The Legal "Rights" of LGBT Educators in Public and Private Schools

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"[Y]ou can't have equality if you can get married on Saturday and fired on Monday."[1]

INTRODUCTION

While educators can no longer be fired simply because of their gender, race, religion, or disability, it is not entirely settled whether educators can be dismissed because of their sexual orientation. As President Obama noted in 2014, "[I]n too many states and in too many workplaces, simply being gay, lesbian, bisexual, or transgender can still be a fireable

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[1] Denise LaVoie, *Judge Rules Against Catholic School in Gay-Hiring Retraction*, ASSOCIATED PRESS (Dec. 17, 2015), http://www.apnewsarchive.com/2015/Judge rules_against_Catholic school in gay-hiring_retraction/id-e1e1905ca1774bdb827cabba30528a77 [https://perma.cc/4YGD-U8Q9] (quoting Ben Klein, non-profit attorney, regarding marriage equality).

offense."[2] Even after the Supreme Court held it unconstitutional for states to deny same-sex couples the right to marry in *Obergefell v. Hodges*,[3] workplace discrimination on the basis of sexual orientation still occurs.[4]

After *Obergefell*, lesbian, gay, bisexual, and transgender (LGBT)[5] educators who marry their same-sex partners may mistakenly believe that, because they have the constitutional right to marry, they are now free from discrimination based on their sexual orientation in public and private school employment. This article examines the legal issues involved when LGBT educators are dismissed from school employment. It first gives an overview and provides context regarding the current landscape of LGBT rights. It then explores some possible legal and policy avenues that might be available as recourse for those who experience this form of discrimination. It concludes by discussing the different legal barriers that LGBT educators will likely confront, especially in private schools, if they allege that school officials engaged in discriminatory practices when dismissing them.

OVERVIEW AND CONTEXT

Within educational-policy and leadership research, there is extensive focus on LGBT educators' identities[6] and school politics around sexual orientation.[7] Vast literature focuses on LGBT employment discrimination issues,[8] but relatively little specifically addresses LGBT edu-

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[2] David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITE HOUSE BLOG (Jul. 21, 2014, 3:00 PM ET), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers [https://perma.cc/48DZ-ZZ9T].

[3] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[4] *See infra* notes 58–82 and accompanying text.

[5] This article focuses on teachers who have been dismissed because of their *sexual orientation*. LGBT is a term used in the literature that often encompasses a broader population than what is included when the acronym is used in this article. Specifically, it is important to recognize that transgender persons vary in their sexual orientation; they may be straight, lesbian, gay or bisexual. Thus they might also experience discrimination because of their sexual orientation. Transgender persons, however, are often discriminated against based on their *gender identity*, which is beyond the scope of this paper. Sexual orientation and gender identity, though often discussed together, are not synonymous.

[6] *See, e.g.*, Brent L. Bilodeau & Kristen A. Renn, *Analysis of LGBT Identity Development: Models and Implications for Practice*, 111 NEW DIRECTIONS FOR STUDENT SERVS. 25 (2005) (discussing LGBT identity development in various settings); Catherine Lugg & Autumn Tooms, *A Shadow of Ourselves: Identity Erasure and Politics of Queer Leadership*, 30 SCH. LEADERSHIP & MGMT. 77 (2010) (discussing the norms involved in professional education and its impact on identity).

[7] *See, e.g.*, Catherine Lugg, *Sissies, Faggots, Lezzies, and Dykes: Gender, Sexual Orientation, and a New Politics of Education*, 39 EDUC. ADMIN. Q. 95 (2003) (discussing how gender identity and sexual orientation shape educational practice and administration); Kenneth D. Wald et al., *Sexual Orientation and Education Politics: Gay and Lesbian Representation in American Schools*, 42 J. OF HOMOSEXUALITY 145, 145 (2002) (discussing how gay representation on school boards, in school administration, and in teaching positions relates to policies regarding sexual orientation education).

[8] *See, e.g.*, WILLIAMS INSTITUTE, *Employment Discrimination Against LGBT Workers*,

cators' *legal rights* in public[9] or private[10] schools. A discussion of these legal rights is especially timely in light of the Supreme Court's *Obergefell* decision on the equality of rights to marry and because media reports show that LGBT educators are still being fired because of their sexual orientation—oftentimes after speaking publicly of their relationships.[11] In addition, the Department of Justice, under the Trump Administration, recently posited that the Civil Rights Act of 1964 provides employees no protection from discriminatory firing on the basis of sexual orientation.[12]

CONTEXT OF LGBT EMPLOYMENT RIGHTS

Within the last sixty years, the rights of LGBT employees have continued to evolve. From the 1950s through the 1970s, some states proposed or enacted legislation that permitted the firing of openly gay teachers. In Florida, a group of legislators known as the "Johns Committee" pushed through legislation in 1956 that permitted the investigation of alleged communism and homosexuality.[13] This committee investigat-

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https://williamsinstitute.law.ucla.edu/headlines/research-on-lgbt-workplace-protections/ [https://perma.cc/YHN4-FSKY] (noting that the institute's "significant body of research . . . consistently shows that LGBT people continue to face high rates of discrimination in the workplace"); Christy Mallory & Brad Sears, *Discrimination Against State and Local Government LGBT Employees: An Analysis of Administrative Complaints*, 4 LGBTQ POL'Y J. 37 (2014) (presenting information about 589 complaints of discrimation by public sector workers on the basis of sexual orientation and gender identity).

[9] *See, e.g.*, Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357 (2011) (discussing experiences of LGBT educators in American public schools as support for anti-discrimination legislation); Joshua Dressler, *Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) is Discharge?*, 10 U. DAYTON L. REV. 599 (1985) (discussing survey results regarding opinions and perspectives of secondary school principals on gay educators); *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1584 (1989) (discussing sexual orientation in the school context and different treatment of students and educators); Suzanne Eckes & Martha McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 AM. EDUC. RESEARCH J. 530 (2008) (discussing litigation involving LGBT educators and anti-discrimination statutes); Suzanne Eckes, *The U.S. Supreme Court Rules in Favor of Marriage Equality: Can Gay Teachers Who Marry Still be Fired?*, TEACHERS COLLEGE RECORD (2016) (discussing legal protections for LGBT teachers in public and private schools).

[10] *See, e.g.*, Karen Lim, *Freedom to Exclude After* Boy Scouts of America v. Dale*: Do Private Schools Have a Right to Discriminate Against Homosexual Teachers?*, 71 FORDHAM L. REV. 2599 (2003); Charles J. Russo, *Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow Their Beliefs in Hiring*, 45 U. TOL. L. REV. 457 (2014).

[11] *See, e.g.*, Dominique Fong, *Beaverton School District Will Pay $75,000 to Settle Discrimination Claim by Gay Student Teacher*, OREGONIAN (Feb. 12, 2011), http://www.oregonlive.com/beaverton/index.ssf/2011/02/beaverton_school_district will_pay_75000_to_settle_discrimination claim_by_gay_student_teacher.html [https://perma.cc/H78Q-G9RG]; Scott Eric Kaufman, *Students Rally Around Gay Teacher Who Says Catholic School Gave Him Two Choices: Leave Your Fianc . . . or Lose Your Job*, SALON (May 1, 2015), http://www.salon.com/2015/05/01/students rally around gay_teacher who_says catholic school_gave him two_choices_leave your fiance or_lose_your job/ [https://perma.cc/AAN7-WDVW].

[12] Chris Riotta, *Trump Administration Says Employers Can Fire People for Being Gay*, NEWSWEEK (Sept. 28, 2017), http://www.newsweek.com/trump-doj-fired-being-gay-lgbt-issues-jeff-sessions-673398 [https://perma.cc/5YVC-CFSH].

