

University of St. Thomas, Saint Paul

From the Selected Works of Austin R Caster

May 16, 2011

**“Charitable” Discrimination: Why Taxpayers
Should Not Have to Fund 501(c)(3)
Organizations That Discriminate Against LGBT
Employees**

Austin R Caster



Available at: https://works.bepress.com/austin_caster/1/

“Charitable” Discrimination: Why Taxpayers Should Not Have to Fund 501(c)(3) Organizations That Discriminate Against LGBT Employees

Austin Caster

INTRODUCTION

Until now, the first amendment protection of religious liberty¹ has allowed—and even publicly funded—discrimination against LGBT employees, but this article argues that *Christian Legal Society v. Martinez* changes that analysis. According to *Bob Jones University v. United States*,² organizations that base admissions decisions on racial discrimination violate public policy and cannot receive taxpayer funding. Similarly, *Christian Legal Society v. Martinez*³ shows us that universities do not have to fund student organizations that discriminate on the basis of sexual orientation. Therefore, because discrimination based on an immutable minority trait bars taxpayer funding in one instance, this article argues it should also in the other. Private organizations will continue to be allowed to discriminate, but if they do, they should no longer receive public funding through tax-exempt status, taxpayer-funded federal loans, and tax-deductible donations.

For fifteen years, Lucinda Naylor served as the artist in residence for the Basilica of St. Mary in Minneapolis, Minnesota, creating artwork for church banners and publications.⁴ After the Knights of Columbus—“the world’s foremost Catholic fraternal benefit society”⁵—mailed out 400,000 DVDs to Minnesota residents calling for a constitutional amendment banning same-

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

² 461 U.S. 574 (1983).

³ 561 U.S. ____ (2010).

⁴ Jim Spencer, *Job on line over DVD protest*, MINNEAPOLIS-ST. PAUL STARTRIBUNE, Sept. 27, 2010, available at <http://www.startribune.com/lifestyle/faith/103901758.html>.

⁵ Knights of Columbus, Learn About Us, <http://www.kofc.org/un/en/about/index.html> (last accessed April 27, 2011). Though many reports and opinions suggest that the Catholic Church sent out the DVDs, fairness requires it be noted that though the Knights of Columbus roots its mission in Catholic Social Teaching, they are actually separate entities. Like the Catholic Church, however, the Knights of Columbus organization does enjoy tax-exempt status.

sex marriage just before 2010 mid-term elections, however, she decided to use her talents to take a stand.⁶ Naylor decided to peacefully protest and raise awareness for marriage equality by creating a sculpture out of the unwanted DVDs she collected from parishioners.⁷ Two days after she commenced the project, however, Naylor received a suspension from her job, what she believed to be a “kind word for termination.”⁸

Whereas the church had a legitimate argument that Naylor directly took a stand against her employer’s mission and Catholic Social Teaching, Laine Tadlock was terminated from Benedictine University in Springfield, Illinois, for something thousands of Americans do each week: putting her wedding announcement in the newspaper.⁹ Tadlock, who served as the director of the education program, was upfront with her employer about her sexual orientation from the beginning, and Benedictine even knew when the wedding would take place.¹⁰ After her announcement, which did list Benedictine as her employer, was published in The State Journal-Register, however, Tadlock left her position.¹¹ Though the university alleged she resigned—a claim Tadlock disputed—Benedictine President William Carroll wrote, “By publicizing the marriage ceremony in which she participated in Iowa she has significantly disregarded and flouted core religious beliefs which, as a Catholic institution it is our mission to uphold.”¹²

Still other cases further blur the line between what is speaking out against an employer’s mission and participating in conduct fundamental to one’s immutable identity. Lisa Howe, a soccer coach at the Christian Belmont University in Tennessee, got her pink slip two days after

⁶ Spencer, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ Dave Bakke, *Wedding announcement costs gay woman job at Benedictine*, THE STATE JOURNAL-REGISTER, Nov. 10, 2010, available at <http://www.sj-r.com/top-stories/x1109354817/Newspaper-wedding-announcement-costs-gay-woman-her-job-at-Benedictine-University>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

sharing with her team her excitement about expecting a child.¹³ Belmont insisted the mid-year departure was Howe's decision, but many sources on and off campus, including her team members, were quoted as saying she was fired or forced to resign.¹⁴ Her players—thirty of whom earned Atlantic Sun All-Academic honors for their achievements on and off the field since Howe arrived in 2005—were “shocked and angered” by the dismissal.¹⁵ Even religious liberties scholars would likely be appalled a pregnant woman could get fired for privately sharing the news about something as fundamental as having a child,¹⁶ especially considering coaching soccer, even at a Jesuit institution, is not a religious sacrament.

At least two of these firings seem completely unwarranted, but the commonality—and why they are all protected under Title VII of the Civil Rights Act of 1964 and the employment at will doctrine—is the fact that these employees were lesbians. Title VII does not include sexual orientation as a protected class, so in the forty-nine states that follow the employment at will doctrine,¹⁷ an employee can be fired at any time for any—or no—reason at all unless the state legislature enacts a sexual-orientation-specific nondiscrimination statute.¹⁸ Though the stories of Naylor, Tadlock, and Howe are only a few examples of targeted discrimination LGBT employees face, taxpayers currently have no choice but to subsidize these actions. Under the Internal Revenue Code, organizations deemed charitable receive tax-exempt status,¹⁹ and any

¹³ Pierce Greenberg, *Coach Lisa Howe's dismissal shocks women's soccer team*, BELMONTVISION.COM, Dec. 2, 2010, available at <http://belmontvision.com/2010/12/02/belmont-soccer-coach-fired/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NORTHWESTERN J. L. & SOC. POL'Y 206, ¶ 66 (2010) (“To make it possible for both sides to live out their identities, it is necessary to compare the burdens on them.”).

