ANTIDISCRIMINATION AND TAX EXEMPTION

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The Supreme Court held, in Bob Jones University v. United States*, that violations of fundamental public policy—including race discrimination in education—disqualify an entity for tax exemption. The holding of the case was broad, and its results cohered with the ideals of progressive society: the government ought not to subsidize discrimination, particularly of marginalized groups. But almost four decades later, the decision has never realized its antidiscriminatory potential. The Internal Revenue Service (IRS) has limited implementation to the narrowest facts of the case. The scholarly literature has not formulated a systematic account of how to enforce the* Bob Jones *regime, in light of the expansion of antidiscrimination protections and the Court's reasoning that is deeply rooted in common-law charity. At the same time, tax-exempt entities engage in a smattering of discriminatory activities, often with impunity.*

This Article argues for extending Bob Jones *enforcement to antidiscrimination on the basis of all protected traits. It first shows, through an examination of IRS written determinations, the inadequate scope of implementation: the agency has limited denials of tax exemption to racially discriminatory schools. Second, it contends that the goals of antidiscrimination and common-law charity coincide. Both aim to ameliorate inequality by facilitating the entry of marginalized populations into the labor market. This affinity further justifies the Court's holding that tax exemption requires conformity to the requirements of charity and established public policy. Third, the Article offers implementation strategies to minimize backlash, and paves a path toward an administrative model of antidiscrimination enforcement. As the Biden Administration continues to implement* Bostock *in its efforts to strengthen the*

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federal antidiscrimination regime, Bob Jones *could serve as a potent mechanism of advancing civil-rights enforcement.*

INTRODUCTION

In 1983, the Supreme Court held, in *Bob Jones University v. United States*, that entitlement to federal tax exemption requires meeting common-law standards of charity, which include serving a public purpose and not violating established

public policy.[1] In that consolidated case, two religiously affiliated educational institutions—Bob Jones University and Goldsboro Christian Schools—discriminated against Black applicants and students on the basis of their race.[2] Those practices, the Supreme Court explained, violated our country's fundamental policy commitment—evidenced by case law, civil-rights statutes, and executive-branch actions—to racial nondiscrimination in education.[3] Religious freedom was no defense, as the government demonstrated a compelling, "overriding" interest in eradicating discrimination. This interest substantially outweighed any burden that loss of tax exemption might place on free exercise.[4] Despite falling facially under section 501(c)(3) of the Internal Revenue Code, neither Bob Jones University nor Goldsboro Christian Schools qualified for tax exemption.[5] The Court's decision represented the culmination of over a decade of judicial efforts and administrative constitutionalism to curb the rise of racially discriminatory private schools that, in effect, preserved segregation in the South.[6] The holding of the case was broad: violation of funda-

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1 Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

2 Bob Jones University prohibited interracial dating and admitted only unmarried Black students or Black students married to other Black individuals, while Goldsboro Christian Schools accepted only students who were white or had one white parent. Both institutions justified their practices on the basis of their interpretation of the Bible. *Id.* at 580, 583; *see also* Dyllan Moreno Taxman, *What About* Bob*? The Continuing Problem of Federally-Subsidized LGB Discrimination in Higher Education*, 34 WISC. J.L. GENDER & SOC'Y 39, 42 (2019) (explaining how Bob Jones University denied admission to interracial couples and prohibited interracial dating); Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?* 8 STAN. J. C.R & C.L 123, 147 (2012) ("Goldsboro . . . said it excluded black students because mixing of the races violates God's law mandating racial purity."); Olatunde Johnson, *The Story of* Bob Jones University v. United States *(1983): Race, Religion, and Congress's Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 128 (William N. Eskridge, Philip P. Frickey & Elizabeth Garrett eds., 2011) (providing an overview of the background).

3 *See Bob Jones Univ.*, 461 U.S. at 592–97.

4 *Id.* at 603–04; *see also infra* subpart III.C (explaining that denial of tax exemption does not constitute a "substantial burden" for purposes of the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA)).

5 *See Bob Jones Univ.*, 461 U.S. at 595–99, 605; *see also* 26 U.S.C. § 501(c)(3) (2018) (exempting "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" from federal income taxation).

6 *See* INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION: PRIVATE SCHOOLS 1–3 (1980), https://www.irs.gov/pub/irs-tege/eotopicd80.pdf [https://perma.cc/W85E-CFSL] (detailing the judicial and administrative efforts to regulate discriminatory private schools); Daniel L. Johnson, Jr., Note, *Federal Taxation—*Bob Jones University v. United States*: Segregated Sectarian Education and IRC Section 501(c)(3)*, 62 N.C. L. REV. 1038, 1038 (1984) (linking the rise of racially discriminatory private schools to the efforts to preserve

mental public policy disqualifies an entity for tax-exempt status. The results of the holding cohered with the ideals of progressive society: the government ought not to subsidize discrimination, particularly of marginalized groups.[7]

Nonetheless, *Bob Jones* has never lived up to its antidiscriminatory potential. In the past few decades, the Internal Revenue Service (IRS) has limited the application of *Bob Jones* almost entirely to the facts of the case: private, religious schools with racially discriminatory practices in admissions.[8] The IRS's narrow approach to regulatory implementation clashes with *Bob Jones*'s broad holding that entitlement to tax exemption requires compliance with fundamental public policy, in particular antidiscrimination norms.[9] This dissonance is striking because the past few decades have witnessed a dramatic expansion in the federal antidiscrimination regime.[10] Since 1964, traits protected by federal civil-rights statutes have

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segregation). The IRS first announced, in 1965, that it would suspend actions on applications for tax exemption by segregated schools, before concluding, in 1967, that it had authority to deny tax exemption only to public schools receiving state aid under Title VI. *See* Paul B. Stephan III, Bob Jones University v. United States*: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33, 56 (describing the 1965 announcement); John M. Spratt, Jr., *Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation*, 12 WM. & MARY L. REV. 1, 6–7 (1970) (quoting a 1967 IRS news release introducing the new policy). In *Green v. Connally*, a federal district court permanently enjoined the IRS from granting tax exemption to racially discriminatory private schools in Mississippi. Green v. Connally, 330 F. Supp. 1150, 1179 (D.D.C. 1971), *aff'd per curiam sub nom.*, Coit v. Green, 404 U.S. 997, 997 (1971). The IRS's subsequent denials of tax-exempt status to Bob Jones University and Goldsboro Christian Schools then formed the basis of the litigation that eventually reached the Supreme Court. *See* Taxman, *supra* note 2, at 42–44.

7 Russell J. Upton, Note, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax Exempt Status*, 50 AM. U. L. REV. 793, 800 (2001) (explaining that the Court "did not compel the University to stop discriminating, but decided that the government should not subsidize such discrimination"). For a discussion of whether the federal tax benefits accorded to charitable organizations constitute "subsidies," see *infra* section III.C.2.

8 *See infra* subpart I.C. In a few other rulings, the IRS has relied on *Bob Jones* to deny tax exemption to entities that promote polygamous marriage. *See* I.R.S. Priv. Ltr. Rul. 201325015 (June 21, 2013).

9 *See Bob Jones Univ.*, 461 U.S. at 595–99, 604.

10 *See* Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 90–94 (2012).

grown to include age,[11] pregnancy,[12] and disability.[13] In *Bostock v. Clayton County*, the Supreme Court incorporated sexual orientation and transgender status into the protection afforded by Title VII.[14] Given this evolution, it is unsurprising that antidiscrimination law now plays a central role in effectuating equality and, in the words of a leading scholar, has driven "important and far-reaching changes in the social practices of gender and race."[15] But despite this evolving antidiscriminatory landscape, IRS enforcement of *Bob Jones* remains frozen in time.

As a result, in part, of the IRS's under-enforcement, tax-exempt entities, particularly religious institutions, today engage in a wide range of discriminatory activities.[16] In one representative case, a longtime teacher at a religiously affiliated school, Tabatha Hutson, became pregnant out of wedlock.[17] Upon learning the news, Hutson's supervisor fired her and advised that she could "straighten racks at SteinMart [sic]," a discount clothing store.[18] Tellingly, the father of Hutson's child also worked at the school but was not fired. As a matter of sex discrimination, Hutson's employer clearly treated similarly situated employees differently because of their sex. As a matter of pregnancy discrimination, should the employer proffer premar-

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11 *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (codified at 29 U.S.C. § 603) (prohibiting adverse employment decision against an individual on the basis of age).

12 *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e) (amending the Civil Rights Act of 1964 to classify pregnancy and childbirth as falling under sex discrimination, and overriding the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125, 135 (1976), which held that pregnancy discrimination did not constitute sex discrimination).

13 *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 102, 202, 104 Stat. 327, 331–32, 337 (codified as amended at 42 U.S.C. §§ 12112, 12132) (prohibiting disability discrimination in employment and public services).

14 Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020); *see also* Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 4–11 (2020) (providing the political context in which *Bostock* was decided and explaining its new-textualist approach to statutory interpretation).

15 Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 8–14, 40 (2000).

16 *See infra* notes 24–27 and accompanying text (describing the range of discriminatory activities undertaken by tax-exempt institutions). *See generally infra* subpart I.C (describing the IRS's enforcement of the fundamental public policy standard).

17 Hutson v. Concord Christian Sch., LLC, No. 3:18-CV-48, 2019 WL 5699235, at *1–4 (E.D. Tenn. Nov. 4, 2019).

18 Complaint at 4, *Hutson*, No. 3:18-CV-48; Stein Mart, Inc., Annual Report (Form 10-K) 3 (June 15, 2020).

ital sex[19] as a nondiscriminatory reason for terminating Hutson's employment as part of the *McDonnel Douglas* burden-shifting framework,[20] there is substantial evidence that the proffered reason is mere pretext. This would have been an easy case if the employer had no religious affiliation, but the federal district court refused to grant trial. Relying on *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[21] the trial court applied the ministerial exception, which exempts religious institutions from employment-discrimination challenges by ministerial employees, and granted summary judgment for the employer.[22] It did so even though Hutson was responsible for secular instruction and had no religious training.[23]

Unfortunately, Hutson's experience is hardly rare: religious institutions routinely undertake adverse employment actions against employees because of protected traits and often do so with impunity.[24] The discriminatory practices go beyond

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19 Federal appellate courts have generally categorized premarital sex as falling outside of the protections of the Pregnancy Discrimination Act, and consequently a nondiscriminatory ground of adverse employment actions. *See* Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1319–20 (11th Cir. 2012) ("Title VII does not protect any right to engage in premarital sex, but as amended by the Pregnancy Discrimination Act of 1978, Title VII does protect the right to get pregnant."); Cline v. Cath. Diocese of Toledo, 206 F.3d 651, 666 (6th Cir. 2000) (holding that premarital sex constitutes a legitimate, nondiscriminatory ground for termination). Although premarital sex that does not result in pregnancy may conceivably fall outside of pregnancy discrimination, it is difficult to see how discrimination because of premarital sex that ultimately results in pregnancy can be legitimate. In this sense, some of the appellate courts' reasoning resurrects the specter of the now-repudiated logic behind *General Electric Co. v. Gilbert*, 429 U.S. 125, 135 (1976).

20 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799–807 (1973).

21 Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (holding that the ministerial exception to employment discrimination lawsuits can be applied to a teacher who, in addition to secular instruction, also teaches daily religious classes).

22 *Hutson*, 2019 WL 5699235, at *1.

23 *Id.* at *5.

24 *See, e.g.*, Aparicio v. Christian Union, Inc., No. 18-CV-0592 (ALC), 2019 WL 1437618, at *10 (S.D.N.Y. Mar. 29, 2019) (concluding that the defendant's policy reserving executive positions for men cannot be challenged due to the Free Exercise Clause); Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803, 806 (D.S.C. 2018) (holding that the employee, a faculty member, may not bring discrimination claims on the basis of race, sex, or national origin against the Christian university where she taught); Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1168–69 (N.D. Ind. 2014) (denying the employer's summary judgment motion with respect to the employee's Title VII claims, which she brought after the Catholic school fired her for undergoing in vitro fertilization); Complaint at 5, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195 (S.D. Ind. 2020) (alleging that a guidance counselor at a Catholic school was given the options of divorcing her wife, being fired, resigning, or "keeping quiet" for the remainder of her contract after a local parishioner obtained a copy of her same-sex marriage certificate); Demkovich v. St. Andrew the Apostle Parish, 3 F.4th

the employer-employee relationship: churches and religiously affiliated institutions have sparked controversy for their ban of interracial marriage,[25] their refusal to recognize same-sex marriage,[26] and their denials of membership to LGBTQ, disabled, and elderly worshippers.[27] Even more alarming is the rise of white-only churches that exploit religious doctrine to further the goals of white supremacy and former President Trump's

968, 973 (7th Cir. 2021) (en banc) (holding that a hostile-environment claim filed by a choir director, whose supervisor made humiliating remarks about his sexual orientation and weight, falls under the ministerial exception).

25 *See* Christina Ng, *Kentucky Church Bans Interracial Couples*, ABC NEWS (Dec. 1, 2011), https://abcnews.go.com/US/kentucky-church-bans-interracial-couples/story?id=15065204 [https://perma.cc/F323-B8U5]; P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing "Christian Belief." It's Far from the First to Do So*, VOX (Sept. 3, 2019), https://www.vox.com/identities/2019/9/3/20847943/mississippi-event-hall-interracial-couple-wedding-religious-exemption [https://perma.cc/Z9HU-WE2B]. The Kentucky church later nullified the decision to ban interracial marriage, but not before a Change.org petition emerged, pleading that the church should not receive tax-exempt status for "promoting racism." *Want Them to Lose Their Tax Exempt Status Due to Racism*, CHANGE.ORG (2012) https://www.change.org/p/the-president-of-the-united-states-want-them-to-lose-their-tax-exempt-status-due-to-racism [https://perma.cc/2CK5-ZRCR] (showing a petition to the Glunare Freewill Baptist Church). Some churches have also refused to officiate non-white marriage ceremonies that do not involve a couple of different races, but those instances are relatively uncommon. *See* Alon Harish, *Mississippi Church Refuses to Marry Black Couple*, ABC NEWS (July 28, 2012), https://abcnews.go.com/US/mississippi-church-rejects-black-wedding/story?id=16878536 [https://perma.cc/Z6GN-W3XG].

26 *See, e.g.*, Complaint at 3, Holladay Inv'rs, Inc. v. Holy Rosary Church, No. 18CV20835 (Or. Cir. Ct. May 22, 2018) (alleging that the Church prohibited the management company from renting out space to LGBTQ organizations); *What Is the Church's Position on Homosexuality?*, UNITED METHODIST CHURCH, https://www.umc.org/en/content/ask-the-umc-what-is-the-churchs-position-on-homosexuality [https://perma.cc/E8EV-HFUN] (last visited Apr. 4, 2022) ("Pastors may not be 'self-avowed, practicing homosexuals' and may not conduct ceremonies that celebrate same-sex weddings or unions. Such ceremonies also may not be held on church property.").

27 *See* Sarah Pulliam Bailey, *A Methodist Church's Revitalization Plan Raises Questions for Older Members*, WASH. POST (Jan. 22, 2020), https://www.washingtonpost.com/religion/2020/01/22/church-allegedly-asked-older-members-leave-leaders-say-that-didnt-actually-happen [https://perma.cc/J9BK-9CQ2] ("One 70-year-old member called the church leaders' decision to fold temporarily to start a new congregation 'age discrimination.'"); Antonia Noori Farzan, *An Autistic Boy Was Denied First Communion Because He Can't Tell Right from Wrong, His Family Says*, WASH. POST (Feb. 28, 2020), https://www.washingtonpost.com/nation/2020/02/28/autistic-boy-denied-communion-church [https://perma.cc/AM89-TJHB]; Marina Pitofsky, *Judge in Same-Sex Marriage Denied Communion at Michigan Catholic Church*, THE HILL (Nov. 30, 2019), https://thehill.com/blogs/blog-briefing-room/news/472487-judge-in-same-sex-marriage-denied-communion-at-michigan [https://perma.cc/U2S5-PB5M].

attempts to undermine our democratic institutions.[28] Of course, not all of these instances present viable legal actions even if they involve purely secular parties, but the range of discriminatory practices runs the gamut of protected classes under federal antidiscrimination statutes.

This twin doctrinal development—including more marginalized groups under protection while exempting more interest groups from the obligation to comply with antidiscrimination law—reached a crescendo in the Supreme Court's 2019 term. The same Court that extended Title VII to the LGBTQ community also carved out an ever-increasing ministerial exception that allows religious institutions to discriminate against the LGBTQ community (among others) without legal consequences.[29]

In today's polarized political environment, how to—and whether we should—regulate religious institutions' noncompliance with antidiscrimination norms presents a live political debate and has elicited passionate responses from both sides of the ideological spectrum. In 2019, Beto O'Rourke, then a candidate for the Democratic presidential nomination, voiced his support for the controversial proposal to deny tax-exempt status to religious institutions that oppose same-sex marriage.[30] Despite his appealing rhetoric—"There can be no reward, no benefit, no tax break for anyone, or any institution, any organization in America, that denies the full human rights and the full civil rights of every single one of us"—his Democratic primary opponents quickly dismissed his views as divisive and running afoul of First Amendment values.[31] In the same year, the House Ways and Means Committee held a heated hearing

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28 *See, e.g.*, Talia Lavin, *White-Only Religious Groups Aren't New to America. Trump's Helped Reinvigorate Them.*, MSNBC (Dec. 18, 2020), https://www.msnbc.com/opinion/white-only-religious-groups-aren-t-new-america-trump-s-n1251624 [https://perma.cc/M8EF-635U] (documenting Trump-affiliated religious groups founded on "an abhorrence of 'mixed blood'" and with the goal of securing "a future for white children").

29 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (holding religiously affiliated schools immune from employment-discrimination lawsuits, where the employee has religious duties, broadly defined).

30 *See* Julia Manchester, *O'Rourke: Religious Institutions Should Lose Tax-Exempt Status if They Oppose Same-Sex Marriage*, THE HILL (Oct. 10, 2019), https://thehill.com/homenews/campaign/465344-orourke-religious-institutions-should-lose-tax-exempt-status-if-they-oppose [https://perma.cc/2KF7-ASX8].

31 *See* Quinn Gawronsky, *Warren, Buttigieg Reject O'Rourke Threat to Tax Anti-LGBTQ Churches*, NBC NEWS (Oct. 14, 2019), https://www.nbcnews.com/feature/nbc-out/warren-buttigieg-reject-o-rourke-threat-tax-anti-lgbtq-churches-n1066036 [https://perma.cc/3Y5F-HNQM].

on "how the tax code subsidizes hate."[32] The hearing featured voices of victims, including a survivor of the Pulse Nightclub shooting,[33] as well as somber testimonies of scholars and former IRS officials. While the Chairman of the Committee declared, "Groups that propagate white supremacy, anti-Semitism, hatred for the LGBTQ community, among others, do not deserve government subsidy through tax exemptions [because h]ate is not charitable,"[34] Professor Eugene Volokh argued that the government could not constitutionally distribute tax exemptions based on differences in viewpoints.[35] At stake, in addition to the tax-exempt status of many religious institutions, is also the deductibility of portions of the $125 billion charitable contributions given to religious institutions each year, which represents a substantial tax expenditure by the public fisc.[36]

This Article concerns how federal tax laws should treat institutions (in particular religious tax-exempt entities) that engage in discriminatory practices. It argues that enforcement of *Bob Jones*'s fundamental public policy doctrine should extend to all forms of statutorily recognized discrimination and, in the process, offers observations about the nature of charity and sketching a path toward administrative enforcement of antidiscrimination laws.

The Article aims to make three main contributions. First, it shows, through an examination of private letter rulings (PLRs), that the IRS has limited the implementation of the fundamental public policy doctrine to racially discriminatory private schools.[37] Second, by assessing the evolution of the common-law standard of charity (which *Bob Jones* requires all tax-exempt entities to meet[38]), it argues that the goals of antidiscrimination and common-law charity coincide: to ameliorate inequality by integrating marginalized populations into the labor market and, by extension, civil society.[39] This natural affinity between antidiscrimination and charity, together with

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32 *How the Tax Code Subsidizes Hate: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 116th Cong. (2019) [hereinafter *Hearing*].

33 *Id.* at 14–15 (statement of Brandon Wolf, survivor of Pulse Nightclub shooting).

34 *Id.* at 8–9 (statement of Congressman Richard E. Neal, Chairman, H. Comm. on Ways & Means).

35 *Id.* at 21–22 (statement of Eugene Volokh, Professor, UCLA Sch. of L.).

36 *See* JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023, at 28 (2019).

37 *See infra* subpart I.C.

38 Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

39 *See infra* subpart II.B.

requirements of public benefit and concerns of distributive justice, leads to the conclusion that *Bob Jones* should apply not only to race discrimination in education but also discrimination on the basis of other protected traits. Objections from religious freedom are unavailing, because denials of tax-exempt status hardly qualify as a substantial burden.[40] Third, the Article proposes a burden-shifting framework under which the IRS can implement the fundamental public policy doctrine.

The remainder of this Article proceeds as follows. Part I introduces the doctrinal framework and the regulatory background. It surveys the existing literature, which does not offer a systematic treatment of federal tax exemption in the context of expanding antidiscrimination protections. It also situates the IRS's regulatory trajectory within the broader scholarly discourse on administrative constitutionalism. Part II argues that common-law charity, the public-benefit principle, and concerns of distributive justice all support extending the implementation of *Bob Jones* to the full panoply of federal antidiscrimination law. Part III addresses objections, including from religious freedom and the Religious Freedom Restoration Act (RFRA), and shows that they are unavailing. Part IV considers various approaches to implementation. It then sketches a path toward administrative enforcement of statutory antidiscrimination protections.

I
DOCTRINAL, REGULATORY, AND SCHOLARLY BACKGROUND

A. Section 501(c)(3)

Section 501(c)(3) of the Internal Revenue Code lays out the tax-exemption requirements for charitable organizations, described as:

> 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 . . . , 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 state-

40 *See infra* subpart III.C.

