

March 8, 2006

## Same-Sex Marriage & The Coming Anti-Discrimination Campaigns Against Religion

Douglas W. Kmiec<sup>1</sup>

In recent proceedings before the United States Supreme Court,<sup>2</sup> law schools sought to keep military recruiters off campuses in retaliation for the military's "don't ask, don't tell" policy against overt homosexual identity or conduct. These law schools simultaneously attempted to avoid being penalized pursuant to a federal spending condition for treating the military unequally. The schools claimed that losing federal subsidies for refusing to give equal access to military recruiters would be an unconstitutional infringement of their rights of speech and association. The argument re-opened the debate on whether it was proper for the Court, some twenty-five years earlier, to yank the tax-exempt status of a university that drew racial distinctions among its students as a matter of scriptural understanding.<sup>3</sup> As Justice Breyer asked during the *FAIR* oral arguments, wouldn't they also have the "same right, Bob Jones University, because they disapprove of social mixing of the races" on religious grounds<sup>4</sup>. Mr. Rosenkranz,

---

<sup>1</sup> Caruso Family Chair & Professor of Constitutional Law, Pepperdine University; former. Head of the Office of Legal Counsel for Presidents Reagan and Bush I.

<sup>2</sup> Transcript of Oral Argument, *Rumsfeld v. Forum For Academic and Institutional Rights, Inc.*, (2005 WL 3387694) [hereinafter *FAIR*].

<sup>3</sup> *Bob Jones University v. U.S.*, 461 U.S. 574 (1983).

<sup>4</sup> Transcript of Oral Argument at 42, *FAIR*, (2005 WL 3387694).

counsel for the law schools, argued that in *Bob Jones University*<sup>5</sup> the government could demonstrate a compelling need to eradicate racial discrimination. The proffered answer left some Justices unconvinced. The government has other needs of “immense national importance” also, Justice Scalia said, referring to recruiting top candidates for the military.<sup>6</sup> Those other needs led to a unanimous judicial endorsement of the power of Congress to condition the receipt of federal subsidy on equal access for military recruiters notwithstanding the claim that doing so would threaten a school’s freedom of association and speech.<sup>7</sup>

The above colloquy and result suggest a possible coming difficulty for churches who remain steadfast in their defense of traditional marriage. Were federal equal protection or substantive due process to be construed to require states to license same-sex marriage, those who have profound moral or religious objection to the social affirmation of homosexual conduct would be argued to be the out-liers of civil society. The questioning from the bench during oral argument and the ultimate result in *FAIR* suggest that even “politically correct” speech or associational claims cannot be acknowledged lest doing so give credence to any theory that might weaken the government’s ability to deny a tax exemption for socially disfavored organizations, like Bob Jones. Of specific interest to the present paper is this question: were the social antipathy directed toward Bob Jones for its religiously-inspired racial segregation be

---

<sup>5</sup> *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) [hereinafter *Bob Jones*].

<sup>6</sup> Linda Greenhouse, *Justices Weigh Military’s Access to Law Schools*, *The New York Times*, December 7, 2005 at p. 1 (discussing the oral argument in *FAIR*).

<sup>7</sup> The Supreme Court in a unanimous (8-0) decision upheld the requirement of equal access, rejecting *FAIR*’s speech and association claims. *Rumsfeld v. FAIR*, \_\_\_U.S.\_\_\_ , 2006 WL 521237 (March 6, 2006).

newly aimed at the religious proponents of traditional marriage between a man and a woman, how conceivable is it that churches would be targeted for similar legal penalties and disadvantages? This is hardly a far-fetched inquiry, as apparently one of the main aspirations of the homosexual movement is retaliation against the defenders of traditional marriage. Professor Eugene Volokh, a noted libertarian scholar and advocate of same-sex marriage, writes:

The gay rights movement has long involved three related goals. One has to do with liberty from government repression – freedom from sodomy prosecutions, from police harassment, and the like. A second has to do with equal treatment by the government: The movement to recognize same-sex marriages is the most prominent recent example. A third has to do with de-legitimizing and legally punishing private behavior that discriminates against or condemns homosexuals.<sup>8</sup>

Other gay advocates put the matter more bluntly describing their objective as wanting to “discredit[] and force[] to the margin”<sup>9</sup> religious practices that honor traditional marriage.

To this author, it seems presently inconceivable that a successful analogy will be drawn in the public mind between irrational, and morally repugnant, racial discrimination and the rational, or, at a minimum morally and socially debatable, differentiation of traditional and same-

---

<sup>8</sup> Eugene Volokh, Same-Sex Marriage and Slippery Slopes, 33 Hofstra L. Rev. 1155, 1178 (2005).

<sup>9</sup> Larry W. Yackle, Parading Ourselves: Freedom of Speech at the Feast of St. Patrick, 73 B.U. L. Rev. 791, 792 (1993).

sex marriage.<sup>10</sup> Nevertheless, for the purpose of a thought experiment, this essay assumes such analogy to have gained popular acceptance, and then asks the further question, what penalties may accrue to churches that refuse to adjust their doctrine to accept and perform same-sex marriages?

### **Loss of Federal Tax-Exemption?**

Section 501 of the Internal Revenue Code (IRC)<sup>11</sup> provides an organization an exemption from federal income taxation, provided that organization meets several criteria.<sup>12</sup> Qualifying organizations must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, . . . or for the prevention of cruelty to children or animals. . . .”<sup>13</sup> Beyond this, net earnings may not accrue “to the benefit of any private shareholder or individual,”<sup>14</sup> and the entity may not be engaged in political campaigns or substantial lobbying.

---

<sup>10</sup> Douglas W. Kmiec, *The Procreative Case Against Same-Sex Marriage*, 31 *Hastings Const. L.Q.* 653 (Fall 2004/ Winter 2005).

<sup>11</sup> I.R.C. § 501(a) (passed 1/11/06) This section states: “An organization described in subsection (c) or (d) or section 401(a) [26 USCS § 401(a)] shall be exempt from taxation under this subtitle [26 USCS §§ 1 et seq.] unless such exemption is denied under section 502 or 503 [26 USCS § 502 or 503].”

<sup>12</sup> I.R.C. § 501(c)(3).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Parallel provisions in section 170 of the IRC permit taxpayers to deduct contributions to a qualifying organization.<sup>15</sup>

*Bob Jones*,<sup>16</sup> however, stands for the proposition that the statute is only part of the story. After all, Bob Jones University was unquestionably an educational institution organized on a nonprofit basis. This was insufficient, reasoned the Supreme Court, since “underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity--namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”<sup>17</sup> The Court discerned that “Congress' intention was to provide tax benefits to organizations serving charitable purposes,”<sup>18</sup> and the meaning of charity was then derived from common law trust doctrine. The trust doctrine would acknowledge the “public benefit” of education, but this

---

<sup>15</sup> I.R.C. § 170(a), (c). Section 170 outlines charitable, etc., contributions and gifts. Section 170(a) states that the general rule is that “There shall be allowed as a deduction any charitable contribution . . .” Section 170(c) defines a charitable contribution as “a contribution or gift to or for the use of - - - . . . [a] corporation, trust, or community chest, fund, or foundation - - - . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual.

