Section 501(c)(3) of the Internal Revenue Code awards exemptions from taxation to institutions that are “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” In *Bob Jones University v. United States*, however, the Supreme Court recognized that a tax exemption may be denied to institutions whose activities “violate fundamental public policy.”\(^1\) Internal Revenue Commissioner Koskinen has now stated, several times, that private institutions otherwise described in § 501(c)(3) remain eligible for tax exemptions notwithstanding practices reflecting opposition to same-sex marriage. The Commissioner has explained that such private practices do not violate fundamental public policy, and that the recent decision in *Obergefell v. Hodges* \(^2\) does not change this result. The Commissioner is correct. Indeed, under well established law, he is obliged to reach this conclusion.

As a threshold matter, there can be a public policy justifying denial of a tax exemption only if a statute duly enacted by Congress establishes such a policy. When the Supreme Court in *Bob Jones* inferred a public policy against racial discrimination in private education, it did not rely on its own or the Internal Revenue Service’s beliefs about the evils of racism, but instead rested on congressional enactments such as the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965.\(^3\) Similarly, in the Revenue Ruling that prompted *Bob Jones*, the IRS did not make an independent assessment of the harms of racial discrimination, but instead emphasized federal statutes that sought to discourage such discrimination.\(^4\) To be sure, the Court and the IRS also discussed executive orders and judicial decisions, but to reinforce a policy already codified by Congress, not to supply an independent basis for denying the tax exemption.\(^5\) In fact, the Supreme Court expressly disclaimed the theory that “the Internal Revenue Service is invested with authority to decide which public policies are sufficiently ‘fundamental’ to require denial of tax exemptions,” dismissing that position as a “misread[ing]” of its opinion.\(^6\)

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\(^1\) *Bob Jones Univ. v. United States*, 461 U.S. 574, 598 (1983).


\(^3\) *Id.* at 594.


\(^5\) *Bob Jones*, 461 U.S. at 593–96.

\(^6\) *Id.* at 598, n.23.
Apart from *Bob Jones*, ordinary principles of statutory interpretation support the conclusion that the IRS has no freestanding power to craft new public policies under which tax exemptions may be denied. Enacting our nation’s laws and determining its public policy are not matters of tax administration. They instead involve judgments about issues of “deep political . . . significance,” and it is “especially unlikely that Congress would have delegated [them] to the IRS, which has no expertise in crafting [social] policy of this sort.”

Here, there are no congressional enactments establishing a public policy against private opposition to same-sex marriage. In fact, Congress has never enacted any law specifically prohibiting discrimination on the basis of sexual orientation in education, employment, housing, public accommodation, or similar areas. In contrast, it has enacted numerous civil-rights laws prohibiting discrimination on the basis of other traits, such as race, religion, and sex. What is more, Congress has sometimes taken affirmative steps to ensure that its civil-rights legislation does not cover sexual orientation. In light of this congressional posture, the IRS would have no grounds for treating private opposition to same-sex marriage as a violation of fundamental public policy, and thus as a reason for denying a tax exemption.

Nor can the IRS infer the requisite public policy from cases such as *United States v. Windsor* and *Obergefell*. Those decisions are about restricting state action; they hold that the Government may not deny same-sex couples the right to marry. But those decisions do not preclude private entities—such as churches and religious universities—from opposing same-sex marriage. To the contrary, *Obergefell* reaffirms that “those who adhere to religious doctrines” and “those who oppose same-sex marriage for other reasons” “may continue to advocate with utmost, sincere conviction that . . . same-sex marriage should not be condoned.” Given this language, it would be erroneous for the IRS to conclude that *Obergefell* either compels or permits it to deny tax exemptions to private organizations on the basis of their opposition to same-sex marriage for “religious” or “other” reasons.

Well established law confirms the distinction between a constitutional restriction governing state action and a public policy governing private action. For example, in *Bob Jones* the Supreme Court carefully explained that federal statutes, executive orders, and judicial decisions showed that “racially discriminatory private schools violate public policy.” Similarly, in the Revenue Ruling upheld in *Bob Jones*, the IRS concluded that federal law “demonstrate[d] a national policy to discourage racial discrimination in education, whether public or private.” As explained above, however, there is no comparable federal statutory scheme addressing private opposition to same-sex marriage.