¹⁷ Montana's just cause statute, MONT. CODE ANN. §§39-2-901-915, makes it the only state that does not strictly adhere to the employment at will doctrine. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 16 (2010).

¹⁸ 82 Am. Jur. 2d Wrongful Discharge § 1 (2011) (“‘Employment at will’ is a term used to mean that an employer may discharge an employee without restriction, that is, for any reason or for no reason, without incurring any liability to the employee, as long as the reason for the discharge does not violate public policy.”).

¹⁹ I.R.C. § 501(c)(3) (2011).

individuals who donate to these organizations can also deduct that amount from their own income.²⁰

Because these charitable organizations—even if they are private schools—do not have to pay taxes, they receive a benefit from our entire society, even those taxpayers who believe in equality. Similar discrimination in a racial context led to revocation of tax-exempt status for violating public policy,²¹ but only recently has protection for the LGBT community evolved.²² Though other minorities received Federal protection from employment discrimination under the Civil Rights Act of 1964,²³ the Age Discrimination in Employment Act,²⁴ and the Pregnancy Discrimination Act,²⁵ no “governmental declaration” evidenced that discrimination on the basis of sexual orientation violated public policy, something required to revoke tax-exempt status.²⁶

The first section of this article explains how and why the tax-exempt status for charitable organizations came about in the United States. Section two applies the original intent of charitable tax-exempt status to LGBT employment discrimination. The third section offers a public policy analysis regarding why equal protection should at least be balanced equally with religious liberty when interests conflict. The fourth section analyzes the case law regarding discrimination and tax-exempt status and shows how *Christian Legal Society* in particular

²⁰ I.R.C. § 170(c)(2)

²¹ *Bob Jones University v. United States*, 461 U.S. 574 (1983).

²² *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, H.R. 2647 (2009); *Christian Legal Society v. Martinez*, 561 U.S. ____ (2010); *The Don’t Ask, Don’t Tell Repeal Act of 2010*, H.R. 2965 (2010); Department of Justice, Office of Public Affairs, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

²³ 42 U.S.C. §§ 2000e et seq. (2001).

²⁴ 29 U.S.C. §§ 621–634 (2011).

²⁵ 42 U.S.C. §§ 2000e et seq. (2011).

²⁶ *Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue*, 356 U.S. 30, 33–34 (1958) (“deductibility...is limited to expenses that are both ordinary and necessary to carrying on the taxpayer’s business...A finding of ‘necessity’ cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.”).

evolves the debate. The fifth and final section offers analogies of how other countries handle constitutional conflicts regarding equal protection and religious freedom.

I. History

A. How did tax-exempt status come about?

The first reference to a charitable organization tax-exempt status appeared in an 1894 tax law.²⁷ It stated, “nothing herein contained shall apply...to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”²⁸ The corresponding deduction for taxpayers who donate to these organizations first appeared in 1917.²⁹ Most of the requirements to receive tax-exempt status dealt more with procedure than substance, making it a relatively easy and unregulated process: “(1) the organization must be involved in one of the (now) eight general listed purposes; (2) the organization must not be a profit-making unit; (3) the organization must not be involved in ‘lobbying’ or other similar ‘political activities.’”³⁰

To receive tax-exempt status, the organization merely needed to submit a form to the IRS and meet both the organizational and operational test.³¹ Though some scholars disagree,³² one judge proffered that Congress intended to lower the standard to regulate charitable organizations as opposed to other government programs because “charitable organizations relieve the government of the burden of meeting public needs for which the government is otherwise responsible.”³³

²⁷ Michael Yaffa, *The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds*, 30 UCLA L. REV. 156, 158 (1982).

²⁸ *Id.* at n.14.

²⁹ *Id.* at 158.

³⁰ *Id.* at 158–59.

³¹ *Id.* (citing Treas. Reg. § 1.501 (1960)).

³² *Id.* at n.23.

³³ *Id.* at 159.

To meet the organizational test, the applicant must show through such means as its articles of incorporation or corporate charter that it is organized exclusively for one or more exempt purposes.³⁴ To meet the operational test, the organization must satisfy the Internal Revenue Service that it engages “primarily in activities which accomplish one or more of such exempt purposes specified in 501(c)(3).” If more than an insubstantial part of the organization’s activities are not in furtherance of an exempt purpose, then the organization will not pass the “operational” test.³⁵

Receiving a classification as a charitable organization and the tax-exempt status that came with it was relatively routine and non-controversial until 1970.³⁶ Prior to 1970, as long as the organization fell into one of the broad categories prescribed in the tax code,³⁷ these entities received tax-exempt status without much regard to violations of public policy, statutory, or constitutional grounds.³⁸ Not only does the organization receive tax-exempt status under 501(c)(3), I.R.C. § 170(c)(2) provides a deduction for any contribution a taxpayer makes to a charitable organization.³⁹ Consequently, individuals who donate to these charitable organizations that discriminate against LGBT employees also receive a reward on their personal income taxes, a benefit intended to be reserved for causes that actually help marginalized populations, such as soup kitchens or homeless shelters.

B. What makes an organization charitable?

This article should not be misconstrued as an attack on all religious charities because the only organizations affected would be those that actively choose to discriminate against LGBT

³⁴ Treas. Reg. § 1.501(c)(3)-1(b) (1960).

³⁵ Yaffa, *supra* note 27, at n.18 (citing Treas. Reg. § 1.501(c)(3)-1(c) (1960)).

³⁶ *Id.* at 156–57.

³⁷ *Id.* at 157 (citing I.R.C. § 501(c)(3) (1976)) (“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures [to] the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office [are exempt from taxation].”).

