

“CHARITABLE” DISCRIMINATION: WHY TAXPAYERS
SHOULD NOT HAVE TO FUND 501(C)(3)
ORGANIZATIONS THAT DISCRIMINATE AGAINST
LGBT EMPLOYEES[†]

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ABSTRACT

Until now, First Amendment protection of religious liberty¹ has allowed—and even indirectly publicly funded through tax exemption—discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) employees, but this Article argues that *Christian Legal Society v. Martinez*² changes that analysis. According to *Bob Jones University v. United States*, charitable, tax-exempt organizations that make admissions decisions based on racial discrimination violate public policy and cannot receive taxpayer funding.³ Similarly, *Martinez* demonstrates that universities do not have to fund student organizations that discriminate on the basis of sexual orientation.⁴ Therefore, because discrimination based on an immutable⁵ minority trait bars taxpayer

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¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

² 130 S. Ct. 2971 (2010).

³ 461 U.S. 574, 595–96 (1983).

⁴ *Martinez*, 130 S. Ct. at 2998.

⁵ Either unaware of or choosing to ignore the wealth of evidence to the contrary, Professor James Davids’s response to this Article cites “ex-gays” as evidence that sexual orientation is in fact a mutable characteristic like religion. James A. Davids, *Enforcing a Traditional Moral Code Does Not Trigger a Religious Institution’s Loss of Tax Exemption*, 24 REGENT U. L. REV. 433, 433 n.1 (2012). The American Psychological Association and American Psychiatric Association, however, widely regard “reparative” therapy as not only ineffective, but also harmful to patients. For an accurate professional discussion of these dangerous experiments, please see generally GREGORY HEREK, “REPARATIVE THERAPY” AND OTHER ATTEMPTS TO ALTER SEXUAL ORIENTATION: A BACKGROUND PAPER (1999), *available at* <http://psychology.ucdavis.edu/rainbow/html/rephtherapy.pdf>; AM. PSYCHOLOGICAL ASS’N,

funding in one instance, this Article argues it should also in the other. Private organizations will continue to be allowed to discriminate, but if they do, they should no longer receive public funding through tax-exempt status, taxpayer-funded federal loans, and tax-deductible donations.

INTRODUCTION

For fifteen years, Lucinda Naylor served as the artist-in-residence for the Basilica of St. Mary in Minneapolis, Minnesota, creating artwork for church banners and publications.⁶ After the Knights of Columbus—“the world’s foremost Catholic fraternal benefit society”⁷—mailed out 400,000 DVDs to Minnesota residents calling for a constitutional amendment banning same-sex marriage just before the 2010 midterm elections, however, Naylor decided to use her talents to take a stand.⁸ Naylor peacefully protested and raised awareness for marriage equality by creating a sculpture out of the unwanted DVDs she collected from parishioners.⁹ Two days after she commenced the project, though, Naylor received a suspension from her job, what she believed to be a “kind word for termination.”¹⁰

Whereas the church had a legitimate argument that Naylor directly took a stand against Catholic social teaching and, thus, against her employer’s mission, Laine Tadlock was terminated from Benedictine University in Springfield, Illinois for something thousands of Americans do each week: putting her wedding announcement in the newspaper.¹¹

APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>; *Sexual Orientation*, AM. PSYCHIATRIC ASS’N, <http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> (last visited Apr. 6, 2012).

⁶ Jim Spencer, *Job on Line over DVD Protest*, STAR TRIB., Sept. 28, 2010, at 1B.

⁷ *Learn About Us*, KNIGHTS OF COLUMBUS, <http://www.kofc.org/un/en/about/index.html> (last visited Apr. 6, 2012). Though many reports and opinions suggest that the Catholic Church sent out the DVDs, fairness requires it be noted that, though the Knights of Columbus roots its mission in Catholic Social Teaching, the two are actually separate entities. See Carl A. Anderson, *Ethics and Profitability*, KNIGHTS COLUMBUS (May 1, 2010), http://www.kofc.org/un/en/columbia/detail/2010_05_ethics.html. Like the Catholic Church, however, the Knights of Columbus organization does enjoy tax-exempt status. Letter from Harold N. Toppall, Chief, Projects Branch 2, Exempt Orgs. Div., Internal Revenue Serv., to Knights of Columbus Supreme Council (Oct. 15, 1998), available at <http://www.kofc-or.org/Forms/2010%20annual%20tax%20filing%20packet.pdf>. In any case, the Catholic Church had a large hand in the production and distribution of the DVD in Minnesota along with the Knights of Columbus. Mary Jane Smetanka, *Catholics to Get DVDs Opposing Gay Marriage*, STAR TRIB., Sept. 22, 2010, at 1A.

⁸ Spencer, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Dave Bakke, *Women’s Wedding Announcement Irks Benedictine*, ST. J.-REG., Nov. 10, 2010, at 1.

Tadlock, who served as the director of Benedictine's education program, was upfront with her employer about her sexual orientation from the beginning of her employment, and the university even knew when her wedding would take place.¹² Yet, after her announcement that listed Benedictine as her employer was published in *The State Journal-Register*, Tadlock left her position.¹³ Though the university alleged she resigned—a claim Tadlock disputed—Benedictine President William Carroll wrote, "By publicizing the marriage ceremony in which she participated in Iowa she has significantly disregarded and flouted core religious beliefs which, as a Catholic institution, it is our mission to uphold."¹⁴

Still other cases further blur the line between what is speaking out against an employer's mission and what is participating in conduct fundamental to one's immutable identity. Lisa Howe, a soccer coach at Belmont University in Tennessee, got her pink slip just days after sharing with her team her excitement about expecting a child.¹⁵ Belmont, a private Christian school, insisted the midyear departure was Howe's decision, but many sources on and off the campus, including her team members, were quoted as saying that she was fired or forced to resign.¹⁶ Her players—thirty of whom earned Atlantic Sun All-Academic honors for their achievements on and off the field since Howe arrived in 2005—were "shocked and angered" by the dismissal.¹⁷ Even religious liberties scholars would likely be appalled that a pregnant woman could get fired for privately sharing the news about something as fundamental as having a child,¹⁸ especially considering coaching soccer, even at a Christian institution, is not a religious sacrament.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Pierce Greenberg, *Coach Lisa Howe's Dismissal Shocks Women's Soccer Team*, BELMONTVISION.COM (Dec. 2, 2010, 11:09 PM), <http://belmontvision.com/2010/12/02/belmont-soccer-coach-fired/>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 226 (2010) ("To make it possible for both sides [gay-rights and religious-liberty] to live out their identities, it is necessary to compare the burdens on them."). Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law and a noted religious liberties scholar. According to his faculty biography, "Berg has established himself as one of the leading scholars of law and religion in the United States. He has written approximately 60 articles in law reviews and religion journals on religious freedom, constitutional law, and the role of religion in law, politics and society." He has also "received the Religious Liberty Defender of the Year Award from the Christian Legal Society in 1996" and "the Alpha Sigma Nu Book Award (2004) from the Association of Jesuit Colleges and Universities, for the Religion and the Constitution casebook, and the

At least two of these firings seem completely unwarranted, but the commonality—and why they are all permissible under Title VII of the Civil Rights Act of 1964¹⁹ and the employment at will doctrine—is the fact that these employees were lesbians. Title VII does not include sexual orientation as a protected class.²⁰ So, in the forty-nine states that follow the employment-at-will doctrine,²¹ an employee can be fired at any time, for any (or no) reason at all, unless the state legislature enacts, for example, a sexual-orientation-specific non-discrimination statute.²² Though the stories of Naylor, Tadlock, and Howe are only a few examples of targeted discrimination that LGBT employees face,²³ taxpayers currently have no choice but to subsidize these actions. Under the Internal Revenue Code, organizations deemed “charitable” receive tax-exempt status,²⁴ and individuals who donate to these organizations

John Courtney Murray Award from DePaul University College of Law for scholarly and other contributions to church-state studies.” *See id.* at 206; *School of Law: Faculty Biography of Professor Thomas C. Berg*, UNIV. ST. THOMAS, <http://www.stthomas.edu/law/facultystaff/faculty/berghthomas/> (last visited Apr. 6, 2012).