<sup>16</sup> *Bob Jones University*, 461 U.S. 574 (1983).

<sup>17</sup> *Id.* at 586. The IRS had maintained this position long before it litigated in *Bob Jones*. See *Green v. Connally*, 330 F. Supp. 1150, 1179-80 (D.D.C. 1971) (enjoining the Service from granting exempt status to racially discriminatory private schools in Mississippi, as the schools' violation of the public policy against discrimination prevented them from being “charitable”); Rev. Rul. 71-447, 1971-2 C.B. 230 (stating that “a school... must be a common law charity in order to be exempt” under § 501(c)(3)).

<sup>18</sup> *Bob Jones University*, 461 U.S. at 586.

doctrine, according to the Court, also contained within it the proposition that no trust or charity can be formed to advance an illegal purpose.<sup>19</sup> This implied qualification was thought to be especially important in order to keep the government from indirectly supplying assistance to anti-social hateful groups like schools for training terrorists.<sup>20</sup>

The implied corollary was broadened further such that exemption would be denied if “there [is any] doubt that the activity involved is contrary to a fundamental public policy.”<sup>21</sup> As already noted, the focal point of public policy in *Bob Jones* was the elimination of racial discrimination in education. It was relatively easy for the Court to locate this fundamental policy goal in precedent such as *Brown v. Board of Education*,<sup>22</sup> the legislative enactment of the Civil Rights Act of 1964, and “numerous Executive Orders.”<sup>23</sup>

The Court noted that Bob Jones defended its racial distinctions on what the University claimed was “a genuine belief that the Bible forbids interracial dating and marriage.”<sup>24</sup> Recurring to the belief-conduct distinction, however, the Court found that practice unprotected

---

<sup>19</sup> *Bob Jones University*, 461 U.S. at 591; see also Restatement of Trusts Second Series § 377 (1959) (“A charitable trust cannot be created for a purpose which is illegal.”).

<sup>20</sup> *Id.* at 591 n.18.

<sup>21</sup> *Id.* at 592.

<sup>22</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>23</sup> *Bob Jones Univ.*, 461 U.S. at 592-96.

<sup>24</sup> *Id.* at 604, n.29 (citing *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 894 (1978)).

by the Free Exercise Clause. Relatedly, the Court viewed the governmental interest in racial neutrality to be “compelling” and “substantially outweigh[ing] whatever burden denial of tax benefits places on [Bob Jones] exercise of [its] religious beliefs.”<sup>25</sup> Finally, the Court rebuffed an Establishment Clause argument that through its selective exemption decision the government was favoring one religion over another. Not so, said the Court, “a regulation does not violate the Establishment Clause merely because it ‘happens to coincide or harmonize with the tenets of some or all religions.’”<sup>26</sup> Having a singular rule against racial discrimination kept the government from becoming entangled in assessing claims that particular discriminatory practices were genuinely religious. Thereafter, the task of determining whether an organization’s activities violate such a public policy would rest squarely with the IRS, as part of its responsibility for making the initial determination of whether the organization is charitable.<sup>27</sup> The Court upheld the IRS’s determination that Bob Jones University violated the federal policy against racial discrimination in education and thus did not provide a public benefit justifying its tax exemption as a charity.<sup>28</sup>

***Bob Jones* is not a precedent for denying a tax exemption to churches which refuse to perform same-sex marriages**

---

<sup>25</sup> Id. at 604.

<sup>26</sup> Id. at 604, n. 30 (quoting *McGowan v. Maryland*, 366 U.S. 422 (1961); citing *Harris v. McRai*, 448 U.S. 297, 319-20 (1980)).

<sup>27</sup> Id. at 597-98.

<sup>28</sup> Id. at 605. The Court reached an identical result in the companion case to *Bob Jones*. See *Goldsboro Christian Sch., Inc. v. United States*, 461 U.S. 574 (1983) (denying a tax

Professor Robin Wilson, in a thoughtful paper, notes that the IRS has taken the position in a private letter ruling that while the decision in *Bob Jones* related only to race discrimination in education, “the implication of the *Bob Jones* decision extends to any organization claiming exempt status under section 501(c)(3) and to any activity violating a clear public policy.”<sup>29</sup> As a general matter, letter rulings are no longer entitled to *Chevron*<sup>30</sup> deference; rather, under the decision in *Mead Corporation*,<sup>31</sup> these more informal interpretative directives will be accorded deference by a reviewing court only if they draw on the agency’s specialized expertise and are well reasoned. In the tax area, however, letter rulings and temporary regulations are sometimes given full *Chevron* deference normally reserved for formal rules issued after notice and comment rulemaking on the theory that IRS letter rulings represent the studied and unified policy of the Department of Treasury.<sup>32</sup> As noted immediately below, there have been very few true

---

exemption to a school that maintained racially discriminatory admissions policies for its kindergarten through high school program).

<sup>29</sup> Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage From The Health Care Context*, (forthcoming, on file with the Becket Fund).

<sup>30</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

<sup>31</sup> *United States v. Mead Corp.*, 533 U.S. 218 (U.S. 2001).

<sup>32</sup> *In Hospital Corp. of America & Subsidiaries v. Comm’r.*, 348 F.3d 136 (6<sup>th</sup> Cir. 2003), the court observed:

In *Mead Corporation*, the Court found that Congress had not implicitly delegated law-interpreting authority through the 10,000 to 15,000 tariff rulings made each year by forty-six different Customs offices without notice and comment procedures. *See* 533 U.S. at 232-33. The Court made clear, however, that while most of the Supreme Court cases applying *Chevron* involved notice-and-comment rulemaking or formal adjudication, “the want of such procedure ... does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.” 533 U.S. at 231. The temporary regulations involved in this case were arrived at

extensions of the *Bob Jones* public policy limitation outside the racial discrimination context by either regulatory means.<sup>33</sup>

Before *Bob Jones*, for example, the IRS has denied exempt status on public policy grounds to organizations believed to be violent.<sup>34</sup> After *Bob Jones*, the IRS took a dim view of granting an exemption on public policy grounds to the Church of Scientology, which it found to be “imped[ing] the IRS in performing its duty to determine and collect taxes from petitioner and other Scientology churches.”<sup>35</sup> The activities alleged were egregious, including “fil[ing] false

---

centrally by the Treasury Department after careful consideration. They were issued pursuant to statutory authority to “prescribe” needful rules and regulations. *See* I.R.C. § 7805(a). The regulation was “interpretive” in the same sense that the regulation in *Chevron* was interpretive--it gave content to ambiguous statutory terms. Congress clearly intended that the Treasury Department do so, and *Chevron* deference is therefore appropriate. *Id.* at 144-45.