[13] Gerard Sullivan, *Political Opportunism and the Harassment of Homosexuals in Florida 1952*

ed a large number of "subversive" activities led by civil rights groups, scholars, and alleged communist organizations; the committee tried to eliminate gay and lesbian teachers from public education and state government.[14] Likewise in 1978, California voters proposed a state ballot initiative called the "Briggs Initiative," which would have forbidden openly LGBT teachers from working in public schools.[15] The ballot initiative never passed, but 41.6% of California voters supported the measure.[16] Some federal legislators or candidates have expressed ongoing interest in these kinds of measures; for example, then-Senator Jim DeMint said in 2010 that gays should not be teachers in public schools,[17] and 2017 Senate candidate Roy Moore said in 2005 that "[h]omosexual conduct should be illegal."[18] Commentators have also highlighted more recent claims of hostility toward LGBT educators in schools.[19]

Prior studies and early court decisions suggested that when public school teachers were discriminatorily fired because of their sexual orientation, it may have been legal under state teacher-dismissal statutes that forbade teacher immorality.[20] In some of these cases, there was no evidence of any disruption in the school related to a teacher's sexual orientation; mere knowledge that a teacher was gay could result in that teacher's termination.[21] Even as recently as twenty years ago, public school teachers were dismissed or their contracts were not renewed because of their sexual orientation.[22] In 1996, an award-winning California teacher sued under state law alleging that she was harassed and denied promo-

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1965, 37 J. OF HOMOSEXUALITY 57, 63–67 (1999).

[14] *Id.*; *see also* Clifford Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 632 (2013) (noting that the John's Committee "launched a campaign to rid the state's public schools of homosexual teachers in 1958").

[15] California Secretary of State, *California Voter Information Guide for 1978, General Election* 28, (1978).

[16] *California Proposition 6, the Briggs Initiative (1978)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_6,_the_Briggs_Initiative_(1978) [https://perma.cc/RGX6-AAEF].

[17] Brian Montopoli, *Jim DeMint Criticized Over Comments on Gay and Sexually Active Teachers*, CBS NEWS (Oct. 5, 2010), http://www.cbsnews.com/news/jim-demint-criticized-over-comments-on-gay-and-sexually-active-teachers [https://perma.cc/7AGG-HWD7].

[18] Nathan McDermott & Andrew Kaczynski, *Senate Candidate Roy Moore in 2005: Homosexual Conduct Should be Illegal*, CNN (Sept. 22, 2017), http://www.cnn.com/2017/09/21/politics/kfile-roy-moore-homosexuality-illegal/index.html [https://perma.cc/F5MX-4VJW].

[19] *See, e.g.*, Vineeta Sawkar, *Gay Teacher Speaks Out About Being Fired from Totino-Grace*, STAR TRIBUNE (Sept. 23, 2015), http://www.startribune.com/gay-teacher-speaks-out-about-being-fired-from-totino-grace/328834761 [https://perma.cc/7J7R-XPUJ].

[20] *See, e.g.*, Gaylord v. Tacoma, 559 P.2d 1340, 1345–46 (Wash. 1977) ("[I]t is a disorder for those who wish to change their homosexuality which is acquired after birth. In the instant case plaintiff desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality. He has made a voluntary choice for which he must be held morally responsible."); Eckes & McCarthy, *supra* note 9, at 532; Eckes, *supra* note 9.

[21] *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 454 (6th Cir. 1984) ("The jury had heard ample evidence to find that, but for the fact that [the plaintiff] revealed her sexual preference, she would not have been either transferred, or suspended [by school officials], or 'non-renewed' by the Board.").

[22] *See, e.g.*, Glover v. Williamsburg Local Sch. Dist., 20 F. Supp. 2d 1160, 1171 (S.D. Ohio 1998) (holding that the school board did not renew teacher's contract due to his sexual orientation).

tions because of her sexual orientation.[23] The case eventually settled for more than $140,000.[24] Similarly, a Utah teacher and volleyball coach was removed from her coaching position when school officials learned that she was gay.[25] The federal district court, in its equal protection analysis, found that there was no rational job-related basis for her removal.[26] Likewise, an Ohio teacher whose contract was not renewed prevailed in his equal protection claim alleging sexual orientation discrimination because the court found that there was no rational reason under the Equal Protection Clause not to renew his contract and that the district was hostile in making its decision.[27] These court decisions and others sent a message to school officials nationwide that courts were beginning to favor LGBT plaintiffs on equal protection grounds.[28]

Indeed, there has been a major shift in attitudes regarding LGBT employees. As of 2015, 75% of the U.S. Fortune 500 companies had policies specifically prohibiting discrimination on the basis of sexual orientation.[29] Furthermore, polls cited by Congress in 2013 show that between sixty-five and seventy percent of Christians favor extending employment protections to LGBT persons.[30]

As attitudes have shifted, the Supreme Court's approach has continued to evolve as well. In the past few years, recognition of LGBT rights has greatly expanded. In the 2013 *United States v. Windsor* decision, the Court struck down the federal Defense of Marriage Act, which had denied employment benefits to married same-sex couples.[31] Justice Kennedy wrote for the majority that the Act "violates basic due process and equal protection principles applicable to the Federal Government."[32] He also noted that the Constitution's "guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[33]

In 2015, the U.S. Supreme Court held in *Obergefell*, consistent with *Windsor*, that denial of the right to marry to same-sex couples was unconstitutional.[34] Justice Kennedy wrote for the majority that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union,

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[23] Murray v. Oceanside Unified Sch. Dist., 79 Cal. App. 4th 1338, 1345–46 (Cal. App. 2000).

[24] Lambda Legal, *California Teacher Settles Sexual Orientation Discrimination Suit with School District* (May 23, 2002), https://www.lambdalegal.org/news/ca_20020523_ca-teacher-settles-discrimination-suit [https://perma.cc/QHR4-4XV2].

[25] Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1281 (D. Utah 1998).

[26] *Id.* at 1289.

[27] *Glover*, 20 F. Supp. 2d at 1174.

[28] Eckes & McCarthy, *supra* note 9, at 538–40.

[29] Hayley Miller, *Best of 2015: Corporate Equality Index Expands to Rate Global LGBT Workplace Inclusion*, HUMAN RIGHTS CAMPAIGN (2015), http://www.hrc.org/blog/best-of-2015-corporate-equality-index-expands-to-rate-global-lgbt-workplace [https://perma.cc/9QAY-NWRK].

[30] 159 CONG. REC. S7,783-02 (2013) (quoting Senator Tom Harkin).

[31] U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[32] *Id.* at 2693.

[33] *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

[34] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

two people become something greater than once they were."[35] Commenting on *Obergefell*, legal scholar Kenji Yoshino wrote that the holding is "a game changer for substantive due process jurisprudence" and will likely have implications beyond marriage equality.[36] In particular, some commentators have noted how the *Obergefell* opinion raises questions related to educational employment.[37]

The *Obergefell* opinion relied in part on the 1967 *Loving v. Virginia* decision, where the Supreme Court addressed the issue of interracial marriage.[38] In *Loving*, an African-American woman and a white man were indicted for violating Virginia's ban on interracial marriage after they married in the District of Columbia and then returned to Virginia.[39] The Supreme Court held that Virginia's anti-miscegenation laws violated the Fourteenth Amendment.[40] The Court continued to uphold the fundamental right to marry in subsequent decisions.[41] The recent *Windsor* and *Obergefell* decisions both noted the similar constitutional questions addressed in *Loving*,[42] and also cited *Lawrence v. Texas*, in which the Supreme Court in 2003 struck down a state law prohibiting sodomy.[43] In *Lawrence*, two men sued after they were arrested for acts they committed in their own home in violation of state law.[44] The Court ruled that the law resulted in state denial of the right to privacy under the Due Process Clause of the Fourteenth Amendment.[45] Significantly, the Court also

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[35] *Id.* at 2608.

[36] Kenji Yoshino, *Comment, A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 145, 148 (2015).

[37] *See, e.g.*, National School Boards Association, *Same-Sex Marriage: What the Obergefell Decision Means for School Districts* (July 2015), https://www.nsba.org/sites/default/files/reports/NSBA Same_Sex Marriage%20Guide-Obergefell-Decision.pdf [https://perma.cc/ND52-H4SP]; Maria Lewis et al., *The Impact of the Marriage Equality Decision on Schools*, PRINCIPAL LEADERSHIP (2016); Mark Walsh, *In Case Watched by Educators, Supreme Court Backs Right to Same-Sex Marriage*, EDUC. WEEK (2015), http://blogs.edweek.org/edweek/school law/2015/06/supreme_court backs right_to_s.html [https://perma.cc/R5ND-UMDZ].