¹⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (2006)).

²⁰ § 2000e-2(a)(1).

²¹ Montana’s “just cause” statute makes it the only state that does not strictly adhere to the employment at will doctrine. *See* MONT. CODE ANN. § 39-2-904 (2011); Rachel Arnov-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 16 (2010); *The At-Will Presumption and Exceptions to the Rule*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/employment-working-families/at-will-employment-overview.aspx> (last visited Apr. 6, 2012).

²² 82 AM. JUR. 2D *Wrongful Discharge* § 1 (2003) (“‘Employment at will’ is a term used to mean that an employer may discharge an employee without restriction, that is, for any reason or for no reason, without incurring any liability to the employee, as long as the reason for the discharge does not violate public policy.”).

²³ *See, e.g.*, JODY L. HERMAN, WILLIAMS INST., THE COST OF EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER RESIDENTS OF MASSACHUSETTS (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-MA-TransEmp-Discrim-Apr-2011.pdf>; CHRISTY MALLORY ET AL., WILLIAMS INST., EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN OKLAHOMA (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Herman-Badgett-OK-Emp-Discrim-Jan-2011.pdf>; CLIFFORD ROSKY ET AL., WILLIAMS INST., EMPLOYMENT DISCRIMINATION AGAINST LGBT UTAHNS (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rosky-Mallory-Smith-Badgett-Utah-Emp-Discrim-Jan-11.pdf>; BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>; BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 2003–2007 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-DiscriminationComplaintsReport-July-2011.pdf>.

²⁴ I.R.C. § 501(a), (c)(3) (2006).

can also correspondingly deduct qualifying contributions from their own incomes.²⁵

Because these charitable organizations—even if they are private schools—do not have to pay taxes, they receive a benefit from our entire society, even from those taxpayers who believe in equality. While discrimination by tax-exempt organizations in a racial context will lead to the revocation of a charitable organization’s tax-exempt status because racial discrimination has been held to violate public policy,²⁶ only recently has protection for the LGBT community evolved.²⁷ Though other minorities have received federal protection from employment discrimination under Title VII of the Civil Rights Act of 1964,²⁸ the Age Discrimination in Employment Act,²⁹ and the Pregnancy Discrimination Act,³⁰ no “governmental declaration” has evidenced that discrimination on the basis of sexual orientation violates public policy, something required to revoke tax-exempt status.³¹ That may soon change, however,

²⁵ I.R.C. § 170(a)(1), (c)(2) (2006).

²⁶ *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96 (1983).

²⁷ *See, e.g.*, Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654 (2006)); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009) (codified as amended in scattered sections of Titles 18, 28, and 42 of the U.S.C.); *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2993, 2998 (2010) (holding that public universities “may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership”); *Romer v. Evans*, 517 U.S. 620, 624, 635–36 (1996) (holding that a Colorado constitutional amendment prohibiting “all legislative, executive or judicial action at any level of state or local government” from protecting homosexuals as a class violated the Equal Protection Clause); *Perry v. Brown*, No. 10-16696, slip. op. at 79–80 (9th Cir. Feb. 7, 2012) (holding that California’s Proposition 8 restricting marriage to opposite-sex couples is unconstitutional as a violation of the Equal Protection Clause); Press Release, Dep’t of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (stating that the Department of Justice will no longer defend Section 3 of the Defense of Marriage Act).

²⁸ 42 U.S.C. § 2000e-2(a) (2006) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

²⁹ Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602, 602–03 (codified as amended at 29 U.S.C. § 623(a) (2006)) (prohibiting employment discrimination based on age).

³⁰ The Pregnancy Discrimination Act modified the definitions of “because of sex” and “on the basis of sex” from the Civil Rights Act of 1964 to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.” Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

³¹ *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (“[E]ntitlement 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.”); *Tank Truck Rentals, Inc. v. Comm’r*, 356 U.S. 30, 33–34 (1958) (“[D]eductibility . . . is limited to expenses that are both ordinary and necessary to carrying on the taxpayer’s business. . . . A finding of ‘necessity’ cannot be

as the Ninth Circuit recently held in a landmark decision, *Perry v. Brown*, that discrimination against the LGBT community in the form of a ballot initiative restricting marriage to opposite-sex couples violates the U.S. Constitution.³² The Supreme Court could hear an appeal as early as 2013.³³

The first Part of this Article explains how and why tax-exempt status for charitable organizations came about in the United States. The second Part applies the original intent of charitable, tax-exempt status to LGBT employment discrimination. The third Part offers a public policy analysis explaining why equal protection should at least be balanced equally with religious liberty when those interests conflict. The fourth Part analyzes case law regarding discrimination and tax-exempt status and shows how *Martinez* in particular evolves the debate. The fifth and final Part analyzes how other countries have handled constitutional conflicts between equal protection and religious freedom and discusses what the United States should learn from the way these countries balance these important rights.

I. HISTORY OF CHARITABLE TAX EXEMPTION

A. How Did Tax-Exempt Status Come About?

In the United States, the first modern reference to tax exemption for charitable organizations appeared in an 1894 tax law.³⁴ It provided, “[N]othing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”³⁵ The corresponding deduction for taxpayers who donate to these organizations first appeared in 1917.³⁶ Most of the requirements to receive tax-exempt status dealt more with procedure

made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.” (citations omitted) (citing *Comm’r v. Heininger*, 320 U.S. 467, 473 (1943)).

³² *Perry v. Brown*, No. 10-16696, slip. op. at 79–80 (9th Cir. Feb. 7, 2012).

³³ See Maura Dolan & Carol J. Williams, *Divided Court Rejects Prop. 8*, L.A. TIMES, Feb. 8, 2012, at A1; Bob Egelko, *Prop. 8: Supreme Court May Redefine Gay Rights*, SFGATE (Feb. 12, 2012), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2012/02/12/MNO51N5108.DTL>.

³⁴ Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556; see also Michael Yaffa, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 158 (1982) (“The tax exemption for [charitable] organizations originated with the income tax law enacted in 1894.”).

³⁵ § 32, 28 Stat. at 556.

³⁶ War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917); see also Yaffa, *supra* note 34, at 158.

than substance, making it a relatively easy and unregulated process.³⁷ The IRS required that "(1) the organization . . . be involved in one of the (now) eight general listed purposes [in I.R.C. Section 501(c)(3)]; (2) the organization . . . not be a profit-making unit; [and] (3) the organization . . . not be involved in 'lobbying' or other similar 'political activities.'"³⁸

To receive tax-exempt status, the organization merely needed to submit a form to the IRS and meet both the "organizational" and "operational" tests.³⁹ Though some scholars disagree as to the rationale for charitable tax exemption and the corresponding contribution deduction for taxpayers,⁴⁰ one judge proffered that Congress intended to lower the standard to regulate charitable organizations as opposed to other government programs in order to "relieve[] itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the Government."⁴¹ Receiving a classification as a charitable organization and the tax-exempt status that came with it was relatively routine and non-controversial until 1970.⁴²

Prior to 1970, as long as the organization fell into one of the broad categories prescribed in the tax code,⁴³ these entities received tax-exempt status without much regard to violations of national public policy, notwithstanding the statutory or constitutional grounds on which the alleged violations were based.⁴⁴ Not only do charitable organizations

³⁷ Yaffa, *supra* note 34, at 158.

³⁸ *Id.* at 158.

³⁹ *Id.* at 158–59 ("To meet the organizational test, the applicant must show through such means as its articles of incorporation or corporate charter that it is organized exclusively for one or more exempt purposes. To meet the operational test, the organization must satisfy the Internal Revenue Service (IRS) that it engages 'primarily in activities which accomplish one or more of such exempt purposes specified in 501(c)(3).' If more than an insubstantial part of the organization's activities are not in furtherance of an exempt purpose, then the organization will not pass the 'operational' test." (citations omitted) (citing Treas. Reg. §§ 1.501(c)(3)-1(b), (c) (1960))).

⁴⁰ *See id.* at 159–60.

⁴¹ *McGlotten v. Connally*, 338 F. Supp. 448, 456 (D.D.C. 1972).

⁴² Yaffa, *supra* note 34, at 156–57.