³⁸ *Id.*

³⁹ *Id.* at 158.

employees or use taxpayer funding to advocate for political issues targeting minorities. The thesis does not suggest religious organizations should have to perform same-sex marriages or photograph commitment ceremonies against their will, but it seems currently the only right taken into these cases has been religious liberty, which can have a devastating effect on minorities and their families. There is no denying that many religiously affiliated organizations substantially contribute to charity—the Catholic Church being “the largest provider of social services after the federal government”⁴⁰—but in a case where a soccer coach gets fired for telling her team she is pregnant, there should be a balancing of harms in the decision whether a corporation should get to keep its tax-exempt status. Many churches donate food or provide shelter to homeless or provide medical care for children. Even the Knights of Columbus donated “more than \$151 million to charitable needs and projects” in a single year, but these organizations should not be able to use taxpayer funding toward projects that target marginalized populations, such as the anti-marriage equality DVDs or hiring and training replacements for employees who were fired just for being gay.

This article recognizes the value of religion in many people’s lives and the service many religious institutions provide, but rational minds should agree that the privilege is currently being abused. Even for the 501(c)(3) organizations that are using some of their tax-exempt donations on causes that benefit the poor and marginalized, it is still against public policy to let taxpayer money go toward causes that directly harm minorities—especially considering the language of the statute itself prohibits political or lobbying activities.⁴¹ Considering all things objectively, these causes do not conform to the charitable standard. Consequently, even though religious

⁴⁰ Berg, *supra* note 16, at n.111–13 and accompanying text.

⁴¹ See *supra* note 30 and accompanying text.

freedom will continue to be constitutionally protected, the Internal Revenue Code should not reward it with tax exemptions when those actions do not conform to the charitable scrutiny test.

II. If the U.S. won't enact federal legislation to protect LGBT employees, taxpayers at least should not have to fund these organizations because this discrimination violates public policy.

As long as LGBT employees have no federal statutory protection from employment discrimination, tax-exempt status for charitable organizations that discriminate against minorities from both the state and federal government violates public policy. Federal taxpayer funds especially should benefit the *entire* nation. Even scholars who argue for religious exemptions for government employees recognize that public funds should support the entire public.⁴²

Allowing unfettered religious liberty to organizations funded by taxpayer money puts a substantial burden on those in favor of workplace equality that goes beyond monetary terms. For example, discharging nearly 37,000 active duty soldiers and recruiting and training their replacements under Don't Ask Don't Tell from 2004–2009 alone⁴³ cost American taxpayers more than \$193 million, or about \$52,800 per troop.⁴⁴ According to a report from the Government Accountability Office, “about 39% of the service members separated under the policy held critical occupations, such as infantryman and security forces.”⁴⁵ About ninety-eight percent of the troops discharged were enlisted, and of those, approximately sixty-seven percent

⁴² Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-sex Marriage Laws*, 5 NW J. L. & SOC. POL'Y 318, 318 and n.6 (2010) [hereinafter Wilson, *Insubstantial Burdens*] (“Some are willing to exempt both individuals and groups who object for religious reasons to facilitating a same-sex marriage so long as they perform no government functions and receive no public funds.”).

⁴³ The policy was enacted in 1993 as a compromise under President Bill Clinton after the Department of Defense's 1982 policy stating homosexuality was incompatible with military service garnered so much support that a gay naval officer was brutally murdered. See Sam Jameson, *U.S. Sailor Sentenced to Life Imprisonment in Murder*, LOS ANGELES TIMES, May 28, 1993, available at <http://tech.mit.edu/V113/N28/sailor.28w.txt.html>. Consequently, discharges occurred for about seventeen years total.

⁴⁴ Andrew Tilghman, *Report: More Than \$193M Spent on 'Don't Ask, Don't Tell'*, USA TODAY, Jan. 23, 2011, available at http://www.usatoday.com/news/military/2011-01-21-military-cost_N.htm.

⁴⁵ *Id.*

had served less than two years.⁴⁶ Additionally, some of the discharges had critical language skills such as Arabic or Chinese, losses that could not be measured in terms of money.⁴⁷

An objector might argue that many taxpayers do not want their tax dollars supporting wars overseas and they do not get to stop paying taxes, so taxpayers in favor of LGBT employment equality should be treated no differently. Though it is true not all taxpayers agree with the decisions of the department of defense, the military does defend our entire country. Here, taxpayer money is going toward organizations that not only allow unequal access to a public good, but also actively try to take it away from others.⁴⁸ Therefore, taxpayers in favor of equality receive double the detriment of a taxpayer against the war in Iraq. Not only are they paying taxes that go to a cause they are against, here the cause they are funding directly harms them. Consequently, *Arizona Christian School Tuition Organization v. Winn*,⁴⁹ the religious school voucher case that was dismissed on standing would not be binding in this situation because taxpayers here do not lack standing. Even if 501(c)(3) charitable organization exemptions were considered “a tax credit as opposed to a governmental expenditure,”⁵⁰ discriminatory organizations such as the Jerry Falwell-founded Liberty University receive half a billion dollars in federal financial aid each year.⁵¹

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ For example, the Knights of Columbus using taxpayer funds to send out anti-marriage equality DVDs or defend priests in child sex abuse scandals. *See, e.g.,* Spencer, *supra* note 4; Advocate.com Editors, *Cardinal Orders Sexual Abuse Investigations in Philadelphia*, THE ADVOCATE, Feb. 17, 2011, available at http://www.advocate.com/News/Daily_News/2011/02/17/Cardinal_Orders_Sexual_Abuse_Investigations_in_Philadelphia/.

⁴⁹ 2011 WL 1225707 (U.S.).

