2017

A Diachronic Approach to Bob Jones: Religious Tax Exemptions after Obergefell

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A Diachronic Approach to *Bob Jones*: Religious Tax Exemptions After *Obergefell*

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In Bob Jones University v. United States, *the Supreme Court held that an entity may lose its tax exemption if it violates a fundamental public policy, even where religious beliefs demand that violation. In that case, the Court held that racial discrimination violated fundamental public policy. Could the determination to exclude same-sex individuals from marriage or attending a college also be considered a violation of fundamental public policy? There is uncertainty in the answer. In the recent* Obergefell v. Hodges *case that legalized same-sex marriage, the Court asserted that LGBT individuals are entitled to "equal dignity in the eyes of the law." Constitutional law scholars, such as Laurence Tribe, are advocating that faith groups might lose their status, citing that this decision is the dawning of a new era of constitutional doctrine in which fundamental public policy will have a more broad application.*

Regardless of whether Obergefell *marks a shift in fundamental public policy, that shift will happen at some point. The problem is, under the current diachronic fundamental-public-policy regime, tax-exempt organizations have no way to know, ex ante, what will violate a fundamental public policy. We believe that the purpose of the fundamental-public-policy requirement is to discourage bad behavior in advance, rather than merely to punish it after it occurs. As a result, we believe that the government should clearly delineate a manner for determining what constitutes a fundamental public policy. We recommend three safe harbor regimes that would allow religiously affiliated tax-exempt organizations to know what kinds of discrimination are incompatible with tax exemption. Tying the definition of fundamental public policy to strict scrutiny, to the Civil Rights Act, or to equal protection allows a tax-exempt entity to ensure compliance, ex post. In the end, though, we believe that the flexibility attendant to equal protection, mixed with the nimbleness that the Treasury Department would enjoy in crafting a blacklist of prohibited discrimination, would provide the best and most effective safe harbor regime.*

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INTRODUCTION

In the wake of *Obergefell v. Hodges*,[1] opponents of same-sex marriage have been asking how the Supreme Court's decision will affect religious liberty.[2] On its face, this juxtaposition of same-sex marriage and religious liberty seems alarmist and far outside the contours of the decision. After all, religions should be free to determine the tenets of their faith, including whether or not to perform same-sex marriages.[3]

But could government put undue pressure on religions and religiously affiliated organizations, post-*Obergefell*, through, for example, the tax law?[4] There is a real concern that if religious institutions refuse to embrace same-sex marriage, they will

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1. 135 S. Ct. 2584 (2015).

2. *See* Dennis Romboy, *A Look at the '12 Religious Freedom Grenades' Launched by the Supreme Court Decision on Marriage*, DESERET NEWS (July 7, 2015, 4:10 PM), http://national.deseretnews.com/article/5096/a-look-at-the-12-religious-freedom-grenades8217-launched-by-the-supreme-court-decision-on-marriage.html [https://perma.cc/9HZF-HV7W].

3. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 401 (1963); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 205 (2016); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 30–31 (2015); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 176 (2015).

4. *See, e.g.*, David J. Herzig & Samuel D. Brunson, *Tax Exemption, Public Policy, and Discriminatory Fraternities*, 35 VA. TAX REV. 116, 116 (2015) [hereinafter Herzig & Brunson, *Tax Exemption*] (arguing that the IRS should reject tax exemptions of social clubs "if there is disparate impact, at minimum as to race, in their policies"); David J. Herzig & Samuel D. Brunson, *Subsidized Injustice: Racist Fraternities and Sororities Should Have Their Tax-Exempt Status Revoked*, SLATE (Mar. 13, 2015, 10:31 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/racist_fraternities_sororities_and_universities_should_have_their_tax_exempt.html [https://perma.cc/6P9Y-XDXV]; David J. Herzig, *Donald Trump Suggests He Was Audited Because of His 'Strong Christian Faith.' Here's Why That's Unlikely*, WASH. POST (Feb. 26, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/02/26/donald-trump-suggests-he-was-audited-because-of-his-strong-christian-faith-heres-why-thats-unlikely/ [https://perma.cc/D32Q-7U74]. *But see* Peter J. Reilly, *Don't Sic IRS on Racist Frat Boys*, FORBES (Mar. 16, 2015, 9:43 AM), http://www.forbes.com/sites/peterjreilly/2015/03/16/dont-sick-irs-on-racist-frat-boys/ [https://perma.cc/439H-E8YW].

lose their tax exemptions.[5] And that risk is not necessarily hypothetical: a significant number of tax-exempt organizations, many of which are affiliated with religions, continue to discriminate against LGBT individuals,[6] notwithstanding the Supreme Court's assertion that LGBT individuals are entitled to "equal dignity in the eyes of the law."[7]

On its surface, of course, *Obergefell* says nothing about private discrimination based on sexual orientation. The litigants in *Obergefell* disagreed on a narrow and well-defined question: whether states could constitutionally deny marriage to same-sex couples.[8] The Court decided that there was a fundamental right to marry and rejected the various states' prohibitions on same-sex marriage.[9] The obligations of states to perform marriages, however, cannot be generalized to churches. The fundamental right the majority recognizes is a right against the state.[10] In fact, Justice Kennedy explicitly acknowledged 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."[11] Churches, according to Justice Kennedy, continue to be secure in their right to understand for themselves God's law.

Despite the narrow focus on state obligations, almost instantly the discussion of legalized same-sex marriage became wrapped up in, and to some extent confused with, questions of religious freedom and tax policy. Even in his dissent, Chief Justice Roberts cautioned that "the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . . Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."[12]

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5. *See, e.g.*, Mark Oppenheimer, *Now's the Time To End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/ [https://perma.cc/AG9F-UE7B]; Felix Salmon, *Does Your Church Ban Gay Marriage? Then It Should Start Paying Taxes*, FUSION (June 29, 2015, 12:24 PM), http://fusion.net/story/158096/does-your-church-ban-gay-marriage-then-it-should-start-paying-taxes/ [https://perma.cc/T547-KKXL]; Eugene Volokh, *Religious Exemptions —A Guide for the Confused*, WASH. POST: VOLOKH CONSPIRACY (Mar. 24, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/ [https://perma.cc/49PM-2VN4].

6. For example, more than 100 private religiously affiliated schools in Georgia have explicit policies prohibiting LGBT students from attending. Kim Severson, *Backed by State Money, Georgia Scholarships Go to Schools Barring Gays*, N.Y. TIMES (Jan. 20, 2013), http://www.nytimes.com/2013/01/21/education/georgia-backed-scholarships-benefit-schools-barring-gays.html [https://perma.cc/ZWL6-BM55].

7. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *cf.* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.").

8. *Obergefell*, 135 S. Ct. at 2593.

9. *Id.* at 2607.

10. *Id.*

11. *Id.*

12. *Id.* at 2626 (Roberts, C.J., dissenting).

Chief Justice Roberts's dissent follows the reasoning of Justice Alito who, during oral arguments, asked whether the rule endorsed in *Bob Jones*[13] would cause schools that oppose same-sex marriage to lose their exemptions.[14] Solicitor General Verrilli replied that it was "certainly going to be an issue."[15]

Is Justice Kennedy correct? Or do religions need to worry about the eventuality that Chief Justice Roberts points to? Those who worry that *Obergefell* threatens conservative religions' tax exemptions *may* sound alarmist.[16] There certainly are same-sex marriage supporters who argue that religious organizations that oppose same-sex marriage *should* lose their exemptions.[17] They assert that, if a religion opposes same-sex marriage, the government "should certainly not bend over backwards to give [it] the privilege of tax exemption."[18]

Moreover, there is a growing view that *Obergefell* represents not the end of an era but a dawning of a new era of constitutional doctrine. This view has been adopted and espoused by such eminent constitutional law scholars as Kenji Yoshino and Laurence Tribe. In Professor Tribe's recent essay,[19] he stated we are now entering a new era of protections for previously marginalized groups. He calls this view of constitutional protections "equal dignity."[20] Justice Kennedy, according to Professor Tribe, "tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity."[21] If Professor Tribe is correct, then the subsidiary questions regarding religious freedom asked by the dissent will need to be answered.

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13. Bob Jones Univ. v. United States, 461 U.S. 574, 577 (1983) (mapping a public policy exception on to the tax-exempt rules which would provide "private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine" fail to qualify as tax-exempt organizations).

14. Transcript of Oral Argument at 38, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf [https://perma.cc/2BNZ-EN3J].

15. *Id.*

16. *See, e.g.*, W. James Antle III, *How the Supreme Court's Gay Marriage Ruling Could Destroy the United Methodist Church*, WEEK (July 2, 2015), http://theweek.com/articles/564067/how-supreme-courts-gay-marriage-ruling-could-destroy-united-methodist-church [https://perma.cc/C8QD-WS2L]; David Lauter, *Will a Religious Institution Lose Tax-Exempt Status for Refusing To Marry a Same-Sex Couple?*, L.A. TIMES, (June 26, 2015), http://www.latimes.com/nation/nationnow/la-na-tax-exemptions-religious-20150626-story.html [https://perma.cc/Q5A5-JWPY]; Team Fix, *The CNN-Telemundo Republican Debate Transcript, Annotated*, WASH. POST: THE FIX (Feb. 25, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/25/the-cnntelemundo-republican-debate-transcript-annotated/ [https://perma.cc/SQX7-FHEC] ("[Question of Hugh Hewitt to Donald Trump]: Mr. Trump, Senator Cruz mentioned the issue that keeps me up at night, which is religious liberty. Churches, Catholic and Christian colleges, Catholic adoption agencies—all sorts of religious institutions fear that Hobby Lobby, if it's repealed, it was a five-four decision, they're going to have to bend their knee and provide morning-after pills. They fear that if Bob Jones is expanded, they will lose their tax exemption.").

17. Salmon, *supra* note 5.

18. Salmon, *supra* note 5; *accord* Oppenheimer, *supra* note 5.

19. Tribe, *supra* note 3.

20. *Id.* at 17

21. *Id.*

Even if *Obergefell* marks the beginning of a constitutional equal-dignity regime, it is not altogether clear that the law changes substantively. Although the repercussions could be manifold, here we intend to explore how *Obergefell* affects the tax-exempt status of churches and religiously affiliated schools that continue to discriminate on the basis of sexuality. Like the Solicitor General at oral arguments, both those who fear and those who celebrate the potential loss of exemption by religious institutions skip over the hard work of figuring out how the public policy rule would apply to churches and other religiously affiliated organizations that discriminate on the basis of sexuality.[22] Instead, they merely assume that it will apply and that these religious organizations can and will lose their exemptions.

This Article will focus on this intersection between the First Amendment and the tax law. Congress clearly has the authority to remove entities—including religious entities—from the purview of the tax law. Whether the IRS must remove an entity (e.g., whether the tax exemption is a subsidy) is not a particularly relevant inquiry for our discussion. We instead are focusing on the specific question derived from the Supreme Court that an organization can lose its tax exemption if it violates a fundamental public policy, even where religious beliefs demand that violation. The *fundamental public policy* rule is a diachronic concept, and it is not clear how *Obergefell*, or Professor Tribe's proposed equal dignity regime, affects its application. We try to answer that question.

The Article proceeds as follows. Part I describes the lens in which Tribe and Yoshino view *Obergefell.* In this Part, we do not endorse their interpretation of *Obergefell* as necessarily correct. Rather, we use their interpretation as a jumping-off point to revisit the basis of denial of tax-exempt status for violation of public policy. Part II then articulates the current tax standards applied to churches and religiously affiliated schools, including the structural limitations of the tax exemption. Those observations motivate a further inquiry into what constitutes a fundamental public policy. Part III takes a pragmatic approach by applying the existing standard to tax exemptions for religion and religiously based educational organizations. Together, Parts II and III make a case for a legislative solution to the problem. Part IV then pivots to consider the future of the fundamental public policy if *Obergefell*

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22. Among other things, whether and how the public policy rule applies to religious organizations must rely on a theory of why religious organizations are exempt. Otherwise, asserting that they should or should not be subject to the rule is merely that: an assertion. *Cf.* Ellen P. Aprill, *Why the IRS Should Want To Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 673–74 (2012) (arguing that the IRS should develop bright-line rules to encourage compliance); Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1288 (1969) (arguing that tax-exempt organizations are not part of the tax base); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 305–06, 357–58 (1976) ("The exemption of nonprofit organizations from federal income taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxationto organizations which, unlike the typical business corporation, do not seek profit."); Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 TAX L. REV. 133, 133 (2006) (questioning Bittker's premise that there are no owners of charity); David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. 451, 515 (2014) (proposing to eliminate tax exemption if organization fails certain tests).

is indeed the beginning of a more holistic approach by the Supreme Court. This Part shows the limitations of the fundamental public policy doctrine and considers three tiers of examination as proxies for the standard of fundamental public policy as established by the Supreme Court in *Bob Jones*. Ultimately, it finds all of those standards flawed in some manner once again begging for a legislative remedy.

I. POST-*OBERGEFELL* EQUAL DIGNITY

In June 2015 the Supreme Court decided the *Obergefell* case, holding that same-sex couples had a fundamental right to marriage.[23] The case represented an important enumeration of rights under the Fourteenth Amendment.

The Court's opinion has been subject to *critical* praise. The result the Court reached was praised; yet, the criticism has come from the legal reasoning the Court used to achieve the result.[24] For example, scholars questioned the majority position for failing to make sexual orientation a suspect class.[25]

A. Expansive View of Obergefell

Two prominent constitutional law scholars have taken an alternative approach to the naysayers, arguing that their criticism misses the point. Professor Kenji Yoshino began the discussion of placing *Obergefell* in context of the larger constitutional framework.[26] Professor Yoshino, rather than focusing on the language of the opinion, demonstrated how the opinion "represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence."[27]

According to Yoshino, the *Obergefell* opinion is the move away from the current *Glucksberg*[28] three-prong test that dominated the Court's jurisprudence in the 1990s.[29] The move returns the jurisprudential test of the Fourteenth Amendment to Justice Harlan's holistic inquiry first articulated in the 1960s dissent in *Poe v. Ullman*.[30]

Poe dealt with a criminal ban on contraception.[31] The Court avoided deciding the case on grounds that the case was nonjusticiable because of either standing or

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23. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); Tribe, *supra* note 3, at 16; Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 1 (2015); Yoshino, *supra* note 3, at 147.

24. Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIRCUIT 107, 107 (2015).