⁴³ *Id.* at 157 n.6 ("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 . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office [are exempt from taxation]." (quoting I.R.C. § 501(e)(3) (1976))).

⁴⁴ *See id.* at 157.

receive tax-exempt status under Section 501(c)(3), Section 170(c) provides a deduction for any contribution a taxpayer makes to a charitable organization, within certain parameters.⁴⁵ Consequently, individuals who donate to these charitable organizations that discriminate against LGBT employees also receive a reward on their personal income taxes, a benefit intended to be reserved for causes that actually help marginalized populations, such as soup kitchens or homeless shelters.

B. What Makes an Organization “Charitable”?

This Article should not be misconstrued as an attack on all religious charities because the only organizations affected by this Article’s thesis would be those that actively choose to discriminate against LGBT employees or use taxpayer funding to advocate for political measures targeting minorities. The thesis does not suggest that religious organizations should have to perform same-sex marriages or photograph commitment ceremonies against their will, but it seems that the only right currently taken into account in employment discrimination cases has been religious liberty—an approach that can have devastating effects on minorities and their families.

There is no denying that many religiously affiliated organizations substantially contribute to charity—Catholic Charities being “the largest provider of social services after the federal government”⁴⁶—but, in a case like the one in which a soccer coach was fired for telling her team that she was pregnant, there should be a balancing of interests when deciding whether a corporation should get to retain its tax-exempt status. Many churches donate food or provide shelter to the homeless or provide medical care for children. Even the Knights of Columbus donated “more than \$151 million to charitable needs and projects” in a single year,⁴⁷ but these organizations should not be able to use taxpayer funding toward projects that target marginalized populations, such as anti-marriage-equality DVDs or hiring and training replacements for employees who were fired just for being gay.

This Article recognizes the value of religion in many people’s lives and the services that many religious institutions provide to society, but rational minds should agree that the privilege of charitable tax exemption is being abused. Even though some 501(c)(3) organizations that discriminate against LGBT employees use part of their tax-exempt

⁴⁵ I.R.C. § 170(a)(1), (c)(2)(B) (2006).

⁴⁶ Berg, *supra* note 18, at 224.

⁴⁷ *During the Past Decade, the Knights of Columbus Has Donated More than \$1.367 Billion to Charity*, KNIGHTS OF COLUMBUS, <http://www.kofc676.org/what.htm> (last visited Apr. 6, 2012).

donations to aid the poor and marginalized, it is still against public policy to let taxpayer money go toward causes that directly harm minorities—especially considering that the language of Section 501(c)(3) itself prohibits political or lobbying activities.⁴⁸ Considering all things objectively, these causes do not conform to the charitable standard. Consequently, even though religious freedom will continue to be constitutionally protected, the Internal Revenue Code should not reward discriminatory organizations with tax exemptions when their actions do not conform to the charitable scrutiny test.

II. IF THE U.S. WILL NOT ENACT FEDERAL LEGISLATION TO PROTECT LGBT EMPLOYEES, THEN TAXPAYERS SHOULD AT LEAST NOT HAVE TO FUND "CHARITABLE" ORGANIZATIONS THAT DISCRIMINATE.

As long as LGBT employees have no federal statutory protection from employment discrimination, tax-exempt status for charitable organizations that discriminate against minorities from both the state and federal government violates public policy. Federal taxpayer funds especially should benefit the *entire* nation. Even scholars who argue for religious exemptions for government employees recognize that public funds should support the entire public.⁴⁹

Allowing unfettered religious liberty to organizations funded by taxpayer money puts a substantial burden on those in favor of workplace equality that goes beyond monetary terms. For example, under the U.S. military's "Don't Ask, Don't Tell" policy,⁵⁰ nearly 3,700 active-duty soldiers were discharged between 2004 and 2009 alone.⁵¹ Discharging these soldiers and recruiting and training their replacements cost American taxpayers more than \$193 million, or about \$52,800 per troop.⁵² According to a report from the Government Accountability Office, "[A]bout 39% of the service members separated under the policy

⁴⁸ I.R.C. § 501(c)(3) (2006).

⁴⁹ Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW J.L. & SOC. POL'Y 318, 319 (2010) ("Some are willing to exempt both individuals and groups who object for religious reasons to facilitating a same-sex marriage so long as they perform no government functions and receive no public funds.").

⁵⁰ The policy was enacted in 1993 as a compromise under President Bill Clinton after the Department of Defense's 1982 policy stating that homosexuality was "incompatible with military service" garnered so much support that a gay naval officer was brutally murdered. See Sam Jameson, *U.S. Sailor Sentenced to Life Imprisonment in Murder*, TECH, May 28, 1993, at 2; see also Sharon E. Debbage Alexander & Kathi S. Wescott, *Repeal of "Don't Ask, Don't Tell:" A Smooth Transition*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 129, 129 (2008).

⁵¹ Andrew Tilghman, *Report: More than \$193M Spent on 'Don't Ask, Don't Tell,'* USA TODAY (Jan. 23, 2011, 2:31 PM), http://www.usatoday.com/news/military/2011-01-21-military-cost_N.htm.

⁵² *Id.*

held ‘critical occupations,’ such as infantryman and security forces.”⁵³ About 98% of the troops discharged were enlisted, and of those, approximately 67% had served less than two years.⁵⁴ Additionally, some of the discharged soldiers had critical language skills, such as Arabic or Chinese,⁵⁵ losses that cannot be measured in terms of money.

Detractors might argue that many taxpayers do not want their tax dollars supporting wars overseas, but they are not allowed to stop paying taxes,⁵⁶ so taxpayers in favor of LGBT employment equality should be treated no differently. Though it is true that not all taxpayers agree with the decisions of the Department of Defense, the military does defend the entire country. When taxpayer money goes to organizations that discriminate against LGBT employees, taxpayers are forced to support organizations that not only prevent equal access to a public good but also actively try to take it away from others.⁵⁷

Consequently, *Arizona Christian School Tuition Organization v. Winn*, a 2011 case in which the Supreme Court denied a group of taxpayers’ challenge to a religious school voucher program because they lacked standing,⁵⁸ is not binding in this context because, here, taxpayers do have standing. Even if 501(c)(3) charitable organization exemptions were not considered “governmental expenditures,”⁵⁹ discriminatory organizations like Liberty University, which was founded by fundamentalist Baptist minister Jerry Falwell, received almost half a billion dollars in federal financial aid last year.⁶⁰

When a discriminatory firing occurs, courts do not even balance the hardships faced by religious organizations against the hardships faced by LGBT employees, as many rational religious liberties scholars

⁵³ *Id.*; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 11-170, MILITARY PERSONNEL: PERSONNEL AND COST DATA ASSOCIATED WITH IMPLEMENTING DOD’S HOMOSEXUAL CONDUCT POLICY 10 (2011).

⁵⁴ Tilghman, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* Welch v. United States, 750 F.2d 1101, 1106 (1st Cir. 1985) (holding that war objectors who deducted “war tax” credits from their tax returns did so in clear violation of the law).

⁵⁷ For example, the Catholic Church using taxpayer funds to send out anti-marriage-equality DVDs. *See* Spencer, *supra* note 6.

⁵⁸ 131 S. Ct. 1436, 1440 (2011).

⁵⁹ *Id.* at 1447.

⁶⁰ *See* Liz Barry, *Liberty Tops State in Federal Aid for Its Students: Online Enrollment Spurs Big Increase in Assistance*, NEWS & ADVANCE (Mar. 27, 2011), <http://www2.newsadvance.com/news/2011/mar/27/liberty-tops-state-federal-aid-its-students-ar-929147/>; Alex Pareene, *Evangelical Liberty University Received Half a Billion Dollars in Federal Aid Money*, SALON.COM (Apr. 5, 2011, 11:45 AM), http://www.salon.com/life/education/index.html?story=/politics/war_room/2011/04/05/liberty_university_federal_money.

suggest they should do in other contexts.⁶¹ These scholars reasonably argue that religious employees who do not want to perform same-sex marriages should get a hardship exception only when there is not another justice of the peace, photographer, or government clerk issuing marriage licenses available because this alone would not create a barrier to same-sex couples' rights.⁶² This strategy would take both sides' harms into consideration:

Cabining the ability to object to only those situations when no hardship for same-sex couples would result is principled: the state should not confer the right to marry with one hand and then take it back with the other by enacting broad, unqualified religious objections that could operate to bar same-sex couples from marrying.⁶³

In the context of employment discrimination used to preserve religious liberties, however, no balance of competing interests occurs. Currently, in many states, religious employers can fire LGBT employees without fear of any recourse⁶⁴ and then use taxpayer money to hire and train replacements.⁶⁵ In these cases, because courts do not balance the competing interests of equal protection and religious liberty, discriminatory organizations receive a windfall.