⁵⁰ *Id.*

⁵¹ Alex Pareene, *Evangelical Liberty University Received Half a Billion Dollars in Federal Aid Money*, WWW.SALON.COM, April 5, 2011, available at http://www.salon.com/life/education/index.html?story=/politics/war_room/2011/04/05/liberty_university_federal_money; Liz Barry, *Liberty Tops State in Federal Aid for its Students: Online Enrollment Spurs Big Increase in Assistance*, THE NEWS & ADVANCE, March 27, 2011, available at <http://www2.newsadvance.com/news/2011/mar/27/liberty-tops-state-federal-aid-its-students-ar-929147/>.

Discriminatory firings do not even balance the hardships to religious organizations and LGBT employees as many rational religious liberties scholars suggest.⁵² These scholars reasonably argue for a hardship exception for religious employees who do not want to perform same-sex marriages only when there is not another justice of the peace, photographer, or government clerk issuing marriage licenses available because this alone would not create a barrier to same-sex couples' rights.⁵³ This strategy would take both sides' harms into consideration.

Cabining the ability to object to only those situations when no hardship for same-sex couples would result is principled: the state should not confer the right to marry with one hand and then take it back with the other by enacting broad, unqualified religious objections that could operate to bar same-sex couples from marrying.⁵⁴

In the context of employment discrimination used to preserve religious liberties, however, no balance of competing interests occurs. Currently, in many states religious employers can fire LGBT employees without fear of any recourse and use taxpayer money to hire and train a replacement. In these cases, it is a windfall rather than a balance of competing interests.

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

⁵² Berg, *supra* note 16; Wilson, *Insubstantial Burdens*, *supra* note 47, at n.70.

⁵³ Wilson, *Insubstantial Burdens*, *supra* note 42, at n.70.

⁵⁴ *Id.* at n.77–78 and accompanying text.

III. Conflicting Constitutional Rights: Religious Freedom v. Equal Protection

A. Religious Freedom under the 1st Amendment

While religious freedom is protected under the first amendment of the Constitution, as the Supreme Court stated in *United States v. Lee*, even constitutional amendments have rational limitations.⁵⁵ For example, the second amendment does guarantee the right to bear arms,⁵⁶ but reasonable individuals would agree that right should not be extended to the mentally ill or minors less than ten years old. Hate speech may be allowed under the first amendment,⁵⁷ but even the freedom of speech stops short of yelling “fire!” in a crowded theater. If a gun toting, mentally ill toddler seems beyond the realm of possibility, consider drug rehabilitation counselors who appealed all the way to the Supreme Court a denial of unemployment benefits when they were fired for using a powerful psychedelic drug called peyote for religious purposes.⁵⁸ If drug counselors could use illegal drugs for religious reasons, why not semi-truck drivers? The Bible condones many dubious acts that the law does not encourage or protect such as slavery, genocide, polygamy, misogyny, and spousal abuse.⁵⁹ Even constitutional rights have limits that must be balanced against other rights, so religious freedom should not be a catchall defense against discrimination persecuting a marginalized minority.

Additionally, even if organizations with 501(c)(3) status are religion-based, coaching soccer is not a religious sacrament.⁶⁰ The zone of doctrinal transmission protected by the Free Exercise clause includes only activities such as “preaching, praying, proselytizing, and

⁵⁵ 445 U.S. 252, 258–61 (1982).

⁵⁶ U.S. Const. amend. II (“A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.”).

⁵⁷ *Snyder v. Phelps* (2011).

⁵⁸ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁵⁹ Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, 19 CORNELL J. L. & PUB. POL’Y 383, 422–27 (2010).

⁶⁰ Wilson, *Insubstantial Burdens*, *supra* note 42, at n.46 and accompanying text.

worshipping within a group.”⁶¹ Howe was not fired for refusing to perform her job—in fact her team performed exceptionally well on and off the field—she was fired based on an immutable trait, much more harsh than being given the choice to step down rather than perform same-sex marriages.⁶² Howe had no choice in the matter. Forcing religious workers to choose between supporting their families and trying to find a new job in a poor economy does not seem so harsh when compared to employees who were fired with neither a choice nor any notice.⁶³ Even if Howe’s employment contract contained a morality clause, it would certainly be debatable whether having a child within a committed relationship is immoral. If these employers are allowed to continue legally firing employees just for being gay, they should no longer receive taxpayer money because state action approving or encouraging discrimination violates the 14th Amendment.

B. Equal Protection under the 14th Amendment

After *Employment Division v. Smith*, religious organizations worried the holding would be used as precedent to deny them other religious liberties, so they lobbied the legislatures to enact the Religious Freedom Restoration Act of 1993.⁶⁴ Even this act was overturned as unconstitutional four years later in *City of Boerne v. Flores*, however, because the legislature usurped the court’s power to interpret the 14th amendment.⁶⁵

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed...Congress does not enforce a constitutional right by changing what the right is.⁶⁶

⁶¹ Burleson, *supra* note 59, at 421.

⁶² *Id.*

⁶³ *Id.* at n.61.

⁶⁴ 42 U.S.C. § 2000bb et seq. (1993).

⁶⁵ 521 U.S. 507 (1997).

⁶⁶ *Id.* at 519–20.

Over the years the debate has and seemingly always will continue about where to draw the line between religious freedom and equal protection.⁶⁷ It is beyond the scope of this article to discuss the ramifications of every religious freedom statute and holding, but the point this article seeks to show is that when constitutional rights conflict, there should be a balance of interests rather than a winner-take-all approach. As stated *supra*, conservative scholars recognize the importance of balance in their arguments as well.⁶⁸

C. The Civil Rights Act protects some minorities but does not include sexual orientation

Denying taxpayer funding to organizations that target marginalized minorities does not stop religious groups from practicing their religions, as the Supreme Court has repeatedly ruled that tax-exempt status is a privilege rather than a right.⁶⁹ Therefore, allowing LGBT employment discrimination should not even be cast as providing an accommodation to religious liberty. In a free country, American employees should not need an accommodation to be excited about the fact that they are getting married or having a child. It would be nonsensical to suggest any straight woman would be worried about getting fired for submitting a wedding announcement to the local newspaper or having a child—especially considering the Pregnancy Discrimination Act.⁷⁰ For LGBT employees, it's like asking for an accommodation to be alive. Even under Title VII employers must provide a reasonable accommodation to preserve the employee's status if one is available.