[38] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[39] *Id.* at 1. For context, note that when the Supreme Court struck down Virginia's Act to Preserve Racial Integrity in *Loving* in 1967, only 20% of the U.S. population approved of interracial marriage. Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP NEWS (July 25, 2013), http://www.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx. Many rejected interracial marriage based on their sincerely held religious beliefs. *See* Mike Tolson, *In Resistance to Same-Sex Marriage, Echoes of 1967*, HOUST. CHRON. (July 5, 2015), http://www.houstonchronicle.com/local/gray-matters/article/In-resistance-to-same-sex-marriage-echoes-of-1967-6365105.php [https://perma.cc/9TK8-SPNQ] (recounting President Truman's statement that he opposed interracial marriage and supported only intraracial marriage because "the Lord created it that way").

[40] *Loving*, 388 U.S. at 12.

[41] *See* Turner v. Safley, 482 U.S. 78, 83 (1987) (holding that there is "a constitutionally protected marital relationship in the prison context"); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (reasoning that it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society").

[42] Obergefell v. Hodges, 135 U.S. 2584, 2620 (2015); U.S. v. Windsor, 133 S. Ct. 2675, 2709 (2013).

[43] Lawrence v. Texas, 539 U.S. 558, 579 (2003).

[44] *Id.* at 563–64.

[45] *Id.* at 478; *see* U.S. CONST. amend. XIV, § 1.

overturned its 1986 decision in *Bowers v. Hardwick*, which had upheld the constitutionality of a Georgia law making it a crime to engage in certain consensual acts of sexual intimacy.[46] The focus on a right to privacy in *Lawrence* might result in more protections to LGBT public school teachers' private lives.[47]

Obergefell is consistent with the earlier decisions that found that the Fourteenth Amendment was designed to protect minority groups who were unable to protect themselves through other means. Thus, the four dissenting judges' reasoning in *Obergefell* may not have been supported by these precedents. For example, in his dissenting opinion, Chief Justice John Roberts wrote that the U.S. Constitution did not address same-sex marriage and therefore he could not find a constitutional right to hold in favor of it.[48] Applying this reasoning, then, one might wonder why the Chief Justice has felt comfortable weighing in on the merits of other cases that have involved unenumerated constitutional rights.[49] Furthermore, one might also wonder whether, had the Chief Justice been on the Court when *Loving* was decided, he would have also found no unenumerated constitutional right to freely choose whom to marry from any race. Appropriately, the majority in *Obergefell* observed that

> [t]he nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[50]

The dissenting justices in *Obergefell* were also concerned with changing the definition of marriage, which was not at issue in earlier marriage cases.[51] If the current Court had decided *Loving* today, would these dissenting justices have upheld the Virginia law if marriage had been defined as an institution between people of the same race?[52] Constitutional scholar Michael Dorf of Cornell Law School contends that the dissenting justices in *Obergefell* would likely not have been caught up in the definition of marriage if they decided the fundamental rights portion

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[46] *See Lawrence*, 539 U.S. at 575; Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding a Georgia law criminalizing sodomy).

[47] Eckes & McCarthy, *supra* note 9, at 536.

[48] Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (Roberts, C.J., dissenting).

[49] *See* Michael Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language [https://perma.cc/5WH8-V3XT] ("Nearly all of what the Chief Justice says [in *Obergefell*] would work equally well as an argument against all unenumerated rights, indeed, against all judicial decisions that draw inferences from vague language contained in enumerated rights as well.").

[50] *Obergefell*, 135 S. Ct. at 2598.

[51] *Id.* at 2613–40.

[52] *See* Dorf, *supra* note 49 ("Would the eight Justices who signed onto the fundamental rights portion of *Loving v. Virginia* have reached a different conclusion if the Virginia statute *defined* marriage as an institution between a man and a woman of the same race?" (emphasis in original)).

of *Loving*, and he questions why it was so heavily focused upon in *Obergefell*.[53]

Finally, the dissenters in *Obergefell* asserted that states should decide the issue of whether the right to marry extends to same-sex couples. Paul Smith of the Georgetown University Law Center posits that democratic considerations were apparently not a problem for the Court when it recently invalidated Section 5 of the Voting Rights Act in *Shelby County v. Holder* in 2013.[54] If the dissenters in *Obergefell* applied a states' rights argument to marriage, one must ask whether they therefore believed such issues should be allowed to play out democratically and whether this same approach then should have also applied to the *Brown v. Board of Education* decision[55] and other civil rights cases. Moreover, some of the dissenting justices appeared concerned about what the *Obergefell* decision would mean for religious freedom.[56] This issue and others will be examined in greater depth later in this article.

LGBT EDUCATORS DISMISSED BASED ON SEXUAL ORIENTATION

There is no reported litigation in the last decade related to public school teachers being fired for their sexual orientation.[57] News reports in 2013, however, suggested that a principal planned to file a lawsuit after administrators learned he was gay and his contract was not renewed.[58] Of course, lack of litigation does not mean that LGBT educators employed by public schools are not being discriminatorily fired; LGBT employees sometimes do not file complaints in order to avoid "outing" themselves further.[59] Public school educators also may not have the resources to engage in costly litigation. But unlike LGBT educators employed by public schools, LGBT educators in religious private schools appear to have experienced firings with much more prevalence; according to media reports, several educators in private religious schools were recently dismissed because they decided to marry their same-sex partners.[60]

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[53] *Id.*

[54] Paul Smith, *Symposium: A Fair and Proper Application of the Fourteenth Amendment*, SCOTUSBLOG (June 27, 2015, 10:17 AM), http://www.scotusblog.com/2015/06/symposium-a-fair-and-proper-application-of-the-fourteenth-amendment/ [https://perma.cc/PX42-R4NP] (discussing Shelby County v. Holder, 133 S. Ct. 2612 (2013)).

[55] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[56] Dorf, *supra* note 49.

[57] This includes the LexisNexis and WestLaw legal databases.

[58] Sunnivie Brydum, *Oregon Principal Claims He Was Let Go for Being Gay*, ADVOCATE (Mar. 8, 2013), http://www.advocate.com/society/education/2013/03/08/oregon-principal-claims-he-was-fired-being-gay [https://perma.cc/4QPU-A67C].

[59] Mallory & Sears, *supra* note 8, at 38.

[60] Maryclaire Dale, *Archbishop: School That Fired Gay Teacher Showed 'Character'*, SEATTLE TIMES (July 13, 2015), https://www.seattletimes.com/nation-world/archbishop-school-that-fired-gay-teacher-showed-character; Sasha Goldstein, *Ohio Catholic School Teacher Fired after 'Appalled' Parent Learned that She was Gay*, N.Y. DAILY NEWS (Apr. 18, 2013)

To illustrate, a teacher was fired from a private Catholic school in Ohio after school officials read her mother's obituary, which mentioned the teacher's same-sex partner.[61] In another case, a gay teacher in Pennsylvania was dismissed from a Catholic school after school officials learned that he planned to marry his partner.[62] A Catholic school official wrote that "[u]nfortunately, this decision contradicts the terms of his teaching contract at our school, which requires all faculty and staff to follow the teachings of the Church as a condition of their employment."[63] Similarly, gay educators in Arkansas, North Carolina, California, Minnesota, Nebraska, and Georgia have been reportedly fired or had their contracts not renewed at Catholic schools when school officials learned of the teachers' marriage plans or the fact that they were involved in a same-sex relationship.[64]

In fact, since 2010 there have reportedly been over fifteen cases—many resulting in employment lawsuits—of private school educators, administrators, or staff being dismissed or reluctantly resigning for supporting same-sex marriage or going public with their relationships with their same-sex partners.[65] Related legal challenges have continued.[66] Some of these cases proceeded to trial, and others settled for undisclosed amounts.[67]

In Washington, a vice principal was fired from a Catholic school when school officials learned that he married his same-sex partner.[68] The

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http://www.nydailynews.com/life-style/ohio-catholic-school-teacher-fired-outed-gay-article-1.1321258; Michael Gordon, *Posted Wedding Plans Cost Charlotte Teacher His Job*, CHARLOTTE OBSERVER (Jan. 13, 2015), http://www.charlotteobserver.com/news/local/crime/article9258446.html [https://perma.cc/A7CF-A58W]; Kaufman, *supra* note 11; Michael McGough, *Gay Teacher Fired: Does Discrimination Law Trump Theological Conviction?*, L.A. TIMES (Aug. 5, 2015), http://articles.latimes.com/2013/aug/05/news/la-ol-gay-teacher-fired-20130805 [https://perma.cc/3XDQ-WCFA]; Gillian Mohney, *Gay Catholic School Teacher Fired for Wedding Plans*, ABC NEWS (Dec. 8, 2013), http://abcnews.go.com/US/gay-catholic-school-teacher-fired-married/story?id=21141075 [https://perma.cc/89ZW-X54W]; Adam Raguesea, *Gay Teacher Files Sex Discrimination Claim Against Georgia School*, NAT'L PUBLIC RADIO (July 9, 2014), http://www.npr.org/2014/07/09/329235789/gay-teacher-files-sex-discrimination-claim-against-georgia-school.

