ARE CALLS TO ALTER THE TAX-EXEMPT STATUS OF ORGANIZATIONS AFTER OBERGEFELL PREMATURE?

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On June 26, 2015, the U.S. Supreme Court recognized lawful same-sex marriage in Obergefell v. Hodges.1 The Obergefell court ruled that the right to marry is a fundamental right protected by the Fourteenth Amendment’s Due Process and Equal Protection Clauses and that same-sex couples should not be deprived of that right and that liberty.2 The Obergefell court eloquently highlighted that the history of marriage evidences both continuity and change based on shifting views where “new dimensions of freedom become apparent to new generations.”3 Although some individuals may be opposed to same-sex marriage based on religious or other beliefs, the Supreme Court determined that those beliefs should not override the right of same-sex couples to marry under the laws of our government.

Long before Obergefell, the U.S. Supreme Court in 1983 ruled in Bob Jones University v. U.S.4 that a university no longer qualified as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 because certain of its policies were racially discriminatory. After the Obergefell decision, some commentators have suggested that Bob Jones supports the revocation of the tax-exempt status of religious or other organizations which do not condone same-sex marriage.5 The court in Bob Jones stated that “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”6 In reaching its decision, the Bob Jones court reasoned that “there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.”7 The Bob Jones court expressly noted that the case dealt only with religious schools and not churches and other purely religious institutions.8 The court further pointed out that racially discriminatory schools exercise “a pervasive influence on

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2 Id. at 2604.
3 Id. at 2594-96.
5 Mark Oppenheimer, Now’s the Time to End Tax Exemptions for Religious Institutions, TIME (June 28, 2015).
6 103 S. Ct. at 2029.
7 Id. (emphasis added).
8 Id. at 2035 n.29.
the entire educational process” which outweighs any social benefit that the schools might otherwise provide.9

The Bob Jones court determined that, in addition to falling within one of the statutorily enumerated categories (e.g., religious, education or charitable), a tax-exempt institution must “serve and be in harmony with the public interest.”10 In a concurring opinion, however, Justice Powell questioned whether evaluating charities based upon if they confer a “public benefit” was an appropriate standard.11 Justice Powell argued that the provision of tax-exempt status to charities was the means of “limiting the influence of government orthodoxy on important areas of community life” rather than reinforcing any purported “common community conscience.”12 Justice Powell further expressed the great importance of “untrammeled choice for private philanthropy.”13 In response to Justice Powell’s concerns, the majority noted that its opinion should not be read to imply that the IRS is vested with authority to decide which public policies are sufficiently fundamental to require denial of tax exemption.14 Rather, the majority and Justice Powell agreed that “if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under Code § 501(c)(3), it is the policy against racial discrimination in education.”15

Nearly thirty years passed between the U.S. Supreme Court decision in Brown v. Board of Education16 in 1954 which ended racial segregation in schools and the Bob Jones decision. By 1983, racial discrimination in an educational setting was of the utmost importance to the Bob Jones court and, arguably, at the present time, a religious or other organization’s failure to condone same-sex marriage is not analogous. Also, as noted above, the Bob Jones case does not give the IRS the discretion to determine what is a fundamental public policy that rises to the level of requiring the denial of tax exemption. Furthermore, with respect to churches and other purely religious institutions, any constitutional concerns arising from the Obergefell case must be balanced against any First Amendment concerns. The Obergefell court stated that the “First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”17 The Obergefell court also stated that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”18

For these reasons, when read in conjunction with Bob Jones, Obergefell does not require or even allow the IRS to deny tax-exempt status to religious or other institutions which do not condone same-sex marriages, including those which might refuse to perform same-sex marriages. The Obergefell case does not address many scenarios that advocates of same-sex marriage undoubtedly will support. For example, in his dissenting opinion in Obergefell, Chief Justice Roberts raised concerns that the majority opinion inevitably will result in future cases before the court such as a religious college that provides married