<sup>33</sup> The racial discrimination limit also did not emerge suddenly in *Bob Jones* and it seemed at first to draw a distinction between so-called benign and hurtful uses of race. For example, six years before *Bob Jones*, the IRS ruled that exempt status could be granted to a trade school exclusively for American Indians. Rev. Rul. 77-272, (1977). This type of “affirmative action” admission practice was not the “type of racial restriction that is contrary to Federal public policy,” as it was “designed to implement certain statutorily defined Federal policy goals that are not in conflict with Federal public policy against racial discrimination in education.” *Id.* at 4; see Adult Indian Vocational Training Act of 1956, Pub. L. No. 84-959, § 1, 70 Stat. 986, 986 (1956) (codified as amended at 25 U.S.C. § 309 (2004), providing for federal funds to be used to finance job training programs for adult American Indians).

By contrast, shortly before *Bob Jones*, the D.C. Circuit sustained the denial of exemption eligibility for an organization that sought to demonstrate the inferiority of minorities to white Americans of European ancestry. *National Alliance v. United States*, 710 F.2d 868 (D.C.Cir. 1983).

<sup>34</sup> Pre-*Bob Jones*, the IRS denied an exemption to a world peace group since it sponsored demonstrations “in which demonstrators are urged to commit violations of local ordinances and breaches of public order.” Rev. Rul. 75-384 (1975). The IRS commented that “the generation of criminal acts increases the burdens of government, thus frustrating a well recognized charitable goal, *i.e.*, relief of the burdens of government.” *Id.*

<sup>35</sup> *Church of Scientology of Cal. v. Commissioner*, 83 T.C. 381, 503 (1984), *aff'd*, 823 F.2d 1310 (9th Cir. 1987) (limited on other grounds).

tax returns, burglariz[ing] IRS offices, st[ealing] IRS documents, and harass[ing], delay[ing], and obstruct[ing] IRS agents who tried to audit the Church's records.”<sup>36</sup>

*Bob Jones* has been administratively extended to include racial discrimination in any 501(c)(3) context, not just education. For example, exemption was denied to a trust maintained for impoverished white citizens of a particular city.<sup>37</sup> Discrimination on the basis of race was stated to be a violation of a “public policy so fundamental as to justify denial[sic] of charitable status to any organization otherwise described in section 501(c)(3).”<sup>38</sup> But the IRS has refused to explicitly push *Bob Jones* beyond the topic of race. For example, when a support program for teaching the literature and history of the Bible was challenged as an impermissible establishment of religion, the IRS determined that, based on precedent, the objection was without merit, and cautioned against finding *Bob Jones*-like violations of public policy premised on other individual rights.<sup>39</sup> Somewhat confusingly, the IRS also noted that it could “think of no more fundamental federal public policy than the Bill of Rights.”<sup>40</sup>

Extension of the *Bob Jones* principle to same-sex marriage is unlikely. First, the Court’s description in *Bob Jones* of the “consistent” efforts to eliminate racial discrimination – even by military force<sup>41</sup> – has no counterpart with same-sex marriage. Second, the Court found *Bob Jones* to lack all public benefit insofar as it was in violation of “fundamental” public policy. The

---

<sup>36</sup> Id. at 505.

<sup>37</sup> Tech. Adv. Mem. 89-10-001 (Mar. 20, 1989); PLR 8910001 (PLR 1988). (Note that pursuant to Section 6110(j)(3) of the Internal Revenue Code, “[t]his [private ruling] may not be used or cited as precedent.”)

<sup>38</sup> Id. at 7.

<sup>39</sup> Gen. Couns. Mem. 39,800 (Oct. 25, 1989)// (IRS GCM 1989). Note, “[t]his [private ruling] document is not to be relied upon or otherwise cited as precedent by taxpayers.”

<sup>40</sup> Id. at 11.

Court expressly left open “whether an organization providing a public benefit and otherwise meeting the requirements of § 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy.”<sup>42</sup> Applying this framework, it is inconceivable that the positive social good of a church could be wholly disregarded. Third, the *Bob Jones* Court emphasized that a “sensitive determination [of whether particular activities are “charitable”] should be made only where there is *no doubt* that the organization’s activities violate fundamental public policy.

*Bob Jones* found a common law public policy against racial discrimination in education. There is no comparable common law base supporting same-sex marriage. The absence of common law support for same-sex marriage can be discerned in *Lawrence v. Texas*,<sup>43</sup> itself. *Lawrence* may have overruled *Bowers v. Hardwick*,<sup>44</sup> but that overruling could not revise the common law, which, even the *Lawrence* majority had to concede, did not affirmatively protect homosexual sodomy, at least as that conduct was a subset of non-procreative sexual activity that was generally prohibited. The *Lawrence* majority simply chose not to be bound either by common law or democratic definition of immorality. As such, *Lawrence* is a precedent built solely upon judicial will – or in Justice Kennedy’s words the Court’s “obligation . . . to define the liberty of all. . . .”<sup>45</sup> This is a troubling exercise of judicial hubris. Nevertheless, by its own terms, the right of intimacy discovered in *Lawrence* does not have a common law lineage and it

---

<sup>41</sup> See *Cooper v. Aaron*, 358 U.S. 1 (1958). (Little Rock).

<sup>42</sup> *Bob Jones Univ.*, 461 U.S. at 596, n.21.

<sup>43</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>44</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

has nothing to do with public policy derived from the “common law standards of charity.” For this reason alone, *Bob Jones* is not fairly seen as a precedent relevant to tax-exempt status and same-sex marriage.

The most recent IRS thinking is to confine *Bob Jones* to its racial context. In finding no basis to revoke an exemption on public policy grounds for an over accumulation of income,<sup>46</sup> the IRS commented that “[c]urrently the sole basis for revocation of exemption on public policy grounds is engaging in racial discrimination.”<sup>47</sup> Were it otherwise, Professor Wilson nicely illustrates the range of difficult questions that would demand answer by an unthinking expansion of the *Bob Jones* ruling, including most basically: what defines the contours of public policy?, what makes a public policy fundamental? and how many acts would demonstrate a disregard of public policy?

Professor Wilson nevertheless writes that “churches that oppose same-sex marriage in the United States today could reasonably conclude that they face a credible, palpable threat [of loss of tax exemption].”<sup>48</sup> “Threat” is an appropriate word to capture the ideological goal of the gay and lesbian community to de-legitimize or marginalize those who adhere to a religiously-based, traditional concept of marriage. However, the word is misleading if it represents speculation

---

<sup>45</sup> *Lawrence*, 539 U.S. at 570.