[61] Goldstein, *supra* note 60.

[62] Mohney, *supra* note 60.

[63] *Id.*

[64] Neal Broverman & Michelle Garcia, *Fired for Being LGBT*, THE ADVOCATE (Nov. 17, 2015), http://www.advocate.com/politics/2013/05/08/fired-being-lgbt [https://perma.cc/K6V8-YMZ3] (Arkansas, California); Gordon, *supra* note 60 (North Carolina); Kaufman, *supra* note 11 (Nebraska); Raguesea, *supra* note 60 (Georgia); Sawkar, *supra* note 19 (Minnesota).

[65] Rachel Zoll, *Lesbian Files Suit for Firing by Kansas City Diocese* (July 17, 2014), BOS. GLOBE, https://www.bostonglobe.com/news/nation/2014/07/17/lesbian-sues-kansas-city-diocese-over-firing/GjJndHJbRTMrLLrbKnlylN/story.html (citing case findings by New Ways Ministry, a Catholic gay rights group).

[66] *Fired Gay Glendora Catholic Schoolteacher Sues St. Lucy's Priory*, SAN GABRIEL VALLEY TRIBUNE (Mar. 13, 2014), http://www.sgvtribune.com/social-affairs/20140313/fired-gay-glendora-catholic-schoolteacher-sues-st-lucys-priory [https://perma.cc/QC2J-PJEU] (discussing an ongoing case); *see also* Laura Crimaldi, *Milton Catholic School Loses Gay Bias Case*, BOS. GLOBE (Dec. 17, 2015), https://www.bostonglobe.com/metro/2015/12/17/fontbonne/ANcFqZ2bns2r6Et7GSEl7H/story.html (discussing a case that concluded in 2016).

[67] *See supra* note 24 and accompanying text; *infra* notes 68–82 and accompanying text.

[68] Dan Morris-Young, *Court Greenlights Fired Gay Teacher's Lawsuit Against Catholic School*,

vice principal filed a lawsuit alleging that school officials violated state anti-discrimination laws.[69] School officials claimed that this complaint would "impermissably [sic] entangle the Court in Catholic doctrine" and violate the school's First Amendment rights.[70] The judge denied the school district's initial motion to dismiss,[71] and the case was dismissed by mutual stipulation in November 2014 after the plaintiff secured alternative employment.[72] The judge initially denied the motion to dismiss because it did not appear that the case would interfere with the school's First Amendment rights, but it did appear that the vice principal's allegations could be proven.[73]

In Massachusetts, a gay man who was offered the position of director of food services at a Catholic school had his offer rescinded when school officials learned from his emergency contact information that he was married to another man.[74] In the lawsuit he then filed, he alleged that school officials violated state anti-discrimination laws.[75] The private school contended that it fell within a statutory exemption for religious entities, and as a result the state could not interfere with its employment matters.[76] The school also argued that the teacher's claims infringed upon its rights to expressive association and free exercise under both the state and federal constitutions.[77] The state superior court judge rejected the school's argument that hiring the plaintiff infringed on its religious liberties and denied its motion for summary judgment.[78]

The Massachusetts court ultimately found that the plaintiff experienced remediable discrimination on the bases of both sexual orientation and gender (*i.e.*, if a female was hired for this position, she could have been married to a man without any consequences).[79] With regard to the expressive association argument, the judge noted that the school could

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NAT'L CATHOLIC REP. (Mar. 7, 2014), http://ncronline.org/news/faith-parish/court-green-lights-fired-gay-teachers-law-suit-against-catholic-school [https://perma.cc/Z65M-T484].

[69] *Id.*

[70] Lornet Turnbull, *Court Battle Next in Ouster of Eastside Catholic Educator*, SEATTLE TIMES (Mar. 6, 2014), http://www.seattletimes.com/seattle-news/court-battle-next-in-ouster-of-eastside-catholic-educator.

[71] Order Denying Defendant's Motion to Dismiss Pursuant to CR 12(b)(6), Zmuda v. Corp. of Catholic Archbishop of Seattle, No. 14-2-07007-1 SEA, 2014 WL 10381241, at *1 (Wash. Sup. Ct. May 23, 2014).

[72] Stipulation and Order of Dismissal, Zmuda v. Corp. of Catholic Archbishop of Seattle, No. 14-2-07007-1 SEA, 2014 WL 10381240, at *1 (Wash. Sup. Ct. Nov. 17, 2014); Mark Pulkkinen, *Eastside Catholic Vice Principal Ousted After Gay Marriage Drops Lawsuit*, SEATTLE POST-INTELLIGENCER (Nov. 28, 2014), http://www.seattlepi.com/local/article/Vice-principal-ousted-for-Eastside-Catholic-after-5919802.php (noting the plaintiff secured alternative employment).

[73] Morris-Young, *supra* note 68.

[74] Barrett v. Fontbonne Acad., No. CV2014-751, 2015 WL 9682042, at *3 (Mass. Super. Dec. 16, 2015).

[75] *Id.* at *1.

[76] *Id.* at *8.

[77] *Id.* at *29.

[78] *See id.* at *31 ("[T]he relatively narrow scope of the ministerial exception may shed light on the scope of expressive association rights regarding employees whose job does not include instruction.").

[79] *Id.* at *7–8.

retain control over its mission and message, but was not allowed to discriminate against the employee.[80] The judge stressed that the employee was not offered a position that required him to be Catholic, and he never publicly advocated for same-sex marriage.[81] The court thus reasoned that the state had a compelling and overriding interest in prohibiting discrimination in this instance.[82]

LEGAL & POLICY AVENUES

As highlighted above, LGBT educators still provoke considerable controversy in some public schools and in many private, religious schools. While there are more legal avenues for relief for educators in the public school setting, there may be limited protections in private schools. This section briefly reviews some of the legal avenues that LGBT educators may have available to them.

LGBT educators may have recourse under federal laws. Title VII of the Civil Rights Act of 1964 protects against discrimination based on race, color, national origin, sex, and religion in both public and private employment.[83] There is no federal law, however, that *explicitly* prohibits discrimination based on sexual orientation in the workplace. A proposed federal law, the Employment Non-Discrimination Act (ENDA), was designed to prohibit discrimination in employment on the basis of sexual orientation and gender identity[84] but has never passed in Congress.[85] Several prominent LGBT advocacy organizations withdrew their support for ENDA in 2014 because of their concerns that the bill's religious exemption was too broad.[86] The recent *Obergefell* decision may create a renewed push for ENDA; several iterations have been introduced in the past twenty years.[87]

In a few recent instances, Title VII has been used to address discrimination based on sexual orientation. A federal district court found in 2014 that an employer discriminated against a gay employee based on the employee's non-conformity with sex stereotypes, which was sufficient to establish a viable sex discrimination claim under Title VII.[88] In addition, the Equal Employment Opportunity Commission (EEOC) in-

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[80] *Id.* at *29.

[81] *Id.* at *24.

[82] *Id.* at *29.

[83] Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e 2000e-2 (2012).

[84] Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 2 (2013).

[85] *See* Chris Johnson, *Support for ENDA Crumbles*, WASH. BLADE (July 9, 2014), http://www.washingtonblade.com/2014/07/09/endas-fate-dismal-religious-exemption-splits-lgbt-advocates/ [https://perma.cc/3HG8-79M2] (noting political opposition).

[86] *Id.*

[87] Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 N.D. J. L. ETHICS & PUBL. POL'Y 133, 134–35 (2015).

[88] Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014).

terpreted Title VII to cover discrimination based on sexual orientation in the workplace.[89] It is important to note, however, that the EEOC's interpretation is not binding on courts. Finally, the Seventh Circuit Court of Appeals, in a 2017 en banc decision, affirmed a lower court decision finding that discrimination on the basis of sexual orientation is covered under Title VII's prohibition of sex discrimination.[90] This decision contradicts an Eleventh Circuit opinion decided earlier that year that did not recognize sexual orientation discrimination claims under Title VII.[91] The Seventh Circuit opinion marks the first time a federal circuit court has found that Title VII covers discrimination based on sexual orientation.