A few analogies further illustrate the point. The Fourteenth Amendment restricts the ability of public universities (though not private ones) to use race-based affirmative action to ameliorate past discrimination, to admit students of only one sex, or to require students to observe religious practices. Yet it does not follow that a private university

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8 See, e.g., 42 U.S.C. § 12211(a) (expressly excluding homosexuality and bisexuality from the traits protected by the Americans with Disabilities Act).
9 133 S. Ct. 2675 (2013).
10 134 S. Ct. at 2607.
11 461 U.S. at 605 (emphasis added).
would lose its tax exemption if it used affirmative action to compensate for past wrongs, offered single-sex education, or required its students to attend chapel. So too a private university should not lose its tax exemption on account of its opposition to same-sex marriage. These examples demonstrate how constitutional rules that restrict state action do not translate into public policies restricting private action.

Finally, it should be noted that the Religious Freedom Restoration Act of 1993 (the “RFRA”) separately protects institutions whose opposition rests on sincerely held religious beliefs. The RFRA, which applies to all federal statutes and regulations, enables individuals and organizations to seek exemptions from government action to which they have religious objections. In particular, it prohibits the Government from taking any action that “substantially burden[s] a person’s exercise of religion,” unless the Government proves that the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”

An IRS ruling that purported to eliminate an institution’s exemption because of its religious opposition to same-sex marriage would be subject to the RFRA. There is no question that the RFRA protects institutions, including corporations organized in accordance with § 501(c)(3). There should likewise be no question that taking away an organization’s tax exemption because of religious opposition to same-sex marriage would substantially burden its religious exercise. Long before Congress enacted the RFRA, the Supreme Court recognized in Sherbert v. Verner that “the denial of . . . a benefit or privilege”—such as “a tax exemption”—amounts to a “substantial infringement of religious liberties.” The same result follows under the RFRA, which “provides even broader protection for religious liberty than was available under [decisions such as Sherbert].”

The IRS would be unable to show that this substantial burden on religious exercise withstands scrutiny under the RFRA. The statute’s compelling-interest and least-restrictive-means requirements sum to “the most demanding test known to constitutional law.” An interest qualifies as compelling only if it is a goal “of the highest order,” and the “exceptionally demanding” least-restrictive-means standard requires a showing that the Government “lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties.” The Government rarely overcomes these hurdles, and it is doubtful that the IRS could overcome them here.

To be sure, Bob Jones held (before the RFRA) that denying tax exemptions to racially discriminatory private universities advanced the Government’s “fundamental, overriding interest in eradicating racial discrimination in education.” That decision rested on the unique history of race discrimination in American education. There is not now a comparable “fundamental, overriding interest” in prohibiting private opposition to same sex marriage. Numerous Supreme Court decisions beyond Obergefell have recognized that private entities have the right to adhere to traditional views about sexual orientation. Thus,

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19 Hobby Lobby, 134 S. Ct. at 2761, n.3.
22 Hobby Lobby, 134 S. Ct. at 2780.
23 461 U.S. at 596, n.21.
24 Id. at 604.
in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, the Supreme Court held that private parade organizers had a constitutional right to exclude a group of gay marchers from a parade. Likewise, in Boy Scouts of America, Inc. v. Dale, the Court held that the Boy Scouts had the constitutional right to exclude gay members. These cases make clear that private institutions have a constitutional right to maintain and express traditional views regarding sexual orientation. It necessarily follows that the Government has no compelling interest in prohibiting private organizations from effecting such views.

All in all, the IRS cannot now find a fundamental public policy against private discrimination on the basis of sexual orientation, because Congress has not enacted legislation establishing such a policy. Neither can the IRS infer such a policy from decisions such as Windsor and Obergefell, because those cases relate only to state action, not private action. And even if the IRS were to argue that private adherence to traditional views regarding sexual orientation, including opposition to same-sex marriage, contradicted public policy, the RFRA would prohibit it from denying tax exemptions to institutions whose position is based in religion.

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