<sup>46</sup> 1997 FSA LEXIS 478 (April 23, 1997) (Note, “[t]his document is not to be relied upon or otherwise cited as precedent”).

<sup>47</sup> *Id.* at 5.

upon the law's present direction. The invalidation of a state law that had criminalized homosexual sodomy in *Lawrence v. Texas*<sup>49</sup> or the Massachusetts decision in *Goodridge*<sup>50</sup> finding a state-constitutional requirement of same-sex marriage cannot be taken lightly. Yet, these form an insufficient foundation upon which to claim a fundamental public policy basis for exemption denial under *Bob Jones*. States overwhelmingly prohibit same-sex marriage,<sup>51</sup> with many recent reaffirmations of marriage being between a man and a woman.<sup>52</sup> Beyond that, the Defense of Marriage Act absolves states from recognizing same-sex marriages under another state's law.<sup>53</sup> In addition, the Supreme Court held in *Boy Scouts of America v. Dale*,<sup>54</sup> that a scout troop could exclude an openly gay scoutmaster on the grounds that as a private entity the

---

<sup>48</sup> Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage From The Health Care Context*, (forthcoming, on file with the Becket Fund).

<sup>49</sup> *Lawrence*, 539 U.S. 558.

<sup>50</sup> *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (Mass. 2003)

<sup>51</sup> "Sixteen states have constitutional amendments explicitly barring the recognition of same-sex marriage, confining civil marriage to a legal union between a man and a woman. Twenty-seven states have legal statutes defining marriage to two persons of the opposite-sex. A small number of states ban any legal recognition of same-sex unions that would be equivalent to civil marriage." Wikipedia definition of "Same Sex Marriage in the United States" [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States) (last visited Jan. 20, 2006).

<sup>52</sup> Unitarian Universalist Association, *States Facing Constitutional Amendments Banning Same-Sex Marriage*, at [http://www.uua.org/news/2004/freedomtomarry/state\\_ballot\\_initiatives.html](http://www.uua.org/news/2004/freedomtomarry/state_ballot_initiatives.html) (last visited January 20, 2006) (on file with the American University Law Review) (states that added constitutional amendments on the 2004 ballot, including Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah).

<sup>53</sup> 28 U.S.C. § 1738C (2003) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

<sup>54</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

scouts right of association trumped a state public accommodations law prohibiting such discrimination.

### ***Tax Exemptions Are Not Subsidies***

In order to fully differentiate *Bob Jones*, it may be important to return to the understanding of tax exemption that is both an aspect of tax theory, and an important limit upon government control conditions in constitutional jurisprudence. Quite simply, tax exemptions are not subsidies. As a matter of tax policy, an exemption is a recognition that nonprofit organizations, like churches, do not realize taxable income. Moreover, to liken an exemption to a subsidy makes it too easy to confuse the two in constitutional jurisprudence, as Justice Brennan's concurring opinion observed in *Walz v. Tax Commissioner*.<sup>55</sup> There Justice Brennan noted that an exemption is less support than the simple abstention "from demanding that the [entity] support the state."<sup>56</sup> Exemptions and subsidies are "qualitatively different."<sup>57</sup>

Confusing exemption and subsidy brings with it the unwarranted consequence of government control associated with spending conditions.<sup>58</sup> From the recent oral argument of *FAIR v. Rumsfeld*, it would seem that the Supreme Court is poised to say that a law school which accepts federal money must observe a federal spending condition requiring equal access for

---

<sup>55</sup> *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

<sup>56</sup> *Id.* at 677.

<sup>57</sup> *Id.* at 690.

<sup>58</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

military recruiters.<sup>59</sup> While Justice Breyer appeared to believe that this flows directly from the holding in *Bob Jones*, as a matter of tax theory, it does not. The law schools in *Rumsfeld* are bound by a condition on a direct cash subsidy – and it should not be surprising that the government gets to decide how to spend its own resources.<sup>60</sup> There was no similar expenditure of resources in *Bob Jones*, there was only a tax policy decision that the income benefit imputed to the beneficiaries of the services of a non-profit university was simply too diffuse to administratively and efficiently capture.<sup>61</sup> As Professor Bittker writes:

[t]he federal income tax of current law, then, ‘exempts’ nonprofit groups; and this quite naturally leads, on a quick glance, to the conclusion that they have been granted the ‘privilege’ of ‘immunity.’ Once this characterization is accepted, it is only a short step to such pejoratives as ‘loophole,’ ‘preference,’ and ‘subsidy.’ Unless blinded by labels, however, one can view the federal income tax instead as a tax on income that inures in measurable amounts to the direct or indirect personal benefit of

---

<sup>59</sup> Transcript of Oral Argument, *Rumsfeld v. Forum For Academic and Institutional Rights, Inc.* (FAIR), (2005 WL 3387694).

<sup>60</sup> When the government disburses funds to convey a governmental message, it may take steps to ensure that its message is not garbled, distorted, or in the case of the law schools, ignored by a grantee. *Rust v. Sullivan*, 500 U.S. 173, 196-200 (1991).

<sup>61</sup> Boris I. Bittker, *Churches, Taxes, and the Constitution*, 78 *Yale L. J.* 1285, 1290 (1969). “A[n] . . . analysis of the income of religious organizations might lead to the conclusion that the beneficiaries [of the parish] are too diffuse for a satisfactory imputation of the group’s income to individuals, and so divergent in economic status that it would be difficult to establish a fair average rate at which to tax the church as their surrogate.”

identifiable natural persons. So viewed, the Internal Revenue Code's 'exemption' of nonprofit organizations is simply a way of recognizing the inapplicability to them of a concept that is central to the tax itself.<sup>62</sup>

Viewed in this manner, a tax exemption of a non-profit organization is not the equivalent of a subsidy that, under existing spending power doctrine, can support a control condition. Professor Jonathan Turley nicely elaborates why tax exemptions and subsidies should be treated differently in terms of free speech theory, noting that with a tax exemption "the ultimate choice of speech and association is left to individual citizens. The government should not 'put a thumb on the scale' to make it relatively more difficult for these organizations to survive than those organizations that conform to popular views."<sup>63</sup> Professor Turley's observation thus echoes a point made by Justice Powell in his concurring opinion in *Bob Jones*, itself. Justice Powell noted that, apart from race, 501(c)(3) should not be interpreted in a fashion that "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints."<sup>64</sup> Powell, thus, recognized that, unlike a subsidy, "the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life."<sup>65</sup>

---

<sup>62</sup> Id. at 1290-91.

<sup>63</sup> Jonathan Turley, *The Perfect Constitutional Storm: Free Speech, Free Exercise, and The Right to Association in The Debate Over Same-Sex Marriage*, (Becket Fund Abstract n. 29).

<sup>64</sup> *Bob Jones Univ.*, 461 U.S. at 609 (Powell, J., concurring).

<sup>65</sup> Id.