> ments), any political campaign on behalf of (or in opposition to) any candidate for public office.[41]

Regulations promulgated by the Treasury Department collapse the statutory requirements into a two-part test that applicants must satisfy to qualify for tax-exempt status. Under the organizational test, the applicant's articles of organization must limit the purpose of the organization to one of the specified exempt purposes and cannot empower the organization to engage in any activity unrelated to those exempt purposes.[42] Under the operational test, the applicant will be regarded as operating *exclusively* for an exempt purpose if (1) the applicant *primarily* engages in activities in furtherance of the exempt purpose, (2) the applicant's earnings do not benefit private individuals, and (3) the applicant does not substantially engage in lobbying and political-campaign-related activities.[43] For the purposes of this Article, most applicants for tax exemption readily satisfy this set of statutory and regulatory requirements, especially since the Treasury regulations only require applicants to operate primarily for exempt purposes. In general, the agency denies tax-exempt status on these grounds only where the applicant has flagrantly violated the statutory requirements.[44]

Underlying section 501(c) is a long Anglo-American history of granting tax exemption to charitable organizations, as well as a judicial and administrative recognition that the statutory

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41 26 U.S.C. § 501(c)(3) (2018).

42 *See* Treas. Reg. § 1.501(c)(3)–1(b) (2017).

43 *See id.* § 1.501(c)(3)–1(c). In implementing section 501(c), the Treasury Department has changed the statutory requirement of *exclusive* operation for an exempt purpose to a requirement of *substantial* operation for an exempt purpose, replacing congressional policy with its own judgment. This unusual interpretation of the statutory language has sparked controversy in recent years because it has allowed a flood of conservative political organizations to qualify for tax exemption under section 501(c)(4) after *Citizens United v. FEC*, 558 U.S. 310 (2010). See Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2017); *The IRS's Targeting Scandal: Changing Stories of the Missing Emails: Hearing Before the Subcomm. on Econ. Growth, Job Creation & Regulatory Affairs of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 26–27 (2014) (statement of John Koskinen, Comm'r, IRS) (answering questions about why the IRS has substituted "primarily" for "exclusively" and whether its treatment of 501(c)(4) applications reflects a political targeting against conservative organizations).

44 *See, e.g.*, Living Faith, Inc. v. Comm'r, 950 F.2d 365, 376 (7th Cir. 1991) (denying tax-exempt status to a non-profit that operates publicly accessible vegetarian and health-food restaurants on the basis of its Seventh-Day Adventist beliefs); Church of Eternal Life & Liberty v. Comm'r, 86 T.C. 916, 928 (1986) (denying tax-exempt status where the church has paid for the founder's living expenses and purchased him a house).

requirements track the basic common-law concept of charity.[45] Ever since the original Statute of Charitable Uses of 1601,[46] English charities that confer public benefits have received at least partial exemption from local property taxes and full exemption from income taxes (beginning with the first Income Tax Act of 1842).[47] In the United States, charities have been exempt from state and local taxes since the colonial era.[48] In 1894, the Wilson-Gorman Tariff Act exempted "corporations . . . organized and conducted solely for charitable, religious, or educational purposes" from the first federal income tax imposed during peacetime.[49] Although the Supreme Court struck down the income tax as unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*,[50] the broad language of exemption survived into the Corporate Excise Tax Act of 1909[51] and, after the passage of the Sixteenth Amendment, the Income Tax Act of 1916.[52] Beyond the three original categories (charitable, religious, and educational), Congress later expanded exempt purposes to include, for example, organizations centered around literary, scientific, or cruelty-prevention efforts.[53] This statutory evolution evinces changing societal needs, but the common-law concept of charity remains at the core of the statute, as recognized by the IRS[54] and the Supreme Court itself in *Bob Jones*.[55]

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45 *See generally* John P. Persons, John J. Osborn, Jr. & Charles F. Feldman, *Criteria for Exemption Under Section 501(c)(3)*, *in* 4 DEP'T OF THE TREASURY, RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 1909–2024 (1977) (providing a history and general overview of the criteria for tax exemption under section 501(c)(3)).

46 Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.). For a more detailed discussion of this highly influential statute, see *infra* subpart II.A.

47 Persons, Osborn, Jr. & Feldman, *supra* note 45, at 1919.

48 *Id.* at 1923.

49 Wilson-Gorman Tariff of 1894, ch. 349, § 32, 28 Stat. 509, 556.

50 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 586 (1895).

51 Corporate Excise Tax Act of 1909, ch. 6, § 38, 36 Stat. 11, 113.

52 Revenue Act of 1916, ch. 463, § 11(a), 39 Stat. 756, 766.

53 *See, e.g.*, Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 227, 241 (adding literary purposes to the list of tax exemptions).

54 *See* Rev. Rul. 71-447, 1971-2 C.B. 230 ("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." (alteration in original) (emphasis added)); *see also* INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION: ACTIVITIES THAT ARE ILLEGAL OR CONTRARY TO PUBLIC POLICY 6–7 (1985), https://www.irs.gov/pub/irs-tege/eotopicj85.pdf [https://perma.cc/5TJN-Z2XS] (explaining that under *Bob Jones*, section 501(c)(3) imposes on tax-exempt entities the requirement of complying with common-law charity).

55 Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

B. *Bob Jones University v. United States*

In *Bob Jones*, this statutory history and language led the Supreme Court to affirm the IRS's authority to revoke the tax-exempt status of section 501(c)(3) organizations if they engage in activities contrary to fundamental public policy, including racial discrimination in education.[56] In articulating this rule, the Court took a highly purposive approach. By examining the overall statutory scheme instituted by the Internal Revenue Code, it found an underlying congressional intent that "entitlement to tax exemption depends on meeting certain common law standards of charity," which require the taxpayer both to serve a public purpose (as a positive requirement) and not to act contrary to established public policy (as a negative requirement).[57] The Court rejected the argument that the term "or" in the statutory phrase, "religious, charitable . . . *or* educational purposes," served a disjunctive function to sever the specifically enumerated tax-exempt purposes from the requirement of charity.[58] Instead, it looked to the similar language deployed in section 170 of the Internal Revenue Code. This provision for the deductibility of charitable contributions, according to the Court, reflected Congress's intention "to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind," by providing tax benefits to charitable organizations.[59] No 501(c)(3) organization, therefore, can escape the requirements of common-law charity.

Three aspects of *Bob Jones* are noteworthy for purposes of this Article. First, the Court focused on horizontal coherence in determining the content of fundamental public policy, which is not restricted to racial antidiscrimination. That is, compliance with fundamental public policy requires consistency with *current* public-law norms. Such norms can be found in statutory enactments, constitutional text, case law, and regulations.[60] In articulating the fundamental public policy against race dis-

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56 *See id.* at 592.

57 *Id.* at 586.

58 *Id.* at 585–86 (alteration in original) (emphasis added).

59 *Id.* at 588; *see also* 26 U.S.C. § 170(a) (2018) (providing a deduction for "charitable contribution").

60 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 70, 122–24 (1988) (distinguishing, for purposes of statutory interpretation, horizontal continuity, or the "coherence of rules and policies at any given time," from vertical continuity, or the "perseverance of an interpretation over time," and arguing that the Court ought to shift emphasis to horizontal coherence); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1013 (1989) (noting that horizontal coherence requires consis-

crimination, the *Bob Jones* Court itself looked to a variety of sources, including the Constitution (as interpreted in an "unbroken line of cases following *Brown v. Board of Education*"),[61] the intent of Congress (as codified in Titles IV and VI of the Civil Rights Act of 1964 and subsequent legislation),[62] and the judgment of the executive branch (as expressed by numerous executive orders dating from the Truman Administration).[63] The combined weight of this evidence demonstrates that "racial discrimination in education violates deeply and widely accepted views of elementary justice."[64] Importantly, the Court's approach does not single out racial discrimination as the *only* possible violation of public policy that could disqualify an entity for tax-exempt status. Instead, the broad holding suggests that discrimination on the basis of *any* protected trait can constitute a violation of fundamental public policy, the content of which evolves together with public-law norms.

Second, under *Bob Jones*, an entity stands to lose its tax-exempt status because it engages in discriminatory activities, *not* because its organizational purpose itself is discriminatory. That is, both Bob Jones University and Goldsboro Christian Schools lost their tax exemption because they discriminated against (current or prospective) Black students in pursuit of nondiscriminatory purposes (i.e., the advancement of education). As a result, the case stands for the strong proposition that violations of federal antidiscrimination norms are independently sufficient for denials of tax-exempt status, rather than the weaker view that denials of tax exemption require the entity itself be organized for a discriminatory purpose. An organization can very much meet the positive requirement (serving a public purpose) of *Bob Jones* by satisfying one of the statutorily specified exempt purposes and still fail to meet the requirement of charity because it engages in discriminatory activities.[65]

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tency "of a present decision with other sources of law (other statutes, common law decisions)").

61 *Bob Jones Univ.*, 461 U.S. at 593 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

62 *Id.* at 594 (citing, inter alia, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. §§ 2000c, 2000c-6)).

63 *Id.* at 594–95 (citing, inter alia, Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963)).

64 *Id.* at 592.

65 For a more detailed discussion of this distinction, see MATTHEW HARDING, CHARITY LAW AND THE LIBERAL STATE 206–08 (2014), which describes (and rejects as lacking in textual support) the claim that *Bob Jones* "might be interpreted as

Third, the Court's opinion reflected its position on the long-standing tax-policy debate about whether charitable organizations' tax-exempt status (and, for that matter, the deductibility of charitable contributions to donors) represents a government subsidy or an entitlement. This distinction is important because, as this Article will explain, RFRA limits the government's imposition of substantial *burdens* on the free exercise of religion.[66] Whether a denial of tax-exempt status constitutes a substantial burden (or a burden at all) obviously depends on whether religious institutions are entitled to tax exemption or are awarded tax exemption as government aid. In this regard, *Bob Jones* gestures toward recognizing tax exemption as a subsidy to the taxpayer but does not explicitly reach that holding. The majority notes that a grant of exemption or deduction is premised on the exempt entity's conferral of a "public benefit" that either supplements or fills a gap in government functions, because all other taxpayers are "indirect and vicarious 'donors.'"[67] Although this language does not go as far as holding that tax exemptions should be distributed like federal grants, it implies that exemption is more akin to a deviation from normal federal taxation rather than a natural result of it.

C. Regulatory Implementation

The magisterial language and broad reach of the majority opinion, as well as the induction of *Bob Jones* into the canon of statutory interpretation and constitutional law casebooks,[68] appeared to portend the arrival of a landmark case that would transform constitutional and administrative norms. In practice, however, denials of tax exemption by the IRS—for any reason, let alone because of a violation of fundamental public policy—have been exceedingly rare. In 2018, the IRS received 91,981 applications for tax-exempt status and denied only 72,

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resting on an inference that the true purpose of the university was in fact discriminatory, an inference drawn from the university's discriminatory activities."

66 *See* 42 U.S.C. § 2000bb–1(a) (2018); *infra* subpart III.C.

67 *Bob Jones*, 461 U.S. at 591.

68 *Cf.* Neal Devins, *On Casebooks and Canons or Why* Bob Jones University *Will Never be Part of the Constitutional Law Canon*, 17 CONST. COMMENT. 285, 292 (2000) (explaining that, for *Bob Jones* to be part of the constitutional law canon, scholars would need "to see constitutional law as a broad mosaic that includes both actors outside the courts and judicial interpretations that technically are about statutes, not the Constitution"). With the rise of administrative constitutionalism and its twin emphasis on agencies' implementation of constitutional norms and the statutory manifestation of the country's foundational commitments, *see infra* notes 116–122 and accompanying text, this moment may have arrived.

or 0.078%, of them.[69] Among religious and charitable organizations, the rate of denial was even lower—only 45, or 0.052%, of all applications were denied.[70] According to a recent empirical study, the most common reason for denying tax-exempt status is the applicant's failure to satisfy the organizational and operational tests specified by Treasury regulations, in particular a violation of the prohibition of private inurement.[71] This section examines all IRS written determinations since 2004 that deny tax-exempt status on the authority of *Bob Jones* and based on the applicant's violation of fundamental public policy. It shows that, in the area of antidiscrimination, the IRS has all but limited the application of *Bob Jones* to the facts of the case.

A methodological note first: I found a total of 16 IRS written determinations since 2004 that deny tax-exempt status due to violations of established public policy.[72] The miniscule num-

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69 INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2018, at 55 tbl.24a (2019).

70 *Id.* The IRS approved roughly 92% (83,866) of all applications for tax-exempt status and neither approved nor disapproved about 8% (8,043) of the applications (mostly because the applications were incomplete, or the applicants withdrew those applications prior to a decision).

71 *See* Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. 1, 30 (2016).

72 These written determinations are: I.R.S. Priv. Ltr. Rul. 201917008 (Apr. 26, 2019) (denying tax-exempt status to organization that promotes marijuana use); I.R.S. Priv. Ltr. Rul. 201712014 (Mar. 24, 2017) (revoking tax-exempt status for promoting civil disobedience against established federal policy); I.R.S. Priv. Ltr. Rul. 201531022 (July 31, 2015) (revoking tax-exempt status because acquiring reimbursement claims for oil spills for a fee is not "charitable" and does not lessen the burdens of government); I.R.S. Priv. Ltr. Rul. 201405022 (Jan. 31, 2014) (denying tax-exempt status to organization that promotes free speech in foreign countries for failing to show that freedom of speech is legal in countries outside of the United States); I.R.S. Priv. Ltr. Rul. 201333014 (Aug. 16, 2013) (denying tax-exempt-status to marijuana cooperative); I.R.S. Priv. Ltr. Rul. 201325015 (June 21, 2013) (denying tax-exempt status for promoting polygamous activities); I.R.S. Priv. Ltr. Rul. 201323025 (June 7, 2013) (same); I.R.S. Priv. Ltr. Rul. 201310047 (Mar. 8, 2013) (denying tax-exempt status for promoting polygamy, which it calls "Celestial Marriages [with] a plurality of wives"); I.R.S. Priv. Ltr. Rul. 201224036 (June 15, 2012) (denying tax-exempt status for distributing cannabis); I.R.S. Priv. Ltr. Rul. 201041046 (Oct. 15, 2010) (denying tax-exempt status because private school did not promote its racial nondiscrimination policy and did not conduct outreach to minorities); I.R.S. Priv. Ltr. Rul. 201036024 (Sept. 10, 2010) (denying tax-exempt status to school for presumptive race discrimination); I.R.S. Priv. Ltr. Rul. 201033039 (Aug. 20, 2010) (denying tax-exempt status to school that did not provide evidence to overcome inference of racial discrimination); I.R.S. Priv. Ltr. Rul. 200909064 (Feb. 27, 2009) (denying tax-exempt status for race discrimination); I.R.S. Priv. Ltr. Rul. 200826043 (June 27, 2008) (denying tax-exempt status to organization that promotes decriminalization of child pornography and consensual sex between adults and minors); I.R.S. Priv. Ltr. Rul. 200703039 (Jan. 19, 2007) (denying tax-exempt status to school for failing to

ber itself is evidence that the aspirational holding of *Bob Jones* has not translated into administrative reality.[73] In 2003, the D.C. Circuit ruled that the IRS must disclose to the public all written determinations that deny or revoke a taxpayer's tax-exempt status, invalidating previous Treasury regulations that prevented the disclosure of those determinations as contrary to the plain language of the Tax Reform Act of 1976.[74] The appellant in that case, Tax Analysts, later obtained a continuing Freedom of Information Act request and has published all IRS written denials or revocations of tax exemption in the online database of *Tax Notes*.[75] In order to arrive at my final sample, I examined all IRS written determinations from 2004 to the present that cite to *Bob Jones* (or contain the phrase "Bob Jones") in the *Tax Notes* database and cross-checked my results on Westlaw's database of IRS private letter rulings. I also conducted a search on both the *Tax Notes* database and Westlaw using the search string, "application for recognition of exemption from federal income tax" AND ("fundamental public policy" OR "established public policy"), to capture additional written determinations that deny tax-exempt status due to violations of public policy but do not cite to *Bob Jones*. This search yielded one additional result.

These denials and revocations can be divided into four categories based on their rationale: (1) illegality under federal statutes—in particular as related to marijuana use under the Controlled Substances Act and sexual abuse of minors under the Protection of Children Against Sexual Exploitation Act; (2) violations of generalized federal policies;[76] (3) promotions of polygamy—in particular among religious institutions; and (4) racially discriminatory schools. The first two sets of determinations are not relevant to this Article. They involve neither religious institutions nor antidiscrimination norms. But we may

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show race nondiscrimination); I.R.S. Priv. Ltr. Rul. 200447038 (Aug. 24, 2004) (same).

73 As already described, IRS denials of tax-exempt status are rare. But in the rare case of a denial, grounding the decision in violations of public policy is even rarer. A recent study has found 290 written determinations of denials of tax-exempt status based on private inurement, *see* Helge, *supra* note 71, at 31 tbl.2, compared to only 16 for violations of public policy.

74 Tax Analysts v. IRS, 350 F.3d 100, 104 (D.C. Cir. 2003).

75 *See Documents*, TAX NOTES, https://www.taxnotes.com/exempt-organizations/documents [https://perma.cc/AW58-7VE9] (last visited Dec. 3, 2021) (showing a database of documents for exempt organizations).

76 *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201712014, *supra* note 72 (explaining that organizations promoting civil disobedience, which is against public policy, do not qualify for tax-exempt status).

glean one pattern from these denials: the IRS appears to regard violation of a federal statute as per se illegality for purposes of triggering denials of tax-exempt status.[77] To be sure, the main operations of such organizations focus on the promotion of illegal activities. By contrast, religious institutions operate for clearly legal purposes—religious worship and education—but may engage in discriminatory practices alongside their main operations. Nonetheless, the IRS's strong position on violations of statutory prohibitions provides additional weight for the extension of *Bob Jones* into other areas of statutory violations (e.g., antidiscrimination statutes protecting traits other than race).

The denials based on promotions of polygamy reveal the IRS's approach to tax exemption for religious institutions. In a series of letter rulings in 2013, the IRS denied tax-exempt status to a group of churches that subscribe to "a religious belief known as 'Celestial Marriage' which includes [men taking] a plurality of wives."[78] These churches regard Celestial Marriages as "private religious relationship[s] between consenting parties of legal age" and do not allow their members to seek multiple marriage certificates from their respective state and local governments.[79] Despite the churches' denial of an equivalence between "Celestial Marriages" and secular marriages as recognized by state and local authorities, the IRS has concluded that Celestial Marriage proceedings show intent to enter into marital union and create common-law marriages as defined by state law.[80]

Importantly, the IRS considered and rejected the applicants' argument that "Celestial Marriages" represent a constitutionally protected exercise of the freedom of religion. Citing *Reynolds v. United States*, which concluded that criminalization of bigamy does not violate the Free Exercise Clause of the First Amendment,[81] the IRS found polygamy contrary to public policy, and summarily rejected the applicant's religious-free-

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77 *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200826043, *supra* note 72 (citing 18 U.S.C. § 2251 (2018) (prohibiting the sexual exploitation of minors)) (noting that "all charitable trusts (and by implication all charitable organizations, regardless of their form) are subject to the requirement that their purpose may not be illegal or contrary to public policy," and reasoning that violation of a federal criminal statute is thus sufficient for denying an application for tax-exempt status); *see also* I.R.S. Priv. Ltr. Rul. 201917008, *supra* note 72 (citing 21 U.S.C. § 841(a) (prohibiting the manufacture and distribution of controlled substances)).

78 I.R.S. Priv. Ltr. Rul. 201325015, *supra* note 72.

79 *See id.*

80 *See* I.R.S. Priv. Ltr. Rul. 201310047, *supra* note 72.

81 Reynolds v. United States, 98 U.S. 145, 166–67 (1878).

dom-based argument for tax exemption.[82] The underlying logic is that, if the federal government has constitutional power to prohibit or criminalize a type of conduct (e.g., bigamy) by statute, and if that statute, as applied to religious institutions performing the prohibited conduct as an exercise of their religion, does not violate the First Amendment, then the IRS can deny tax-exempt status to all applicants performing the prohibited conduct. That is, the IRS does not see religious freedom as imposing a heavier burden on its denial of tax-exempt status than on legislative prohibitions of a particular conduct. If Congress can prohibit *x* without impermissibly encroaching on religious liberty, then the IRS can deny tax-exempt status to organizations engaging in *x* on the ground that *x* is contrary to fundamental public policy, even if those organizations claim *x* as an exercise of their religion. This is intuitive. If the government can impose liability for engaging in an activity, then *a fortiori* the government can withhold a discretionary good (e.g., tax exemption) for engaging in that activity.

Six written determinations deny tax-exempt status to racially discriminatory schools. In these letter rulings, the IRS applied a highly rigorous review procedure. Private schools cannot overcome an inference of race discrimination unless they have implemented effective outreach programs that actually result in minority enrollment. Relying on *Green v. Connally*,[83] the IRS establishes a presumption of race discrimination if one of the following factors is present: formation or expansion of the school during the era of desegregation, absence of African American student enrollment or staff/faculty employment for a lengthy period of time, and operation for lengthy periods of time without a facially nondiscriminatory admission policy.[84] Overcoming this inference requires "clear and convincing evidence" that the school is no longer engaged in any racially discriminatory practices.[85] This may include "active and vigorous recruitment programs . . . or proof of continued meaningful public advertisements stressing the school's open admissions policy."[86]

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82 *See, e.g.*, I.R.S. Priv. Ltr. Rul. 201325015, *supra* note 72 (refusing to exempt a religious organization that "affirm[s] the practice of polygamy").

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

84 *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200703039, *supra* note 72 (refusing to exempt schools that cannot overcome the presumption of racial discrimination).

85 I.R.S. Priv. Ltr. Rul. 201041046, *supra* note 72.

86 I.R.S. Priv. Ltr. Rul. 200703039, *supra* note 72 (quoting the revised injunctions of Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.*, Coit v. Green, 404 U.S. 997 (1971)); *see also* INTERNAL REVENUE SERV., EXEMPT ORGANIZA-

In practice, these efforts must indeed be vigorous and meaningful for the school to qualify for tax-exempt status. One school was denied tax-exempt status even after implementing a minority outreach and scholarship program, on the ground that those programs were not active enough to result in actual African American enrollment (allegedly because a private school for African American children already existed in the area).[87] Another school was denied tax-exempt status after adopting and advertising its nondiscrimination policy in local newspapers and open houses, on the ground that the outreach program did not specifically address itself to African American communities.[88] These written determinations evince heightened scrutiny that is highly uncharacteristic of how the IRS—a chronically underfunded agency[89]—usually treats applications for tax exemption. Unsatisfied with paper adoptions of nondiscrimination policies or implementations of ineffective outreach programs, the IRS requires private schools to demonstrate—clearly and convincingly—that its efforts have come to full fruition before considering them for tax-exempt status.

