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THE NEW “ILLEGITIMATE CHILD”: HOW PAROCHIAL SCHOOLS ARE IMPUTING DISCRIMINATION AGAINST HOMOSEXUALS TO CHILDREN OF HOMOSEXUAL PARENTS AND GETTING AWAY WITH IT

DANIEL MAKOFSKY*

INTRODUCTION

In the Gospel of Matthew, Jesus rebuked his disciples for turning children away from him, saying “[l]et the little children come to me, and do not hinder them, for the kingdom of heaven belongs to such as these.”¹ Jesus’ special love for children is further emphasized in Matthew chapter 18 where Jesus instructs his disciples, “I tell you the truth, unless you change and become like little children you will never enter the kingdom of heaven. Therefore, whoever humbles himself like this child is the greatest in the kingdom of heaven.” Jesus continues by instructing, “[s]ee that you do not despise one of these little ones. For I tell you that in heaven their angels always see the face of my Father who is in heaven.”² The message here is about inclusion; God’s love is not only for those people advanced in wisdom and knowledge, rather it is for those who come before God as a child, bearing humility and purity.

This message of God’s inclusive love was recently disregarded by a parochial school in Hingham, Massachusetts when it excluded an 8-year old boy from the school after learning that the child’s parents were lesbian.³ This was not the first occurrence of such an incident; months

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¹ *Matthew* 19:14 (New International).

² *Matthew* 18:10 (New International).

³ Lisa Wangsness, *2 Views on Excluding Lesbians’ Son; Archdiocese Distances self from School Ruling*, BOSTON GLOBE, May 13, 2010, at metro 1, available at http://www.boston.com/news/education/k_12/articles/2010/05/13/students_exclusion_draws_denial/.

earlier in Boulder, Colorado a parochial elementary school did not allow one of its pre-school students to return the following year after discovering that the child's parents were lesbian.⁴

From a legal standpoint, this scenario raises the grave concern of an individual being treated unequally based on another's behavior. Discrimination rooted in the disapproval of an individual's behavior raises a moral dilemma. Its imputation to another person is morally reprehensible, especially when imputed to a minor child. From a theological standpoint, these discriminatory practices fall out of line with Jesus's teachings of an inclusive love that eagerly welcomes children. The legal and theological discussions surrounding this topic differ. However, regardless of the forum, it is clear that the extension of discrimination to innocent children within society is a complex matter that has neither a clear moral or legal solution. This Note presents the legal discussion and takes the position that discrimination against innocent children because of the sexual orientation of their parents is immoral, contrary to fundamental public policy and therefore deserves a legal remedy.

I. THE SEARCH FOR A LEGAL REMEDY

So what does the family do? For illustrative purposes this Note explores the possible options of four hypothetical families from different states: California, New York, Massachusetts, and Texas. Each family has a common experience. After sending its 10-year old child to public school for elementary school, each decided that its child would benefit educationally and spiritually by attending a parochial school. The family has limited options so it applied to the only parochial middle school in town. During the course of the admissions process, the school's administrators discovered that the parents are homosexual and accordingly denied the child admission. The decision was based on the school's position that homosexual relationships are in discord with the teachings of

⁴ Sarah Netter, *Colorado Catholic School Boots Student With Lesbian Mothers*, ABC NEWS, (Mar. 9, 2010), <http://abcnews.go.com/WN/colorado-catholic-school-kicks-student-lesbian-mothers/story?id=10043528>. These incidents are not indicative of a uniform policy of the Catholic Church. In fact, in the wake of the parochial school's decision in Hingham, the Archdiocese of Boston issued a statement that the school was not following archdiocesan policy. Additionally, several months later, the Archdiocese issued a new admissions policy that said "parochial schools will not "discriminate against or exclude any categories of students." The disconnect between the Archdiocese and the parochial school on this matter stems from the fact that individual parochial schools are given authority to make admission decisions. The decision to exclude a child can be made if the local parish deems it in the best interest of the child to do so. Therefore, this is an issue that has the potential to recur. Wangsness, *supra* note 3.

the Catholic Church, and that teachers in the school would be placed in an awkward position by having to answer questions about a child's same sex parents.⁵ Each family is unsatisfied and seeks a legal remedy.

Currently, the law does not adequately provide a remedy for this discrimination. The families' possible legal protections under the U.S. Constitution, their state constitutions, federal anti-discrimination laws, and state anti-discrimination laws are insufficient to stop the parochial schools' discriminatory actions. The U.S. Constitution only protects individuals from state actors, not private entities. Although some state constitutions extend beyond the U.S. Constitution in prohibiting discrimination and protecting individual liberties, like the U.S. Constitution, state constitutions are restricted by state action requirements. Federal anti-discrimination laws fail because these children do not fit into any of the federally protected classes. State anti-discrimination laws also fail because even though some states prohibit sexual orientation discrimination, there are other obstacles that limit the reach of anti-discrimination law to parochial schools.

This Note sets out two alternative paths to securing a legal remedy. The first path, a more immediate albeit incomplete solution, is to seek the revocation of a discriminatory parochial school's 501(c)(3) tax-exempt status.⁶ Pursuant to this path, the Internal Revenue Service (hereinafter "I.R.S.") might revoke the tax-exempt status of the parochial school where it can demonstrate that the school's activities are contrary to fundamental public policy. This Note applies the Supreme Court's analysis in *Bob Jones University v. United States*⁷ to argue that the revocation of a parochial school's tax-exempt status might be a possible way to combat the school's discrimination against children of homosexual parent(s). Revocation of the parochial school's tax-exempt status may not compel the school to stop discriminating; however, it will ensure that the opportunity for a dual tax subsidy – tax-exemption of the school's revenues and tax deductions for donors – is no longer available to subsidize the school's discrimination.⁸ This approach may have the effect of reducing donations, thereby undermining the school's funding,⁹ in turn putting pressure on the

⁵ David Gibson, *Children of Gay Parents: Another Student Booted From Catholic School*, POLITICSDAILY, (May 14, 2010), <http://www.politicsdaily.com/2010/05/14/children-of-gay-parents-another-student-booted-from-catholic-sc/>; Netter, *supra* note 4.

⁶ See I.R.C. 501(c)(3). Parochial schools receive indirect aid from the federal government through a 501(c)(3) tax-exempt status.

⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

⁸ See *infra* discussion, at Part II. B.

⁹ See I.R.C. 170(c)(2). When an organization loses its tax-exempt status, donors can no longer claim § 170 deductions for the donations that they make to that organization. Therefore, an

parochial school to change its discriminatory policy in an effort to prevent the loss of revenue.¹⁰

Notwithstanding the potential success of this approach, two limitations must be conceded. First, this path has only been used against educational organizations practicing racial discrimination, a form of discrimination the Court found to be contrary to fundamental public policy.¹¹ Therefore in order to succeed in this context, it must be demonstrated that discrimination of children from non-traditional families is a violation of fundamental public policy. Second, this approach presents a standing issue. Because the I.R.S. has sole authority to revoke an organization's tax-exempt status, where the I.R.S. does not act affirmatively, a party must gain standing to enjoin the I.R.S. from maintaining an organization's tax-exempt status. This task is increasingly difficult in the wake of the Supreme Court's recent decision in *Arizona Christian School Tuition Organization v. Winn*.¹² This Note presents an argument to overcome the first limitation. With respect to the standing limitation, this Note concedes that a family's chance of achieving standing to challenge a third party's Federal tax-exempt status is doubtful. Accordingly, the most practical solution is for Congress to enact a new law that will compel the I.R.S. to affirmatively revoke an organization's tax-exempt status where such organization's policies and practices violate fundamental public policy.

The first path's perhaps insuperable limitations demonstrate the great need for a complete remedy. Accordingly, this Note proposes a second solution: new federal legislation that includes children of non-traditional families as a protected class under federal law. At present, the prospect of such legislation is idealistic, but nevertheless a goal to strive toward. This legislation is necessary for two additional reasons: first, there is currently no law that forbids religious organizations from imputing discrimination of an adult to the adult's minor child;¹³ and second, there is a lack of uniformity among the states' anti-discrimination laws.¹⁴

Part I discusses the families' constitutional, federal and state anti-

organization's loss of tax-exempt status also takes away a major incentive for people to donate money to that organization.

¹⁰ Russell J. Upton, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking its State-level Tax-exempt Status*, 50 AM. U.L. REV. 793, 800-01 (2001); Russell J. Upton, *A Sensible Alternative to Revoking the Boy Scouts' Tax Exemption*, 30 FLA. ST. U.L. REV. 137, 141 (2002).

¹¹ See *Bob Jones Univ.*, 461 U.S. at 574.

¹² *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011).

¹³ See *infra* discussion Part I.B-C.

¹⁴ See *infra* discussion Part I.D.

discrimination law arguments, ultimately explaining why each do not prevent the schools' discriminatory practices. This Part follows with a discussion of the parochial schools' First Amendment defenses, addressing constitutional protections the schools might have. Part II discusses the history and theory behind fighting discrimination through the revocation of tax-exempt status. This Part also addresses the obstacles that a family faces when seeking to have the I.R.S. revoke a religious organization's tax-exempt status, hence demonstrating why Congress needs to adopt new legislation that would prompt greater scrutiny over organizations that receive tax-exempt status. Part III presents a proposal for new federal legislation that would provide the most complete solution for challenging a parochial school's discrimination of children of homosexual parent(s).

