

**AN UNHOLY UNION:
SAME-SEX MARRIAGE AND THE USE OF GOVERNMENTAL
PROGRAMS TO PENALIZE RELIGIOUS GROUPS WITH
UNPOPULAR PRACTICES.**

Jonathan Turley¹

I. INTRODUCTION

The debate over same-sex marriage has become for the twenty-first century what the abortion debate was for the twentieth century: a single, defining issue that divides the country in a zero-sum political battle.² However, just below the surface of this raw debate, are fundamental constitutional questions that transcend same-sex marriage as a cultural issue. These questions concern the interaction of the government with organizations that discriminate on the basis of religious values. Inevitably, the government will have basic points of contact with any organized group that range from garbage to tax collection. In a free society, some of these groups will espouse or exercise values that conflict with majoritarian values. When these values are discriminatory, the government is caught between

¹ J.B. and Maurice Shapiro Professor of Public Interest Law, George Washington University. The author wishes to thank both the Becket Fund and the George Washington Law School for their support in the research and writing of this paper.

² See Jonathan Turley, *How to End the Same-Sex Marriage Debate*, USA Today, April 3, 2006, at 15A.

enforcing its principles of equality and protecting the principles of free speech, expressive association, and free exercise.

In the last few decades, the government has abandoned a neutral position in its dealings with political or religious groups in favor of enforcing antidiscrimination policies. In doing so, the government has taken sides on religious or cultural controversies through such means as the denial of tax exemption or access to state-run charity programs. Same-sex marriage is only the latest public controversy forcing the government to address religious-based, discriminatory practices. As such, it may offer an opportunity for the Supreme Court to correct its own ill-conceived decisions in the area, particularly its decision in *Bob Jones v. United States*,³ where it allowed the government to withdraw tax-exempt status from a university due to its unpopular religious practices.

The Court's jurisprudence in this area is now hopelessly confused and contradictory. While the Court has allowed the government to punish groups for their religious practices thru the denial of tax exemption, it has recently reinforced rights of speech and association in decisions like *Boy Scouts v. Dale*,⁴ where it stressed that the right to association "is crucial in preventing the majority from imposing its views on groups that would rather

³ 461 U.S. 574 (1983).

⁴ See *Boy Scouts v. Dale*, 530 U.S. 640 (2000).

express other, perhaps unpopular, ideas.”⁵ The cause for this confusion is due in large part to the Court’s preference for creating insular and different lines of jurisprudence. Thus, we have cases like *Roberts v. United States Jaycees* where the Court allowed a state to force a private organization to abandon a gender-based membership policy while protecting the right of the Boy Scouts to exclude people on the basis of sexual orientation.⁶ The result is a lack of internal coherence – a problem that has become something of a signature for the Supreme Court in the last few decades.

Same-sex marriage brings us once again to this inherent conflict between the exercise of first amendment rights and the government’s enforcement of an anti-discrimination policy penalizing such views. The merits of the same-sex marriage debate is largely secondary to the constitutional questions addressed in this paper. In the interest of full disclosure, however, it is worth noting that I do not oppose same-sex marriage. To the contrary, I have been a critic of prior decisions, such as *Reynolds v. United States*⁷ that allow states to ban certain forms of marriage

⁵ *Id.* at 647-48.

⁶ Likewise, in *Hurley*, the Court upheld the right to the South Boston Allied War Veterans Council to exclude the Irish-American Gay, Lesbian, and Bisexual group of Boston from its St. Patrick’s Day parade.

⁷ 98 U.S. 145 (1878)

such as polygamy on moral grounds.⁸ I have also advocated the elimination of the term “marriage” from governmental programs in favor of the more relevant term “civil union.”⁹ Despite these views, I believe strongly that the government should not use tax policy or charity funds to discriminate against groups on the basis of their religious views or practices. Indeed, over the last few decades, we have seen an unholy union between government programs and groups with majoritarian views that endangers the very basis of religious freedom and the rights of free speech and association.

The debate over same-sex marriage represents a coalescing of rights of free exercise, free speech, and expressive association. With the exception of abortion, same-sex marriage is almost unique in blurring neat divisions between these rights. Many organizations attract members with their commitment to certain fundamental matters of faith or morals, including a rejection of same-sex marriage or homosexuality. It is rather artificial to tell such groups that they can condemn homosexuality so long as they are willing to hire homosexuals as part of that mission. It is equally

⁸ See, e.g., Jonathan Turley, *How to End the Same-Sex Marriage Debate*, USA Today, April 3, 2006, at 15A; Jonathan Turley, *Polygamy Laws Expose Our Own Hypocrisy*, USA Today, October 4, 2004, at 13A; Jonathan Turley, *Of Lust and the Law*, The Washington Post (Sunday), Outlook, September 5, 2004 at B1.