⁶⁷ See, e.g., Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc(1) *et seq.*; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

⁶⁸ Berg, *supra* note 16; Wilson, *Insubstantial Burdens*, *supra* note 47.

⁶⁹ Christine Roemhildt Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 308–13 (citing *Bob Jones University v. U.S.*, 461 U.S. 574, 603 (1983); *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

⁷⁰ Pregnancy Discrimination Act, 42 U.S.C. § 2000e (2011).

Title VII does not extend to sexual orientation,⁷¹ but because LGBT employees face discrimination similar to the injustices Title VII was enacted to prevent for other discrete and insular minorities, many states have already enacted employment protection for LGBT workers unprovoked. LGBT protection started with municipalities at the local level in East Lansing, Michigan in 1972.⁷² Until Massachusetts acted in 1989, however, Wisconsin was the only state able to enact a statewide protection.⁷³ Twenty-nine states in the U.S. still allow employment discrimination against the LGBT community,⁷⁴ even though “ninety percent of Americans in recent Gallup polls support equal employment opportunities” for LGBT employees.⁷⁵

Naylor’s firing by the Catholic Church in Minnesota seems rather puzzling considering Minn. Stat. Ann. § 363A.08 (West 2004) states it is an unfair employment practice

for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age, (1) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) to discharge an employee; or (3) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment. (emphasis added)

The church, however, would argue that Naylor was not fired for being gay, but rather her vocal opposition to church teaching, but many would consider those issues inextricably intertwined. Scholars disagree whether the charitable choice provision under Section 702 of Title VII, which allows religious organizations receiving taxpayer funds to discriminate in hiring, applies to state nondiscrimination laws, but no court has ruled on the question.⁷⁶

⁷¹ The Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 (2011).

⁷² Burleson, *supra* note 59, at 413.

⁷³ *Id.* at 414.

⁷⁴ Human Rights Campaign, Employment Non-Discrimination Act, *available at* http://www.hrc.org/laws_and_elections/enda.asp.

⁷⁵ Berg, *supra* note 16, at n.164.

⁷⁶ Melissa McClellan, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Employment Laws?*, 61 WASH & LEE L. REV. 1437, 1439–45 (2004).

Though the context was marriage rather than employment, the Supreme Court of Connecticut recently considered the basis of sexual orientation a quasi-suspect class and used an intermediate scrutiny standard to determine that prohibitions on marriage violated substantive due process and equal protection under the constitution.⁷⁷

To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others...the bigotry and hatred that gay persons have faced are akin to, and, in certain respects, perhaps even more severe than, those confronted by some groups that have been accorded heightened judicial protection.”⁷⁸

Though more and more states and individual employers are contemplating legislative protection for LGBT workers,⁷⁹ the Employment Nondiscrimination Act, or ENDA,⁸⁰ which would provide Federal protection, is currently stalled in Congress.

D. Does granting tax-exempt status have to be “state action”?

For it to matter under the 14th Amendment whether a 501(c)(3) organization is using funds for a discriminatory purpose, a grant of tax-exempt status must be considered state action. Though the Supreme Court *has* discussed this distinction in dicta, cases such as *Green v. Connally* and *Bob Jones* were decided based on statutory grounds.⁸¹ Many scholars and cases point out marked differences between granting a tax-exempt status and directly funding a private organization, arguing that it does not violate the Establishment Clause merely to grant tax-exempt status.⁸² Granting tax-exempt status could not signify approval, they argue, because the government grants tax-exempt status to so many organizations with contrary and opposing

⁷⁷ Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 411–12 (Conn. 2008).

⁷⁸ *Id.* at 411, 446.

⁷⁹ Jim Nolan, *Senate panel advances anti-discrimination legislation*, THE NEWS AND ADVANCE, Jan. 27, 2011, available at <http://www2.newsadvance.com/news/2011/jan/27/senate-panel-advances-anti-discrimination-legislation-802850/>.

⁸⁰ http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act

⁸¹ Yaffa, *supra* note 27, at 174–87; Stephen Cohen & Laura Sager, *Why Civil Rights Lawyers Should Study Tax*, 22 HARV. BLACKLETTER J. 1, 14–24.

⁸² *Id.*

views.⁸³ For example, if Planned Parenthood and the Catholic Church are both deemed nonprofits, the government cannot possibly endorse both organizations' views regarding abortion and contraception. Though based on recent governmental declarations it seems intuitive that LGBT employment discrimination does violate the 14th Amendment if the granting of tax-exempt status were deemed state action, that connection is not necessary as it also violates public policy—the statutory grounds on which previous cases have been decided.

IV. Case law shows tax-exempt status has been revoked in the past from organizations that violated public policy through racial discrimination, and case law and legislation regarding discrimination against the LGBT community has evolved in a similar fashion

This would not be the first time the government revoked tax-exempt status as a result of discrimination. Several state and federal cases over the years have addressed racial discrimination at publicly funded institutions. Private schools promoting racial segregation and prohibiting miscegenation have not been able to pass the charitable scrutiny test as a violation of public policy, regardless of any Biblical or religious intent. Even now, however, courts disagree whether sexual orientation constitutes a suspect class similar to race.⁸⁴

In determining a suspect classification, courts generally consider whether the minority group is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,”⁸⁵ and whether the trait making the members in the class a minority is immutable.⁸⁶ Even conceding differences between racial and sexual

⁸³ *Id.*

⁸⁴ Compare *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010) with *Conway v. Deane*, 932 A.2d 571 (Md. 2007).