II. WHY CONSTITUTIONAL AND ANTI-DISCRIMINATION LAW CLAIMS FALL SHORT

A. United States Constitutional Arguments

The families from California, New York, Massachusetts, and Texas are each guaranteed the same liberties and protections under the United States Constitution. Possible constitutional arguments for these families include the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the First Amendment's guarantee of free exercise of religion.¹⁵ However, before delving into the merits of these constitutional arguments, a preliminary question must be examined: does the U.S. Constitution apply to parochial schools? The Constitution applies only to state action; therefore unless the parochial school fits into an exception from that general premise, the Constitution will not protect these families.¹⁶ The Supreme Court has qualified the state action requirement with two exceptions: public function and entanglement.

The public function exception provides that when private conduct involves a task that has traditionally been exercised exclusively by the state, that conduct must comply with the Constitution.¹⁷ Education has long

¹⁵ U.S. CONST. amend. XIV. The Equal Protection Clause provides that no state shall deprive any person within its jurisdiction the Equal Protection of the laws.

¹⁶ *United States v. Stanley*, 109 U.S. 3, 11 (1883); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 507 (Aspen Publishers 3rd ed. 2006).

¹⁷ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974) (holding that a private utility company did not have to provide due process before it terminated a customer's service because running a utility is not a traditional prerogative of the State, and therefore the Constitution did not apply); CHERMERINSKY, *supra* note 16, at 517.

been a function of the government, and there is a strong argument that a private school is performing a public function by providing a secular education to children.¹⁸ The Court however, has limited the application of the public function exception in this area by asking whether providing education has been “traditionally the exclusive prerogative of the state.”¹⁹ The Court’s response was simply “no” because private schools have long existed alongside public education.²⁰

The entanglement exception provides that where the government affirmatively authorizes, encourages, or facilitates unconstitutional conduct, the Constitution applies.²¹ Whether the government is entangled in a given situation turns on the degree of government involvement in the private activity.²² In the context of parochial schools, entanglement is determined by the amount of financial support or other government resources granted to the school. In making this determination, the Supreme Court has reached different conclusions. These differences show that the Court is more likely to find entanglement where it is apparent that the government is supporting a private actor for the purpose of undermining constitutional protections. In *Norwood v. Harrison*, the Court held that there was state action when the government gave free textbooks to private schools that engaged in racial discrimination²³; however, in *Rendell-Baker v. Kohn*, the Court held that there was no state action when a private school, receiving 90 percent of its funds from the state, fired a teacher because of her speech activities.²⁴

If the Court finds that the government is supporting a parochial school for the purpose of undermining the equal protection rights of a child of homosexual parents, the Court would likely find state action with a lesser degree of entanglement. Accordingly, two questions remain: first, what is the degree of government support to the parochial school? Second, is the government supporting that parochial school for the purpose of undermining the child’s constitutional rights? The answers to these questions are fact specific and require an in-depth examination of the

¹⁸ Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 247 (1968); CHEMERINSKY, *supra* note 16, at 524–25. Parochial schools are unique from other religious schools because the curriculum at a parochial school provides secular education along with religious education, as compared to a school that provides solely religious education.

¹⁹ *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

²⁰ *Id.* at 842–43.

²¹ *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948); CHEMERINSKY, *supra* note 16, at 517, 527.

²² *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); CHEMERINSKY, *supra* note 16, at 527.

²³ 413 U.S. 455, 463 (1973).

²⁴ 457 U.S. at 837.

state's intentions for supporting the parochial school.

Although it is uncertain whether these parochial schools would fall within the entanglement exception to the state action requirement, articulation of the Fourteenth Amendment Clauses is important because they influence the broader definitions of equality and individual liberty. A brief discussion of these provisions illuminates the underlying principles throughout this Note.

a. The Child's Equal Protection Rights

The Equal Protection Clause comes into play where a state action, policy, or law creates classifications among people and then withholds certain rights or benefits based on those classifications.²⁵ Where the parochial school denied admission to a 10-year old child because of that child's homosexual parent(s), that school is treating children of homosexual parents differently than those of heterosexual parents, thereby creating a classification. This discriminatory policy can be described in two ways: either homosexual families are being treated differently than heterosexual families, or children not born or adopted into traditional families are being treated differently than children born into traditional families. The Supreme Court has dealt with both types of discrimination.

The Supreme Court has addressed controversies involving discrimination against children not born or adopted into traditional families in the Equal Protection context of non-marital children.²⁶ These claims challenged the constitutionality of laws that denied non-marital children equal rights in the areas of wrongful death damages, the rights of fathers, financial assistance from state benefits, financial assistance from federal benefits, inheritance, paternity and support actions, and immigration.²⁷ Claimants in these cases argued that the government did not have an important interest in denying children of non-married parents the same rights as children of married parents. The Supreme Court in *Clark v. Jeter* endorsed the application of intermediate scrutiny to discrimination against non-marital children, and held that such classifications violated the Equal Protection Clause.²⁸ The Court condemned the state for punishing children of non-married parents

²⁵ *United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008); see CHEMERINSKY, *supra* note 16, at 669.

²⁶ Between 1968 and 1992, the Supreme Court adjudicated over twenty cases involving Equal Protection claims of non-marital children, MARTHA T. ZINGO & KEVIN E. EARLY, NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES 41 (1994).

²⁷ *Id.*

²⁸ 486 U.S. 456, 461 (1988).

for a birth status beyond their control.²⁹

The treatment of sexual orientation under Equal Protection jurisprudence has received increased attention after the Supreme Court's decisions in *Romer v. Evans* and *Lawrence v. Texas*. In *Romer* the Supreme Court held that a Colorado referendum repealing all state and local laws prohibiting discrimination based on sexual orientation violated the Equal Protection Clause.³⁰ This case is extremely significant because the Court struck down a law using the rational basis test. Because the rational basis test only requires that the classification rationally advances a legitimate state objective,³¹ the Court's analysis reveals that a more rigorous rational basis standard was applied.³² Although the Court did not expressly apply a heightened level of scrutiny to the sexual orientation classification, the Court's application of a more rigorous rational basis standard leaves open-ended the future treatment of sexual orientation as a suspect class. In *Lawrence v. Taylor*, the Supreme Court struck down a criminal sodomy law holding that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the Fourteenth Amendment.³³ Even though this case was not decided on Equal Protection grounds, there is reason to believe that the Court's decision calls into question and challenges other limits on same-sex equality, including same-sex marriage.³⁴

Although the future of how the Court will treat sexual orientation is not clear after *Romer v. Evans* and *Lawrence v. Taylor*, rational basis remains the standard of review for sexual orientation discrimination. Based on the current state of equal protection jurisprudence, a family has a stronger argument that the discrimination its child suffered puts them in the same classification as non-marital children. The Court applies a higher degree of

²⁹ *Id.* (stating "we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'").

³⁰ 517 U.S. 620, 632 (1996).

³¹ *Id.* at 631.

³² *Id.* Under traditional rational basis review, the party challenging a state action or law must demonstrate that the law is not rationally related to any legitimate governmental interest. The traditional application of this standard represents a very high bar for finding a law unconstitutional. The fact that the *Romer* Court held that the Colorado referendum did not even pass the rational basis standard suggests that the Court applied a rational basis test with "bite." See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 777 (2011).

³³ 539 U.S. 558, 578 (2003).

³⁴ David S. Buckel, *Building Marriage Equality with Lawrence v. Texas*, LAMBDA LEGAL, Mar. 29, 2008, available at <http://web.archive.org/web/20081120080530/http://www.lambdalegal.org/our-work/publications/general/building-marriage-equality.html>. See Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1185 (2004).

scrutiny to laws and practices that discriminate against children for the actions of their parents than to laws that create classifications on the basis of sexual orientation classification.³⁵

b. The Parent's Substantive Due Process Clause

The Supreme Court in *Meyer v. Nebraska* held that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes the right to "acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience,"³⁶ and the right to "send one's children to a private school that offers specialized training."³⁷ Accordingly, parents have a constitutional right to send their child to a private school where that child will receive religious instruction. Once again, the Constitution only protects this right from government interference, not the interference of a private actor such as a parochial school. Thus, the Constitution does not prevent a parochial school from denying a parent the right to bring up its child as they see fit.

c. The Parent's First Amendment Free Exercise Rights

A parent has a First Amendment right to guide the religious future and education of his or her children.³⁸ Arguably, this right is infringed upon when the parochial school denies its child admission. The child is being excluded from a religious community, and accordingly the parent's fundamental interest in controlling the religious future and education of his or her child is violated. This argument is deficient for two reasons. First, a parochial school is not a state actor and therefore is not obligated to respect a person's free exercise rights. A parochial school's discriminatory admissions policy is not the equivalent of a state regulation that interferes with an individual's free exercise right. Second, this argument is based on the misleading assumption that the family's only way to direct the religious future of its child is to send him or her to a parochial school. This ignores

³⁵ Compare *Jeter*, 468 U.S. 456, 461 (applying intermediate scrutiny to an equal protection claim based on the non-marital classification) with *Romer*, 517 U.S. 620, 632-33 (using the rational basis standard to an equal protection claim based on a sexual orientation classification).

³⁶ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (ruling that a parent's right to direct the upbringing and education of their child includes the right to send a child to a school in order to receive instruction in the German language).

³⁷ *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (referencing *Meyer v. Nebraska*, 262 U.S. 390).

³⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (holding that the state may not prevent Amish parents from taking their children out of school before they reach the age of sixteen because the parent's religious right to free exercise outweighed the states interest in education); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (stating that the state may not ban private schools).

the possibility that a parent can supplement a purely secular education with religious education at a Sunday school or other church program.