Unfortunately, the IRS's treatment of racially discriminatory schools represents the exception rather than the rule. The IRS never invokes sex, age, disability, or sexual-orientation discrimination, for example, as a ground for denying tax-exempt status. This accords with the general guidance that the IRS has published. In a sample nondiscrimination policy that the IRS has drafted for purposes of satisfying tax-exemption requirements, an organization only needs to prohibit discrimination on the basis of race, color, and national and ethnic origin.[90] The latter two traits (color and national and ethnic origin) have been added only because the IRS sees them as equivalent to and constitutive of race discrimination.[91] In short, *when* the IRS detects potential race discrimination in

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TIONS CONTINUING EDUCATION: UPDATE ON PRIVATE SCHOOLS 1 (1982) ("Although the *Green* injunction was limited to organizations operating private schools in Mississippi, the Service subsequently adopted nationwide procedures requiring that private schools be operated on a racially nondiscriminatory basis in order to be recognized as tax exempt.").

87 *See* I.R.S. Priv. Ltr. Rul. 200909064, *supra* note 72.

88 *See* I.R.S. Priv. Ltr. Rul. 201036024, *supra* note 72.

89 *See* Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX L. 169, 169 (2016) (describing the IRS as "an agency in crisis—mired in scandal, chronically underfunded, overreliant on automation, and failing to provide taxpayers with the support they need to comply with the tax laws and pay their taxes").

90 Rev. Proc. 2019–22, 2019–22 I.R.B. 1260.

91 *See id.*

education—the specific fundamental public policy violation found in *Bob Jones*—it rigorously scrutinizes the organization before granting tax exemption. In the absence of this trigger, there is practically no review at all.

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An uneven doctrinal landscape emerges from this discussion. At the statutory level, section 501(c) of the Internal Revenue Code grants tax exemption to religious and educational organizations but incorporates common-law charity as a core requirement. From the doctrinal perspective, entities lose their tax exemption if they violate fundamental public policy, the content of which evolves with public-law norms. Given the evolution of federal civil-rights law in the past few decades, discriminatory activities on the basis of any protected trait should constitute a violation of fundamental policy. Both the statute and the case law, therefore, counsel denying tax exemption to organizations that engage in discrimination. The IRS, however, has limited the implementation of *Bob Jones* to race antidiscrimination in education, an approach that falls far short of the broad holding and aspirational goal of the case.

D. Scholarly Literature

The IRS's narrow approach to implementing *Bob Jones*'s doctrine of fundamental public policy mirrors the state of the scholarly literature. Previous scholarship in this area has focused on three themes: criticism of the Supreme Court's decision itself; reflections on the potential extension of the fundamental public policy framework to same-sex marriage after the Court's decision in *Obergefell v. Hodges*, especially given the concerns of Chief Justice Roberts;[92] and analysis of the conflict between religious freedom and civil rights, in particular those associated with the rights and conditions of employment. This section surveys these strands of existing literature, as well as the lively scholarly discourse about administrative constitutionalism, which the IRS's implementation of the fundamental public policy doctrine exemplifies.

First, scholars, particularly in the wake of the Supreme Court decision itself, have critically assessed the reasoning behind *Bob Jones*. In his foreword to the 1982 term, *Nomos and*

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92 Obergefell v. Hodges, 576 U.S. 644, 711–12 (2015) (Roberts, C.J., dissenting) (emphasizing the Solicitor General's acknowledgment, during oral argument, "that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage").

Narrative, Professor Robert Cover criticized the *Bob Jones* Court's lack of commitment to the antidiscrimination norm. Law consists not only in legal rules and institutions but also a normative universe filled with narratives and meanings—that is, a *nomos*.[93] Bob Jones University, together with other religious communities as amici, advanced a forceful claim of "nomic insularity," associated with autonomous communities that generate their own law and reject "participation in the creation of a general and public *nomos*."[94] The Court should have counteracted this claim of insularity (otherwise deserving of protection) with a narrative of constitutional redemption, envisioning the replacement of the existing state of affairs with a "fundamentally different reality."[95] In other words, the *Bob Jones* opinion falls short of articulating the necessary "constitutional commitment to avoiding public subsidization of racism," merely vindicating the IRS's administrative power without normative engagement with the demands of antidiscrimination.[96]

Other scholars have advanced different critiques of *Bob Jones*. Some have criticized the Court for recognizing the IRS's broad rulemaking authority—which empowers the executive branch to effectuate its political goals through tax laws—and failing to articulate a holding to ensure enforcement of its conclusion that tax-exempt status must reflect charitable values.[97] Because the IRS is subject to the President's control and the federal judiciary is insulated from democratic accountability, Congress can better formulate tax policy, including the

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93 Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983). The term *nomos* comes from the ancient Greek word, νόμος, which initially denoted custom or "habitual practice [or] use" and gradually evolved, in the classical period (fifth and fourth centuries, BCE) to refer to law, in particular general (quasi-constitutional) statutes as opposed to decrees that could not contravene those statutes. A GREEK-ENGLISH LEXICON 1180 (Henry George Liddell & Robert Scott eds., 1996). Professor Cover's association of *nomos* with a universe is non-accidental: according to Aristotle, law, or *nomos*, is rationality free from desire (made famous in the contemporary world by the fictional Harvard Law School Professor Stromwell in LEGALLY BLONDE 26:04–26:07 (Metro-Goldwyn-Mayer, 2001)), and the Greek word for universe, *cosmos*, literally meant "order." A GREEK-ENGLISH LEXICON, *supra*, at 985.

94 Cover, *supra* note 93, at 36, 44, 62.

95 *Id.* at 34.

96 *Id.* at 67.

97 Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of* Bob Jones University v. United States, 36 VAND. L. REV. 1353, 1354, 1368–71 (1983); Stephan III, *supra* note 6 (characterizing the decision as a partially developed revival of the public policy doctrine, which had given broad discretion to the government to deny tax advantages to taxpayers that violate some nontax norm of behavior).

policy for exemption from taxation.[98] Others have argued that the breadth of *Bob Jones*'s holding ignores the needs of a diverse society: the Court's judgment, by constraining generally available government funding based on viewpoints, forms part of a broader trend of "constitutional doctrine [that] has departed from our longstanding embrace of pluralism and the political arrangements that make pluralism possible."[99] Still more have commented on the unpredictable nature of the fundamental public policy framework.[100]

Second, the question whether religious institutions would lose their tax exemption for opposing same-sex marriage emerged in both the oral argument and the dissent of Chief Justice Roberts in *Obergefell v. Hodges*.[101] This prompted scholarly discussions about how (or whether) to extend the *Bob Jones* framework after the Court affirmed the fundamental right to marry. Some scholars have characterized the fundamental public policy framework as furthering the goals of deterrence rather than punishment, recommending that the federal government develop clear guidance and safe-harbor regimes specifying what triggers denials of tax exemption for violating public policy.[102] In particular, in contrast to judicially

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98 Galvin & Devins, *supra* note 97, at 1379–80; *see also* Neal Devins, *Tax Exemptions for Racially Discriminatory Private School: A Legislative Proposal*, 20 HARV. J. ON LEGIS. 153, 176–77 (1983) (providing a sample text for congressional enactment).

99 JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 8, 75 (2016) (contending, in addition, that "*Bob Jones*, while normatively attractive to almost everyone, is conceptually wrong"); *see also* Neal Devins, Bob Jones University v. United States*: A Political Analysis*, 1 J.L. & POL. 403, 405 (1984) (criticizing the Court's ruling in *Bob Jones* as overbroad because, inter alia, the Court overlooked the value of diversity among tax-exempt institutions).

100 Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 10–19 (arguing that, in *Bob Jones*, public policy not specifically articulated in any statute or precedent forms the basis of a legal rule—a weakness and an informality of law-creation contrary to the Burger Court's contemporary opinion in *INS v. Chadha*, 462 U.S. 919 (1983)).

101 Obergefell v. Hodges, 576 U.S. 644, 711–12 (2015) (Roberts, C.J., dissenting) (commenting that "the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage," and that the right to same-sex marriage may collide with free exercise); Transcript of Oral Argument on Question 1 at 38, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-566) (acknowledging that the tax-exempt status of an institution opposing same-sex marriage is "certainly going to be an issue").

102 Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to* Bob Jones*: Religious Tax Exemptions After* Obergefell, 92 IND. L.J. 1175 (2017); *see also* Michael A. Lehmann & Daniel Dunn, Obergefell *and Tax-Exempt Status for Religious Institutions*, 7 COLUM. J. TAX L. 7 (2016) (arguing that, on balance, *Obergefell* should change the IRS's determinations of tax-exempt status for institutions refusing to recognize same-sex marriage).

articulated standards (e.g., strict scrutiny) or congressional enactments (e.g., the Civil Rights Act of 1964), those scholars argue that a blacklist of impermissible discrimination, maintained by the Treasury Department, forges the best path forward given "the flexibility attendant to equal protection [and] . . . the nimbleness" of the Treasury Department.[103] On the other hand, more conservative commentators have forcefully argued against any extension of the fundamental public policy framework post-*Obergefell*. Some have deplored the lack of doctrinal clarity (and the associated issues of vagueness and lack of fair notice), as well as the vesting of excessive discretion in an agency without the requisite expertise.[104] Others have criticized the exclusion of groups from generally available government funding on the basis of viewpoint or ideology, given the demands of pluralism.[105] Still more have argued for a contraction of the *Bob Jones* doctrine, out of fear for "the potential to coerce private institutions serving a public purpose into compliance with administrative and judicial notions of appropriate behavior" without anchorage in statutory language or common law.[106]

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103 Brunson & Herzig, *supra* note 102, at 1210, 1215–19. The normative strand of this Article can be seen as an extension to this proposal: the Treasury blacklist, if used, should track the substance of the federal antidiscrimination regime. But importantly, while *Obergefell*'s affirmation of the fundamental right to marry represents a major victory for the LGBTQ-rights movement, *Bob Jones*'s fundamental public policy framework focuses on *antidiscrimination*, so is conceptually distinct from the support of or opposition to same-sex marriage. *See generally* WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS *passim* (2020) (describing the history and process of the lawsuit that carried the LBGTQ-rights movement to the U.S. Supreme Court).

104 *See* Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL'Y 255 (2017). However, the IRS *does* have extensive expertise in administering exemption from federal taxation. The IRS's lack of expertise is in *identifying* what policies are fundamental enough to disqualify an entity for exemption. If the IRS should instead deny exemption to entities that discriminate on the basis of protected traits that the federal government has already recognized, as this Article suggests, then the argument from lack of expertise becomes much weaker.

105 INAZU, *supra* note 99, at 66–80; *see also* Lloyd Hitoshi Mayer & Zachary B. Pohlman, *What is Caesar's, What is God's: Fundamental Public Policy for Churches*, 44 HARV. J.L. & PUB. POL'Y 145 (2021) (focusing on the application of the fundamental public policy framework to churches, as distinguished from other tax-exempt entities); Herman D. Hofman, *For Richer or for Poorer: How* Obergefell v. Hodges *Affects the Tax-Exempt Status of Religious Organizations That Oppose Same-Sex Marriage*, 52 GONZ. L. REV. 21, 24 (2016) (arguing that fundamental public policies arise "only in the context of a decades-long, concerted effort by all three branches of government to address an issue").

106 Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 KAN. L. REV. 397, 398 (2005); Timothy J. Tracey, Bob Jones*ing: Same-Sex Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status*, 11 FIU L. REV.

One difficulty surrounds some scholarship within this second strand. *Obergefell v. Hodges* concerns same-sex couples' constitutional right to *marriage*. By contrast, *Bob Jones* focuses on antidiscrimination. To be sure, these two doctrinal areas overlap, as evidenced by the Solicitor General's comment during oral argument that *Obergefell* could affect the tax-exempt status of religious institutions opposing same-sex marriage[107]—a suggestion that eventually led to then-IRS Commissioner John Koskinen's public statement that the agency does not view *Obergefell* as having changed the law applicable to section 501(c)(3) determinations or examinations.[108] But there is a conceptual distinction between extending state recognition of marital unions to same-sex couples, on the one hand, and prohibiting actors (including private ones) from differential treatment on the basis of enumerated traits in specified spheres of activity, on the other. That is, *Obergefell* might provide additional support for finding the state's normative commitment to LGBTQ equality. But *Bostock*, by broadening the federal antidiscrimination regime to include sexual orientation and transgender status, provides a much stronger justification for extending the enforcement of the fundamental public policy framework to those protected traits.[109]

Third, scholars have more broadly analyzed the conflict between religious freedom and civil rights, in particular those associated with the rights and conditions of employment.[110]

85, 94 (2015) ("[I]ncome tax exemptions provided to religious institutions are constitutionally mandated[,] and [ ] whatever interest the government has in eradicating sexual orientation discrimination does not justify setting this mandate aside."). But as subpart I.A–B, *supra*, and Part II, *infra*, argue, the holding of *Bob Jones* has a solid basis in common-law charity and the statutory purposes of tax exemption.

107 *See supra* note 101.

108 Letter from John A. Koskinen, Comm'r of the Internal Revenue Serv., to E. Scott Pruit, Att'y Gen. of Okla. (July 30, 2015) (on file with author).

109 Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

110 *See, e.g.*, Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 782 (2007) (identifying an inherent inconsistency in the exemption of religious groups from some antidiscrimination laws, but not others); Laura L. Coon, *Employment Discrimination by Religious Institutions: Limiting the Sanctuary of the Constitutional Ministerial Exception to Religion-Based Employment Decisions*, 54 VAND. L. REV. 481, 485 (2001) (arguing that in employment disputes involving religious organizations, courts should ask whether adjudicating the dispute would involve consideration of religious practice or doctrine, instead of applying the traditional ministerial exception analysis); Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 1, 4 (2016) (analyzing *Burwell v. Hobby Lobby*'s effect on LGBTQ-related employment discrimination); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to*

These three strands of scholarly engagement have shown the merits and deficiencies of the Court's fundamental-policy approach and offered innovative solutions to implement *Bob Jones* after *Obergefell*. But none has offered a systematic account of how the IRS and the courts should treat the fundamental public policy framework given the vast expansion of the federal antidiscrimination regime. Some of the most promising scholarship on this topic has been highly context-specific, arguing, for example, that *Bob Jones* should apply to sex discrimination, or that institutions of higher education should lose their tax exemption for discriminating against LGBTQ students.[111] Others have proposed drastic reforms such as the elimination of tax exemption for all religious institutions[112]—a step that, even if theoretically desirable, is not a decision for the courts or the IRS to make.[113]

This Article provides this missing account. It has already shown the limited extent of IRS enforcement through an exami-

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Religion, 81 CORNELL L. REV. 1049, 1059 (1996) (suggesting that the conflict between religious freedom and civil rights is best addressed and resolved through the lens of substantive equality).

111 *See* Caroline Mala Corbin, *Expanding the* Bob Jones *Compromise*, *in* LEGAL RESPONSES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 123 (Austin Sarat ed., 2012); *see* Taxman, *supra* note 2.

112 *See* Judith C. Miles, *Beyond* Bob Jones*: Toward the Elimination of Governmental Subsidy of Discrimination by Religious Institutions*, 8 HARV. WOMEN'S L.J. 31, 34, 58 (1985) (arguing that "eliminat[ing] religious organizations altogether from the list of institutions entitled to [tax-exempt] status . . . maximiz[es] religious liberty while minimizing unconstitutional governmental support of discrimination," while acknowledging that the "proposed tax policy is . . . eminently unrealistic" given the political environment). Another promising article explores the related, but much more limited, question of whether the IRS should apply constitutional law principles to charities, which are not government actors, in the context of determining potential public-policy violations of tax-exempt entities. *See* David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779 (2002).

113 Section 501(c)(3) of the tax code explicitly grants tax-exempt status to organizations "organized and operated exclusively for *religious*, charitable, scientific, testing for public safety, literary, or educational purposes." 26 U.S.C. § 501(c)(3) (2018) (emphasis added). Any departure from this unambiguous text and expression of legislative intent requires congressional action and cannot be unilaterally undertaken by the judiciary or administrative agencies. A somewhat more recent study (which still predates *Bostock* and the expansion of ministerial-exception doctrine, *see supra* note 29 and accompanying text) recommends precisely the route of adding a statutory nondiscrimination provision. Nicholas A. Mirkay, *Is It "Charitable" to Discriminate?: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45. But as the challenges associated with the Equality Act and the Do No Harm Act make clear, *see infra* notes 351–52 and accompanying text, legislative action is unlikely until a major breakthrough in congressional deadlock.

nation of the private letter rulings since 2004.[114] In part against calls to contract or limit the scope of the fundamental public policy doctrine to race-based discrimination in education only,[115] the next two Parts make the normative argument that *Bob Jones*'s implementation by the administrative state should evolve *with* the federal antidiscrimination regime, in particular given its conceptual affinity with common-law charity.

One final note on existing scholarship: while largely in agreement with Professor Cover's theoretical analysis in *Nomos and Narrative*, this Article argues that, especially with the rise of administrative constitutionalism, robust enforcement of the fundamental public policy doctrine by a judicially empowered agency can signal precisely the normative commitment that the Court's opinion may have lacked. In the past decade, scholars have engaged in a lively discourse about administrative constitutionalism, which broadly refers to agencies' and administrative actors' efforts to interpret and implement the norms embodied in the Constitution (as well as structural measures to "constitute" the administrative state).[116] This literature has shown the vast extent to which agencies have constructed and fleshed out constitutional norms.[117] It has documented the exceptional range of administrative elaboration of constitutional meaning, including the Washington Administration's construction of the constitutional status of Native Americans,[118] the Federal Communications Commission's creative interpretations of equal protection norms in adopting its equal employment rules,[119] administrators' roles in structuring so-

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114 *See supra* subpart I.C.

115 *See supra* note 106 and accompanying text.

116 For an excellent, early guide to this line of scholarship, see Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). *See also* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 497 (2010) (describing administrative constitutionalism as agencies' "tak[ing] constitutional values and concerns into account in their decisionmaking . . . , [thus] fostering a more affirmative and independent agency role in implementing constitutional requirements").

117 *See, e.g.*, Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1706 (2019) (suggesting that "administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States").

118 Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1019 (2015) (arguing that "the executive branch gave concrete meaning to the Constitution's sparse framework through extensive deliberations," which "emphasiz[es] the importance of constitutional understandings outside the courts").

119 Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 811–44 (2010).

cial welfare programs in accordance with their understanding of the Fourteenth Amendment,[120] and much more.[121] In particular, administrative constitutionalism is not limited to agencies' express interpretations of the federal Constitution (with a large-C) but also their implementation of the country's foundational norms, especially efforts to carry out statutory purposes "in a manner that is workable, coherent, and consistent with the nation's other normative commitments."[122] The IRS's implementation of the fundamental public policy doctrine, thus, exemplifies this administrative construction of the constitutional (with a small-C) commitment to antidiscrimination. The trajectory of its enforcement approach, however, illustrates the challenges of norm entrepreneurship by an agency bounded by its statutory mandate and its tendency to provoke democratic backlash.[123]

II
COMMON-LAW CHARITY AND ITS AFFINITY WITH ANTIDISCRIMINATION

This Part of the Article argues that the goals of common-law charity and antidiscrimination coincide.[124] It first provides

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120 Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 828–29 (2015); *see also* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 214 (2016) (discussing the administrative origins of poverty law).

121 Other representative works include: Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2143 n.26 (2014) ("The history of *jus sanguinis* citizenship, and its development in the hands of administrators charted in this Article, is a prime example of 'administrative constitutionalism.'"); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018). For more critical evaluations of administrative constitutionalism, see, for example, David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381, 1385 (2019) (criticizing administrative enforcement of antidiscrimination legislations as "inconsiderate of constitutional limitations on government authority in general, and especially of the limitations imposed by the First Amendment's protection of freedom of expression").

122 WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 24 (2010).

123 In particular, it is difficult for the IRS to engage in localized experiments of norm entrepreneurship—for example, expansive interpretations of constitutional norms—without provoking backlash from the public at large. Instead of elaborating on this issue, I leave it to future research.

124 By "antidiscrimination," I primarily refer to the statutory regime brought into place by legislations enacted since 1964 to prohibit discrimination on the basis of certain protected traits in education, employment, public accommodations, and other areas (as well as their associated judicial doctrine and interpreta-

an overview of the evolution of the concept of charity at common law. Second, it shows that common-law charity emerged and expanded in definition largely as a result of facilitating poor relief. In particular, the Statute of Charitable Uses of 1601 (whose definition of charity remained authoritative until at least the nineteenth century) was enacted alongside poor laws and identified as charitable efforts to facilitate the poor's entry into commerce and the labor market.[125] This coincides with the purpose of many antidiscrimination statutes: the amelioration of socio-economic inequality by integrating minorities into a meritocratic workplace. Discrimination on the basis of statutorily protected traits, therefore, not only violates fundamental federal policy but also runs counter to the core of the common-law concept of charity itself—the very basis for tax exemption.

A. The Evolution of Charity at Common Law

Charity at common law finds its origins in the Charitable Uses Act of 1601,[126] which aimed to curb the abuse of charitable trusts by setting up county commissions with power to investigate any breach or misadministration of charitable funds.[127] The Elizabethan statute was enacted during a period of social upheaval and economic distress. Plagues, agricultural failures, and political uprising had led to a dramatic rise in vagrancy, property crimes, and poverty levels.[128] From 1598 to

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tion by the executive branch), not the antidiscrimination principle embodied in, for example, the Fourteenth Amendment of the Constitution. For a classic exploration of the relationship between the two, see generally Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 4 (1976) (analyzing the relationship between the two through a defense of the antidiscrimination principle). *See also infra* notes 180, 184 and accompanying texts (describing, but not endorsing their application to the issue of tax exemption, certain views from constitutional antidiscrimination that privilege race as a protected trait).

125 *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY, 1532–1827, at 22–27 (1969).

126 *See, e.g.*, *id.* at 25 (arguing that the Statute of Charitable Uses "helped to draw definitively the outlines of 'legal' charity"); Rupert Sargent Holland, *The Modern Law of Charity as Derived from the Statute of Charitable Uses*, 52 U. PA. L. REV. 201, 203–04 (1904); Persons, Osborn, Jr. & Feldman, *supra* note 45, at 1912 (noting that the Statute of Charitable Uses "contained the first comprehensive definition of charitable purposes" in English law).

127 Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.). The full text of the statute can be found in JONES, *supra* note 125, at 224–25.