⁹ Jonathan Turley, *How to End the Same-Sex Marriage Debate*, USA Today, April 3, 2006, at 15A.

disingenuous to suggest that denial of such things as tax exemption do not constitute a content-based punishment for religious views. Many discriminatory organizations rely on tax exemption and state-sponsored charitable programs to survive. The denial of tax-exempt status presents a particularly serious threat to these organizations and puts them at a comparative disadvantage to groups with contrary views.¹⁰ In both areas, the government has actively distinguished between groups based on their beliefs – a role that troubles even those of us who support gay rights.

This paper looks at restrictions on charitable giving as a perfect microcosm of issues in this area. It is also where a new and more consistent neutrality principle might be forged. Unlike direct government subsidies or grants, state restrictions of charitable giving constitute a dangerous intervention into the relationship between citizens exercising first amendment rights and their chosen associations. As the Court has emphasized in campaign contribution cases, restricting money is often the same as restricting speech. The dangers of such intervention are magnified when the government imposes restrictions or barriers on some groups due to their faith-based practices while allowing other more popular or mainstream groups to reap the full benefits of tax exemption or access to donors. In the

¹⁰ Notably, after being denied tax-exempt status, Bob Jones University eventually abandoned its long-held policy.

area of charitable giving, the Court should apply a strict neutrality principle that focuses on the status of the organization rather than its practices to determine questions of tax exemption or fund access. Absent such a neutrality principle, the public policy rationale (including a non-discriminatory policy) for intervention places the government in the position of inhibiting the exercise of political and religious beliefs on a discriminatory basis.

As marriage or civil union licenses become more common, couples will increasingly and publicly identify themselves as gay and lesbian Americans. This will in turn increase the number of negative actions taken by private organizations that view such status to be offensive or immoral. In this way, the self-identification of couples will cause the self-identification of discriminatory organizations. Courts will then have to decide what, if any, action governments can take against such organizations. It should be viewed as much as an opportunity for correction as for conflict. While the rivaling groups in the same-sex marriage debate have obvious differences on the merits, a neutrality principle in charity cases should be a common article of faith for Americans committed to a free and pluralistic society.

II. TAXING RELIGIOUS PRACTICES: THE USE OF TAX EXEMPTION TO PENALIZE UNPOPULAR RELIGIOUS PRACTICES.

The very life's blood of the American democracy is the concept of free and robust exchange of ideas and faiths. Obviously, the right to freely choose one's views and beliefs comes with the assumption that you may exercise those views and beliefs so long as you do not endanger or harm others. As the Court has noted, "[i]mplicit in the right to engage in activities protected by the First Amendment is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."¹¹ To protect this right of free thought and free exercise, our Constitution forces a strict neutrality of the government, particularly in the free exercise of religion. Thus, we have strived to both maintain a strict neutrality of government while using the power to the government to foster a pluralistic society of diverse views and faiths.

For much of our history, federal tax policy has reflected both ideals by maintaining a strict neutrality while giving tax-exempt status to not-for-profit organizations. Indeed, before 1970 and the *Green v. Kennedy*¹² case, there was a reasonable assumption that tax exemption under section 501 (c)

¹¹ *Dale*, 530 U.S. at 647.

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

(3) was equally available to all charitable, religious, or public interest organizations regardless of their specific views. After all, tax exemption was viewed as an important public policy to encourage private donations and charitable conduct. The strength of the country has long been linked to the involvement of citizens in religious, public interest, and educational groups. By exempting money given to non-profit organizations, the government removed financial penalties or barriers to the creation and maintenance of different groups. Without reference to the particular views or values, the government accepted that citizens should not be taxed a second time for seeking to express their beliefs in civil, cultural, political, or religious organizations. This approach was embodied in the language of Section 501(c)(3) of the 1986 Internal Revenue Code that granted tax-exempt status to

Corporations, and any community chest fund, or foundation, 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 (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, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any

political campaign on behalf of (or in opposition to) any candidate for public office.¹³

The sole concern of this section is that the organization does not work for the financial benefit of individuals or the political benefit of a candidate. To put it another way, the focus is on the nature – not the views – of the organization.

In the 1970s, there was a fundamental shift in the view of tax exemption. The government's change in policy toward discriminatory religious practices in part was due to a more general change in society and the law. Until 1954, most public education systems were racially segregated and the concept of separate but equal espoused in *Plessy v. Ferguson*¹⁴ was the law of the land. With the rejection of "separate but equal" in its landmark decision in *Brown v. Board of Education*,¹⁵ the Court correctly noted that discrimination itself produces great harm to both students and society. Thus, separate could never be truly equal in public education. In the decisions that followed, the Court enforced the Constitution's protections from discrimination in

¹³ I.R.C. 501(c)(3).