Not only does unfettered religious liberty to discriminate against LGBT workers in hiring and firing practices unfairly burden taxpayers who are in favor of equality, it also prevents the LGBT employees themselves from having equal access to employment. LGBT employees getting fired simply for living their lives without "walking on eggshells" does not compare to getting transferred to a different department or finding another photographer in a free exercise case concerning a religious exemption. This Article respects and does not advocate eliminating the ministerial exception,⁶⁶ but an administrative or coaching job does not involve religious sacraments, and the public can differentiate between laypersons and those speaking on behalf of the church.

⁶¹ See, e.g., Letter from Robin Fretwell Wilson et al. to Chet Culver, Governor of the State of Iowa (July 9, 2009) ("[O]ur aim is to define a "middle way" where both equality in marriage and religious liberty can be honored and respected."); see also Berg, *supra* note 18, at 226; Wilson, *supra* note 49, at 331.

⁶² Wilson, *supra* note 49, at 331 n.70, 333; Letter from Wilson, *supra* note 61.

⁶³ Wilson, *supra* note 49, at 334–35.

⁶⁴ See *supra* notes 21–22 and accompanying text.

⁶⁵ Because charitable religious organizations are tax-exempt under Section 501(c)(3), they can use money that they would otherwise have to pay in taxes to hire and train these replacements.

⁶⁶ The "ministerial exception" for religious employers was recently reaffirmed by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 707 (2012) (concluding that the ministerial exception is grounded in the First Amendment).

III. CONFLICTING CONSTITUTIONAL RIGHTS: RELIGIOUS FREEDOM V. EQUAL PROTECTION

A. *Religious Freedom Under the First Amendment*

While religious freedom is protected under the First Amendment,⁶⁷ as the Supreme Court held in *United States v. Lee*, even constitutional amendments have rational limitations.⁶⁸ For example, the Second Amendment guarantees the right to bear arms,⁶⁹ but reasonable individuals would agree that this right should not be extended to the mentally ill or to minors under ten-years-old.⁷⁰ Hate speech may be allowed under the First Amendment,⁷¹ but even the freedom of speech stops short of falsely yelling “Fire!” in a crowded theater.⁷²

If a gun-toting, mentally-ill toddler seems beyond the realm of possibility, consider the facts of *Employment Division v. Smith*, a case in which drug rehabilitation counselors appealed a denial of unemployment benefits all the way to the Supreme Court after they were fired for using a powerful psychedelic drug called peyote for religious purposes.⁷³ If drug counselors could use illegal drugs for religious reasons, what would stop semi-truck drivers from doing the same? The Bible condones many dubious acts that the law does not encourage or protect, such as slavery, genocide, polygamy, misogyny, and spousal abuse.⁷⁴ Even constitutional rights have limits that must be balanced against other rights. Religious

⁶⁷ U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

⁶⁸ 455 U.S. 252, 259 (1982) (“To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”).

⁶⁹ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”).

⁷⁰ See, e.g., *United States v. Rene E.*, 583 F.3d 8, 16 (1st Cir. 2009) (holding that a federal statute prohibiting juveniles from possessing handguns did not violate the Second Amendment); *United States v. Milheron*, 231 F. Supp. 2d 376, 377 (D. Me. 2002) (rejecting a mentally-ill defendant’s argument that a federal statute denying him the right to bear arms violated due process).

⁷¹ *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

⁷² *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁷³ 494 U.S. 872, 874, 890 (1990) (holding that Oregon could prohibit sacramental peyote use consistent with the Free Exercise Clause and, thus, deny unemployment benefits to persons discharged for such use).

⁷⁴ For example, Professor Elizabeth Burleson has argued that passages in Leviticus should not be relied on to condemn homosexuality any more than to condone slavery. See Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 CORNELL J.L. & PUB. POL’Y 383, 422–27 (2010).

freedom should not be a catch-all defense against discrimination that allows for persecution of a marginalized minority.

Additionally, even if organizations with tax-exempt status are religion-based, coaching soccer is not a religious sacrament.⁷⁵ The zone of doctrinal transmission protected by the Free Exercise Clause includes activities such as "preaching, praying, proselytizing, and worshipping within a group."⁷⁶ Howe was not fired for refusing to perform her job.⁷⁷ In fact, her team performed exceptionally well on and off the field.⁷⁸ Howe had no choice in the matter. She was fired based on an immutable trait, which is much harsher than being given the choice to step down rather than perform same-sex marriages. Forcing religious workers to choose between supporting their families and trying to find a new job in a poor economy does not seem so harsh when compared to employees who were fired with neither a choice nor any notice. Even if Howe's employment contract contained a morality clause, it would certainly be debatable whether having a child within a committed relationship is immoral. If these employers are allowed to continue legally firing employees just for being gay, they should no longer receive taxpayer money because state action approving or encouraging discrimination violates the Fourteenth Amendment.

B. Equal Protection Under the Fourteenth Amendment

After *Employment Division v. Smith*, religious organizations worried the holding would be used as precedent to deny them other religious liberties, so they lobbied the legislatures to enact the Religious Freedom Restoration Act of 1993.⁷⁹ Even this Act was held unconstitutional as applied to the states four years later in *City of Boerne v. Flores* because the legislature usurped the judicial branch's power to interpret the Fourteenth Amendment:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. . . . While the line

⁷⁵ Wilson, *supra* note 49, at 328 n.46 and accompanying text (noting that for many people marriage is traditionally considered a religious sacrament and, while they would not object to providing services to gays and lesbians, they would not directly facilitate a homosexual marriage).

⁷⁶ Burleson, *supra* note 74, at 421.

⁷⁷ See Greenberg, *supra* note 15.

⁷⁸ *Id.*

⁷⁹ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); see also Bradley P. Jacob, *Free Exercise in the "Lobbying Nineties,"* 84 NEB. L. REV. 795, 814-18 (2006) (chronicling the lobbying efforts of religious groups in the 1990s to overturn *Smith* by legislative means, an effort which ultimately culminated in the passage of the Religious Freedom Restoration Act).

between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.⁸⁰

Over the years, the debate has been, and seemingly always will be, over where to draw the line between religious freedom and equal protection.⁸¹ It is beyond the scope of this Article to discuss the ramifications of every religious freedom statute and holding, but the basic point this Article seeks to make is that, when constitutional rights conflict, there should be a balancing of interests rather than a winner-take-all approach in which one right always trumps the other. As stated previously, conservative scholars recognize the importance of such a balance in their arguments as well.⁸²

*C. The Lack of Protection Against Sexual-Orientation Discrimination
Under the Civil Rights Act*

Denying taxpayer funding to organizations that target marginalized minorities does not stop religious groups from practicing their religions, as the Supreme Court has repeatedly ruled that tax-exempt status is a privilege rather than a right.⁸³ Therefore, allowing LGBT employment discrimination should not even be cast as providing an accommodation to religious liberty. In a free country, American employees should not need an accommodation to be excited about getting married or having a child. It would be nonsensical to suggest that any straight woman would be worried about getting fired for submitting a wedding announcement to the local newspaper or for having a child—especially considering the

⁸⁰ *Boerne*, 521 U.S. at 519–20.

⁸¹ *See, e.g.*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (2006) (providing that no government may impose substantial burdens on the religious exercise of inmates, even by laws of general applicability, unless the government has a compelling interest and the law is narrowly tailored); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (holding that the government had no compelling interest under the Religious Freedom Restoration Act to prosecute a religious group for using a hallucinogenic drug in its rituals); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338–39 (1987) (holding that the religious exemption to the Civil Rights Act does not violate equal protection).