128 *See* Paul Slack, *Poverty and Social Regulation in Elizabethan England*, *in* THE REIGN OF ELIZABETH I 226–28 (Christopher Haigh ed., 1984) (noting the "contemporary perceptions that economic conditions had been deteriorating and that per capita incomes had fallen sharply"); James J. Fisherman, *The Political Uses of Private Benevolence: The Statute of Charitable Uses* 8–9 (Pace L. Sch. Working

1601, the Parliament passed a series of laws in order to provide welfare and working opportunities for the poor (and alleviate social problems such as vagrancy for which the poor was perceived to be responsible).[129] These poor laws specified procedures and penalties for vagabonds, in addition to setting up parishes as the administrative authorities for providing material relief to the poor.[130] Importantly, the Acts authorized parishes to set local tax rates whose proceeds could be used to take care of the disabled, generate employment for the working poor, and apprentice poor children.[131]

The Statute of Charitable Uses was integral to the poor laws of this period, as Parliament intended for private philanthropy to take on part of the task of poor relief.[132] Indeed, because compulsory taxation by the local parishes evolved from voluntary church giving, which replaced, almost dollar-for-dollar, the need for tax revenues from the "poor rates," the distinction between taxes and charitable contributions was murky during this period.[133] The fact that charitable funds reduced burdens on government revenues, as well as a widespread contemporary perception that charitable trusts were subject to fraud and abuse, resulted in the public regulation of

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Paper 487, 2008), https://core.ac.uk/download/pdf/46713595.pdf [https://perma.cc/LU32-K2Z7].

129 For a survey of the poor laws and regulations of charity in this period, as related to the relief of poverty, see, for example, Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2444–51 (2005); and Persons, Osborn, Jr. & Feldman, *supra* note 45, at 1913, which notes that poor relief was the key manifestation of the public-benefit principle in the Statute of Charitable Uses.

130 *See generally* PAUL SLACK, THE ENGLISH POOR LAW 1531–1782, at 10–11 (1995) (providing an overview of the poor laws enacted in the Elizabethan era). The penalties for vagrancy, which included whipping and imprisonment, were seen as a quid pro quo for public measures of poor relief. *See* Slack, *supra* note 128, at 222.

131 *See* An Act for the Relief of the Poor 1601, § 1, 43 Eliz. c. 2 (Eng.) (authorizing local parishes to raise "by taxation of every [i]nhabitant . . . in such competent sum and sums of money as they shall think fit[ ] a convenient stock . . . to set the poor on work . . . and towards the necessary relief of the lame, impotent, old, blind . . . and also for the putting out of such children to be apprentices").

132 *See, e.g.*, Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 512 (2010) (describing the scholarly view that common-law charity originates from encouraging "private charity to the poor to help ease the burden on the localities").

133 *See* Fisherman, *supra* note 128, at 28–29 (arguing that there was "little distinction between the kind of relief afforded by private charity and that provided by poor rates").

charities through the commissions set up by the Act of 1601.[134]

Although the procedures and mechanisms for regulating charities attained only dubious success, the Act contained a Preamble whose enumeration of charitable purposes continues to be highly influential today.[135] Under the Preamble, the following purposes qualified as charitable:

> Relief of aged, impotent and poor People, . . . Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, . . . Repair of Bridges, Ports, Havens, Causeways, Churches, Sea-banks and Highways, . . . Education and Preferment of Orphans, . . . Relief, Stock or Maintenance for Houses of Correction, . . . Marriages of Poor Maids, . . . Supportation, Aid and Help of young Tradesmen, Handicraftsmen, and Persons decayed, and . . . Relief or Redemption of Prisoners or Captives, and [] Aid or Ease of any poor Inhabitants concerning Payments of Fifteens, setting out of Soldiers and other Taxes . . . .[136]

The original charitable purposes, therefore, fall into three main categories. Unsurprisingly, given the contemporary enactment of poor laws and the social crises that the Act was intended to combat, poor relief constitutes the first, overriding principle of charity. Whether it comes in the form of direct material benefits (i.e., "Relief of aged, impotent and poor People") or indirect equipment with the skills and social capital necessary for economic advancement (i.e., "Education . . . of Orphans," "Marriages of Poor Maids," and "Supportation, Aid and Help of young Tradesmen"), poor relief always constitutes a charitable

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134 These origins of common-law charity provide some historical context to the Supreme Court's suggestion that taxpayers are vicarious donors when charitable entities are exempt from taxation. Exempting organizations from taxes and granting deductions to charitable contributions increase the tax burdens that the government has to impose on other taxpayers to generate a particular amount of revenue. Charities, therefore, should perform some type of public function that, if performed by the government, would increase public expenditures. This rationale (i.e., that charitable contributions replace governmental services) is explicit at the beginning of common-law charity: charitable funds reduced the local tax rates imposed for poor relief.

135 *See, e.g.*, Penina Kessler Lieber, *1601–2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 734 (2001) (noting that the "Preamble's charitable purposes continue to survive as good law under the Common Law of England").

136 Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.); *see also* Joseph Willard, *Illustrations of the Origin of* Cy Près, 8 HARV. L. REV. 69, 70–71 (1894) (showing that the list of charitable purposes contained in the Preamble first originated in the medieval poem, *Visions of Piers Plowman*).

purpose deserving of government support.[137] The two other categories of permissible charity focus on education and maintenance of certain public infrastructure. The commonality that links all purposes in the Preamble is public benefit. Because charitable funds qualify for subsidies and certain legal protections,[138] they must confer a benefit to an indefinite subset of the public (often those materially or otherwise deprived) that would incur government expenditures if provided by the state.

The Statute of Charitable Uses thus put forth a vision of charity centered on the conferral of a public benefit that both reduces the government's fiscal burden and provides the disadvantaged with either material welfare or the (educational and cultural) prerequisites for socioeconomic advancement. This vision has formed the core of the common-law concept from the seventeenth century to the present. In the next two centuries following the enactment of the Elizabethan statute, public benefit constituted the most important factor in establishing the charitable nature of an entity.[139] The 1805 decision of *Morice v. Bishop of Durham* made the Preamble's enumeration close to an *exclusive* list of charitable uses for the purpose of qualifying for the legal privileges accorded to charities.[140] The 1601 statute conspicuously left religion outside of charitable uses, precisely because the Elizabethan regulations set up parishes to facilitate poor relief, so that efficient employment of funds for certain religious purposes would not replace public expenditures for poverty.[141] But as poor relief shifted from the realm of

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137 Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.). Given this connection, it is unsurprising that the Treasury regulations implementing section 501(c)(3) list "[r]elief of the poor and distressed or of the underprivileged" as the first definition of charitable purpose. Treas. Reg. § 1. 503(c)(3)–1(d)(2) (1960).

138 *See* JONES, *supra* note 125, at 59–101 (documenting the equitable privileges accorded to charitable trusts, including the "refusal to allow charitable trusts to fail because of a defect of form" and application of the doctrine of *cy près* to save the charitable instrument from failure for indefiniteness at common law); Kimberley Scharf & Sarah Smith, *Charitable Donations and Tax Relief in the UK*, *in* CHARITABLE GIVING AND TAX POLICY: A HISTORICAL AND COMPARATIVE PERSPECTIVE 121 (Gabrielle Fack & Camille Landais eds., 2016) (commenting that England's 1799 income tax exempted charitable organizations "on the grounds that the activities of charitable organizations generated a 'public benefit'—i.e.[,] relieved pressure from the public purse"); *supra* notes 47–53 and accompanying text.

139 *See* JONES note 125, at 122 (suggesting that uses of funds that benefited the public "were *ipso facto* deemed charitable" in the eighteenth century).

140 Morice v. Bishop of Durham [1805] 10 Ves. 521, 541 (Ch.) (Eng.) (holding that charity means "either such charitable purposes as are expressed in the Statute [stat. 43 Eliz. c. 4] . . . , or . . . purposes having analogy to those").

141 *See* JONES note 125, at 31 (arguing that repair of the church building falls under the Statute of Charitable Uses because common law requires the physical maintenance of churches, so a charitable trust would free up parish budget for poor relief, and suggesting that other religious purposes do not fall under the

the local parish to a project of the state,[142] religion became a legitimate charitable purpose, since charitable funds for the sake of religion could then enable the church to devote more resources to supplement the government's efforts at alleviating poverty. In this way, by the late nineteenth century, charity at common law came to embrace four main "heads:" (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, and (4) other purposes beneficial to the community—each of which has at its core the performance of a public benefit that would otherwise require government expenditure.[143]

In the American context, the evolution of the legal concept of charity has followed a similar trajectory. During the colonial period, churches were granted exemption from local property taxation for their primary responsibility over poor relief.[144] During the nineteenth century, secular institutions assumed a more substantial role in providing welfare to the impoverished and gradually received property-tax exemption. In this "spontaneous process," charitable organizations started to perform a "public function" and relieve "the state of a burden which it had avowedly undertaken to bear" as almost a "quid pro quo" for immunity from taxes.[145] By the time Congress first drafted the language of federal tax exemption for charitable, religious, and educational institutions,[146] both the Statute of Charitable Uses—and its core principle of conferring a public benefit to the disadvantaged while reducing public expenditures—were well settled as the foundations of charity.[147] In enacting the Reve-

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Statute because the "efficient employment of [those] endowments could not . . . free parish funds for the relief of poverty").

142 *See generally* LYNN HOLLEN LEES, THE SOLIDARITIES OF STRANGERS: THE ENGLISH POOR LAWS AND THE PEOPLE, 1700–1948, at 42–144, 177–293 (1998) (providing an overview of the development of English poor laws after the Elizabethan era).

143 Income Tax Special Purposes Comm'rs v. Pemsel [1891] AC 531 (HL) (appeal taken from Eng.) ("'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.").

144 *See* Persons, Osborn, Jr. & Feldman, *supra* note 45, at 1919.

145 PHILIP ADLER, HISTORICAL ORIGIN OF THE EXEMPTION FROM TAXATION OF CHARITABLE INSTITUTIONS 73 (1922); *see also* Persons, Osborn, Jr. & Feldman, *supra* note 45, at 1923 (quoting ADLER, *supra*) ("In the nineteenth century, secular charitable institutions assumed a more significant role in the conduct of charitable work. . . . The *quid pro quo* which the private institutions received was immunity from taxation.").

146 *See supra* note 49 and accompanying text.

147 *See, e.g.*, Jackson v. Philips, 96 Mass. 539, 556 (1867) (defining charity as a gift "for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their

nue Act of 1938, for example, the House explicitly stated that tax exemption for "charitable and other purposes" is grounded in the fact that the "government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds."[148] Importantly, both direct welfare and indirect equipment of the skills for socioeconomic advancement qualified as charitable purposes, since making marginalized populations "accustomed to habits of industry and trained in some occupation" would reduce public spending on poor relief that would otherwise fiscally burden the state.[149] Common-law charity's emphasis on conferring benefits on an indefinite group of the poor survives, albeit in inconsistent forms,[150] in modern tax law. Tax exemption today requires certain charitable organizations to operate for the community benefit, which often involves the provision of public goods for free or at a low cost to the disadvantaged.[151]

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bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government"); Holland, *supra* note 126, at 201 (characterizing *Jackson v. Philips* as offering the "best definition of a legal charity"); *see also* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (AM. LAW INST. 2003) (explaining that the definition of charitable-trust purposes in the *Restatement* substantively follows the "general scope of charitable purposes in England[, which] was indicated over four centuries ago in the [P]reamble to the Statute of Charitable Uses").

148 H.R. REP. NO. 75–1860, at 19 (1938).

149 *In re* House of the Good Shepherd, 203 N.W. 632, 634 (Neb. 1925) (holding a laundry organization, which aimed to provide training to poor women, exempt from taxation as a "[p]roperty owned and used exclusively for educational, religious, charitable or cemetery purposes"); *see also* Franklin Square House v. City of Boston, 74 N.E. 675, 675–76 (1905) (relying on the Statute of Charitable Uses to characterize as charitable a corporation that provided housing to poor working women) (citing Statute of Charitable Uses 1601, 43 Eliz. c. 4 (Eng.)).

150 For a criticism of this inconsistency, see Fleischer, *supra* note 132, at 554–56, which questions the doctrine of applying the community-benefit requirement to charitable organizations but not to organizations formed for other enumerated purposes, even though the Supreme Court has held that all are subject to the requirement of common-law charity.

151 *See, e.g.*, IHC Health Plans, Inc. v. Comm'r, 325 F.3d 1188, 1197–98 (10th Cir. 2003) (holding that charitable tax exemption under section 501(c)(3) for a healthcare provider requires conferral of community benefit, which "either further[s] the function of government-funded institutions or provide[s] a service that would not likely be provided within the community but for the subsidy," and listing as examples the provision of medical and emergency care at low cost or regardless of ability to pay (citing Rev. Rul. 69–545, 1969-2 C.B. 117)); Fed'n Pharmacy Servs., Inc. v. Comm'r, 625 F.2d 804, 809 (8th Cir. 1980) (denying charitable tax-exempt status to a pharmacy because it made "no accommodation . . . for those unable to pay").

B. The Goals of Antidiscrimination and Common-Law Charity

As a common-law concept, charity thus consists in the conferral of a public benefit that both reduces the state's fiscal burden and lifts disadvantaged groups, through either material welfare or equipment of (educational and cultural) prerequisites for socioeconomic advancement. This vision of charity resonates with antidiscrimination, a central goal of which is to eliminate arbitrary and animus-laden criteria in the distribution of employment opportunities and material welfare, thus ameliorating economic inequality.[152] In other words, the point of antidiscrimination statutes is not to single out, in a vacuum, certain impermissible traits—immutable or otherwise[153]—on which decisionmakers may not base employment or economic choices, but to improve the substantive, socio-economic inequality that tracks those identifiable traits. Affording minority groups resources in education and public accommodations, and curating a meritocratic workplace in which such resources can turn into opportunities for economic advancement, are integral components of the antidiscrimination project. The integration of disadvantaged populations into the economy then reduces the fiscal burden of the government in, for example, providing welfare benefits to the poor.

This conception of antidiscrimination has gained widespread recognition. The executive branch has codified the purpose of the Civil Rights Acts: "to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place," given that the underlying inequalities "were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment."[154] In holding disparate impact sufficient for establishing a violation of Title VII, the Supreme Court has identified the statutory "objective" as the achievement of "equality of employment opportunities and remov[al of] barriers that have operated in the

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152 For a general overview of the goals of antidiscrimination, see, for example, ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 13–114 (1996), which surveys the dominant theories; and Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627 (2015), which states that the canonical purposes of antidiscrimination law are "the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination."

153 *Cf.* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 10–12 (2015) (challenging the view that antidiscrimination statutes should protect only those traits that an individual cannot change).

154 29 C.F.R. § 1608.1 (2014).

past to favor an identifiable group of white employees."[155] Within academic discourse, scholars often define discrimination itself as the "intentional denial of access to a *material good* or an *opportunity* on the basis of prejudice, animus, or capriciousness," that is, an "unjust source of economic inequality."[156] Antidiscrimination, then, ought intuitively to correct the distributive imbalance of both welfare and opportunities for advancement.[157] Recent debates about the nature of accommodation mandates, as compared to prohibitions on discrimination, as well as the battle over LGBTQ employment antidiscrimination, have also brought to light the need for antidiscrimination law to remedy the "intolerable effects on our society" of "a pattern of social and economic subordination,"[158] and its commitment to meritocratic workplace ideals.[159] Importantly, the original drafters of the Civil Rights Act of 1964 recognized the potential for antidiscrimination statutes to replace government expenditures in welfare or unemployment benefits and to spur overall economic growth, which would

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155 Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

156 Sujit Choudhry, *Distribution vs. Recognition: The Case of Antidiscrimination Laws*, 9 GEO. MASON L. REV. 145, 152 (2000) (emphasis added).

157 *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1352 (1988) (noting that "economic exploitation and poverty have been central features of racial domination," with poverty manifesting as "its long-term result," and arguing that a legal regime without "redistribution of wealth cannot remedy one of the most significant aspects of racial domination").

158 Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 837 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001).

159 *See, e.g.*, William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 393 (2017) (illustrating the federal government's strong commitment "to a meritocratic norm of employment evaluation that . . . favors the integration, under conditions of equality, of women, racial minorities, religious minorities, and sexual and gender minorities long excluded from and harassed within the workplace").

increase government tax revenues.[160] Both aims formed part of the original justification for antidiscrimination law.[161]

Viewed through this lens, antidiscrimination and common-law charity share at least four commonalities in their goals. First, both center on the conferral of a public benefit, the direct administration of which often targets an identifiable group, but whose indirect benefits extend to a large, indefinite set of broader society. For charity, this benefit consists in poor relief, the provision of which was thought to alleviate a host of social problems such as property crime and vagrancy. For antidiscrimination, this benefit consists in the removal of arbitrary and animus-laden criteria in making employment and other economic decisions, the achievement of which was thought to improve efficiency in the national economy. Second, both emphasize the need to equip the targeted communities with the social and cultural prerequisites for advancement. This might include, in the case of common law's permissible charitable purposes, supporting poorer populations in their efforts to establish themselves in the workforce or, as antidiscrimination statutes provide, the elimination of problematic cognitive attitudes that entrench unequal distributions of employment opportunities and economic inequality. Third, neither is distributively neutral. That is, common-law charity now only requires the conferral of benefits upon an indefinite group, which is not necessarily socioeconomically disadvantaged (and

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160 *See, e.g.*, H.R. REP. NO. 88–914 (1964), *reprinted in* U.S. EQUAL EMP. OPPORTUNITY COMM'N, LEGIS. HIST. OF TITLES VII AND XI OF C.R. ACT OF 1964, at 2149 (1968) (observing, after an analysis of the income levels of Black and white Americans, that the "severe inequality in employment" and "failure of our society to extend job opportunities to [Black Americans]" represent an "economic waste," which burden the federal government with "added costs for the payment of unemployment compensation, relief, disease, and crime"); *see also* Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 430 (2018) (characterizing the origins of antidiscrimination law as "part of a broader effort to address the structural forces that simultaneously entrench group-based disparities *and* restrain economic growth").

161 Empirical studies have confirmed some of the positive effects of antidiscrimination law in improving minorities' access to the labor market. *See, e.g.*, Jinyong Hahn, Petra Todd & Wilbert Van der Klaauw, *Evaluating the Effect of an Antidiscrimination Law Using a Regression-Discontinuity Design* 18 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7131, 1999) (arguing that coverage under the Equal Employment Opportunity Commission has a statistically significant effect on the percentage of minorities employed at smaller firms); James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2854, 1989) (showing a "significant contribution of federal antidiscrimination programs" to advancing the economic status of Black Americans).

certainly many charitable tax-exempt organizations today cater primarily to the interests of the wealthy[162]), and antidiscrimination statutes could end up protecting the interests of privileged populations in the name of colorblindness.[163] But these should be seen as anomalies because at their core and in their origins, charitable purposes and antidiscrimination protections are meant to alleviate the plight of, respectively, the poor and minorities (with respect to race, sex, age, health condition, and others). Lastly, both contemplate the potential of the enacted legal regimes in lessening the fiscal burdens of the state. Efficient administration of charitable funds would replace local taxes that fund poor relief, and a more meritocratic distribution of employment opportunities and public resources would reduce the government's expenditures on welfare and unemployment benefits.

Indeed, common-law charity and statutory antidiscrimination are two sides of the same coin, reflecting a judgment that lifting groups disadvantaged by deprivation and structural prejudices can take forms beyond state-mandated redistribution of material welfare. Encouraging charitable activities by the grant of legal privileges enables the government to outsource poor-relief work—both material redistribution and equipment of intangible prerequisites for participation in the workforce—to the nonprofit sector. Likewise, eliminating animus-laden and arbitrary factors of decision-making in the marketplace enables the government to integrate groups, whose minority status tracks economic inequality, into broader society. Through either legal regime, the state alleviates inequality without itself engaging in redistribution, thus preserving revenues for public expenditures in other areas. In exchange, the state grants tax exemption to charitable organizations and,

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162 Scholars have commented on the distributive unfairness of the tax subsidies for charity. *See* Fleischer, *supra* note 132, at 549–53 (summarizing existing scholarship, including criticism that charitable giving mainly benefits the already-privileged in society); Rob Reich, *Philanthropy and Its Uneasy Relation to Equality*, *in* TAKING PHILANTHROPY SERIOUSLY: BEYOND NOBLE INTENTIONS TO RESPONSIBLE GIVING 27–49 (William Damon & Susan Verducci eds., 2006) (arguing that philanthropy can be a vehicle of inequality by structurally benefiting the well-off).

163 *See, e.g.*, Letter from Eric S. Dreiband, Assistant Att'y Gen., U.S. Dep't of Just., to Peter S. Spivak, Att'y, Hogan Lovells US LLP (Aug. 13, 2020), https://www.justice.gov/opa/press-release/file/1304591/download [https://perma.cc/6S2M-GLKC] (notifying Yale University's attorney of the Department of Justice's determination that Yale has violated Title VI by disfavoring white applicants on the basis of race).

more recently, rewards for private-sector programs that further the goals of antidiscrimination.[164]

This affinity between charity and antidiscrimination solidifies the foundation for extending the implementation of *Bob Jones* to areas beyond racially discriminatory schools.[165] As a doctrinal matter, the Supreme Court has announced that the requirements of common-law charity apply to organizations whose tax-exempt status derives from enumerated purposes other than "charitable" (e.g., educational and religious purposes).[166] In its analysis, the Court has broken down this requirement into a positive component of serving a public purpose and a negative component of not violating any fundamental public policy.[167] In *Bob Jones*, the IRS correctly denied tax-exempt status because the organizations failed to meet the negative requirement by engaging in racial discrimination.[168] But since the very core of common-law charity itself consists in equipping disadvantaged populations with the prerequisites for integration into civil society,[169] those discriminatory activities are antithetical to the precise public benefits that charity intends to supply. That is, there is ground to question whether organizations that discriminate against marginalized populations in fact serve a public function, within the meaning of charity at common law, and whether they meet the positive requirement of tax exemption imposed by the *Bob Jones* Court. If this public function is conceived in terms of replacement of government spending, it is an open, empirical question

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164 *See, e.g.*, Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1794–98 (2017) [hereinafter Johnson, *Overreach and Innovation*] (describing incentive and competitive-grant programs as part of the federal government's recent efforts at inclusive regulation).

165 An important clarifying note: this subpart argues that the core of common-law charity involves conferring a public benefit by alleviating economic inequality, and that this recognition supports extending *Bob Jones* to antidiscrimination on the basis of protected traits other than race. This is not to say that charity law ought to form a sufficient basis and define the very contours of tax exemption. *See also* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 332–45 (1991) (criticizing this view); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1384–85 (1991) (same).