25. Peter Nicolas, *Obergefell's Squandered Potential*, 6 CALIF. L. REV. CIRCUIT 137, 139 (2015).

26. Yoshino, *supra* note 3, at 147.

27. Tribe, *supra* note 3, at 16; *accord* Yoshino, *supra* note 3, at 148.

28. Washington v. Glucksberg, 521 U.S. 702 (1997).

29. Yoshino, *supra* note 3, at 148–51.

30. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

31. *Id.* at 498 (plurality opinion); Yoshino, *supra* note 3, at 149.

ripeness.[32] The Court relied on a formalistic approach to the ripeness question, ignoring any due process analysis. A plurality of the Court decided that because the state had never begun a prosecution under the statute, the issue was not ripe.[33]

Justice Harlan rejected the majority avoidance of the issue by stating that the statute was ripe to decide on the merits.[34] Justice Harlan created a more open-ended approach to due process jurisprudence that "weighed individual liberties against governmental interests in a reasoned manner."[35] Justice Harlan was advocating for unshackling due process jurisprudence from the tradition because the "tradition was itself 'a living thing.'"[36]

Justice Harlan's approach was, obviously, rejected in the case and after the early 1970s mostly abandoned as a mode of inquiry.[37] Until *Obergefell*, the formalistic approach continued to gain a stronger foothold, culminating with the decision of *Washington v. Glucksberg*.[38] The *Glucksberg* approach adopted by the Court tied due process liberty to tradition and required a "'careful description' of the asserted fundamental liberty interest."[39] The test established by *Glucksberg* is a three-prong test involving tradition, specificity, and negative inquiry.[40]

Professor Yoshino situates *Obergefell* in the larger Fourteenth Amendment jurisprudence and signals a potential shift in Supreme Court jurisprudence. By Justice Kennedy harking back to *Poe*, "it will be much harder to invoke *Glucksberg* as binding precedent."[41] Thus, from Professor Yoshino's perspective, *Obergefell* retains *Glucksberg*'s requirements of "tradition."[42] The difference, in Yoshino's opinion, is that tradition is a much less prevalent factor than under *Glucksberg*.

The dissent in *Obergefell* recognized this goal of Justice Kennedy's shift. Justice Alito addressed the issue head on by stating that "only those rights that are '"deeply rooted in this Nation's history and tradition"'" should be upheld under the Due Process Clause.[43] This required the majority in *Obergefell* to respond to the dissent's concern regarding untethering the standard from the objective *Glucksberg* rule. "Without an ostensibly constraining test like the one proposed by *Glucksberg*, these conservatives worry, substantive due process will run riot, with outcome-driven judges inventing new fundamental rights as it strikes their fancy."[44] Yoshino dismisses the conservative comparison of *Obergefell* to *Lochner*, through a limiting

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32. *Poe*, 367 U.S. at 503–09; Yoshino, *supra* note 3, at 149.

33. *Poe*, 367 U.S. at 508; *see also* Andrew B. Schroeder, *Keeping Police Out of the Bedroom: Justice John Marshall Harlan,* Poe v. Ullman, *and the Limits of Conservative Privacy*, 86 VA. L. REV. 1045, 1045–46 (2000).

34. *Poe*, 367 U.S. at 522–24 (Harlan, J., dissenting).

35. Yoshino, *supra* note 3, at 150.

36. *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

37. Tribe, *supra* note 3, at 16.

38. 521 U.S. 702 (1997).

39. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

40. Yoshino, *supra* note 3, at 162.

41. *Id.*

42. *Id.* at 162–63.

43. Obergefell v. Hodges, 135 S. Ct. 2584, 2640 (2015) (Alito, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721).

44. Tribe, *supra* note 3, at 17–18.

lens.[45] By only applying the broader rule when a group demonstrates subordination, the *Lochner* comparison can be avoided. For example, *Obergefell* was to address the subordination of LGBT individuals in the context of marriage.[46] Professor Yoshino defines this constraint as an "antisubordination principle."[47] This is a cautious way to cast *Obergefell* as a shift from *Glucksberg* to *Poe*.

Professor Tribe then advances Professor Yoshino's interpretation of *Obergefell* through a view of the decision in even more expansive terms.[48] He argues "that *Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."[49] Under this view, *Obergefell* is not the last word on this issue, but the first.

The new orthodoxy that Professor Tribe envisions after *Obergefell* is one that protects "*all* individuals . . . against the specter of coerced conformity."[50] He provides examples of how equal dignity would play out on a go-forward basis. For example, equal dignity would portend the end of discrimination based on sexual orientation in areas like employment or housing.[51]

Most importantly for our purposes, he provides an example of how equal dignity would apply to Kim Davis's opposition to marriage equality.[52] Kim Davis is a Kentucky county clerk who would not issue marriage licenses to same-sex couples because it violated her religious dogma.[53] The federal court for the Eastern District of Kentucky issued an order compelling her to issue licenses.[54] She continued to defy the court by not issuing any licenses.[55] At that time, she was jailed for contempt, and her clerks issued licenses that may or may not be valid under Kentucky law.[56]

Professor Tribe argues that the *Obergefell* decision does nothing to limit

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45. Yoshino, *supra* note 3, at 170–71.

46. Tribe, *supra* note 3, at 18; Yoshino, *supra* note 3, at 175.

47. Yoshino, *supra* note 3, at 179.

48. Tribe, *supra* note 3, at 19.

49. *Id.* at 17 (emphasis in original).

50. *Id.* at 30 (emphasis in original).

51. *Id.* The government has begun to hint that it is moving this direction. In March 2016, the U.S. Equal Employment Opportunity Commission announced that it had filed its first two "sex discrimination suits based on sexual orientation." Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination, Mar. 1, 2016, http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm [https://perma.cc/F22E-QTW8].

52. Tribe, *supra* note 3, at 30; David J. Herzig & Faisal Kutty, *The Kim Davis Debacle Exposes the Limits of Religious Liberty*, HUFFINGTON POST (Sept. 11, 2015, 5:05 PM), http://www.huffingtonpost.ca/david-herzig/kim-davis-law-religion_b_8124466.html [https://perma.cc/8FNS-KBB9].

53. Herzig & Kutty, *supra* note 52.

54. Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0 [https://perma.cc/PBN6-V6HA].

55. *Id.*

56. Sandhya Somashekhar, *Judge: Kim Davis May Keep Her Name off Marriage Licenses*, WASH. POST (Feb. 10, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/10/judge-kim-davis-may-keep-her-name-off-marriage-licenses/ [https://perma.cc/GBW4-SWFV].

individuals' First Amendment rights to voice their personal objections.[57] Whether they are an agent of the government or not is inconsequential. However, the doctrine of equal dignity would "prohibit[] them from *acting on* those objections . . . in a way that demeans or subordinates LGBT individuals and their families by preventing them from giving legal force to their marriage vows."[58]

Through the lens of Professors Tribe and Yoshino, *Obergefell* represents the beginning of a new constitutional paradigm. Through this approach, the Fourteenth Amendment becomes more prominent. Unlike most of the critique of the decision, Professors Tribe and Yoshino seem to be framing *Obergefell* within the historic jurisprudence and within the context of dissents.

B. Support of Expansive View Through Oral Argument and Decision

Plenty of anecdotal evidence exists supporting the way in which Tribe and Yoshino situate *Obergefell*. The larger frame of *Obergefell* echoes the concerns of dissenting Justices in both their opinions and oral arguments. During oral arguments, the Justices picked up on the concern about the balance between the First Amendment and the Fourteenth Amendment.[59] This priority manifests in two situations. The first is within the context of the religious freedom of churches themselves, and the second is in the context of religious freedom for religiously affiliated organizations, including schools.

Justice Scalia raised the first issue when he asked whether a minister would "not have to conduct same-sex marriages."[60] Ms. Bonauto, the advocate for the *Obergefell* plaintiffs, stated, "If they do not want to, that is correct. I believe that is affirmed under the First Amendment."[61] Although under Professor Tribe's analysis that is not entirely clear.

Chief Justice Roberts raised the second issue. After restating that clergy would not have to perform the same-sex marriage, he followed up with the harder question of "[w]ould a religious school that has married housing be required to afford such housing to same-sex couples?"[62]

Solicitor General Verrilli responded by deferring initially to the actual decision the Court would render, which, according to Professor Tribe and Yoshino, is more expansive than the Solicitor General expected during oral argument.[63] Then the Solicitor General stated the answer would "depend on how States work out the balance between their civil rights laws . . . and how they decide what kinds of accommodations they are going to allow."[64]

Pressing the issue, Justice Alito asked whether the rule endorsed in *Bob Jones*[65]

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57. Tribe, *supra* note 3, at 30.
58. *Id.* (emphasis in original).
59. *See, e.g.*, Transcript of Oral Argument, *supra* note 14, at 23 ll. 12–18.
60. *Id.* at 27 ll. 8–10.
61. *Id.* at 27 ll. 11–13.
62. *Id.* at 36 ll. 4–9.
63. *Id.* at 36–37.
64. *Id.*
65. 461 U.S. 574 (1983); *see supra* notes 82–84 and accompanying text.

would cause schools that oppose same-sex marriage to lose their exemptions.[66] Solicitor General Verrilli replied that it was "certainly going to be an issue."[67]

The issues presented in the oral argument were echoed in the dissents of the opinion. First, Chief Justice Roberts cautioned that "the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . . Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today."[68] The majority decision disagreed, stating that

> it 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.[69]

However, Professors Tribe and Yoshino do not take as narrow of a view. Under equal dignity the religious organizations have freedom to determine the contours of their faith. Nothing in the equal dignity analysis would impact the freedom of expression nor the freedom of association. It is not until those beliefs bleed into the public sphere that the constitutional doctrine would override that preference.

Their view seems to echo Chief Justice Robert's dissent, in which he asserted that

> [t]oday's decision, for example, creates serious questions about religious liberty. . . .
>
> Respect for sincere religious conviction has [resulted in] accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses.[70]

Similarly, in his dissent, Justice Thomas wrote that

> [r]eligious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.[71]

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66. Transcript of Oral Argument, *supra* note 14, at 38.

67. *Id.*

68. Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

69. *Id.* at 2607 (majority opinion).

70. *Id.* at 2625 (Roberts, C.J., dissenting) (emphasis in original) (citations omitted).

71. *Id.* at 2638 (Thomas, J., dissenting) (omission in original) (citation omitted) (quoting *Obergefell*, 135 S. Ct. at 2607 (majority opinion)).

Justice Roberts follows up the specific example of religion with the second-order problem facing religious schools.

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.[72]

How would then equal dignity affect the tax exemptions of either religions or religious based schools? We will next explore the rationale for the tax exemption. It will become evident in the evolution of the boundaries of the exemption, that the post-*Obergefell* view espoused by Professors Tribe and Yoshino could prove deleterious to discriminatory tax-exempt entities.

II. TAX-EXEMPTION OF RELIGIOUS ORGANIZATIONS

Even if *Obergefell* introduced equal dignity as a new constitutional principle, it did not single-handedly eliminate homophobia and discrimination.[73] In the broader legal landscape, there is no consistent impediment to *private* (as opposed to government) discrimination. Neither the federal government nor the governments of nearly half of the states protects LGBT employees from discrimination based on their sexual orientation, for example.[74]

And employment is not the only area of life where LGBT individuals can face legal discrimination. According to the Southern Education Foundation, at least 115 private grade schools in Georgia have "explicit, severe anti-gay policies or belong to state and national private school associations that promote anti-gay policies and practices among their members."[75] At many of these schools, any student's

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72. *Id.* at 2625–26 (Roberts, C.J., dissenting) (citation omitted).

73. *See, e.g.*, Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099 (2015) (describing workplace discrimination post-*Obergefell*); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. FORUM 136, 154 (2015); Tobias Barrington Wolff, *The Three Voices of Obergefell*, L.A. LAW., Dec. 2015, at 28, 31; David R. Wheeler, *Gay Marriage and the Future of Evangelical Colleges*, ATLANTIC (July 14, 2015), http://www.theatlantic.com/education/archive/2015/07/evangelical-colleges-struggle-gay-marriage-ruling/398306/ [https://perma.cc/LY67-BJ3X].

74. Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 946 (2015).

75. S. EDUC. FOUND., ISSUE BRIEF: GEORGIA'S TAX DOLLARS HELP FINANCE PRIVATE SCHOOLS WITH SEVERE ANTI-GAY POLICIES, PRACTICES, & TEACHINGS 1 (2013), http://www.southerneducation.org/getattachment/857328be-3d6b-415f-af8b-da7bd3b75519/Georgia%E2%80%99s-Tax-Dollars-Help-Finance-Private-Schools.aspx [https://perma.cc/6TLN-Z73M].

homosexual actions *or identity* are sufficient for expulsion.[76] At some, merely supporting people who are LGBT will get a student expelled.[77]

Educational institutions' discrimination against LGBT individuals is not, moreover, limited to grade schools. Dozens of religiously affiliated colleges and universities have policies that explicitly discriminate against gay students.[78] At Cedarville University in Ohio, for example, "the University prohibits same-sex dating behaviors," and "patterns of disregard for University standards" constitutes grounds for dismissal.[79] The specter of dismissal is not merely hypothetical, either. While no families of grade-school children who "have been expelled over sexual orientation from a school that uses the tax scholarship program have come forward in Georgia,"[80] in 2013, Danielle Powell was expelled from Grace University for "[s]exually immoral behavior, with a woman."[81]

Even though federal law has not legally proscribed discrimination on the basis of sexuality, religiously based institutions' fears they will lose their tax exemptions do not emerge out of nothing. In 1983, the Supreme Court, in *Bob Jones*, approved the IRS's revocation of two private schools' tax exemptions on the basis that those schools discriminated against African American students.[82] In doing so, it endorsed the extrastatutory public policy rule that the IRS had applied in determining whether organizations qualified as tax-exempt.[83] Under this rule, an organization that violates an "established public policy" cannot qualify as tax-exempt under section 501(c)(3) of the Tax Code.[84]

Though the Supreme Court endorsed the public policy rule, it did little to clarify

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76. Kim Severson, *Backed by State Money, Georgia Scholarships Go to Schools Barring Gays*, N.Y. TIMES (Jan. 21, 2013), http://www.nytimes.com/2013/01/21/education/georgia-backed-scholarships-benefit-schools-barring-gays.html [https://perma.cc/8J5C-Z5E9]. For example, the Cherokee Christian Schools student/parent handbook states that, "[i]n accordance with the CCS Statement of Faith and in recognition of Biblical principles, no 'immoral act' or 'identifying statements' concerning fornication, adultery, homosexuality, lesbianism, bisexuality, transgender desires, or pornography, will be tolerated. Such behavior will constitute grounds for expulsion." CHEROKEE CHRISTIAN SCH., ISSUE 2016.2, STUDENT/PARENT HANDBOOK (CCHS) 22 (2016), https://www.cherokeechristian.org/wp-content/uploads/2013/10/CCHS-Student-Handbook-2016-2017.pdf [https://perma.cc/R736-NF5W].