Assuming, however, that the Court is no longer prepared or capable of differentiating a subsidy from an exemption, the very language used to justify the anti-discrimination or control condition on the tax exemption in *Bob Jones* simply does not transfer to the same-sex context. First, the Court in *Bob Jones* sought to maintain the imperfect analogy between subsidy and exemption in order to exclude “Fagin’s school for educating English boys in the art of picking pockets,” or closer to the present era, “a school for intensive training of subversives for guerrilla warfare and terrorism . . . .”<sup>66</sup> The public policy limitation was a fail-safe mechanism to not underwrite extremism, or at least, those social institutions which “violate[] deeply and widely accepted views of elementary justice.”<sup>67</sup> Such a fail-safe mechanism is inapposite to entities like churches which, the debate over same-sex marriage aside, are generally conceded to have an unquestioned role of positive good.<sup>68</sup>

---

<sup>66</sup> Id. at 592, n.18.

<sup>67</sup> Id.. at 592.

<sup>68</sup> Professor Turley aptly notes that eliminating altogether the public policy exception for tax exemption “requires an element of courage . . . [since] it means that racist and anti-Semitic citizens can form tax-exempt organizations . . . .” Turley, *supra* at n.31. The analysis offered in the text of this paper assumes this level of courage to be politically unlikely. For this reason, while it might be analytically tidy to eliminate any temptation to allocate tax exemptions on viewpoint grounds, it is unnecessary to achieve that full step in order to protect the church. The church fits the common law definition of a charity and there is no common law support for same-sex marriage. There is no tenable basis to deny the church’s tax exemption. Thus, churches should be unaffected even if the government retains the ability selectively to deny a tax exemption to organizations on the basis of hateful conduct. Refusing to sanction a conception of marriage unknown to most of American, if not western, history is hardly the equivalent of sexual harassment or the racial targeting of a person for criminal assault. *Compare Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (distinguishing a government penalty enhancement for unpopular

***The “public benefit” conferred by churches to merit tax exemption does not make churches into state actors?***

The common law justification for tax exemptions specified in *Bob Jones* was “that the exempt entity confers a public benefit - - a benefit which . . . supplements . . . the work of public institutions already supported by tax revenues.”<sup>69</sup> By its own terms, a church officiating at traditional, but not same-sex, marriage supplies a public benefit. Yes, the public registry – rather than a church -- will have to fulfill any demand for same-sex process, but any continued officiating at traditional marriages still supplements and is to the public benefit.

While supplying a public benefit through the partial performance of a public function is yet another reason to find the church’s tax exemption to be reasonably secure against *Bob Jones* attack, it may raise a more profound difficulty. In particular, does officiating at marriage ceremonies, in lieu of the state, mean that the church has been delegated a public function<sup>70</sup> in

---

or even hateful expression from a penalty enhancement aimed at conduct that is not protected by the First Amendment).

<sup>69</sup> *Bob Jones Univ.*, 461 U.S. at 591.

<sup>70</sup> David Boaz has intriguingly argued for “privatizing” marriage by allowing couples to form their own contracts or participate in the religious ceremonies of their choice without state license. <http://patriot.net/~crouch/act/boaz.html>. (last visited Jan. 20, 2006). State involvement would be limited to enforcement as with any other private contract. The Boaz proposal fails to recognize the extent to which marriage is not merely a private matter but the assumption of duty to community, and a promise to responsibly educate and care for off-spring – matters in which

such a way as to now be subject to the more stringent application of constitutional precepts applicable to a state actor? In all states, religious personnel are given authority to “solemnize” a marriage, provided they do so within the parameters of civilly issued licenses.<sup>71</sup> Determining when religious solemnization falls within acceptable civil regulation, however, can result in considerable interplay between church and state. Consider, for example, the question put to the California Attorney General of whether a resigned priest may satisfy the state solemnization requirement. After surveying a good deal of theological information, albeit duly noting that it was not the role of the Attorney General to take sides in internal religious matters, the state’s chief law enforcement officer reached his conclusion:

Thus, in order to fall within the category of 'priest' under [state law] one must be authorized by his denomination to solemnize marriage, and act within the scope of that authority in the solemnization of marriage; i.e., the authority of an individual other than a judge or commissioner to solemnize marriage depends upon the duly constituted authorization by the religious denomination of such person, whether or not ordained, to act in that capacity. An individual who is not duly authorized by his religious denomination to solemnize marriage, such as a

---

the public has a profound interest well beyond other matters of private contract. See generally, Douglas W. Kmiec, *Marriage and Family in Never A Matter of Indifference* (Berkowitz, Peter ed.) Stanford, CA: Hoover Institution Press, 2003..

<sup>71</sup> A state-by-state compilation of these laws can be found at: <http://www.sevenplanes.org/laws1.htm> (last visited Jan. 20, 2006). In California, for example, any priest, minister, or rabbi of any religious denomination, of the age of 18 years or over may perform marriages. Ministers must complete the marriage license and return it to the county clerk within 4 days after the marriage.

person who, by virtue of resignation, is not authorized to engage in active ministry, does not satisfy the criteria of [state law]. It may be noted in this regard that [state law] makes no reference, as in the case of a judge, to a resigned or retired priest, minister, or rabbi.

It is concluded accordingly that a priest who has resigned from active ministry within the official Roman Catholic structure, who is recognized by the church as a priest but is not allowed by the church to perform marriages without a bishop's authorization, may solemnize marriages under [state law] only as authorized by the bishop.<sup>72</sup>

Likewise, numerous judicial decisions have opined on the sufficiency or insufficiency of particular religious credentials to solemnize a marriage.<sup>73</sup> These church-state interactions are of some relevance in determining whether a church is a “state actor” under either the Court’s public function or entwinement tests. These tests inquire as to the joint participation and private involvement in state activity. A classic case involved the lease of parking space by a

---

<sup>72</sup> Opinion No. 81-210, 64 Ops. Cal. Atty. Gen. 409, 1981 WL 126761 (Cal.A.G.).

<sup>73</sup> See, e.g., *Ligonia v. Buxton*, 2 Me 102, 1822 WL 286 (Me., 1822) (holding that a marriage was void where it had been solemnized by a minister who had been ordained by an unincorporated religious society, and was not an ordained minister of the gospel within the meaning of a pertinent act. Furthermore, the court pointed out that the marriage was invalid because a ceremony had taken place at the home of a minister, which home was in a town in which neither party resided, in direct contravention of controlling laws); *Ravenal v. Ravenal*, 72 Misc. 2d 100 (N.Y. 1972) (invalidating a marriage performed by the mail-order minister of the Universal Life Church which the court noted did not have an actual church or meeting place, and it was not presided over by a minister or other person who was authorized to perform marriages,

discriminatory private restaurant which facilitated the retirement of public debt obligations. The Court found a sufficient “symbiotic relationship” to attribute the racial discrimination of the private entity to the state.<sup>74</sup> So too, the Court found the selection of a jury by private civil counsel to be the equivalent of a state personnel selection exercise.<sup>75</sup> In deciding this type of public function delegation case, Justice Kennedy elaborated several factors that might be argued to make the church a state actor in its solemnization function. For example, Kennedy highlighted the extent to which the private actor is performing a traditional governmental function and employing the incidents of government authority.