166 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."); *see supra* notes 57–59 and accompanying text (explaining the Court's rationale and textual basis in reaching this conclusion).

167 *See supra* notes 56–57 and accompanying text.

168 *Bob Jones Univ.*, 461 U.S. at 595–96.

169 *See supra* notes 137–51 and accompanying text.

whether the reduction in public expenditures from legitimate tax-exempt activities of those organizations would offset the increases in expenditures from their discriminatory activities, which entrench rather than alleviate economic inequality. With respect to the negative requirement, decades of civil-rights legislation (and its associated interpretation by the Court and the Executive) establish a fundamental public policy.[170] The coincidence between the goals of charity and in particular employment antidiscrimination also supports the extension of *Bob Jones* to areas beyond education. That is, both common-law charity and antidiscrimination recognize the centrality of facilitating equal access to the labor market as a means of ameliorating socioeconomic inequality. Employment nondiscrimination and the resulting expansion of access to the workforce, therefore, constitute not only fundamental public policies of the civil-rights regime but also core policy rationales for granting privileges and tax exemption to charitable organizations in the first place. The doctrinal and conceptual implications that follow from this Part's discussion of charity and antidiscrimination, therefore, further underscore the discrepancy between the holding of *Bob Jones* and its implementation.

As a final note, common-law charity, designed to equip disadvantaged populations with the material and educational prerequisites to socioeconomic advancement, by definition furthers anti-subordination rather than anti-classification ideals.[171] Textualist interpretations of antidiscrimination statutes may highlight the harm that individuals suffer by racial, sexual, disability-based, or age-based categorizations, regardless of whether those categories track inequality (or even if those categories identify socioeconomic *privilege*). In contrast, charity inherently concerns the poor and the marginalized. Therefore, to the extent that courts read antidiscrimination statutes as prohibiting differentiation on the basis of any protected trait, even if to benefit disadvantaged populations (e.g., through affirmative action), the link between those "violations" of antidiscrimination statutes and the loss of tax exemption is missing. That is, when tax-exempt entities rely on protected traits as factors in their decision-making process in an effort to benefit

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170 Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

171 *See, e.g.*, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287–89 (2011) (making the distinction between and mapping the intellectual history of the anti-subordination and the anti-classification principles in the context of the Equal Protection Clause).

disadvantaged populations, their activities—even if labeled discriminatory—in fact advance the charitable goals that form the basis of tax exemption. Those activities differ fundamentally from the core violations of the antidiscrimination regime that disqualify an entity for tax exemption.[172]

III
OBJECTIONS AND RESPONSES

This Part of the Article examines—and rejects—arguments that *Bob Jones* should not extend to cases beyond private schools that practice racial discrimination in admissions. These arguments generally fall into three categories. First, race-centric views hold that the privileged status of race within the antidiscrimination regime shields other forms of discrimination from the strong medicine of *Bob Jones*. But as subpart III.A argues, these claims are contrary to both judicial interpretation and congressional policy. Second, religion-centric views hold that differential treatment based on sex, sexual orientation, or other protected traits occupies a more prominent place in religious worship, and that secular authorities can eradicate race discrimination (but not other forms of discrimination) without threatening religious freedom. But as subpart III.B shows, these claims depend on incorrect factual premises. Third, RFRA, enacted a decade after *Bob Jones*, may reflect a fundamental public policy of religious freedom. But as subpart III.C argues, tax exemption does not constitute a "substantial burden" within the meaning of the Act. As a threshold matter, it is important to note that these arguments must clear a high hurdle to be persuasive: *Bob Jones* plainly held that tax exemption requires meeting the common-law standard of charity and complying with established public policy, without singling out race antidiscrimination as the only kind of public policy that counts.

A. Race at the Center: Civil-Rights-Centric Views

The first set of arguments against extending *Bob Jones* to other forms of discrimination concerns the centrality of race to

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172 *See also* David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 16–17 (2006) (suggesting that "even though racial preference in the context of racial subordination is not permissible in tax-exempt charity law, racial preference in the context of affirmative action may be permissible" (footnotes omitted)).

the emergence of the modern regime of civil rights.[173] Race, and in particular eliminating the subordination and oppression faced by Black Americans in the public life of employment, education, and accommodations, served both as a motivation and as a paradigm for antidiscrimination. The earliest evidence comes from the aftermath of the Civil War, when the Reconstruction Congress enacted the first series of Civil Rights Acts to protect newly freed slaves from Southern Black Codes and secure their participation in public life and their access to public facilities.[174] In *Plessy v. Ferguson*, Justice Harlan, in dissent, articulated the idea of colorblindness: facial distinctions on the basis of *race*—not sex, poverty, or any other trait—resulted in the division of equal citizens into unequal classes and were constitutionally impermissible.[175] In *Brown v. Board of Education* (itself quoted by the majority in *Bob Jones*[176]), the Court was concerned with *racial* segregation in education, which denied Black children an equal opportunity to attain intellectual and social achievements necessary for the performance of basic public responsibilities.[177] Throughout, and especially toward the beginning of the Civil Rights Era, *race* occupied center stage in the development of the modern antidiscrimination regime.[178] Some of the early, influential scholarly work on antidiscrimination adopts this view: race provides the "prototype" of antidiscrimination, "an idealized version of a fair employment law" whose analysis "seems to be the first step

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173 Professor Eugene Volokh alludes to this argument in *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1963 (2006), which argues that the *Bob Jones* "decision rested expressly on the discrimination's being race discrimination, and on its being in education," so that its reasoning may not apply to cases that do not involve "massive nationwide efforts to dismantle a deeply entrenched discriminatory system that had deprived millions of people of important economic opportunities." *See* INAZU, *supra* note 99, at 75–77.

174 *See, e.g.*, Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335; *see also* James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 493 (1965) ("The Civil Rights Act of 1875 climaxed a decade of efforts by radical Republicans, particularly Charles Sumner, to incorporate [Black Americans'] freedom and equal rights into the law of the land.").

175 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The gendered language of Justice Harlan's dissent is striking: "In respect of civil rights, all citizens are equal before the law. . . . The law regards *man* as *man*, and takes no account of *his* surroundings or of *his* color when *his* civil rights as guaranteed by the supreme law of the land are involved." *Id.* (emphasis added). Our Constitution might indeed be colorblind, but it is not sex-blind in the eyes of Justice Harlan.

176 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

177 *Brown*, 347 U.S. at 493.

178 *See infra* notes 179–82 and accompanying text.

in understanding the limits of the obligation imposed by [civil-rights] laws."[179] The antidiscrimination principle, then, "[b]y definition . . . applies only to race-dependent decisions and their effects."[180] Although the generalized statutory language (e.g., prohibiting discrimination because of race and sex) allow a large class of "theoretical" beneficiaries with *formal* entitlement to protection, "[Black Americans] were generally viewed as the *exclusive* primary beneficiaries of the antidiscrimination laws."[181] Proliferation of the protectorate, manifested in the inclusion of women in Title VII, was perceived as "political sabotage," and could result in antagonism between Black Americans and subsequent beneficiaries of antidiscrimination statutes as they compete for "public attention, for the legislature's concern, and for law enforcement resources—all of which are bounded by conditions of scarcity."[182] Because race constituted the genesis and the main paradigm for the design of the modern antidiscrimination regime, one might argue, it deserves special treatment as a protected trait. According to this line of argument, then, the privileged status of race justifies limiting *Bob Jones* to racially discriminatory schools. Denying tax exemption is strong medicine and imposes a heavy burden on regulated entities. It should thus be reserved for especially heinous practices.

The race-centric view is not merely historical but also incorporates an anti-subordination element. The fact that race played a central role in the evolution of statutory and constitutional antidiscrimination protections is not accidental—Black Americans have endured slavery, exclusion, and economic oppression to an extent that many other minority groups have not, so it is only natural for laws, whose purpose is to promote

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179 Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235, 310 (1971).

180 Brest, *supra* note 124, at 5; *see also id.* at 1 (defining the antidiscrimination principle as "disfavoring classifications and other decisions and practices that depend on the *race* (or ethnic origin) of the parties affected." (emphasis added)); *id.* at 2 ("The heart of the antidiscrimination principle is its prohibitions of *race-dependent* decisions that disadvantage the members of minority groups." (emphasis added)).

181 Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Education, 41 U. CHI. L. REV. 742, 749 (1974) (emphasis added) [hereinafter Fiss, *Fate of an Idea*]; *see also* Owen M. Fiss, *One Century of Antidiscrimination*, 15 CAP. U. L. REV. 395, 398 (1986) ("The antidiscrimination norm . . . was largely fashioned at a time when the nation was swept by the separate-but-equal doctrine of Jim Crow and when [Black Americans] were disadvantaged in a rather open and crude manner. In such a context, antidiscrimination invites a color blindness . . . .").

182 Fiss, *Fate of an Idea*, *supra* note 181, at 751–52.

some type of equality or eliminate some type of disadvantage,[183] to privilege race. Professor Fiss, for example, has categorized Black Americans as a "specially disadvantaged group" and as the "prototype" of the class protected under the Equal Protection Clause, because, as an identifiable social group, Black Americans have the twin characteristic of being in a position of "perpetual subordination" and possessing severely "circumscribed political power."[184] Responding to both neoconservative and critical legal scholars, Professor Kimberlé Crenshaw similarly emphasizes the "singular power of racism as a hegemonic force in American society," resulting in the oppression and material subordination of African Americans.[185] By its "role in legitimating American society and isolating [Black Americans]," racism constitutes a unique system of domination and formed the "historical and ideological conditions that brought about antidiscrimination law" itself.[186] One might contend that similar arguments do not apply to sexual minorities: women, according to Professor Fiss, are "a group that is not a minority and whose members generally have an intimate personal relationship with the alleged oppressors that members of other victim groups do not have with their respective alleged oppressors."[187] LGBTQ status is often not immediately visible and in any event cuts across the oppressing/oppressed divide—same-sex attraction can be found among the elite that benefits from an existing structure of domination.[188] According to this line of argument, then, anti-subordination reasons counsel limiting *Bob Jones* to race discrimination because racial minorities have experienced the type of oppression that justifies the denials of tax exemption. Both antidiscrimination and denials of tax exemption are conceptualized as legal regimes of corrective and restorative justice.

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183 *See* SANDRA FREDMAN, DISCRIMINATION LAW 1–33 (2nd ed., 2011).

184 Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 155 (1976).

185 Crenshaw, *supra* note 157, at 1331.

186 *Id.* at 1360; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 243 n.11 (1980) ("Racial classifications that disadvantage minorities are 'suspect' because we suspect they are the product of racially prejudiced thinking of a sort we understand the Fourteenth Amendment to have been centrally concerned with eradicating.").

187 Fiss, *Fate of an Idea*, *supra* note 181, at 750.

188 For criticism of the LGBTQ community's tendency to promote formalist legal strategies that focus on the common, unidimensional trait of sexual orientation but may end up marginalizing intersectional identities, see Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 657 (2016).

Opponents of extending *Bob Jones* to other forms of discrimination also rely on specific statutory exclusions of "sex" as a protected trait. Under Title VII, for example, although employers cannot terminate or discriminate against employees on the basis of race or sex, it is permissible for employers to base hiring decisions on sex if sex is a "bona fide occupational qualification reasonably necessary to the normal operation" of business.[189] Race, on the other hand, is never a permissible basis for making employment decisions. Similarly, section 501(i) of the Internal Revenue Code specifically denies tax-exempt status to any social clubs that discriminate on the basis of race, color, or religion; discrimination on the basis of sex, on the other hand, is not prohibited by this section.[190] The statutory exclusions of sex appear to privilege race as a protected status.

These arguments against applying *Bob Jones* to forms of discrimination beyond race are unpersuasive. First, it is unclear which way the statutory-exclusion evidence cuts. To be sure, Title VII's inclusion of sex as a possible bona fide occupational qualification and section 501(i)'s omission of sex as an impermissible ground of discrimination for tax-exempt social clubs may reflect congressional intent to privilege race in those two areas. At the same time, it shows that Congress knows exactly how to articulate differential treatment between race and sex discrimination when it wants to.[191] As a corollary, then, where the statutory language shows no such distinction, we should not draw an inference for differential treatment between race and sex discrimination. This means that, unless the employer can show a bona fide occupational qualification, or the tax-exempt applicant in question is a recreational social club, neither Title VII's nor section 501's statutory language shows congressional judgment to privilege race or warrants differential treatment between race and sex antidiscrimination as fundamental public policies.

Second, although race may have served as the paradigm for modern antidiscrimination regimes, and the exclusion of

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189 42 U.S.C. § 2000e–2(e) (2018).

190 26 U.S.C. § 501(i) (2018).

191 The contrast between a desired outcome and Congress's expression of that outcome with clearer and more direct statutory language elsewhere generates a well-known canon of statutory interpretation. *See, e.g.*, LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 17 (2014) (commenting on the "Congress knows how to say" principle of statutory interpretation); WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 124–27 (2016) (commenting on the meaningful variation canon).

Black Americans from public life the driving force behind the Civil Rights era, both Congress and the Supreme Court have rejected an approach that marginalizes enforcement against non-racial forms of discrimination. In the case of Title VII, both the statutory history and later judicial interpretations have rejected a limited understanding of the statute. The prohibition against arbitrary discrimination applies equally to all protected traits, without privileging race above any other enumerated bases, such as sex or religion, as Professor William Eskridge has convincingly documented.[192] Without excessively repeating this line of scholarship, it is worth noting that while the Equal Employment Opportunity Commission (EEOC) initially focused on race antidiscrimination, Congress, through various amendments, including the Equal Employment Opportunity Act of 1972, has unambiguously signaled its policy judgment that sex discrimination is no less serious than race discrimination.[193] In the realm of public education, the *VMI Case* stands as a sex-discrimination counterpart to *Brown*'s proscription of race discrimination and segregation, even if the two cases rely on differing rationales to reach the same conclusion.[194] In other words, the fact that race motivated and served as the prototype of modern antidiscrimination regimes has not eroded the normative grounding of antidiscrimination protections on the basis of classifications beyond race. Nor has it elevated race to a privileged status to the marginalization or exclusion of other protected traits, for good reasons. Whether framed as the "merit-based workplace" or combating institutions that "single out certain groups of citizens for stigma and disadvantage,"[195] the values underlying a classification-based approach to antidiscrimination almost always implicate the ideals of individualism and autonomy. Instantiating those ideals may require, at the core, banning certain considerations of immutable traits from biased decision-making, and at the periphery, respecting people's choices and self-expressions that constitute their individuality.[196] It is difficult to see how these considerations

192 *See* Eskridge, *supra* note 159, at 332; *see also* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 Yale L.J. 78, 82 (2019) (documenting the gradual prohibition of sex discrimination in public-accommodations law).

193 *See* Eskridge, *supra* note 159, at 347–49.

194 United States v. Virginia, 518 U.S. 515, 557–58 (1996) (holding that under equal protection standards, "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less").

195 KOPPELMAN, *supra* note 152, at 8; Eskridge, *supra* note 159, at 334.

196 *See, e.g.*, Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1636 (2020) ("[T]he Court is mistaken in asserting that colorblindness draws support from a basic moral imperative to treat people as individ-

translate into a hierarchy of protected traits otherwise given equal legislative attention: sex (or, for that matter, sexual orientation, age, or disability) is as much a part of our individuality as race.[197]

Even more relevant to this Article is race-centric critics' failure to justify privileging race antidiscrimination in the context of tax exemption. As already described,[198] *Bob Jones* stands for the idea that violation of any fundamental public policy disqualifies a charitable organization for tax-exempt status: to the extent that sex antidiscrimination is a fundamental public policy, then, the opinion itself does not leave much room for an agency to pick and choose which public policy to enforce.

One caveat: the arguments presented in this subpart do not aim to diminish the heinous discrimination that Black Americans have endured, as evidenced, for example, by recent mass demonstrations and activism against racism. Rather, the point is that critics against extending *Bob Jones* to all forms of discrimination overlook statutory and regulatory histories, as well as the fact that extension of protection to more marginalized populations *enhances*, rather than weakens, the antidiscrimination regime for all.

B. Race at the Periphery: Religion-Centric Views

An additional set of arguments opposes applying *Bob Jones* to forms of discrimination beyond race and reverses the approach of the first. Instead of elevating race as the prototype and paradigm for the modern antidiscrimination regime, this view contends that the goals and mechanisms of race antidiscrimination are more compatible with the free exercise of religion than, for example, sex equality. In other words, instead of emphasizing the centrality of race to antidiscrimination, some focus on the hurdles that equal treatment on the basis of sex or sexual orientation presents for religious worship. It is not that race antidiscrimination deserves special treatment in the area of civil rights, but that potentially discriminatory practices based on sex warrant special protection in the area of free exercise of religion. In essence, much of this approach depends on the sociological assumption that major religious beliefs align more with systematic, biased decision-making on the ba-

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uals."); *see also* Clarke, *supra* note 153 at 7 ("[T]he new immutability . . . is a questionable strategy for reconceptualizing the broader project of equality law.").

197 For our purposes, it is worth noting that statutory antidiscrimination does not produce a hierarchy of tiers of scrutiny like constitutional doctrine.

198 *See supra* notes 56–64 and accompanying text.

sis of protected traits other than race. Some of the scholarly engagements with this line of reasoning have emerged primarily to reject the analogy between same-sex marriage and *Loving v. Virginia*, where the Supreme Court struck down a state ban on interracial marriage.[199] One scholar, for example, has argued that the conjugal conception of marriage essentially differs from anti-miscegenation, because "the status of African Americans is importantly different from that of Americans who identify as gay," so that "First Amendment protections for people who act on the belief that marriage unites husband and wife differ in critical ways" from those associated with racism.[200] While anti-miscegenation depends on short-lived notions of the inferiority of minority races, "[t]oday's beliefs about conjugal marriage . . . grew organically out of millennia-old religious and moral traditions that taught the distinct value of male-female union."[201] Because denials of tax-exempt status impose burdens on the free exercise of religion, the centrality of beliefs about protected traits beyond race (e.g., opposition to gender equality) to religious traditions justifies not applying *Bob Jones* to those cases.

The difficulty with this line of arguments is that they depend on incorrect factual premises. Scholars have documented that religious arguments were marshaled to support apparatuses of race discrimination from slavery to Jim Crow, and that segregation and anti-miscegenation were presented as central to religious beliefs.[202] Southern pastors, for example, mobilized opposition to the Civil Rights Act of 1964 and labeled God the original segregationist,[203] while Senator Byrd read the biblical Curse of Ham—a passage from Genesis frequently used to justify the enslavement of Black Americans—during his filibuster speech.[204] Bob Jones University characterized its ban on interracial dating as required by its religious commit-

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199 Loving v. Virginia, 388 U.S. 1, 12 (1967).

200 Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On* Masterpiece Cakeshop *and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 124 (2018).

201 *Id.* at 134.

202 *See generally* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665–84 (2011) (surveying the history of religious justifications for slavery and segregation).

203 *See* CAREY DANIEL, GOD THE ORIGINAL SEGREGATIONIST 3–6 (1955).

204 *See* 110 CONG. REC. 13,206 (1964) (statement of Sen. Robert Byrd).

ments.[205] Goldsboro Christian School, the second petitioner in the consolidated case, similarly had maintained a "racially discriminatory admissions policy based upon its interpretation of the Bible": since race is determined by descent from one of Noah's sons, the school regarded "[c]ultural or biological mixing of the races . . . as a violation of God's command."[206] It is for these reasons that some scholars characterize religious opposition to LGBTQ equality not as specially warranted by religious conscience but a replay of arguments that had been advanced against race equality in the Civil Rights era.[207] The demands of antidiscrimination based on protected traits other than race, therefore, do not place a heavier burden on religious exercise today than race antidiscrimination did in the mid-twentieth century.

C. Religious Freedom as Fundamental Public Policy?

If no compelling argument justifies limiting *Bob Jones* to racially discriminatory schools, the courts and the IRS must still proceed in a way that does not impermissibly burden the free exercise of religion as a potential fundamental policy.[208] With respect to religious freedom, the statutory and constitutional landscape has evolved dramatically since 1983: ten years after *Bob Jones*, Congress enacted the Religious Freedom Restoration Act (RFRA),[209] which, though invalidated as applied to state governments,[210] continues to apply to the federal government. In *Masterpiece Cakeshop*, the Supreme Court ruled, however narrowly, that overt hostility toward sincerely held religious beliefs violates the First Amendment.[211] More recently, *Espinoza v. Montana Department of Revenue* held unconstitutional a state's exclusion of religious schools from educational tax credits.[212] *Fulton v. City of Philadelphia* found no compelling interest behind a city's nondiscrimination policy

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205 Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage.").

206 *Id.* at 583, 583 n.6.

207 Eskridge, *supra* note 159, at 396.

208 *See also* Bernstein, *supra* note 121, at 1385–99 (contending that administrative agencies enforcing constitutional norms are inconsiderate of First Amendment values).

209 Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb, 2000bb-4).

210 *See* City of Boerne v. Flores, 521 U.S. 507, 507–09 (1997).

211 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

212 Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020).

and its refusal to contract with a Catholic adoption agency that would not certify same-sex couples for adoption.[213] Determining the scope and the method of applying *Bob Jones* requires careful attention to these developments, since they may signal a fundamental policy commitment to religious freedom, in addition to antidiscrimination. This subpart of the Article examines the impact of recent case law and, in particular, RFRA on extending the regulatory application of *Bob Jones* to forms of discrimination beyond race.

1. *Recent Doctrinal Development*

First, *Masterpiece Cakeshop* provides lessons in implementation. The most important upshot from the case's narrow holding is that sincerely held religious convictions are entitled to "neutral and respectful consideration" by government actors in adjudicating religious-exemption claims.[214] The government, in other words, should not exhibit dismissive attitudes toward religious beliefs or disparage them (i.e., by characterizing them as despicable or "as merely rhetorical—something insubstantial and even insincere").[215] For purposes of the IRS's determinations of tax-exempt status, this risk is minimal: where the applicant organization claims that its potential violations of established public policy constitute an exercise of religion, the IRS has treated the demand for religious exemption evenhandedly, objectively describing the nature of those beliefs even if eventually determining that the organization's practices are inconsistent with public policy.[216]

Second, *Espinoza* similarly presents minimal obstacles to extending *Bob Jones* to the full federal panoply of antidiscrimination. In that case, the Montana Legislature granted dollar-for-dollar tax credits for individual donations to scholarship programs that supported students enrolled in private schools.[217] Since the Montana constitution prohibits government appropriations for institutions affiliated with the church,[218] the state revenue department promulgated an ad-

213 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

214 *Masterpiece Cakeshop*, 138 S. Ct. at 1729; *see* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in* Masterpiece Cakeshop, 2018 YALE L.J.F. 201, 218 (2018).

