RELIGIOUS ORGANIZATIONS

DOES *BOB JONES* SUPPORT EXEMPTION REVOCATIONS AFTER *OBERGEFELL?*

Author: JONATHAN T. McCANTS

JONATHAN T. McCANTS Jonathan T. McCants is a principal in the Atlanta law firm of Bird, Loechl, Brittain & McCants, LLC. His practice concentrates in laws affecting tax-exempt organizations.

Without question, June 26, 2015 was a historic day on many levels, as the Supreme Court's ruling in *Obergefell v. Hodges* **1** sent shockwaves of surprise, and even disbelief among some supporters, **2** throughout America. Despite the legal sea change wrought by the decision, it should not have come as a surprise to experienced Court watchers. In prior cases, Justice Anthony Kennedy had laid a foundation for recognizing same-sex marriage that was unmistakable, as Justice Antonin Scalia had noted in his dissents.

The Court's decision in *Obergefell,* along with the dissents, expose divides over many questions, constitutional and otherwise. The scope of this article is far more limited, however-to consider the effect of *Obergefell* on the tax exemption of religious nonprofits that do not share the Court's view concerning same-sex marriage.

The *Obergefell* decision was announced on a Friday, and before the weekend was over there were calls by some commentators for churches and religious institutions to lose their tax exemptions as a result-at least those that reject the legitimacy of same-sex marriage. **3** While there are notable examples of individuals who both welcome the *Obergefell* result and seek to protect the rights of dissenting religious

institutions, [4] this author believes that calls for the revocation of tax exemptions are likely to increase in frequency and intensity, particularly given Justice Kennedy's language in *Obergefell* and its forbearers, as well as the current proliferation of what is considered hate speech.

If a legal argument for revocation were desired, the Supreme Court's decision in *Bob Jones University* [5] would provide the most obvious justification. That decision affirmed the Commissioner's decision to revoke the tax exemptions of Bob Jones University and Goldsboro Christian Schools for racially discriminatory policies. Of the two policies at issue, Bob Jones University's policy was the most analogous to the same-sex couple context, for while Goldsboro refused to admit students on the basis of race, Bob Jones (at least by the time of oral argument) admitted students without regard to race, but it did not permit any student, regardless of race, to participate in interracial dating. [6]

The argument for revoking certain tax exemptions based on the *Bob Jones* case can be summed up as follows.

- Premise 1: *Bob Jones* stands for the proposition that a charity exempt under **Section 501(c)(3)** cannot violate an established public policy, particularly one involving unlawful discrimination, and maintain its tax exemption.
- Premise 2: *Obergefell* establishes a clear national public policy against discrimination against same-sex couples.
- Conclusion: Therefore, any charity must not discriminate against same-sex couples, or otherwise its tax exemption is subject to revocation.

However, careful consideration of these premises and the conclusion reveals that neither premise is correct and, thus, that the conclusion is erroneous.

The Commissioner lacks discretion.

Bob Jones does not provide the Commissioner with the discretion to determine and enforce public policies by revoking tax exemptions.

In *Bob Jones,* the Supreme Court was presented with the following fact pattern. Prior to at least 1965, the IRS granted tax exemptions to private schools without regard to whether they practiced racial discrimination. [7] In 1970, the District Court for the District of Columbia in *Green v. Kennedy* [8] issued a preliminary injunction preventing the IRS from continuing to recognize as exempt private schools in Mississippi with racially discriminatory admissions policies. As a result, the IRS issued a news release stating that it would no longer grant tax exemptions to private schools that practiced racial discrimination nationwide. [9] A permanent injunction was issued in the *Green* case the following year, [10] at which point the IRS formalized its nationwide policy in **Rev. Rul. 71-447** , [11] That revenue ruling, in pertinent part, read:

> Section 1.501(c)(3)-1(d)(3)(ii) of the Income Tax Regulations provides that a primary or

> secondary school that has a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on may qualify for exemption as an educational organization of the character contemplated by Code section 501(c)(3) if it otherwise meets the requirements of that section.
>
> Under common law, the term "charity" encompasses all three of the major categories identified separately under **section 501(c)(3) of the Code** as religious, educational, and charitable. Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable, * * * or educational purposes" was intended to express the basic common law concept. Thus, a school asserting a right to the benefits provided for in **section 501(c)(3) of the Code** as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section.