¹⁴ 163 U.S. 537 (1896).

¹⁵ 347 U.S. 483 (1954).

education, housing, and other areas. The antidiscrimination cases, however, inevitably took the Court closer and closer to private exclusionary policies.¹⁶

For the I.R.S., the issue came to a head in the case of *Green v. Kennedy*,¹⁷ when a federal court granted an injunction against the Secretary of the Treasury to enjoin the I.R.S. from granting tax-exempt status to schools that practice discriminatory practices. This decision led to a new I.R.S. policy embodied in a 1971 Revenue Ruling that required “all charitable trusts, educational or otherwise, [be] subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy.”¹⁸ Illegality is hardly a concern. However, when the I.R.S. informed various organizations and schools that they would have to show that they do nothing that is “contrary to public policy” it sent a chilling message to many faith-based organizations, particularly non-mainstream organizations. First and foremost in these public policies was elimination of discrimination. Since many religions are based on distinctions between the faithful and the unfaithful, the pure and the impure; the chosen and the unchosen,

¹⁶ This transition was noted by the Court in *Bob Jones. Bob Jones University*, 461 U.S. 592-93 (“prior to 1954, public education in many places still was conducted under the pall of *Plessy v. Ferguson* . . . This Court’s decision in *Brown v. Bd. of Education*, 347 U.S. 483 (1954)”).

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

¹⁸ Rev. Rul. 71-447, 1971-2 C.B. 230.

discrimination is at the heart of many faiths. Central to the idea of purity is often the exclusion of individuals or practices viewed as impure. The adoption of the anti-discrimination policy as the touchstone of tax exemption put the government on an inevitable collision path with religious groups. Religious coherence and cohesion cannot be maintained without exclusion. Exclusion requires a form of discrimination between people who maintain principles of faith and those who do not.

The most significant collision point occurred in *Bob Jones University*. The religious-based university had long maintained a policy against interracial relationships; denying admission to students in such relationships. It was an obviously repellent view for the vast majority of Americans, but the university insisted that it was a view directly linked to its religious mission. Thus, when the IRS denied the university tax-exempt status on public policy grounds, the university argued that to deny tax exemption is to severely punish the university for the exercise of its core religious views. Nevertheless, the Court held that the IRS could deny tax-exempt status in light of the antidiscrimination policies embodied in the Civil Rights Act of 1964, executive orders, and other legislative and executive sources.¹⁹ The Court found that “an examination reveals unmistakable evidence that,

¹⁹ *Bob Jones University*, 461 U.S. at 594.

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.”²⁰

Once neutrality was abandoned, the government was free to determine whether some forms of preferential treatment or exclusion are good or bad forms of discrimination. Thus, in a technical advice memorandum (TAM), the IRS decided that a charity could discriminate against people with inadequate Hawaiian ancestry. The Bishop Estate is a tax-exempt trust that maintains schools limiting admission to applicants who can show “at least one Hawaiian ancestor.”²¹ The IRS held that this form of discrimination was consistent with public policy and thus could continue with federal tax exemption for the trust.

Underlying the imposition of a non-discriminatory condition is a view of tax exemption as essentially the same as a direct subsidy or grant. Many

²⁰ *Bob Jones University*, 461 U.S. at 586; *but see* Robert M. Cover, *The Supreme Court, 1982 Term: Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4, 63-64 (1983) (“Neither the text of the Code nor the legislative history before the IRS’s 1970 ruling seemed to compel [the Court[s] interpretation.”).

²¹ *See generally* David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law’s Public Policy Limitation for Charities*, 5 Fla. Tax Rev. 779 (2002).

academics agree with the view that there is no cognizable difference between not taxing an organization and giving money directly to that organization. There is, however, a fundamental difference if you view tax exemption as serving a single purpose: fostering public participation in associations and groups regardless of their inherent views or policies. Tax exemption is the most direct way for the government to support the rights of free speech, free exercise, and association. Once tax exemption was viewed as a direct government subsidy of views or conduct, the government embarked on a new role of certifying appropriate and inappropriate groups for the purposes of section 501 (c) (3) eligibility.

