

## WHAT ABOUT *BOB*? THE CONTINUING PROBLEM OF FEDERALLY-SUBSIDIZED LGB DISCRIMINATION IN HIGHER EDUCATION

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### INTRODUCTION

The time has come to reconsider whether colleges and universities that discriminate against lesbian, gay, and bisexual (LGB) students and applicants through restricted access to married housing, discriminatory codes of conduct, and other means deserve federal tax benefits.<sup>2</sup> In *Bob Jones University v. United*

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2. Gender identity discrimination, an important topic deserving public attention, is not within the scope of this Article. While the author believes that much of the public policy disfavoring discrimination based on sexual orientation may apply to gender identity discrimination, this Article looks specifically to actions of the judiciary, legislature, and executive branch with regard to sexual orientation discrimination. While many institutions that discriminate against the LGB community also discriminate against transgender Americans, the author seeks to avoid conflating the two groups with a term like “LGBT” when the analysis of public policy with respect to LGB and transgender Americans may be different.

*States*,<sup>3</sup> the United States Supreme Court held that universities adhering to racially discriminatory admissions processes and exercising racially discriminatory codes of conduct are not “charities” under the U.S. Tax Code, and are not entitled to tax-exemption and other tax benefits.<sup>4</sup> The Court relied on the common law of charitable trust enforcement to decide that institutions violating the law or clear public policy need not receive the tax benefits owed to a charity, even though the would-be charity promotes and furthers educational or religious goals usually associated with a tax-exempt institution.<sup>5</sup>

This Article proposes extending the principles from *Bob Jones* to LGB discrimination in higher education, and suggests that discriminating institutions should be denied tax exemptions available to charities. First, Part II discusses the *Bob Jones* Court’s holding that exemptions to various tax liabilities for charities depend on the charitable organization’s satisfaction of the criteria for enforceable charitable trusts, namely that the charity not act contrary to law or established public policy. Parts III and IV of this Article describe the current “state of play” in public policy and law with regard to protections for LGB persons; Part III looks to policy, and Part IV discusses illegal discrimination. Because the *Bob Jones* Court focused substantially on agreement among all three branches of government that racial discrimination was inconsistent with charitable status,<sup>6</sup> any extension of *Bob Jones* must carefully consider how each branch has treated LGB discrimination. Part III is concerned with recent and historic decisions of the judiciary, legislative action towards sexual orientation-based discrimination, and executive actions.

Part III Section B focuses on the judicial branch. The judiciary has perhaps provided the greatest support of the contention that law and policy forbid sexual orientation discrimination: the United States Supreme Court’s decisions in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*,<sup>7</sup> *Lawrence v. Texas*,<sup>8</sup> *United States v. Windsor*,<sup>9</sup> *Romer v. Evans*,<sup>10</sup> and, most distinctly, *Obergefell v. Hodges*<sup>11</sup> explain the development of American policy with respect to LGB persons. A growing number of U.S. Courts of Appeals have also interpreted Title VII of the Civil Rights Act of 1964 to protect against sexual orientation discrimination in employment; these decisions demonstrate a growing public policy prohibiting LGB discrimination, at least to the same extent our society prohibits gender discrimination.<sup>12</sup>

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

4. *Id.* at 591, 598.

5. *Id.*

6. *Id.* at 593.

7. *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010).

8. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

9. *United States v. Windsor*, 570 U.S. 744, 770 (2013).

10. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

11. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015).

12. *See, e.g., Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018); *Zarda v. Attitude Express, Inc.* 883 F.3d 100, 111-13, 115-19 (2d Cir. 2018) (en banc); *Hively v. Ivy*

Part III Section C examines legislative support for non-discriminatory public policy, while Section D discusses executive actions. The legislative and executive branches of federal and state government generally support a public policy of equality for the LGB community.<sup>13</sup> Congress has withheld protections from LGB persons in the past,<sup>14</sup> but its position is changing,<sup>15</sup> and a majority of state legislatures have acted to protect LGB citizens.<sup>16</sup> The LGB community remains protected by executive action in the same fields emphasized in *Bob Jones*' discussion of executive support for public policy prohibiting discrimination: equal employment directives, military integration, and rules for federally-subsidized housing all protect against discrimination based on sexual orientation.<sup>17</sup> State anti-discrimination statutes, federal equal employment actions, provisions of the Civil Rights Act of 1964, and directives from executive agencies and officials lend themselves to a conclusion that a public policy against LGB discrimination is currently widely-held.<sup>18</sup>

Part IV discusses whether sexual orientation discrimination is unlawful in some instances. *Obergefell* appears to outlaw some restrictions on same-sex marriage recognition,<sup>19</sup> such as withholding available married housing from same-sex spouses. Similarly, while the tension between religiously-motivated LGB discrimination and state public accommodations laws remain unresolved after *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,<sup>20</sup> much of the

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Tech Cmty. Coll. of Ind., 853 F.3d 339, 349-51 (7th Cir. 2017) (en banc); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (finding that gender stereotyping is a cognizable violation of Title VII).

13. See, e.g., Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515-3517 (enacted Sep. 20, 2011) (codified as 10 U.S.C. § 654 (2012)); Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (enacted Jul. 2, 1964) (codified as 42 U.S.C. §§ 2000e-2000e-15 (2012)); *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015).

14. See, e.g., Defense of Marriage Act of 1996, Pub. L. No. 104-119, 110 Stat. 2419 (enacted Sep. 21, 1996) (codified as 1 U.S.C. § 7 (1996) & 28 U.S.C. § 1738C (1996)), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013)).

15. See, e.g., Brian Montopoli, *Obama Signs Historic "Don't Ask" Repeal Bill*, CBS News (Dec. 22, 2010 5:13 PM), <https://www.cbsnews.com/news/obama-signs-historic-dont-ask-repeal-bill/> [<https://perma.cc/7KU7-UBCW>].

16. See Jerome Hunt, *A State-by-State Examination of Non-Discrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACCESS FUND (Jun. 2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf). [<https://perma.cc/3FSS-LGQV>] [hereinafter CAPAF Study].

17. See, e.g., *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015); Brian Montopoli, *Obama Signs Historic "Don't Ask" Repeal Bill*, CBS News (Dec. 22, 2010 5:13 PM), <https://www.cbsnews.com/news/obama-signs-historic-dont-ask-repeal-bill/> [<https://perma.cc/7KU7-UBCW>]; 24 C.F.R. § 5.105(a)(2) (2018).

18. See, e.g., CAPAF Study, *supra* note 15; *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015); Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (enacted Jul. 2, 1964) (codified as 42 U.S.C. §§ 2000e-2000e-15 (2012)).

19. *Obergefell*, 135 S.Ct. at 2601.

20. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1720-23 (2018).

case's language—despite its mandate—indicates that the Court is prepared to soon declare that genuinely-held religious beliefs will not excuse violating a state's public accommodations law prohibiting discrimination in most cases.<sup>21</sup> Where such a law encompasses institutions of higher education, LGB discrimination may fall within *Bob Jones*' scope.

Finally, Part V of this Article will discuss the Free Exercise defense available to religious colleges and universities in any action seeking to challenge their tax-exemption. The *Bob Jones* Court found that the compelling state interest in prohibiting racial discrimination in education overrode the university's Free Exercise claim.<sup>22</sup> The state interest in prohibiting sexual orientation discrimination may be sufficiently compelling. If not, a court may still find a revocation of tax-exemption constitutional where a college or university's discriminatory conduct is not prohibited outright.

*BOB JONES V. UNITED STATES AND TAX-EXEMPTION FOR RELIGIOUS COLLEGES  
AND UNIVERSITIES*

The Supreme Court's 1983 decision regarding Bob Jones University's (Bob Jones or the University) status as a tax-exempt charity serves as the legal precedent for this Article's conclusion that discriminatory institutions of higher education should not receive the tax benefits accorded to other charities. As such, a detailed analysis of its holding is essential to understand whether it may extend to other forms of discrimination.

*Background*

Bob Jones University is a private non-profit religious university in Greenville, South Carolina.<sup>23</sup> Until 2000, the University applied admissions criteria that denied admission to interracial couples and spouses, as well as advocates of interracial dating or marriage.<sup>24</sup> Bob Jones also prohibited interracial dating, affiliation with organizations promoting interracial dating, or advocacy of interracial dating on campus, and mandated expulsion as the punishment for a violation of its interracial dating policy.<sup>25</sup> These policies stemmed from the University's sincerely-held belief that the Bible forbids interracial marriage and dating.<sup>26</sup>

Racially discriminatory policies in private schools evaded legal scrutiny until the early 1970's, when the Internal Revenue Service (IRS) began to consider discriminatory practices in its provision of tax-exemptions for academic

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21. *Id.* at 1727.

22. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

23. *Id.* at 579.

24. *Bob Jones University Ends Ban on Interracial Dating*, CNN (Mar. 4, 2000, 1:26 AM), <http://www.cnn.com/2000/US/03/04/bob.jones/index.html> [<https://perma.cc/NLH8-GW87>].

25. *Bob Jones Univ.*, 461 U.S. at 580-81.