In other words, the Service's position was that a charity must meet both the statutory definition under **Section 501(c)(3)** as well as the common law definition of charity. According to the Court in *Bob Jones*, applying the common law definition of a charity meant, "namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." **12** The plaintiff schools, of course, argued that they were entitled to exemption if they met the statutory definition under **Section 501(c)(3)** , without reference to a common law standard.

Ultimately, the Court sided with the Commissioner, ruling that the common law definition of charity must be met in addition to falling under one of the enumerated categories of exempt entities under **Section 501(c)(3)** . **13** However, what is not as clear, at least not without further review of the various opinions and the oral argument, is the depth of concern that the Supreme Court showed for limiting the Commissioner's ability to revoke exemptions based on the public policy requirement necessary under common law. But the Court was well aware of the slippery slope that such a public policy requirement might entail, and its concern was palpable.

Indeed, William Ball, representing Bob Jones University, squarely set the issue before the justices at oral argument in his opening statement: **14**

> [T]here is a major premise that organizations which violate federal public policy cannot be tax exempt. The minor premise is that racial non-discrimination represents federal public policy, and the conclusion is that a racially discriminatory organization cannot be tax exempt.... [T]here's obviously no end of the federal public policies which can be substituted for racial non-discrimination in the minor premise.
>
> Sex non-discrimination, age non-discrimination, religious non-discrimination, environmental purity, and you can go on with federal act after federal act which states a

> federal public policy.

Appearing on behalf of the Service's position at the special invitation of the Court, **15** William Coleman, Jr. argued that the IRS was within its rights to require all **Section 501(c)(3)** applicants to meet the common law definition of charity, and it had correctly determined that racially discriminatory private schools did not meet that standard.

Justice Lewis Powell, and later Justice Byron White, pushed Mr. Coleman for a principle that would limit the Service's ability to determine and enforce public policy. At first, Mr. Coleman distinguished educational institutions from churches or other types of charities. "A church, from the time it got the exemption, had to be charitable at common law, but the rules as to what a church does which is legal or not legal are different from what a school does which is legal or not legal." **16**

Clearly, Mr. Coleman was arguing for an expansive right of the IRS that was considerably greater than what the Court was willing to find. When initially pressed for a "limiting principle" regarding which public policies might act to prevent exempt status, Mr. Coleman said that the IRS could only "make those determinations with respect to those issues which have been reflected in statutes of Congress and decisions of this Court which deal with the basic, fundamental issues." **17**

Justice Powell countered that there was a public policy against sex discrimination, such that gender-specific schools would lose their exemption, and that the IRS might decide that because "no commitment of the United States is greater ... than to preserve the common defense," pacifist organizations should lose their exemptions. **18**

Mr. Coleman countered that racial discrimination was in a class all by itself, stating: **19**

> [W]e start with the fact that we didn't fight a civil war over sex discrimination, we didn't have the problem in this country of trying to remove the provisions in the Constitution which say that black people could be brought here in slavery...."
>
> [N]o one can stand here today and say that [any] issue is as fundamental as the issue in this country that you cannot make a distinction based upon race...."
>
> "I am saying that [the policy against racial discrimination is] the one policy where it is crystal clear that there is a national commitment and that you can't have educational institutions which disagree with that."