B. States' Constitutional Arguments

In addition to each family's constitutional rights under the U.S. Constitution, each family enjoys protections under its respective state constitution. At a minimum, the protections offered by state constitutions match those of the U.S. Constitution, and in some states, extend beyond those guaranteed in the U.S. Constitution.³⁹ As under the U.S. Constitution, the families might look for protection under their respective state constitutions' freedom of religion provisions, Due Process and Equal Protection clauses, or any other applicable provision unique to their state's constitution. Despite room for greater protection under these state constitutional provisions, it must be acknowledged that the role of state constitutions is to define the powers of its state's government and to protect an individual's rights from abuse by that state government. Accordingly, parochial schools will only be restricted by a state constitution if the parochial school is a state actor, or if the particular state constitution has an applicable provision that does not have a state action requirement. A look at New York and California's constitutions demonstrates the limited ability of state constitutions to protect against the parochial school's discriminatory actions.

The New York family might look for protection under New York Constitution's Due Process,⁴⁰ Equal Protection,⁴¹ or Civil Rights clauses.⁴² New York's Equal Protection clause has not been interpreted to extend beyond the reach of the U.S. Constitution's Equal Protection clause;⁴³

³⁹ Jon J. Aho, *High Court Study: A Case of Good Intentions: The Vermont Supreme Court and State Constitutional Protection of Civil Rights and Liberties*, 60 ALB. L. REV. 1845, 1846 (1997) (describing how the framers designed the United States Constitution to set only minimum standards for individual rights and liberties and envisioned the states, through their own state constitutions, as the primary protectors of individual rights and liberties); see Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 401 (1987) ("The [Founder's] contemplation was that the states would remain the principal protectors of individual rights— 'the immediate and visible guardian of life and property'" (quoting *The Federalist* No. 17, at 107 (Alexander Hamilton) (J. Cooke ed. 1961))).

⁴⁰ N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

⁴¹ N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

⁴² *Id.* ("No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.").

⁴³ *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 548 (N.Y. 1949) (stating that New York's Equal Protection Clause "is no more broad in coverage than its Federal prototype, which reads: 'No

however, New York courts do have the authority under the state Due Process clause to impose higher standards than those held to be necessary by the U.S. Constitution.⁴⁴ Despite room for greater protection under New York's Due Process clause, New York's Due Process and Equal Protection clauses are limited by the state action requirement.⁴⁵ The state action requirement attached to New York's Due Process and Equal Protection clauses was addressed in *Oefelein v. Monsignor Farrell High School*.⁴⁶ In that case, the plaintiff claimed that his Due Process and Equal Protection rights under both the federal and state constitutions were violated when he was expelled from his parochial high school without receiving a hearing.⁴⁷ The court dismissed the claim, finding that the parochial school was not a state actor despite the existence of several state contacts.⁴⁸ The court's decision demonstrates unwillingness to extend due process and equal protection rights into parochial schools.

New York's Civil Rights Clause, unlike the Due Process and Equal Protection clauses, does not have a state action requirement.⁴⁹ As explained in *People v. Kern*, section 11 of article I of New York's constitution contains both New York's Equal Protection and Civil Rights clauses, however, only the Equal Protection clause is addressed to "state action."⁵⁰ The Civil Rights clause prohibits private as well as state discrimination as to "civil rights."⁵¹ This clause however, is not self-executing, and its prohibition against discrimination applies only to civil rights, which are elsewhere declared by Constitution, statute, or common law.⁵² In order for

State shall deny to any person within its jurisdiction the equal protection of the laws.' This conclusion follows from the plain meaning of plain words").

⁴⁴ *People v. Isaacson*, 378 N.E.2d 78, 82 (N.Y. 1978); So Chun, *A Decade After Smith: an Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California*, 63 ALB. L. REV. 1305, 1310 (2000) (describing that "when a state interprets its constitution, the state must take into account its unique history, socioeconomic and demographic needs, local desires and interests, and the public attitudes of the state's citizens.").

⁴⁵ *Dorsey*, 87 N.E.2d at 548; *Ryan v. Hofstra University*, 324 N.Y.S.2d 964, 977-78 (N.Y. Sup. Ct. 1971); *Oefelein v. Monsignor Farrell High School*, 353 N.Y.S.2d 674, 675 (N.Y. Sup. Ct. 1974).

⁴⁶ *Oefelein*, 353 N.Y.S.2d at 674.

⁴⁷ *Id.*

⁴⁸ *Id.* at 675. The school's state contacts included: 1) the school was chartered by the State and was required to provide an education substantially equivalent to that provided by public schools; 2) state regents examinations were given; 3) the school's real property was tax-exempt; and 4) secular text books were supplied by the State because the school performs a public purpose.

⁴⁹ *People v. Kern*, 554 N.E.2d 1235, 1241 (N.Y. 1990); *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1173 (N.Y. 1978).

⁵⁰ *Kern*, 554 N.E.2d at 1241 (stating "[t]he term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which appertain to a person by virtue of his citizenship in a state or community.'").

⁵¹ *Id.*; *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 548 (N.Y. 1949).

⁵² *Kern*, 554 N.E.2d at 1241; *Dorsey*, 87 N.E.2d at 548.

a family to successfully claim that a parochial school violated New York's Civil Rights Clause they would have to point to a violation of a specific civil right. Nevertheless, even if the family could point to a declared civil right that covers the family's right to send its child to a parochial school, the Civil Rights Clause only protects against discrimination on the basis of race, color, creed or religion.⁵³ Because the discrimination was not on account of any of these four grounds, the Civil Rights Clause will not protect the family from the parochial school's discrimination.

The California family will look to its Constitution's Unalienable Rights provision,⁵⁴ Due Process and Equal Protection clauses for protection.⁵⁵ Under California's Due Process and Equal Protection clauses there is no explicit state action requirement.⁵⁶ However, despite the absence of an explicit requirement, the Supreme Court of California in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.* stated that "the history of the constitutional provision offered no suggestion that the provision was intended to apply broadly to all purely private conduct."⁵⁷ In light of this history, California courts have implied a state action requirement into the state's Due Process and Equal Protection clauses, but have taken a lenient approach.⁵⁸ The court exercised this leniency in *Gay Law Students Ass'n* by allowing an action against a utility company for denying homosexuals equal opportunity to work in violation of the Equal Protection Clause of the California Constitution.⁵⁹ Despite California's willingness to extend its Due Process and Equal Protection clauses to private actors, there have been no cases where California has extended the Equal Protection or Due Process clauses of California's Constitution to protect against a parochial school's discriminatory admission practices.

California's Unalienable Rights provision allows privacy actions without

⁵³ N.Y. CONST. art. I, § 11.

⁵⁴ CAL. CONST. art. I, § 1.

⁵⁵ CAL. CONST. art. I, § 7 ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . .").

⁵⁶ *Id.*; *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 598 (Cal. 1979).

⁵⁷ *Gay Law Students Ass'n*, 595 P.2d at 598; *Kruger v. Wells Fargo Bank*, 521 P.2d 441, 450 (Cal. 1974) ("To construe [California's Due Process clause] to apply to private action would involve a judicial innovation which, as of this date, is without precedent.").

⁵⁸ *Gay Law Students Ass'n*, 595 P.2d at 598 (stating that in interpreting the scope of the Due Process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments); see Ivo Becica, *Privacy-State Constitutional Privacy Rights Against Private Employers: A "Hairy" Issue in Alaska*, 37 RUTGERS L.J. 1235, 1238 (2006) (examining *Miller v. Safeway, Inc.*, 102 P.3d 282 (Alaska 2004), to explain how state courts, including California courts, have used their power to weaken or eliminate the state action requirement in several contexts other than privacy, including free speech and the right to assemble, equal protection, and due process).

⁵⁹ *Gay Law Students Ass'n*, 595 P.2d at 598-600.

a showing of state action.⁶⁰ This provision provides that "[a]ll people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."⁶¹ Among the rights enumerated, only the right to enjoy and defend life and liberty is applicable. Therefore, in making a claim under this provision, the family might assert that the parochial school's discriminatory admission practices infringe on the family's liberty interest to direct the education and religion of its child.⁶² This is essentially the same argument made under the U.S. Constitution's Free Exercise and Due Process clauses. Even though the state action requirement is absent here, the family will face the same challenge of having to demonstrate that the discriminatory practice of one parochial school denied its right to direct the religious future and education of its child. The family's access to secular educational opportunities and other sources of religious education make the chances of succeeding on this argument unlikely.

The family's chance of securing protection under their states' constitution is dubious at best. The first explanation for this forecast is the state action requirement. Although states are not obligated to follow federal court's application of the state action requirement, there is nonetheless an adherence to the construction that the constitution should not govern private actors. The second explanation is what some commentators describe as constitutional law's diminished role in the fight against discrimination.⁶³ This position is based on the realization that state and federal anti-discrimination legislation has become a more effective tool in mandating equal treatment of disfavored classes.⁶⁴ Anti-discrimination laws are preferable because they often impose greater restrictions on private actors than the Constitution would impose if the actors were a state actor.⁶⁵

⁶⁰ Hill v. NCAA, 865 P.2d 633, 644 (Cal. 1994) (en banc) ("[T]he Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as government entities."); Beca, *supra* note 57, at 1239.

⁶¹ CAL. CONST. art. I, § 1.

⁶² See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁶³ See John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 821-22 (1990); see *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992) (holding that constitutional right to free speech superseded a city's ability to bar discriminatory activity with too broad a brush, in that case a ban on burning a cross in the yard of an African American family).

⁶⁴ Devlin, *supra* note 63, at 871; M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 4-30 (1977).