⁸⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁸⁶ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

orientation discrimination,⁸⁷ however, many recent governmental declarations illustrate discrimination against the LGBT community alone violates public policy.⁸⁸ Therefore, notwithstanding differing opinions about the suspect classification of the LGBT community, organizations discriminating based on sexual orientation should similarly not be rewarded with tax-exempt status.

A. *Green v. Connally*

A Mississippi court first granted a preliminary injunction preventing the IRS from granting tax-exempt status to any Mississippi private schools practicing racial discrimination in *Green v. Kennedy*.⁸⁹ In 1970, a group of black “Federal taxpayers and their minor children attending public schools in Mississippi” brought a class action lawsuit to enjoin the Secretary of the Treasury from granting tax-exempt status to private schools that practiced racial discrimination in their admissions practices.⁹⁰ The name of the case changed before trial to reflect John Connally replacing David Kennedy as Secretary of the Treasury,⁹¹ but another development affected the case more substantially.

On July 10 and 19, 1970, the IRS issued two releases stating it could “no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.”⁹² Testifying before the Senate Select Committee on Equal Educational Opportunity, the Commissioner of Internal Revenue stated, “An organization seeking exemption as being organized and operated exclusively for educational purposes, within the meaning of section 501(c)(3) and section 170,

⁸⁷ Berg, *supra* note 16, at ¶¶ 89–90.

⁸⁸ *Supra* note 22.

⁸⁹ 309 F. Supp. 1127.

⁹⁰ *Id.* at 1129.

⁹¹ Yaffa, *supra* note 27, at n.34.

⁹² *Green v. Connally*, 330 F. Supp. 1150, 1156 (1970).

must meet the tests of being ‘charitable’ in the common-law sense.”⁹³ The IRS did not find that racial discrimination met that test, declaring “the Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools and of Federal income tax deductions for such contributions to those schools.”⁹⁴ Consequently, because the IRS changed its position, litigation was no longer necessary.

In dictum, however, the court found that the Internal Revenue Code should be construed to avoid frustrations of public policy.⁹⁵ The court based its analysis on *Tank Truck Rentals, Inc. v. Commissioner of Internal Revenue*, which disallowed tax deductions for fines truck drivers paid for violating maximum weight restriction laws holding “A finding of ‘necessity’ cannot be made, however, if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof.”⁹⁶ The court cited the thirteenth amendment to the Constitution,⁹⁷ *Brown v. Board of Education*,⁹⁸ and the Civil Rights Act of 1964⁹⁹ as examples of governmental declarations evidencing the nation’s view that discrimination violates public policy.¹⁰⁰

B. *Norwood v. Harrison*

Three years later the Supreme Court of the United States held unconstitutional a Mississippi program under which the state bought textbooks and lent them to schools without inquiry into racially discriminatory practices.¹⁰¹ Appellants complained that by supplying textbooks to students attending racially segregated schools, the program provided direct funding

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1160–64

⁹⁶ 356 U.S. 30, 33–34 (1958).

⁹⁷ U.S. Const. amend XIII.

⁹⁸ 347 U.S. 483 (1954).

⁹⁹ 42 U.S.C. §§ 2000(c)–(d)(4) (1964).

¹⁰⁰ *Green*, 330 F. Supp. at 1163–64.

¹⁰¹ 413 U.S. 455 (1973).

to racially segregated education and impeded desegregation in public schools.¹⁰² In striking down the program, the Court reasoned “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.”¹⁰³

C. *Goldsboro Christian Schools v. United States*

In *Goldsboro*, a North Carolina private religious school sued the federal government to recover taxes that had been withheld under the Federal Insurance Contributions Act (F.I.C.A) and the Federal Unemployment Tax Act (F.U.T.A.).¹⁰⁴ The school, which was heavily influenced by the fundamentalist Second Baptist Church of Goldsboro, maintained a racially discriminatory admissions policy based upon its interpretation of the Bible.¹⁰⁵ The school never received a determination from the Commissioner of Internal Revenue that it qualified as a 501(c)(3) organization, yet it paid teachers’ salaries—even providing them with housing—without withholding taxes required under the law.¹⁰⁶ Analyzing precedent case law and the legislative intent behind § 501(c)(3), the court reasoned that “[s]ince benefit to the public is the justification for the tax benefits, it would be improper to permit tax benefits to organizations whose practices violate clearly declared public policy.”¹⁰⁷ The court held that the Treasury Department could validly disallow tax benefits to racially discriminatory schools because “there is a declared Federal public policy against support for racial discrimination in education which overrides any assertion of value in practicing private racial discrimination, whether ascribed to philosophical pluralism or divine inspiration for racial segregation,” and “the general across-the-board denial

¹⁰² *Id.* at 457.

¹⁰³ *Id.* at 470.

¹⁰⁴ 436 F.Supp. 1314, 1315–16 (1977).

¹⁰⁵ *Id.* at 1316–17.

¹⁰⁶ *Id.* at 1317.