215 *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

216 *See* I.R.S. Priv. Ltr. Rul. 201325015 (June 21, 2013); I.R.S. Priv. Ltr. Rul. 201323025 (June 7, 2013); I.R.S. Priv. Ltr. Rul. 201310047 (Mar. 8, 2013).

217 MONT. CODE ANN. § 15-30-3103 (West 2021).

218 MONT. CONST. art. X, § 6 (prohibiting "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, col-

ministrative rule that denied the use of the tax-credit-funded scholarship for sectarian schools.[219] The Montana Supreme Court later invalidated the entire scholarship program because no statutory provision existed to ensure that religious schools could not receive the funding.[220]

The U.S. Supreme Court disagreed. In a splintered decision, the Court held that "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' . . . 'triggers the most exacting scrutiny,'" which was ultimately not met in this case.[221] For the purposes of this Article, however, *Espinoza*'s conclusion is largely irrelevant: for the IRS to extend enforcement of *Bob Jones* to forms of discrimination beyond race is not to deny a public good on the basis of religious character of any otherwise tax-exempt organization. That is, although tax exemption, similar to tax credits, might constitute a public good, implementation of *Bob Jones* disqualifies an otherwise exempt organization on the basis of its *discriminatory activities*, not on the basis of its religious nature. In fact, since *Bob Jones* subjects all tax-exempt entities to the requirement of common-law charity (and therefore nondiscrimination as a fundamental public policy), the IRS would deny tax exemption to any discriminatory organization, religious or not. Such an approach should not fall under *Espinoza*'s strict scrutiny.

Third, *Fulton v. City Philadelphia* does not undermine the rationale for extending *Bob Jones* enforcement to all statutorily recognized traits. In *Fulton*, the City of Philadelphia refused to contract with Catholic Social Services ("CCS"), which provides foster care services but would not certify same-sex couples for adoption on the ground that certification is equivalent to the church's endorsing same-sex marriage.[222] The City justified its refusal to contract with CCS by arguing that CCS violated its nondiscrimination policy, which prohibits foster care agencies from rejecting prospective families based on their sexual orientation.[223] As a threshold matter, the Supreme Court found the City's nondiscrimination policy not generally applicable, be-

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lege, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination").

219 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020).

220 Espinoza v. Mont. Dep't of Revenue, 393 P.3d 603, 611–12 (Mont. 2018).

221 *Espinoza*, 140 S. Ct. at 2255 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

222 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021).

223 *Id.* at 1878 (quoting § 3.21 of Philadelphia's standard contract with foster-care agencies).

cause the policy makes available individual exemptions at the "sole discretion" of the City Commissioner.[224] Since the municipal policy is not generally applicable and burdens CCS's exercise of religion, the Court subjected it to strict scrutiny.[225] In part due to the availability of individual exemptions, the City could not advance antidiscrimination as a compelling interest.[226] In other words, *Fulton* relies on the availability of discretionary, individual exemptions from compliance with a nondiscrimination policy—a feature that does not, and should not, exist in the context of expanding the fundamental public policy framework to all statutorily protected traits. The federal antidiscrimination regime does not give the federal government the discretion to grant individual exemptions, and the Commissioner of the IRS certainly does not have the power to authorize an individual entity's deviation from fundamental public policy.

2. *Religious Freedom Restoration Act*

RFRA presents a more complex issue. The statute prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that the burden is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[227] The background leading up to the enactment of RFRA is central to understanding its meaning. In the 1960s and 1970s, the Supreme Court generally applied a compelling-interest test to government encroachment on the free exercise of religion, upholding the state's "substantial infringement of [an individual's] First Amendment right" only if justified by "compelling state interest."[228] In 1990, the Court reversed course, holding in *Employment Division, Department of Human Resources of Oregon v. Smith* that the *Sherbert* test of compelling interest was developed for adjudicating unemployment compensation claims and should not be used to assess laws of general applicability.[229] *Smith* led to

224 *Id.*

225 *Id.* at 1881.

226 *See id.* ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.").

227 42 U.S.C. § 2000bb–1 (2018).

228 Sherbert v. Verner, 374 U.S. 398, 406 (1963); *accord* Wisconsin v. Yoder, 406 U.S. 205, 205 (1972).

229 Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990).

public outrage, and Congress enacted RFRA—with the support of both liberal organizations such as the ACLU and conservative Christian groups—in response to the decision.[230] The statutory findings section explicitly states that RFRA's purpose is "to restore the compelling interest test as set forth in *Sherbert*," because *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[231] While there is some debate about the nature of the Court's pre-*Smith* free exercise jurisprudence,[232] RFRA mandates strict scrutiny when government substantially burdens religious freedom, and the Roberts Court has confirmed that the statutory test "is exceptionally demanding."[233]

Through RFRA, Congress has clearly articulated some type of fundamental policy commitment to religious freedom. RFRA's requirements, however, are triggered only if generally applicable laws substantially burden the free exercise of religion. This section of the Article argues that denials of tax-exempt status do not constitute a substantial burden on charitable and religious organizations.

First, the Supreme Court's free exercise jurisprudence suggests that imposition of general tax burdens substantially burdens religious exercise only if the religious beliefs themselves somehow obligate the worshipper to resist government taxation. Even when the Court finds a substantial burden, it has upheld revenue generation as a compelling state interest to overcome strict scrutiny. In *United States v. Lee*,[234] a member of the Old Order Amish challenged payroll taxation as an unconstitutional infringement on his religious practices, which required, as a matter of religious doctrine, the rejection of government aid and any financial contribution to social insurance programs. The Court characterized the obligation to pay social security and unemployment taxes as a "burden" on religious freedom, because the Amish faith specifically prohibited complying with those tax laws, only to uphold them as "essential to accomplish an overriding governmental interest"—the mainte-

230 Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 772–73 (2013) (book review).

231 42 U.S.C. § 2000bb (2018).

232 *See, e.g.*, Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 164, 167–68 (2015) (discussing courts' "deferential pre-*Smith* free exercise jurisprudence" and subsequent applications of RFRA).

233 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

234 United States v. Lee, 455 U.S. 252 (1982).

nance of an economic safety net through the social security program.[235] Where taxpayers are not prohibited by their religion from paying taxes, but merely claim that general tax obligations have reduced the fiscal resources that they may devote to religious practices, the Supreme Court has explicitly rejected the label of substantial burden.[236] Most of the religious institutions whose tax-exempt status is at risk due to potential violations of fundamental public policy do not claim that their religion prohibits tax payments (and cannot demonstrate, as the Amish challenger did in *United States v. Lee*, that their longstanding religious tradition bars funding certain types of government spending). Rather, those institutions' claims are that their religion mandates the discriminatory practices that violate antidiscrimination norms, and that denials of tax-exempt status, *due to* those violations, encroach on their religious freedom. This type of claim is analytically distinct from that raised in *United States v. Lee*. When Amish farmers resist payroll taxation, the denial of tax exemption imposes a direct burden on their religious obligation not to fund the expenses of social insurance. When discriminatory religious institutions claim entitlement to 501(c) status, the denial of tax exemption merely depletes the financial resources that those institutions can devote to religious activities. For the latter, denials of tax-exempt status do not, therefore, constitute a substantial burden. With respect to the deductibility of charitable contributions, the Supreme Court has similarly expressed doubts that disallowance of a section 170 deduction constitutes a substantial burden to the religious taxpayer.[237]

Second, insights from tax law back up the judicial recognition that denials of tax-exempt status, when primarily operating to reduce taxpayer's funds for religious activities, do not constitute substantial burdens. First, because both 501(c) status and the deductibility of charitable contributions represent deviations from a normal income tax, denials of those two tax positions are, in formal terms, not imposition of burdens but refusal to grant a privilege or a subsidy. An ideal system of income taxation aspires to tax "the money-value of the net

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235 *Id.* at 257.

236 *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) ("We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs.").

237 *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one.").

accretion to [one's] economic power between two points of time,"[238] conceptualized, economically, as the sum of consumption and savings and encoded, as a matter of legislative judgment, in section 61's broad definition of income.[239] Allowing individual taxpayers to deduct charitable contributions from their income, or completely exempting charitable and religious organizations from paying any taxes, amounts to a federal subsidy in the form of tax expenditures (i.e., reductions in federal revenue that are equivalent, in economic terms, to direct-spending programs).[240] In other words, granting tax exemptions to religious institutions is equivalent to taxing those institutions but providing a federal aid program that distributes funds directly to churches. To be sure, these tax expenditures may in fact be justified. In addition to replacing government spending as the origins of common-law charity suggests,[241] 501(c) organizations produce positive externalities and result in the increased provision of social goods (e.g., education, research, or religious and cultural plurality) that are inefficient for the government or the private market to produce.[242] But denying even economically or distributively justified expenditures is not equivalent to imposing a substantial burden: Americans may well deserve free higher education, but the government's refusal to provide this good hardly constitutes a substantial burden on its citizens in a constitutionally relevant sense.

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238 Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, *in* THE FEDERAL INCOME TAX: A SERIES OF LECTURES DELIVERED AT COLUMBIA UNIVERSITY 27 (Robert Murray Haig ed.,1921).

239 *See* 26 U.S.C. § 61(a) (2018) (defining gross income as "all income from whatever source derived").

240 Early scholars attributed the tax exemption for charitable organizations to the impossibility of applying ordinary concepts of taxable income to nonprofits, but this view has been persuasively criticized. *Compare* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 58–62 (1981) (contending that "arguments concerning the impossibility of applying ordinary tax accounting to nonprofits apply only to nonprofits that receive substantial income in the form of donations," rather than all nonprofits generally), *with* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 330–33 (1976) (arguing that "neither the 'net income' concept nor the 'ability to pay' rationale for income taxation can be satisfactorily applied to charitable organizations").

241 *See supra* subpart II.A.

242 *See, e.g.*, James Alm, *Is the Haig-Simons Standard Dead? The Uneasy Case for a Comprehensive Income Tax*, 71 NAT'L TAX J. 379, 390 (2018) (asserting that charitable organizations can most efficiently "provide goods and services" akin to public goods).

Denials of tax exemption are, therefore, more akin to refusals to grant discretionary privileges. In determining the taxpayer's eligibility for the subsidy in question, it is entirely natural for the government to consider whether the taxpayer performs activities whose nature justified the provision of the subsidy in the first place. This was exactly the approach taken by the *Bob Jones* Court, which justified sections 501(c) and 170 "on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."[243] The reduction in federal revenue incurred by the grant of tax exemption must be made up by increased contributions from other taxpayers, who are "indirect and vicarious 'donors.'"[244] This argument unmistakably signaled the Court's recognition that tax exemptions represent expenditures funded by the government in the form of higher taxes to non-exempt individuals and entities. If charitable tax exemption is justified because of charitable organizations' advancement of public values, then violations of established public policy erode that normative foundation for federal aid and the justification for granting the tax-exempt status in the first place.[245]

Third, beyond the formal distinction between imposing burdens and refusing subsidies, the economic costs associated with a denial of tax-exempt status are, contrary to popular belief, relatively miniscule for charitable organizations that do not have a large amount of investment income. Tax-exempt status eliminates liability from two types of taxes that are respectively imposed on business profits and investment returns.[246] A recent analysis by Professor Daniel Halperin has shown that, to the extent that a charitable organization will spend all of its income at some point in the future, income-tax exemption provides very little financial advantage.[247] In fact, exempting charitable organizations from income taxation and taxing for-profit firms for income (while allowing the for-profit firms a deduction for their future expenditures, as tax law normally does through section 162[248]) would place charitable or-

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243 Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

244 *Id.*

245 *See supra* note 164 and accompanying text.

246 Hansmann, *supra* note 240, at 85.

247 Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283, 293–94 (2011).

248 26 U.S.C. § 162 (2018) (providing for a deduction for "ordinary and necessary expenses . . . in carrying on any trade or business").

ganization in the same position as the for-profit firm, after the completion of future spending.[249] This is because the for-profit firm is entitled to a deduction for their ordinary business expenses, which produces tax savings, while the charitable organization, being exempt from income tax, obviously cannot take any deduction for any of its own spending.[250] To be sure, tax exemption still results in *some* advantage: the availability of a future tax saving can be uncertain, and the deduction may not result in immediate monetary gain to the taxpayer who has no tax liability. But the point stands that denial of 501(c) status imposes a smaller than expected economic "burden" on charitable organizations, even compared to a baseline position where they are entitled to tax exemption.

The bigger impact may come from the loss of section 170 deductibility (for charitable contributions) to the taxpayer, who may now be disincentivized from donating to the religious institution due to the increased (tax) costs of contributions. But even here the risk appears somewhat limited. The 2017 tax legislation, by increasing the standard deduction, has reduced the importance of the deductibility of charitable contributions, in particular to low- and middle-income households.[251] Further, if the taxpayer has been willing to donate to a religious institution involved in discriminatory practices that violate established public policy, that willingness shows an extraordinary enthusiasm for the religion and tolerance for its deviations from modern antidiscrimination norms. In those cases, it would be hard to imagine that the religious enthusiast would cease donations due to a loss of deductibility for those contributions. That is, the tax price elasticity of charitable donations to discriminatory tax-exempt organizations is likely low.

In economic terms, therefore, the "burden" imposed by a denial of tax-exempt status is far more limited than most realize. This implication, together with the Court's free exercise jurisprudence and income-tax concepts recognizing tax exemp-

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249 Halperin, *supra* note 247, at 294 n.45.

250 *See id.* at 293–94.

251 Jasper L. Cummings, Jr., *The Political Calculus of the 2017 Act*, 161 TAX NOTES 467, 472 (2018); Eugene Steuerle, *Challenges & Opportunities for Charities After the 2017 Tax Cuts and Jobs Act*, TAX POL'Y CTR. 1–2 (May 11, 2017), https://www.taxpolicycenter.org/sites/default/files/publication/155255/challenges_opportunities_for_charities_after_the_2017_tax_cut_and_jobs_act_3.pdf [https://perma.cc/BX4H-PH8C] (estimating that "the new tax law took away charitable deductions from about 60 percent of those who formerly benefited from it, while reducing subsidies by around $17 billion annually").

tion as a privilege rather than entitlement, further confirms that a denial of tax-exempt status does not constitute a "substantial burden" within the meaning of RFRA.

Lastly, even if a court finds substantial the burden imposed on religious exercise by the removal of a government subsidy in the form of tax exemption, antidiscrimination constitutes a compelling interest.[252] This Article has shown the deep commitment of the state to nondiscrimination as an instrument of effecting equality and integrating marginalized populations into the labor market and civil society.[253] Given the limited burden imposed by the denial of tax-exempt status, the IRS's extension of the enforcement of the fundamental public policy framework may well be the least restrictive means of advancing this compelling interest.[254]

IV
IMPLEMENTATION STRATEGIES: ADMINISTRATIVE ENFORCEMENT OF ANTIDISCRIMINATION

Since doctrine, policy, and theory all advise extending the enforcement of *Bob Jones* to antidiscrimination on the basis of all statutorily protected traits—and since religious freedom presents little obstacle—how should the IRS proceed? The most straightforward method would deny tax exemption to any organization engaged in discriminatory activities, but such an approach risks provoking populist resentment. This Part of the Article first examines the backlash generated by the IRS's denials of tax exemption to religious schools in the 1970s and 1980s (as well as the *Bob Jones* decision itself). It then outlines three strategies for implementation—outright denials, sunsets, and partial exemption—as well as a burden-shifting framework for determinations of tax exemption. It concludes with a reflection on the nature of this new paradigm of civil-rights enforcement: in addition to relying on private litigants or legislative breakthroughs, agencies take center stage in cementing and extending the peripheries of antidiscrimination norms' operation through their administration of government funding and revenue laws.

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252 Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2134–35 (2017) ("Courts have long recognized that antidiscrimination statutes serve compelling purposes, even when they address factors that do not trigger strict scrutiny under the Equal Protection Clause.").

253 *See supra* Part II.

254 *See supra* notes 234–251 and accompanying text.

A. The Fight Over Tax Exemption and the Rise of the Religious Right

Speaking about *Roe v. Wade*, the late Justice Ruth Bader Ginsburg commented, "Doctrinal limbs too swiftly shaped . . . may prove unstable,"[255] yielding outcries against an "imperial" government and the rise (in the case of *Roe*) of powerful counter-movements that undo progressive victories.[256] Justice Ginsburg's general warning about the possibility of backlash is well taken, but research has debunked the myth that the conservative movement rallied around the issue of abortion. Instead, it was the IRS's denials of tax exemption to religious schools—along with the subsequent fight in Congress, the executive branch, and the courts—that facilitated the participation of religion in politics and the rise of the Religious Right.[257]

Prior to the 1970s, most conservative Christians, in particular those living in the South, voted for Democrats, and this electoral pattern began to break down only after the Democratic Party threw its support behind socially liberal policies such as the Equal Rights Amendment.[258] In 1969, the Lawyers' Committee for Civil Rights and the NAACP-LDF started litigating, on behalf of Black parents, the tax exemption of racially discriminatory private schools—the so-called "segregation academies" formed after *Brown* and *Cooper v. Aaron*—and won important victories in the courts.[259] But IRS regulations proved inadequate, as private schools merely adopted pro forma nondiscrimination policies to retain their tax-exempt status, and the agency was prepared to fight the lawsuits until President Jimmy Carter took office in 1976.[260]

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255 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

256 *Id.* at 1205–06.

257 Aaron Haberman, *Into the Wilderness: Ronald Reagan, Bob Jones University, and the Political Education of the Christian Right*, 67 THE HISTORIAN 234, 239 (2005).

258 GEOFFREY LAYMAN, THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS 41–43 (2001); Haberman, *supra* note 257, at 238–39.

259 THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 131–32 (1992); *e.g.*, Norwood v. Harrison, 382 F. Supp. 921, 926 (N.D. Miss. 1974) (holding that four racially discriminatory private schools were not entitled to a state-funded program that distributed purchased textbooks to both public and private schools), *on remand from* 413 U.S. 455 (1973); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom.*, Coit v. Green, 404 U.S. 997 (1971) (permanently enjoining the IRS from granting tax-exempt status to racially discriminatory schools).

260 EDSALL & EDSALL, *supra* note 259, at 132.

With the appointment of Jerome Kurtz as Commissioner, however, the IRS switched course, publishing a proposed revenue procedure in 1978 that, in effect, would shift the burden of proof (of nondiscrimination and tax exemption) from the government to the private schools.[261] The proposed revenue procedure identified a category of "reviewable schools": those that (1) "formed or substantially expanded at the time of public school desegregation in the community served by the school" and (2) "ha[d] a student body whose percentage of minority students [was] less than 20 percent" of the minority share of the local community's school age population.[262] Any significant expansion from one year before implementation of an initial public school desegregation plan until three years after the final implementation of the plan would meet the requirement of (1).[263] Reviewable schools, by definition, would establish a prima facie case of racial discrimination and lose their tax-exempt status.[264] They could only rebut this presumption by "clearly and convincingly" showing either actual enrollment of minority students at or above twenty percent of the local community's minority school-age population or "[o]peration in good faith on a racially nondiscriminatory basis," the latter of which required meeting four of five specified factors.[265] In addition to tax exemption for the schools, racial discrimination also led to the loss of deductibility (to the donors) of contributions to those schools.[266] In sum, the 1978 revenue procedure reflected the then-IRS's (even if only momentary) expansive interpretation

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261 *Id.*; *see* Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37296, 37297 (proposed Aug. 22, 1978); Randall Balmer, The Historian's Pickaxe: Uncovering the Racist Origins of the Religious Right 10 (unpublished manuscript), https://amc.sas.upenn.edu/sites/default/files/Balmer%20-%20Historian%27s%20Pickaxe.pdf [https://perma.cc/ZN8Y-GSYP]; Wilfred F. Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463, 487–88 (1979).

262 Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. at 37297.

263 *Id.*

264 *Id.* at 37298.

265 *Id.* These factors include: (1) "Availability of and granting of scholarships or other financial assistance on a significant basis to minority students;" (2) "[a]ctive and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified;" (3) "[a]n increasing percentage of minority student enrollment;" (4) "[e]mployment of minority teachers or professional staff;" and (5) "[o]ther substantial evidence of good faith, including evidence of a combination of lesser activities," such as efforts in advertising, recruitment, making facilities available to integrated schools, including minority members in the governing board, and implementing minority-oriented curriculum or orientation programs. *Id.*

266 *Id.*

and commitment to foundational antidiscrimination norms. This commitment was embodied in rigorous review of any potentially discriminatory schools for purposes of tax exemption and section 170 deductibility.

This proposed regulation "sounded a thunderbolt through the fundamentalist and evangelical communities," elicited about 126,000 letters of protest to the government, and resulted in the claim that the IRS Commissioner "ha[d] done more to bring Christians together than any man since the Apostle Paul."[267] Conservative politicians quickly recognized the partisan potential of the tax-exemption fight. Senators Bob Dornan and John Ashbrook succeeded in adding a rider to the 1979 Act funding the Treasury Department, which denied the IRS's use of any appropriations to change the tax-exempt status of church-affiliated schools.[268] Ronald Reagan attacked the IRS for "threaten[ing] the destruction of religious freedom itself," commenting that the denials of tax-exempt status were especially unjustified because "virtually all [Christian private] schools are presently desegregated"—a claim that, in 1978, was dubious at best.[269] His delegates at the Republican National Convention included fundamentalists from Bob Jones University itself, and as soon as he took office, the Reagan Administration disavowed the previous IRS position, refusing to defend it in the Supreme Court and characterizing it as "administrative fiat."[270] The IRS itself backed away from the rigorous approach taken by the 1978 proposed revenue procedure, as the agency quickly promulgated in 1979 a new set of rules that scaled back the broad definition of reviewable schools. The IRS added a third requirement, including among

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267 EDSALL & EDSALL, *supra* note 259, at 132–33; Robert Freedman, *The Religious Right and the Carter Administration*, 48 HIST. J. 231, 240 (2005).

268 Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559, 562 (1979); *see also* Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 488–91 (1987) (illustrating the risks of governing through appropriation riders by the example of the Dornan and Ashbrook amendment).