⁶⁵ David A. Brennan, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U.L. REV. 167, 180-81 (2001)

C. Federal Anti-discrimination Law Arguments

The four families' next option would be to explore federal anti-discrimination law. Unlike constitutional law, federal anti-discrimination law extends to private actors.⁶⁶ Federal anti-discrimination law provides different degrees of protection depending on the forum in which the discrimination is taking place, and provides either absolute or no protection at all depending on the basis of the discrimination. The forums that federal anti-discrimination laws cover include: voting rights, access to public facilities and accommodations, discrimination in education, discrimination within federally assisted programs, discrimination in employment,⁶⁷ and discrimination in the making and enforcement of contracts.⁶⁸ Federal anti-discrimination laws prohibit discrimination on the basis of race, religion, national origin, sex,⁶⁹ age,⁷⁰ and disability.⁷¹

For our hypothetical families, the discrimination can be described as taking place in the forum of education, federally assisted programs, or in the enforcement of contracts. The discrimination can be defined either on the basis of sexual orientation or being a child in a non-traditional family. Unfortunately, these forms of discrimination are not covered by federal anti-discrimination law.⁷²

In sum, although Congress has enacted laws that combat discrimination on many fronts within the private sector, no federal law has been enacted to

(explaining how "certain civil rights statutes extend constitutional-like protections to 'forms of discrimination not covered in any meaningful way by the Constitution such as discrimination based on age or disability. Also, civil rights statutes often broaden the substantive principles governing discrimination,' by allowing claims to be based upon disparate impact, rather than proof of discriminatory intent. Thus, civil rights statutes arguably provide greater protections against civil rights violations than the Constitution."); Gillian E. Metzger, *Privatization as Delegation*, 103 COL. LAW REV. 1367, 1474 (2003).

⁶⁶ 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, 2607 (2003). The catalyst for a large portion of our federal anti-discrimination law which was enacted through the Civil Rights Act of 1964 was the civil rights movement. Congress' goal for this legislation was to extend the values of equality to private actors; David A. Brennan, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 791 (2002).

⁶⁷ See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 199 (1988).

⁶⁸ 42 U.S.C. § 1981(a) (1994).

⁶⁹ 42 U.S.C. § 2000e-2 (1994).

⁷⁰ 29 U.S.C. § 623(a) (1994).

⁷¹ 42 U.S.C. § 12112 (1994).

⁷² Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 USC § 2000d - 2000d-4A; William Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 493 (2011).

provide protection against discrimination on the basis of sexual orientation or being a child in a homosexual family.⁷³

D. States' Anti-Discrimination Law Arguments

a. Sexual Orientation as a Protected Class under State Law

Among the fifty states, the treatment of sexual orientation as a protected class under state law varies from no protection at all, to broad protection.⁷⁴ Thus for the four families involved, success will depend largely on the state where they reside. In the area of employment, 22 states and the District of Columbia prohibit discrimination based on sexual orientation.⁷⁵ In the area of education, 14 states and the District of Columbia have laws that address discrimination, harassment and/or bullying on the basis of sexual orientation.⁷⁶ This section explores the state anti-discrimination laws where the families reside.

In California, state law provides protection for homosexuals in employment and public accommodations.⁷⁷ The applicable statute provides that all persons within the state, regardless of his or her sexual orientation, are free and equal, and entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.⁷⁸ The face of this statute seems to offer broad protection to homosexuals against discrimination by private actors. The

⁷³ J. Banning Jasiunas, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?* 61 OHIO ST. L.J. 1529, 1535 (2000); Lim, *supra* note 66, at 2608.

⁷⁴ See generally *Equality from State to State* (Human Rights Campaign Found., Wash., D.C.), Dec. 2009 (hereinafter "Equality from State to State") available at http://www.hrc.org/documents/HRC_States_Report_09.pdf; Institute of Real Estate Management, *Laws Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, at 6-7, July 2007 (hereinafter "Laws Prohibiting Discrimination Based on Sexual Orientation") available at <http://www.irem.org/pdfs/publicpolicy/Anti-discrimination.pdf>.

⁷⁵ *Equality from State to State*, *supra* note 74, at 15. As of December 2009, the states that prohibit discrimination on the basis of sexual orientation within employment include: California (1992, 2003), Colorado (2007), Connecticut (1991), Delaware (2009), District of Columbia (1977, 2006), Hawaii (1991), Illinois (2006), Iowa (2006), Kentucky (2008), Maine (2005), Maryland (2001, 2007), Massachusetts (1989), Minnesota (1993), New Jersey (1992, 2007), New Hampshire (1998), New Mexico (2003), New York (2003), Nevada (1999), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007), Wisconsin (1982), and Washington (2006); *Laws Prohibiting Discrimination Based on Sexual Orientation*, *supra* note 74, at 3-4.

⁷⁶ *Equality from State to State*, *supra* note 74, at 19. As of December 2009, the states that address discrimination of students on the basis of sexual orientation include: California (2002), Connecticut (2001), District of Columbia (2001), Iowa (2007), Maine (2005), Maryland (2008), Massachusetts (2002), Minnesota (1993), New Jersey (2002), New York (2003), North Carolina (2009), Oregon (2007), Vermont (2001/2007), Washington (2002/2009), and Wisconsin (2001).

⁷⁷ Cal. Civ. Code § 51 (West 2012).

⁷⁸ Cal. Civ. Code § 51(b) (West 2012).

question, however, is whether this statute has enough reach to extend to a parochial school that exercises discriminatory practices against homosexuals. This question was answered by a California Intermediate Court in *Doe v. California Lutheran High School Assn.*⁷⁹ This case addressed a claim against a Lutheran high school brought by two teenage girls who were expelled for displaying lesbian behavior.⁸⁰ The issue came down to whether the school was a “business enterprise” for purposes of California’s anti-discrimination law dealing with public accommodations.⁸¹ The court ultimately concluded that the school did not fall under the statute because the school “is an expressive social organization whose primary function is the inculcation of values in its youth members.”⁸² The court agreed that where “a private nonprofit religious school has as its ‘overall purpose and function’ the education of children in keeping with its religious beliefs, the ‘inculcation of a specific set of values,’ with programs ‘designed to teach the moral principles to which the [school] subscribes,’ prevents such a school from being considered a ‘business establishment’ whose student admission practices would be subject to the Act.”⁸³ The court’s narrow interpretation of California’s anti-discrimination law represents the complexities of applying anti-discrimination laws to religious institutions, especially when the discrimination is based on sexual orientation.

Our next family lives in New York, a state that prohibits discrimination on the basis of sexual orientation in employment, private housing, public accommodations, credit, and education.⁸⁴ The applicable section of New York’s anti-discrimination is New York Executive Law, Article 15 Human Rights Law § 296(4), which provides,

It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status, except that any such institution which establishes or maintains

⁷⁹ 170 Cal. App. 4th 828 (2009).

⁸⁰ *Id.* at 830.

⁸¹ *Id.* at 834.

⁸² *Id.* at 838.

⁸³ *Id.* at 839.

⁸⁴ N.Y. Exec. Law § 296 (McKinney 2010).

a policy of educating persons of one sex exclusively may admit students of only one sex.

Although the statute applies to educational institutions, it only applies to those that "hold itself out to the public to be non-sectarian and exempt from taxation pursuant" Thus, by definition, this statute does not extend to parochial schools. In fact the legislature's intent to exclude religious organizations from the general purview of this statute is expressly stated in section 296(11) of Article 15 of New York Executive Law, which provides religious institutions the freedom to take such actions "calculated by such organizations to promote the religious principles for which it is established or maintained."⁸⁵ Under this language, it would appear that a parochial school is permitted to exclude a child of homosexual parents if such an action is necessary to promote the school's religious position against homosexuality.

The third family is from Massachusetts, a state that was at the forefront of expanding anti-discrimination law to include sexual orientation.⁸⁶ Massachusetts, like New York, prohibits discrimination based on sexual orientation in employment, public accommodations, housing,⁸⁷ and public education.⁸⁸ Despite this state's strict prohibition of discrimination based on sexual orientation,⁸⁹ there is no provision that extends such protection to private schools. With the exception of Massachusetts' anti-bullying law

⁸⁵ NY Exec. Law § 296 (11) (McKinney 2010). This section of the statute provides, "[n]othing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.;" *Scheiber v. St. John's Univ.*, 600 N.Y.S.2d 734, 735 (N.Y. App. Div. 1993).

⁸⁶ See generally Mass. Ann. Laws ch. 151B (LexisNexis 2012). In 1989 Massachusetts became the second state in the country to pass a comprehensive anti-discrimination law prohibiting sexual law prohibiting sexual orientation discrimination in the areas of employment, housing, public accommodations, credit and services; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1625, 1626 (1996).

⁸⁷ Mass. Ann. Laws ch. 151B (LexisNexis 2012); Laws Prohibiting Discrimination Based on Sexual Orientation, *supra* note 75, at 6.

⁸⁸ Mass. Ann. Laws ch. 76 § 5. The Massachusetts statute covering discrimination within public education provides, "[e]very person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation."

⁸⁹ See THE OFFICE OF ATTORNEY GENERAL MARTHA COAKLEY, GUIDE TO CIVIL RIGHTS IN SCHOOLS, available at http://my.mass.gov/Cago/docs/civilrights/civil_rights_schools_singlepage.pdf.

passed in May 2010, the legal rights and protections for students discriminated on the basis of sexual orientation reach only public schools.⁹⁰

The final family is from Texas, a state that represents a majority of states in this country that afford little protection from discrimination on the basis of sexual orientation. Texas' anti-discrimination law prohibits discrimination on the basis of race, color, religion, national origin, disability, sex, or age within employment and housing and not beyond.⁹¹

The survey of anti-discrimination law in these four states demonstrates the difficulty families in this situation face. California, New York, and Massachusetts are states on the liberal end of the social and political spectrum, yet even these states provide no statutory prohibition against discrimination of children from homosexual families that extend to parochial schools.