Justice Powell agreed with his point, noting that the Court had "never held that the most heightened scrutiny applied to sex [discrimination]." **20**

In light of this discussion at oral argument, it is apparent why the Court's opinion took great pains to limit

the application of its holding. In order to qualify for exemption under **Section 501(c)(3)** , "[t]he 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." **21** Because of the serious consequences that flow from this determination, "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. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice." **22**

In the case of a national public policy against racial discrimination in education, the Court held that the unanimous stance of all branches of government could not be clearer. Regarding the judiciary, "[a]n unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." **23** Regarding the legislature, Congress had obviously ratified the IRS decision (1) by allowing it to stand for a decade unchallenged, and (2) by enacting **Section 501(i) of the Code** , which prohibited exemption for racially discriminatory social clubs. **24**

As a result, the Court concluded that: **25**

> On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear. The correctness of the Commissioner's conclusion that a racially discriminatory private school "is not charitable within the common law concepts reflected in ... the Code," Rev.Rul. 71-447 [citation omitted] is wholly consistent with what Congress, the Executive, and the courts had repeatedly declared before 1970. Indeed, it would be anomalous for the Executive, Legislative, and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.

In Justice Powell's concurrence, he highlighted his concerns over the broader implications of allowing either the IRS or the courts to evaluate charities based on the "public benefit" they might confer on society. **26**

The Court's opinion addressed Justice Powell's concerns in footnote 23, stating:

> Justice Powell misreads the Court's opinion when he suggests that the Court implies that the Internal Revenue Service is invested with authority to decide which public policies are sufficiently "fundamental" to require denial of tax exemptions, post at 611. The Court's opinion does not warrant that interpretation. Justice Powell concedes that, if any national policy is sufficiently fundamental to constitute such an overriding limitation on the availability of tax-exempt status under 501(c)(3), it is the policy against racial discrimination in education. Post at 607. Since that policy is sufficiently clear to warrant

> Justice Powell's concession and for him to support our finding of longstanding congressional acquiescence, it should be apparent that his concerns about the Court's opinion are unfounded. **27**

Indeed, even though Justice William Rehnquist dissented from the decision, the Court *unanimously* agreed that there was both a clear and a strong "national policy in this country opposed to racial discrimination." **28** Furthermore, the Court's decision reveals a national policy against racial discrimination greater than any other public policy, and the enforcement of that public policy in the context of educational institutions was unlike any other charitable context. **29**

Obergefell falls far short of the *Bob Jones* standard.

Although the *Obergefell* opinion is grounded in a public policy determination, it falls far short of the standard enunciated in *Bob Jones.*

By the time the *Obergefell* arguments were heard, Justice Kennedy already had laid the foundations for his opinion in *Lawrence v. Texas* **30** and *United States v. Windsor.* **31** It is undeniably true that there is much within these opinions that could, at some point, be used to support a *Bob Jones* public policy argument by same-sex couples or individuals who identify as gay, lesbian, bisexual, or transgendered people. However, for the foreseeable future, such an argument does not seem tenable, much less compelling.

In *Lawrence*, Justice Kennedy described how criminal sodomy laws "demean" and "stigmatize" homosexuals and serve as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." **32**

In his opinion in *Windsor*, Justice Kennedy described the Defense of Marriage Act as a "bare congressional desire to harm a politically unpopular group" **33** that "writes inequality into the entire United States Code," "demeans the couple," "humiliates tens of thousands of children now being raised by same-sex couples," "imposes a disability," and "disparage[s]" and "injure[s]" same-sex couples. **34**

In *Obergefell,* Justice Kennedy wrote that the Court now understands that a homosexual "sexual orientation is both a normal expression of human sexuality and immutable." **35** Because non-recognition of same-sex marriage denied the plaintiffs "person autonomy" to make "such profound choices," it "disparages," "diminishes their personhood," "impose[s] stigma and injury," and "harm[s] and humiliate[s] the children of same-sex couples." **36** As a result, a traditional definition of marriages "inconsistency with the central meaning of the fundamental right to marry is now manifest." **37**

All of this is strong language articulating a public policy stance of a majority of the Court, but the most potentially troubling aspect of the *Obergefell* decision for religious institutions involved this exchange at oral argument between Justice Samuel Alito and U.S. Solicitor General Donald Verrilli:

> JUSTICE ALITO: Well, in the *Bob Jones* case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
>
> SOLICITOR GENERAL VERRILLI: You know, I - I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I - I don't deny that. I don't deny that, Justice Alito. It is - it is going to be an issue. **38**