26. *Id.* at 580.

institutions.<sup>27</sup> The federal courts addressed tax-exemptions for discriminatory private education in January 1970, when the U.S. District Court for the District of Columbia, in *Green v. Kennedy*, enjoined the IRS from providing tax exemption to private schools in Mississippi that held racially-discriminatory admissions processes.<sup>28</sup> The *Green* court reviewed a class challenge to the IRS's provision of tax exemption to private schools that discriminated on racial grounds. The court considered two claims: violation of the Fifth Amendment, based on the federal government's support of racial discrimination, and a non-constitutional challenge for the failure of such practices to provide a public benefit.<sup>29</sup> *Green* established that "tax benefits under the Internal Revenue Code mean a substantial and significant support by the Government" for unlawful discriminatory practices, finding state action in tax-exemption for discriminatory private schools.<sup>30</sup>

Six months after the district court issued a preliminary injunction against the IRS's provision of tax benefits to those schools, the IRS "concluded that it could 'no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination.'"<sup>31</sup> A year later, the court permanently enjoined the IRS from exempting Mississippi private schools that continued to discriminate.<sup>32</sup> The IRS subsequently revised its policy on tax-exemptions for charities as follows:

Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable, . . . or educational purposes" was intended to express the basic common law concept [of "charity"] . . . All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.<sup>33</sup>

On November 30, 1970, following the injunction in *Green*, the IRS submitted a letter to Bob Jones announcing that it would be challenging the University's tax-exempt status, officially revoking its tax-exempt status on December 1, 1971.<sup>34</sup> After its tax refund request was denied pursuant to this IRS decision, the University sued the IRS to reclaim its withheld tax benefits.<sup>35</sup> The Supreme Court granted certiorari after the U.S. District Court for the District of

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27. *Id.* at 581.

28. See *Green v. Kennedy*, 309 F. Supp. 1127, 1140 (D.D.C. 1970), *app. dismissed sub nom.* *Cannon v. Green*, 398 U.S. 956 (1970).

29. *Id.* at 1129-130.

30. *Id.* at 1134.

31. *Bob Jones Univ.*, 461 U.S. at 578 (quoting IRS News Release (7/10/70)); see also *Green*, 309 F. Supp. at 1136.

32. *Bob Jones Univ.*, 461 U.S. at 578-79 (citing *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* *Coit v. Green*, 404 U.S. 997 (1971) (*per curiam*)).

33. *Id.* at 579 (quoting Rev. Rul. 71-447, 1971-2 C.B. 230).

34. *Id.* at 581.

35. *Id.* at 582.

South Carolina ruled against the IRS and the U.S. Court of Appeals for the Fourth Circuit reversed.<sup>36</sup>

*Analysis and Holding: Charitable Trust Law, Discrimination, and Tax Exemption*

The Supreme Court analyzed the IRS provisions defining the scope of tax exemptions for charities; the Court found that the “public benefit” principle included in the new IRS policy referred to “the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or contrary to public policy.”<sup>37</sup> The Court went on to determine whether prohibiting interracial dating in admissions and codes of conduct ran contrary to the law or public policy in deciding whether Bob Jones could be denied the tax-exempt status granted to other institutions of higher education.

The Court’s opinion focused on the national consensus that racial discrimination violates public policy. In determining a national consensus, the Court looked to find agreement among the three branches of government.<sup>38</sup> It found that “[a]n unbroken line of cases following *Brown v. Board of Education*” made clear that the Court itself unquestionably considered racial discrimination contrary to public policy and offensive to individual rights under the Fourteenth Amendment.<sup>39</sup> The Court also analyzed Congress’ clear view that racial discrimination offends public policy, as demonstrated, inter alia, by Titles IV, VI, and VIII of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Emergency School Act of 1972.<sup>40</sup> The Court found that the executive branch was equally clear in its condemnation of racial discrimination, relying upon executive action prohibiting racial discrimination in federal employment, military service, and federally-assisted housing.<sup>41</sup> The Court concluded that, given the IRS’s authority as recognized by Congress,<sup>42</sup> as well as agreement within the federal government as to the policy prohibiting racial discrimination, “an educational institution engaging in practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a beneficial and stabilizing influence in community life.”<sup>43</sup>

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36. *Id.*

37. *Id.* at 591, 598.

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

39. *Id.* (citations omitted).

40. *Id.* at 594 (citing Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Emergency School Aid Act of 1972, Pub. L. No. 92-318, 86 Stat. 354 (repealed; replaced by Emergency School Aid Act of 1978, Pub. L. No. 95-561, 92 Stat. 2252)).

41. *Id.* at 594-95 (citing Exec. Order No. 9980, 3 C.F.R. § 720 (1943-1948 comp.); Exec. Order No. 9988, 3 C.F.R. §§ 726, 729 (1943-1948 comp.); Exec. Order No. 10730, 3 C.F.R. § 389 (1954-1958 comp.); Exec. Order No. 11063, 3 C.F.R. § 652 (1959-1963 comp.)).

42. *Id.* at 596-98.

43. *Id.* at 598-99 (citations omitted).

*The First Amendment Challenge in Bob Jones*

Bob Jones argued that denying the University tax exemption based on genuinely-held religious beliefs violated the Free Exercise Clause of the First Amendment, even if its discriminatory practices violate widely-held public policy.<sup>44</sup> Adhering to its foundational Free Exercise jurisprudence,<sup>45</sup> the Court explained that the substantial protection for conduct grounded in religious belief gives way when necessary to accomplish a compelling state interest.<sup>46</sup> The Court summarized the state interest in racial equality as follows:

The governmental interest at stake here is compelling. As discussed in Part II(B), *supra*, the Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation’s history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest and ‘no less restrictive means,’ are available to achieve the governmental interest.<sup>47</sup>

Having reached its conclusion by weighing the state’s interest against the religious burden on Bob Jones, the Court did not substantially discuss how the withdrawal of tax benefits would impact the University’s religious conduct. But the Court did emphasize that “denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.”<sup>48</sup> So, while the revocation of tax-exemption was a practical burden for the University, it did not prohibit their religious conduct.

## THE PUBLIC POLICY PROHIBITING LGB DISCRIMINATION

*Introduction: Discrimination in Higher Education Today and Bob Jones*

Discrimination based on sexual orientation is prevalent in higher education. By 2017, 103 religious institutions had requested Title IX exemptions to deny admission or equal access to married housing based on LGB status,<sup>49</sup> and to

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44. *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-03 (1983).

45. *Id.* at 603 (citing *United States v. Lee*, 455 U.S. 252 (1982), *Thomas v. Review Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972), *Sherbert v. Verner*, 374 U.S. 398 (1963)).

46. *Bob Jones Univ.*, 461 U.S. at 603; *see also* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that child protection laws apply to religiously-motivated conduct); *Thomas*, 450 U.S. at 718 (1981) (requiring that no “less restrictive means” exist to accomplish the state’s goal).

47. *Bob Jones Univ.*, 461 U.S. at 604 (citations omitted).

48. *Id.* at 603-04.

49. Christian Legal Society, *Religious Schools and Colleges Guidance for Same-Sex Issues*, 22 (2015), <https://www.clsnet.org/document.doc?id=873> [<https://perma.cc/QMG9-57FN>] [hereinafter CLS Guidance].

punish homosexuality or bisexuality on campus.<sup>50</sup> Indeed, in the wake of *Obergefell v. Hodges*,<sup>51</sup> dozens of presidents of religiously-affiliated private colleges submitted a letter to the Senate majority leader and Speaker of the House expressing fear that they might lose tax-exemption.<sup>52</sup> The letter stated that, of the “more than 1,700 religiously-affiliated colleges . . . [t]he majority . . . forbid sexual intimacy outside of marriage *between one man and one woman*.”<sup>53</sup> This discrimination extends beyond the failure to recognize a same-sex marriage to the denial of benefits to same-sex spouses in housing policies.<sup>54</sup> Some colleges and universities expel students who come out as gay or bisexual.<sup>55</sup>

Much of the discussion of public policy prohibiting racial discrimination in *Bob Jones* can be applied to contemporary public policy regarding discrimination based on sexual orientation. The *Bob Jones* Court limited its holding to racial discrimination, noting a distinctly painful national history of segregated education and unified efforts to combat such policies and mitigate their lasting impact.<sup>56</sup> The Court, however, emphasized that the legislative mandate for the IRS to grant or deny tax exemptions requires the ability “to exercise [IRS] authority to *meet changing conditions and new problems*” and the IRS’s “*continuing duty to interpret and apply the Internal Revenue Code*.”<sup>57</sup> The Court seems to clearly establish that the principles upon which tax exemption are to be determined—lawfulness and public policy—remain flexible enough to adapt as law and policy do. In reaching its holding, the *Bob Jones* Court relied heavily on the unanimity of the three branches of government in seeking to prohibit racial discrimination.<sup>58</sup> Thus, as the *Bob Jones* Court did in 1983 with race, this Article examines how the three branches of government have contributed to a contemporary public policy prohibiting LGB discrimination.

### *The Judicial Branch*

The Supreme Court has, in several instances, acknowledged growing public policy prohibiting discrimination based on sexual orientation. Early cases applying this type of analysis include *Romer v. Evans* and *Lawrence v. Texas*. In *Romer*, the Court struck down an Amendment to the Colorado Constitution that

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50. *Shame List: The Absolute Worst Campuses for LGBT Youth*, Campus Pride (Sep. 13, 2017), <https://www.campuspride.org/ShameList/> [https://perma.cc/QMU5-K2HE] [hereinafter Campus Pride Shame List]; CLS Guidance, *supra* note 41, at 22.