269 SIDNEY M. MILKIS & DANIEL J. TICHENOR, RIVALRY AND REFORM: PRESIDENTS, SOCIAL MOVEMENTS, AND THE TRANSFORMATION OF AMERICAN POLITICS 247 (2019).

270 *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 221 (2016); Daniel K. Williams, *Reagan's Religious Right: The Unlikely Alliance Between Southern Evangelicals and a California Conservative*, *in* RONALD REAGAN AND THE 1980S: PERCEPTIONS, POLICIES, LEGACIES 137 (Cheryl Hudson & Gareth Davies eds., 2008); *Statement on Tax Exemptions for Private, Nonprofit Educational Institutions*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Jan. 12, 1982), https://www.reaganlibrary.gov/archives/speech/statement-tax-exemptions-private-nonprofit-educational-institutions-january-12-1982 [https://perma.cc/S5S4-5F56].

reviewable schools only those "whose creation or substantial expansion was related in fact to public school desegregation in the community."[271] It also re-defined substantial expansion to exclude any increase in maximum enrollment during a calendar year below twenty percent.[272] The much less ambitious 1979 revenue procedure did not extinguish the backlash, as Grover Norquist, a noted conservative activist, concluded: "The religious right did not get started in 1962 with prayer in school . . . [or] in '73 with *Roe v. Wade*. It started in '77 or '78 with the Carter administration's attack on Christian schools . . . ."[273]

While some scholars have warned not to overestimate the costs of backlash,[274] it is hard to ignore the extent to which the IRS's previous efforts at eradicating government subsidies of discrimination facilitated the political mobilization of a generation of conservative activism. Not only did the IRS's and the Supreme Court's decisions provide compelling practical reasons for religion to enter politics, the tax-exemption battle exemplified the broader controversies of race and money that divided American society. By marrying religious freedom (and its associated social conservatism) with fiscal policy, *Bob Jones* provided a "powerful internal coherence" to the New Right, which emerged as a counterweight to the progressive aspiration of a liberal, welfare state.[275] The regrettable aspect of this populist resentment generated by the IRS is that the 1978 proposed revenue procedure was overinclusive and embraced in its purview any school that was formed or expanded around the time of desegregation.[276] To be sure, racial animus motivated the formation of the segregation academies. But private-school enrollment in this period also shot up because of disagreement over changes in public-school curriculum (e.g., over sex education) and culture (e.g., regulation over the use of drugs).[277] As a result, many defenders of the private Christian schools were labeled as racists when they were primarily re-

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271 Proposed Revenue Procedure on Private Tax-Exempt Schools, 44 Fed. Reg. 9451, 9452 (proposed Feb. 13, 1979).

272 *Id.* at 9453.

273 Balmer, *supra* note 261, at 13.

274 Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376–77 (2007). Professors Post's and Siegal's view that *Roe* itself did not provoke the intense backlash popularly attributed to it is well taken.

275 EDSALL & EDSALL, *supra* note 259, at 131.

276 Proposed Revenue Procedure on Private Tax-Exempt Schools, 43 Fed. Reg. 37296, 37297 (proposed Aug. 22, 1978).

277 *See* EDSALL & EDSALL, *supra* note 259, at 133.

sponding to broader cultural changes that did not involve race discrimination, and prominent activists within the religious right were in fact quite secular.[278] In other words, the proposed revenue procedure, if successfully implemented, would not have contributed to the government's antidiscrimination policy and, instead, only alienated key Christian groups that did not discriminate on the basis of race, incurring a heavy cost in the form of their political mobilization.

B. Backlash and Implementation Strategies

The trajectory of the IRS's enforcement approach and its interaction with democratic politics provide prudential considerations in extending the fundamental public policy framework to the full panoply of the federal antidiscrimination regime. This section first examines the range of substantive outcomes—whether, and in what circumstances, the IRS should mandate an outright denial of tax exemption, a partial exemption, or a sunset of existing exemption. It then proposes a procedural, burden-shifting framework for identifying which tax-exempt entities should stand to lose their tax benefits for their discriminatory activities.

1. *Outright Denials*

Despite the possibility of backlash, outright denials of tax exemption are still appropriate under certain circumstances. Discrimination by tax-exempt entities fall into three categories: (1) organizations that have a discriminatory purpose, (2) organizations that have a charitable purpose but engage in discriminatory activities involving the core of that purpose, and (3) organizations that have a charitable purpose but engage in discriminatory activities in an area distinct from that purpose. Under current law, the first type of organization (e.g., one whose mission is to discriminate or further a discriminatory purpose) is generally not entitled to tax exemption because it would not fall under any of the statutorily enumerated tax-exempt purposes.[279] Racially discriminatory schools would fall under the second category: they engage in discrimination in admissions or the provision of education, the charitable pur-

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278 Freedman, *supra* note 267.

279 26 U.S.C. § 501(c) (2018). A separate scenario arises where the organization has two purposes—one discriminatory and one otherwise tax-exempt—or where the organization facially adopts a tax-exempt purpose but substantively pursues a discriminatory end. *See supra* note 28 and accompanying text (describing the emergency of Trump-affiliated white-only churches).

pose that forms the basis of their tax exemption. The third category would embrace, for example, private schools that discriminate on the basis of protected traits in employment decisions: while those practices are discriminatory, they are incidental to but not constitutive of the performance of the core charitable mission of the organization.

Discriminatory activities involving the core charitable purpose of an organization, on the basis of any protected traits, warrant outright denials of tax exemption. Under this view, the IRS's current practice of denying tax exemption to schools that discriminate on the basis of race in admissions should continue. Similarly, an organization whose tax-exempt status derives from charitable poor relief but which discriminates in the distribution of that benefit (e.g., a soup kitchen that prohibits women, people or color, or those with certain religious affiliations from enjoying the food) should stand to lose its tax exemption. Those organizations run afoul of one of the core principles of charity—the provision of goods to an "indefinite" group of the public.[280] They deny access to the very public benefit that justifies their tax exemption in the first place, on the basis of characteristics that the federal government has judged impermissible. In doing so, they violate fundamental public policies of our country, and their discriminatory activities directly taint their charitable function.

At the same time, the IRS must take care to define the criteria of outright denials with precision. If the regulations deny tax exemption to organizations discriminating on the basis of protected traits in the distribution of benefits that constitutes their charitable purpose, then the agency must provide clear definitions and examples of disqualifying activities. Importantly, the government should exercise caution in using proxies or indirect indicators of those disqualifying discriminatory activities. As already discussed, the intense resentment provoked by the 1978 proposed revenue procedure was generated, in large part, by the overinclusive nature of the regula-

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280 *See supra* note 147 and accompanying text; *see also* Jackson v. Phillips, 96 Mass. 539, 556 (1867) (describing a charitable gift as one "to be applied, consistently with existing laws, for the benefit of an indefinite number of persons"). To be sure, provision of a benefit to an "indefinite" group needs not entail distributing that benefit to *every* member of the public without any general limitations. Charitable organizations centered on educational purposes, for example, may certainly limit need-based scholarships to disadvantaged children and family. Instead, the point is that, however an entity defines eligibility to the benefits it provides, those definitions should not involve facial classification on the basis of protected traits in areas falling under the federal antidiscrimination regime (e.g., education, public accommodations, etc.).

tion, which threatened the tax exemption of not only private schools that discriminated on the basis of race but also those that expanded in response to broader cultural shifts.[281] By bringing all schools that expanded during the desegregation efforts of the 1960s and 1970s under its purview, the proposed revenue procedure facilitated the mobilization of nondiscriminatory groups into conservative politics. More targeted denials of tax exemption could preempt that outcome, while still furthering the government's antidiscrimination goals.

2. *Sunsetting the Exemption*

For entities that engage in discriminatory activities incidental to their core charitable purpose (e.g., most tax-exempt organizations that engage in employment discrimination), the IRS may use two mechanisms to minimize the backlash potentially generated by its denial determinations. Neither is perfect, and both raise issues of efficiency and administrability. It is not the contention of this Article that the IRS *must* use them in regulating tax-exempt organizations with discriminatory activities. I only argue that, *should* the current Administration form the political judgment that denials of tax exemption to such organizations carry too great a risk of backlash, readily available (though imperfect) tools exist to reduce that risk.[282]

Sunsetting the tax exemption of discriminatory organizations is one of those options. An important cause of backlash—whether resulting from court adjudications or executive-branch policymaking—concerns timing. Swift legal changes "can disrupt the order in which social change might otherwise have occurred by dictating reform in areas where public opinion is not yet ready to accept it."[283] In other words, the public, regulated entities, and interest groups may need time to catch up with the evolution of fundamental public policy and to bring their behavior into compliance with the requirements of antidiscrimination and tax law. Therefore, the IRS can reduce the

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281 *See supra* notes 277–278 and accompanying text.

282 There is a countervailing consideration here. Any potential for backlash might be minimized by the fact that evangelical and fundamentalist voters are already aligned with conservative politicians and the Republican Party. *See* Michael Lipka, *U.S. Religious Groups and Their Political Leanings*, PEW RSCH. CTR. (Feb. 23, 2016), https://www.pewresearch.org/fact-tank/2016/02/23/u-s-religious-groups-and-their-political-leanings [https://perma.cc/4Q48-UMXD]. As a result, the political costs of outright denials of tax exemption might be lower than expected.

283 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 465 (2004); *accord* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 449 (2005).

risk of backlash today by sunsetting the tax exemption of discriminatory entities, either by promulgating a general notice of future enforcement, or by denying tax exemption to specific organizations that engage in discriminatory activities but giving them time to comply with civil-rights laws (without taking away their tax exemption in the meantime). In addition to minimizing backlash, this approach is also consistent with the ideal of fair notice and reduces the transition costs to a stronger framework of civil-rights enforcement.

The main downside of the sunsetting approach is that, depending on changes in presidential administrations, denials of tax exemption may never be implemented. A subsequent IRS with an unfavorable view toward aggressive enforcement of antidiscrimination laws may revoke the determinations and the policymaking of the prior agency. Under current standing doctrines, it would be impossible to challenge those policy reversals in federal court.[284] Further, sunsetting the tax exemption of discriminatory organizations might also produce inefficient social outcomes: termination of tax benefits at a fixed point in the future allows politicians to "extract votes and campaign contributions from parties affected by the threatened provision."[285]

3. *Partial Exemption*

The IRS may also utilize partial tax exemption—a strategy that has two main benefits: one theoretical, and one practical. First, this approach may cohere with the basic framework of charity and public benefits. As already discussed, a core justification for tax exemption consists in the relevant organization's (nondiscriminatory) distribution of a benefit to an indefinite group of the public.[286] Any discriminatory activity in the process of *producing* that benefit (i.e., as opposed to any discrimination in the process of *distributing* that benefit) does not necessarily taint the organization's conferral of the public benefit itself. In other words, a private school that discriminates on the basis of, for example, pregnancy (a protected

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284 Allen v. Wright, 468 U.S. 737, 739–40 (1984) (denying standing to parents of Black children who sought to challenge the IRS's insufficient review of racially discriminatory private schools in granting tax exemption, on the basis that racial stigmatization was not a cognizable injury, and that the children's diminished ability to receive an education at an integrated school was not fairly traceable to the government's actions).

285 Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 340 (2006).

286 *See supra* Part III.

trait[287]) in employment decisions is analytically distinct from one that discriminates on the basis of race in admissions or curricular policy. The former has still provided to the public an educational benefit on a nondiscriminatory basis, even if it has denied fair treatment to its employees and violated antidiscrimination norms in areas beyond its core charitable purpose, thus qualifying for partial but not full tax exemption. The latter, in contrast, has not even provided a public good on a nondiscriminatory basis.

Second, in addition to proportionality concerns, partial tax exemption could serve a more practical function of diminishing backlash and encouraging the piecemeal development of a broader culture of antidiscrimination. If, for example, the IRS allows the entity to reorganize into two arms—a taxable arm and a charitable, nondiscriminatory arm disentangled from any of its fundamental public policy violations—then taxing the noncharitable arm might generate less intense backlash than denying tax exemption wholesale. After all, it would be hard for exempt organizations to elicit sympathy if the government taxes only their income and investment returns related to discriminatory activities and leaves exempt their income related to charitable purposes. Even more promising is the possibility that, because they must comply with the obligation to cabin discrimination into a taxable arm, exempt organizations will reconsider their engagement in discriminatory practices, resulting in a broader cultural shift against arbitrary, differential treatment on the basis of protected traits.

The difficulty with implementing partial tax exemptions lies in administrability. Two mechanisms could facilitate partial tax exemption. First, the IRS could utilize the existing framework of unrelated business income tax (UBIT), which subjects to taxation an organization's income from trades and businesses not substantially related to its exempt purpose[288]—for example, income generated from the public use of an exempt school's athletic facilities or from the sale of certain souvenirs at an exempt museum's gift shop.[289] The IRS, therefore, could impose UBIT liability on an exempt organization's income that is entangled with discriminatory practices. The challenge

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287 42 U.S.C. § 2000e(k) (2018).

288 *See* 26 U.S.C. §§ 511–12 (2018) (imposing on exempt organizations a tax on unrelated business taxable income, defined as "gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it, less the deductions allowed").

289 *See, e.g.*, I.R.S. Publ'n 598, Cat. No. 46598X, 5–6 (Feb. 26, 2019) (describing examples of activities that are unrelated to trades or businesses).

with this approach is that congressional action might be necessary, because the statute contains a clear definition of unrelated business income that may not encompass income entangled with discriminatory practices.[290] The second possibility is to require the exempt organization to form a taxable subsidiary that contains all of its potential public policy violations. An exempt private school that discriminates on the basis of sex in employment decisions in its athletic department, for example, might be required to separate its athletics department into a taxable entity distinct from the tax-exempt activities conducted by the main charitable arm. This approach, however, may require complex organization plans in order to cabin all of an entity's potentially discriminatory practices into one taxable subsidiary.

C. A Burden-Shifting Procedure for Identifying Discriminatory Tax-Exempt Entities

Minimizing backlash and ensuring a fair administration of the fundamental public policy framework also require a careful formulation of the procedure for identifying discriminatory tax-exempt entities. As discussed, the 1979 Proposed Revenue Procedure provoked intense reactions from conservative activists in part due to its broad and overinclusive definition of schools subject to heightened review by the IRS.[291] In extending its enforcement of the fundamental public policy framework to all federally protected traits, the IRS should avoid the mistake of using proxies and second-order indicia of discrimination (e.g., an education institution's enrollment expansion during a period of desegregation or an employer's large turnover in or termination of employees during an expansion of the antidiscrimination regime like *Bostock*[292]) to bring a vast nonprofit sector within its regulatory ambit. Instead, without any evidence to the contrary, an entity applying for tax-exempt status, which otherwise satisfies the requirements for tax ex-

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290 26 U.S.C. § 513 (2018) (defining "unrelated trade or business" as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501"). Given the arguments of subpart III.B, *supra*, one might argue that discriminatory practices, by running afoul of the core requirements of charity imposed on all exempt purposes, are indeed not "substantially related" to an organization's basis of tax exemption under section 501(c)(3).

291 *See supra* subpart IV.A.

292 Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

emption under section 501(c)(3),[293] should be presumed non-discriminatory. The IRS can make this presumption clear by requiring applicants for tax exemption to submit a statement of their non-discrimination policy. This statement would then create a rebuttable presumption that the applicant does not engage in discriminatory activity that disqualifies it from tax exemption.

This presumption of non-discrimination is not absolute; instead, it should be made rebuttable upon evidence of discrimination. In addition to individual whistleblowing, the IRS can make use of the existing administrative apparatus for employment antidiscrimination to determine when the burden shifts to the tax-exempt entity to prove that they do not discriminate on the basis of statutorily protected traits. Under current law, private litigants who seek to sue their employers for violating antidiscrimination statutes must, in general, satisfy an administrative exhaustion requirement. In order to litigate any allegation of discrimination on the basis of race, color, religion, sex, age, or disability, an employee must first file a charge with the EEOC.[294] Upon receipt of the charge, the EEOC notifies the employer, investigates the allegations, and for complaints where reasonable cause exists, "endeavor[s] to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[295] Should informal mediation and dispute resolution fail, the EEOC has the right to "bring a civil action" against any non-government employer on behalf of the aggrieved employee.[296] Because the EEOC does not have the resources to bring enforcement lawsuits on behalf of all employees,[297] the agency resolves most charges by issuing a Notice of Right-to-

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293 *See supra* subpart I.A (outlining the statutory and regulatory requirements for tax exemption).

294 42 U.S.C. § 2000e-5 (2018); *see Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/DFS4-UJBV] (last visited Apr. 1, 2022). For an overview of the EEOC's enforcement procedure, see, for example, Eric E. Petry, Comment, *Master of Its Own Case: EEOC Investigations After Issuing a Right-to-Sue Notice*, 85 U. CHI. L. REV. 1229, 1233–39 (2018) ("EEOC involvement begins when an aggrieved individual . . . files a formal charge of unlawful employment discrimination with the [EEOC].").

295 42 U.S.C. § 2000e–5(b) (2018).

296 42 U.S.C. § 2000e–5(f)(1) (2018).

297 The EEOC has discretion over which charges it litigates and considers numerous "factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC's efforts to combat workplace discrimination." *Filing a Lawsuit*, *supra* note 294.

Sue that allows the employee to bring a private lawsuit in the court.[298]

While the Supreme Court has clarified that this requirement to exhaust administrative remedies is not jurisdictional (i.e., is waivable), failure to file a charge with the EEOC serves as a bar to litigation (as long as the objection is timely raised by the employer).[299] This administrative exhaustion requirement has two exceptions. First, age discrimination lawsuits can proceed in court without a Notice of Right-to-Sue (but still requires the filing of a charge 60 days in advance of the litigation).[300] Second, lawsuits under the Equal Pay Act[301] (an amendment to the Fair Labor Standards Act that prohibits sex-based wage discrimination for employees performing jobs with substantially equal skills) can proceed without a Notice of Right-to-Sue.[302] These two exceptions cover fewer than a quarter of the charges filed with the EEOC.[303] In other words, the vast majority of employment discrimination disputes need to satisfy the administrative exhaustion requirement and obtain a Notice of Right-to-Sue to proceed to court.

An employee's receipt of a Notice of Right-to-Sue from the EEOC thus represents an optimal moment for the IRS to shift the burden onto the tax-exempt entity to demonstrate that it

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298 *Compare, e.g.*, *Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 [https://perma.cc/5FZZ-LBUJ] (last visited Apr. 1, 2022) [hereinafter *EEOC Charge Statistics*] (showing that 67,448 charges were filed with the EEOC in fiscal year 2020), *with EEOC Litigation Statistics, FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2020 [https://perma.cc/73LX-EJBA] (last visited Apr. 1, 2022) (showing that the EEOC filed 97 lawsuits in fiscal year 2020, or 0.14% of charges filed in the same period). Aggrieved employees can also request Notices of Right-to-Sue if the EEOC is not able to finish its investigation within 180 days. *Filing a Lawsuit*, *supra* note 294; *see* 29 C.F.R. § 1601.28 (2020).

299 Fort Bend County v. Davis, 139 S. Ct. 1843, 1846 (2019) ("Title VII's charge-filing instruction is not jurisdictional . . . [but is instead] properly ranked among the array of claim-processing rules that must be timely raised to come into play.").

300 29 U.S.C. § 626(d)(1) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.").

301 Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

302 *See Filing a Lawsuit*, *supra* note 294 ("If you plan to file a lawsuit under the Equal Pay Act, you don't have to file a charge or obtain a Notice of Right to Sue before filing. Rather, you can go directly to court, provided you file your suit within two years from the day the pay discrimination took place (3 years if the discrimination was willful).").

303 *See EEOC Charge Statistics*, *supra* note 298 (showing that alleged age discrimination and violations of the Equal Pay Act constitute approximately 21% of all charges filed with the EEOC during fiscal year 2020).

does not engage in discriminatory activities and should not lose its tax exemption. First, at this point, the EEOC will have conducted an investigation into the employee's allegations of discrimination and will have determined whether "reasonable cause" exists to believe that the employer has violated an antidiscrimination statute.[304] With adequate information sharing between the two agencies, the IRS will not need to conduct its own independent factfinding but can rely on the EEOC's investigation to compel tax-exempt entities accused of violating antidiscrimination statutes to put forth an affirmative case that they are not engaged in discriminatory activities. In many cases where the EEOC has found no reasonable cause to suspect any discrimination, the IRS should allow the tax-exempt entity to rely on the EEOC's determination to preserve its rebuttable presumption of non-discrimination.[305] (But note that the EEOC's no-reasonable-cause determination does not certify an employer's compliance with antidiscrimination statutes,[306] so pending the outcome of litigation, the IRS may still shift the burden to the employer to prove, relying on evidence beyond the EEOC determination, absence of discrimination in its workplace.) In the converse, if the EEOC has made a reasonable-cause determination or has itself initiated a lawsuit against the employer, the IRS can rely on either event as creating a presumption that the employer has engaged in disqualifying discriminatory activities and will lose its tax exemption. This framework thus relieves the IRS of the burden of conducting independent factfinding into an entity's potential violation of antidiscrimination statutes and fundamental public policy.

Second, shifting the burden to the employer upon the employee's receipt of a Notice of Right-to-Sue also eases compli-

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304 29 C.F.R. § 1601.28(b) (2020).

305 In fiscal year 2020, for example, the EEOC found no reasonable cause in approximately 66.8% of all charges filed. *See All Statutes (Charges Filed with EEOC) FY 1997-FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/7NZZ-KHM7] (last visited Apr. 19, 2022) [hereinafter *Charges Filed with EEOC*].