LGBT educators may also have recourse under some state laws.[92] In some states, however, LGBT teachers can be legally fired by an employer for being gay[93] despite being legally able to marry. Eighteen states currently have no protections for public school employees from discrimination based on their sexual orientation, and twenty-nine states have no such protections for private school employees.[94] Public and private school teachers in those states thus do not have any specific state protections. Some cities, however, have enacted some additional local ordinances to offer LGBT individuals protection from discrimination, and individual school districts might offer specific protections as well. Nonetheless, it is still the case that if an LGBT teacher is teaching in a state, municipality, or school district with no protections, the teacher could be discriminatorily fired from a public school based on sexual orientation without legal recourse under state law.

Additionally, LGBT public school teachers could argue, as some have successfully,[95] that discrimination on the basis of sexual orientation

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[89] Baldwin v. Foxx, EEOC Decision No. 0120133080 (July 15, 2015), http://www.eeoc.gov/decisions/0120133080.pdf [https://perma.cc/1184M-QHKK] ("In the case before us, we conclude that Complainant's claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent [Front Line Manager] position. Complainant, therefore, has stated a claim of sex discrimination."). Macy v. Holder, EEOC Decision No. 0120120821 (Apr. 20, 2012), https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt [https://perma.cc/W7TS-8DAX] (finding Title VII prohibits discrimination related to gender identity).

[90] Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 341 (7th Cir. 2017).

[91] *See* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("[The plaintiff] next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action.").

[92] *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (2017), http://www.hrc.org/state maps/employment (noting that twenty-one states have some protections for private school employees and thirty-two have protections for public school employees).

[93] Amanda Machado, *The Plight of Being a Gay Teacher*, THE ATLANTIC (Dec. 16, 2014), http://www.theatlantic.com/education/archive/2014/12/the-plight-of-being-a-lgbt-teacher/383619/ [https://perma.cc/FH6E-NU7C] (citing Patrick J. Egan, *More Gay People Can Now Get Legally Married. They Can Still Be Legally Fired.*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/06/more-gay-people-can-now-get-legally-married-they-can-still-be-legally-fired/?utm term=.adb0e2d3973f [https://perma.cc/CPQ2-9BXJ])).

[94] *Statewide Employment Laws and Policies*, *supra* note 92.

[95] *See, e.g.*, Glover v. Williamsburg Local Sch. Dist., 20 F. Supp. 2d at 1160, 1169 (S.D. Ohio

is prohibited under the Equal Protection Clause of the Fourteenth Amendment of the Constitution because there is no rational reason to treat LGBT teachers differently than heterosexual teachers. Although the Fourteenth Amendment was ratified in the wake of the Civil War, it does not only apply to racial discrimination. To be certain, the Supreme Court has applied this clause to other types of governmental classifications that exclude individuals from equal participation in society.[96] The Equal Protection Clause requires that similarly situated public educators be treated the same regardless of sexual orientation.[97]

When analyzing an Equal Protection Clause claim, the Supreme Court has created three levels of judicial scrutiny that apply depending upon the classification that forms the basis of the discrimination: strict scrutiny, intermediate scrutiny, and rational basis review. Discrimination based on racial classification is subject to strict scrutiny, "which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest."[98] If a school board wanted to adopt a policy that prohibited African-American teachers from teaching in schools that predominantly enrolled white students, it would thus need a compelling governmental interest to do so, and further would need to demonstrate that this racial classification was necessary to serve that compelling interest. Courts have not found any interest sufficiently compelling to justify such a policy.

The next level of judicial scrutiny is intermediate scrutiny, which is the level used when the government makes sex-based classifications.[99] "[T]he government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[100] Thus, if a school board wanted to adopt a policy that prohibited women from serving as superintendents, it would need to ensure there was an important objective in adopting such a policy and to further demonstrate that this sex-based classification was substantially related to serving that important interest. Any school board would have difficulty enforcing such a policy because no court has found a sufficiently important state interest involved in prohibiting women from serving in school leadership positions. It is not entirely clear within the judicial system whether discrimination based on sexual orientation would receive

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1998) ("Homosexuals, while not a 'suspect class' for equal protection analysis, are entitled to at least the same protection as any other identifiable group which is subject to disparate treatment by the state.").

[96] Brief of NAACP Legal Defense & Education Fund, Inc. and NAACP as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1048441, at *10–11 (citing cases).

[97] *Glover*, 20 F. Supp. 2d at 1174.

[98] Suzanne Eckes & Stephanie McCall, *The Potential Impact of Social Science Research on Legal Issues Surrounding Single-Sex Classrooms and Schools*, 50 EDUC. ADMIN. Q. 195, 199 (2014) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)).

[99] *Id.* (citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)).

[100] *Id.*

intermediate scrutiny review, although many argue that discrimination based on sexual orientation is also discrimination based on sex.[101]

The lowest level of judicial scrutiny is known as rational basis, which "requires a legitimate government objective with a minimally rational relation between the means and the ends."[102] Classifications based on sexual orientation, for example, have oftentimes fallen under this level of scrutiny.[103] Rational basis review is the lowest level of judicial scrutiny used when applying the Equal Protection Clause, and as a result it is much easier to justify a government policy that would treat LGBT educators differently from other educators under this level of review. Nevertheless, it is difficult to imagine such a policy with a legitimate government objective.

Former Supreme Court Justice Antonin Scalia, however, provided a stark example of the kind of reasoning that might pass judicial muster under the rational basis test—despite that reasoning being grounded in an outdated understanding of sexual orientation. When former Chief Justice William Rehnquist asked an attorney during oral arguments in *Lawrence v. Texas* if it would be unconstitutional to deny gay people an equal right to teach kindergarten, Justice Scalia interjected that one reason the denial might be justified would be that "children . . . might [otherwise] be induced to . . . follow the path of homosexuality."[104] In Justice Scalia's dissenting opinion in *Lawrence*, he further noted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools or as boarders in their home."[105] Justice Scalia further suggested that citizens may prefer to "protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive."[106]

As noted above, however, lower courts have not often found a rational reason to treat LGBT teachers differently.[107] Although some misinformed individuals and groups may mistakenly believe that gay teachers are a threat to children in the classroom, the American Psychological Association and others have concluded that there is no scientific support for a correlation between homosexuality and sexual abuse of children.[108]

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[101] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination.").

[102] Eckes & McCall, *supra* note 98, at 199.

[103] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 777–78 (2011).

[104] Transcript of Oral Argument at 21, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), https://www.supremecourt.gov/oral arguments/argument transcripts/2002/02-102.pdf [https://perma.cc/U7QM-YMDM].

[105] Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

[106] *Id.*

[107] *See, e.g.*, Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) ("If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and under . . . Supreme Court precedent, it provides no legitimate support for the School District's decisions.").

[108] *See generally* Ruth U. Paige, *Proceedings of the American Psychological Association for the*

Similarly outlandish arguments regarding harms to children were made during the historic debate on interracial marriage; in upholding an anti-miscegenation law, for example, the Louisiana Supreme Court wrote that interracial marriage creates "half-breed children" who "have difficulty in being accepted by society."[109]

In 2014, President Obama signed an executive order to protect LGBT employees of federal contractors from being discriminating against based on their sexual orientation or gender identity.[110] At the order's signing, President Obama said, "It doesn't make much sense, but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay, bisexual, transgender. And that's wrong."[111] This executive order was a positive step but limited in application; it did not apply to the vast majority of teachers in the U.S. because they are not employees of federal contractors.[112] Further, an executive order by its nature merely states administrative policy and does not create any new enforcement rights. Such enforcement rights can only be granted by laws passed by Congress. As discussed above, ENDA could grant enforcement rights, but it has not yet been passed into law by Congress. Finally, executive orders are easier to change than congressional laws; subsequent presidential administrations have the authority to rescind them, including those implemented by previous administrations.

LEGAL BARRIERS

The discussion above demonstrates, among other things, that there are more legal avenues available to address discrimination on the basis of sexual orientation for those who teach in public schools than for those who teach in private schools. There are also additional barriers that private school teachers face. One barrier is the lack of clarity about when anti-discrimination laws apply to private, non-profit organizations and religious schools. Another barrier stems from disagreement about whether private, non-profit organizations should be able to control their mem-

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Legislative Year 2004: Minutes of the Annual Meeting of the Council of Representatives, February 20–22, 2004, Washington, DC, and July 28 and 30, 2004 Honolulu, Hawaii, and Minutes of the February, April, June, August, October, and December 2004 Meetings of the Board of Directors, 60 AM. PSYCHOL. 463 (2005) (compiling multiple findings supporting the author's assertion that there is no correlation between homosexuality and child abuse).