Mitigating against a finding of a delegation of public function, however, would be the fact that marital licensing could hardly be said to be now, or historically, the exclusive province of the state, a factor that, if absent, has influenced the Court not to find state action.<sup>76</sup> Exclusivity is important in public delegation analysis since it is far easier to justify imposing stringent constitutional requirements where the state empowers a private entity and then leaves no choice but to patronize it.<sup>77</sup> This, however, is not the modern circumstance of the church. Even as church officials may solemnize a marriage, they hardly have a monopoly on this function. Moreover, as an historical matter, public involvement with marriage is relatively

---

baptisms, and the like). *State v. Lynch*, 301 N.C. 479 (N.C., 1980) (marriage performed by Catholic layman invalid).

<sup>74</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>75</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

<sup>76</sup> *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982) (private school not state actor because schooling is not exclusive function of the government).

modern day, and this fact cuts as well against finding even the existence of a public function.<sup>78</sup>

In the middle ages, marriage was a private contract between families. In America, well into the 19<sup>th</sup> century, marriage was recognized as a contract valid under common law until superseded by statute.<sup>79</sup> Indeed, common law marriage whereby a couple consent to live together and hold themselves out as husband and wife remains possible in a dozen states, even as the practice has been abolished in many states.

The alternative entwinement test seems even less applicable. This standard was first announced in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,<sup>80</sup> where the court found a private athletic regulatory body to be so dominated by public officials in its inner workings that fairness demanded the observance of constitutional limitations. The state action inquiry, said the Court, was fact-bound and could be outweighed by a “countervailing reason against attributing activity to the government.”<sup>81</sup> In *Brentwood*, the association was populated largely (84%) by public institutions, state officers were *ex officio* members of its board, and the employees of the association were participants in the state retirement system. None of these facts are truly present vis-a-vis solemnization, other than the already noted evaluation by public

---

<sup>77</sup> *West v. Adkins*, 487 U.S. 42 (1988), where a private prison doctor was considered a state actor in light of the limited choice of the prison population for medical care.

<sup>78</sup> *Rendall-Baker v. Kohn*, 457 U.S. 830 (1982), the practice of a private school to provide education for special needs students did not make it a state actor since there was no tradition of public provision of special education.

<sup>79</sup> *Meisher v. Moore*, 96 U.S. 76 (1877).

<sup>80</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001).

<sup>81</sup> *Id.* at 296.

legal officials of legitimate or “approved” religious actors. Such approval determinations may press the free exercise boundary, but they also supply a “countervailing reason” – keeping church and state separate – for the judiciary to be highly reluctant to find the church to be a state actor. The notion that churches are state actors, merely because their ceremonies are accepted in lieu of a civil one, is insufficient symbiotic relationship/public delegation or entwinement to satisfy existing Supreme Court precedent that defines the outer boundary of state action.

More plausible is not that the church is a state actor in its marriage solemnization function, but that following constitutional approval of same-sex marriage – the hypothetical assumed here only for purposes of analysis – the state, itself, will be argued to be precluded, as a matter of equal protection, from assigning any part of the licensing to a discriminatory private actor that subscribes only to traditional marriage. This claim would likely be premised upon *Norwood v. Harrison*,<sup>82</sup> which held that the Equal Protection Clause prohibited the government from providing textbooks to private schools that engaged in racial discrimination. But *Norwood* is an oft-cited, but seldom applied precedent. There are no cases applying the holding of *Norwood* to organizations that discriminate on the basis of religion. Indeed, the *Norwood* Court distinguished the case before it from others in which the government extended aid to religious schools because unlike discrimination on the basis of race to which the Constitution ascribes no value, discrimination on the basis of religion may stem from the right to free exercise, which is constitutionally protected. The Court specifically noted that “the Constitution ... places no value on [racial] discrimination as it does on the values inherent in the Free Exercise Clause.”<sup>83</sup> A

---

<sup>82</sup> *Norwood v. Harrison*, 413 U.S. 455 (1973).

<sup>83</sup> *See id.* at 469-70.

recent Equal Protection claim against government support of the Salvation Army was rejected by the federal trial court in New York for just this reason.<sup>84</sup>

Of course, any state government approving of same-sex marriage may decide on its own to withdraw the authority of the church to solemnize marriage for civil law purposes.

Government may structure its own programs even as it may not punish a private speaker for the exercise of constitutional right.<sup>85</sup> It is not always easy to differentiate these cases, a matter that gets murkier when a tax exemption is wrongly characterized as a subsidy. As already discussed, government may not condition the continuation of federal tax exemption on the church's discontinuation of its support for traditional marriage.

### ***Jurisdiction over the church?***

There is a general ministerial exemption which, on occasion, precludes civil courts from inquiring into disputes or application of religious doctrine. Arguably, a law suit seeking to compel some manifestation of church acceptance of same-sex marriage might fall within this exemption. As the Supreme Court has noted, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must

---

<sup>84</sup> Lown v. Salvation Army, Inc. 393 F.Supp.2d 223 at 236 (S.D.N.Y.,2005).

<sup>85</sup> Boy Scouts of America v. Till, 136 F.Supp.2d 1295 (S.D. FL 2001) (school board can refuse to endorse or embrace the participation of the scouts in the schools, but it may not exclude the scouts from the school as a limited public forum).

inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; . . . .”<sup>86</sup>

In *Rockwell v. Roman Catholic Archdiocese of Boston*,<sup>87</sup> the court referenced and applied the well-accepted “ministerial exception” in a gender discrimination challenge to the all-male priesthood. Priestly selection and retention is based on faithful observance of religious teaching, and thus, is outside the purview of anti-discrimination laws. This is true even if such anti-discrimination laws are neutral and generally applicable in accordance with *Employment Division, Dep’t of Human Resources v. Smith*.<sup>88</sup> Several appellate decisions confirm that the ministerial exemption survives *Smith*,<sup>89</sup> and *Rockwell* followed this reasoning finding the gender complaint to fail to state a claim. The court in *Rockwell* also found the woman’s challenge to the tax exempt status of the church to be without standing. The court reasoned that the women could show no factual nexus between the tax exempt status and church teaching that makes women priests an impossibility in Roman Catholicism. Relatedly, the court observed that redressibility was also absent. Just as revoking a tax exempt status could not modify church doctrine

---

<sup>86</sup> *Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich* 426 U.S. 696, 713 (1976).