E. Parochial Schools' First Amendment Rights

A discussion of each family's legal argument is not complete without addressing the parochial school's First Amendment defenses. There is a tension between the expanding definition of equality on the basis of race, gender, and sexual orientation under constitutional and statutory law on one hand and a religious institution's First Amendment rights that include the right to free exercise and the right to freedom of association on the other hand.⁹² Should religious organizations be required to adhere to the same anti-discrimination laws as other organizations, or do the religious organizations' First Amendment rights exempt them from anti-discrimination laws?⁹³ Opposing views exist on this question. One view is that no one, not even religious organizations, should be exempt from civil rights laws.⁹⁴ Another view is that religious groups should be exempt from regulations that otherwise would coerce their members to violate their

⁹⁰ AN ACT RELATIVE TO BULLYING IN SCHOOLS. S. 2404, (Mass. 2010); GLAD Equal Justice Under Law, Massachusetts Rights of LGBT in Public Schools, 2, Oct. 2010, available at <http://www.glad.org/uploads/docs/publications/ma-rights-of-lgbt-students.pdf>. Many of the requirements of the Massachusetts anti-bullying law apply to all schools, whether public or private, however, this law would not apply to the discrimination faced by the families. A school's discriminatory admission policy would not fall under the definition of "bullying" as defined by the Massachusetts statute.

⁹¹ Tex. Lab. Code § 21.051 (2002); Tex. Prop. Code § 301.021 et seq. (2002).

⁹² See Laura K. Klein, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge The Legal System*, 98 GEO. L.J. 505, 513-14 (2010); Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B.C. L. REV 781, 781-82 (2007).

⁹³ RONALD B. FLOWERS, MELISSA ROGERS, AND STEVEN K. GREEN, *RELIGIOUS FREEDOM AND THE SUPREME COURT* 96 (2008).

⁹⁴ Klein, *supra* note 92, at 513-14; Minow, *supra* note 92, at 782.

religious beliefs.⁹⁵ The Supreme Court has at times ruled that a religious organization's free exercise right may require the government to accommodate a person's religious practice by exempting him or her from the requirements of a particular law.⁹⁶ On the other hand, the Court has also made it clear that "not all burdens on religion are unconstitutional" and that "the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest."⁹⁷ The remainder of this Part focuses on the interplay between a parochial school's First Amendment rights and a family's equality interests protected by anti-discrimination laws or public policy arguments.

a. First Amendment Defenses to Suits Brought Under Anti Discrimination Law

The parochial school's First Amendment affirmative defenses against an anti-discrimination law challenge are the rights to Free Exercise and Freedom of Association. Religious and other private organizations have raised both affirmative defenses against challenges brought under anti-discrimination laws.⁹⁸

1. Parochial School's Free Exercise Defense

A parochial school is likely to argue that challenges under anti-discrimination law burden its free exercise of religion. It is important to note two points at the outset. First, the Supreme Court has drawn a distinction between regulation of churches and regulation of religious schools. The Court has found that interference in the affairs of religious schools is less constitutionally problematic than interference with churches because schools are not purely religious institutions, and the government has a heightened interest in the area of education.⁹⁹ Second, under the free exercise analysis set out in *Employment Division v. Smith*, anti-discrimination laws are not directed at religion, but are valid and neutral

⁹⁵ *Id.*

⁹⁶ FLOWERS, *supra* note 93, at 96; *See Prince v. Massachusetts*, 321 U.S. 158, 165-66 (1944).

⁹⁷ *United States v. Lee*, 455 U.S. 252, 257 (1982); *see Reynolds v. United States*, 98 U.S. 145 (1875) (holding that the free exercise interest of Mormons to practice polygamy was outweighed by overriding state interests in keeping marriage between one man and one woman).

⁹⁸ *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Boy Scouts of American v. Dale*, 530 U.S. 640, 679 (2000).

⁹⁹ *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983) (citing *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)); Michael Kavey, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 782 (2003).

laws of general applicability.¹⁰⁰ Therefore, in order for the parochial school to succeed with a free exercise defense, it must demonstrate that it should be exempt from the anti-discrimination law's general purview.

In the realm of parochial schools, the government has two interests: education and equality. These two governmental interests must be weighed against the school's free exercise interest. The weight of the government's interest in promoting equality and education depends on two factors: the form of equality sought and the person seeking the equality.

With the first factor, the weight of the government's interest compared to the religious school's interest varies depending on whether the classification is based on race, gender, sexual orientation, or some other group. Martha Minow argues that history demonstrates that "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."¹⁰¹

The other factor to consider is the person seeking equal treatment from the religious organization. Recently, the Supreme Court in *Hosanna-Tabor Church v. Equal Employment Opportunity Commission* recognized a "ministerial exception" to employment discrimination laws. This exception effectively allows churches and other religious groups to choose and dismiss their leaders without government interference;¹⁰² however, there is no special protection that allows religious groups to discriminate against those outside of the ministerial designation - including children and non-ministerial staff.¹⁰³

The combination of these two factors demonstrates that a parochial school will not likely be able to assert a free exercise interest in the exclusion of a minor child that will outweigh both the government and

¹⁰⁰ Kavey, *supra* note 99, at 778; see *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (holding that where a law was not directed at religion, but was instead a "valid and neutral law of general applicability," the right of free exercise "does not relieve an individual of the obligation to comply with such a law on the ground that the law proscribes (or prescribes) conduct that his religion prescribes or (proscribes)").

¹⁰¹ Minow, *supra* note 92, at 782.

¹⁰² *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 706 (2012) (explaining that the scope of the "ministerial exception" is designed to cover those employees that preach the beliefs, teach the faith, and carry out the mission of the religious group); Adam Liptak, *Religious Groups Given 'Exception' to Work Bias Law*, N.Y. TIMES, Jan. 11, 2012, at A3.

¹⁰³ Kavey, *supra* note 99, at 781, 782 (noting that the justification for discriminating in the hiring of ministerial staff does not also apply to discrimination against students and non-ministerial staff, because these people are not responsible for teaching the faith. The fact that their lifestyle is not completely in accordance with the religious organization's beliefs does not compromise the religious organizations' mission); see *McCallum v. Billy Graham Evangelistic Ass'n*, 824 F.Supp.2d 644, 651 (W.D.N.C. 2011).

parental interest in equality in education.

2. Parochial School's Freedom of Association Defense

The freedom to associate is a right implied by the First Amendment's freedom of speech provision.¹⁰⁴ Most modern freedom of association cases focus on whether the government can force organizations to accept members they do not want.¹⁰⁵ The Court in *Roberts v. United States Jaycees* concluded that there were two prongs of the right to associate: the right to engage in "intimate human relationships," and the right to associate for expressive purposes.¹⁰⁶ Most recently, the Supreme Court in *Boy Scouts of America v. Dale* addressed whether the Boy Scout's decision to terminate the adult membership of an openly gay Eagle Scout, James Dale, on the grounds that the organization "specifically forbids membership to homosexuals," was protected by the Boy Scout's right to associate for expressive purposes.¹⁰⁷ James Dale brought suit against the Boy Scouts of American under a New Jersey anti-discrimination law.¹⁰⁸ The Court found that the Boy Scouts engaged in expressive association and that its membership policy was protected by the First Amendment, thereby exempting the Boy Scouts from the state anti-discrimination law.¹⁰⁹ Chief Justice William H. Rehnquist, writing for the majority, gave deference to the Boy Scout's assertion that Dale's inclusion in the organization would significantly and adversely affect the Scout's message.¹¹⁰ The Court's decision in *Dale* was a major victory for advocates of freedom of association and a major loss for advocates of expanding anti-discrimination law.

If parochial schools are granted the same right to freedom of association as the Court in *Dale* granted to the Boy Scouts, anti-discrimination claims based on sexual orientation are likely to be losing battles.¹¹¹ The Catholic

¹⁰⁴ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543 (2007); *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

¹⁰⁵ *See Boy Scouts of American v. Dale*, 530 U.S. 640, 644 (2000); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

¹⁰⁶ *Roberts*, 468 U.S. at 617-18.

¹⁰⁷ *Dale*, 530 U.S. at 644.

¹⁰⁸ *Id.* at 645 (noting that James Dale's complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation).

¹⁰⁹ *Id.* at 648-49; Kavey, *supra* note 99, at 749.

¹¹⁰ *Dale*, 530 U.S. at 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public and private viewpoints."); Kavey, *supra* note 99, at 749.

¹¹¹ Kavey, *supra* note 99, at 749 ("It is still unclear how broad Dale's reach will be. If it does extend into the realm of private schools, the consequences for antidiscrimination laws and voucher

Church has taken a strong stance against homosexuality, taking the position that homosexual behavior is contrary to natural and divine law.¹¹² Parochial schools therefore have an argument that the forced inclusion of homosexual people in their schools violates the schools' right of free speech to express disapproval of homosexuality.

In order to overcome the parochial school's freedom of association argument it is important to remember that the person being discriminated against is not a homosexual, but rather the child of a homosexual. This fact cuts against the parochial school's argument that accepting a child of homosexual parents into the school prevents the school from advocating a viewpoint on homosexuality. The child's presence in the school may put teachers and administrators in an uncomfortable position when addressing the topic of homosexuality; however, discomfort alone does not significantly affect the school's ability to advocate its position on homosexuality. If the presence of a child with homosexual parents in a parochial school prevents the school from advocating against homosexuality, then why are children of divorced or non-married parents accepted into parochial schools? The Catholic Church admonishes divorce and having children out of wedlock just as it does homosexuality. Therefore, it is hard to give credence to a Catholic parochial school arguing that forced inclusion of children of homosexual parents into the school infringes upon its right to advocate against homosexuality – if such were the standard, children of parents guilty of other sins would also be excluded from the school.