[109] State v. Brown, 108 So.2d 233, 234 (La. 1959).

[110] Exec. Order No. 13,672, 3 C.F.R. § 282 (2014), *reprinted in* 42 U.S.C. § 2000e app. at 998 (Supp. II 2014) (amending, to add protections for gender identity, both Exec. Order No. 11,478, 3 C.F.R. § 803 (1966–1970), *reprinted* in 42 U.S.C. § 2000e app. at 10,297 (1976), and Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *reprinted in* 42 U.S.C. 2000e app. at 28–31 (1982)).

[111] Hudson, *supra* note 2.

[112] *See* 3 C.F.R. § 282 (protecting only employees of federal contractors).

bership and employment without any governmental intervention. These disagreements highlight the tension between anti-discrimination laws and religious institutions' rights to freely exercise religion.[113] This section will examine some of the legal tensions related to free exercise claims and freedom of association arguments. It will also provide an overview of some of the legal and policy issues related to private schools' tax-exempt status.

The Free Exercise Clause of the First Amendment states that Congress may not pass laws that prohibit the free exercise of religion.[114] This proscription is qualified; in general, the government can only substantially burden free religious exercise with a compelling justification.[115] The governmental interest of pursuing non-discriminatory practices in the workplace must be weighed against a regligious school's interest in free exercise.[116] In some cases, a private religious school's interest in freely practicing its religion might be outweighed when it discriminates against a teacher in conflict with federal anti-discrimination employment law. As will be discussed, the Supreme Court has already found the interest in free exercise outweighed in the case of racial discrimination.[117]

The Supreme Court has observed a religious ministerial exemption to employment discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.[118] This exemption permits religious organizations to choose and dismiss their leaders without government interference and is rooted in the First Amendment's Free Exercise and Establishment Clauses.[119] Although this exemption could permit religious organizations extensive leeway in the hiring and firing of their employees, the exemption does not extend to employees performing work in non-ministerial capacities. Religious organizations can thus only exclude a gay teacher if his or her duties fall inside the "ministerial" designation; a chemistry or algebra teacher arguably does not qualify under the ministerial exemption. But who is considered a "minister" continues to be addressed and clarified by the courts;[120] the Court of Appeals for the Fifth Circuit, for example, found that an organ player was a "minister" for purposes of the exemption, and his age discrimination lawsuit was barred.[121]

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[113] *See generally* Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B. C. L. REV. 781, 782 (2007) (discussing the tension between a pluralistic society committed to equality but tolerating of religious differences).

[114] U.S. CONST. amend. I.

[115] *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 673 (7th Cir. 2013) (citing to the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997)).

[116] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[117] Bob Jones Univ. v. U.S., 461 U.S. 574, 592 (1983).

[118] Hosanna-Tabor, 565 U.S. at 188.

[119] *Id.* at 188.

[120] *See id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

[121] Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 180 (5th Cir. 2012).

It is possible, of course, that religious freedom arguments may gain additional traction and more extensively trump the federal anti-discrimination rights of LGBT employees. Some of these religious freedom arguments were also commonly espoused during the desegregation movement in the 1950s; many Southern schools relied on religious beliefs to keep black students and black teachers segregated from white students.[122] For example, Goldsboro Christian, a private religious school providing education from kindergarten through the twelfth grade, argued when attempting to exclude black students that God "separated mankind into various nations and races," and that this separation "should be preserved in the fear of the Lord."[123] As will be discussed further below, the Supreme Court did not find this explanation for segregation to be a legitimate assertion of conflicting religious belief in matters involving racial equality.[124] It remains unclear whether courts will consider similar explanations for exclusion to be a legitimate assertion of conflicting religious belief in matters related to sexual orientation.

If the law does permit such extensive religious exemptions, legal scholar Katherine Franke of Columbia University suggests that it could open the door to an array of discriminatory employment practices cloaked as religious practice that could violate social norms.[125] For example, she contends that perhaps:

> An employer could refuse to include HIV-related treatment in its health plan because HIV is God's vengeance for a sinful lifestyle, or refuse to cover alcohol or drug treatment because the use of alcohol or drugs is sinful, or refuse to cover blood transfusions because of the employer's commitment to the tenets of Christian Science, or refuse to employ women because it is God's plan that they stay home and care for their children, or fire an employee who marries a person of a different race because doing so offends the employer's religious beliefs.[126]

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[122] *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 (2011) (explaining how religious beliefs were used to justify slavery and racial segregation); *see also Bob Jones Univ.*, 461 U.S. at 574 (upholding decision to deny tax exempt status to K-12 private school and university that discriminated against black students in admissions based upon religious beliefs); *see also* STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS 92–93 (2000) (outlining Biblical arguments used to maintain racial inequality).

[123] Complaint at 12, Goldsboro Christian Sch., Inc. v. U.S., 436 F. Supp. 1314 (E.D.N.C. 1977), reproduced in Joint Appendix at 3–11, *Bob Jones Univ.*, 461 U.S. at 574 (Nos. 81-1, 81-3).

[124] *See Bob Jones Univ.*, 461 U.S. at 604–05 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets. The governmental interest [in eradicating racial discrimination in education] at stake here is compelling.").

[125] *See* Nina Martin, *"To Say 'My Religious Law Trumps Your Secular Law' is a Radical Idea"*, SALON (May 19, 2015), http://www.salon.com/2014/03/19/to_say_my_religious_law_trumps_your_secular_law_is_a_radical_idea_partner/ [https://perma.cc/ECX9-6WEU] (questioning why it is acceptable to discriminate for religious reasons, but not secular ones).

[126] *Id.* (internal citations omitted).

Justice Scalia, in a case involving religious exemptions, similarly wrote that:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage law, child labor laws, animal cruelty laws, environmental protection laws, and laws providing the equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.[127]

The Supreme Court's 2014 decision in *Burwell v. Hobby Lobby* offers additional insight into the extent to which religious freedom arguments may justify discrimination at odds with federal anti-discrimination law.[128] The Court's decision suggests that the Patient Protection and Affordable Care Act regulations requiring employer healthcare plans to cover certain forms of birth control created a substantial burden on closely held corporations' rights to freely exercise religion because the corporations' owners held sincere religious beliefs about certain forms of contraception.[129] Even though the *Hobby Lobby* decision focused on contraception, it sparked much debate about the balance between religious liberty and sexual orientation discrimination.[130] Specifically, some feared that religious exemptions in healthcare benefits would allow cultural conservatives to impose other discriminatory policies against LGBT employees.[131]

Separate from arguments related to the right to free exercise, private schools could argue that the First Amendment right of free association justifies discrimination against LGBT teachers. This right of free association is not explicitly stated in the First Amendment; rather, it is implied.[132] The Supreme Court has found that rights to intimate associa-

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[127] Employment Div. v. Smith, 494 U.S. 872, 888–89 (1990).

[128] *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (holding that the operation of a business in a manner required by religious belief is protected under the Religious Freedom Restoration Act (RFRA), *supra* note 115, regardless of whether the business is a for-profit corporation).

[129] *See id.* at 2775 (noting the owners' sincere religious beliefs).

[130] Molly Ball, *How Hobby Lobby Split the Left and Set Back Gay Rights*, THE ATLANTIC (July 20, 2014), http://www.theatlantic.com/politics/archive/2014/07/how-hobby-lobby-split-the-left-and-set-back-gay-rights/374721/ [https://perma.cc/5AYG-URCA].

[131] *See, e.g.*, *id.* ("To many liberals, however, *Hobby Lobby* sent the opposite message: that religious exemptions were a potentially dangerous new wedge for cultural conservatives seeking to impose discriminatory policies.").

[132] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) ("[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other

tion, related to the right of privacy, and expressive association, related to the First Amendment's protection of free speech, are constitutionally protected.[133] Both states and the federal government must protect the right of free association.[134] Some cases unrelated to education have addressed whether the government can force private organizations to accept members whom they do not want.[135] The discussion of the court decisions below provides an examination of their reasoning and their potential applicability to the issue of discrimination in private schools.