9 Id.
10 Id. at 2028-29.
11 Id. at 2037 (Powell, J., concurring).
12 Id. at 2038.
13 Id.
14 Id. at 2032 n.23.
15 Id.
17 135 S. Ct. at 2607.
18 Id. at 2602.
student housing only to opposite-sex married couples or a religious adoption agency which does not place children with same-sex married couples.\textsuperscript{19} However, the \textit{Obergefell} and \textit{Bob Jones} opinions do not address these scenarios and cannot stand for the proposition that those actions should result in the organizations losing their tax-exempt status. Justice Scalia cited \textit{Bob Jones} in 1996 in his dissent in \textit{United States v. Virginia}\textsuperscript{20} and expressed concern that a donation to a single-sex college might be contrary to public policy in the aftermath of the Supreme Court’s decision that the Constitution did not permit the Virginia Military Institute to admit only male students.\textsuperscript{21} Justice Scalia’s concern was unwarranted because same-sex private colleges are still able to qualify for tax-exempt status under Internal Revenue Code section 501(c)(3) after nearly twenty years.

It is the view of this author that, although some individuals may wish to alter the tax-exempt status of religious or other organizations that do not condone same-sex marriage, it is premature to use \textit{Obergefell} as a “sword” to revoke or deny the tax-exempt status of an organization that otherwise meets the requirements of Internal Revenue Code section 501(c)(3). If for no other reason, a religious organization that does not condone same-sex marriage might still provide needed services and other resources to the poor which surely is a benefit to the public and stripping the tax-exempt status of such organization would be contrary to public policy.

Of course, tax-exempt organizations must comply with a number of rules that might limit certain actions on their part. For example, the tax-exempt rules that limit lobbying will have implications on tax-exempt organizations that might attempt to influence lawmakers related to the issues raised by this article (e.g., advocating for rules that may make it difficult for same-sex couples to obtain marriage licenses or register their marriages). Continually developing anti-discrimination laws related to employment issues and health-care laws may impact tax-exempt organizations that do not wish to provide spousal benefits to the same-sex spouse of an employee. Nevertheless, \textit{Obergefell}, standing alone and when read in conjunction with \textit{Bob Jones}, does not give the IRS the ability to revoke the tax-exempt status of these organizations.

Justice Powell in his concurring opinion in \textit{Bob Jones} pointed out that our government traditionally has allowed disparate groups with strongly held divergent views to share the privilege of tax exemption.\textsuperscript{22} Groups should be able to co-exist without having the same beliefs. Segments of our society today, though, fueled by constant media attention, respect views held only by the far right or far left which leads to divisiveness evidenced in the current presidential race. Individuals on social media and otherwise regularly espouse positions that suggest that if you are a Republican, you cannot possibly find any redeeming qualities in a Democratic politician, and vice versa; if you are fiscally conservative, you cannot possibly support any type of tax increase; if you are a hunter, you cannot possibly support any type of gun control; or if you truly are a Christian, you cannot possibly support same-sex relationships or marriage. During his recent trip to the United States, however, Pope Francis advocated for a more tolerant and inclusive society while at the same time respecting the right to religious liberty.\textsuperscript{23} We should heed the wisdom of Justice Powell and Pope Francis. Human nature assures us that all members of society will

\textsuperscript{19} Id. at 2625-26 (Roberts, J., dissenting).
\textsuperscript{20} 116 S. Ct. 2264 (1996).
\textsuperscript{21} Id. at 2307 (Scalia, J., dissenting).
\textsuperscript{22} 103 S.Ct. at 2038 (Powell, J., concurring).
never agree on every issue. Our government should be able to continue to allow religious
and other organizations which may not condone same-sex marriage to qualify for tax-
exempt status when they otherwise meet the requirements of Internal Revenue Code
section 501(c)(3). This policy does not have to be contrary to the right of same-sex couples
to marry legally under the laws of our government.