77. Severson, *supra* note 76.

78. Wheeler, *supra* note 73.

79. THE CEDARVILLE EXPERIENCE, 2015-16 STUDENT HANDBOOK 12, 25 (2015), http://publications.cedarville.edu/brochures/studentlife/studenthandbook/files/assets/common/downloads/publication.pdf [https://perma.cc/D429-UC2L].

80. Severson, *supra* note 76.

81. Allie Grasgreen, *Expelled for Sexuality, and Sent a Bill*, INSIDE HIGHER ED (June 13, 2013), https://www.insidehighered.com/news/2013/06/13/student-expelled-being-gay-and-charged-6000-back-tuition-protests-online-petition [https://perma.cc/U374-JHSP].

82. Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983).

83. *Id.* at 591–92.

84. *Id.* at 586; Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523, 550 (2014) (describing the "established public policy" rule); Philip T. Hackney, *A Response to Professor Leff's Tax Planning "Olive Branch" for Marijuana Dealers*, 99 IOWA L. REV. BULL. 25, 31 (2014) (describing application of the "established public policy" rule).

the rule's scope.[85] There is a real possibility that the Tribe and Yoshino view would mean that the fundamental public policy rule should be expanded to include LGBT. Therefore, before addressing the question of whether religions will lose their tax exemptions as a result of opposing same-sex marriage, we must determine whether churches are subject to the public policy doctrine and whether opposing same-sex marriage violates an established public policy.

The Constitution requires little religious accommodation from the tax law. In spite of special constitutional protections religion enjoys,[86] religious organizations have no constitutional right to exemption from taxes.[87] In fact, religions do pay some taxes, including the unrelated business income tax.[88] Courts have also recognized that under certain circumstances, churches can lose their tax exemptions and become subject to the federal income tax.[89] It would appear to follow that a church that violated the public policy doctrine—a bedrock requirement for tax exemption—could lose its exemption and become taxable.

But does the United States have an established public policy of opposing discrimination against same-sex marriage? Broadly speaking, the IRS has used the public policy rule only in limited circumstances to revoke exemptions except where a charity acts illegally or where a school discriminates on the basis of race.[90] No tax-exempt organization has ever lost its exemption, or been refused an exemption, for discriminating on the basis of gender, national origin, or any other classification that receives heightened scrutiny.[91] Moreover, although the opinion in *Obergefell* is slightly ambiguous, it does not appear to have added sexual orientation to the list of protected classes.[92] There is no reason, then, to believe that *Obergefell* somehow announces a public policy so extreme and so fundamental that churches opposing same-sex marriage will be subject to losing their tax exemptions. This Part will examine the evolution as well as the limitations of the doctrine.

A. Evolution of Public Policy Doctrine

Although *Bob Jones* has become an iconic case, a rare instance where constitutional law and tax law meet, it did not emerge, fully formed, from the head of the Supreme Court. Its holding reflected more than merely the procedural history underlying the case—in its background was a long series of executive, legislative, and judicial attempts to root out racial discrimination in United States education.

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85. *See* David A. Brennen, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 391 (2000).

86. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 9.

87. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990).

88. *See* S. REP. NO. 91-552, at 67–68 (1969).

89. Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000).

90. *See* Herzig & Brunson, *Tax Exemption*, *supra* note 4, at 129.

91. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (finding that heightened scrutiny applies to laws that classify by race, national origin, alienage, or gender); Herzig & Brunson, *Tax Exemption*, supra note 4, at 129.

92. *See, e.g.*, Hunter, *supra* note 24, at 113; Kyle C. Velte, Essay, Obergefell*'s Expressive Promise*, 6 HOUS. L. REV.: OFF THE RECORD 157, 159 (2015).

We have previously detailed the IRS's history with private schools that discriminated on the basis of race.[93] While it is unnecessary here to recount the whole history, it is instructive to look at how and why the IRS began revoking the exemptions of discriminatory schools.

After the Supreme Court declared the "separate but equal" doctrine unconstitutional in 1954,[94] some white parents turned to self-help to recreate racially segregated education. If public schools were going to integrate, they would maintain segregation by sending their children to discriminatory private schools. And because the private schools were not state actors, the Supreme Court's constitutional analysis did not prevent them from discriminating.

A decade later, Congress passed the Civil Rights Act of 1964.[95] A year later, the IRS stopped processing exemption applications from segregated private schools.[96] For two years, it explored the legal issues attendant to exempting discriminatory schools from the income tax.[97] In 1967, the IRS unfroze the exemption process, announcing that it would no longer grant tax exemptions to discriminatory schools with sufficient involvement with the state.[98] Where the school was private, though, and did "not have such degree of involvement with the political subdivision as has been determined by the courts to constitute State action for constitutional purposes," the IRS determined that it did not have authority to reject the school's exemption application.[99]

In response, a group of African American parents in Mississippi sued the IRS to enjoin it from granting tax-exempt status to discriminatory schools.[100] The district court granted their injunction, forbidding the IRS from approving applications for tax exemption for discriminatory schools within its jurisdiction.[101] The IRS proceeded to expand on the court's order. Not only did it implement the policy nationwide, but it also implemented it retrospectively.[102] Henceforth, it would not approve applications for exemption from discriminatory private schools, but it would also look at private schools that had already obtained exemptions and, if they discriminated on the basis of race, would revoke their exemptions.

Still, a discriminatory private school will not automatically lose its exemption. Before that could happen, two conditions precedent would have to occur. First, the government would have to establish that eliminating discrimination against LGBT individuals had become a fundamental public policy. Then the IRS would have to choose to implement that policy by revoking discriminatory schools' exemptions.

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93. Herzig & Brunson, *Tax Exemption*, *supra* note 4, at 126–29.

94. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

95. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

96. Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C. 1970) (per curiam).

97. *Id.*

98. *Id.*

99. *Id.* (quoting Internal Revenue Service Press Release, [1967] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6734 (Aug. 2, 1967)).

100. *Id.* at 1129.

101. *Id.* at 1140.

102. I.R.S. News Release, [1970] 7 Stand. Fed. Tax Rep. (CCH) ¶ 6790 (July 10, 1970).

B. What Is a "Fundamental Public Policy," Anyway?

While the Supreme Court held that the IRS could constitutionally revoke a tax-exempt organization's exemption if that organization violated a "fundamental public policy," it did not provide any guidance on what constituted a fundamental public policy, the violation of which would warrant loss of exemption.[103]

The Supreme Court did explain why it considered racially discriminatory private schools as violating a fundamental public policy. Almost thirty years earlier, the Supreme Court explained, it had determined in *Brown v. Board of Education*[104] to strike down as unconstitutional the separate-but-equal doctrine.[105] The subsequent "unbroken line of cases . . . establishe[d] beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy."[106]

And it was not just the judicial branch. Congress passed the Civil Rights Act of 1964,[107] and, from there, passed many additional laws that clearly demonstrated its commitment to racial nondiscrimination.[108] The executive branch, through a series of executive orders spanning several presidential administrations, also worked to combat racial discrimination.[109]

Under the Supreme Court's analysis, then, the question of whether racial discrimination violated a fundamental public policy was easy. Three decades of concerted effort by all three branches of the federal government demonstrated that the government wanted to end racial discrimination and segregation. The Supreme Court did not, however, say that three decades of concerted effort was *necessary* to establish a fundamental public policy, only that it was *sufficient*.[110] Outside of clarifying that racial discrimination did violate fundamental public policy, the Supreme Court provided the IRS with no guidance in determining what else violated fundamental public policy.

In light of the lack of guidance, the IRS has responded almost exactly as it would be expected to respond. By and large it has not revoked or denied exemptions on public policy grounds. The exceptions fall broadly into two main categories: racial discrimination and illegality.[111]

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

104. 347 U.S. 483 (1954).

105. *Bob Jones*, 461 U.S. at 592–93.

106. *Id.* at 593.

107. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

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

109. *Id.* at 594–95.

110. *See id.*

111. Nicholas A. Mirkay, *Globalism, Public Policy, and Tax-Exempt Status: Are U.S. Charities Adrift at Sea?*, 91 N.C. L. REV. 851, 871 (2013). Professor Mirkay actually lays out three public policy categories that the IRS will revoke or deny exemptions: "racial discrimination, civil disobedience, or certain illegal activity." *Id.* The way the IRS has discussed civil disobedience, though, suggests that it would better be categorized under the heading of illegal activity.

1. Racial Discrimination

Racial discrimination now represents an easy case for the IRS. The IRS has a long history of denying tax exemptions for racially discriminatory private schools.[112] In fact, even while recognizing that there was no federal law preventing private schools from discriminating on the basis of race, the IRS determined that "the policy of the United States is to discourage discrimination in such schools."[113] In furtherance of this policy, the IRS refused to allow racially discriminatory schools to enjoy the benefits of tax exemption.[114]

The IRS did more than merely revoke or deny the exemptions of discriminatory private schools, though—it required schools to affirmatively disavow racial discrimination. In 1971, it announced that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in sections 170 and 501(c)(3) of the Code and in other relevant Federal statutes and accordingly does not qualify as an organization exempt from Federal income tax."[115] A year later, the IRS built on its requirement for racially nondiscriminatory policies. For a private school to qualify as tax-exempt, it not only had to have such a policy, but it also had to publicize the policy.[116] Finally, the IRS required evidence that the private school actually operated under its nondiscrimination policy.[117]

The Supreme Court explicitly adopted the IRS's fundamental public policy rules regarding racial discrimination.[118] And the adoption of racial discrimination as violating fundamental public policy, and therefore incompatible with a tax exemption, was not limited to the judicial branch. When a federal district court found that private clubs could discriminate on the basis of race and keep their tax exemptions,[119] Congress legislatively overruled the court, requiring that a club would not qualify as tax-exempt if it had a written policy allowing for discrimination on the basis of race, color, or religion.[120] Each of the three branches of government recognized racial discrimination as violative of public policy, and thus as preventing the tax exemption of a discriminatory organization that would otherwise qualify as tax-exempt.

2. Illegality

Just as the Supreme Court recognized that opposing racial discrimination was not the government's sole public policy goal, the IRS has recognized that it can reach beyond racial discrimination in evaluating whether an organization qualifies as

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112. *See, e.g.*, *Bob Jones*, 461 U.S. at 592; Rev. Proc. 75-50, 1975-2 C.B. 587; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 71-447, 1971-2 C.B. 230.

113. Rev. Rul. 71-447, 1971-2 C.B. at 230.

114. I.R.S. News Release, *supra* note 102.

115. Rev. Rul. 71-447, 1971-2 C.B. at 231.

116. Rev. Proc. 72-54, 1972-2 C.B. 834.

117. Rev. Proc. 75-50, 1975-2 C.B. at 589–90.

118. Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983).

119. McGlotten v. Connally, 338 F. Supp. 448, 458 (D.D.C. 1972).

120. Herzig & Brunson, *Tax Exemption*, *supra* note 4, at 131–32.

exempt.[121] But the only areas in which the IRS appears to have expanded the fundamental public policy reach have been in the area of illegality.

What kind of illegal behavior will the IRS deem to violate public policy? A wide range, it turns out. In some cases, the illegality is both obvious and egregious. For example, a hospital that violates the Medicare and Medicaid Anti-Fraud and Abuse Law, commonly known as the anti-kickback statute, does not qualify as tax-exempt according to the IRS.[122] Similarly, a cooperative formed to facilitate the sale of marijuana between members (in violation of federal, though not state, law) did not qualify for tax-exempt status because its illegal activities violated a fundamental public policy.[123]

Though both examples represent significant violations of law, the IRS can invoke the public policy requirement for less serious violations. In one case, it revoked the exemption of a nonprofit animal shelter and sanctuary.[124] The president of the organization had been convicted of misdemeanor cruelty to animals and later had pleaded guilty to felony cruelty to animals.[125] Neither, though, appears to have been the motivating factor in revoking the organization's tax exemption; rather, the organization had failed to file the required information reporting and had refused to respond to IRS inquiries.[126] Failure to file alone would have been sufficient for the organization to lose its tax exemption.[127] The IRS's invocation of the public policy requirement served as a backstop to its more technical disqualification for failure to file a return. The fact that the public policy portion of the revocation serves principally as a backstop, combined with the lack of any guidance about the relevance of whether a crime is a misdemeanor or a felony, means that the IRS's decision here provides almost no guidance about the contours of illegality and public policy.

In addition to the uncertainty that remains about whether the severity of a crime affects whether it violates fundamental public policy, the IRS has muddied the waters about whether, for public policy purposes, illegality is limited to illegal *acts*. In a number of instances, the IRS has denied an organization's exemption request, not because the organization acts illegally, but because it advocates actions that would violate the law. These violative actions range from promoting world peace through

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121. *See, e.g.*, I.R.S. Tech. Adv. Mem. 89-10-001 (Mar. 10, 1989) ("Although applying on its face only to race discrimination in education, the implication of the *Bob Jones* decision extends to any organization claiming exempt status under section 501(c)(3) and to any activity violating a clear public policy.").

122. I.R.S. Gen. Couns. Mem. 39,862 (Nov. 21, 1991).

123. I.R.S. Priv. Ltr. Rul. 2013-33-014 (Aug. 16, 2013). Interestingly, the marijuana cooperative applied for an exemption under section 501(c)(16), not section 501(c)(3), of the Code. *Id.* While the IRS imported the public policy requirement into section 501(c)(16), it is not completely clear that it belongs there. *See, e.g.*, Leff, *supra* note 84, at 536 (arguing that the public policy requirement should not apply outside of section 501(c)(3)). *But see* Hackney, *supra* note 84, at 26 (arguing that the public policy requirement applies beyond merely section 501(c)(3)).

124. I.R.S. Priv. Ltr. Rul. 2008-37-039 (Sept. 12, 2008).

125. *Id.*

126. *Id.*

127. *See id.*

civil disobedience[128] to educating the public about polygamy and empowering polygamous families.[129]

In part, the fact that the IRS has not clarified the contours of the fundamental public policy rule can be laid at the feet of the Supreme Court, which merely announced the rule, but also did not provide any guidance about how to determine what constituted a fundamental public policy.[130] Since the Supreme Court's decision in *Bob Jones*, moreover, the courts have done virtually nothing to clarify the fundamental public policy rule.