¹⁰⁷ *Id.* at 1318.

of tax benefits to such schools is essentially neutral, in that its principal or primary effect cannot be viewed as either enhancing or inhibiting religion.”¹⁰⁸

D. *Bob Jones University v. United States*

The Supreme Court granted certiorari in *Bob Jones* to decide whether private nonprofit schools enforcing racially discriminatory admissions practices qualify for tax exempt status under § 501(c)(3).¹⁰⁹ Scholars uniformly consider *Bob Jones* the seminal case in tax-exempt discrimination as it also incorporates the appellants from *Goldsboro*, and *Norwood* narrowly dealt with a particular program rather than nonprofit status as a whole. Like *Goldsboro*, *Bob Jones University* completely excluded black students until 1971, when it began to permit blacks married within their own race to apply.¹¹⁰ Forced by precedent in 1975 the university finally began to admit unmarried black students, but continued to prohibit interracial dating or marriage.¹¹¹

The Court emphasized “a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy,” but subsequently listed numerous indicia why “racial discrimination in education violates deeply and widely accepted views of elementary justice.”¹¹² Chief Justice Burger, writing for the majority, explained

Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a benefit within the “charitable” concept ... or within the Congressional intent underlying § 170 and § 501(c)(3).¹¹³

¹⁰⁸ *Id.* at 1319–20.

¹⁰⁹ 461 U.S. 574.

¹¹⁰ *Id.* at 580.

¹¹¹ *Id.*

¹¹² *Id.* at 592–96.

¹¹³ *Id.* at 595–96.

E. *Romer v. Evans*

In a landmark decision for LGBT rights, the United States Supreme Court struck down a Colorado constitutional amendment barring any governmental action to protect homosexuals from discrimination, a clear indication that discrimination against LGBT persons also violates public policy.¹¹⁴ Justice Kennedy rejected the argument that the LGBT community was looking for special protection recognizing, “These are protections taken for granted by most people either because they already have them or do not need them.”¹¹⁵

F. *Cradle of Liberty Council v. City of Philadelphia*

Even before *Boy Scouts v. Dale*,¹¹⁶ which held under the First Amendment Freedom of Association a private organization could exclude a person from membership when “the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints,”¹¹⁷ the American public has questioned whether it should have to support discrimination. According to the American Civil Liberties Union, “about 360 school districts and 4,500 schools in 10 states have terminated sponsorship of scout activities because of the scouts’ stance on homosexuals.”¹¹⁸ Though the case was eventually settled rather than appealed to the Supreme Court, taxpayers in Philadelphia did not agree a discriminatory organization should receive the benefit of using a public building and revoked its license.¹¹⁹

G. *Christian Legal Society v. Martinez*

As most of the previously mentioned cases involving discrimination sanctioned by public funding in one way or another, *Christian Legal Society* involved a religious organization that

¹¹⁴ 517 U.S. 620 (1996).

¹¹⁵ *Id.* at 631.

¹¹⁶ 530 U.S. 640 (2000).

¹¹⁷ *Id.* at 648.

¹¹⁸ Nathan Gorenstein, *Federal jury decides in favor of Scouts*, THE PHILADELPHIA INQUIRER, July 23, 2010, available at http://articles.philly.com/2010-06-23/news/24961775_1_city-solicitor-shelley-smith-cradle-of-liberty-council-national-scout-policy.

¹¹⁹ *Cradle of Liberty Council v. City of Philadelphia*, 2010 U.S. Dist. LEXIS 20484

wanted to keep its university funding and status based on its First Amendment rights despite its exclusion of a marginalized minority group.¹²⁰ The Christian Legal Society chapter at Hastings College of the Law wanted the recognition as and benefits of being a “Registered Student Organization,” but the university’s nondiscrimination policy required all student groups “shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.”¹²¹ In upholding the school’s policy, the Court disagreed with the plaintiff’s arguments that it was prohibiting membership based on homosexual conduct rather homosexual status,¹²² further adding to the growing national sentiment that sexual orientation should be treated with heightened scrutiny for purposes of judicial review and discrimination against the LGBT community runs contrary with public policy.¹²³

V. How do other nations handle the constitutional conflicts between equal rights and religious liberty?

Forty-nine countries from all around the world completely prohibit employment discrimination against the LGBT community.¹²⁴ Though some scholars argue it is not only irresponsible, but also dangerous to look to other countries’ interpretations of their constitutions because so many variables exist,¹²⁵ others argue this information can only help our analysis.¹²⁶

¹²⁰ 130 S. Ct. 2971 (2010).

¹²¹ *Id.* at 2978–79.

¹²² *Id.* at 2990.

¹²³ Austin Caster, *Why Same-sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43 (2010); Austin Caster, *Don’t Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L. J. ____ (2011), at section IV(A); Evan Perez, *Reversal on Gay Marriage: In Legal Shift, Obama Administration Contends Same-Sex Marriage Ban Unconstitutional*, THE WALL STREET JOURNAL, Feb. 24, 2011, available at http://online.wsj.com/article/SB10001424052748703775704576162441655208626.html?mod=WSJ_Election_LEFTSecondStories.

¹²⁴ DANIEL OTTOSSON, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 47 (The International Lesbian, Gay, Bisexual, Trans and Intersex Association 2010).

¹²⁵ Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L. J. 411 (1985).

For the same reasons we ask our friends and families for advice knowing they might think of something our own emotional state precluded, it can be helpful to get an outside perspective on constitutional law matters as well. Though factors ranging from politics to cultural mores to even geography make certain laws inapplicable or at least impractical in other parts of the world,¹²⁷ without at least considering any other options, it is irrational to continue assuming the United States' policies are complete or the best.

A. Canada

In Canada as opposed to the United States, family law is regulated nationally.¹²⁸ Under the Canadian Charter of Rights and Freedoms, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”¹²⁹ Though United States judges and justices often quibble about the founders' original intent regarding subjects our founders could not have possibly fathomed, the Ontario Court of Appeals evidenced its “living document” interpretation in 2003: “to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to Canada’s jurisprudence of progressive constitutional interpretation.”¹³⁰ This quote becomes somewhat ironic in context knowing that Canada did not recognize Jewish marriages before 1847 or Catholic marriages until 1857.¹³¹ The LGBT community would logically follow as a

¹²⁶ Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. OF PRACTICE & PROCEDURE 685 (1976).