The fact is that few organizations can thrive without tax-exempt status and fewer can effectively compete in the marketplace of ideas when outspent by mainstream groups with such status. Moreover, tax exemption is not a form of federal subsidy or conditional grant. In *Rumsfeld v. FAIR*, the Court held that Congress could place conditions on the receipt of federal funds that include the obligation to afford equal access to military recruiters on campus.²²

There is an obvious distinction between direct federal funds and tax exemption, though the distinction has admittedly become more blurred with

²² See generally Jonathan Turley, *An Issue of Hypocrisy*, The National Law Journal, January 9, 2006, at 34.

time and later decisions. The Court spoke most clearly in *Walz v. Tax Commissioner of the City of New York* where it noted that, while tax exemption necessarily “afford[s] an indirect economic benefit,” “tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”²³ Likewise, in *Trinidad v. Sagrada Orden*, the Court stated that “the [501(c)(3)] exemption is made in recognition of the benefit which the public derives from corporate activities and is intended to add them when not conducted for private gain.”²⁴

This clarity would be lost as the Court increasingly treated direct federal grants and tax exemption as a “practical similarity.”²⁵ Yet, the Court was right in its effort to define a distinction in *Walz*. Tax exemption is less an agreement running between the government and the organization as it is an agreement running between the government and the taxpayer. With Section 501(c)(3), Congress assured taxpayers that they would not be taxed twice on the money; first, when they earned the money and then when they give the money to a charity or non-for-profit. It is far more threatening for the government to single out organizations for penalties based on fluid concepts

²³ 397 U.S. 664, 674 (1970).

²⁴ *Trinidad v. Sagrada Orden*, 263 U.S. 578 (1924).

²⁵ *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973).

of public policy than it is to impose a national obligation to perform a specific precondition as in *Rumsfeld v. FAIR*.

While Congress may certainly deny all tax exemption to organizations, it has allowed for tax exemptions from the beginning of federal taxation. The Code, however, makes no mention of the public policy limitation in such exemptions. Congress has never given the IRS the authority to implement public policies through tax exemption denials – an authority that would allow any number of antidiscrimination, environmental, moral, or other policies to be imposed on private groups or corporations. The 1971 Revenue Ruling constituted a paradigm shift from a view of non-profit groups as inherently good for society as a whole without addressing individual views or practices. Where the Court once distinguished between a subsidy and a tax exemption, it now viewed a tax exemption as almost indistinguishable from giving money directly to the organization. Indeed, in *Bob Jones*, the Court treated a tax exemption as part of a quid pro quo arrangement:

when the Government grants exemptions . . . all taxpayers are affected, the very fact of the exemption . . . means that other taxpayers can be said to be indirect and vicarious ‘donors.’ . . . To warrant exemption under 501(c)(3), an institution must fall within a category specified in

that section and must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.²⁶

It is hardly comforting that the Court wanted to “emphasize . . . that these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy.”²⁷ The Supreme Court has emphasized that the agency is entitled to great deference²⁸ and the level of scrutiny given such decisions seems often to depend on the inherent offensive aspects of the associational practice.

The decision ignores the fact that federal funding involves a far greater and intrusive level of involvement than does a blanket exemption for all non-for-profit organizations.²⁹ There are a host of constitutional and

²⁶ *Bob Jones University*, 461 U.S. 591, 592.

²⁷ *Bob Jones University*, 461 U.S. at 597-98; *see also id.* at 592 (“a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity is contrary to a fundamental public policy.”).

²⁸ *Id.* at 597 (“In the first instance . . . the responsibility for construing the Code falls to the IRS.”).

²⁹ Indeed, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7 (1989), Justice Brennan placed great emphasis on such blanket treatment of organizations as a whole without reference to their individual beliefs. Indeed, the secular purpose noted in reference to the *Walz* decision was a pluralistic society:

legal distinctions between the two types of actions. Treating such exemptions as the equivalent of federal funding not only defies logic but it conflicts with other analogous cases. For example, in the area of tax deductions, the Court has already held that such indirect state support is not the same as direct funding of a religious organization. In *Mueller v. Allen*, the Court rejected such claims given “the primary effect of advancing the sectarian aims of the nonpublic schools.”³⁰

The willingness to penalize some organizations based on their religious-based practices reinforces a dangerous dichotomy of protected views and unprotected exercise of those views. While no one would seriously argue that the government cannot prohibit illegal conduct that harms others or society, there must be a clear distinction that allows for conduct that is viewed as abhorrent but protected. Under the logic of *Bob*

[W]e emphasized in *Walz* that in granting a property tax deduction, the State “has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasipublic corporations which include hospitals, libraries, play-grounds, scientific, professional, historical, and patriotic groups.” The breadth of New York’s property tax exemption was essential to our holding that it was “not aimed at establishing, sponsoring, or supporting religion,” but rather possessed the legitimate secular purpose and effect of contributing to the community’s moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community’s well-being and that would otherwise have to be funded by tax revenues or left undone.

³⁰ 463 US 388 (1983).