When the Minneapolis and St. Paul chapters of the United States Junior Chamber, known as "the Jaycees," admitted women as full members, the national organization considered revoking the chapters' charters.[136] Both of the chapters filed claims against the national Jaycees organization, arguing that the membership restrictions imposed by the national organization violated the Minnesota Humans Rights Act, which prohibits discrimination based on sex in public accommodations.[137] In a unanimous decision, the Supreme Court held in favor of the Minnesota and St. Paul chapters, finding that the national organization's right to free association, and therefore its ability to control the membership of its local chapters, could be limited by law because the Human Rights Act served "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[138] Here the state had a compelling interest in eradicating discrimination against women, and it promoted the state's interest through the least restrictive method.[139] By allowing women to join the Jaycees, the women gained professional networking opportunities and leadership training, and the Jaycees did not need to change their overall mission.[140]

A few years later, the Supreme Court addressed a similar issue in a case involving the Rotary Club. California's Unruh Civil Rights Act prohibited sex discrimination in public accommodation.[141] After the Rotary Club chapter in Duarte, California, permitted women to join, the international organization objected.[142] In another unanimous opinion, the Court ruled that admitting women to the Rotary Club chapter was not a consti-

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individual liberties.").

[133] *See id.* at 618 ("We therefore find it useful to consider separately the effect of applying the Minnesota statute to the Jaycees on what could be called its members' freedom of intimate association and their freedom of expressive association.").

[134] NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.").

[135] *See infra* notes 136–151 and accompanying text.

[136] *Jaycees*, 468 U.S. at 614.

[137] *Id.* at 614–15 (citing MINN. STAT. § 363.03(3) (1982)).

[138] *Id.* at 623.

[139] *Id.* at 626.

[140] *Id.* at 627.

[141] Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (2016).

[142] Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 541 (1987).

tutional violation of the Club's freedom to associate.[143] The Court noted that the Rotarians were not forced to change any of their activities as a result of this decision.[144]

Shortly after *Duarte*, a concurring opinion to another Supreme Court case yet again suggested that a private club's right to association can be limited under certain circumstances.[145] In that case, New York City had recently amended its human rights law to modify how certain clubs were exempted from discrimination prohibitions.[146] The amendment permitted the city to determine which clubs were "distinctly private" and thus exempted, and which were "sufficiently public" to be subject to the prohibitions.[147] The goal behind the amendment was to target those clubs wherein business deals were made so that minorities and women would not be excluded from conducting such transactions.[148] An association of New York State clubs filed a lawsuit alleging a violation of their members' rights to expressive association[149] in part because the city made the exemption narrower.[150] The Supreme Court upheld the amendment to New York City's law, finding that the law did not require any changes to the clubs' protected First Amendment activities.[151]

After these three decisions, it was apparent that a private organization's right to freely associate was not absolute. In *Boy Scouts of America v. Dale* in 2000, however, the Court found that a private organization's right to freely associate could in fact exclude it from the scope of applicability of certain anti-discrimination laws.[152] Unlike the previous three cases discussed, this opinion focused on discrimination on the basis of sexual orientation rather than gender.[153] In this case, the Supreme Court addressed whether the Boy Scouts' decision to terminate the adult membership of an openly gay assistant scoutmaster and former Eagle Scout, James Dale, on the grounds that the organization "specifically forbid membership to homosexuals," was protected by the Boy Scouts' right to associate for expressive purposes.[154]

In *Dale*, the Boy Scouts had appealed from a New Jersey Supreme Court decision upholding the state anti-discrimination law; that court cited *Duarte* in reasoning that "Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not

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[143] *Id.* at 550.

[144] *Id.* at 548.

[145] N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 20 (1988) (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law.").

[146] *Id.* at 4–5.

[147] *Id.* (citing N.Y.C. Local Law No. 63 of 1984).

[148] *Id.* at 5–6.

[149] *Id.* at 13.

[150] *Id.* at 6 (citing N.Y.C. ADMIN. CODE § 8-102(9) (1986)).

[151] *Id.* at 18.

[152] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000).

[153] *Id.*

[154] *Id.* at 643–45.

'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'"[155] Specifically, the state supreme court found that there was no violation of the First Amendment because Dale's presence in the organization did not mean that the Boy Scouts endorsed homosexuality.[156] In a narrow 5–4 decision, the U.S. Supreme Court reversed, finding that the Boy Scouts were exempt from New Jersey's anti-discrimination law.[157] The Court ruled that the right to free association allowed the Boy Scouts of America to prohibit membership of openly gay scoutmasters.[158]

Other legal and policy arguments bear on the extent to which private organizations should or can be exempt from federal or state anti-discrimination laws. In a 2015 letter to Congressional leaders, more than seventy private religious school leaders expressed worry that the *Obergefell* decision would raise concerns about schools "adhering to traditional religious and moral values."[159] Along these lines, recent articles have raised the question of whether religious private schools could lose their tax-exempt status as a non-profit if they discriminate against individuals based on sexual orientation.[160] An amicus brief submitted during the *Obergefell* case by the United States Conference of Catholic Bishops similarly said that "it would seem a short step" from a decision in favor of same-sex marriage to a decision to revoke tax-exempt status for religious institutions that opposed same-sex marriage.[161] These concerns likely stem from a 1983 Supreme Court decision that denied tax-exempt status to a private K–12 school and a private university that engaged in racial discrimination.[162]

In *Bob Jones University v. United States*, the Court examined whether a non-profit private university and K–12 private school, which both admitted students using racially discriminatory standards ostensibly based on school officials' religious beliefs, could still qualify as a tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code of 1954.[163] The K–12 private school only accepted white students and occa-

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[155] Dale v. Boy Scouts of Am., 160 N.J. 562, 615 (N.J. 1999) (quoting Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 538 (1987)).

[156] *Id.* at 623.

[157] *Boy Scouts of Am.*, 530 U.S. at 661.

[158] *Id.*

[159] Letter from Daniel L. Akin et al., President, Southeastern Baptist Theological Seminary, to Mitch McConnell, Sen. Majority Leader, U.S. Senate, and John Boehner, Speaker of the House, U.S. House of Representatives (June 3, 2015), *available at* http://downloads.frc.org/EF/EF15F04.pdf [https://perma.cc/4F4Y-CLFJ].

[160] *See, e.g.*, Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html.

[161] Brief of Amicus Curiae of U.S. Conference of Catholic Bishops in Support of Respondents and Supporting Affirmance, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042 at *26.

[162] Bob Jones Univ. v. U.S., 461 U.S. 574, 578 (1983).

[163] *Id.* at 574.

sionally students of mixed race.[164] The K–12 school argued that God "separated mankind into various nations and races," and that such separation "should be preserved in the fear of the Lord."[165] The private university, on the other hand, had reduced its exclusionary and restrictive policies over time. The university fully excluded black students until 1971.[166] From 1971 through 1975, the university accepted only married black students; from 1975 to the time of the suit, it accepted both married and unmarried black students but strictly prohibited interracial dating.[167] In 1970, the IRS adopted a new policy that withheld tax-exempt status from private schools that engaged in racially discriminatory practices because, under the IRS's interpretation of the code, such practices meant the institution did not qualify as charitable.[168]

The IRS subsequently revoked the tax-exempt status of the two private schools; the schools then filed suit in two different federal district courts.[169] The cases were combined when they reached the U.S. Supreme Court.[170] The Court ultimately ruled that racial discrimination was contrary to public policy, and private schools engaging in such conduct could not be considered charitable organizations under the tax code.[171] Moreover, the Court held that the actions of the IRS did not violate the Free Exercise Clause because the government has a fundamental overriding interest to eradicate racial discrimination, which outweighed the schools' ability to practice their religious beliefs.[172]

Bob Jones suggests that the government can have interests that effectively outweigh private religious beliefs. Religious beliefs were cited in other cases involving racial discrimination. For example, when sentencing a couple for violating Virginia's anti-miscegenation laws in 1959, the trial court judge in *Loving* wrote that "[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents," and also wrote that "[t]he fact that he separated the races shows that he did not intend for the races to mix."[173] Similar to the arguments in *Bob Jones*, these religious-based arguments in *Loving* did not sway the Court.