The Court attempts to lessen this concern by stating "it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." **39**

Needless to say, the fears of the four dissenting justices were not allayed. In his dissent, Chief Justice John Roberts wrote:

> The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. *Ante*, at 27. The First Amendment guarantees, however, the freedom to "*exercise*" religion. Ominously, that is not a word the majority uses. Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage-when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. **40**

Of the four dissenters, Justice Alito sounded the sharpest alarm:

> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. *Ante*, at 2627. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools. **41**

Strong words, indeed, appear on all sides of this debate.

Conclusion

Despite the fears of Justice Alito and perhaps the hopes of some left-leaning activists, *Bob Jones* does not provide convincing support for the end of tax exemptions for dissenting religious institutions, whether churches, schools, mission societies, adoption agencies, or otherwise.

First, racial discrimination has a place in our nation's history and jurisprudence unlike any other, and strict scrutiny is used to evaluate it. Not even gender discrimination rises to the same level, and it is unlikely that any other public policy could ever rise to that level.

Second, racial discrimination within the school context was of particular importance to the *Bob Jones* court, and there is no analogous situation with regard to same-sex marriage.

Third, *Bob Jones* does not provide the IRS with discretion to make judgment calls on what is and is not public policy. The *Bob Jones* Court noted that all branches of government were in unanimous agreement regarding this national policy. In addition, many of the cases striking down racial discrimination were unanimous (*Brown v. Board of Education*, **42** *Loving v. Virginia* **43**). On the issue of same-sex marriage, the people, the respective branches of government, and indeed the Court itself remains sharply divided.

Fourth, even if the foregoing were not the case, there are competing First Amendment and statutory concerns that must be balanced against any Constitutional concerns arising from *Obergefell.*

It is also worth noting that even with the tremendous public policy against racial discrimination, nothing in the *Bob Jones* decision would have prevented Congress from overriding the Service's decision regarding private schools. In other words, the Court did not hold that the Equal Protection Clause, the Due Process Clause, or any other clause or statute *required* the IRS to withhold tax exemption for the two schools. Rather, the uniquely clear public policy simply meant that the Service's position on revocation was not barred as a matter of law.

Without doubt, the *Obergefell* decision is one that offers little, if any, middle ground regarding its legal framework or the underlying issues addressed. Support it or not, one can hope that a decision that ostensibly celebrates diversity will not be successfully used to impair or limit the philanthropic choices of millions of religious donors. As Justice Powell wrote in his *Bob Jones* concurrence regarding the importance of tax exemptions, "Given the importance of our tradition of pluralism, [t]he interest in preserving an area of untrammeled choice for private philanthropy is very great." **44**

1 *Obergefell v. Hodges,* 576 U.S. ___ (No. 14556).

2 Elliot, "Older Gays and Lesbians Greet Marriage Ruling With Disbelief," *Time,* 6/26/15, available at http://time.com/3937989/gay-marriage-older-americans/.

3 Oppenheimer, "Now's the Time to End Tax Exemptions for Religious Institutions," *Time,* 6/28/15, available at http://time.com/3939143/nows-the-time-to-end-tax-exemptions-forreligious-institutions/.

4 "A Win on Marriage-Now Protect Faith," Wall St. J., 6/30/15, available at www.wsj.com/articles/SB12351676079200283713404581079980316058542.

5 **52 AFTR 2d 83-5001** 461 US 574 76 L Ed 2d 157 83-1 USTC ¶9366 1983-2 CB 80 (1983).

6 *Bob Jones*, 461 U.S. at 580-81.

7 The Court actually stated that this was the case until 1970 (*Bob Jones*, 461 U.S. at 577), but that is an oversimplification of the issue from 1965 to 1970, since the IRS modified its position several times during that period.

8 *Green v. Kennedy*, **25 AFTR 2d 70-508** 309 F Supp 1127 70-1 USTC ¶9176 (DC D.C., 1970).