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

52. Letter from Religious Educational Institutions on Loss of Tax-Exemption to Mitch McConnell and John Boehner (Jun. 3, 2015) (on file at the Family Research Council), <https://downloads.frc.org/EF/EF15F04.pdf> [https://perma.cc/M9M2-TXMX].

53. *Id.* (emphasis added).

54. *Id.*; CLS Guidance, *supra* note 41, at 22.

55. Campus Pride Shame List, *supra* note 42.

56. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (“Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education.”).

57. *Id.* at 596-97 (emphasis added).

58. *Id.* at 598.

prospectively sought to deny LGB Coloradans the protection of anti-discrimination legislative, judicial, or executive action.<sup>59</sup> The Amendment was aimed at combating a series of state and municipal anti-discrimination laws protecting against sexual orientation discrimination.<sup>60</sup> The Court explained that anti-discrimination statutes “typify . . . emerging tradition of statutory protection” for groups subject to discrimination.<sup>61</sup> And, while the Court acknowledged that the Colorado anti-discrimination statutes “depart from the common law” by enumerating protected classes, the Court also noted—with apparent approval—that enumeration serves as a useful guide to assist compliance.<sup>62</sup> Moreover, enumeration of protected classes—including the LGB community—have become commonplace in the years following *Romer*.<sup>63</sup> By acknowledging both the emerging trend of statutory protection against discrimination, and the helpfulness of enumerating protected classes, the *Romer* Court laid a foundation for the Supreme Court’s recognition of public policy favoring LGB equality.

But *Romer*’s more significant contribution to the public policy argument at hand comes from its refusal to tolerate state action that “imposes a special disability on [LGB] persons alone.”<sup>64</sup> *Romer* stands as the Court’s first holding that the Equal Protection Clause of the Fourteenth Amendment extends to LGB persons.<sup>65</sup> *Romer*’s holding should not be construed to provide *direct* support for a public policy that would be violated by a private institution’s sexual orientation-based discrimination. Rather, *Romer* is about the unconstitutionality of a state’s attempt to exclude one group from the general protections against discrimination available to all others. As such, it serves only as an introduction to the Court’s later, more express, acknowledgments of non-discrimination as public policy.

When the Court next considered LGB discrimination in *Lawrence*, its acknowledgement of public policy favoring LGB equality progressed incrementally. In striking down a Texas statute criminalizing homosexual sodomy,<sup>66</sup> the Court examined developments in tolerance and acceptance of homosexuality in America,<sup>67</sup> and found that the Fourteenth Amendment guaranteed homosexual individuals the autonomy to form intimate relationships.<sup>68</sup> The Court explained that constitutional protections develop as society does, and that freedom from infringement on the rights and dignity

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

60. *Id.* at 628-29.

61. *Id.* at 628.

62. *Id.*

63. See CAPAF Study, *supra* note 15.

64. *Romer*, 517 U.S. at 631.

65. See *id.* at 633 (“Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”).

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

67. *Id.* at 567, 573-74, 578.

68. *Id.* at 578.

assured by the Fourteenth Amendment develops alongside contemporary public policy. This position is best exemplified in the closing paragraph of the opinion:

[The authors of the Fourteenth Amendment] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>69</sup>

The Court's affirmation of the LGB community's right to define intimate relationships under the Fourteenth Amendment rests on principles of dignity and equality.<sup>70</sup> *Lawrence* stands for the Constitution's protection of the "dignity as free persons" of citizens, regardless of their sexual orientation.<sup>71</sup> *Lawrence* plainly refers to the unconstitutionality of an infringement on this dignity in the form of criminal punishment, and discrimination in higher education is no criminal sanction. But the Court later clarified that "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."<sup>72</sup> The *Lawrence* Court's assertion that members of the LGB community are entitled to the same dignity as other Americans stands as another early example of the judicial branch's acknowledgement of public policy disfavoring LGB discrimination and disparate treatment.

The Supreme Court acknowledged anti-discriminatory public policy again in *United States v. Windsor*, finding the Defense of Marriage Act (DOMA) unconstitutional.<sup>73</sup> DOMA is discussed at greater length in Section C, but the *Windsor* Court held that Congress could not constitutionally deny federal acknowledgment and benefits to a state-recognized or state-licensed same-sex marriage.<sup>74</sup> *Windsor* is most significant as a Supreme Court public policy signal of LGB equality by extending *Romer*'s holding to marriage, finding that a law singling out same-sex marriage for disparate treatment invokes the same Fourteenth Amendment concerns as the Colorado Amendment in *Romer*.<sup>75</sup> *Windsor*'s statement that equality in marriage rights reflects "the community's . . . evolving understanding of the meaning of equality" is significant in the discussion of how acknowledging the constitutional right to same-sex marriage indicates support for general equality and non-discrimination.<sup>76</sup> The Court's position that equal access to marriage is a reflection of societal equality, coupled with its affirmation that the fundamental right to marriage applies equally to

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69. *Id.* at 579.

70. *Id.* at 560, 567.

71. *Id.* at 567.

72. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2600 (2015).

73. Defense of Marriage Act of 1996, Pub. L. 104-119, 110 Stat. 2419 (enacted Sep. 21, 1996) (codified as 1 U.S.C. § 7 (1996) & 28 U.S.C. § 1738C (1996), *invalidated by United States v. Windsor*, 570 U.S. 744 (2013)).

74. *United States v. Windsor*, 570 U.S. 744, 775 (2013).

75. *Id.* at 769-70.

76. *Id.* at 769.

same-sex couples in *Obergefell*,<sup>77</sup> demonstrates support for widely-held public policy supporting non-discrimination on the basis of sexual orientation.

Most notable, however, is the Supreme Court's discussion in *Obergefell v. Hodges* of the public policy against sexual orientation discrimination and unequal treatment. *Obergefell* demonstrates the Due Process Clause and Equal Protection Clause requirements that same-sex couples have equal access to the fundamental right to marriage.<sup>78</sup> Although *Obergefell* did not establish sexual orientation as a suspect category or otherwise issue a broad proclamation of anti-discrimination for all purposes, it contains an extensive discussion of general equality. Justice Kennedy includes in his analysis a prolonged discussion of contemporary public opinion emphasizing an increasingly widely-held national policy of tolerance, acceptance, and equality for the gay community. From the start of the opinion, the Court considers "the Nation's experiences with the rights of gays and lesbians."<sup>79</sup> Justice Kennedy explains that criminal laws and social conventions denied homosexuals the individual dignity afforded to other Americans until the mid-20<sup>th</sup> century.<sup>80</sup> He notes that homosexuality was considered a disease by the American Psychiatric Association's Manual for Mental Disorders well into the 20<sup>th</sup> century.<sup>81</sup> However, Justice Kennedy explains that public policy changed drastically in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries as follows:

In the late 20<sup>th</sup> century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.<sup>82</sup>

The *Obergefell* decision continues with a discussion of the flexibility of law and policy, expressly emphasizing the Court's need to acknowledge rights and protections as they develop, rather than confining them to groups that have been protected in the past.<sup>83</sup> Justice Kennedy's commentary on the public policy surrounding the rights and equality of homosexual persons strongly supports a finding that contemporary public policy is one of equality for Americans without regard to their sexual orientation. Again, *Obergefell*'s actual holding is clearly limited to a constitutional right to marriage and its accompanying public benefits.

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77. *Obergefell*, 135 S.Ct. at 2600-601 (citing *Windsor*, 570 U.S. at 771).

78. *Id.* at 2607-608.

79. *Id.* at 2596.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence*, 539 U.S. at 566-67 ("If rights were defined by those who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.")).

However, even *Obergefell* dissenters acknowledge that the holding is “rooted in social policy.”<sup>84</sup> Thus, while *Obergefell* holds that LGB individuals have an equal fundamental right to marriage, it rests on a discussion of general equality.

*Obergefell*'s discussion of the change in public policy from criminality and oppression to equal rights and open living can and should illuminate an understanding of the IRS's duty to interpret tax-exemptions to adapt to changing public policy.<sup>85</sup> The duty to interpret provisions of the Internal Revenue Code alongside developing public policy, as illustrated in *Bob Jones* and read in light of the *Obergefell*'s public policy discussion, indicates that the IRS should consider an organization's sexual orientation discrimination as it determines whether to grant tax benefits. In fact, *Obergefell* appears to acknowledge the need for such consideration when genuinely-held convictions conflict with a public policy of equality: “when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”<sup>86</sup> Despite sincerely-held religious opposition, public policy favors the inclusion of homosexuals as equals in American life, not exclusion and discrimination at the hands of institutions meant to educate them.

*Christian Legal Society v. Martinez* further supports applying *Bob Jones* to LGB discrimination.<sup>87</sup> In *Christian Legal Society*, a student group seeking to exclude LGB members sued the University of California at Hastings over its policy that school-sponsored student organizations open registration and admission to “all-comers.”<sup>88</sup> The Supreme Court held that the university's policy did not violate the student organization's First Amendment rights, finding the “all-comers” policy reasonable and viewpoint-neutral.<sup>89</sup> To be clear, *Christian Legal Society* does not involve Equal Protection or Due Process rights for LGB persons with respect to state-sponsored discrimination; nor is it primarily about anti-discrimination law or policy more generally. But while *Christian Legal Society* in no way demands that universities adopt an “all-comers” policy in any matter, it does find that they may, and that a First Amendment challenge to such a policy by a group seeking to discriminate in membership based on genuinely-held religious beliefs will not necessarily prevail. *Christian Legal Society* provides support for extending *Bob Jones* only through analogy: that a public university may condition funding to a student group on non-discrimination supports the proposition that the IRS could condition tax-exemption on similar non-discrimination, but is in no way dispositive.