<sup>87</sup> *Rockwell v. Roman Catholic Archdiocese of Boston*, 2002 WL 31432673 (D. N.H. 2002) (unpublished).

<sup>88</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

regarding ordination, it can be reasonably argued that it cannot alter (and thereby redress), the church's fidelity to marriage solely between a man and a woman.

While the standing objection to an individual suit seeking the revocation of a church tax exemption is premised upon well-settled Supreme Court precedent,<sup>90</sup> too much comfort should not be drawn from either a defense premised on standing or the ministerial exemption. The latter is often limited to employment questions. For example, in a case upholding a subpoena in a criminal prosecution of clergy sex abuse, a California appellate court reasoned that “the ministerial exception doctrine is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, [and thus] is an inherently religious function because clergy are such an integral part of a church's functioning as a religious institution.”<sup>91</sup> Finding the matter to be “not an employment case,” the court held the ministerial exception doctrine to have no application and enforced the process against the church. While it is possible to argue that an anti-discrimination law or judicial decision favoring same-sex marriage raises a middle question insofar as it implicates the sacramental or liturgical practices of the church, the prospect of a court readily accepting the analogy to the ministerial exception seems too close to call.

---

<sup>89</sup> *Combs v. Central Texas Annual Conf. Of United Methodist Church*, 173 F.3d 343 (5<sup>th</sup> Cir. 1999); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11<sup>th</sup> Cir. 2000).

<sup>90</sup> *Allen v. Wright*, 468 U.S. 737 (1984).

*Learning from the Boy Scouts—Undermining the church’s tax exemption from below*

The Boy Scouts of America (BSA) maintain a policy comparable to church teaching in opposition to homosexual conduct, and by inference, same-sex marriage. For reasons coinciding with the analysis made on this paper, gay advocates have conceded that it would be futile or unrealistic to anticipate removal of the BSA *federal* tax-exemption.<sup>92</sup> In addition, the BSA is conceded not to be a state actor since “the courts have yet to accept the argument that tax exemption rises to the threshold level of ‘state action.’”<sup>93</sup> Moreover, *Bob Jones* is accepted as inapposite insofar as sexual orientation, unlike race, is not a suspect class. Notwithstanding these points that support the freedom of both the BSA and the church, gay advocates argue that state law will prove to be friendlier to a lawsuit challenging a state or local tax-exemption. State standing doctrines, for example, are often premised simply upon ownership of property and the contention that an exemption contrary to public policy raises an objecting owner’s tax. Such generalized taxpayer standing is not available in federal court.<sup>94</sup>

---

<sup>91</sup> *Roman Catholic Archbishop of Los Angeles v. Superior Court*, 131 Cal.App.4th 417, 433 (Cal.App. 2005).

<sup>92</sup> Russell J. Upton, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America’s Discriminatory Practices By Revoking Its State-Level Tax-Exempt Status*, 50 Am. U. L. Rev. 793 (2001) [hereinafter Upton].

<sup>93</sup> Upton at 817, (citing *Walz v. Tax Comm’r*, 397 U.S. 664 (1970)).

Once in state court, pursuant to relaxed state-level standing, a complainant would likely point to state law protecting against discrimination on the basis of sexual orientation. There is no corresponding federal anti-discrimination provision. This more expansive state anti-discrimination provision would then be argued to be a compelling justification equivalent to that recognized in *Bob Jones* and sufficient to overcome BSA defenses of free speech and association. We know, of course, that the U.S. Supreme Court has protected the BSA's speech and associational rights from direct state mandate under a public accommodation law to include active homosexuals in its leadership ranks.<sup>95</sup> But to date, there is no high court precedent securing those same speech and associational rights from the burden of tax exemption loss. Recognizing this, homosexual advocates have launched a retaliatory strike from below against the BSA – successfully precluding it from various local public resources, such as parks and marinas.<sup>96</sup> The next step, say gay activists, is removal of BSA's state-level tax exemption.

### ***Retaliation from Below As Unconstitutional Condition – The Denial of Viewpoint***

#### ***Neutrality***

---

<sup>94</sup> *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (no standing to challenge favorable tax treatment given to nonprofit which did not supply the level of indigent non-emergency support desired by the complainant).

<sup>95</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. at 661.

<sup>96</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (scouts excluded from charitable fund-raising campaign).

The church obviously enjoys comparable rights of speech and association to that of the BSA, as well as the added constitutional protection of free exercise. But as with the scouts, same-sex marriage proponents could seek to make the exercise of these rights subject to retaliatory penalty at the local level. Arguably, revoking a state or local tax exemption in response to the constitutional exercise of speech, association, (and in the church's case, religion,) amounts to an unconstitutional condition. Government may not condition government benefits on the relinquishment of constitutional rights. Government may prohibit speech or associational rights only where it has a viewpoint neutral basis for doing so; as, for example, in the evenhanded preclusion of political activity by all nonprofit organizations<sup>97</sup> or in pursuit of a compelling interest.

Unfortunately, this textbook legal doctrine has not always been observed, and the BSA has already suffered an inscrutable and questionable loss in a federal circuit court<sup>98</sup> which should have prompted the assistance of the church community, and certainly, should merit its attention now. Specifically, the Second Circuit asserted that an anti-discrimination law covering sexual orientation does not suppress viewpoint, but rather merely avoids "immediate harms" such as economic discrimination. Aside from its *non sequitur* quality, the Circuit's reasoning seems to amount to the proposition that the government can suppress the BSA (or a church) from maintaining the view that same-sex marriage is doctrinally impossible because otherwise there would be "harm" from not obtaining a same-sex marriage. This tautological logic cannot be squared with existing constitutional principle. It is intended to fit the government's suppression

---

<sup>97</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

<sup>98</sup> *Boy Scouts of Am. v. Wyman*, 335 F.3d at 91-93.

of viewpoint into the legal rubric that posits that “nonverbal expressive activity can be banned because of the action it entails.”<sup>99</sup> But this rubric is ill-fitting, as all it means is that government must have a viewpoint neutral justification to ban what could be, but is not always, expressive or symbolic conduct. Flag-burning, after all, can be banned for fire risk, though not because it gives political offense. When the government’s only plausible justification for denying the BSA access to a charitable campaign (or a church a local tax exemption) is to prevent the expression of the idea that homosexual conduct is immoral or that marriage can only exist between a man and a woman, a viewpoint neutral justification is constitutionally wanting. Penalizing churches for adhering to religious teaching supporting traditional, but not same-sex, marriage is either facially viewpoint-based, or at a minimum, premised upon viewpoint in application.

Nor does the case law supporting the unique suppression of abortion protest allow local tax exemption retaliation against the church. The abortion protest injunction cases have permitted the imposition of an injunction only where it was *not* directed at the protesting message.<sup>100</sup> Revoking the church’s local tax-exemption for unwillingness to preside at same-sex marriage ceremonies is unquestionably directed at making the church pay a price for fidelity to religious principle. Moreover, it cannot be excused by the abstract suggestion that it is directed not at content or viewpoint, but a psychological injury akin to sexual harassment or hateful, race-based conduct.