¹²⁷ For this very reason I chose the two countries many would consider culturally and socially most like the United States: Canada and England.

¹²⁸ Burleson, *supra* note 59, at 395.

¹²⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), c. 11, § 15(1).

¹³⁰ Burleson, *supra* note 59, at 394.

¹³¹ *Id.*

sympathetic case to religious organizations considering religious discrimination has historically even led to Diasporas.

Looking to Canada for advice regarding the conflict between civil rights and religious liberties in employment law would certainly not be the first time. The Massachusetts Supreme Court cited Canadian courts in its historic *Goodridge* decision granting same-sex couples the right to marry.¹³² Reciprocally, Canadian courts have in turn cited the American levels of scrutiny in their opinions:

Section I of the Charter of Rights and Freedoms requires that there be proportionality and a rational connection between the objective of a law and the means selected to achieve it, a standard on par with the lowest level of scrutiny that federal courts in the United States apply to a law passed by the federal government.¹³³

Though many viewed it as the result of an attempt to change its reputation rather than a genuine attempt to advance human rights, Quebec became the first North American jurisdiction to prohibit discrimination based on sexual orientation in 1977.¹³⁴ The Canadian Human Rights Act, originally passed in 1976, followed suit in 1996 adding an amendment to include sexual orientation, something our legislatures have yet to add to Title VII.¹³⁵ As early as 1992, Canadian courts overturned laws discriminating against the LGBT community such as bans regarding military service and same-sex partner benefits from their employers.¹³⁶ Though the United States did finally repeal Don't Ask Don't Tell amid much controversy in late 2010, nations already prohibiting similar discrimination include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Israel, Italy, Lithuania,

¹³² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

¹³³ *Burleson*, *supra* note 59, at 396.

¹³⁴ *Id.*

¹³⁵ *Id.* at 397–98.

¹³⁶ *Id.* at 398.

Luxembourg, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.¹³⁷

A marriage commissioner in Saskatchewan, Canada, was even fined by the Human Rights Tribunal after refusing to perform ceremonies for same-sex couples.¹³⁸ Though a decision like this still seems quite far off in the United States, American scholars should follow Canadian courts and constitutions as they seem to be a good indication of our future, being only a few decades ahead of America's progress.

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

[W]hether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.¹³⁹

Many Americans still oppose same-sex marriage and some still agree with employment discrimination based on what their own particular religion tells them, but Canada shows compassion for sexual orientation in the same way it halted discrimination against religious minorities. Canada seems to take the "live and let live" approach that regardless of what makes someone else gay, if you are not gay, same-sex marriage or the fact that others are gay should not make a bit of difference to you because it does not affect you at all.

B. England

¹³⁷ *Id.* at 410.

¹³⁸ Wilson, *Insubstantial Burdens*, *supra* note 42, at n.47.

¹³⁹ Burleson, *supra* note 59, at 398–99.

Because the United Kingdom does not have a written constitution, it is slightly more difficult to compare to the United States, yet it regardless leads on progress toward equality. The United Kingdom's constitution comprises various documents, including "statutes, European Union legislation, the common law, and conventions."¹⁴⁰ Most notable for human rights progress in the United Kingdom, however, was the Human Rights Act of 1998, which incorporated the European Convention on Human Rights, or ECHR.¹⁴¹ Article 8 of the ECHR states

Everyone has the right to respect for his private and family life, his home and his correspondence There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹⁴²

Though some might argue the provision regarding the "protection of health or morals" might exclude the LGBT community, the European Court of Human Rights in 1981 used Article 8(2) to strike down Northern Ireland's sodomy law.¹⁴³ Because the morality clause did not preclude same-sex relationships between consenting adults there, those whose definition of morality discounts the GLBT community could be considered merely subjective. Not everyone is going to agree with or approve of what everyone else does, but in a modern civilized society balancing harms suggests that one group's ideals do not justify discrimination against another. "As new countries have sought membership in the European Union, each has had to address the

¹⁴⁰ Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religious Belief*, 21 EMORY INT'L L. REV. 13, 16 (2007).

¹⁴¹ *Id.*

¹⁴² Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 8.

¹⁴³ *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 165 (1981).

substantial level of discrimination against sexual minorities that remained pervasive and legally sanctioned within its borders.”¹⁴⁴

CONCLUSION

Though LGBT employees can take comfort in the fact that the discriminatory and expensive Don't Ask Don't Tell has been repealed¹⁴⁵ and even Belmont University has adopted a new non-discrimination policy in the wake of Lisa Howe's firing,¹⁴⁶ they can still be fired just for being gay in twenty-eight states. Because these discriminatory actions by 501(c)(3) organizations violate notions of freedom, equality, and public policy, the Internal Revenue Code should cease rewarding them with tax-exempt status now that we have several declarations that discrimination based on sexual orientation is against public policy. Until the United States adopts the human rights norms followed in much of the rest of the world, our federal government should at least stop incentivizing discrimination with tax-exempt status.

¹⁴⁴ Burleson, *supra* note 59, at 404 (citing ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 95 (Oxford University Press Inc. 1995)).

¹⁴⁵ William Branigin, Debbi Wilgoren & Perry Bacon, Jr., *Obama signs DADT repeal before big, emotional crowd*, THE WASHINGTON POST, Dec. 22, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122201888.html>.

¹⁴⁶ Travis Loller, *Belmont University changes non-discrimination policy after protest over departure of gay coach*, ASSOCIATED PRESS, Jan. 26, 2011, available at <http://www.wreg.com/news/sns-ap-tn--belmontcoachcontroversy,0,5927463.story>.