*Christian Legal Society* is also relevant in the Court's hesitance to require subjects of discrimination to financially support the organizations that

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84. *Id.* at 2611 (Roberts, C.J., dissenting).

85. *Id.* at 2596. Compare *Bob Jones Univ.*, 461 U.S. at 596-97.

86. *Obergefell*, 135 S.Ct. at 2602.

87. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 662 (2010).

88. *Id.* at 668.

89. *Id.* at 697.

discriminate against them. In reaching its decision, the *Christian Legal Society* Court stated: “we count it significant [that student organizations] are eligible for financial assistance drawn from mandatory student-activity fees; the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member.”<sup>90</sup> The Court notes again that “Hastings’ policy, which incorporates . . . state-law proscriptions on discrimination, conveys the Law School’s decision ‘to decline to subsidize with public monies and benefits conduct of which the people of California disapprove.’”<sup>91</sup>

Like mandatory student-activity fees in *Christian Legal Society*, federal taxes force the LGB community to subsidize its own discrimination at institutions of higher education receiving tax benefits. *Bob Jones*, like *Christian Legal Society*, bases its decision, in part, on the relationship between the charitable institution and the public at large who bear the cost for its tax benefits.<sup>92</sup> And, though *Christian Legal Society*’s holding does not consider equal protection for LGB persons, it is informative to consider the similarities between *Christian Legal Society*’s state action in withholding financial benefits from a mandatory student-activities fee and the IRS action proposed in this Article. That the Court expressly relied in part on the tax-like nature of using mandatory student-activity fees to fund discriminatory student groups is supportive, although not dispositive, of acceptance of a public policy that would prohibit tax exemptions for universities that discriminate on the same grounds.

Most recently, the Court considered LGB discrimination in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, a case in which a baker was held in violation of a state anti-discrimination statute when he refused to create a custom cake for a same-sex wedding.<sup>93</sup> The Court held that the Colorado Civil Rights Commission (Commission) did not neutrally evaluate the baker’s claim, citing disparaging language and differential treatment to similar claims levied for non-religious purposes.<sup>94</sup> Because the Court found that the Commission improperly analyzed the claim, it reversed without deciding whether the Colorado public accommodations law was constitutional as applied to discrimination based on genuinely-held religious belief. However, as in *Obergefell*, Justice Kennedy includes in the Court’s opinion a picture of the current public policy of tolerance and equality for LGB Americans. Whereas *Obergefell*’s public policy discussion involved equal access to fundamental rights, *Masterpiece Cakeshop* concerns itself more with equal access to goods and services.

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90. *Id.* at 688 (citations omitted).

91. *Id.* at 689-90 (citations omitted).

92. See *Bob Jones Univ.*, 461 U.S. at 591-92 (“History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must . . . demonstrably serve and be in harmony with the public interest. The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”).

93. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1720 (2018).

94. *Id.* at 1721.

Justice Kennedy provides an overview of the current tension between freedom of religion and the civil rights of LGB Americans:

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views . . . . Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.<sup>95</sup>

While *Masterpiece*'s holding side-steps a resolution of that tension, Justice Kennedy's policy discussion also moves one step forward from *Obergefell* in its specific assertion of equal access to goods and services for gay Americans. Justice Kennedy reflects on *Obergefell*'s notion that members of the clergy who object to same-sex unions might be protected from compelled participation by the Free Exercise Clause.<sup>96</sup> He notes, however, that these exceptions must be "confined" to protect general and equal access to goods and services for the LGB community.<sup>97</sup> Indeed, if the baker in *Masterpiece Cakeshop* had refused any and all goods and services for the purposes of a same-sex wedding, Justice Kennedy asserts that the State, in arguing to uphold the application of its anti-discrimination statute, "would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public."<sup>98</sup> Even were a decision on the merits to be reached in favor of the baker, Justice Kennedy asserts, such a ruling would have to be "sufficiently constrained" to avoid allowing a wholesale ban on the provision of goods and services to same-sex couples by a place of public accommodation on the basis of religious belief.<sup>99</sup> Such a "serious stigma" runs contrary to established civil rights for gay persons.<sup>100</sup>

Although these segments of Justice Kennedy's *Masterpiece Cakeshop* opinion are dicta, it is difficult to read them as anything but inconsistent with LGB discrimination in higher education. He distinguishes those who

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95. *Id.* at 1727.

96. *Id.*

97. *Id.*

98. *Id.* at 1728.

99. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1728-29 (2018).

100. *Id.*

discriminate based on genuinely-held religious beliefs—such as the baker in *Masterpiece Cakeshop* or a religious college or university—from members of the clergy, whose refusal to perform a same-sex marriage garners greater constitutional protection.<sup>101</sup> As in *Obergefell*, Justice Kennedy repeatedly emphasizes a contemporary public policy demanding equality and tolerance.<sup>102</sup> But most important to this analysis, he indicates that a state civil rights law may protect gay Americans from an outright exclusion from equal access to goods and services.<sup>103</sup> Indeed, a college or university’s decision to deny admission to LGB applicants or prohibit an LGB lifestyle in student handbooks serves to absolutely deny such an applicant or student the goods and services available at the institution, and the absolute exclusion of same-sex spouses from family housing is hardly distinguishable from the “no goods or services . . . for gay marriages” proscription that Justice Kennedy denounces in *Masterpiece Cakeshop*.<sup>104</sup> While *Masterpiece Cakeshop* did not redefine the contours of public accommodations law and religious liberty, as many may have thought or hoped, its language is helpful in evincing a mature public policy disfavoring disparate treatment of LGB Americans.

Federal Courts of Appeals are moving toward greater recognition of a public policy of LGB non-discrimination. The U.S. Courts of Appeals for the First, Second, and Seventh Circuits have found that a claim for discrimination based on sexual orientation falls within Title VII’s prohibition on sex discrimination.<sup>105</sup> U.S. District Courts in the Third, Ninth, and Eleventh Circuits have also found sexual orientation discrimination violative of Title VII.<sup>106</sup> These lower court discussions of sexual orientation discrimination as gender discrimination serve a dual purpose: they provide greater judicial support for a policy of LGB non-discrimination and they interpret the voice of the legislature. Title VII does not explicitly mention sexual orientation discrimination, and traditionally was not considered to protect the LGB community.<sup>107</sup> But as Justice Kennedy noted in his extensive discussion of public policy in this area in *Obergefell*, time passes, and interpretations and attitudes develop and mature.<sup>108</sup>

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101. *Id.*

102. *Id.* at 1732.

103. *Id.*

104. *Id.* at 1728-29.

105. *See, e.g.*, *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018); *Zarda v. Attitude Express, Inc.* 883 F.3d 100, 111-13, 115-19 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 349-51 (7th Cir. 2017) (en banc); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (finding that gender stereotyping is a cognizable violation of Title VII).

106. *See, e.g.*, *EEOC v. Scott Medical Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839-40 (W.D. Pa. 2016); *Isaacs v. Felder Services, LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

107. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (enacted Jul. 2, 1964) (codified as 42 U.S.C. §§ 2000e-2000e-15 (2012)); Sonya K. Parrish, *The Plight of Same-Sex Harassment Victims Under Title VII: Why Sexual Orientation Discrimination Should Be Recognized as a Form of Sex Stereotyping*, 4 Nev. L. J. 471, 480, 484 (2004).

108. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

The Second and Seventh Circuit decisions applying Title VII to sexual orientation discrimination were reached in binding, en banc, hearings.<sup>109</sup> In 2017, the Seventh Circuit determined that an adjunct professor's claim of sexual orientation discrimination was actionable under Title VII.<sup>110</sup> In 2018, the Second Circuit ruled, en banc, that a skydiving instructor's firing was discrimination based on failure to conform to sexual stereotypes due to his homosexuality.<sup>111</sup> Both courts relied heavily on the 2015 Equal Employment Opportunity Commission (EEOC) opinion, discussed *infra*,<sup>112</sup> describing sexual orientation discrimination as prohibited sex discrimination. The Seventh Circuit's holding, while not addressing discrimination against applicants or students, is noteworthy for its higher education context.<sup>113</sup> These two en banc decisions, and the First Circuit's similar holding, evidence a trend toward recognizing LGB discrimination as gender discrimination cognizable under Title VII.

From *Romer* to *Obergefell*, the Supreme Court has, with relative consistency, articulated alignment with a public policy favoring the equality of LGB Americans. The Court has found unconstitutional legislation depriving LGB persons alone protections of the law,<sup>114</sup> struck down criminal penalties for homosexual conduct,<sup>115</sup> held unconstitutional a federal law depriving same-sex spouses financial benefits,<sup>116</sup> guaranteed equal access to the fundamental right to marriage,<sup>117</sup> and rejected a First Amendment challenge to state-sponsored non-discrimination policies in public education.<sup>118</sup> What is more, however, is that each of these opinions has included a discussion of the once-emerging, now-established public policy disfavoring discrimination based on sexual orientation.<sup>119</sup> And while the Civil Rights Act's text fails to provide protections based on sexual orientation, the U.S. Courts of Appeals and U.S. District Courts are continuing to interpret those laws as they relate to the gender-based discrimination protections in the Act. While school segregation based on race had been expressly outlawed prior to *Bob Jones*,<sup>120</sup> contemporary jurisprudence has recognized a sufficient public abhorrence for state-sponsored LGB discrimination to conclude that the judicial branch acknowledges a public policy of equality and non-discrimination.