That is not to say that courts have ignored the public policy rule—they mention it frequently when adjudicating questions of the IRS's wrongful denial or revocation of an organization's tax-exempt status.[131] In the vast majority of cases that mention the public policy rule, though, the opinion merely mentions public policy as one of the requirements for tax exemption.[132]

Even where courts could easily and uncontroversially reach the question of fundamental public policy, they remain hesitant to do so. In *Mysteryboy Incorporation v. Commissioner*,[133] for example, the Tax Court reviewed the IRS's denial of tax-exempt status to Mysteryboy. Mysterboy was formed to research "the pros and cons of decriminalizing natural consensual sexual behaviors between adults

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128. Rev. Rul. 75-384, 1975-2 C.B. 204. The group was not formed to actually break the law, but it encouraged protestors to maximize their publicity by, among other things, blocking traffic, disrupting government work, and "prevent[ing] the movement of supplies." *Id.* at 204.

129. I.R.S. Priv. Ltr. Rul. 2013-23-025 (June 7, 2013). Like in the *Bob Jones* case, the IRS looked at the long history of criminalizing polygamy, and the judicial support for such laws, to determine that polygamy violated a fundamental public policy. *Id.* It concluded that, because the organization was "operated to condone and support those engaging in the illegal act of polygamy," it violated a fundamental public policy and did not qualify for exemption, even though the organization itself did nothing illegal. *Id.*

130. The closest the Court comes to laying out a standard is acknowledging that "contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption." *Bob Jones*, 461 U.S. at 593 n.20 (1983). But the Court fails to even explain what contemporary standard the IRS should consider, much less how to use them to determine fundamental public policy.

131. A Westlaw search in the "All Federal" database on May 27, 2017, for **advanced: (revoke deny) & ("public policy" & "section 501(c)") & DA(aft 05-24-1983)** found 133 cases.

132. *See, e.g.*, Church of Scientology of Cal. v. Comm'r, 823 F.2d 1310, 1315 (9th Cir. 1987) ("Because we may affirm the Tax Court on this ground, we do not reach the questions of whether the Church operated for a substantial commercial purpose or whether it violated public policy."); Educ. Assistance Found. for the Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. United States, 111 F. Supp. 3d 34, 39 n.4 (D.D.C. 2015) ("While not applicable in this case, the Court also notes that '[a]n organization that otherwise meets the statutory requirements will nevertheless fail to qualify for tax-exempt status if its exemption-related activities violate public policy.'" (alteration in original) (quoting Airlie Found. v. IRS, 283 F. Supp. 58, 62 n.3 (D.D.C. 2003))); United Cancer Council, Inc. v. Comm'r, 109 T.C. 326, 382 (1997) (stating that, among the requirements for tax-exempt status, an organization's "purpose must not be 'contrary to a fundamental public policy.'" (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 592 (1983))), *rev'd*, 165 F.3d 1173 (7th Cir. 1999); Variety Club Tent No. 6 Charities, Inc. v. Comm'r, 74 T.C.M. (CCH) 1485, 1491 (1997) (same).

133. 99 T.C.M. (CCH) 1057 (2010).

and underagers and decriminalizing what is defined as child pornography," as well as to lobby for such decriminalization.[134] The IRS rejected Mysteryboy's application on the grounds that its purposes were "contrary to a fundamental public policy."[135]

Although the Supreme Court never mentioned promoting pedophilia and child pornography as violating a fundamental public policy, it seems like an uncontroversial classification. Federal law explicitly criminalized child pornography in 1977,[136] and, in subsequent years, Congress broadened the scope of federal law.[137] While the Tax Court ultimately upheld the IRS's denial of tax-exempt status, though, it did so on the basis that Mysteryboy had failed to carry its burden of demonstrating that it was organized and operated for permissible purposes, not because it violated a fundamental public policy.[138]

Similarly, in *Synanon Church v. United States*, the court reviewed the IRS's revocation of Synanon's tax-exempt status.[139] Synanon was originally founded to rehabilitate drug addicts.[140] It subsequently expanded into other endeavors, including distributing farmers' goods, developing real estate, performing investment counseling, and training security forces.[141]

Along with Synanon's new business ventures, it appears to have engaged in both fiscal improprieties and violence against its perceived enemies.[142] The violence disturbed the judge, who found it "disturbing" and "serious."[143] Nonetheless, although the IRS argued that fundamental public policy prohibited Synanon from qualifying as tax-exempt, the court chose not to ground its opinion on public policy.[144] Although it believed that dictum in *Bob Jones* clearly indicated that applying the public policy rule to Synanon's violence "would have been proper," it reluctantly declined to apply the public policy rule.[145] Rather, it found that Synanon's suit had to be dismissed (and the IRS's revocation thus upheld) because Synanon committed fraud upon the court.[146]

As is evident from this discussion, even the clearest portion of the fundamental public policy requirement—the illegality aspect—would benefit from significant clarification. The IRS claims authority to reject or revoke the tax-exempt status of any organization that violates the law.[147] It is, however, far from clear that the IRS *should* treat illegality as a bright-line disqualification. Illegality is not the equivalent of immorality.

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134. *Id.* at 1059.
135. *Id.* at 1065.
136. James E. Bristol, III, *Free Expression in Motion Pictures: Childhood Sexuality and a Satisfied Society*, 25 CARDOZO ARTS & ENT. L.J. 333, 342 (2007).
137. *Id.* at 345–46.
138. *Mysteryboy*, 99 T.C.M. (CCH) at 1068–69 .
139. 579 F. Supp. 967, 969 (D.D.C. 1984).
140. *Id.* at 970.
141. *Id.*
142. *Id.* at 971.
143. *Id.* at 971, 977.
144. *Id.* at 978–79.
145. *Id.* at 979.
146. *Id.* at 972.
147. *See supra* notes 121–23 and accompanying text.

The problematic approach currently taken by the IRS is that there is a long history in the United States of civil disobedience as a morally justified "conscientious violation of the law as a protest over an unjust law or governmental policy."[148] Abolitionists deliberately flouted the law in opposing slavery.[149] Toward the end of his life, Dr. Martin Luther King Jr. called for civil disobedience to call attention to the evils of racism, poverty, and unemployment.[150]

We do not know, however, how the public policy doctrine would have applied to abolitionists; the abolition movement occurred prior to the federal income tax, and therefore prior to the existence of tax-exempt organizations. And the civil rights movement's civil disobedience is similarly inapposite, both because the disobedience was generally performed by individuals, not tax-exempt organizations, and because it occurred prior to the Supreme Court's adoption of the fundamental public policy standard.

Even today, though, civil disobedience occurs. And sometimes tax-exempt organizations participate. Recently, in response to the Obama administration's deportations of undocumented Central American immigrants, dozens of churches have revived the sanctuary movement.[151] In violation of federal law, these churches (which are exempt from taxation) provide a refuge for immigrants facing deportation.[152]

In the past, organizations that encouraged civil disobedience (even if they themselves did not participate in it) have had their applications for tax exemption rejected by the IRS on public policy and illegality grounds.[153] Illegality in the service of civil disobedience is substantively different, though, than illegality in the pursuit of selfish ends. Where the latter certainly violates public policy, it is not clear that the former does. Public policy may favor civil disobedience, notwithstanding that it necessarily involves violating the law.[154] In fact, Dr. King asserted that, just as people have a moral obligation to obey just laws, they have "a moral responsibility to disobey unjust laws."[155] And that moral obligation complicates the question of

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148. Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2085 (2007).

149. Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 71 (1990).

150. *Id.* at 76.

151. Cathaleen Chen, *How Churches Are Protecting Immigrants from Deportation*, CHRISTIAN SCI. MONITOR (Feb. 8, 2016), http://www.csmonitor.com/USA/Justice/2016/0208/How-churches-are-protecting-immigrants-from-deportation [https://perma.cc/D5D3-HFUR].

152. Cindy Carcamo, *After Recent ICE Raids, Sanctuary Movement Grows for Immigrants Here Illegally*, L.A. TIMES (Feb. 8, 2016, 7:20 A.M.), http://www.latimes.com/local/california/la-me-immigration-sanctuary-revival-20160208-story.html [https://perma.cc/R3UB-DSBT].

153. Rev. Rul. 75-384, 1975-2 C.B. 204.

154. Although Henry David Thoreau recognized that there were unjust laws, he was not content to obey them, or even obey them until they could be changed through legal means. Rather, he said, "[i]f the injustice is part of the necessary friction of the machine of government, let it go . . . . Let your life be a counter friction to stop the machine." HENRY D. THOREAU, *Civil Disobedience*, *in* WALDEN, CIVIL DISOBEDIENCE, AND OTHER WRITINGS 227, 234 (William Rossi ed., W.W. Norton & Co. 3d ed. 2008) (1849).

155. MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, *in* WHY WE CAN'T WAIT 85, 93 (1963).

whether illegality is an appropriate bright-line rule for determining fundamental public policy.

Courts' hesitation to apply the fundamental public policy rule is understandable. The Supreme Court emphasized that it should only be applied "only where there is no doubt that the organization's activities violate fundamental public policy."[156] But courts' understandable skittishness at applying the rule means they have done nothing to clarify the muddy waters in which the IRS currently operates. It also means that neither the IRS nor the courts have provided tax-exempt organizations with any guidance as to what "fundamental public policy" means outside of the context of racial discrimination in education.

C. But the IRS Does Not Have To Enforce the Fundamental Public Policy Rule

Bob Jones does not mandate that the IRS revoke the tax exemptions of entities that violate a fundamental public policy. In fact, outside of the context of racially discriminatory schools, the IRS has rarely (if ever) revoked an exemption for violation of public policy and has only denied exemptions on public policy grounds in rare instances, as discussed above.[157] The rare instances where the IRS has revoked or denied exemptions on public policy grounds certainly do not represent a complete list of behaviors that violate public policy.[158] And yet the IRS has not revoked the tax exemptions of organizations that violate other fundamental public policies. How can that be?

There are a handful of reasons that the IRS can ignore tax-exempt organizations' bad behavior. The first is, the Supreme Court's decision in *Bob Jones* did not mandate the loss of exemption. Rather, it confirmed that revocations for the violation of fundamental public policies was constitutionally permissible. Though the IRS *can* revoke exemptions, the Supreme Court did not create a constitutional obligation for it to do so, and Congress has never explicitly required the IRS to enforce the public policy rule either.

This lack of constitutional or statutory obligation matters. It buttresses the fact that, both as a legal and a practical matter, the IRS has complete discretion to not enforce the fundamental public policy rule. How does the IRS have such unconstrained discretion when it comes to not enforcing the public policy rule?

1. Administrative Discretion

In the first instance, the IRS enjoys broad administrative discretion when it comes to choosing not to enforce rules.[159] When the Supreme Court recognized the right of the executive branch to refuse to enforce laws, it grounded that right in three main considerations.[160] It allowed an agency to balance factors, including whether

156. Bob Jones Univ. v. United States, 461 U.S. 574, 598 (1983).

157. *See supra* note 111 and accompanying text.

158. *See supra* note 112 and accompanying text.

159. Samuel D. Brunson, *Dear IRS, It Is Time To Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 163–64 (2016); David J. Herzig, *Justice for All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 1, 16–17 (2013).

160. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

enforcement is a good use of finite agency resources.[161] It recognized that refusing to act does not exercise coercive power.[162] And it acknowledged that an agency's refusal to act was closely related to the decision not to indict, a decision that had long been granted to the executive branch.[163]

Even those proponents of same-sex marriage who *want* religions that oppose it to lose their exemptions are powerless to effect that change. Only the IRS can revoke an organization's tax-exempt status.[164] As a federal administrative agency, the IRS is part of the executive branch and, as part of the government, its decisions are subject to judicial review.[165] As a result, proponents of same-sex marriage could in theory lobby the president to appoint an IRS commissioner who would prioritize revoking religions' exemptions, or they could attempt to litigate. Neither move would be effective, though.

The executive has a long history of using the IRS to do its bidding. From President John F. Kennedy in the 1960s, to the Nixon Enemies List in the 1970s, to alleged misconduct in the 1990s, politicians are happy to use the IRS to do their dirty work.[166] To ensure that politics did not affect the IRS's audit decisions, in 1998 Congress passed the Restructuring and Reform Act.[167] The Act established a taxpayer bill of rights that was intended to protect taxpayers from IRS abuses.[168] Although there have been some anomalies, such as the recent Tea Party scandal, in general the IRS has demonstrated its independence from the executive.[169]

Finally, the doctrine of administrative discretion—a derivative of prosecutorial discretion—gives the IRS "leeway to decline to enforce statutes and shields [its] inaction from judicial review."[170] In general, unless Congress has explicitly required the IRS to enforce a particular part of the tax law, courts will respect the IRS's decision not to enforce it.[171] Even if opposing same-sex marriage violated an established public policy, Congress has not mandated that the IRS enforce the public

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161. *Id.* at 831.

162. *Id.* at 832.

163. *Id.*

164. Treas. Reg. § 601.201(n)(6)(i) (as amended in 2002).

165. In theory, Congress could also pass legislation requiring the IRS to revoke churches' exemptions. Even if a majority of Congress supported such a move, though, congressional gridlock would make its enactment difficult. *See* Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX L. REV. 555, 557 (2014).

166. Herzig, *supra* note 159, at 21–22.

167. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

168. Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 981 (2003).

169. There are other areas that have come up, including the Service reliance on the Department of Justice to enforce the litigation position of the Service in district courts, the courts of appeals, or the Supreme Court. *See, e.g.*, Herzig, *supra* note 159, at 40–47.

170. Brunson, *supra* note 159, at 163–64.

171. Heckler v. Chaney, 470 U.S. 821, 834–35 (1985). The Supreme Court held open the possibility that in some cases, agency refusal to enforce a provision could be so extreme that it warranted judicial oversight, *id.* at 833 n.4, but no case has ever found such abdication, Brunson, *supra* note 159, at 164–65.

policy doctrine. As such, the IRS's decision not to revoke a church's tax exemption is insulated from judicial review by three layers of laws.

Even if the IRS internally decided to revoke a religion's exemption, it would face serious practical impediments. The tax law mandates that the IRS follow a complicated, burdensome set of procedures both to initiate and to perform a church audit.[172] In light of the fallout of its delay in processing certain Tea Party groups' exemption applications, the IRS is understandably gun-shy about acting in a way that could be seen as targeting conservative tax-exempt organizations on the basis of their beliefs.[173] Even if the government were to tax churches, more than ninety percent of most churches' revenue comes from member contributions, which do not constitute taxable income.[174] The IRS would balance the criticism it could expect against the little, if any, additional revenue it would collect for the federal government.[175]

The IRS does not enjoy unlimited administrative discretion, of course. Congress has the ability to expressly require the IRS to enforce the law, thus overruling its discretion.[176] Although Congress apparently approves of the public policy rule,[177] it has never explicitly required the IRS to enforce it.