Jones, the government could strip tax-exempt status from Jewish organizations that refuse to hire a dedicated Nazi or a fundamentalist Islamic organization that refuses to hire a non-Muslim woman as an office assistant. In so doing, we would guarantee views but not practices and, in so doing, sacrifice a cherished pluralistic society on the alter of non-discrimination.

Gay rights and same-sex marriage are issues that promise to reignite this controversy over tax-exempt status. This area is a perfect microcosm of the confusion over the Court's ill-conceived cases. On one hand, the Court correctly found that the Boy Scouts of America could refuse to retain or hire a gay scout leader due to its faith-based principles. However, this decision in *Boy Scouts of America v. Dale* seems inherently at odds with the *Bob Jones* case. Presumably, while the Boy Scouts could fire Dale, the IRS could eventually strip the organization of tax-exempt status under the public policy rationale. Thus, they can constitutionally fire Dale but can be punished for that protected act with the massive financial penalty in the loss of tax exemption. While it cannot be said that there is a clear federal public policy against all forms of discrimination on the basis of sexual orientation, it is likely that such a policy will be recognized within the decade. Once that occurs, any organization that engages in discrimination as a matter of faith would be in a position similar to Bob Jones University.

The Court once described direct federal subsidies of religious based or discriminatory organizations as “a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.”³¹ Indeed, with the advent of school vouchers deductions for religious-based schools, such involvement is likely to increase despite the exclusionary practices of many religious schools. Tax exemption pales in comparison and offers an area where strict neutrality is possible and warranted.

There is no question, in my mind, that discriminatory policies like Bob Jones’ are bad for society. I also view the views of groups like the American Nazi party as bad for society. However, there is no way to foster the pluralistic ideals of our society if we cross the constitutional Rubicon of content-based discrimination on the part of the government. Just as the Court recognized that bad speech comes with good speech when it protected speech in *New York Times v. Sullivan*, the same is true for associations. Otherwise, in the name of antidiscrimination policies, the government must discriminate between organizations on the basis of their views.

³¹ *Walz*, 397 U.S. at 675.

The same-sex marriage debate is likely force these areas to collide. For example, it is doubtful that a fundamentalist Muslim or Christian school would retain a teacher who openly marries a gay or lesbian partner. The resulting termination will trigger the same issues as raised in *Bob Jones*. Indeed, the impact is likely to be more significant in the area of sexual orientation than it was in the *Bob Jones* case. Thankfully, relatively few organizations follow racially discriminatory policies and those organizations tend to be fringe groups. It is far more common for mainstream religious and civil groups to discriminate on the basis of sexual orientation. The extent to which groups would be potentially disenfranchised under section 501 (c) (3) is quite large.

The cause of this coming storm is the failure of the I.R.S., Congress, and the Court to adhere to a content-neutral approach to tax exempt status – returning to the pre-1970s treatment of organizations as qualifying based on their non-profit status and function rather than their internal views. Tax exemption on its face can be distinguished from other forms of governmental action like federal subsidies or conditional grants. There is far greater danger of content-based discrimination and a forced acquiescence of diverse groups to follow majoritarian values. Particularly given the silence of the Code on the use of non-tax policies to deny tax-exempt status, the

Court should use this coming opportunity to change the path taken in *Bob Jones* and return to a neutrality principle in tax exemption cases.

III. PRE-CERTIFICATION OF IDEAS: THE GOVERNMENT'S BARRING ACCESS OF UNPOPULAR ORGANIZATIONS TO PUBLICLY FUNDED CHARITY SITES.

The denial of access to public-sponsored charity sites offers a close variation of the tax-exemption issue. Once again, the issue concerns the ability of the government to make it comparatively harder for unpopular organizations to reach citizens and secure funding for their activities. Again, federal courts appear willing to draw convoluted distinctions to maintain the right of governments to discriminate against certain organizations based on their beliefs while recognizing that their members have protected rights of association and speech in maintaining those beliefs. For example, the Second Circuit decision in *Boy Scouts of America v. Wyman*,³² held that the state of Connecticut could exclude the Boy Scouts from its public-sponsored charitable campaign due to their discrimination on the basis of the sexual orientation.

Notably, the Second Circuit structured its analysis in a frank assumption “that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA’s exercise of what the Supreme Court has

³² 335 F.3d 80 (2d Cir. 2003)

held to be a constitutionally protected right.”³³ Nevertheless, the fractured cases left by the Supreme Court gave the Second Circuit ample basis to uphold the exclusion of the BSA. Despite the fact that the exclusion penalized the BSA alone and the state retained other organizations with discriminatory practices,³⁴ the court found that the state still maintains viewpoint neutrality. To buttress this decision, the court relied on the line of cases, including *Cornelius v. NAACP Legal Defense & Education Fund*,³⁵ distinguishing public from non-public forums.