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109. *Zarda*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively*, 854 F.3d 339 (7th Cir. 2017) (en banc).

110. *Hively*, 853 F.3d at 346-52.

111. *Zarda*, 883 F.3d at 127-32.

112. *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015).

113. *Hively*, 853 F.3d at 341.

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

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

116. *United States v. Windsor*, 570 U.S. 774, 775 (2013).

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

118. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 697 (2010).

119. *See Obergefell*, 135 S.Ct. at 2596, 2602, 2611; *Windsor*, 570 U.S. at 769-70; *Christian Legal Soc'y*, 561 U.S. at 688-90; *Lawrence*, 539 U.S. at 567, 573-74, 578; *Romer*, 517 U.S. at 628-29.

120. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

*The Legislative Branch*

Among the three branches of federal government, the federal legislature has been the most silent on the issue of sexual orientation discrimination. In the few instances where it has reached the issue, its position has been inconsistent. In some instances, the legislature has been reticent to acknowledge public policy protecting LGB Americans. It passed the Defense of Marriage Act (DOMA) and failed to include, or amend to include, specific protections for sexual orientation in Titles VII or IX of the Civil Rights Act.<sup>121</sup> In other instances, the legislature has moved to protect LGB Americans. It passed the Don't Ask, Don't Tell Repeal Act of 2010, allowing gay and bisexual service members to serve openly in the military.<sup>122</sup> And further muddying the waters, while it provides no explicit protections for sexual orientation discrimination, Title VII of the Civil Rights Act protects against gender discrimination, which has been interpreted by some U.S. Courts of Appeals to include protection for discrimination based on LGB status.<sup>123</sup>

On September 21, 1996, the legislature passed DOMA, which defined "marriage," under the law of the United States, exclusively as a union between one man and one woman.<sup>124</sup> DOMA passed through the senate and house by wide majorities, with 79% and 85%, respectively, voting "yea."<sup>125</sup> DOMA prohibited federal recognition of state- or foreign-licensed same-sex marriages, including material benefits, until the Supreme Court's decision in *United States v. Windsor*, discussed *supra*, struck down DOMA as unconstitutional.<sup>126</sup> That both chambers of Congress passed law, by a veto-proof majority, aimed at denying state-licensed spouses federal recognition because of their LGB status demonstrates apparent legislative antipathy toward a public policy of non-discrimination and equality for LGB Americans.

But political changes over the last twenty-two years cannot be ignored. The unified legislative opposition to same-sex marriage has been replaced with the

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121. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (enacted Jul. 2, 1964) (codified as 42 U.S.C. §§ 2000e-2000e-15 (2012)); Civil Rights Act of 1964, Title IX, Pub. L. No. 92-318, 86 Stat. 374 (enacted Jun. 23, 1972) (codified as 20 U.S.C. § 1681 et seq.).

122. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515-3517 (enacted Sep. 20, 2011) (codified as 10 U.S.C. § 654 (2012)).

123. Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253 (enacted Jul. 2, 1964) (codified as 42 U.S.C. §§ 2000e-2000e-15 (2012)).

124. Defense of Marriage Act of 1996, Pub. L. No. 104-119, 110 Stat. 2419 (enacted Sep. 21, 1996) (codified as 1 U.S.C. § 7 (1996) & 28 U.S.C. § 1738C (1996), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013)).

125. *Final House Vote Results for Roll Call 316, HR 3396, Defense of Marriage Act* (Jul. 12 1996 2:21 PM), <http://clerk.house.gov/evs/1996/roll316.xml>; *Roll Call Senate Vote 104th Cong. 2nd Session, H.R. 3396, Defense of Marriage Act* (Sep. 10, 1996 2:42 PM), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=104&session=2&vote=00280](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280) [<https://perma.cc/JCH7-PPL4>].

126. Defense of Marriage Act of 1996, Pub. L. No. 104-119, 110 Stat. 2419 (enacted Sep. 21, 1996) (codified as 1 U.S.C. § 7 (1996) & 28 U.S.C. § 1738C (1996), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013)); *Windsor*, 570 U.S. at 775.

Democratic Party's commitment to the public policy of LGB equality and non-discrimination, clearly displayed in the 2016 Democratic Party Platform.<sup>127</sup> The Platform expressly commits the Democratic Party to addressing inequities in immigration, economic status, military service, and reproductive health disadvantaging LGB communities.<sup>128</sup> More significantly, the Platform directly opposes all discrimination based on sexual orientation, including "the misuse of religion to discriminate."<sup>129</sup> While the 2016 Republican Party Platform does not include similar aims,<sup>130</sup> that one of the two major political parties represented in Congress has shifted its views on LGB public policy since DOMA demonstrates a significant change in legislative voice since 1996.

The Don't Ask, Don't Tell Repeal Act of 2010 is a striking example of legislative support for a public policy of inclusion for LGB Americans.<sup>131</sup> Don't Ask, Don't Tell permitted LGB citizens to serve in the armed forces for the first time without a pre-enlistment or pre-commissioning investigation into sexual orientation, but required these service members to hide their sexual orientation or face administrative separation.<sup>132</sup> The fascinating history of Don't Ask, Don't Tell, and the development in the American armed forces from court-martialing LGB service members to the 2010 repeal is extensive and could constitute a separate writing in itself. Most noteworthy to this analysis is the current state of the American military, post-2010, in which the federal legislature determined that gay and bisexual American service members should be free to serve openly and honestly.<sup>133</sup>

While *Bob Jones* drew on a wealth of federal legislative prohibitions on racial discrimination, state legislative actions have played prominently in forming our idea of a national public policy related to sexual orientation discrimination and, in light of limited federal legislative action, bear particular relevance to this analysis. Furthermore, state legislatures can serve as an appropriate measure of the legislative branch's position on public policy, provided an examination broadly spans American state governance, not just the legislative actions of a select group of states, so that the analysis looks to the country at large.

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127. *Democratic Party Platform*, 16-17, 41 (July 8-9, 2016), [http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016\\_DNC\\_Platform.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf) [<https://perma.cc/4VAS-K7AN>].

128. *Id.* at 13, 33-34, 37.

129. *Id.* at 16-17.

130. *Republican Party Platform* (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT\\_12\\_FINAL%5b1%5d-ben\\_1468872234.pdf?mid=76323&rid=16150088](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf?mid=76323&rid=16150088) [<https://perma.cc/6VHJ-NSYU>].

131. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515-3517 (enacted Sep. 20, 2011) (codified as 10 U.S.C. § 654 (2012)).

132. Dep't of Def. No. 1304.26, Qualification Standards for Enlistment, Appointment, and Induction § E1.2.8.1 at 9 (Dec. 21, 1993).

133. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515-3517 (enacted Sep. 20, 2011) (codified as 10 U.S.C. § 654 (2012)).

By 2012, thirty-one states included protections for sexual orientation discrimination in their state anti-discrimination statutes.<sup>134</sup> Since 2015, the number of states with protection for sexual orientation discrimination, including those states with protection offered at the local-government level instead of state-level protection, has increased to thirty-six.<sup>135</sup> For comparison: by 2015 all but fourteen states protected against sexual orientation discrimination in some form;<sup>136</sup> at the time of the *Loving v. Virginia* decision, all but sixteen states had abolished anti-miscegenation laws;<sup>137</sup> at the time of the *Lawrence* decision, all but thirteen states had abolished laws criminalizing homosexual sodomy.<sup>138</sup> While criminal laws prohibiting interracial marriage and same-sex relationships are distinguishable in many ways from a failure to protect LGB communities from discrimination, the comparison in nation-wide policy development by states is relevant to show a growing public policy against LGB discrimination.

Data from the Center for American Progress Access Fund's 2012 survey provides the most inclusive picture of state employment anti-discrimination laws and LGB protections, although many state legislatures have increased protections after 2012.<sup>139</sup> States differ significantly in the degree and scope of protection afforded to sexual orientation. Some statutes apply only to public employment, while others extend to the private context.<sup>140</sup> To provide a more specific picture, state protections for sexual orientation discrimination can be divided into four main areas: public employment, private employment, public accommodations laws, and housing laws. The thirty-six state figure, discussed *supra*, deals with public employment, but twenty-two states have enacted laws that prohibit sexual orientation discrimination in private employment as well,<sup>141</sup> twenty-three states have enacted laws prohibiting sexual orientation

134. CAPAF Study, *supra* note 15.

135. Christine Chan, Letitia Stein & Grant Smith, *LGBT Protections*, REUTERS GRAPHICS, [http://fingfx.thomsonreuters.com/gfx/rngs/USA-LGBT-CITIES/010040570BX/index.html?utm\\_source=Twitter&utm\\_medium=Social](http://fingfx.thomsonreuters.com/gfx/rngs/USA-LGBT-CITIES/010040570BX/index.html?utm_source=Twitter&utm_medium=Social) [https://perma.cc/YP8K-PFZ4] [hereinafter Reuters Map].

136. *Id.*

137. *Loving v. Virginia*, 388 U.S. 1, 6 (1967).

138. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

139. See Reuters Map, *supra* note 125.

140. See CAPAF Study, *supra* note 15, at 3-4.

141. CAL GOV'T CODE § 12940 (Deering 2018); COLO. REV. STAT. § 24-34-402 (2017); CONN. GEN. STAT. § 46a-60 (2017); DEL. CODE ANN. tit. 19, § 711 (2018); D.C. CODE § 2-1402.11 (2018); HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2018); 775 ILL. COMP. STAT. 5 / 1-102 (LexisNexis 2018); IOWA CODE ANN. § 216.6 (West 2018); ME. REV. STAT. ANN. tit. 5, § 4572 (2017); MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis 2018); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); MINN. STAT. ANN. § 363A.08 (West 2014); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2018); N.H. REV. STAT. ANN. § 354-A:7 (LexisNexis 2018); N.J. STAT. ANN. § 10:5-12 (West 2018); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2018); N.Y. EXEC. LAW § 296 (LexisNexis 2018); OR. REV. STAT. ANN. § 659A.030 (West 2018); 28 R.I. GEN. LAWS ANN. § 5-7 (West 2018); VT. STAT. ANN. tit. 21, § 495 (2018); WASH. REV. CODE ANN. § 49.60.180 (LexisNexis 2018); WIS. STAT. § 111.36 (West 2018).

discrimination in housing;<sup>142</sup> and twenty-two states have enacted laws prohibiting sexual orientation discrimination by places of public accommodation.<sup>143</sup>

Among states providing protection for sexual orientation, twenty-two have religious exceptions to the anti-discrimination statute, although the scope of religious exceptions also varies by state.<sup>144</sup> This is a salient point for opponents of a growing public policy that would prohibit a religious institution of higher education from discriminating against LGB students and applicants. While religious exceptions are prevalent, only Massachusetts provides an exception for non-profit institutions generally.<sup>145</sup> Thus, outside of Massachusetts, a non-profit charity that discriminates falls within the policy of non-discrimination. So, while religious exceptions to anti-discrimination statutes are fairly common, the Supreme Court's decision in *Bob Jones* rested on a public policy development relevant to charities under charitable trust law generally, and the paucity of exceptions for non-profits demonstrates support for the contention that a charitable organization practicing LGB discrimination is not exempt from a growing public policy prohibiting such discrimination.

Congress has spoken with a mixed voice on public policy disfavoring state-financed LGB discrimination. While DOMA once rejected such a policy, many legislators have altered their stances on LGB issues in the twenty-two years since DOMA's passage. The Don't Ask, Don't Tell Repeal Act of 2010 demonstrates legislative support for LGB service members to live open and dignified lives without fear of disparate treatment for their sexual orientation. Perhaps predictably, given sharp political divides on the issue, it is difficult to interpret

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142. CAL GOV'T CODE § 12955 (Deering 2018); COLO. REV. STAT. 24-34-502 (2017); CONN. GEN. STAT. § 46a-81e (2017); DEL. CODE ANN. tit. 6, § 4603 (2018); D.C. CODE § 2-1402.21 (2018); HAW. REV. STAT. ANN. § 515-3 (LexisNexis 2018); 775 ILL. COMP. STAT. ANN. 5 / 3-102 (LexisNexis 2018); IOWA CODE § 216.8 (2017); ME. REV. STAT. ANN. tit. 5, § 4581-A (2017); MD. CODE ANN., STATE GOV'T § 20-705 (LexisNexis 2018); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); MINN. STAT. ANN. § 363A.09 (West 2018); NEV. REV. STAT. ANN. § 118.100 (LexisNexis 2017); N.H. REV. STAT. ANN. § 354-A:10 (LexisNexis 2018); N.J. STAT. ANN. § 10:5-9.1 (West 2018); N.M. STAT. ANN. § 28-1-7 (LexisNexis 2018); N.Y. EXEC. LAW § 296 (LexisNexis 2018); OR. REV. STAT. ANN. § 659A.421 (West 2018); 34 R.I. GEN. LAWS § 37-1 (2017); UTAH CODE ANN. § 57-21-5 (LexisNexis 2018); VT. STAT. ANN. tit. 9, § 4503 (West 2017); WASH. REV. CODE ANN. § 49.60.222 (LexisNexis 2018); WIS. STAT. ANN. § 106.50 (West 2018).

143. CAL. CIV. CODE § 51 (Deering 2018); COLO. REV. STAT. § 24-34-601 (2017); CONN. GEN. STAT. ANN. §§ 46a-64, 81d (West 2017); DEL. CODE ANN. tit. 6, § 4504 (2017); D.C. CODE § 2-1402.31 (2018); HAW. REV. STAT. ANN. § 489-3 (LexisNexis 2018); 775 ILL. COMP. STAT. ANN. 5/1-102 (LexisNexis 2018); IOWA CODE § 216.7 (West 2018); ME. REV. STAT. tit. 5, §§ 4552, 4591 (2018); MD. CODE ANN., § 20-304 (LexisNexis 2018); MASS. ANN. LAWS ch. 272, § 98 (LexisNexis 2018); MINN. STAT. ANN. § 363A.11 (West 2018); NEV. REV. STAT. ANN. § 651.070 (LexisNexis 2017); N.H. REV. STAT. ANN. § 651.050 (LexisNexis 2018); N.J. STAT. ANN. § 10:5-12 (LexisNexis 2018); N.M. STAT. ANN. § 28-1-7(f) (West 2018); N.Y. C.R. LAW § 40-c (Consol. 2018); OR. REV. STAT. ANN. § 659A.403 (West 2018); 11 R.I. GEN. LAWS ANN. § 24-2 (West 2017); VT. STAT. ANN. tit. 9, § 4502 (2017); WASH. REV. CODE ANN. § 4949.60, 215 (LexisNexis 2017); WIS. STAT. ANN. § 106.52 (West 2018).

144. CAPAF Study, *supra* note 15, at 3-4.

145. *Id.*

just where the legislature as a whole stands on the issue of discrimination based on LGB status. But given the growing support for LGB equality in Congress and LGB protection in a majority of states, the legislature has demonstrated a general, though not absolute, resistance to LGB discrimination.

### *The Executive Branch*

A determination of the executive branch's position merits an analysis of the type of executive actions examined in *Bob Jones*. The *Bob Jones* Court carefully examined executive action in three main fields to determine the executive branch's contribution to the public policy prohibiting racial discrimination: federal employment, military service, and federally-subsidized housing.<sup>146</sup> The *Bob Jones* Court cites other executive action on race and notes President Eisenhower's use of military forces to ensure school desegregation,<sup>147</sup> but only mentions executive action with regard to the three aforementioned areas by name.<sup>148</sup> Because executive positions on federal employment, military service, and subsidized housing are specifically mentioned, an examination of the executive branch's actions in these three areas deserve special attention in the context of LGB discrimination.

The executive branch has unambiguously prohibited discrimination based on sexual orientation in federal employment. In 2015, the EEOC issued an opinion pursuant to a homosexual air traffic controlman's allegations of discrimination and reprisal based on his sexual orientation.<sup>149</sup> The EEOC opinion stated the following:

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. Someone is referred to as "heterosexual" or "straight" if he or she is physically and/or emotionally attracted to someone of the opposite-sex. It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.<sup>150</sup>

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146. *Bob Jones Univ. v. United States*, 461 U.S. 574, 594-95 (1983).

147. *Id.* at 594.

148. *Id.* at 594-5.

149. *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015).

150. *Id.* at 6 (citations omitted).

The EEOC held that “sexual orientation is inherently a sex-based consideration, and . . . discrimination based on sexual orientation . . . necessarily . . . alleg[es] that the agency took his or her sex into account.”<sup>151</sup> The Commission also found that an allegation of sexual orientation discrimination necessarily alleges sex discrimination based on gender stereotypes.<sup>152</sup> So, in the case of federal employment decisions, the executive branch is clear in its position that—as with racial discrimination in *Bob Jones*—sexual orientation discrimination is unambiguously prohibited.

An examination of the U.S. military and developments in acceptance of the LGB community in the armed forces displays the executive’s support for homosexual and bisexual inclusion and equality. With regard to sexual orientation, President Obama, former Secretary of Defense Leon Panetta, and the Joint Chiefs of Staff’s certification of the Don’t Ask, Don’t Tell Repeal Act of 2010 demonstrates a clear executive position that LGB service members must be permitted to live openly in the armed forces.<sup>153</sup> With regard to sexual orientation and the military, this appears equally strong an executive acknowledgement of public policy of non-discrimination as the Selective Service Executive Order relied upon in *Bob Jones*.<sup>154</sup>

The executive branch quite clearly aligns itself with a public policy of LGB non-discrimination through its regulation of federally-subsidized housing, the third type of executive action cited in *Bob Jones*. In 2012, the Department of Housing and Urban Development (HUD) implemented the Equal Access Rule to govern equal access to housing through a recipient or sub-recipient of HUD funds or Fair Housing Act (FHA) insurance.<sup>155</sup> The rule prohibits LGB discrimination by any HUD funding or insurance recipient, sub-recipient, or lender.<sup>156</sup> It prohibits owners and operators of HUD-assisted and FHA-insured housing from inquiring into the sexual orientation or gender identity of applicants and occupants.<sup>157</sup> It also generally prohibits discrimination based on sexual orientation and gender identity in granting access to HUD-assisted or FHA-insured housing.<sup>158</sup> *Bob Jones* relied on a similar executive directive, requiring executive agencies to prohibit discrimination based on race, to demonstrate a widely-held public policy proscribing racial discrimination.<sup>159</sup> The Equal Access Rule provides guidance regarding sexual orientation discrimination and, like the cited executive actions involving racial intolerance in *Bob Jones*, is demonstrative of widely-held policy prohibiting LGB discrimination.