⁸² *See, e.g.*, Berg, *supra* note 18, at 226; Wilson, *supra* note 49, at 331–32 & n.70.

⁸³ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963); *see also* Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295, 308–19 (2003) (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983)) (explaining how recent precedents reveal that the Supreme Court may now consider tax exemption a mere privilege rather than a constitutional right).

Pregnancy Discrimination Act.⁸⁴ For LGBT employees, doing so would be like asking for an accommodation to be alive. Even under Title VII, employers must provide a reasonable accommodation to preserve the employee's status if one is available.⁸⁵

Title VII does not extend to sexual orientation,⁸⁶ but, because LGBT employees face discrimination similar to the injustices that Title VII was enacted to prevent for other discrete and insular minorities, many states have already enacted employment protection for LGBT workers despite the federal government's inaction.⁸⁷ These states reap considerable rewards for their foresight. For instance, author and professor Kirk Snyder argues that "[g]ay male bosses produce 35 to 60 percent higher levels of employee engagement, satisfaction, and morale than straight bosses" because of LGBT employees' huge skills in adaptability, intuitive communications, and creative problem-solving as a result of "having to dodge and weave and assess how and where they're going as they grow up."⁸⁸ LGBT employment protection started at the municipal level in East Lansing, Michigan in 1972.⁸⁹ Until Massachusetts acted in 1989, however, Wisconsin was the only state able to enact a statewide protection.⁹⁰ Twenty-nine states in the United States still allow employment discrimination against the LGBT community,⁹¹ even though "ninety percent of Americans in recent Gallup polls support equal employment opportunities" for LGBT employees.⁹²

⁸⁴ See Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

⁸⁵ The Equal Employment Opportunity Act of 1972 amended Title VII by mandating that employers accommodate "all aspects of [an employee's] religious observance and practice." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e(j)).

⁸⁶ See 42 U.S.C. § 2000e-2(a) (2006) (making it unlawful for employers to discriminate on the basis of race, color, religion, sex, or national origin).

⁸⁷ E.g., CAL. GOV'T CODE § 12940(a) (West 2011 & Supp. 2012); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010 & Supp. 2012).

⁸⁸ Danielle Sacks, *Why Gay Men Make the Best Bosses: America's Most Desirable Managers All Have One Thing in Common: Homosexuality*, DETAILS, <http://www.details.com/culture-trends/career-and-money/200702/why-gay-men-are-the-best-bosses?currentPage=1> (last visited Apr. 6, 2012) (citing KIRK SNYDER, *THE G QUOTIENT: WHY GAY EXECUTIVES ARE EXCELLING AS LEADERS . . . AND WHAT EVERY MANAGER NEEDS TO KNOW* (2006)).

⁸⁹ See EAST LANSING, MICH., CODE OF ORDINANCES § 22-33(b)(1) (1972); Burlson, *supra* note 74, at 413.

⁹⁰ See WIS. STAT. § 111.36(d)(1) (1982); Burlson, *supra* note 74, at 414.

⁹¹ According to the Human Rights Campaign, as of 2011, there are twenty-nine states that allow employment discrimination on the basis of sexual orientation. See *Pass ENDA Now: End Workplace Discrimination!*, HUM. RTS. CAMPAIGN, http://www.hrc.org/laws_and_elections/enda.asp (last visited Apr. 6, 2012).

⁹² Berg, *supra* note 18, at 233 n.164.

Naylor's firing by the Catholic Church in Minnesota seems rather puzzling considering the state's non-discrimination law makes it an unfair employment practice

*for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age to: (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (b) discharge an employee; or (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.*⁹³

The church, however, would argue that Naylor was not fired for being gay, but, rather, her vocal opposition to church teaching. Yet, many would consider those issues inextricably intertwined. Scholars disagree whether Title VII's charitable choice provision, which allows religious organizations receiving taxpayer funds to discriminate in hiring, applies to state non-discrimination laws, but no court has ruled on the question.⁹⁴

Though the context was marriage rather than employment, the Supreme Court of Connecticut recently held that sexual orientation is a quasi-suspect class and used an intermediate scrutiny standard to determine that the state's prohibition of same-sex marriage violated substantive due process and equal protection under the Connecticut Constitution.⁹⁵ The court concluded, "To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others."⁹⁶ Furthermore, the court reasoned, "[T]he bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even more severe than, those confronted by some groups that have been accorded heightened judicial protection."⁹⁷

Though more and more states and individual employers are contemplating protection for LGBT workers against employment discrimination,⁹⁸ the Employment Non-Discrimination Act ("ENDA"),

⁹³ MINN. STAT. ANN. § 363A.08 (West 2004) (emphasis added).

⁹⁴ Melissa McClellan, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH. & LEE L. REV. 1437, 1443 (2004).

⁹⁵ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008).

⁹⁶ *Id.* at 482.

⁹⁷ *Id.* at 446.

⁹⁸ For instance, in 2011, the Virginia Senate passed a bill that would have prohibited employment discrimination on the basis of sexual orientation, but the bill did not become law because it was not voted upon by the Virginia House of Delegates. S.B. 747, 2011 Session (Va. 2011).

which would provide federal protection, is currently stalled in Congress.⁹⁹

D. Tax Exemption and State Action

For the Fourteenth Amendment to bar a charitable organization's discriminatory use of funds, a grant of tax-exempt status must be considered state action.¹⁰⁰ Though the Supreme Court *has* discussed this distinction in dicta,¹⁰¹ cases such as *Green v. Connally*¹⁰² and *Bob Jones*¹⁰³ were decided on statutory grounds. Many scholars and cases point out marked differences between granting tax-exempt status and directly funding a private organization, arguing that it does not violate the Establishment Clause merely to grant tax-exempt status.¹⁰⁴ Granting tax-exempt status could not signify approval, they argue, because the government grants tax-exempt status to so many organizations with contrary and opposing views.¹⁰⁵ For example, if Planned Parenthood and the Catholic Church are both deemed nonprofits, the government cannot possibly endorse both organizations' views regarding abortion and contraception.

The distinction here—which Professor Davids fails to acknowledge or attempt to refute in his response¹⁰⁶—is that religious employers use tax dollars as a sword rather than a shield, as equal rights organizations do. Though based on recent governmental declarations,¹⁰⁷ it seems intuitive that LGBT employment discrimination does violate the

⁹⁹ Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 4(a) (2011).

¹⁰⁰ See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

¹⁰¹ *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970) ("The grant of a 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."); *Green v. Connally*, 330 F. Supp. 1150, 1164 (D.D.C.) (noting that private schools operating predominantly through public funds is an "*a fortiori* case of unconstitutional state action"), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

¹⁰² 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971).

¹⁰³ *Bob Jones Univ. v. United States*, 461 U.S. 574, 595–96 (1983); *Connally*, 330 F. Supp. at 1164–65. For a detailed analysis of the issue of tax-exempt status and state action, see generally Stephen Cohen & Laura Sager, *Why Civil Rights Lawyers Should Study Tax*, 22 HARV. BLACKLETTER L.J. 1, 14–24 (2006) and Yaffa, *supra* note 34, at 174–87.

¹⁰⁴ Cohen & Sager, *supra* note 103, at 18.

¹⁰⁵ Yaffa, *supra* note 34, at 184.

¹⁰⁶ See generally Davids, *supra* note 5.

¹⁰⁷ Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.").

Fourteenth Amendment if the granting of tax-exempt status were deemed state action. That connection, however, is not necessary because LGBT employment discrimination also violates public policy—the statutory grounds on which previous cases have been decided.

IV. TAX-EXEMPT STATUS HAS BEEN REVOKED IN THE PAST FOR RACIAL DISCRIMINATION, AND PROTECTION AGAINST SEXUAL-ORIENTATION DISCRIMINATION HAS EVOLVED IN A SIMILAR FASHION.