9 *Bob Jones*, 461 U.S. at 577.

10 *Green v. Connally*, **28 AFTR 2d 71-5164** 330 F Supp 1150 71-2 USTC ¶9529 (DC D.C., 1971).

11 1971-2 CB 230.

12 *Bob Jones*, 461 U.S. at 586.

13 *Bob Jones*, 461 U.S. at 599.

14 The un-paginated transcript of the oral argument, as well as the audio files, are available at www.oyez.org/cases/1980-1989/1982/1982_81_3 (hereinafter, the "*Bob Jones* Transcript").

15 Once Ronald Reagan was elected President, the Justice Department no longer supported affirmance of the lower court's ruling in favor of the IRS, and the Supreme Court asked Mr. Coleman to argue for affirmance.

16 *Bob Jones* Transcript.

17 *Id*.

18 *Id*.

19 *Id*.

20 *Id*.

21 *Bob Jones*, 461 U.S. at 592.

22 *Bob Jones*, 461 U.S. at 592. This same emphasis that no doubt can remain regarding the public policy is stated again on page 598 of the majority's opinion.

23 *Bob Jones*, 461 U.S. at 593.

24 *Bob Jones*, 461 U.S. at 601.

25 *Bob Jones,* 461 U.S. at 598.

26 Justice Powell argued: "Even more troubling to me is the element of conformity that appears to inform the Court's analysis. The Court asserts that an exempt organization must 'demonstrably serve and be in harmony with the public interest,' must have a purpose that comports with 'the common community conscience,' and must not act in a manner 'affirmatively at odds with [the] declared position of the whole Government.' Taken together, these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the Government in carrying out governmentally approved policies. In my opinion, such a view of 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, nonprofit groups receive tax exemptions because 'each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.' *Walz* [*v. Tax Commission of City of New York*, 397 US 664 25 L Ed 2d 697 (1970)], at 689 (concurring opinion). Far from representing an effort to reinforce any perceived 'common community conscience,' the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. *Bob Jones*, 461 U.S. at 609 (Powell, J., concurring in part and in the judgment).

27 *Bob Jones,* 461 U.S. at 598, fn. 23.

28 *See Bob Jones*, 461 U.S. at 622 (Rehnquist, J., dissenting), 607 (Powell, J., concurring in part and in the judgment), 594-596 (Opinion of the Court).

29 Even today, a private school (particularly in the South) with a racially nondiscriminatory policy but

no racial diversity in its faculty and student body would likely face a difficult exemption fight. In applications for **Section 501(c)(3)** recognition of houses of worship, the author has never been asked the racial makeup, and there are numerous churches, synagogues, and mosques with little or no racial diversity that maintain their exempt status.

30 539 US 558 156 L Ed 2d 508 (2003).

31 570 U.S. ____ (2013).

32 *Lawrence,* 539 U.S. at 574.

33 Windsor, 570 U.S. ____, at 20 (quoting *Department of Agriculture v. Moreno*, 413 US 528 37 L Ed 2d 782 , 534-35).

34 Windsor, 570 U.S. ____, at 21-22, 25-26.

35 *Obergefell*, 576 U.S. ___ , slip op. at 8.

36 *Id.* at 15-19.

37 *Id.* at 17.

38 Transcript of the oral argument of *Obergefell v. Hodges* at 38, available at www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf.

39 *Obergefell*, 576 U.S. ___ , slip op. at 27.

40 *Id.* at 28 (Roberts, C.J., dissenting).

41 *Id.* at 7 (Alito, J., dissenting).

42 347 US 483 98 L Ed 873 (1954).

43 388 US 1 18 L Ed 2d 1010 (1967).

44 *Bob Jones*, 461 U.S. at 609-610 (Powell, J., concurring in part and in the judgment). *Jackson v. Statler Foundation*, **33 AFTR 2d 74-1151** 496 F2d 623 74-1 USTC ¶9363 (CA-2, 1974) (Friendly, J.,

dissenting from denial of reconsideration en banc).