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151. *Id.* (emphasis added).

152. *Id.* at 7.

153. See Brian Montopoli, *Obama Signs Historic “Don’t Ask” Repeal Bill*, CBS NEWS (Dec. 22, 2010 5:13 PM), <https://www.cbsnews.com/news/obama-signs-historic-dont-ask-repeal-bill/> [https://perma.cc/7KU7-UBCW].

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

155. 24 C.F.R. § 5.105(a)(2) (2018).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Bob Jones Univ.*, 461 U.S. at 594-95.

An examination of the three main areas of executive action relied upon in *Bob Jones* demonstrates that the executive branch promotes a public policy of LGB non-discrimination. The EEOC's interpretation of Title VII to include protections for sexual orientation discrimination and the certification and implementation of the Don't Ask, Don't Tell Repeal Act demonstrate strong executive support for a policy of non-discrimination in federal employment and the military, two of the most significant areas considered in *Bob Jones*. The HUD Equal Access Rule provides protections for LGB applicants and occupants of federally-subsidized housing,<sup>160</sup> an area on which *Bob Jones* relied to demonstrate executive support for widely-held public policy of non-discrimination.

#### THE LAW PROHIBITING LGB DISCRIMINATION

Where LGB discrimination is unlawful under state or federal law, a discriminatory charity may be stripped of its charitable status and tax-exemption under *Bob Jones*.<sup>161</sup> The IRS is less likely to prevail on a claim that sexual orientation discrimination is unlawful *in general*, although a claim based specifically on denial of family housing to same-sex couples based on *Obergefell* is more powerful. A colorable argument that a form of discrimination is unlawful at least supports a contention that such conduct is contrary to public policy. The strongest unlawfulness argument is one suggesting that the denial of family housing to same-sex spouses violates *Obergefell* and *Windsor*. Nevertheless, a brief examination of the argument that other forms of LGB discrimination in higher education violate the law should be analyzed, both for its strengths and shortcomings. In this context, unlawfulness would be related to a state's anti-discrimination statute or a college or university's location in a jurisdiction that has interpreted Title IX of the Civil Rights Act to protect against sexual orientation discrimination, although the latter is still only a fledgling body of law comprising a few district court rulings.

*Obergefell* informs that, with regard to access to the fundamental right to marriage, the Due Process and Equal Protection clauses are "connected in a profound way."<sup>162</sup> The Court found that the inequality of same-sex marriage bans derive from both the denial of the fundamental right to marriage *and* the denial of material "benefits afforded opposite-sex couples."<sup>163</sup> Both the majority opinion<sup>164</sup> and Justice Roberts' dissent appear to view public benefits associated with a lawful marriage as guaranteed by the Equal Protection Clause.<sup>165</sup> The

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160. 24 C.F.R. § 5.105(a)(2) (2018).

161. *Id.* at 591-92.

162. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602-03 (2015).

163. *Id.* at 2604.

164. *See, e.g., id.* at 2606 ("Were the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.")

165. *See, e.g., id.* at 2612, 2626 (Roberts, C.J., dissenting) (finding "no serious dispute that . . . the Constitution . . . requires states to apply their marriage laws equally" and that

Court's holding, that the right to marriage is constitutionally guaranteed to same-sex couples "on the same terms" as opposite-sex couples, seems to explicitly include public benefits.<sup>166</sup> Justice Roberts' dissent emphasizes that "[t]here is no serious dispute that, under our precedents, the Constitution . . . requires states to apply their marriage laws equally."<sup>167</sup> Indeed, as the Court held in *Windsor*, it is unconstitutional for the state to treat a subset of legal marriage unequally.<sup>168</sup>

The IRS could argue that colleges and universities violate the language and mandate in *Obergefell* and *Windsor* when they fail to afford benefits to same-sex spouses by implementing discriminatory housing policies. *Obergefell*'s discussion of equal access to the fundamental right to marriage for same-sex couples included the requirement that they not be "denied the constellation of benefits that the States have linked to marriage."<sup>169</sup> It is arguable that refusing to provide married housing to same-sex spouses where such housing is available to any other married students constitutes a denial of the kind of benefits entitled to same-sex spouses after *Obergefell*. Where the federal government provides financial support to colleges and universities denying married housing to same-sex spouses, such a denial may be the kind of state-linked benefit that Justice Kennedy considered in *Obergefell*. While *Obergefell* did not specifically hold that private universities must make married housing equally available to same-sex spouses, the IRS could argue that tax subsidies for an institution that fails to do so violates the holding that the benefits of marriage not be denied on the basis of sexual orientation.

While *Obergefell* is directly concerned with *public* benefits, the quasi-public nature of a tax-exempt charity may bring colleges and universities within its holding.<sup>170</sup> At oral argument, Justices Roberts and Alito expressed concern that, were the Court to rule in favor of same-sex couples, such a holding—examined in light of *Bob Jones*—would require private religious colleges and universities to provide family housing for same-sex spouses or face tax consequences.<sup>171</sup> *Obergefell*'s holding that same-sex spouses have an equal right to public benefits would almost certainly require public universities to provide family housing to same-sex spouses, but whether the same requirement applies

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proponents of same-sex marriage will "[c]elebrate the availability of new benefits"); *id.* at 2631 (Thomas, J., dissenting) (considering the majority opinion to grant "entitlement to government benefits"). Clearly, the dissenters in *Obergefell* did not believe that the benefits accorded to married couples were constitutionally guaranteed to same-sex couples. However, between *Windsor*, the majority in *Obergefell*, and Justice Roberts' dissent, it appears that the Court recognizes that subsets of lawfully-recognized marriages cannot be denied benefits.

166. *Obergefell*, 135 S.Ct. at 2605-06.

167. *Id.* at 2612 (Roberts, C.J., dissenting).

168. *United States v. Windsor*, 570 U.S. 744, 772, 775 (2013).

169. *Obergefell*, 135 S.Ct. at 2601.

170. It is also possible that the granting of tax-exemption itself, a state action, may violate *Obergefell*. However, since this piece concerns the application of *Bob Jones*, which concerns itself with whether the tax-exempt charity violates law or policy, the examined conduct must be that of the college or university, not the IRS.

171. Tr. of Oral Arg. on Question 1 at 36-38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

to private colleges and universities is a harder question. That the federal government financially supports the denial of equal benefits in educational housing might well render such a denial unlawful after *Obergefell*. The extent to which tax-exempt status subjects religious colleges and universities to *Obergefell*'s requirement that the state refrain from denying equal marital benefits to same-sex spouses remains an open question. Chief Justice Roberts' dissent anticipates that this exact question will soon appear before the Court, and contends that religious colleges denying family housing to same-sex couples "take no comfort" in *Obergefell*'s holding.<sup>172</sup> If *Obergefell* extends to federally-funded discrimination by private colleges and universities, failure to provide family housing to same-sex spouses proves unlawful and justifies stripping federal tax benefits under *Bob Jones*.

Some courts have found discrimination unlawful in the context of higher education by applying Title IX of the Civil Rights Act to discrimination based on sexual orientation.<sup>173</sup> Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any education program or activity receiving Federal financial assistance."<sup>174</sup> In 2015, the U.S. District Court for the Central District of California found that Title IX gender stereotyping and gender discrimination included claims based on sexual orientation where two homosexual members of the Pepperdine University women's basketball team faced discrimination by their coach.<sup>175</sup> The Court relied in part on the 2015 EEOC decision, discussed *supra*,<sup>176</sup> that sexual orientation discrimination necessarily states a claim of sex discrimination in Title VII cases to determine that the same analysis applied to Title IX.<sup>177</sup> Just this year, the same approach led the U.S. District Court for the District of Massachusetts to hold that Title IX protected a student in a public high school from sexual orientation discrimination.<sup>178</sup> Title IX case law, as applied to sexual orientation, is still developing and more jurisdictions currently hold that Title IX does not protect against discrimination based on sexual orientation.<sup>179</sup>

Other courts have considered issues of state anti-discrimination statutes and sexual orientation, some in the context of higher education. One of the earliest and most illustrative cases occurred at the Georgetown University Law Center (GULC), where the Gay Rights Coalition at GULC sued Georgetown University

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172. *Obergefell*, 135 S.Ct. at 2625-26.

173. *See, e.g.*, *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Ca. 2015); *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015); *Harrington v. City of Attleboro*, 15-cv-12769-DJC, 2018 WL 475000 (D. Mass. 2018) (slip op.).

174. 20 U.S.C. § 1681(a) (2012).

175. *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Ca. 2015).

176. *Baldwin v. Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (2015).

177. *Id.* at 7 n.6.

178. *Harrington v. City of Attleboro*, 15-cv-12769-DJC, 2018 WL 475000 (D. Mass. 2018) (slip op.).