306 *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973) ("The [EEOC] itself does not consider the absence of a 'reasonable cause' determination as providing employer immunity from similar charges in a federal court, and the courts of appeal have held that, in view of the large volume of complaints before the [EEOC] and the nonadversary character of many of its proceedings, 'court actions under Title VII are de novo proceedings, and . . . a Commission "no reasonable cause" finding does not bar a lawsuit in the case.'" (alteration in original) (citations omitted)) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971)).

ance costs. At this point, the majority of the employers can preserve their presumption of non-discrimination and their tax-exempt status simply by relying on EEOC's no-reasonable-cause determination. Where the EEOC has found the aggrieved employee's complaint of discrimination credible, the employer will likely have made preparation to defend its actions in an expected lawsuit brought either by the EEOC itself or by the aggrieved employee. The employer can then use similar arguments and materials, which are in its ready possession in anticipation of litigation, to establish to the IRS that it has not engaged in disqualifying discriminatory activities.[307]

In sum, the IRS should institute a burden-shifting procedure to identify tax-exempt entities that stand to lose their exemption due to discriminatory activities. First, all entities can create the presumption that they do not violate fundamental public policy by submitting a non-discrimination statement in their application for tax-exempt status. Second, upon evidence of discrimination (for example, an employee's receipt of a Notice of Right-to-Sue from the EEOC), the IRS should shift the burden to the tax-exempt entity to establish, affirmatively, that it does not engage in discrimination. Most employers can preserve their presumption of tax exemption through the EEOC's no-reasonable-cause determination. Third, entities that cannot establish non-discrimination to the IRS should have their tax-exempt status revoked, partially denied, or sunset, as appropriate.[308] This burden-shifting procedure minimizes the possibility of backlash by not using second-order indicia of discrimination to subject a large number of tax-exempt entities to immediate, heightened review by the IRS. Instead, it relies on actual evidence of discrimination to shift the burden to the tax-exempt organization to show its compliance with fundamental public policy, at a time when both the agency and the organization have sufficient information.

D. Toward a Paradigm of Administrative Enforcement of Antidiscrimination

In addition to minimizing backlash, extending the fundamental public policy framework to all statutorily protected

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307 To be clear, this Article does not propose that the IRS in fact adjudicate the employment discrimination dispute—that responsibility belongs to the judiciary. Instead, the IRS can articulate affirmative commitments that an organization must make and actions that it can undertake to preserve its status of non-discrimination, as the agency already does with respect to racially discriminatory schools.

308 *See supra* subpart IV.B.

traits (and implementing it via the burden-shifting procedure outlined in the previous section) have the potential of introducing a new paradigm of administrative enforcement of antidiscrimination. This section describes the nature of this enforcement paradigm, which focuses on cementing the boundaries of antidiscrimination norms' operation by careful administration of the country's revenue laws and spending programs. By letting agencies take center stage in enforcement, this paradigm can supplement legislative protections and reinforce the litigation-based model currently used to vindicate antidiscrimination norms. The section ends with a brief discussion of potential applications of this paradigm to additional areas of the law.

This paradigm emerges from a backdrop of scholarly critiques of the absence of any administrative enforcement of antidiscrimination law, as well as the political reality of legislative inertia and inaction. The current legal regime provides for little public enforcement of antidiscrimination statutes and instead relies on private litigation: scholars have shown that, because passage of the original 1964 Civil Rights Act required support of conservative Republicans in Congress, the EEOC was deprived of the strong administrative powers—including adjudicatory authority—that civil-rights advocates had initially proposed.[309] This compromise—providing explicit statutory entitlement to antidiscrimination based on protected traits but no bureaucratic structure authorized to enforce it independently—resulted in a "toothless" agency, one that had no power "to make substantive rules, hold adjudications, and issue cease and desist orders."[310] Today, the primary authority to

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309 *E.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 94–128 (2010); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 691–92 (2013); Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 126–27 (2014).

310 Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 461–62 (2021); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1535 (2018); Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 309 (2001) ("From its inception, the EEOC recognized that its power to enforce its own investigative findings was virtually nonexistent."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 550 (2001) ("As a result of earlier political compromise, the [EEOC] lacks independent power to sanction violations of the employment discrimination laws or to promulgate regulations under Title VII. . . . The agency has been repeatedly and consistently criticized as a toothless tiger.").

implement (in particular employment) antidiscrimination law resides in the federal courts. Indeed, the EEOC has no independent power to order remedies for aggrieved employees, receives little deference from the judiciary for its regulations,[311] and even lacks power to investigate instances or patterns of discrimination on its own initiative (unlike other agencies), because the charge-filing process serves not only as an administrative-exhaustion requirement for the employees[312] but also as a jurisdictional prerequisite to enforcement of the EEOC's subpoena.[313] In other words, the EEOC, beyond informal conciliation efforts, can only choose to bring what it judges as meritorious lawsuits on behalf of aggrieved employees and functions as a quintessential "litigation gatekeeper," an agency vested with "the power to oversee and manage private litigation efforts."[314] In the course of litigation, whether initiated by the agency or the aggrieved employees themselves, the EEOC's reasonable-cause determination "lacks legal effect apart from its persuasive power."[315] Weak administrative enforcement of antidiscrimination and the limits of private litigation have led to thorough criticism and many scholarly calls for reform.[316]

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311 *See, e.g.*, Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) ("In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to 'chart its own course' rather than defer to [the EEOC] . . . ."); *What You Should Know: EEOC Regulations, Subregulatory Guidance, and Other Resource Documents*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/9EDL-Y85B] ("Under Title VII of the Civil Rights Act, EEOC's authority to issue legislative regulations is limited to procedural, record keeping, and reporting matters. Regulations issued by EEOC without explicit authority from Congress, called 'interpretive regulations,' do not create any new legal rights or obligations, and are followed by courts only to the extent they find EEOC's positions to be persuasive.").

312 *See supra* notes 294–299 and accompanying text.

313 EEOC v. Shell Oil Co., 466 U.S. 54, 65 (1984) ("Accordingly, we hold that the existence of a charge that meets the requirements set forth in § 706(b), 42 U.S.C. § 2000e–5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC.").

314 David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619, 621 (2013).

315 *Id.* at 649.

316 *E.g.*, Bornstein, *supra* note 309, at 120 n.2 (surveying the literature); Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 195–96 (2009) (proposing a reformed EEOC modeled on a "truth commission"); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1239 (2010) (proposing "a complete restructuring of the EEOC to create an agency that focuses primarily on preventing discrimination"); *see also* Engstrom, *supra* note 314, at 625–26, 689–711 (proposing "a radical overhaul of the role of the [EEOC] by rendering its gatekeeper powers both more and less expansive than at present,

Against this background of inadequate administrative enforcement is the reality of congressional inertia. The Biden Administration has made it a priority to bolster antidiscrimination and civil-rights protections for marginalized groups. On Inauguration Day, the Administration issued two executive orders declaring its policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation,"[317] as well as to "pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[318] The Executive's promise of stronger civil-rights enforcement, however, has not translated into legislative action. Pending, and languishing, in Congress are two bills that would advance antidiscrimination protections for LGBTQ communities: The Equality Act would explicitly prohibit discrimination based on sexual orientation and transgender status and extend those antidiscrimination protections to public accommodations and federal funding.[319] The Do No Harm Act would prohibit the application of RFRA to statutes that promote equal opportunity, including the Civil Rights Act of 1964, and would, in essence, prevent the use of religious freedom to license discrimination.[320] The former has passed the House but faces difficult odds of surviving the Senate's filibuster,[321] while the latter has been repeatedly introduced by Democratic lawmakers but has never passed either chamber of Congress.[322] In short, neither bill, or any statutory

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dismantling the EEOC's current system of charge processing but granting the agency substantial new gatekeeper power over class actions and other 'systemic' private lawsuits"); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 393 (2010) (showing that judicial interpretations of Title VII have been more cautious than the agency's, that "the Court has tended to hesitate before expanding the scope of the antidiscrimination principle" because "its typical approach to questions on which congressional intent is unclear or indeterminate is to limit the reach of the statute"); Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39, 54–55 (2021) (arguing that "enervation of the litigation state" shifts pressure of enforcing statutory rights "to the executive branch and the administrative state").

317 Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021).

318 Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009 (Jan. 20, 2021).

319 Equality Act, H.R. 5, 117th Cong. (2021).

320 Do No Harm Act, H.R. 1378, 117th Cong. (2021).

321 167 CONG. REC. H660 (daily ed. Feb. 25, 2021) (showing that the Equality passed House by a vote of 224–206).

322 *See* Do No Harm Act, H.R. 1378, 117th Cong. (2021); Do No Harm Act, H.R. 1450, 116th Cong. (2019); Do No Harm Act, H.R. 3222, 115th Cong. (2017).

expansion of antidiscrimination protections (or even explicit codification of existing antidiscrimination protections already recognized in judicial doctrine), has a clear path to enactment.

Extending enforcement of the fundamental public policy framework to all statutorily protected traits can both strengthen the current, inadequate administrative mechanism for enforcing antidiscrimination laws and fill some of the gaps left by congressional deadlock. First, IRS implementation of the proposed burden-shifting framework[323] can reinforce the informal pressures exerted by the EEOC and add teeth to the agency's conciliation efforts directed at tax-exempt employers. As already discussed, the EEOC currently has no power to prescribe remedies to aggrieved employees even where it finds reasonable cause for discrimination by the employer and must rely on litigation as its sole enforcement tool if conciliation fails.[324] Requiring the tax-exempt organization to establish that it has not engaged in disqualifying discriminatory activities when the EEOC has found reasonable cause (either as the agency itself initiates litigation or by issuing a notice of right-to-sue to the aggrieved employee) encourages the organization to participate in the EEOC's conciliation efforts in good faith. If informal conciliation fails, what awaits the tax-exempt employer is not only potential litigation in which the EEOC's reasonable-cause determination is entitled to no deference, but also the need to justify its tax exemption to the IRS by affirmatively showing non-discrimination. IRS implementation of *Bob Jones* can, therefore, strengthen the administrative apparatus for enforcing employment antidiscrimination laws.

Second, extending enforcement of the fundamental public policy framework to all statutorily protected traits can advance the same values that the Equality Act and the Do No Harm Act instantiate. The former is expressly premised on the congressional finding that discrimination against LGBTQ people "prevents the[ir] full participation . . . in society and disrupts the free flow of commerce"[325]—a finding that coheres with the historical, common-law concept of charity described earlier in this Article.[326] The latter strips religious organizations—most of which are tax-exempt—of protection under RFRA if their relig-

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323 *See supra* subpart IV.C.

324 Each year, conciliation consistently fails in over one thousand cases where the EEOC has found reasonable cause of discrimination. *See Charges Filed with EEOC*, *supra* note 305 (showing a range between 1134 and 6559 unsuccessful conciliations per year between 1997 and 2020).

325 Equality Act, H.R. 5, § 2(a)(3), 117th Cong. (2021).

326 *See supra* subpart II.A.

ious practice collides with statutory or regulatory protections against discrimination.[327] This provision is intended to prevent any judicial construction of RFRA that would "authorize an exemption from generally applicable law if the exemption would impose meaningful harm, including dignitary harm, on a third party," or if "the exemption would permit discrimination."[328] By conditioning tax exemption on compliance with antidiscrimination statutes, including those protecting LGBTQ status, the IRS and the Executive can facilitate the incorporation of the LGBTQ community into contemporary civil society. This stems in part from the fact that tax-exempt entities encompass a large swath of the nonprofit sector—ranging from education and politics to arts and culture—crucial for the public's access to social capital. Removal of government subsidies, either through section 501(c) tax exemption or section 170 deduction for charitable contributions to donors, for discriminatory tax-exempt entities will, in effect, incentivize compliance with generally applicable antidiscrimination laws by religious organizations.

IRS implementation of the *Bob Jones* framework would exemplify a trend toward regulatory pluralism in advancing equality.[329] Traditional civil-rights enforcement at the federal level has focused on the provision of court remedies for violations of statutory prohibitions on the basis of protected traits.[330] This model has come under siege due to the absence

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327 Do No Harm Act, H.R. 1378, § 3, 117th Cong. (2021).

328 *Id.* § 2.

329 Olatunde C.A. Johnson, *Equality Law Pluralism*, 117 COLUM. L. REV. 1973, 1978–79 (2017) [hereinafter Johnson, *Equality Law Pluralism*] (advocating an expansion of "the regulatory mechanisms that governments utilize to spur and require inclusion" and a "broader range of regulatory levers to induce inclusion"); *see also* Johnson, *Overreach and Innovation*, *supra* note 164, at 1776 ("At the federal level, civil rights agencies are increasingly using forms of regulation that can be described as open-ended, less coercive, and more reliant on rewards, collaboration, and interactive assessment than traditional modes of civil rights regulation."); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 765–69 (1991) (generally criticizing excessive "reliance on the judiciary" as the "[a]ppropriate [i]nstitution" to implement principles of antidiscrimination and to bring about social change in the area of civil rights).

330 *See, e.g.*, *supra* notes 309–316 and accompanying text (describing the primary role of courts in enforcing employment antidiscrimination); Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 138 (2021) ("Scholars have repeatedly expressed concern that courts and traditional civil-rights suits are inherently limited tools for effectuating structural reforms."); K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2491 (2018) (suggesting that by taking a regulatory, rather than litigation-based approach, to validating individual rights, policymakers may formulate more comprehensive and structural inclusion policies).

of strong administrative enforcement tools,[331] as well as the rise of economic inequality and substantive, as opposed to formalist, group-based subordination manifesting more in implicit bias than overt discrimination.[332] A broader range of regulatory tools, however, has emerged in the past decade and holds, in the words of one scholar, "the potential of moving beyond the formalist, liberalist assumptions of traditional civil rights regimes by linking questions of 'identity' inclusion to economic inequality and the distribution of social and public goods."[333] These regulatory levers include "competitive grants, tax incentives, contests for labor agreements and licenses, requirements attached to land-use development, and scoring systems for public contracts that reward entities for promoting inclusion."[334] Commentators have in particular noted the potential of the tax system in advancing equality norms.[335] The IRS's implementation of the fundamental public policy framework would add to this regulatory panoply. Notably, *Bob Jones* enforcement does not *ban* discriminatory activities undertaken by tax-exempt entities in any legally relevant sense: the IRS has no power to order remedies for the individual affected by the tax-exempt entity's discriminatory activities, or any injunctive relief to ensure that the entity does not engage in similar discrimination in the future. Instead, the IRS merely removes a government subsidy, in the forms of tax exemption and decreased costs in fundraising through tax deduction to donors, from discriminatory members of a nonprofit sector that wields

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331 *See supra* note 309 and accompanying text.

332 *See* Johnson, *Equality Law Pluralism*, *supra* note 329, at 1986–87; Sturm, *supra* note 310, at 460 ("Unequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion. 'Second generation' claims [of discriminatory exclusion] involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate." (footnote omitted)).

333 Johnson, *Equality Law Pluralism*, *supra* note 329, at 1978.

334 *Id.*

335 *See e.g.*, *id.* at 1995, 1999–2001 (noting that "[m]any regions currently use tax incentives to spur affordable housing development" and that "[t]he City of Detroit recently enacted an ordinance that requires developers with projects valued at more than $75 million, and who are receiving more than $1 million in tax benefits from the city, to negotiate a community benefits agreement"); Lourdes Germán & Joseph Parilla, *How Tax Incentives Can Power More Equitable, Inclusive Growth*, BROOKINGS (May 5, 2021), https://www.brookings.edu/blog/the-avenue/2021/05/05/how-tax-incentives-can-power-more-equitable-inclusive-growth [https://perma.cc/5KNN-L4LR] (noting that governments should "wield [tax] incentives effectively in ways that support inclusive growth, racial equity goals, and fiscal health").

significant power in the provision and distribution of social and public goods.

This mode of regulation may be particularly appropriate where the regulated entity or sphere poses direct challenges to judicial enforcement by virtue of its (sometimes purported) claim to constitutional protection that muddies the traditional statutory framework. In the case of tax-exempt organizations, for example, many have claims to First Amendment protection for freedom of speech or free exercise of religion.[336] As this Article has shown, their discriminatory activities can be hidden behind the shield of their claimed constitutional protection, under judicially created doctrines (e.g., the ministerial exception) even where the application of such doctrines is dubious at best.[337] Importantly, the judicial carve-outs do not lessen the state's foundational commitment to, for example, statutory antidiscrimination on the basis of protected traits. But they do make civil-rights enforcement against those interest groups through private litigation particularly challenging. At the same time, the state often subsidizes the activities of those organizations in recognition of their claim to constitutional protection and their valuable provision of public goods—ranging from religious worship to education—that the federal government may not be in the best position to distribute directly.[338] A normatively appropriate—as well as administratively effective—tool of encouraging those organizations' compliance with the fundamental policy of the federal government is to remove federal subsidies when the organizations engage in activities contrary to fundamental federal policy. This mode of regulation differs in nature from the traditional "prohibitory enforcement regime" that bans the disqualifying activities and orders remedies to people affected by the disqualifying activities.[339] It merely takes away the fiscal incentives offered by the state and allows the disqualified organization to continue engaging in disqualifying activities as long as they are willing to pay the price—this is the central compromise of the *Bob Jones* decision. On the other hand, this regulatory mode provides a much-needed enforcement tool where traditional private litigation ceases to be

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336 *See generally supra* Part III (describing both statutory and constitutional religious-liberty protections for tax-exempt organizations with religious affiliations).

337 *See, e.g.*, *supra* note 24 (collecting cases).

338 Those subsidies may consist of direct monetary grants or tax deductions and exemptions, but the form of the subsidy is irrelevant since they all functionally amount to the same thing.

339 Johnson, *Equality Law Pluralism*, *supra* note 329, at 1979–80.

effective. It cements and polices the practical boundaries of, for example, antidiscrimination law's operation before sufficient political will catalyzes more foundational change in doctrine and the statutory framework.

The reach of this civil-rights enforcement paradigm potentially extends beyond antidiscrimination in connection with private tax-exempt entities. Take another example: state and local government officials, in particular those involved with law enforcement, who violate constitutional guarantees against unreasonable seizure and excessive force under the Fourth Amendment.[340] Protecting those constitutional entitlements against encroachment by state and local governments surely amounts to fundamental federal policy, not the least evidenced by 42 U.S.C. § 1983[341] and the constitutional provision itself (as well as judicial doctrines incorporating the constitutional guarantees against the states[342]).

But judicially created doctrines, in particular qualified immunity, has made enforcement of those entitlements through § 1983 litigation exceedingly difficult. Under current law, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[343] This "clearly established" standard used to mandate a two-step inquiry: (1) whether the alleged facts make out a violation of a constitutional right, and (2) if so, whether the right was clearly established at the time of the defendant's alleged conduct.[344] But in *Pearson v. Callahan*, the Supreme Court held that the two-step inquiry is not mandatory, allowing lower courts to grant qualified immunity solely on the "clearly established" prong.[345] The result of this doctrinal development is twofold. First, the "clearly established" prong sets a high bar

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340 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

341 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .").

342 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment against the states through the Fourteenth Amendment).

343 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

344 Saucier v. Katz, 533 U.S. 194, 201 (2001).

345 Pearson v. Callahan, 555 U.S. 223, 227 (2009).

for § 1983 plaintiffs to overcome, and in effect precludes § 1983 liability where the plaintiff alleges new factual circumstances that have not already been addressed by the courts. Second, because courts can dismiss § 1983 lawsuits on the basis of a (not) "clearly established" determination alone and without engaging in an inquiry as to whether a constitutional violation has taken place, they will generate less case law articulating clearly established constitutional rights, thus putting future § 1983 plaintiffs at a further disadvantage. The practical outcome is that many state and local officials engage in constitutional violations with impunity.[346] At the same time, the federal government provides enormous subsidies to state and local governments. In fact, the largest source of state government revenue comes from intergovernmental transfers from the federal government, totaling $659 billion in fiscal year 2017.[347] The federal government also provides valuable tax subsidies, including a deduction for state and local taxes[348] and tax exemption for the interests paid on state and local bonds, which decreases the costs of borrowing for state and local governments.[349] These federal subsidies make available new enforcement tools: agencies and the executive branch could, for example, withhold portions of federal funds or deny exemption for interests paid on state and local bonds where the local government in question has engaged in egregious patterns of constitutional violations (but where judicial doctrines make success on § 1983 claims exceedingly difficult). This

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346 Scholars have exhaustively reviewed the doctrinal and policy defects of the Court's qualified immunity doctrine. For recent examples, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018) (arguing that legal justifications for the Court's qualified immunity doctrine "fall[ ] apart for a mix of historical, conceptual, and doctrinal reasons"); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018) ("Qualified immunity has been attacked as ahistorical; unjustified as a matter of statutory interpretation; grounded on inaccurate factual assumptions; antithetical to the purposes of official accountability and of the statute of which it is putatively a part; unadministrable; regularly misapplied; a hindrance to the development of constitutional law; a basis for strategic manipulation by judges; and a source of jurisdictional problems."); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 12 (2017) ("[T]he evidence now available weakens the Court's current justifications for the doctrine's structure and highly restrictive standards."); John C. Jeffries Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 852 (2010) (noting that application of the "'clearly established' law" inquiry presents "a mare's nest of complexity and confusion").

347 *What Are the Sources of Revenue for State Governments?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-governments [https://perma.cc/AE4A-5RED] (last visited Apr. 20, 2022).

348 26 U.S.C. § 164 (2018).

349 *Id.* § 103.

could be another example of the new paradigm of civil-rights enforcement that relies on agencies' administration of the nation's revenue and spending laws to complement an existing (though at times inadequate) litigation-based enforcement regime.

CONCLUSION

When the Supreme Court handed down *Bob Jones University v. United States* in 1983, it contemplated the arrival of a landmark precedent whose broad holding—that violations of fundamental public policy disqualify claims of tax exemption—would shape tax policy and the evolution of antidiscrimination norms for years. After almost four decades, that aspiration has largely failed. The tax-exemption battle (unnecessarily) mobilized an entire generation of conservative activism, and the IRS itself has limited its enforcement of *Bob Jones* to the facts of the case. But as this Article has shown, not only has the potential of *Bob Jones* grown dramatically with the expansion of federal civil-rights laws, antidiscrimination and charitable tax exemption share deep affinities in seeking to equip disadvantaged populations with the skills and cultural prerequisites for their entry into society.

Practical as well as conceptual implications flow from extending *Bob Jones* enforcement to the full panoply of the federal antidiscrimination regime. In particular, the Biden Administration has shown an increasing willingness to bolster civil-rights protections for marginalized groups: on inauguration day, the President issued a sweeping executive order to implement *Bostock*.[350] In contrast, concomitant legislative efforts have not succeeded: neither the proposed Equality Act, which expressly prohibits discrimination on the basis of sexual orientation and gender identity,[351] nor the Do No Harm Act,[352] which excludes compliance with antidiscrimination laws from the scope of religious liberty protections, is likely to clear the odds of passing the deadlocked Congress. In view of the Administration's commitments to equality and the challenges associated with the political landscape, *Bob Jones* could provide a potent instrument to enforce civil rights and remove structural barriers and inequities in our country.

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350 Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).
351 H.R. 5, 117th Cong. (2021).
352 H.R. 1378, 117th Cong. (2021).