Notably, the Second Circuit narrowly construed the Supreme Court’s decision in *Dale* to uphold the exclusion as simply not significant enough to qualify as “compulsion.”³⁶ This is a signature of the Supreme Court’s own cases where difficult issues are conclusorily dismissed by the majority. Thus, in *Roberts*, the Court faced an organization that had a long-standing gender-based membership rule that was tied directly to its stated purpose and identity. Yet, the Court simply held that “the Jaycees have failed to demonstrate that the Act imposes any serious burdens on the male members’

³³ *Id.* at 98.

³⁴ These organizations included not just the Girl Scouts but gay rights organizations and other religious organizations. *Id.* at 96 n.10.

³⁵ 473 U.S. 788 (1985).

³⁶ *Id.* at 91.

freedom of expressive association.”³⁷ It was entirely unclear how the Jaycees could show such a serious burden. The Court noted that they could engage in all of their customary acts, including meetings and civic events, with women. That is akin to saying that an organization can still speak so long as they do so in a state-sanctioned way. Clearly, the Jaycees wanted to do these activities on a gender-exclusive basis – a policy that may be obnoxious to many of us but a policy that was clearly valued by this organization, which litigated the issue to the Supreme Court.³⁸

In reaching this conclusion, the Court endorsed a highly biased and uncertain role of courts in weighing the importance of unpopular characteristics of an organization.³⁹ Thus, in his dissent in *Dale*, Justice Stevens felt entirely comfortable dismissing references in the Boy Scout manual and claims of a religious-based opposition to homosexuality: “It is plain as the light of day that neither one of these principles – ‘morally

³⁷ *Roberts*, 468 U.S. at 626.

³⁸ This point was made by the Eighth Circuit in its ruling in favor of the Jaycees when Judge Richard Arnold noted that “[a]n organization of young people, as opposed to young men, may be more felicitous, more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists.” *Jaycees*, 709 F.2d at 1571.

³⁹ *Roberts*, 468 U.S. at 622 (stressing that the Jaycee chapters were “neither small nor selective [and thus] lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.”).

straight’ and ‘clean’ – says the slightest thing about homosexuality.”⁴⁰ The Court has placed itself, and lower courts, as the ultimate arbiter of the importance of particular exclusionary principles to an organization and the significance of their denial to the organization’s members. It is a role that is pregnant with dangers for judicial bias and the leaves core speech and associational rights uncertain and fluid.

The same type of analysis is evident in *Wyman* where the court simply held that the exclusion from the charity site was not a significant as the injury in *Dale* and “the effect of Connecticut’s removal of BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion.”⁴¹ This would suggest that, absent a denial of the right of exclusion, financial or administrative penalties can be imposed since they do not immediately cause a change – an artificial distinction since, absent funds, many of these organizations will have fewer positions to fill on an exclusionary basis.

⁴⁰ *Dale*, 530 U.S. at 671 (Stevens, J, dissenting). The Boy Scout Handbook defines “morally straight” as “to be a person of strong character, your relationship with others should be honest and open. You should respect and defend the rights of all people. Be clean in your speech and actions, and remain faithful in your religious beliefs. The values you practice as a Scout will help you shape a life of virtue and self-reliance.” Boy Scouts of America, Boy Scout Handbook 9 (11th ed. 1998). The BSA insisted that such statements reflected values that were expanded on in practice to include a religious code that abhors homosexuality.

⁴¹ *Wyman*, 335 F.3d at 91.

It is difficult to accept the rationalization that “Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the BSA pays a price for doing so.”⁴² The actions against the BSA didn’t “just happen.” In the company of other organizations with exclusionary policies or practices, the BSA was singled out for this penalty. The court does not question that there are many people in Connecticut who support the BSA in its religious-based mission.⁴³ Yet, the court allowed the state to make contacts between the organization and citizens comparatively more difficult than with more popular organizations. Not only do such efforts register the hostility toward these views, but there are clearly other means to advance nondiscriminatory policies.⁴⁴

Antidiscrimination rules that are clearly compelling in some circumstances are not so compelling when used against a private

⁴² *Wyman*, 335 F.3d at 95 n.8.

⁴³ For the purposes of full disclosure, I have publicly denounced the BSA policy while supporting its right to exercise its religious-based views. *See, e.g.*, Jonathan Turley, *Of Boy Scouts and Bigots*, *The Chicago Tribune*, June 30, 2000, at A27.