This would not be the first time the government revoked tax-exempt status as a result of discrimination. Several state and federal cases over the years have addressed racial discrimination at publicly funded institutions.¹⁰⁸ Private schools promoting racial segregation and prohibiting miscegenation have not been able to pass the charitable scrutiny test as a violation of public policy, regardless of any purported biblical or religious justification.¹⁰⁹ Even now, however, courts disagree whether sexual orientation constitutes a suspect class similar to race.¹¹⁰

In determining whether a group should be considered a suspect class for purposes of the Equal Protection Clause, courts generally consider whether the minority group is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,”¹¹¹ and whether the trait making the members of the class a minority is immutable.¹¹² Even conceding inherent differences between racial and sexual orientation discrimination,¹¹³ however, many recent governmental declarations illustrate that discrimination against the LGBT community alone violates public policy.¹¹⁴ Therefore, notwithstanding differing opinions about whether the LGBT community should be considered a suspect class, organizations discriminating based on sexual orientation

¹⁰⁸ *Bob Jones*, 461 U.S. at 580–81; *Norwood v. Harrison*, 413 U.S. 455, 462 (1973); *Goldsboro Christian Sch., Inc. v. United States*, 436 F. Supp. 1314, 1317 (E.D.N.C. 1977); *Green v. Connally*, 330 F. Supp. 1150, 1156 (D.D.C. 1970), *aff'd sub nom.* *Coit v. Green*, 404 U.S. 997 (1971).

¹⁰⁹ *E.g.*, *Bob Jones*, 461 U.S. at 580, 592, 595–96.

¹¹⁰ *Compare Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (“[S]trict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. All classifications based on sexual orientation appear suspect . . .”) with *Conaway v. Deane*, 932 A.2d 571, 616 (Md. 2007) (“[W]e decline on the record in the present case to recognize sexual orientation as an immutable trait and therefore a suspect or quasi-suspect classification.”).

¹¹¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹¹² *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

¹¹³ *See Berg*, *supra* note 18, at 235 (noting several differences between racial and sexual-orientation discrimination).

¹¹⁴ *See supra* note 27.

should not be rewarded with tax-exempt status for violating public policy.

A. *Green v. Connally*

In *Green v. Kennedy*, a federal district court ordered a preliminary injunction preventing the IRS from granting tax-exempt status to any Mississippi private schools practicing racial discrimination.¹¹⁵ In 1970, a group of black "Federal taxpayers and their minor children attending public schools in Mississippi" brought a class action lawsuit to enjoin the Secretary of the Treasury from granting tax-exempt status to private schools that practiced racial discrimination in their admissions practices.¹¹⁶ The name of the case changed before trial when John Connally replaced David Kennedy as Secretary of the Treasury,¹¹⁷ but another development affected the case more substantially. On July 10 and 19, 1970, the IRS issued two releases stating that it "[could] no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor [could] it treat gifts to such schools as charitable deductions for income tax purposes."¹¹⁸

Testifying before the Senate Select Committee on Equal Educational Opportunity, the Commissioner of Internal Revenue stated, "An organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of section 501(c)(3) and section 170, must meet the tests of being 'charitable' in the common-law sense."¹¹⁹ The IRS found that racial discrimination failed that test, declaring, "[T]he Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for contributions to such schools."¹²⁰ Consequently, because the IRS changed its position, litigation was no longer necessary.

In dictum, however, the court found that the Internal Revenue Code should be construed to avoid frustrations of public policy.¹²¹ The court

¹¹⁵ *Green v. Kennedy*, 309 F. Supp. 1127, 1140 (D.D.C. 1970).

¹¹⁶ *Id.* at 1129.

¹¹⁷ Yaffa, *supra* note 34, at 162 n.34.

¹¹⁸ *Green v. Connally*, 330 F. Supp. 1150, 1156 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971) (internal quotation marks omitted).

¹¹⁹ *Id.* (quoting *Hearings Before the S. Select Comm. on Equal Educ. Opportunity*, 91st Cong. 1995 (1970)) (internal quotation marks omitted) (statement of Randolph W. Thrower, Comm'r of Internal Revenue).

¹²⁰ *Id.*

¹²¹ *Id.* at 1161 ("[T]he Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy.").

based its analysis on *Tank Truck Rentals, Inc. v. Commissioner*.¹²² In *Tank Truck Rentals*, a case disallowing tax deductions for fines that truck drivers paid for violating maximum weight restriction laws, the Court held, “A finding of ‘necessity’ cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.”¹²³ The *Green* Court also cited the Thirteenth Amendment,¹²⁴ *Brown v. Board of Education*,¹²⁵ and the Civil Rights Act of 1964¹²⁶ as examples of governmental declarations evidencing the nation’s view that racial discrimination violates public policy.¹²⁷

B. *Norwood v. Harrison*

Three years later, in *Norwood v. Harrison*, the Supreme Court held unconstitutional a state-run program that supplied and lent textbooks to Mississippi schools without regard to their racially discriminatory practices.¹²⁸ Parents of children in the school complained that, by supplying textbooks to students attending racially segregated schools, the program provided direct funding to racially segregated education and impeded desegregation in public schools.¹²⁹ In striking down the program, the Court reasoned, “Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”¹³⁰

C. *Goldsboro Christian Schools v. United States*

In *Goldsboro Christian Schools v. United States*, a private, religious school in North Carolina sued the federal government to recover taxes that had been withheld under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.¹³¹ The school, which was heavily influenced by the fundamentalist Second Baptist Church of Goldsboro, maintained a racially discriminatory admissions policy based

¹²² *Id.* at 1162.

¹²³ 356 U.S. 30, 31, 33–34 (1958).

¹²⁴ U.S. CONST. amend. XIII.

¹²⁵ 347 U.S. 483 (1954).

¹²⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000(d) (2006)).

¹²⁷ *Green*, 330 F. Supp. at 1163.

¹²⁸ 413 U.S. 455, 457–58, 471 (1973).

¹²⁹ *Id.* at 457.

¹³⁰ *Id.* at 470.

¹³¹ 436 F. Supp. 1314, 1315–16 (E.D.N.C. 1977).

upon its interpretation of the Bible.¹³² The school never received a determination from the Commissioner of Internal Revenue that it qualified as a 501(c)(3) tax-exempt organization, yet it paid teachers' salaries—even providing them with housing—without withholding taxes required under the law.¹³³ Analyzing case law precedent and the legislative intent behind Section 501(c)(3), the court reasoned that “[s]ince benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy.”¹³⁴ Looking to *Green v. Connally*, the court held that the Treasury Department could validly disallow tax benefits to racially discriminatory schools because “there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation”¹³⁵ and that “the general across-the-board denial of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion.”¹³⁶

D. Bob Jones University v. United States

The Supreme Court granted certiorari in *Bob Jones University v. United States* to decide whether nonprofit, private schools enforcing racially discriminatory admissions practices qualify for tax-exempt status under Section 501(c)(3).¹³⁷ Scholars uniformly consider *Bob Jones* the seminal case concerning discrimination by tax-exempt charities,¹³⁸ since the case also incorporated the appeal from *Goldsboro*,¹³⁹ and *Norwood* narrowly dealt with a particular program rather than nonprofit status as a whole.¹⁴⁰ Like *Goldsboro* Christian School, at one point in its history, Bob Jones University completely excluded black students.¹⁴¹ In

¹³² *Id.* at 1316–17.

¹³³ *Id.* at 1317.

¹³⁴ *Id.* at 1318.

¹³⁵ *Id.* at 1319–20 (quoting *Green*, 330 F. Supp. at 1163) (internal quotation marks omitted).

¹³⁶ *Id.* at 1320.

¹³⁷ 461 U.S. 574, 577 (1983).

¹³⁸ See, e.g., Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 199 n.69 (2004) (referring to *Bob Jones* as the “seminal tax exemption case”); Mindy Herzfeld, *Restricting the Flow of Funds from U.S. Charities to International Terrorist Organizations—A Proposal*, 56 TAX LAW. 875, 879 (2003) (calling *Bob Jones* one of the most important cases concerning the revocation of tax-exempt status for charities engaging in activities that violate public policy).

¹³⁹ *Bob Jones Univ.*, 461 U.S. at 583–85.

¹⁴⁰ *Norwood v. Harrison*, 413 U.S. 455, 458 (1973).

¹⁴¹ *Bob Jones Univ.*, 461 U.S. at 580, 583.

