PROMPT ON THE OBERGEFELL V. HODGES CASE

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In the oral argument before the Supreme Court in Obergefell v. Hodges, Justice Alito asked Solicitor General Verrilli about the tax implications if the Court were to hold that the Constitution guaranteed a right to same-sex marriage: “Well, in the Bob Jones case,¹ the Court held that a college was not entitled to tax exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or college if it opposed same-sex marriage?” The Solicitor General replied, “You know, I don’t think I can answer that question without knowing more specifics, but it’s certainly going to be an issue. I don’t deny that. I don’t deny that, Justice Alito. It is—it is going to be an issue.” In his dissent in Obergefell, Chief Justice Roberts expressed the same concern:

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . . There is little doubt that these and similar questions will soon be before this Court.²

In a July 30, 2015, letter responding to an inquiry from the Attorney General of Oklahoma, IRS Commissioner Koskinen stated that “[t]he IRS does not view Obergefell as having changed the law applicable to section 501(c)(3) determinations or examinations. Therefore, the IRS will not . . . change existing standards in reviewing applications for exemption under section 501(c)(3) or in examining the qualification of section 501(c)(3) organizations.”

In light of Bob Jones and Obergefell, did the IRS get this one right, or should organizations opposed to same-sex marriage now be ineligible for tax-exempt status? If the IRS got it wrong, what sort of organizational behavior should lead to denial of tax-exempt status? Is mere expression of opposition to same-sex marriage enough? If not, what about a church that refuses to perform or recognize same-sex marriages? If that is still not enough, what about an organization that urges county clerks not to register same-sex marriages? What about an organization that declines to provide spousal benefits to the

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same-sex spouse of an employee? Or what about the married student housing and adoption agency hypotheticals of Chief Justice Roberts?

If the IRS did get it wrong, is there anything that anyone can do about it? Would anyone have standing to challenge the IRS’s position in court? If not, can and should the law be changed to confer standing on someone?

Finally, what (if anything) is the relevance here of the Virginia Military Institute (VMI) Supreme Court case and its aftermath? In his dissent in *United States v. Virginia*, Justice Scalia, citing *Bob Jones*, warned of a possible consequence of the Court’s decision that the Constitution did not permit VMI (a public institution of higher education) to admit only male students: “[I]t is certainly not beyond the Court that rendered today’s decision to hold that a donation to a single sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex.” Almost twenty years later, the aftermath is that there has been no aftermath. Same-sex private colleges are still able to qualify under section 501(c)(3), and the IRS has never contended otherwise.

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