other than racial discrimination is remote.¹⁶⁶

The First Amendment and equal protection defenses available to religious institutions are best illustrated in *Colorado Christian University v. Weaver*, a Tenth Circuit case that involved the eligibility of students for state aid.¹⁶⁷ In that case, the State of Colorado had refused to provide aid to students attending Colorado Christian University (“CCU”) because, according to the State, CCU was a “pervasively sectarian” institution, meaning its school policies adhered too closely to religious doctrine, its theology courses tended to “indoctrinate,” and its faculty and students shared a single “religious persuasion.”¹⁶⁸ Colorado had, however, provided aid to students attending a Catholic and Methodist college, the State having determined that those Christian colleges were not “pervasively sectarian.”¹⁶⁹

In *Colorado Christian*, the Tenth Circuit found such inquiry into a college’s commitment to religious practice and doctrine an intrusive entanglement in church affairs, a violation of the requirement that the state remain neutral between “contested questions of religious belief or practice.”¹⁷⁰ Moreover, it found that this entangling inquiry also resulted in unequal treatment between non-pervasively sectarian Christian colleges and CCU, triggering strict scrutiny review and a determination that Colorado did not have a compelling state interest to sustain its burden.¹⁷¹ Similarly, a decision by the IRS to investigate and revoke the tax exemption of a religious organization that chooses to discipline one of its employees for violations of a sexual moral code based on orthodox scriptural reasons entangles the IRS in matters beyond constitutional

¹⁶⁴ 42 U.S.C. § 2000bb-1 (2006).

¹⁶⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

¹⁶⁶ See discussion *supra* Part I; see also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (noting the free exercise right of a religious institution to set moral standards and then enforce those standards with respect to its leaders).

¹⁶⁷ 534 F.3d 1245, 1250 (10th Cir. 2008).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1261, 1266.

¹⁷¹ *Id.* at 1266–69.

bounds. Consequently, an adverse decision would treat comparable religious organizations unequally in violation of the Equal Protection Clause.

B. Tax-Exempt Status and "State Action"

Mr. Caster asserts, without any supporting authority, that the IRS's granting of tax-exempt status to a charity results in the organization becoming a state actor for Fifth and Fourteenth Amendment purposes.¹⁷² He then laudably states that many scholars and cases disagree with this position, claiming that the diversity and often conflicting viewpoints among tax-exempt organizations demonstrate the lack of governmental endorsement.¹⁷³ The scholars cited by Mr. Caster are correct.

Almost always, tax-exempt organizations are private entities and, therefore, their actors are not subject to constitutional law principles like equal protection.¹⁷⁴ Yet, private organizations can become state actors if there is such a "close nexus between the State and the challenged action" that private action "may be fairly treated as that of the State itself."¹⁷⁵

In their constitutional law hornbook, Professors Nowak and Rotunda addressed under what circumstances a government subsidy or aid could convert an otherwise private, tax-exempt organization into a state actor.¹⁷⁶ The distinction they drew is whether the aid is *generalized* (government services like police or fire protection that are available to all other persons or associations), or whether the subsidy is *specialized*.¹⁷⁷ They concluded that tax exemption is more generalized than specialized, and therefore, the mere receipt of tax-exempt status does not convert tax-exempt religious organizations into state actors.¹⁷⁸

III. GRANTING TAX-EXEMPT STATUS TO A PLETHORA OF ORGANIZATIONS WITH DIFFERING VIEWS PROMOTES SOCIETAL DIVERSITY, EVEN THOUGH IT BENEFITS ORGANIZATIONS WITH WHICH SOME TAXPAYERS MAY DISAGREE.

Mr. Caster makes repeated reference to the fundamental unfairness of providing tax-exempt status (and taxpayer funding) to nonprofit organizations that discriminate against LGBT employees and that

¹⁷² Caster, *supra* note 1, at 419–20.

¹⁷³ *See id.* at 419 & n.104.

¹⁷⁴ BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 97–98 (9th ed. 2007).

¹⁷⁵ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)).

¹⁷⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 586–89 (7th ed. 2004).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 587.

advocate against issues that LGBTs favor (like gay “marriage”).¹⁷⁹ In making this argument, Mr. Caster misses (ignores) the fact that the IRS policy of benignly granting tax-exempt status to a plethora of non-government organizations on differing sides of issues ensures diversity of organizations, promotes pluralism, and limits “governmental orthodoxy.”¹⁸⁰

A simple search in the IRS’s Exempt Organizations Select Check database¹⁸¹ shows the diversity of American society and the organizations that members of society have embraced to advance their beloved causes. The database contains thousands of tax-exempt organizations that are eligible for receiving tax-deductible donations. Organizations include the National Right to Life Committee and Planned Parenthood, the National Organization for Women and the National Center for Men, Atheists United and the Muslim Foundation, and the Freedom From Religion Foundation and the Christian Legal Society. The Knights of Columbus continues to enjoy tax-exempt status, and yet its members were engaged in a constitutional amendment battle about which Mr. Caster complains.¹⁸² Also enjoying such status are the Human Rights Campaign Foundation, the Lambda Legal Defense and Education Fund, Inc., the National Center for Lesbian Rights, the National Organization of Gay & Lesbian Scientists, and the National Organization for Lesbians of Size. Since Mr. Caster appeals to “rational minds” in his article,¹⁸³ surely rational minds can agree that if the IRS grants tax-exempt status to organizations advancing the LGBT agenda through public education, the IRS should similarly provide tax-exempt status to those organizations advancing traditional, orthodox religious values through public education.

¹⁷⁹ See Caster, *supra* note 1, at 403–04, 407–08, 410–14, 420–21, 430–31. Mr. Caster is not alone in not wanting to subsidize with tax dollars activity that he dislikes, as this author has similarly complained in the context of education. See James A. Davids, *Pounding a Final Stake in the Heart of the Invidiously Discriminatory “Pervasively Sectarian” Test*, 7 AVE MARIA L. REV. 59, 78–79 n.85 (2008).

¹⁸⁰ In his concurring opinion in the *Bob Jones* case, Justice Powell emphasized “the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints.” *Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring). Such diversity leads to pluralism, with tax exemptions being “one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.” *Id.*

¹⁸¹ The Exempt Organizations Select Check database can be accessed through the IRS’s website at the following link: <http://apps.irs.gov/app/eos/>. The database, replacing what was formerly issued as IRS Publication 78, contains a comprehensive listing of the thousands of tax-exempt organizations eligible to receive tax-deductible contributions.

¹⁸² See Caster, *supra* note 1, at 404 & n.7.

¹⁸³ See *id.* at 411.

CONCLUSION

Prior to accepting employment, a prospective employee should investigate the mission and vision of the prospective employer, determine what ethical and moral conduct standards apply, and assess whether the prospective employee's life decisions comply with the employer's mission and standards. If there is a conflict between the individual's life decisions and the employer's mission and ethical standards, then the prospective employee should find other employment. This is particularly true in the instance of religious institution employers, which have First Amendment protections that other employers do not have. Moreover, because of the arduous barrier created by the context and language of the Supreme Court's decision in *Bob Jones University v. United States*, those religious institutions that fire employees who violate ethical and moral conduct standards will not lose their tax-exempt status.