⁴⁴ *Cf. Roberts*, 468 U.S. at 623 (“Infringements on [the right to association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”).

organizations exercising first amendment rights. The constitutional rights in that context should triumph, as the Court articulated in *Hurley*:

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups, or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.⁴⁵

The *Wyman* decision demonstrates how our constitutional doctrines in this area have begun to resemble the formalistic use of canons of construction to hide bias, as demonstrated by Karl Llewellyn in his famous table of “thrust” and “parries.”⁴⁶ Llewellyn showed that for every canon of construction that said to do A in a given circumstance, there was another that said to do the opposite of A. Whichever canon the court selected, there was the appearance of neutrality but the bias was in the selection of the canon. The

⁴⁵ *Hurley*, 515 U.S. at 579.

⁴⁶ Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 Vand. L. Rev. 395, 401-06 (1950).

same can be said for our current jurisprudence in this area. Courts can easily come to diametrically different results in cases like *Wyman* by simply selecting from a variety of precedential lines of authority. When the Court has structured its rulings in terms of expressive association in cases like *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*⁴⁷ or *Dale*, it has protected first amendment rights to an extent that would have been difficult if it focused on public accommodation or non-public forums issues.⁴⁸ Thus, courts after *Dale* felt free to deny the BSA access to a city-run marina in Berkeley⁴⁹ and a park in San Diego.⁵⁰ Conversely, in cases like *Cuffley v. Mickes*,⁵¹ the Eighth Circuit correctly barred the state from excluding the KKK from participation in a state “Adopt a Highway” program as a content-based form of discrimination.

⁴⁷ 515 U.S. 557 (1995).

⁴⁸ Indeed, in *Hurley*, the Court brushed aside the inconvenient public accommodation analysis by stating that “[a]lthough the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.” *Hurley*, 515 U.S. at 573.

⁴⁹ *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002).

⁵⁰ *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003).

⁵¹ 208 F.3d 702 (8th Cir. 2000).

As shown below, while bringing these areas into complete coherence and consistency may be much to ask, the tax exemption and charity fund cases offer a clear and distinguishable area for a new approach.

IV. CHARITY, NEUTRALITY AND THE RIGHT TO DISCRIMINATORY ASSOCIATIONS.

In *Dale*, a slim five-justice majority appeared to finally give meaning to the right of association for discriminatory organizations. The Court noted that: the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."⁵² As post-*Dale* rulings have demonstrated, however, there remains confusion over the relative weight to be given such associational rights versus antidiscriminatory statutes or policies. Cases like *Roberts* continue to suggest that some groups may be protected only in holding beliefs but not in the exercise of those beliefs.⁵³ There remains a failure to recognize that antidiscrimination policies are a compelling interest in some areas but not others. When applied in areas of public accommodation, for

⁵² *Dale*, 530 U.S. at 648.

⁵³ This point was made most clearly in the trial decision in *Roberts* when the district court blissfully held that “[w]hile the Jaycees has a right to believe that its organization should only advance the interests of men, its practice of excluding women from equal benefits does not enjoy protection under the circumstances presented.” *Jaycees*, 524 F. Supp. at 771.

example, there is a clear compelling interest in the enforcement of antidiscrimination laws and such enforcement is the only effective means to accomplish these goals. However, when applied in the context of a private organization and directed as a matter of associational identity, it is neither compelling nor permissible.

By focusing on the state interest – and applying it in both public and private contexts – the Court can engage in outcome-determinative logic, as it did in *Roberts*.⁵⁴ While recognizing the deprivation of associational values, the Court dismissed any injury in light of the state interest: The change was merely an “incidental abridgement of the Jaycee’s protected speech, [and] the effect is no greater than is necessary to accomplish the State’s legitimate purposes.”⁵⁵ The Court made it sound like there was some spectrum of possible remedies. Yet, since the state interest is the end of discrimination, the prohibition of that discrimination will always be “no greater than is necessary.” Moreover, the significance of the value of equality to our society makes most deprivations – short of public management or

⁵⁴ *Roberts*, 468 U.S. at 623 (“We are persuaded that Minnesota’s compelling interest in eradicating discrimination . . . justifies the impact that application of the statute to the Jaycees may have on its associational freedoms.”).

⁵⁵ *Roberts*, 468 U.S. at 628.

termination – a lesser concern. This was apparent in the language of *Bob Jones*:

The Government has a fundamental, overriding interest in eradicating racial discrimination in education – discrimination that prevailed, with official approval, for the first 165 years of this Nation’s constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . and no “less restrictive means” . . . are available to achieve the governmental interest.⁵⁶

This type of heavily weighted analysis makes a mockery of any notion of a balancing of interests – antidiscrimination policies inevitably trump associational practices.