III. REVOKING TAX-EXEMPT STATUS TO COMBAT DISCRIMINATION

The District Court for the District of Columbia's 1970 decision in *Green v. Kennedy* led the way for using the revocation of an organization's tax-exempt status to combat discriminatory practices.¹¹³ In *Green*, a three-judge panel issued a preliminary injunction prohibiting the I.R.S. from according tax-exempt status to racially discriminatory private schools in Mississippi.¹¹⁴ Until 1970, the I.R.S. granted tax-exempt status to private

programs may be enormous.”); 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, 2601 (2003).

¹¹² CATHOLIC CHURCH, *Catechism of the Catholic Church* 566 (Pope John Paul II trans., United States Catholic Conference eds., 2d ed. 2000); HOMOSEXUALITY, available at <http://www.catholic.com/library/Homosexuality.asp>.

¹¹³ *Green v. Kennedy*, 309 F. Supp. 1127 (D.C. Cir. 1970).

¹¹⁴ *Bob Jones Univ.*, 461 U.S. at 578.

schools regardless of the school's discriminatory admissions policies.¹¹⁵ However, in 1970 the I.R.S. reacted to the District Court's decision in *Green*, and agreed that it would revoke the tax-exempt status of organizations that had racially discriminatory practices. The I.R.S. sent a letter to all private schools on November 30, 1970, notifying these schools of the policy change at all levels of education.¹¹⁶

The Supreme Court in *Bob Jones University v. United States* dealt with challenges brought by Bob Jones University and Goldsboro Christian Schools, two tax-exempt private schools, against the I.R.S.'s changed policy.¹¹⁷ Both Bob Jones University and Goldsboro Christian Schools share the mission of fostering and promoting fundamental Christian beliefs.¹¹⁸ At the time, both schools maintained the position that the Bible justified segregated education.¹¹⁹ When the I.R.S. issued its November 30, 1970 letter informing private schools of its changed policy, both schools sued the I.R.S. to have their tax-exempt status reinstated.¹²⁰ Both cases were appealed to the Fourth Circuit, which ruled in both cases that the I.R.S. had the authority to revoke the schools' tax-exempt status.¹²¹ The

¹¹⁵ *Id.* at 577.

¹¹⁶ *Id.* at 578; The I.R.S. formally expressed this policy in a 1971 Revenue Ruling, providing that a private school will only qualify for tax-exempt status if it has a racially non-discriminatory policy. Rev. Rul. 71-447, 1971-2 C.B. 230.

¹¹⁷ *Bob Jones Univ.*, 461 U.S. at 579-80. Bob Jones University at the time was a non-profit corporation located in Greenville, South Carolina that operated a school of 5,000 students from kindergarten through college and graduate school. Goldsboro Christian Schools at the time was a nonprofit corporation located in Goldsboro, North Carolina, that offered classes from kindergarten through high school. *Id.* at 583.

¹¹⁸ *Id.* at 580.

¹¹⁹ *Id.* Bob Jones University maintained the position that the bible forbade interracial dating and marriage, and therefore in order to maintain same race dating and marriage, the University excluded blacks from its school. In 1971 the University revised its policy and began to enroll black students, however in doing so it also enacted a new disciplinary rule that prohibited interracial dating and marriage. The rule provided, "[t]here is to be no interracial dating" and students in violation of the rule would be expelled. *Id.* at 580-81.

¹²⁰ *Id.* at 581-82. Bob Jones University instituted an action in 1971 seeking to enjoin the I.R.S. from revoking the school's tax-exempt status. Before reaching the Supreme Court in 1982, the United States District Court for the District of South Carolina held that revocation of the University's tax-exempt status exceeded the delegated powers of the I.R.S., was improper under the I.R.S. ruling and procedures, and was therefore a violation of the University's rights protected by the religion clauses of the First Amendment. Goldsboro Christian Schools Goldsboro filed a suit seeking a refund for the taxes it was required to pay, claiming that the school had been improperly denied § 501(c)(3) status. *Id.* at 584.

¹²¹ *Bob Jones Univ. v. United States*, 639 F.2d 147, 150-52 (4th Cir. 1980) (reversing the District Court's decision, concluding that § 501(c)(3) must be read against the background of charitable trust law; that in order for an institution to be eligible for an exemption under § 501(c)(3), that institution must be "charitable" in the common law sense, and therefore must not be contrary to public policy. Because the Court believed that Bob Jones University's racial policies violated a clearly established public policy against racial discrimination, the University fell outside the common law definition of "charity" and therefore was not covered by § 501(c)(3)); *Goldsboro Christian Sch., Inc. v. U.S.*, 644 F.2d 879 (4th Cir. 1981) (affirming the Eastern District of North Carolina's holding that the school's racially

Supreme Court granted certiorari for both *Bob Jones University v. United States* and *Goldsboro Christian Schools v. United States* in 1981 and affirmed the Fourth Circuit's decision in both cases in a joint opinion.¹²²

A. Requirements for an Organization to Receive Tax-Exempt Status under § 501(c)(3)

The Supreme Court's decision in *Bob Jones University* to uphold the revocation of these two private religious school's tax-exempt status is based on a reading of § 501(c)(3) that embraces the common law concept of "charity."¹²³ Pursuant to this concept of "charity," the Court interpreted § 501(c)(3) to embody two requirements. The first requirement explicitly expressed in § 501(c)(3) is that the institution fit in to one of eight categories set forth in the statute.¹²⁴ The second requirement is that the institution's activities not be contrary to public policy.¹²⁵ The schools argued that only the first requirement was necessary, therefore if the institution fell within one or more of the eight specific categories, the institution automatically qualified for § 501(c)(3) status.¹²⁶ The Supreme Court disagreed and supported the existence of the second requirement through an analysis of the overall framework of the Internal Revenue Code (hereinafter "I.R.C."). The Court acknowledged that the general words in § 501(c)(3) taken alone would support the schools argument, however, the Court stated that taking such a narrow approach is not consistent with the overall framework of the I.R.C.¹²⁷ The Court found that the overall framework of the I.R.C. reveals an unmistakable intent that the institution seeking the tax-exempt status must serve a public purpose and not be contrary to public policy.¹²⁸

discriminatory policies violated clearly established federal policy).

¹²² *Bob Jones Univ.*, 461 U.S. at 585.

¹²³ *Id.*; Revenue Ruling 71-447.

¹²⁴ See IRC § 170(b)(1)(A)(i)-(viii); *Bob Jones Univ.*, 461 U.S. at 585.

¹²⁵ *Bob Jones Univ.*, 461 U.S. at 585.

¹²⁶ *Id.* at 585-86.

¹²⁷ *Id.* at 586.

¹²⁸ *Id.* at 586-88. The Court looks to § 170, and points out that Congress used the list of organizations in defining the term "charitable contributions." The Court further states that § 170 reveals that Congress' intention was to provide tax benefits to organizations serving charitable purposes because:

[T]he form of § 170 simply makes plain what common sense and history tells us: in enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.

Id.

a. Common Law Concept of Charity

The justification for providing charitable organizations with tax-exemptions is rooted in the idea that charities provide a benefit to society – this is referred to as the public benefit principle.¹²⁹ The theory is that the Government is able to deal with the loss of revenue because it is being compensated; first, through the relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and second, by the benefits that these charitable organizations provide society, i.e., when students attend private schools, fewer government resources and revenues are appropriated to the funding of public education.¹³⁰

With an understanding of the theoretical underpinning for tax-exemptions for charitable organizations, a corollary to the public benefit principle becomes evident. Where an organization's activities are either illegal or contrary to public policy, the public benefit principle breaks down because that organization is no longer providing a public benefit to society, thereby removing the government's incentive to provide a tax break.¹³¹

b. Racial Discrimination is contrary to Fundamental Public Policy

The next step in revoking an institution's tax-exempt status is to demonstrate that the activity in question is in fact contrary to fundamental public policy. The activity at question in *Bob Jones University* was racial discrimination. In order for the Court to affirm the I.R.S.'s decision to revoke the tax-exempt status of these schools, it had to find that racial discrimination was against fundamental public policy. This was not a difficult task considering that this case was decided in the wake of the civil rights era.¹³² The Court found that the school's activities were contrary to fundamental public policy by paying "attention to the historical context, the views of the other branches of government, and the dominant, though hardly universal, trend in public views of what justice requires."¹³³ The Court stated that "over the past quarter century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm

¹²⁹ *Bob Jones Univ.*, 461 U.S. at 589-90.

¹³⁰ H.R. REP. NO. 75-1860, at 19 (1938); *Bob Jones Univ.*, 461 U.S. at 589-90. This concept was described in 1891 by Lord MacNaghten who in a restatement of English law of charity stated, "[c]harity in its legal sense comprises four principle divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community"

¹³¹ *Bob Jones Univ.*, 461 U.S. at 591-92.

¹³² *See id.* at 593 (stating that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.").

¹³³ Minow, *supra* note 92, at 798.

national policy to prohibit racial segregation and discrimination in public education.¹³⁴ Based upon the overwhelming case that racial discrimination in public education is against fundamental national policy, the Court concluded that educational institutions that practice racial discrimination do not provide a public benefit to society, and are therefore not deserving of “having all taxpayers share in their support by way of special tax status.”¹³⁵

B. Extending the Principles of Bob Jones University to other Forms of Discrimination

The Supreme Court’s ruling in *Bob Jones University* was restricted to racial discrimination by a private educational institution; the Court, however, did not foreclose the possibility of applying the same approach to combat other forms of discrimination. In order to declare an activity as contrary to public policy, the Court found that there must be a strong showing of a community conscience against that activity. Finally, this community conscience should be evidenced by judicial treatment of the issue, legislative enactments or executive action taken in response to the issue.¹³⁶

a. Discrimination Against Children Based on his or her Parent’s Sexual Orientation is against Fundamental Public Policy

It must first be conceded that discrimination against a child of homosexual parents when defined in narrow terms has little company in history or within past legal discussion. However, when this form of discrimination is approached with a broader perspective, it becomes evident that this discrimination is really just another form of a child being discriminated against because he or she is from a non-traditional family. From this perspective, it becomes clear that discrimination against children from non-traditional families is not isolated at all but rather has a long history within our country. The Supreme Court and legislation has addressed discrimination against children from non-traditional families in the context of “non-marital” children and undocumented children.