1971, Bob Jones began to permit blacks married within their own race to apply.¹⁴² Forced by precedent in 1975, the university finally began to admit unmarried black students but continued to prohibit interracial dating or marriage.¹⁴³

The Court emphasized, “[A] declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”¹⁴⁴ It subsequently listed numerous indicia why “racial discrimination in education violates deeply and widely accepted views of elementary justice.”¹⁴⁵ Chief Justice Burger, writing for the majority, explained,

Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the “charitable” concept . . . or within the congressional intent underlying § 170 and § 501(c)(3).¹⁴⁶

E. Romer v. Evans

In a landmark decision for LGBT rights, the Supreme Court in *Romer v. Evans* struck down an amendment to the Colorado Constitution that would have barred any governmental action intended to protect homosexuals from discrimination.¹⁴⁷ The case is a clear indication that, in the eyes of the Supreme Court, discrimination against LGBT persons also violates public policy. Justice Kennedy rejected the argument that the LGBT community was looking for special protection by recognizing, “These are protections taken for granted by most people either because they already have them or do not need them”¹⁴⁸

F. Cradle of Liberty Council v. City of Philadelphia

Even before *Boy Scouts of America v. Dale*—which held that under the First Amendment Freedom of Association a private organization could exclude a person from membership when “the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints”¹⁴⁹—the American public had already questioned whether it should have to support discrimination. According to the

¹⁴² *Id.* at 580.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 592.

¹⁴⁵ *Id.* at 592–96.

¹⁴⁶ *Id.* at 595–96.

¹⁴⁷ 517 U.S. 620, 630, 635–36 (1996).

¹⁴⁸ *Id.* at 631.

¹⁴⁹ 530 U.S. 640, 648 (2000) (citing *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)).

American Civil Liberties Union, "About 360 school districts and 4,500 schools in 10 states have terminated sponsorship of scout activities because of the scouts' stand on homosexuals."¹⁵⁰ Though the case was eventually settled rather than appealed to the Supreme Court, taxpayers in Philadelphia also did not agree that a discriminatory organization should receive the benefit of using a public building and, therefore, revoked the discriminating organization's license.¹⁵¹

G. Christian Legal Society v. Martinez

Like most of the previously mentioned cases involving discrimination sanctioned by public funding in some form, *Christian Legal Society v. Martinez* involved a religious organization that wanted to keep its university funding and status as an official university group based on its First Amendment rights, despite its exclusion of a marginalized minority group.¹⁵² The Christian Legal Society ("CLS") chapter at the University of California Hastings College of the Law wanted recognition as, and benefits of, being a "Registered Student Organization," but the university's non-discrimination policy required that all student groups "not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."¹⁵³ CLS claimed that sexual *conduct* rather than status was its concern, but that argument seems hypocritically disingenuous considering that of the eighty-eight percent of unmarried young adults (ages eighteen to twenty-nine) in the United States who report having premarital sex, eighty percent self-identify as "evangelicals."¹⁵⁴ In upholding the school's policy, the Court disagreed with CLS's argument that it was prohibiting membership based on homosexual conduct rather than homosexual status,¹⁵⁵ further adding to the growing national sentiment that sexual orientation should be treated with heightened scrutiny for

¹⁵⁰ Nathan Gorenstein, *Federal Jury Decides in Favor of Scouts*, PHILLY.COM (June 23, 2010), http://articles.philly.com/2010-06-23/news/24961775_1_city-solicitor-shelley-smith-cradle-of-liberty-council-national-scout-policy.

¹⁵¹ *Cradle of Liberty Council, Inc. v. City of Philadelphia*, No. 08-2429, slip op. at 7 (E.D. Pa. Mar. 2, 2010) (requiring the organization to post bond to accompany a previously issued preliminary injunction); see also Nathan Gorenstein, *Philadelphia, Boy Scouts in Talks to Settle Dispute over Headquarters*, PHILLY.COM (July 30, 2010), http://articles.philly.com/2010-07-30/news/24970975_1_antigay-policy-national-scout-policy-boy-scouts-first-amendment.

¹⁵² 130 S. Ct. 2971, 2979–81 (2010).

¹⁵³ *Id.* at 2979–80.

¹⁵⁴ Tyler Charles, *(Almost) Everyone's Doing It*, RELEVANT, Sept.–Oct. 2011, at 64, 65, available at <http://www.relevantmagazine.com/digital-issue/53?page=66>.

¹⁵⁵ *Martinez*, 130 S. Ct. at 2990.

purposes of judicial review and that discrimination against the LGBT community runs contrary to public policy.¹⁵⁶

V. HOW DO OTHER NATIONS HANDLE THE CONSTITUTIONAL CONFLICTS BETWEEN EQUAL PROTECTION AND RELIGIOUS LIBERTY?

Fifty-four countries throughout the world completely prohibit employment discrimination against the LGBT community.¹⁵⁷ Though some scholars argue it is not only irresponsible but also dangerous to look to other countries' interpretations of their constitutions due to the many existing variables,¹⁵⁸ others argue that this information can only help the United States inform its analysis.¹⁵⁹ For the same reasons that motivate individuals to ask their friends and families for advice knowing that they might think of something their own emotional state precluded, it can be helpful for the United States to seek an outside perspective on

¹⁵⁶ See Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 139, 164 (2010) (arguing that same-sex couples should be considered a "suspect class," and, therefore, that laws that oppress the homosexual class should be reviewed by courts under a heightened judicial scrutiny); Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 68–69 (2010) (concluding that, considering the public policy rationales underlying marriage laws, marriage should not be limited only to opposite-sex couples); Evan Perez, *Reversal on Gay Marriage: In Legal Shift, Obama Administration Contends Same-Sex Ban Unconstitutional*, WALL ST. J., Feb. 24, 2011, at A3 ("The administration's latest legal reversal shows how the gay-rights drive is gaining steam in Washington, after years in which a handful of states took the lead by legalizing gay marriage.").

¹⁵⁷ According to a 2011 report by The International Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA"), fifty-four countries prohibit employment discrimination against the LGBT community. See EDDIE BRUCE-JONES & LUCAS PAOLI ITABORAHY, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASSOC., STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS 12 (2011), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf.

¹⁵⁸ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (Scalia rejecting the argument that "American law should conform to the laws of the rest of the world"); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 437 (1985) ("Comparison is considered useful only with regard to laws that fulfill the same function.").

¹⁵⁹ See, e.g., *Roper*, 543 U.S. at 576–78 (majority opinion) (Justice Kennedy citing favorably to international law in making his argument regarding capital punishment); Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691–93 (1976) (arguing that comparative constitutional law has the following five values: (1) it provides Americans with insight into other constitutional democracies; (2) it can be helpful in defining "public good" and "right political order"; (3) it can "enrich the study of comparative politics"; (4) it can "enrich the study of American constitutional law"; and (5) it can "contribute to the growth of American Constitutional law"); see also David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 615–16 (2001) (noting that U.S. courts are citing institutions that are not that different from American courts and that they are engaged in the same basic tasks).

constitutional law matters as well. Though factors ranging from politics to cultural mores to even geography make certain laws inapplicable or at least impractical in other parts of the world,¹⁶⁰ without at least considering any other options, it is irrational to continue assuming that the United States's policies are complete or the best.

A. Canada

Unlike the United States, Canada regulates family law nationally.¹⁶¹ Under the Canadian Charter of Rights and Freedoms "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."¹⁶² Though United States judges and justices often quibble about the Founders' original intent regarding subjects our Founders could not have possibly fathomed, the Ontario Court of Appeals evidenced its "living document" interpretation of the Canadian constitution by remarking in 2003, "[T]o freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation."¹⁶³ This quote becomes somewhat ironic in context knowing that Canada did not recognize Catholic marriages before 1847 or Jewish marriages until 1857.¹⁶⁴ The LGBT community would logically follow as a sympathetic case to religious organizations, considering religious discrimination has historically even led to Diasporas.