The alternative is to draw distinctions between public and private discrimination, recognizing state interests in the former but not always in the latter. The focus is on the speech and associational activity rather than the state interest in the private realm. A principle of neutrality in charity cases, including tax exemption cases, would significantly reduce the amount of

⁵⁶ *Bob Jones*, 461 U.S. at 604.

state interference with acts of private discrimination or exclusion. It is an approach that seemed to be implied in the approach that the Court took in *Walz* when it noted:

The course of constitutional neutrality . . . cannot be an absolutely straight line; rigidity could well defeat the basic purpose of [the First Amendment], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.⁵⁷

“Benevolent neutrality” must start with protecting associations from governmental interference with the raising of charity. The tax exemption and charity cases offer an important opportunity to bring greater clarity in the application of public policies and specifically antidiscrimination laws to private groups. Such governmental contacts would be viewed as “mere

⁵⁷ *Walz*, 397 U.S. at 669.

passive” acts and “not affirmative involvement characteristic of outright governmental subsidy.”⁵⁸ It would further recognize the importance of fund-raising to free speech and associational rights. Obviously, this is diametrically opposite of the assumption in *Wyman* where the court viewed the loss of access to be neither direct nor immediate” enough to warrant protection.⁵⁹ In these cases, the government is imposing additional barriers for citizens to fund their first amendment activities. Given the centrality of pluralism and open debate in our society, the use of tax exemption or access to publicly-run charity sites to enforce antidiscrimination policies should be barred. This will take some of the Court’s past rhetoric being made reality. As the Court stressed in *Roberts v. U.S. Jaycees*, “[t]he ability and the opportunity to combine with others to advance one’s views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.”⁶⁰

There is an obvious difference in penalizing discrimination in a public accommodation or restaurant and penalizing such discrimination in the

⁵⁸ *Id.* at 691.

⁵⁹ *Wyman*, 335 F.3d at 91.

⁶⁰ *Roberts*, 468 U.S. 609, 622 (1984) (“effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

hiring or membership of a discriminatory organization. We cannot maintain a pluralistic and free society unless our associations are free not just to speak but to exercise their views. As Associate Justice Sandra Day O'Connor noted in her concurrence to *Roberts*, “[a]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members . . . Protection of the association’s right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”⁶¹

The coming decade will force the Supreme Court finally to address the difficult decisions that it has long sought to avoid. If free speech, free exercise, and the right of association have true meaning in a pluralistic society, the government must be restrained in its imposition of some forms of content-based financial penalties. There is a distinction between tax exemption and direct government funding in the form of grants or scholarships. Tax exemption should be based on the simple notion that the government will not seek to tap the religious, educational, or charitable activities of its citizens. It is not a tool to be used to force such organizations to conform to majoritarian views. Likewise, the exclusion of groups from

⁶¹ *Roberts*, 468 U.S. at 627.

charitable listings invites the role of viewpoint discrimination that is anathema to a society based on notions of free, robust, and uninhibited speech and expressive association.

In both tax exemption and charitable listing cases, 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. The popularity of such groups should be left to the marketplace of ideas. This does not mean that the government can distinguish between discriminatory and non-discriminatory organizations in other respects. For example, while Bob Jones should not have had its tax exemption eliminated, the government should not have to pay for students to attend the school through grants or scholarships. In that case, the government is taking public monies from general revenues and directly assisting the school’s educational recruitment and mission.

Of course, clarity requires an element of courage. We have to have the courage to remain faithful to our first principles even when they benefit the least popular organizations. Indeed, it means that racist and anti-Semitic citizens can form tax-exempt organizations that are run in conformity with their hateful ideals. However, the same-sex marriage debate should magnify

the flaws in the Court's past jurisprudence. As states accept same-sex marriage and prohibit discrimination based on sexual orientation, conflicts will grow between the government and discriminatory organizations. There will be many religious-based organizations that will refuse to hire individuals who are homosexual or members of a same-sex marriage. If those individuals are holding a state license of marriage or civil union, it will result in a discriminatory act that was not only based on sexual orientation, but a lawful state status.

In my view, both sides in this debate will be benefited from "greater room for play in the joints" for private discriminatory practices. First, both gay advocates and religious advocates are advantaged by a neutral government that does not interfere with charitable fundraising or access to donors. This is a cultural issue that is fit for national debate with well-funded groups on both sides. Second, this debate will turn increasingly bitter and ugly if one side is viewed as suppressed in its efforts to raise charitable contributions or reach donors. I believe (and hope) that the nation will evolve toward a greater protection of homosexuals and greater recognition of civil unions. This evolution will not, however, occur if the government is viewed as unfairly trying to pre-determine the debate or harass one side. Finally, the progress made toward same-sex marriage and

homosexual rights is due in large part to the protection of free speech and associational rights. The rights of gay citizens will be secured with not simply legal but cultural changes. The latter will depend on greater, not lesser, protection of speech and association on both sides of the same-sex marriage debate.