The Supreme Court also suggested that a court could adjudicate questions of agency nonenforcement where agency inaction amounts to "an abdication of its statutory responsibilities."[178] The Supreme Court did not define the contours of abdication, though, and has never revisited the question.[179] Lower courts, which have adjudicated questions of abdication, have universally found that the agency in question did not abdicate its statutory responsibilities and thus did not compromise its administrative discretion.[180] Thus, judicial doctrine shields the IRS from taxpayer pressure to revoke discriminatory schools' exemptions.[181]

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172. *See* Brunson, *supra* note 159, at 168–69.

173. *Id.* at 193–94.

174. GIVING USA FOUND., GIVING USA 2014: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2013, at 106 (2014).

175. Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty To Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 153 (2011).

176. Brunson, *supra* note 159, at 164.

177. One of the reasons the Supreme Court gave for upholding the IRS's fundamental public policy requirement was that Congress had been aware of the IRS's requirement, had actually introduced thirteen bills to overturn it, and had failed to pass a single one. Bob Jones Univ. v. United States, 461 U.S. 574, 600–01 (1983). While congressional inaction does not always demonstrate Congressional acquiescence, the Court acknowledged, in this case, Congress appeared to acquiesce. *Id.* at 600.

178. Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985).

179. Brunson, *supra* note 159, at 164–65.

180. *Id.* at 165.

181. For example, the Southern Poverty Law Center classifies Westboro Baptist Church as a hate group. The Church has many discriminatory factors. Yet the tax exemption of the organization has yet to be threatened by the IRS. *See, e.g.*, Corey Brettschneider, *Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies*, 79 BROOK. L. REV. 1059, 1071 (2014); J. Bryan Lowder, *Subsidized Hate: Why the Westboro Bapitst Church Remains Tax-Exempt*, SLATE (Mar. 4, 2011, 5:13 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/03/subsidized_hate.html [https://perma.cc/P6WG-CGE4].

Ultimately, the IRS's insulation from taxpayer pressure means that even when we know that protecting LGBT individuals from discrimination is a fundamental public policy, the IRS must affirmatively decide to revoke discriminatory schools' exemptions. But, in spite of more than a decade of concerted federal effort to eliminate racial discrimination in education, the IRS initially decided that it could not and would not do so.[182] Ultimately, it took a lawsuit to motivate the IRS's actions, actions which were eventually confirmed by the Supreme Court.

2. Standing

Likewise, courts cannot force the IRS to revoke a religious institution's tax exemption. No matter how sincerely or vocally a taxpayer may want to see it done, an IRS decision not to revoke is immune from judicial review.[183] The IRS derives its immunity from judicial oversight from three main requirements.

First is the constitutional requirement that a litigant have suffered an *injury in fact* before a court has jurisdiction to hear a controversy.[184] Taxpayers suffer no injury in fact when the IRS grants a tax exemption to a third party.[185] And while the Supreme Court allows litigants to avoid the injury-in-fact requirement through a doctrine called "Establishment Clause standing," the circumstances permitting Establishment Clause standing are tremendously narrow.[186] Among other things, a litigant must show a government expenditure of money, and under the Court's current literalistic view of Establishment Clause standing, an exemption from tax is not the same thing as direct government spending.[187]

Standing represented the fundamental bar to taxpayers' forcing the IRS to act here. Taxpayers—including LGBT students—lack standing to sue the IRS for its nonenforcement. Standing requires, among other things, a litigant who could assert that she had suffered an injury in fact that is traceable to the IRS's nonenforcement.[188] A school's discrimination against LGBT students certainly harms those students, but that harm is insufficient to grant LGBT students standing to challenge the IRS's nonenforcement of the public policy rule. In the first instance, the injury is traceable to the actions of the discriminatory school, not to the IRS's nonenforcement of the public policy rule. A school's exempt status does not cause it to discriminate; while it perhaps subsidizes the discrimination, an injury in fact must be a concrete injury, not one that is conjectural or hypothetical.[189]

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182. *See supra* notes 95–102 and accompanying text.

183. *See* Brunson, *supra* note 159, at 161.

184. U.S. CONST. art. III, § 2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

185. Brunson, *supra* note 159, at 161.

186. Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777, 800 (2013).

187. *Id.*

188. Brunson, *supra* note 159, at 161.

189. *Lujan*, 504 U.S. at 560. The impotence of taxpayers in the face of IRS inaction does not mean, of course, that taxpayers cannot challenge certain IRS actions. A taxpayer only has standing, though, when IRS acts in a way that directly impacts her. *See* Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 239 (2004). In a nonenforcement situation, though, no taxpayer suffers tangible harm, and the indirect and diffuse harm of

How did Mississippi parents' lawsuit get past the standing bar? The court essentially eluded the question; though the Treasury Department, in its role as defendant, contended that the plaintiffs had no standing, the court in *Green v. Kennedy* decided that it did not need to consider the question.[190] Still, the court asserted that the plaintiffs had "standing to attack the constitutionality of statutory provisions which they claim provides an unconstitutional system of benefits and matching grants" that supported discriminatory schools.[191] It referred to *Coffey v. State Educational Finance Commission*,[192] another district court case, as precedent for its view on standing.[193]

In that case, a class of African American parents in Mississippi challenged the state's provision of tuition grants to children who lived in school districts that had desegregated.[194] Though the court in that case did not analyze standing, it appears to have assumed plaintiffs had standing. It determined that the tuition grants perpetuated segregation and enjoined the state from providing the grants.[195]

There is a substantive difference between *Green* and *Coffey*, though: in *Coffey*, the state actually expended money, while in *Green*, the challenged subsidy was merely a tax benefit. Economically, of course, the two are identical—there is no substantive difference between the state giving parents $1000, which they will then pay to a school, and the state reducing the school's taxes by $1000. Either way, the school has an additional $1000 that it can use.

But economics notwithstanding, the courts view the two as different, at least as a basis for standing. In 1968, the Supreme Court created "taxpayer standing," a small exception to the strict "injury in fact" standing requirement.[196] Under certain circumstances, taxpayer standing allows taxpayers to challenge tax laws as unconstitutional, even if they are not directly harmed by the law in question.[197] However, taxpayer standing has generally been limited to questions of religious establishment, and, more importantly, requires both taxing *and* spending.[198] That is, a mere tax subsidy is insufficient to overcome the personalized injury standing requirement.[199]

Moreover, the fact that the *Green* court found standing has no ongoing legal significance. A district court opinion not only does not provide binding precedent for courts outside of its jurisdiction, it also does not bind its own district, or even the

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having to pay marginally more in taxes to make up for the taxes unpaid by a wrongfully exempt organization are insufficient to create standing. *See* Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 244 (2013).

190. 309 F. Supp. 1127, 1132 (D.D.C. 1970).

191. *Id.*

192. 296 F. Supp. 1389 (S.D. Miss. 1969).

193. *Green*, 309 F. Supp. at 1132.

194. *Coffey*, 296 F. Supp. at 1390–91.

195. *Id.* at 1392.

196. *See* Brunson, *supra* note 159, at 162.

197. Flast v. Cohen, 392 U.S. 83, 102 (1968).

198. Brunson, *supra* note 159, at 163.

199. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 142 (2011) ("When the government declines to impose a tax, by contrast, . . . [a]ny financial injury remains speculative.").

judge herself in future cases.[200] The fact that once taxpayers were able to judicially force the IRS to revoke discriminatory schools' tax exemptions is merely an accident of history, then. But it does nothing to support the idea that taxpayers currently have that ability. In fact, in a subsequent suit by African American parents claiming that the IRS was not doing a good enough job at denying tax exemptions to discriminatory private schools, the Supreme Court found that, notwithstanding *Green*, the plaintiff parents had no standing to bring the suit.[201]

Of course, there is one significant difference between 1970, when the Court created taxpayer standing, and today: in 1970, the IRS had decided it did not have authority to revoke a private school's tax exemption unless the school had sufficient connections with the government. Today, the Supreme Court has made clear that revoking a private school's tax exemption for violating a fundamental public policy is constitutionally permissible. Still, knowing that it *can* act and actually *deciding* to act are two fundamentally different things. That is, even knowing it has the ability to revoke a private school's exemption does not provide an incentive for the IRS to do so.

Second, even if taxpayers had standing, courts generally cannot provide the kind of relief that would be necessary to force the IRS to act. The Declaratory Judgments Act, which generally allows courts to "declare the rights and other legal relations of any interested party," explicitly carves out taxes from courts' declaratory judgment authority.[202] Mirroring the limitations in the Declaratory Judgments Act, the Tax Anti-Injunction Act prevents suits seeking to enjoin the assessment or collection of taxes.[203] Even if taxpayers had Establishment Clause standing, then, these laws would insulate the IRS from outside pressure to revoke churches' exemptions.[204]

III. FUNDAMENTAL PUBLIC POLICY AND THE RELIGION CLAUSES

Based on the existing rules as established and as interpreted by the Supreme Court, the practical constraints, and additional constitutional impediments, it is unlikely that the IRS would have to navigate that a revocation of a religious organization's exemption for discriminating against LGBT individuals would occur. These constitutional hurdles are not insurmountable, of course. The Supreme Court has acknowledged that religiously affiliated organizations can lose their tax exemptions, and lower courts have allowed the IRS to revoke churches' exemptions, albeit less

200. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)). That is not to say, of course, that a district court opinion has no precedential value; to the extent its reasoning is persuasive, it can certainly influence future courts. *See* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 519–20 (2016). Where its reasoning is absent or unpersuasive, or where other courts have since taken the law in a different direction, though, a district court opinion cannot be used to reverse the direction of the law.

201. Allen v. Wright, 468 U.S. 737, 739–40 (1984).

202. 28 U.S.C. § 2201(a) (2012).

203. I.R.C. § 7421(a) (2012).

204. *See* Brunson, *supra* note 159.

frequently.[205] Still, there are constitutional limits: in general, the government cannot impose its will on church ecclesiastical decisions, either directly or indirectly.[206] While the government can impose conditions on benefits it grants, it cannot "grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[207]

In this Part we will utilize the existing pragmatic frame as we examine whether *Obergefell* facially changes the analysis. Here we rely on the historic context of the evolution of the fundamental public policy doctrine as well as the limited application. We think it is useful to compare side by side the rationales for retention in the context of religion and religiously based educational institutions. In the next Part, we will change the frame by discussing possible outcomes and limitations should a more expansive view of the doctrine take hold.

A. Religiously Affiliated Organizations and Fundamental Public Policy

The question of whether religiously affiliated organizations can lose their tax exemptions for violating a fundamental public policy is, ultimately, an easy question based on the existing rules but a potentially harder question based on religious liberty concerns. Almost instantly after the IRS introduced the fundamental public policy requirement, the question arose whether the Free Exercise Clause of the First Amendment circumscribed the IRS's ability to revoke the tax exemption of a religiously affiliated discriminatory private school.[208] The Supreme Court, in *Bob Jones*, adopted the IRS's view that violation of a fundamental public policy (here, antidiscrimination in education) was incompatible with tax exemption.[209] It went on to hold that the government's interest in eradicating racial discrimination in education was sufficiently compelling that it outweighed the burden on religious practice the schools faced in losing their exemptions.[210] As long as a right rose to the level of a fundamental public policy, then the balance of the scales would tip to protecting that right over the religious liberty of the school.

Using the Supreme Court's analysis in *Bob Jones*, it is clear that there is theoretically no constitutional impediment to revoking a religious university's tax exemption if that university discriminates against LGBT students and such discrimination violates a fundamental public policy. The Supreme Court explicitly

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205. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000), *aff'g* 40 F. Supp. 2d 15 (D.D.C. 1999); Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931, 933 (2001) ("The appellate court held that revocation of the exemption did not place a substantial burden on Branch Ministries' exercise of religion."). *But see* George Regas, *The Won't-Be-Bullied Pulpit*, L.A. TIMES (Nov. 9, 2005), http://articles.latimes.com/2005/nov/09/opinion/oe-regas9 [https://perma.cc/8ZQH-WD47] (discussing retention of tax exemption after IRS investigation for political speech).

206. IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 73 (2014).

207. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

208. Bob Jones Univ. v. United States, 461 U.S. 574, 582 (1983).

209. *Id.* at 595 ("There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct.").

210. *Id.* at 604.

blessed the IRS's ability to revoke even a religious organization's tax-exempt status for such violation.[211] Moreover, even if a school has a sincere religious mandate to oppose homosexuality, as long as the government's interest in eliminating such discrimination was sufficiently compelling, the Free Exercise Clause of the First Amendment may not protect the tax exemption.

Cedarville University then takes the position that "[w]e believe that God's design at Creation for sexual desire and orientation is within the bounds of a marriage union between a man and a woman."[212] If the IRS and ultimately the Supreme Court believe that same-sex marriage is a fundamental public policy, then the tax exemption of Cedarville University could be revoked. Essentially, this is *Bob Jones* in same-sex marriage. The Supreme Court recognized that, while paying taxes imposes a burden, the burden of taxpaying does not necessarily prevent the exercise of religion.[213]

B. Churches and Fundamental Public Policy

In some ways, churches present an easier question: it seems largely uncontroversial that, even if religiously affiliated tax-exempt organizations should lose their tax exemptions for violating fundamental public policies, churches should not. Among the rights it enshrines in the Constitution, the First Amendment provides expressly for the free exercise of religion.[214] If free exercise means anything, one could argue, it must mean that churches enjoy an extra level of protection from state infringement.[215]

The idea that the Free Exercise Clause provides additional rights to corporate churches, as opposed to the body of believers, turns out to be controversial, though. Some scholars argue that the Free Exercise Clause of the First Amendment grants broad autonomy for churches, subject to being overridden "only for grave reasons of state."[216] Other scholars, uncomfortable with church autonomy, argue that the Free Exercise Clause "applies exclusively to individuals," not to churches.[217] Still others fall somewhere between these two extreme positions: while the religion clauses do apply to churches, they say, churches do not have unlimited autonomy from the state.[218]

Adjudicating between these various views of how the religion clauses apply to

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211. *Id.* at 605.

212. THE CEDARVILLE EXPERIENCE, *supra* note 79, at 12.

213. *See generally* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1180 (2009); Mirkay, *supra* note 111; Susannah Camic Tahk, *Crossing the Tax Code's For-Profit/Nonprofit Border*, 118 PENN ST. L. REV. 489, 500 (2014).

214. U.S. CONST. amend. I.

215. *See, e.g.*, Arlin M. Adams & William R. Hanlon, Jones v. Wolf*: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1291–92 (1980) ("[I]nquiry into the permissible forms and limits of judicial intervention when the matters in controversy relate to disagreements over religious doctrine and practice embraces more fundamental issues concerning the protections afforded by the first amendment.").

216. LUPU & TUTTLE, *supra* note 206, at 43–44.

217. *Id.* at 44.