¹³⁴ *Bob Jones Univ.*, 461 U.S. at 593.

¹³⁵ *Id.* at 595.

¹³⁶ *See id.* at 593-95 (pointing to Supreme Court decisions, Congressional enactments, and Executive orders that all expressed an agreement that racial discrimination was contrary to fundamental national policy).

1. Supreme Court Precedent

The fact that discrimination based upon a child's birth status is contrary to public policy is well established in the Court's treatment of non-marital children and undocumented children within Equal Protection Clause jurisprudence. Between 1968 and 1992 the Supreme Court adjudicated over twenty cases involving equal protection claims of non-marital children, a class of people disparagingly referred to as "illegitimate children."¹³⁷ These claims challenged the constitutionality of laws that denied non-marital children equal rights in the areas of wrongful death damages, the rights of fathers, financial assistance from state benefits, financial assistance from federal benefits, inheritance, paternity and support actions, and immigration.¹³⁸ Claimants argued that the government did not have an important interest in denying children of non-married parents the same rights and benefits of children of married parents.

In 1968, the Supreme Court in *Levy v. Louisiana* dealt with whether a non-marital child had the right to collect wrongful death damages after the death of the mother.¹³⁹ The Court concluded that it was "invidious to discriminate against non marital children when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."¹⁴⁰ In addressing the different treatment of non-marital children, the Court proceeded to ask a series of rhetorical question, which are relevant to this discussion. The Court posed the questions:

"[w]hen the child's claim of damage for loss of his mother is in issue, why, in terms of "Equal Protection," should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"¹⁴¹

The Court's point in asking these questions is to establish that a child regardless of how he or she was brought into this world is still a person, and that just because they come from a non-traditional family does not

¹³⁷ Zingo and Early, *supra* note 27, at 41; see Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INTL. L.J. 208, 216 (2005).

¹³⁸ Zingo and Early, *supra* note 27, at 41.

¹³⁹ 391 U.S. 68, 69-70 (1968).

¹⁴⁰ *Id.* at 72.

¹⁴¹ *Id.* at 71.

make them unworthy of equal protection.¹⁴²

The underlying principle that discrimination against a child on account of that child's parent(s) is a violation of public policy has also been expressed in cases dealing with the unequal treatment of undocumented children.¹⁴³ In *Plyler v. Doe*, the Supreme Court addressed the issue of whether Texas could deny undocumented school-age children the free public education that it provides to citizens and legally admitted aliens.¹⁴⁴ The Court ultimately decided that the Equal Protection Clause did extend to illegal aliens, and in reaching that conclusion, the Court expressed special concern for the treatment of undocumented children. Specifically, the Court classified the children in these actions as special members of this under class of undocumented aliens.¹⁴⁵ The Court found persuasive the argument that the state may withhold rights from those people whose presence in the United States is the product of their own unlawful conduct; however, the Court found that this same justification did not apply when the disabilities are imposed on the minor children of illegal aliens.¹⁴⁶ In strong language, the Court stated "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."¹⁴⁷ Emphasizing this point further, the Court stated,

"[Visiting] . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent."¹⁴⁸

The Court's decision in *Plyler* did not define undocumented children as a suspect class;¹⁴⁹ however, it did highlight the dilemma of minor children being disfavored on account of their parent's conduct. The Court ultimately

¹⁴² *Id.* at 70; *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

¹⁴³ *See Plyler v. Doe*, 457 U.S. 202, 205 (1982).

¹⁴⁴ *Id.* at 205, 212. The Court's opinion focused mostly on whether the phrase within the Equal Protection Clause "all persons within the territory of the United States" extended protection to non-citizens and illegal aliens. *Id.* at 210.

¹⁴⁵ *Id.* at 219.

¹⁴⁶ *Id.* at 219–20.

¹⁴⁷ *Id.* at 220.

¹⁴⁸ *Id.* (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

¹⁴⁹ *Id.* at 221–23, (stating that "undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'" and "undocumented status [is not] an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action").

held the Texas statute unconstitutional because it was directed against children and imposed a discriminatory burden on the basis of a legal characteristic over which children have little control.¹⁵⁰

The Supreme Court's reasoning in this case rests on the same principle that guided the Supreme Court in the non-marital children cases: children should not be denied rights and benefits on account of conduct that is not their own. This principle is an assertion that depriving some children access to the rights, benefits, and protections that other children receive freely has the more serious and long-term effect of stifling these children from having an equal chance at success throughout the remainder of their lives.¹⁵¹ Based on this principle, the fundamental public policy against discrimination of children from non-traditional families emerges.

b. Legislative Enactments

In the wake of the Court's decisions in the area of non-marital children and inheritance law, all state legislatures have alleviated the unsympathetic treatment of non-marital children under intestacy law by amending statutes to liberalize inheritance by non-marital children. Historically, a child born out of wedlock was considered *filiius nullius*, a child of no one, and could not inherit from the father or mother.¹⁵² Eventually, states realized that denying inheritance rights to a child innocent of any sin or crime was harsh and pitiless.¹⁵³ Today, all state legislatures permit a non-marital child to automatically inherit from the mother.¹⁵⁴ Inheritance from the father varies between the states, but is usually permitted so long as certain paternity requirements are met.¹⁵⁵

In the area of immigration law, Congress has made significant efforts to protect children from being held responsible for the misdeeds of their parent(s).¹⁵⁶ Congress added a special provision to the Immigration and

¹⁵⁰ *Id.* at 220.

¹⁵¹ *See id.* at 222 (stating that depriving an undocumented child access to public education has the long term effect of hindering that child's of social, economic, intellectual, and psychological well-being, and moreover it places an obstacle in the path of that child finding individual achievement); *see also* *Brown v. Bd of Educ.*, 347 U.S. 483, 494 (1954).

¹⁵² *DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES* 115 (8th ed. 2009).

¹⁵³ *Id.* at 115; *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

¹⁵⁴ *DUKEMINIER, supra* note 152, at 115; Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1, 7-8 (2007).

¹⁵⁵ *DUKEMINIER, supra* note 152, at 115-16. Most states permit paternity to be established by evidence of the subsequent marriage of the parents, by acknowledgment by the father, by an adjudication during the life of the father, or by clear and convincing proof after his death; *see* Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. TOL. L. REV. 1, 13 (2007).

¹⁵⁶ *See* INA 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J). The requirements for Special Immigrant

Nationality Act that allows certain qualifying minors to petition for immigrant status as a Special Immigrant Juvenile.¹⁵⁷ An undocumented child will qualify for this special status if the child can demonstrate eligibility for long term foster care due to abuse, neglect or abandonment by the child's parent or guardian.¹⁵⁸ This special juvenile status represents Congress's willingness to protect children who would be otherwise harmed on account of their parent's conduct.

c. Discrimination Against a Child on Account of Child's Homosexual Parents is the Same as Discrimination Against Illegitimate Children and Undocumented Children

The specific scenario of a parochial school denying admission to a minor child on account of that child's homosexual parents may be distinct from other forms of discrimination discussed: however, from a public policy standpoint, this discrimination presents essentially the same dilemma as discussed in the area of non-marital and undocumented children: a child is being disfavored on account of something that is out of his or her control. The 10-year old child had no control over being born or adopted into a homosexual family. Why should this child be denied the same opportunities as a child born to heterosexual parents? This treatment of undocumented and non-married children was deemed unconstitutional and immoral, and there is no reason to treat this version of the same discrimination any differently.

C. Standing Requirements for Suits Brought to Revoke a Parochial School's Tax-exempt Status

In *Bob Jones University*, the challenge to the school's tax-exempt status was brought by the I.R.S. and not a private claimant. The I.R.S. has the sole authority to revoke a religiously-related educational institution's federal tax-exempt status when it fails to adhere to certain rules, one of which requires that the institution's purposes and activities may not be illegal or violate fundamental public policy.¹⁵⁹ Here, the I.R.S. should revoke the

Juvenile Status are 1) the juvenile must be under 21; 2) the juvenile must be unmarried; 3) the juvenile must be present in the United States; 4) the juvenile must be deemed eligible by the juvenile court for long-term foster care due to abuse, neglect or abandonment; and 5) a determination must be made through an administrative or judicial proceeding that it would be in the best interest of the alien *not* to be returned to his/her home country.

¹⁵⁷ IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 887 (11th ed. 2008-09).

¹⁵⁸ INA 101(a)(27)(J); KURZBAN, *supra* note 157, at 888.

¹⁵⁹ I.R.S., *Tax Guide for Churches and Religious Organizations*, 5, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>. These rules include: 1) the organization's net earnings may

parochial school's tax-exempt status because the school's discriminatory practices violate fundamental public policy. However, if the I.R.S. does not revoke an organization's tax-exempt status, a private party can attempt to compel the I.R.S. to do so.

a. Suits Brought by Private Parties to Enjoin the I.R.S. From Granting a Parochial School Tax-exempt Status

Where the I.R.S. does not revoke a parochial school's tax-exempt status, the injured party might seek an injunction to prevent the I.R.S. from granting the parochial school tax-exempt status.¹⁶⁰ Here, the plaintiff's claim is directed at the federal government, because when the government affords tax-exempt status to a discriminatory organization, the government is not only condoning that discrimination but also indirectly funding its continued practice.¹⁶¹

Two issues arise in these suits. The first issue is whether the I.R.C. provides a private right of action by which private parties can challenge another party's 501(c)(3) status. Assuming that the I.R.C. does provide a private right of action, the second issue is whether a private party can satisfy the standing requirements.