179. *See, e.g.*, *Hinton v. Virginia Union University*, 185 F. Supp. 3d 807 (E.D. Va. 2016).

for recognition and equal access to university resources.<sup>180</sup> The Gay Rights Coalition sued on the basis of Georgetown's violation of the D.C. Human Rights Act, which prohibits discrimination based on sexual orientation.<sup>181</sup> On appellate review of the lower court's ruling in favor of Georgetown, the D.C. Court of Appeals affirmed in part and reversed in part: it affirmed the lower Court's ruling that Georgetown need not endorse the Gay Rights Coalition under the Human Rights Act; but the court held that the Act required equal provision of tangible benefits to the Gay Rights Coalition because of its provisions protecting against sexual orientation discrimination and reversed the lower court on that issue, finding for the Gay Rights Coalition.<sup>182</sup>

Where a jurisdiction has enacted a public accommodations law or other statute prohibiting discrimination, cases like *Gay Rights Coalition* suggest that discrimination in higher education might prove unlawful if the statute's scope includes colleges and universities. Under *Bob Jones*, unlawful practices by an educational institution, like in a charitable trust,<sup>183</sup> undermine any justification for granting tax-exempt status. The greater application of cases like *Gay Rights Coalition* remains to be seen in light of the Court's ultimate holding in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*. There is a strong possibility that, based on the language in *Masterpiece Cakeshop*, discussed *supra*,<sup>184</sup> the Court will determine in the near future that a compelling state interest exists in prohibiting LGB discrimination, or at least that the compelling interest in ending discrimination extends to LGB discrimination. If discrimination based on religious belief is unlawful where a state anti-discrimination statute protects LGB students and applicants, a college or university practicing LGB discrimination would fail *Bob Jones*' test for tax-exemption.

The status of state anti-discrimination statutes vis-à-vis sexual orientation discrimination based on genuinely-held religious beliefs is still in flux. With regard to Title IX, while some courts have found sexual orientation discrimination violative of the statute, more have yet to do so. As such, arguing that denial of housing to same-sex spouses is contrary to *Obergefell*—given its concern with benefits afforded to same-sex couples—is more powerful than the Title IX argument. Critics of this interpretation of *Obergefell* might find this proposition too attenuated from the Court's holding that the fundamental right to marriage applies equally to same-sex couples. *Obergefell* did not expressly create a legal requirement for private colleges and universities to provide equal housing to same-sex spouses, but it does require same-sex marriages to be afforded “on the same terms and conditions as opposite-sex couples.”<sup>185</sup> While

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180. *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. Ct. App. 1987).

181. *Id.* at 14; D.C. Code Ann. § 2-1402.41 (2015).

182. *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d 1 at 39.

183. *Bob Jones Univ.*, 461 U.S. at 591; RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. LAW INST. 2003).

184. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, slip op. at 12 (2018).

185. *Obergefell*, 135 S.Ct. at 2605.

these arguments do not definitively demonstrate the illegality of sexual orientation discrimination by religious institutions of higher education, they are at least indicative of growing public policy prohibiting such discrimination, and raise serious questions as to whether those practices may be unlawful.

#### THE FIRST AMENDMENT DEFENSE OF COLLEGES AND UNIVERSITIES

Were the IRS to revoke religious colleges and universities' tax-exempt status because of their discriminatory practices with regard to LGB students and applicants, the colleges and universities would likely allege a violation of their First Amendment right to Free Exercise of Religion. This would form the basis of a college or university's challenge to the proposed IRS action. Such a claim is not wholly persuasive for two reasons. First, *Bob Jones* is legal precedent for a determination that, even where discriminatory practices are based on genuinely-held religious beliefs, revocation of exempt status is legally permissible when the would-be charity violates the law or public policy.<sup>186</sup> Second, a revocation of tax-exempt status does not prohibit the religiously-motivated conduct.

Under *Bob Jones*, if an institution violates law or public policy, a genuinely-held religious belief will not be sufficient to guarantee tax-exemption. Before both the Fourth Circuit and the Supreme Court, Bob Jones argued that the IRS's action violated its First Amendment right to free exercise of religion.<sup>187</sup> The Court held that, while the Free Exercise Clause protects lawful conduct based on religious beliefs, a burden on religion is *not* unconstitutional when it is "essential to accomplish an overriding governmental interest."<sup>188</sup> The Court summarily found that the interest in preventing racial discrimination was compelling and inconsistent with Bob Jones' admissions and student conduct policies, despite "whatever burden denial of tax benefits places on . . . religious beliefs."<sup>189</sup>

A court's analysis of the state interest in prohibiting sexual orientation discrimination in education would likely be more extensive, and perhaps a closer call, than the analysis in *Bob Jones*. As Sections III and IV concluded, the three branches of government generally acknowledge a public policy prohibiting sexual orientation discrimination. But each branch offers less in the way of unanimity and a resounding, unified voice than in the case of racial discrimination. But the discussion in Section III—particularly the Court's express acknowledgement of developments in public policy for the equality of gay and bisexual Americans in *Obergefell*—indicates that we have reached a point in time where a prohibition on discrimination could be considered widely- and generally-held. Indeed, as the courts have been the most readily-acknowledging of the three branches of government, it appears possible that they would find a compelling state interest in prohibiting sexual orientation

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186. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983).

187. *Id.* at 582, 602-03.

188. *Id.* at 603 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), *Thomas v. Review Bd. of the Ind. Emp.*, 103 S.Ct. 2017 (1981), *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

189. *Bob Jones Univ.*, 461 U.S. at 604.

discrimination and a compelling interest in LGB non-discrimination was asserted, and not rebutted, during briefing in *Masterpiece Cakeshop*.<sup>190</sup> Each branch of government, to some degree, has acted to support an assertion that promoting the dignity of LGB Americans is compelling.

However, a court interpreting the Free Exercise defense of religious colleges and universities challenging revocation of tax-exemption may choose to put a greater emphasis on the action's failure to actually *prevent* the free exercise of religion. *Bob Jones* emphasized that the "[d]enial of tax benefits will inevitably have an impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets."<sup>191</sup> Even if their tax exemption was revoked, religious institutions of higher education would remain free to discriminate based on genuinely-held religious beliefs, they simply will not receive public funding for that discriminatory conduct. This defense of the IRS's action in *Bob Jones* was not developed beyond a simple iteration, likely because of the extremely evident compelling state interest. And, notably, Bob Jones continued to discriminate based on its genuinely-held religious beliefs for seventeen years after the Court's decision.<sup>192</sup> Were a court to determine that the state interest in preventing sexual orientation discrimination was not as compelling as that prohibiting racial discrimination, it might still justify the constitutionality of revoking tax-exempt status on the basis that the action does not prevent the college or university from continuing its policies. Applying *Bob Jones* to sexual orientation discrimination in higher education does not prohibit discriminatory practices; it merely stands for the proposition that the American public need not subsidize discrimination.

#### CONCLUSION

In *Bob Jones*, the Supreme Court upheld the IRS's revocation of Bob Jones University's tax-exempt status because the university's racially discriminatory practices violated widely-held public policy. The holding was limited to racial discrimination, but American society has progressed in the twenty-five years since *Bob Jones* was decided. Public policy and law have developed to include protections against discrimination based on sexual orientation. And while *Bob Jones* took pains to restrict its holding to race, it also noted the flexibility of the IRS in continuing to adapt, interpret, and apply the Tax Code to keep pace with a changing America.

And, true enough, America has changed. The American judiciary now recognizes protections for LGB citizens from being singled out for unfavorable state treatment, it protects their equal access to the fundamental right to marriage, and it recognizes their dignity to lead free lives regardless of sexual orientation.

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190. Brief in Opposition at 12, 16, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief for Petitioner at 48-49, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

191. *Bob Jones Univ.*, 461 U.S. at 603-04.

192. Civil Rights Movement—A Timeline, University of Maryland (2014), <https://www.artgallery.umd.edu/sites/artgallery.umd.edu/files/lesson-plans/Civil%20Rights%20Timeline.pdf> [<https://perma.cc/H8UH-AR43>].

Our legislature has shifted from passing veto-proof laws prohibiting federal recognition of same-sex marriage to a debate that sees nearly half of our Congress in strong support of LGB equality, and a significant majority of state legislatures enacting anti-discrimination laws protecting LGB Americans. The three areas of executive action relied upon in *Bob Jones*—federal employment, military integration, and subsidized housing—have all adapted to encompass a policy of tolerance and equality for LGB Americans.

Sexual orientation discrimination may even be unlawful in certain contexts, also violating the test for tax-exemption laid down in *Bob Jones*. Some courts have applied anti-discrimination statutes to private educational institutions. Others have applied Title IX to LGB discrimination. Where tangible marriage benefits are denied in the higher education context, such as excluding same-sex spouses from access to family housing, the right to marriage on the *same terms* as opposite-sex couples may be violated.

Admittedly, the evidence in this Article supporting a widely-held public policy lacks the near-*absolute* unanimity of public and private condemnation of racial segregation in education. Yet, as a society and as a nation, the United States has seen a dramatic shift in public belief about the deserved dignity and equality of our LGB citizens, through private and public voices. Contemporary concern for the preservation of religious freedom if institutions of higher education are forced to choose between non-discrimination and tax benefits should not be dismissed, but there were undoubtedly those who harbored similar fears when *Bob Jones* was decided. Those concerned were not prohibited from continuing to discriminate in furtherance of genuinely-held beliefs—indeed, Bob Jones University continued its practices for seventeen years after it lost its tax benefits.

Not long ago, the public policy relied upon in *Bob Jones* had not been sufficiently recognized, and the federal government subsidized racial discrimination in private schools. As Americans reflect on the years before *Bob Jones*, they may lament that the state failed to act sooner. They may ask why our nation did not prevent its citizens from financing a practice that most found abhorrent. If we fail to recognize current developments in public policy with regard to LGB rights, future generations may ask why *we* failed to act sooner.