218. *Id.*

churches is beyond the scope of this Article. Moreover, it is generally unimportant in answering whether the fundamental public policy rule can apply to churches. Scholars who understand the First Amendment as providing for church autonomy would clearly argue that church exemptions should not rest on following fundamental public policy.[219]

Current Supreme Court jurisprudence sides with these scholars, recognizing that churches have specific rights beyond the merely associational enjoyed by both religious and secular groups.[220] The idea that churches merely have the same associational rights as any other organization is, according to the Supreme Court, "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[221]

If the Supreme Court were to revisit its view, though, and find no institutional rights granted by the religion clauses of the First Amendment, the fundamental public policy rule would still be unlikely to apply to church tax exemptions. Even scholars who are profoundly skeptical of church autonomy arguments would seem to agree that churches have the ability to define their own doctrine and beliefs.[222] They merely come to that conclusion differently than scholars who argue for church autonomy.

Congress has also infused the tax law with some level of church autonomy. Although churches' tax exemptions begin in the same Code section as the exemptions of other public charities, the Code includes several provisions that exempt churches from requirements applicable to those other public charities. For example, most charitable organizations must apply to the IRS for tax-exempt status.[223] Churches, though, are exempt from the application requirement, gaining their tax exemption automatically by virtue of being churches.[224]

The differences do not end at formation, moreover. Even after a church (automatically) becomes exempt, the tax law continues to treat it differently in certain significant respects. Most tax-exempt organizations must file an annual information return with the IRS detailing certain financial information.[225] For most organizations, moreover, tax exemption comes with a significant loss of privacy: they are required to make their exemption applications *and* their annual returns available, not just to the IRS, but to the public at large.[226]

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219. *See, e.g.*, Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 254 (2009) ("[W]hen a church does something by way of managing its own internal affairs, it does not have to point to a doctrine or a prohibition or a claim of conscience in every case. It can make out a good church autonomy claim simply by saying that this is internal to the church.").

220. Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

221. *Id.*

222. *Cf.* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 975 (2013) ("The ministerial exception fits quite comfortably within the Lockean justification for church self-governance and is fully explainable as a defense of the freedom of conscience for individuals within the church.").

223. I.R.C. § 508(a) (2012).

224. *Id.* § 508(c)(1)(A). The only other kind of tax-exempt organization that is statutorily exempt from the application requirement is a public charity that expects annual gross receipts of $5000 or less. *Id.* § 508(c)(1)(B).

225. *Id.* § 6033(a)(1).

226. *Id.* § 6104(a), (c).

Just as the tax law does not require churches to apply for exemption, it does not require them to file annual information returns.[227] Because churches need neither file exemption applications nor annual information returns, they also need not provide financial disclosure to the public at large.

And this exemption provided to churches was not a mere accident of history: in 1969, the House of Representatives proposed legislation that would have required churches to file information returns.[228] The risk galvanized churches, which lobbied the Senate, and ultimately preserved their exemption from the generally applicable filing requirement.[229]

In addition to churches' exemption from the application and filing requirements generally applicable to tax-exempt organizations, the Code also provides churches special procedural protections. To the extent the IRS wants to audit a church, it must jump through additional more stringent restrictions on those audits, including additional notice requirements, limits on the scope of what an audit can investigate, and limits on the length and frequency of audits.[230]

The IRS appears to have largely internalized the legislative and judicial deference given churches. As we have discussed above, the IRS has, by and large, not invoked the public policy requirement to reject or revoke organizations' exemptions.[231] Even in the area of racial discrimination, where it has the strongest explicit mandate and has, in fact, revoked exemptions, it has not revoked the exemption of a single discriminatory church.

Whether or not the Constitution guarantees church autonomy, then, the practical effect of the religion clauses, combined with judicial interpretation, legislative mandates, and administrative buy-in, suggests that churches need not worry about losing their exemptions for violating fundamental public policy. The government does not interfere in internal governance of religious bodies, and such bodies are therefore protected from state-level repercussions (such as losing their tax exemptions) in a way that religiously affiliated schools and other charitable institutions are not.

IV. EXPANSIVE FUNDAMENTAL PUBLIC POLICY

As evident from the prior discussion, the well-accepted axiom that the IRS should be nothing more than a neutral collector of taxation does not reflect the actual position of the IRS.[232] This idealistic position has been shown to be vulnerable when, for instance, the IRS has been influenced by the political whims of Congress or the President.[233] Every time that the IRS has stepped outside the bounds of its identity as a theoretic neutral arbitrator of determining taxable income, however, there has been

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227. *Id.* § 6033(a)(3)(A)(i).

228. Samuel D. Brunson, *The Present, Past, and Future of LDS Financial Transparency*, 48 DIALOGUE 1, 5 (2015).

229. *Id.* at 5–7.

230. I.R.C. § 7611 (2012).

231. *See supra* note 111 and accompanying text.

232. Herzig, *supra* note 159, at 1.

233. Herzig, *supra* note 159, at 25–27.

an immediate reigning in of the agency.[234] As a general rule, the IRS should not function as a policymaker but rather as an enforcer and administrator of the policy decisions of Congress.

Yet despite that clear line of historic treatment, in *Bob Jones*, the Court acknowledged that the IRS could play a policy role, at least in overlay of the public policy requirement to tax-exempt organizations.[235] Even at the time, this policy role was controversial, though: in his concurrence, Justice Powell suggested that allocating this responsibility to the IRS was improper.[236] Congress legislated specific qualification criteria for tax-exempt organizations, including churches and educational institutions. Congress did not provide for an overarching exception to the aforementioned charitable rules based on the IRS's importing of value judgments to the analysis. If the IRS, post-*Obergefell*, follows the lead advocated by Professors Tribe and Yoshino and applies the fundamental public policy requirement diachronically, then Congress or Treasury needs to implement objective criteria to determine when a policy transitions into a fundamental public policy.

Applying the fundamental public policy doctrine in a post-*Obergefell* paradigm will prove problematic without a framework for determining the boundaries of what constitutes a fundamental public policy. Line-drawing exercises can be complicated to perform in a principled way.[237] With no guidance beyond the vagaries that currently define fundamental public policies, judges will be forced to interject their own moral judgment in the process. And a judge's own moral judgment is ultimately arbitrary and unpredictable: would-be tax-exempt organizations have no way of knowing *ex ante* what a judge will see as violating fundamental public policy. The rule, then, will necessarily punish bad actors, rather than discouraging tax-exempt organizations from acting badly. Compliance with this kind of inchoate rule borders on the impossible.

Without a bright-line test, the aforementioned vague rule making is compounded in two distinct but related areas. First, the agency continues to be subject to capture by Congress and the executive.[238] The IRS has recently faced significant backlash for allegedly inserting its value judgment into the granting of exemption for conservative social welfare organizations.[239] The subsequent scandal involving Commissioner Lois Lerner clearly signals that congressional intent and public opinion do not allow for the IRS to interject policy judgments.[240]

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234. *See supra* note 113 and accompanying text.

235. *See supra* Part II.A.

236. Bob Jones Univ. v. United States, 461 U.S. 574, 606–07 (1983) (Powell, J., concurring in judgment).

237. *Cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 810–11 (2006) (demonstrating that line drawing exercises in any context are difficult by focusing on attempts to draw lines of years alone in examining Supreme Court jurisprudence regarding strict scrutiny).

238. Herzig, *supra* note 159, at 22–23.

239. Stephen Dinan, *Tea Party Targeting Accusations, Legal Issues Persist for IRS After Justice Ends Probe*, WASH. TIMES (Oct. 25, 2015), http://www.washingtontimes.com/news/2015/oct/25/irs-tea-party-targeting-accusations-legal-issues-p/?page=all [https://perma.cc/3UUF-FTKC].

240. Jackie Calmes, *Senate Report Cites I.R.S. Mismanagement in Targeting Tea Party*

Additionally, not only could the IRS improperly attempt to regulate various charities, but entities cannot comply with an ethereal rule. The goal of the tax code is to encourage compliance through a clear allocation of responsibility and rules.[241] If there is no clear definition of the fundamental public policy, how can an entity comply with the rule? And where the exempt entity cannot understand what the fundamental public policy is—or even where figuring it out is too costly—the rule cannot do its work. If there is a fundamental public policy rule, the rule should be to encourage the school to not be discriminatory rather than punish a school after the fact.

What are the contours of the rule the Supreme Court created in *Bob Jones*? No one really knows. That is why during oral arguments in *Obergefell*, Justice Alito wondered about the applicability of the fundamental public policy rule to same-sex marriage.[242] This is because in *Bob Jones*, outside of illegality and discrimination, the Supreme Court created a vague standard that is not eligible for consistent application by the IRS, other courts, or taxpayers.

It is because of the vagueness of the future application of the fundamental public policy rule many argue that the result of *Bob Jones* is an outlier.[243] As we discussed, one can count on one hand the number of charities that have had their charitable exemption revoked because they violated the public policy rule for anything other than racial discrimination.[244] "[O]nly organizations that participated in racial discrimination, advocated civil disobedience, or were involved in an illegal activity have lost their tax-exempt status pursuant to the public-policy doctrine."[245] If *Bob Jones* is an anomaly, charities should not be concerned with violating the public policy doctrine. However, we are not entirely sure that the holding of *Bob Jones* applies only to racially discriminatory schools.

Rather, we argue that the marginalization of *Bob Jones* relates to a failure to be able to extrapolate when the doctrine would likely apply. While we believe that the fundamental public policy requirement reflects a real and valuable normative framework, we also believe that in its current vague state, it does not accomplish its

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Groups, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/us/politics/senate-report-cites-irs-mismanagement-in-targeting-of-tea-party-groups.html?_r=0 [https://perma.cc/2QJY-SEWN].

241. Brunson, *supra* note 189, at 224–25; David J. Herzig, *Something from Nothing: Taxing Assets Accurately*, 2011 MICH. ST. L. REV. 1057, 1109; Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003); Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice To Target Tax Enforcement*, 109 COLUM. L. REV. 689, 695 (2009).

242. *See supra* notes 113–23 and accompanying text.

243. David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 53–54 (2006); 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).

244. *See supra* notes 113–23 and accompanying text.

245. Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations that Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 738 (2009).

purpose.[246] The requirement should not focus on punishing organizations that violate fundamental public policies. Rather, it should be designed in a manner that gives charities *ex ante* guidance, encouraging them to act in socially beneficial ways.

The law has a simple way it could provide this *ex ante* guidance. Congress, the Treasury Department, or the courts could develop a framework to give tax-exempt organizations the necessary and appropriate guidance.[247] In areas of the tax law similar to this, safe harbors function to facilitate the orderly administration of the tax laws.[248] Alternatively, Congress should act in defining the rule. We believe that taxpayers should have clear guidance on whether they are in compliance with the laws.

We propose three potential frameworks for determining whether a tax-exempt organization violates public policy when it discriminates against a group of people. For our purposes, we have limited these options to dealing with tax-exempt organizations' discriminatory policies, primarily because discrimination was the focus of *Bob Jones* and is the focus of current battles over the application of the public policy rule. Certainly, nothing in our proposal would prevent the IRS from denying tax-exempt status to entities that break the law or violate some nondiscriminatory public policy. Neither category of denial, however, has historically been common or fraught.[249] If the nondiscrimination portions of the public policy requirement were to become more prominent, it may be worth returning to address them systemically. In the meantime, though, we see value in providing a heuristic for determining whether certain behaviors violate the public policy rule.

Two of the frameworks we propose function as bright-line rules—albeit moveable bright-line rules—explaining specifically how to determine whether a tax-exempt's discrimination does not trigger the safe harbor rule. The third would provide a safe harbor (or, more specifically, a "sure shipwreck")[250] for certain types of discrimination.

In addition to cascading from least to most impactful, our proposed heuristic cascades from least to most fluid. The narrowest application would find a violation of the fundamental public policy doctrine in situations where the Supreme Court uses

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246. In fact, while it is beyond the scope of this Article, the vagueness of the contours of the public policy requirement may have constitutional implications: a law may be "void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

247. *See generally* Emily Cauble, *Safe Harbors in Tax Law*, 47 CONN. L. REV. 1385, 1387 (2015) ("Safe harbors represent one example of a type of tax provision in between the extreme ends of the rule-standard spectrum, with some rule-like characteristics and some standard-like characteristics. If a taxpayer meets the typically clear requirements of a given safe harbor, the law assures the taxpayer of receiving specific, generally favorable tax treatment." (footnotes omitted)); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (discussing the differences between standards and rules); Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1389 (2016) (discussing how safe harbors cause more problems than rules or standards).

248. Morse, *supra* note 247, at 1389.

249. *See supra* notes 113–23 and accompanying text.

250. Professor Morse describes a "sure shipwreck" as a combination of a rule and a standard that "describes conduct that will definitely violate the law, while other facts remain subject to a standard as applied by the ex post judgment of future decision makers." Morse, *supra* note 247, at 1387–88.

the strict scrutiny analysis. The intermediate application would use the Civil Rights Act as the proxy for fundamental public policy. Finally, the broadest application would be utilizing the equal protection test under the Fourteenth Amendment. Although it is administratively complicated, the IRS already applies a fifteen-part test to determine whether an entity is a church, so it could certainly apply the equal protection test here.[251]

Each of these potential frameworks lines up with one branch of government: the courts determine which classifications will trigger strict scrutiny, Congress chooses which classifications will be protected by the Civil Rights Act, and the Treasury Department could create a blacklist of behaviors that violate the equal protection test. In determining the benefits and burdens of each potential safe harbor, policy makers could simultaneously determine which branch of government they believe is best suited to provide this guidance to tax-exempt organizations.

A. Strict Scrutiny

Over time, in the realm of constitutional review, the Supreme Court has established a taxonomy of three tiers of review: (i) strict scrutiny, (ii) intermediate scrutiny, and (iii) rational basis review.[252] By using these three tiers, the Court has set the boundaries that create predictability in the majority of cases. "By establishing stable and predictable definitions of litigants' burdens of persuasion and production, judicial employment of tiers of scrutiny lowers decision costs and expedites litigation."[253]

Although many academics have engaged in a push to eliminate the levels of scrutiny,[254] the idea of strict scrutiny has a long and developed history. For our purposes, the viability or the authenticity of the standard is not important. Rather, we believe the tax law could import the strict scrutiny standard to determine whether discrimination violates a fundamental public policy because of the doctrine's theoretical underpinnings as well as the rigor in which courts apply it.