Revoking a local tax exemption for maintaining the traditional view against same-sex marriage should be unconstitutional, absent compelling justification. At present, since sexual

---

<sup>99</sup> *RAV v. City of St. Paul*, 505 U.S. 377, 385 (1992).

<sup>100</sup> *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 762-63 (1994).

orientation is not a suspect classification and same-sex marriage is not a fundamental liberty (even as *Lawrence* has found substantive protection against interference with homosexual intimacy in a home), there is no compelling justification for abridging speech, associational, and religious freedom rights. However, push *Lawrence* to support same-sex marriage as a fundamental right, and the church is then in a similar position to the BSA, seeking to defend one fundamental liberty (religious exercise) against another (same-sex marriage). The church may be more inclusive of homosexuals than the BSA, provided there is adequate assurance of chastity,<sup>101</sup> but the church can ill-afford to let the BSA fight its membership battles alone. The effort to deprive the BSA of state and local tax exemption gives momentum to ill-conceived, but often very costly, private retaliation, such as BSA exclusion from local United Way chapters.<sup>102</sup> The same fate awaits the church.

Overall, the denial of state or local tax exemption strategy is premised upon compounding its initially smaller impact into a larger, and ultimately, federal one. As one proponent of this strategy commented:

the effect of revoking state-level tax-exempt status is potentially exponential. As the other states that prohibit sexual orientation discrimination follow . . . , sending a similar message of disapproval, corporate donation . . . will grow even less attractive. In the best case scenario, the I.R.S. could use a multi-state revocation of state-level tax-exempt status as the basis for a Revenue Ruling denying federal § 501(c)(3) tax-exempt status

---

<sup>101</sup> Cf., Vatican's statement including homosexuals in seminary training if chastity maintained for three or more years.

<sup>102</sup> Upton at 848-850, discussing the various private penalties exacted against the BSA.

and § 170 donor deductibility to [the church]. . . .At that point, [the church] could still theoretically maintain its [policy against same-sex marriage]; however, such a stance would be fiscal suicide.<sup>103</sup>

*Employment Div. v. Smith*<sup>104</sup> will make more difficult any Free Exercise limitation upon governmental retaliatory acts, whether at the federal or local levels. Establishment Clause jurisprudence, however, might permit the church to argue against government establishing a minimum floor or minimally acceptable public theology in order to qualify for tax exemption or a public benefit. To deny a tax exemption because a church refuses to sanction same-sex marriage is to prescribe under force of law a qualifying theology. While this results in preferring some religions over others, it also gives rise to a claim of discrimination or religious preference that may answer *Smith*, itself.

***Why religious freedom should prevail over an assertion of legal equivalence between traditional and same-sex marriage.***

First, the claimed equivalence mistakes equal protection of the law for a guarantee of undifferentiated equality. Like cases – not unlike ones – are to be treated alike. Nothing in equal

---

<sup>103</sup> *Id.* at 857-858.

<sup>104</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

protection history or original understanding suggests an identity between same-sex and traditional marriage.

Second, it is illogical to impose a penalty for unwillingness to perform a same-sex marriage (denial of licensure or solemnization authority, denial of tax exemption, civil fines) where those seeking the performance of such service have ready secular alternatives (e.g., a judge, city clerk, or local justice of the peace).

Third, and relatedly, those who join a church do so with the implied consent to the church government. As Douglas Laycock has written, so long as there is no question about the voluntariness of consent, there is little justification for interference with internal church affairs.<sup>105</sup>

Fourth, the limited nature of the *Bob Jones* ruling suggests that outside racial discrimination, and predominantly in the education context (where unconsenting students may be present), “[m]atters belonging to the spiritual core, or epicenter, such as church membership or employment of clergy are insulated from state regulatory processes.”<sup>106</sup> In contemplating how to reconcile new anti-discrimination claims premised upon sexual orientation and a deeply-embedded civil liberty such as religious freedom, it is appropriate to recall the intrinsic importance of freedom of religion as put by Madison:

It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time

---

<sup>105</sup> Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 *Tex. L. Rev.* 259, 272-73 (1981).

and in degree of obligation, to the claims of Civil Society . . . .We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.<sup>107</sup>

To render "such homage" as only a particular citizen believes "acceptable," there must be freedom to choose a religious community that reflects that choice. Anti-discrimination laws limit choice, and it has been the practice of American law, only to limit freedom of choice in extraordinary circumstances,<sup>108</sup> for example, when necessary to place off-limits the moral irrelevancy of race. To use the coercive power of government to impose same-sex marriage by

---

<sup>106</sup> Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1549 (1979).

<sup>107</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *The Supreme Court on Church and State* 18-19 (Robert A. Alley ed., 1988).

<sup>108</sup> Hence, the longstanding religious exemption from Title VII's prohibition against discrimination in employment. 42 U.S.C. 2000e-1(a). Following a 1972 amendment, the exemption applies to a religious organization whether or not it is engaged in religious activities. The exemption has been upheld as constitutional against an establishment clause challenge. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987). Likewise, Congress exempted religious organizations from an anti-discrimination provision of the District of Columbia as it related to homosexuals. D.C. Appropriations Act of 1990, Pub. L. No. 101-168, 103 Stat. 1267, 1284 (1998). The exemption resulted from litigation against Georgetown which refused to formally recognize a gay student group. The court held recognition was not required, but did require the extension of similar benefits as given other student groups. *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987). Cf., *Dayton Christian Schools v. Ohio Civil Rights Comm'n.*, 766 F.2d 932 (6<sup>th</sup> Cir. 1985) (Christian school dismissed teacher who had young children at home; civil rights commission asserted authority to resolve dispute. Reversing the trial court, the sixth circuit found for the school's right not to employ a teacher who disobeyed church teaching and jeopardized the school's ability to transmit that teaching to students. The Supreme Court reversed the sixth circuit on the grounds that the court should not have intervened in an on-going state proceeding, thereby leaving the freedom of religion issue unaddressed. 477 U.S. 619 (1986). But see, *Ganzy v. Allen Christian School*, 995 F.Supp. 340, 348 (E.D.N.Y. 1998); *Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980) (limiting the ability of religious schools to dismiss unmarried, pregnant teachers on the characterization that such was gender discrimination).

means of loss of tax exemption or public benefit is quite simple a legally and morally dubious denial of freedom.<sup>109</sup>

---

<sup>109</sup> For a thoughtful critique of unthinkingly favoring anti-discrimination laws over civil liberties, see David E. Bernstein, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003). Professor Bernstein argues for keeping the anti-discrimination categories limited and broadening religious exemptions. *Id.* at 163.