The Court discussed the bearing of the *Bob Jones* decision on discrimination based on sexual orientation during oral argument in *Obergefell*:

JUSTICE ALITO: Well, in the *Bob Jones* case, the Court held

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[164] *Id.* at 583.
[165] Complaint, *supra* note 123, at 12.
[166] *Bob Jones Univ.*, 461 U.S. at 580.
[167] *Id.*
[168] *Id.* at 578, 585.
[169] *Id.* at 582, 584.
[170] *Id.* at 585.
[171] *Id.* at 595.
[172] *Id.* at 603–04.
[173] Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial court judge).

> that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
>
> SOLICITOR GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue.[174]

The Court also discussed competing interests regarding the effects of public opinion on the party exercising its religion and the party experiencing discrimination on the basis of sexual orientation. Dissenting in *Obergefell*, Justice Samuel Alito warned that society should not "vilify Americans who are unwilling to assent to the new orthodoxy" because "those who cling to old beliefs" and "repeat those views in public . . . will risk being labeled as bigots and treated as such by governments, employers, and schools."[175] But Justice Kennedy's concurrence in *Hobby Lobby*, however, asserts that, though "no person may be restricted or *demeaned* by government in exercising his or her religion," religious exercise may not "unduly restrict other persons . . . in protecting their own interests."[176] Similarly, the *Obergefell* majority appeared to stress that:

> The First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections—this, too, is an essential part of the conversation—but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals[.][177]

These concerns and competing interests ultimately give rise to questions as to what discriminatory actions private non-profit religious schools and universities can take against LGBT teachers. Should these institutions have a religious right to exclude faculty or teachers based on sexual orientation? Is the discriminatory firing of LGBT teachers in private schools a violation of fundamental public policy? The IRS would likely need to initiate such an action against private schools that discrim-

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[174] Transcript of Oral Argument at 38, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_15gm.pdf [https://perma.cc/7P5J-FEV9].

[175] *Id.*

[176] Burwell v. Hobby Lobby Stores, 134 S. Ct. 2571, 2786–87 (2014) (Kennedy, J., concurring) (emphasis added).

[177] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015) (emphasis in original).

inatorily fire LGBT teachers; it is unlikely that a taxpayer would have standing to bring such a lawsuit.[178] Legal scholars have offered competing views about whether the *Bob Jones* decision will threaten private institutions that discriminate against LGBT persons.[179] Michael McConnell, a professor at Stanford University Law School, posits that "[p]rivate institutions that dissent from today's reformulation of marriage must be prepared for aggressive legal attacks on all fronts[.]"[180]

In addition to *Bob Jones*, earlier cases involving racial discrimination in private schools could provide some guidance in this area. A private school's acceptance of public voucher money or public funding for textbooks or bussing services might allow LGBT teachers to bring legal claims if the school discriminates against them. In *Norwood v. Harrison*, for example, the Supreme Court found state action when a private school racially discriminated in admissions because the private school accepted free textbooks from the government.[181] The Supreme Court held in a unanimous decision that Mississippi could not provide aid to a private school that racially discriminates.[182]

The only time the Court applied anti-discrimination laws to a racially discriminatory non-sectarian private school that did not accept public money was in *Runyon v. McCrary*.[183] In this case, parents filed a lawsuit against private schools that denied admission to their children and other black students.[184] The parents claimed that the private school's policy violated 42 U.S.C. § 1981.[185] Section 1981 guarantees "[e]qual rights under the law."[186] Upholding the Fourth Circuit's decision, the Supreme Court found the private school's policy violated Section 1981.[187] The Court also ruled that Section 1981 did not infringe upon any parental right to direct their children's education.[188] The Court held that "invidious[] private discrimination" had "never been accorded affirmative constitutional protections."[189] The Court further observed that the Civil Rights Act of 1866 "prohibits racial discrimination in the making and enforcement of private contracts," including those for the private education of parents' chil-

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[178] *See* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 125 (2011) ("[T]he mere fact that a plaintiff is a taxpayer is not generally deemed sufficient to establish standing in federal court.").

[179] Scott Jaschik, *The Supreme Court Ruling and Christian Colleges*, INSIDE HIGHER ED. (June 29, 2015), https://www.insidehighered.com/news/2015/06/29/will-supreme-court-decision-same-sex-marriage-challenge-or-change-christian-colleges [https://perma.cc/J7M5-SNH7] (noting that "[l]egal experts are divided" and discussing the opinions of some on the implications of *Obergefell* for private Christian colleges).

[180] *Id.*

[181] Norwood v. Harrison, 413 U.S. 455, 463–64 (1973).

[182] *Id.* at 465–66.

[183] *See* Runyon v. McCrary, 427 U.S. 160, 188 (1976) (noting that schools are "managed by private persons and they are not direct recipients of public funds") (internal citations omitted).

[184] *Id.* at 163–64.

[185] *Id.* at 163.

[186] 42 U.S.C. § 1981 (2012).

[187] *Runyon*, 427 U.S. at 161.

[188] *Id.*

[189] *Id.* at 176.

dren.[190] Perhaps a similar argument could be made regarding private school discrimination in employment contracts with LGBT teachers.

Bob Jones addressed race discrimination; *Jaycees*, *Duarte*, and *New York State Club* focused on gender discrimination; and *Boy Scouts of America* involved sexual orientation discrimination. As Martha Minow, the former Dean of Harvard Law School, noted, "religious groups largely receive no exemptions from laws prohibiting race discrimination, some exemptions from laws forbidding gender discrimination, and explicit and implicit exemptions from rules forbidding sexual orientation discrimination."[191] Katherine Franke likewise contends that Supreme Court jurisprudence suggests that "race is special" and that "[r]acial equality will almost always trump an assertion of free exercise of religion."[192] As such, equality claims related to sexual orientation do not have the same gravitas as racial justice claims when religious beliefs are involved. This should no longer be the case in a country that guarantees the equal protection of laws or, as Justice Kennedy wrote in *Obergefell,* subscribes to the doctrine of "equal dignity."[193]

CONCLUSION

Law continues to influence matters related to education policy,[194] and this is especially true in the context of the employment of LGBT teachers. It appears that some private school educators have been recently dismissed because of their sexual orientation—oftentimes after their same-sex relationship becomes public [195]—and there are few legal avenues available for them. Nevertheless, there have been at least three legal challenges to this type of dismissal in the private school context.[196] To effectively prevent discrimination on the basis of sexual orientation, the IRS could decide to revoke a private school's tax-exempt status if the school engages in discrimination. Similar to the decision in *Bob Jones*, such revocation should not violate the Free Exercise Clause because the

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[190] *Id.* at 168.

[191] Minow, *supra* note 113, at 782.

[192] Martin, *supra* note 125.

[193] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding that the Constitution grants the right of equal dignity).

[194] *See generally* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C.L. REV. 1597 (2003) (discussing the Supreme Court's impact on the limited success of desegregation efforts); Benjamin Superfine, *The Evolving Role of the Courts in Educational Policy: The Tension Between Judicial, Scientific, and Democratic Decision Making in* Kitzmiller v. Dover, 46 AM. EDUC. RESEARCH ASSOC. 898 (2009) (dealing with the constitutionality of the intelligent design policy); Lugg, *supra* note 6 (discussing how queer legal theory can be applied to educational policy).

[195] *See supra* note 11 and accompanying text.

[196] Barrett v. Fontbonne Acad., No. CV2014-751, 2015 WL 9682042, at *3 (Mass. Super. Dec. 16, 2015); SAN GABRIEL VALLEY TRIBUNE, *supra* note 66; Stipulation and Order of Dismissal, *supra* note 72.

government has a fundamental interest in eradicating discrimination based on sexual orientation, and that interest should outweigh and override schools' interests in practicing their religious beliefs to the exclusion of the employment of LGBT persons. Furthermore, as in *Norwood*, private schools that accept public funding in any form should be subject to closer judicial scrutiny if they choose to discriminate. Moreover, similar to the private organizations in *Roberts*, *Duarte*, and *New York State Club*, a private school should not have an unlimited right to freely associate if such association conflicts with state or federal anti-discrimination provisions. Finally, Congress and state legislatures should protect LGBT persons from employment discrimination; Congress should pass ENDA without any broad religious exemptions, and state legislatures should continue to pass legislation that protects LGBT employees from discrimination in the workplace.

In a case involving K–12 public schooling, the Court observed that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[197] It should also recognize that the way to stop discrimination on the basis of sexual orientation is to stop discriminating on the basis of sexual orientation. The Court has not found a legitimate assertion of conflicting religious belief in matters involving racial equality, and it should find none with regard to equality based on sexual orientation.

[197] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).