To determine whether strict scrutiny applies, the Court applies a "test [that] governs challenges under the Equal Protection Clause to statutes that discriminate on the basis of race or other 'suspect' classifications."[255] In strict scrutiny a statute that restricts a fundamental right can only survive if it advances compelling government

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251. INTERNAL REVENUE SERV., PUB. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 33 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf [https://perma.cc/NX2V-9CHW] (listing the fifteen factors); *see also* Mirkay, *supra* note 245, at 764 (arguing that the IRS should confine the use of the fifteen–point test to only churches).

252. *See* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 577 (2013).

253. *Id.*

254. For example, Professor Gerhardt has proposed a sophisticated theory of judicial review that asks the Supreme Court in effect to allow Congress to be Congress. Michael J. Gerhardt, *Letting Congress Be Congress: A Comment on* Tiers of Scrutiny in Enumerated Powers Jurisprudence, 80 U. CHI. L. REV. DIALOGUE 291 (2013).

255. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007).

interests.[256] The Supreme Court has applied strict scrutiny analysis narrowly, from First Amendment laws that regulate speech to racial discrimination.[257]

Strict scrutiny is particularly apt for our purposes because, like fundamental public policy, it is diachronic. The strict scrutiny standard was first articulated in footnote four of *United States v. Carolene Products Co.*[258] In *Carolene Products*, the Supreme Court reversed the *Lochner*-era Supreme Court by upholding economic regulations as "long as the law is a 'rational' way of furthering any 'legitimate' governmental purpose."[259] *Carolene Products* did not set a strict-scrutiny standard in stone, though. Rather, it left open the door for more robust scrutiny in the cases of fundamental rights and discrimination against racial minorities.

In 1942, the Supreme Court used the heightened standard in *Skinner v. Oklahoma*, where Justice Douglas wrote "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[260] What began as a limited constitutional doctrine affecting economic regulations with only an eye on future applications took hold as judicial doctrine.

The evolution of the doctrine continued over time to include free speech and equal protection[261] and then to racial classifications.[262] The evolution of the doctrine over time allowed the Supreme Court to create a malleable taxonomy of classifications with a prescribed doctrine for examination. For example, in the 1950s, the Warren Court expanded the doctrine to religion as well as to voting and travel.[263] From our perspective, the fact that as society evolved strict scrutiny also evolved from the first limited use related to economic regulation to a more robust protection of certain groups indicates the viability of the doctrine for use in determining whether a policy violates a fundamental public policy.

In addition, strict scrutiny is a flexible rule. To this point, we have examined the growth of the rule through expansion of the protected class. However, the evolution of the rule has not been limited to a single dimension. In some areas, the applicability of strict scrutiny has declined. For example, the Court has pulled back on its application of strict scrutiny to the free exercise of religion.

In *Sherbert v. Verner*, the Court introduced the strict scrutiny standard to laws that impinged on the free exercise of religion.[264] In *Sherbert*, the Supreme Court held that

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256. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Reno v. Flores, 507 U.S. 292, 301–02 (1993). *See generally* Fallon, *supra* note 255.

257. Fallon, *supra* note 255.

258. 304 U.S. 144, 152 n.4 (1938); *see also* Winkler, *supra* note 237, at 798.

259. Winkler, *supra* note 237, at 799.

260. 316 U.S. 535, 541 (1942).

261. Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29 (2005) (tracing the equal protection roots of strict scrutiny).

262. Korematsu v. United States, 323 U.S. 214, 216 (1944).

263. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969) (vote); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (travel); Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (religion); Winkler, *supra* note 237, at 801.

264. 374 U.S. 398.

a restriction on unemployment benefits if you worked on Saturday was a violation of the plaintiff's religious liberty as a Seventh-day Adventist.[265] The Supreme Court required South Carolina to justify the rule under a strict-scrutiny analysis. Building on *Sherbert*, the Court began to regularly apply strict scrutiny to Free Exercise claims.[266]

The Supreme Court then reconsidered the applicability of strict scrutiny to religion. In *Employment Division v. Smith*,[267] the Supreme Court was faced with a similar situation as *Sherbert*. In *Smith*, the issue was denial of unemployment benefits based on religious beliefs. The difference was that in *Smith* the denial was based on religiously based drug use.[268] The Oregon Supreme Court, based on *Sherbert* and the line of cases that followed, upheld the exemption based on free exercise of religion.

The Supreme Court limited the applicability of strict scrutiny. Justice Scalia wanted to reserve strict scrutiny for laws that were racially discriminatory or curtailed political speech.[269] To unleash strict scrutiny on any law that anyone found religiously troubling would destroy society.[270] Over time, the Supreme Court found a new equilibrium for strict scrutiny in the context of free exercise.

The *Smith* decision then prompted Congress to pass the Religious Freedom Restoration Act (RFRA).[271] The RFRA required the federal courts to apply the pre-*Smith* rule.[272] Although the Court invalidated the federal RFRA as it applied to states, the give and take between Congress and the Supreme Court resulted in an equilibrium for the application of a strict-scrutiny standard as it is related to the free exercise of religion.[273] The rule evolved to a more modern bifurcated application. In the context of free exercise, strict scrutiny will apply when a statute or practice is "an improper attempt to target."[274]

It is important for our purposes to differentiate the Supreme Court's use of strict scrutiny in the context of religious liberty and in a more general application. As we have seen in the evolution of the doctrine from *Sherbert* to *Smith* in the area of free

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265. *Id.* at 401–02; *see also* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1181 (2005).

266. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (applying strict scrutiny to allow Amish to end education after eighth grade, the Court applied strict scrutiny); *see also* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986).

267. Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

268. *Id.* at 874.

269. *See, e.g.*, Fallon, *supra* note 255, at 1313.

270. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment).

271. 42 U.S.C. §§ 2000bb to 2000bb–4 (2012).

272. *Id.* § 2000bb(a)(3), (b)(1).

273. Winkler, *supra* note 237, at 859 ("The Supreme Court did not take well to Congress's encroachment on its standard-setting turf, and in *City of Boerne v. Flores*, [521 U.S. 507, 532–36 (1997),] the Court invalidated the RFRA to the extent it required strict scrutiny for judicial review of state laws.")

274. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

exercise, strict scrutiny has seen "a troubled history."[275] "In the 1970s and 1980s, however, the courts granted very few religion-based exemptions to generally applicable laws despite applying strict scrutiny in many decisions."[276] As to religious liberty claims, a study by Christopher Eisgruber and Larry Sager framed the application of strict scrutiny as "strict in theory but feeble in fact."[277] At the heart of the matter, only when a law is drafted to "intentionally target religions for discriminatory treatment" will it see the applicability of strict scrutiny.[278]

From our perspective, it is not the applicable standard that is important as much as the manner of evolution of the rule. If we want to tether the application of the fundamental public policy rule to an ascertainable standard, then using strict scrutiny certainly is promising. First, it continues to evolve. The strict scrutiny doctrine is flexible enough to bring groups into or remove groups from the classification, but it changes incrementally, providing groups with some degree of certainty.

Recently, the Supreme Court has softened its stance, stating that the fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny."[279] Even in its current state of application, the positivism of strict scrutiny would ensure compliance.

Further, if we examine *Bob Jones* through this lens, the result is consistent with the actual outcome. We realize that with a data point of one (the *Bob Jones* case) there is a hefty amount of skepticism in this type of analysis. Nonetheless, if the question is whether a tax-exempt entity can maintain a racially discriminatory policy, then would any policy survive strict scrutiny? If we are correct, then the fundamental public policy doctrine would import the strict-scrutiny standard since this is a class affected by the standard. There is no compelling state interest in maintaining racially discriminatory admission standards.

The conflating problem with the analysis is that a version of strict scrutiny would apply to the exercise of religious freedom. However, under *Smith*, laws that incidentally burden religion are not to receive strict scrutiny.[280] Only when a statute "single[s] out religiously motivated conduct for governmental regulation" will we apply strict scrutiny.[281] As long as the law is not intentionally discriminating against a religion, it most likely will be upheld.[282]

Thus, in *Bob Jones*, since the conduct is not of a class that rises to strict scrutiny, only the racially motivated component would persist under our analysis. This approach is consistent with the Supreme Court's view post-*Smith*. Other cases support this approach. In *Boy Scouts of America v. Dale*,[283] the Supreme Court was faced

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275. Winkler, *supra* note 237, at 858–59.

276. *Id.*

277. *Id.* at 859 (quoting Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994)).

278. *Id.* at 859.

279. Adarand Constructors v. Pena, 515 U.S. 200, 230 (1994).

280. Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882–89 (1990); Fallon, *supra* note 255, at 1269.

281. Fallon, *supra* note 255, at 1268–69.

282. Winkler, *supra* note 237, at 797.

283. 530 U.S. 640 (2000).

with the situation of discrimination based on sexual orientation.[284] The Boy Scouts claimed free-expression rights, and the plaintiff claimed discrimination based on sexual orientation.[285] The case was decided pre-*Obergefell*, and the case was not about tax exemption. However, consistent with our interpretation of using strict scrutiny as the proxy for fundamental public policy, the Supreme Court allowed the Boy Scouts to discriminate on the basis of sexual orientation.[286]

However, because the boundaries are so well-defined, strict scrutiny applies to a narrow pool of individuals. The purpose behind the strict-scrutiny standard seems to be to provide a voice to disenfranchised groups that otherwise lack political voice.[287] The Supreme Court uses the standard to protect that group from discriminatory behavior, usually long-standing. Within the context of *Bob Jones* and the application of the fundamental public policy doctrine, this overlay seems particularly apt. Moreover, even after a group is added to the standard, the group can be reexamined as societal preferences change.[288]

Fundamental policy public under this heuristic would not cover all potentially harmful behavior that goes against public policy. For example, discrimination based on gender or sexual orientation would not be covered under this standard.[289] The rigidity of the standard also often lags far behind societal preferences. For example, in *Obergefell*, the Supreme Court did not decide the standard of scrutiny it applied to the marriage statutes in the context of same-sex marriage.[290] The Supreme Court did use signals of strict scrutiny by calling the right a fundamental right. However, the Court did not clarify whether it was referring to the right to marry, the rights of LGBT individuals, or something else altogether. There has been much criticism of the Supreme Court for failing to articulate a standard.[291]

Assume that post-*Obergefell*, the IRS believes that it is required to act against institutions that violate fundamental public policy as determined by groups to which

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284. *Id.* at 644.

285. *Id.*

286. 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, 68.

287. Romer v. Evans, 517 U.S. 620 (1996) 647 (Scalia, J., dissenting); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969); Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 177 n.103 (2009) ("This comes up in the California marriage case, as well. One of the dissents disputes the finding of a suspect class and the application of strict scrutiny in part because 'the gay and lesbian community does not lack political power.'" (quoting *In re* Marriage Cases, 183 P.3d 384, 466 (Cal. 2008)); Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 HARV. L. REV. 1491, 1494 (1980).

288. *But see* David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. 599, 618 (2017) ("In practice, no case has even contemplated (much less seriously threatened) the removal of a classification which previously received strict scrutiny from the ranks of 'suspect classifications.'").

289. For example, many argue that the IRS should have a broader policy. *See* David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 BYU L. REV. 167, 169; Brennen, *supra* note 85, at 391; Mirkay, *supra* note 286, at 103.

290. *See generally* Nan D. Hunter, *A Deer in Headlights: The Supreme Court, LGBT Rights, and Equal Protection*, 52 HOUS. L. REV. 1121 (2015).

291. *See, e.g.*, Hunter, *supra* note 24, at 107; Yoshino, *supra* note 3, at 172.

the strict-scrutiny standard would apply. The IRS denies the Boy Scouts their tax exemption because the proxy for fundamental public policy has now switched to a strict-scrutiny analysis arguably after *Obergefell*.[292] From the Boy Scouts' perspective, there is no clear signal that they have violated the fundamental public policy overlay. But equipoise is the signal by the Supreme Court that they are outside of societal norms and mores. Would the Boy Scouts be surprised by an IRS challenge? It would be hard to believe they would be.

As one can see, the use of the strict scrutiny standard requires time and consideration by the Supreme Court. This then supports the conclusion in *Bob Jones* that the fundamental public policy standard requires a clear harmonization of societal preferences. Additionally, the standard provides a preference in favor of rescinding the discriminatory behavior over religious liberty. But there are limits on the standard. For example, the Supreme Court is not always clear in the applicable standard of review nor does the standard cover all types of discrimination. If a more inclusive standard is desired, we would propose using the Civil Rights Act of 1964.

B. Civil Rights Act of 1964

The fundamental public policy rule is not amenable solely to traditional constitutional law frameworks, however.[293] Scholars such as David Brennen, for example, have recommended using the more expansive Civil Rights Act of 1964 for the applicable testing standard.[294] In order to attempt to stay within a constitutional law frame, they acknowledge that the Civil Rights Act would only apply to a private actor if it receives federal financial assistance.[295]

This line of reasoning has failed to be persuasive because the Court has yet to find the providing of a tax exemption as the functional equivalent of federal financial assistance.[296] Brennen and others are trying to overlay the Civil Rights Act on the rules of 501(c) in a similar fashion as the fundamental public policy doctrine.[297] This approach faces many hurdles as it enters into the difficult debate as to whether or not a tax exemption is a subsidy. Neither scholars nor courts have come to a majority position.[298]

For our purposes, however, the constitutional constraints are irrelevant. We do not suggest that tax-exempt organizations are in all circumstances bound by the Civil Rights Act; rather, we propose that for the purposes of creating a taxonomy for the boundary of the fundamental public policy doctrine, the use of the Civil Rights Act as a proxy fits well within the legal reasoning of *Bob Jones*. By using the Civil Rights Act, rather than Treasury discretion, to establish a framework for the fundamental public policy rule, we avoid various objections and problems. If we were proposing

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292. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (declining to revoke the exemption because sexual orientation was not a protected class subject to strict scrutiny).

293. Brennen, *supra* note 289, at 171–72; Mirkay, *supra* note 286, at 75.

294. Brennen, *supra* note 287, at 171–72.

295. *Id.*

296. McGlotten v. Connally, 338 F. Supp. 448, 462 (D.D.C. 1972); Mirkay, *supra* note 286, at 76–78.

297. *See generally* Brennen, *supra* note 289; Mirkay, *supra* note 286.

298. *See supra* note 14.

adding the Civil Rights Act as another standard, then we would face the existing shortfalls in Brennen's arguments. Instead, if the purpose of the fundamental public policy doctrine is to override the charitable exemption once an organization is outside the bounds of public mores or norms, then the Civil Rights Act is an important proxy.

The Civil Rights Act has created a large body of cases and, as a result, would provide many data points to help sort out what constitutes a fundamental public policy.[299] By utilizing the vast case law in the Civil Rights Act, charities will know when they are approaching the boundaries of the standard. Moreover, the standard shifts over time with societal preferences. As we pointed out earlier, if our goal is to allow charities to act without concern to an unknown standard and we want that standard to be flexible, the Civil Rights Act shows promise as a proxy.