Looking to Canada for advice regarding the conflict between civil rights and religious liberties in employment law would certainly not be the first time that American courts have looked to Canadian courts for guidance. For instance, the Massachusetts Supreme Court cited Canadian decisions in *Goodridge v. Department of Public Health*, its historic decision granting same-sex couples the right to marry in Massachusetts.¹⁶⁵ Canadian courts have in turn analyzed American cases in their opinions.¹⁶⁶ Regarding the application of various levels of

¹⁶⁰ For this very reason, I chose the two countries that many would consider culturally and socially most like the United States: Canada and the United Kingdom.

¹⁶¹ See Burleson, *supra* note 74, at 395.

¹⁶² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 15(1) (U.K.).

¹⁶³ *Halpern v. Toronto* (2003), 65 O.R. 3d 161, 175 (Can. Ont. C.A.).

¹⁶⁴ Burleson, *supra* note 74, at 394.

¹⁶⁵ 798 N.E.2d 941, 948 n.3 (Mass. 2003) (citing *Halpern*, 65 O.R. 3d at 161; *Egale Canada, Inc. v. Canada (Att'y Gen.)* (2003), 13 B.C.L.R. 4th 1 (Can. B.C. C.A.)).

¹⁶⁶ The Canadian Supreme Court has cited American law on a number of substantive issues. See, e.g., *Canadian Nat'l Ry. v. Norsk Pac. S.S.*, [1992] 1 S.C.R. 1021,

scrutiny to laws in both Canada and the United States, Professor Burleson notes,

Section I of the Charter of Rights and Freedoms requires that there be proportionality and a rational connection between the objective of a law and the means selected to achieve it, a standard on par with the lowest level of scrutiny that federal courts in the United States apply to a law passed by the federal government.¹⁶⁷

Though many viewed it as the result of an attempt to change its reputation rather than a genuine attempt to advance human rights, Quebec became the first North American jurisdiction to prohibit discrimination based on sexual orientation in 1977.¹⁶⁸ The Canadian Human Rights Act, originally passed in 1976, followed suit in 1996, adding an amendment to include sexual orientation—something the United States Congress has yet to add to Title VII.¹⁶⁹ As early as 1992, Canadian courts overturned laws discriminating against the LGBT community, such as bans on military service and restrictions on same-sex partner employment benefits.¹⁷⁰ Though the United States did finally repeal its “Don’t Ask, Don’t Tell” policy amid much controversy in late 2010,¹⁷¹ according to a report by the Human Rights Campaign, many other nations had already prohibited similar discrimination, including Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Italy, Lithuania, Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.¹⁷²

A marriage commissioner in Saskatchewan, Canada was even fined by the Human Rights Tribunal after refusing to perform ceremonies for same-sex couples.¹⁷³ Though a decision like this still seems quite far off in the United States, American scholars should follow Canadian courts and statutes as they seem to be a good indication of our future, being only a few decades ahead of America’s progress.

1074 (Can.) (tort and contract law); *Carey v. Ontario*, [1986] 2 S.C.R. 637, 659–60 (Can.) (executive immunity); see also Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 217 (1994) (Former Justice of the Supreme Court of Canada discussing the increasing use of American law by the Canadian Supreme Court in recent years).

¹⁶⁷ Burleson, *supra* note 74, at 396.

¹⁶⁸ See *id.* at 396–97.

¹⁶⁹ *Id.* at 397–98. Compare Canadian Human Rights Act, S.C. 2004, c. 14 § 3(1) (Can.) (making discrimination on the basis of sexual orientation a violation of human rights), with 42 U.S.C. § 2000e-2 (2006) (failing to make sexual-orientation discrimination an unlawful employment practice).

¹⁷⁰ Burleson, *supra* note 74, at 398.

¹⁷¹ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. 654 § (2006)).

¹⁷² See Burleson, *supra* note 74, at 410.

¹⁷³ Wilson, *supra* note 49, at 328.

Though Americans still vigorously debate whether sexual orientation is caused genetically or environmentally, one Canadian justice took a mature stance when he remarked that it is truly irrelevant, and the mere fact that society continues this debate only causes pain to those already downtrodden.¹⁷⁴ Overturning a ban on benefits to a same-sex couple in a forty-six-year relationship that straight couples who had been together only one year in Canada received, former Canadian Supreme Court Justice Gerard V. La Forest explained,

[W]hether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of [the Canadian Charter of Rights and Freedoms] protection as being analogous to the enumerated grounds.¹⁷⁵

Many Americans still oppose same-sex marriage, and some still believe that employment discrimination is not wrong based on their own particular religion, but Canada shows compassion for sexual orientation in the same way it halted discrimination against religious minorities.

B. United Kingdom

Because the United Kingdom does not have a written constitution,¹⁷⁶ it is slightly more difficult to compare to the United States, yet it nonetheless is a leader in progress toward equality. The United Kingdom's Constitution comprises various documents, including "statutes, European Union legislation, the common law, and conventions."¹⁷⁷ Most notable for human rights progress in the United Kingdom, however, was the Human Rights Act of 1998, which incorporated the European Convention on Human Rights ("ECHR").¹⁷⁸ Article 8 of the ECHR provides,

Everyone has the right to respect for his private and family life, his home and his correspondence. . . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

¹⁷⁴ See *Egan v. Canada*, [1995] 2 S.C.R. 513, 528–29 (Can.).

¹⁷⁵ *Id.*

¹⁷⁶ Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 15–16 (2007).

¹⁷⁷ *Id.* at 16.

¹⁷⁸ Human Rights Act, 1998, c. 42 (U.K.); see also Cumper, *supra* note 176, at 16.

protection of health or morals, or for the protection of the rights and freedoms of others.¹⁷⁹

Though some might argue that the provision regarding the “protection of health or morals” might exclude the LGBT community, the European Court of Human Rights in 1981 used Article 8(2) to strike down Northern Ireland’s anti-sodomy law.¹⁸⁰ Because the morality clause did not preclude same-sex relationships between consenting adults in that case, definitions of morality that discount the LGBT community could be considered merely subjective. Not everyone is going to agree with or approve of what everyone else does, but in a modern, civilized society, balancing harms suggests that one group’s ideals do not justify discrimination against another. As Professor Burleson observed regarding Europe’s leadership in recognizing human rights, “As new countries have sought membership in the European Union, each has had to address the substantial level of discrimination against sexual minorities that remained pervasive and legally sanctioned within its borders.”¹⁸¹

CONCLUSION

Though LGBT employees can take comfort in the repeal of the discriminatory and expensive “Don’t Ask, Don’t Tell” policy¹⁸² and the fact that even Belmont University has adopted a new non-discrimination policy in the wake of Lisa Howe’s firing,¹⁸³ LGBT employees can still be fired just for being gay in twenty-nine states.¹⁸⁴ Because these discriminatory actions by 501(c)(3) charitable organizations violate notions of freedom, equality, and public policy, the Internal Revenue Code should cease rewarding them with tax-exempt status now that we have several declarations that discrimination based on sexual orientation is against public policy. Professor Davids’s response dwells on the novelty of these declarations, arguing that sexual orientation has not been a protected class for most of our nation’s history,¹⁸⁵ but slavery,

¹⁷⁹ Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222, 230.

¹⁸⁰ See *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149, 151, 165–70 (1981).

¹⁸¹ Burleson, *supra* note 74, at 404 (citing ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER 95* (1995)).

¹⁸² Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealing 10 U.S.C. § 654 (2006)); see also William Branigin et al., *Obama Signs DADT Repeal Before Big, Emotional Crowd*, WASH. POST (Dec. 22, 2010, 11:49 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122201888.html>.

¹⁸³ Travis Loller, *Belmont Changes Policy After Gay Coach Protest*, USA TODAY (Jan. 26, 2011, 8:24 PM), http://www.usatoday.com/sports/soccer/2011-01-26-1707853827_x.htm.

¹⁸⁴ See *supra* note 91.

¹⁸⁵ See Davids, *supra* note 5, at 444–53.

racism, and sexism were all commonplace at one time as well. Just because an idea is popular with the majority in power for a significant period of time does not mean that it is correct. At various periods throughout history the majority also believed the earth was flat and the sun revolved around it. Consequently, until the United States adopts the human rights norms followed in much of the rest of the world, our federal government should at least stop incentivizing discrimination by granting tax-exempt status.