The Civil Rights Act may not represent a perfect match for what the Court meant by fundamental public policy, of course. It currently only protects individuals from discrimination based on race, color, national or ethnic origin, religion, sex, age, and disability.[300] There are various discriminatory behaviors that are outside of the Civil Rights Act. For example, neither sexual orientation nor marital status is covered by the Act.[301] Additionally, there are carve outs or fixed exemptions built into the Civil Rights Act. For example, a school can discriminate based on sex if it is part of the historic educational mission.[302]

As it stands, the limitations of the Civil Rights Act as a proxy could be explained through the following example. Suppose that a religiously affiliated educational institution refuses to hire a woman as provost because of its religious doctrine. Although Title IX of the Civil Rights Act proscribes discrimination based on gender, it may permit an exemption in this case. The interpretive problem is framed as follows: is that exemption a statement of public policy, which would thus function as a carve-out of *Bob Jones* fundamental public policy, or is that exemption permissible because without strict scrutiny, free exercise controls?[303] It would seem that under *Bob Jones*, the fact that Congress exempted out this behavior would cut in favor of the institution. Moreover, if Congress removed the exemption from Title IX, it would be a strong signal that this is not permitted under the fundamental public policy doctrine.

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299. For example, there are enough cases that various empirical studies can be conducted discussing success rates based on different plaintiff characteristics. Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247 (2005); Vincent James Strickler, Green-*Lighting* Brown*: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 810 (2009); *see also* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) (listing other cases in which Congress amended Title VII to comply with its "broad remedial purpose").

300. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); *see also* Brennen, *supra* note 289; Mirkay, *supra* note 286. For a discussion of each category, see S. REP. No. 88-872 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2356.

301. Brennen, *supra* note 289, at 169.

302. *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005).

303. Ralph D. Mawdsley & Steven Permuth, Bob Jones University v. United States*: Public Policy and Religious Educational Institutions*, 1 ED. L. REP. 745, 749–51 (1982).

As one can see, these restrictions may cut both ways. On one hand, one might believe that the Civil Rights Act is not inclusive enough to capture what may be considered a *Bob Jones* violation of the fundamental public policy doctrine. For example, *Obergefell* shows that although discrimination based on sexual orientation is not covered by the Civil Rights Act, according to the majority, it rises to a similar standard. The Civil Rights Act as a proxy, in that case, may not be inclusive enough.

On the other hand, the finite application of the Civil Rights Act is exactly the type of standard that must be in place in order to have a clear guideline for charitable action. The fact that Congress has not acted to include groups in the Civil Rights Act and the exemption of some groups from the Act are clear indications of public opinion. The purpose as articulated in *Bob Jones* of the fundamental public policy exemption is not to be a test against contemporaneous societal norms or mores but against established ones. The Supreme Court used many factors in determining when an action crossed the threshold. Thus, the Civil Rights Act, with all of its perceived limitations, demonstrates its promise as a proxy.

Moreover, a denial of exemption by the IRS for violating fundamental public policy will end up in courts. In the ultimate balancing test between free exercise and the discriminatory behavior, the Supreme Court will be faced with the determination of priority of protections. When we proposed using the strict scrutiny standard, the balance tilted in favor of denying the exemption because discrimination that rises to applicability of strict scrutiny takes priority. Here, we cannot rely on that de facto determination. Therefore, this will be a true balancing test. The violation of the Civil Rights Act allows the Supreme Court to use it as a foundation for determining the public opinion.

C. Treasury Blacklist

To this point, we have articulated two standards that could be used to define fundamental public policy. First, we analyzed a strict scrutiny standard, which would be based on judicial interpretation: the Supreme Court would add a class to the standard and have to maintain a class within the standard. Second, we looked to congressional action through the Civil Rights Act. In this section, we look to an executive-based standard as defined by the Treasury Department. Here we argue that the Treasury should use a sure shipwreck to allow and encourage compliant behavior. By maintaining a blacklist of impermissible discrimination, tax-exempt entities would have clear guidance on compliance.

One reason we advocate for a potentially more expansive view is because of the limitations on the prior standards. Whether those limitations are positive or negative depends on the amount of additional regulation charities should be subject to. If the goal of fundamental public policy is to prohibit tax-exempt entities from receiving an exemption when they act outside of public norms or mores, then a more expansive interpretation of what constitutes fundamental public policy may be warranted.

Under the Yoshino and Tribe interpretation of *Obergefell*, discrimination based on sexual orientation would violate the fundamental public policy doctrine. Churches and other religious entities would necessarily be protected from losing their exemptions anyway, as we have discussed above. However, *Bob Jones* itself makes clear that religiously affiliated institutions do not enjoy the same level of exemption

from the fundamental public policy doctrine.[304] A religious school's discrimination on the basis of sexual orientation would violate the equal dignity of the individual. Additionally, under this most expansive taxonomy, single-gender schools may also violate the standard.

As it is evident, a standard Treasury blacklist is the most fluid of our proposed standards, requiring charities to continue to monitor the landscape while, at the same time, providing them with a clear guide to current public policy standards. This progressive standard ultimately could prove the most enlightened. For example, assume that a single-sex school discriminates against transgender individuals. In order to not deal with the accommodation of these individuals as related to bathroom facilities, locker room facilities, sports teams, and the like, the school will not admit such students. Under current rules, transgender students are not subject to strict scrutiny nor, currently, are they subject to the Civil Rights Act.[305] Thus, under the two prior safe harbors, the IRS would be unable to deny or revoke the school's exemption.

However, the legal treatment of transgender individuals is rapidly changing. In ten years, discrimination against transgender individuals will likely seem as offensive as racial discrimination is today. Currently, transgender individuals are suing educational institutions for violations under Title IX.[306] Although the cases have been dismissed to date, there is no guarantee the courts in the future will not change their interpretation of Title IX.[307]

In fact, the treatment of transgender individuals illustrates why a Treasury blacklist may be the best way to approach the fundamental public policy rule. While transgender individuals have not yet had success at the judicial or legislative branches, on May 13, 2016, the Obama administration sent a "Dear Colleague" letter to public schools, announcing that it believed that Title IX protected gender identity.[308] Because of the flexibility the executive branch enjoys, it could move far more quickly than Congress or the courts.

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304. *See supra* notes 30–55 and accompanying text.

305. *See generally* Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC'Y 301 (2013).

306. *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev'd*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017) (mem.); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594 (E.D. Mich. 2015); Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ., 97 F. Supp. 3d 657 (W.D. Pa. 2015).

307. In fact, in one case, the transgender plaintiff had some success. The Fourth Circuit held that Title IX was ambiguous with respect to gender identity, and thus accorded deference to the Department of Education, which argued that Title IX required schools to allow transgender students to use the restroom associated with their gender identity. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016). Initially, the Supreme Court stayed the Court of Appeals's mandate pending the filing of a writ of certiorari. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016). But after a change in the Presidency, the Department of Justice and Education in February of 2017 issued new Title IX guidance clarifying protections for transgender students. In light of the intervening actions, the Supreme Court vacated the stay and remanded the case to the Fourth Circuit, Gloucester Cty. Sch. Bd. v. G.G. *ex rel* Grimm, 137 S. Ct. 1239 (2017) (mem.). Still, the question of whether Title IX covers transgender individuals may be resolved soon.

308. Dear Colleague Letter of Transgender Students from Catherine E. Lhamon, Assistant

The use of the equal dignity proxy allows the IRS to prohibit certain behaviors. Because of the fluid nature of the standard, it would require more notice by the IRS. For example, the IRS can continue to maintain a list of what it considers "protected classes" in order create compliance by charities. This would allow charities to either have a safe-harbor or challenge the denial of exemption. Rather than be behind the curve and wait until it is painfully obvious that the behavior was inappropriate, the IRS can achieve the same result quicker.

For example, if the goal is to not permit charities to enjoy tax-exempt status when they violate fundamental public policy, then time should not be the proxy as it was in *Bob Jones*. There are at least two possible ways that the IRS could determine when to include a group. The IRS, in the most expansive approach, would produce yearly lists of prohibited behavior. The concession for compliance with the public opinion portion of the standard, the IRS would have to self-select. If a more rigorous process was necessitated, the IRS could go through a yearly notice and comment process. Through the administrative state a thoughtful inclusion of groups would occur. Because we would be relying on interest group politics to prevent a group from entering the list before there was alignment, we would not be adding groups or removing groups before we had a proxy of public opinion.[309]

A collateral consequence of this approach would be that the IRS is no longer using prosecutorial discretion to opt out of decision making. One of the main criticisms of the current ad hoc approach is that there is no clear understanding outside of race when or if the IRS will use the fundamental public policy stick. Theoretically, the IRS could use this stick at any time for any behavior. Under our sure shipwreck approach, the IRS would be explicit in its decision making.

Giving Treasury the authority to determine what constitutes a fundamental public policy is not, of course, a perfect solution to the problem. In the first instance, it deposits significant authority in the Treasury Department, which alone would get to decide what types of discrimination violate public policy.

We are not put off by this, however, because the Treasury Department already determines fundamental public policy. The IRS determines whether to grant and whether to revoke tax-exempt status. While would-be tax-exempt organizations can challenge its decision when it decides that they do not qualify because they violate a fundamental public policy, the public cannot directly challenge the IRS's

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Sec'y for Human Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney 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/9V99-2GZT]. But since these executive orders are not binding on future administrations, policy perceived as beneficial can be rolled back. The Obama-era executive order was rescinded by President Trump. Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [https://perma.cc/GGM9-Q8CA].

309. *See, e.g.*, Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 9 (1996); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988); Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755 (2015).

determinations. Our proposal leaves that authority with the IRS, but adds a level of transparency—the IRS has to say, in advance, what type of discrimination it views as violating public policy. With that list available to the public, the IRS must justify and explain its decisions.

In the second instance, some may question whether the standard has gone too far or not far enough. Some might advocate that this approach does not goes far enough. We should not be tacitly supporting actions that are against public policy. By definition the disenfranchised group does not have political voice, and that is the reason for the equal protection standard. Thus, by a more proactive standard, we are encouraging social change. In our prior example, the school would be denied tax-exemption because of its effects on the transgender individuals.

Problematic with that approach is that it requires us to predict where societal norms and mores will be in the future. As we can see in the context of strict scrutiny, there are not even constants in this highest constitutional standard. By pushing the standard forward based on a contemporaneous understanding of the problem without the benefit of time, a deleterious standard might apply.

CONCLUSION

We find it interesting that *Obergefell*, a case that has no direct link to taxes,[310] has provoked such a public and emotional debate over tax status. And yet it has. Tax-exempt status appears to be important in the public mind, and the potential for losing that tax-exempt status has proven to have real political salience. While the American public at largely likely does not understand the intricacies of the *Bob Jones* decision or the contours of the fundamental public policy rule, they realize that *Obergefell* changed something. As a result, unfounded or not, the potential of the Court's decision in *Obergefell* to cause religious organizations that oppose homosexuality to lose their tax-exempt status has mobilized a significant swath of Americans.

And fears that churches will lose their tax exemptions in the wake of *Obergefell* are entirely unfounded. Notwithstanding the fundamental public policy rule, churches that discriminate against LGBT individuals will not lose their tax exemptions. Whether the Constitution provides for church autonomy or churches merely have the same associational rights as others, *Bob Jones* is inapplicable to churches that oppose same-sex marriage. *Obergefell*'s holding that marriage is a fundamental right does nothing to change that conclusion.

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310. The federal tax consequences of same-sex marriage came two years earlier, when *United States v. Windsor*, 133 S. Ct. 2675 (2013), struck down section three of the Defense of Marriage Act. At that point, the federal government could recognize same-sex couples as married for tax purposes, *see* Herzig, *supra* note 159; nothing about *Obergefell* supplemented or otherwise affected that conclusion. The limited tax application of *Obergefell* is in the area of state/federal law conformity issues like employee benefits. *See* David J. Herzig, *The Tax Implications of Today's Supreme Court Same-Sex Marriage Decision*, TAXPROF BLOG (June 26, 2015), http://taxprof.typepad.com/taxprof_blog/2015/06/herzig-the-tax-implications-of-todays-supreme-court-same-sex-marriage-decision.html [https://web.archive.org/web/20161024025926/http://taxprof.typepad.com//taxprof_blog/2015/06/herzig-the-tax-implications-of-todays-supreme-court-same-sex-marriage-decision.html].

For religiously affiliated institutions, however, the calculus is different. Although the Supreme Court's opinion in *Obergefell* does not mention the fundamental public policy requirement, its holding may represent a shift in fundamental public policy. If its holding—or its embrace of equal dignity—means that discrimination based on sexual orientation violates a fundamental public policy, religious schools and other religiously affiliated organizations face a loss of exemption if they discriminate. Even where that discrimination is based on religious beliefs, the Supreme Court has held that the interest of the government in encouraging fundamental public policies allows revocation or denial of exemption.

Moreover, even if *Obergefell* does not mark a shift in fundamental public policy, that shift will happen at some point. The problem is, under the current diachronic fundamental public policy regime, tax-exempt organizations have no way to know, *ex ante*, what will violate a fundamental public policy. Only after violation has occurred, and exemption has been revoked, do the contours of fundamental public policy become clear.

Although punishing bad actors may be emotionally satisfying, we believe that the purpose of the fundamental public policy is to discourage such behavior in advance. As a result, we have recommended three safe harbor regimes that will allow religiously affiliated tax-exempt organizations to know what kinds of discrimination are incompatible with tax exemption before they must act. Tying the definition of fundamental public policy to strict scrutiny, to the Civil Rights Act, or to equal protection would work. In the end, though, we believe that the flexibility attendant to equal protection, mixed with the nimbleness that the Treasury Department would enjoy in crafting a blacklist of prohibited discrimination, would provide the best and most effective safe harbor regime.

It would also require little additional work. Presumably, the Treasury Department already has a sense of what it believes violates fundamental public policy and weighs exemption applications against that sense. To create the blacklist, it would merely have to formally list those criteria, an exercise that would eliminate arbitrariness in the application of the list and would provide certainty to tax-exempt organizations. And where it believed fundamental public policy was shifting, or where it believed that tax-exempt organizations were skirting the rules, it would have the ability to amend the list.

With the clarification provided by a sure shipwreck rule, religiously affiliated tax-exempt organizations would be able to weigh the relative value of their religious commitments and the cost of following those commitments. The safe harbor would necessarily not prohibit discrimination, but it would require organizations that wanted to discriminate to internalize additional costs in making that decision, which would, in the end, discourage actions that violate public policy while respecting the religious liberty to act badly.