1. Private Rights of Action under the I.R.C.

Private rights of action to enforce law must be created by the federal or state legislatures.¹⁶² Conceivably, the injured party would assert that such a private right is provided for under § 501(c)(3). This argument fails however, because federal courts repeatedly have held that no federal tax provision confers the right of private individuals to challenge an entity's tax-exempt status under § 501(c)(3).¹⁶³

not inure to any private shareholder or individual; 2) the organization must not provide a substantial benefit to private interests; 3) the organization must not devote a substantial part of their activities to attempting to influence legislation; 4) the organization must not participate in, or intervene in, any political campaign; and 5) the organization's purposes and activities may not be illegal or violate fundamental public policy.

¹⁶⁰ Russell J. Upton, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking its State-level Tax-exempt Status*, 50 AM. U.L. REV. 793, 820 (2001).

¹⁶¹ *Id.* at 820; *Green v. Kennedy*, 309 F. Supp. 1127, 1134 (1970).

¹⁶² *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

¹⁶³ See *Kolari v. N.Y.-Presbyterian Hosp.*, 382 F. Supp. 2d 562, 570 (S.D.N.Y. 2005) (To the extent that Plaintiffs seek to enforce any real or imagined rights created by § 501(c)(3), Plaintiffs lack standing to do so); *Selman v. Harvard Med. Sch.*, 494 F. Supp. 603, 616-17 (S.D.N.Y. 1980) (finding student at foreign medical school lacked standing in attacking § 501(c)(3) status of domestic medical school); 26 U.S.C.A. § 7401. This statute provides "No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or

There is a clear rationale for disallowing private rights of action in challenge of a third party's tax-exempt status. The concern is that the government's power to enforce tax liability will be displaced, and private citizens will be able to use the federal judicial system as an arena for challenging their neighbor's tax liability, essentially opening the floodgates to overwhelm the federal courts. Justice Stewart expressed this concern stating, "I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."¹⁶⁴ The Supreme Court in *Bingler v. Johnson* emphasized this point, stating that the courts "do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commission, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code."¹⁶⁵

In order to ensure a private right of action, the I.R.C. would have to be amended to include a provision allowing private parties to challenge the tax-exempt status of third parties.¹⁶⁶ Because taxpayers, through taxation, are forced to indirectly contribute to tax-exempt organizations, an appropriate provision would allow for a taxpayer to challenge an organization's 501(c)(3) tax-exempt status when the organization has a policy or practice that is illegal or contrary to fundamental public policy.

2. Satisfying Article III Standing

In order for a federal court to have subject matter jurisdiction, the plaintiff must satisfy the Constitution's Article III standing requirement.¹⁶⁷ The Supreme Court in *Lujan v. Defenders of Wildlife* laid out a three part test for determining whether private parties have standing to challenge the I.R.S.¹⁶⁸ First, the plaintiff must have suffered an "injury in fact"; second, there must be a causal connection between the injury and the conduct

sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced." *Id.*

¹⁶⁴ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring).

¹⁶⁵ *Bingler v. Johnson*, 394 U.S. 741, 750-51 (1969); 26 U.S.C. § 7805(a).

¹⁶⁶ 26 U.S.C. § 7428(a)(1)(A) is a declaratory judgment provision in the I.R.C., which allows certain entities to dispute the Treasury Secretary's decision regarding their own initial or continuing qualification for tax-exempt status. A plaintiff may mistakenly interpret this provision as a private right of action, however, by definition, a plaintiff's claim under § 7428 will fail because the plaintiff is not disputing its own qualification for tax-exempt status, but rather that of a third party. *See, e.g., Fulani v. Brady*, 935 F.3d 1324, 1327 (D.C. Cir. 1991) ("Indeed, the statutory scheme created by Congress is inconsistent with, if not preclusive of, third party litigation of tax-exempt status.").

¹⁶⁷ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁶⁸ *Lujan v. Defenders*, 504 U.S. 555, 560-61 (1992).

complained of – the injury has to be ‘fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court; and third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”¹⁶⁹ The Supreme Court in *Allen v. Wright* refined this test by providing that the injury prong is satisfied where the plaintiff can demonstrate that the injury resulted from I.R.S.’s failure to revoke the organization’s tax-exempt status.¹⁷⁰

The Supreme Court has most recently addressed the injury, causation, and redressability requirements in *Arizona Christian School Tuition Organization v. Winn*.¹⁷¹ Here, a group of Arizona taxpayers challenged an Arizona law that gives tax credits for contributions to school tuition organizations, which then use the contributions to provide scholarships to students attending private schools, including religious schools.¹⁷² The plaintiffs argued that standing existed because they had an interest in the Government Treasury and because the allegedly unconstitutional expenditure of Government funds would affect their personal tax liability.¹⁷³ The Court rejected this argument stating that absent special circumstances, standing cannot be based on a plaintiff’s mere status as a taxpayer.¹⁷⁴

In cases of taxpayer standing, courts have found the injury, causation, and redressability prongs to be lacking. The problem is that such claims rest on unjustifiable economic and political speculation.¹⁷⁵ To find injury, a court must speculate “that elected officials will increase a taxpayer-

¹⁶⁹ *Id.*; see also *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (stating that “the ‘case or controversy’ limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”); see generally U.S. Const. Art. III, § 2 (citing to the case and controversy requirement).

¹⁷⁰ *Allen*, 468 U.S. at 756–57.

¹⁷¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

¹⁷² *Id.* at 1440. The plaintiffs claimed that the Arizona statute violated the Establishment clause because it allows school tuition organizations to use State income-tax revenues to pay tuition for students at religious schools. *Ariz. Rev. Stat. Ann.* § 43–1089 (West Supp. 2010). Section 43–1089 allows Arizona taxpayers to obtain dollar-for-dollar tax credits of up to \$500 per person and \$1,000 per married couple for contributions to STOs. § 43–1089(A).

¹⁷³ *Winn*, 131 S. Ct. at 1438.

¹⁷⁴ *Id.* at 1439 (stating “[t]his Court has rejected the general proposition that an individual who has paid taxes has a “continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution.”).

¹⁷⁵ *Id.* at 1440; see *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). The “effect upon future taxation, of any payment out of funds,” was too “remote, fluctuating and uncertain” to give rise to a case or controversy. And the taxpayer-plaintiff’s “interest in the moneys of the Treasury,” the Court recognized, was necessarily “shared with millions of others.” *Id.*

plaintiff's tax bill to make up a deficit."¹⁷⁶ Moreover, courts have found that plaintiffs' alleged injury is not fairly traceable to the tax-exempt status of a third party.¹⁷⁷ With regard to the causation requirement, the Court in *Winn* stated that "a finding of causation would depend on the additional determination that any tax increase would be traceable to the tax credits, as distinct from other governmental expenditures or other tax benefits."¹⁷⁸ Even more problematic, to find redressability, a court must assume that, where a remedy is granted, the taxpayer would receive some actual tax relief. It would be "pure speculation" to conclude that an injunction against a tax benefit "would result in any actual tax relief" for a taxpayer-plaintiff.¹⁷⁹

b. The *Flast* Exception

The Supreme Court in *Flast v. Cohen* carved out a narrow exception from the general rule that a plaintiff's status as a taxpayer is not sufficient to establish standing in federal court.¹⁸⁰ The exception provides that taxpayers may have standing where two conditions are met.¹⁸¹ First, there must be a "logical link" between the "plaintiff's taxpayer status and the type of legislative enactment attacked."¹⁸² Second, there must be a "nexus" between the plaintiff's taxpayer status and the "precise nature of the constitutional infringement alleged."¹⁸³

In *Flast*, the plaintiffs, federal income taxpayers, brought suit in federal court alleging that the expenditure of federal funds to finance instruction in religious schools violated the Establishment Clause of the First Amendment.¹⁸⁴ The Court found that the plaintiffs satisfied the first

¹⁷⁶ *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

¹⁷⁷ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) (dismissing a challenge by patients to a hospital's tax-exempt status for lack of standing because it was too speculative whether the hospital would have provided free care to plaintiffs, even if required to provide more charity care in exchange for its tax-exemption); *Allen v. Wright*, 468 U.S. 737, 757 (1984) ("The line of causation between that conduct and desegregation of respondents' schools is attenuated at best.").

¹⁷⁸ *Winn*, 131 S. Ct. at 1440. The "respondents could not establish that an injunction against the tax credit would prompt Arizona legislators to 'pass along the supposed increased revenue in the form of tax reductions.'" *Id.*

¹⁷⁹ *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989)). In order for the plaintiff to satisfy the redressability requirement, she would have to establish that an injunction against application of the STO tax credit would prompt Arizona legislators to "pass along the supposed increased revenue in the form of tax reductions." *Id.*

¹⁸⁰ *Flast v. Cohen*, 392 U.S. 83, 84 (1968); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988).

¹⁸¹ *Flast*, 392 U.S. at 102; *Winn*, No. 09-987, slip op. at 22.

¹⁸² *Flast*, 392 U.S. at 102; *Winn*, No. 09-987, slip op. at 22.

¹⁸³ *Flast*, 392 U.S. at 102; *Winn*, No. 09-987, slip op. at 23.

¹⁸⁴ *Flast*, 392 U.S. at 85-86. The expenditures were directed by Congress under Congress under the Elementary and Secondary Education Act of 1965.

condition because their allegation was that the federal government violated the Establishment Clause in the exercise of its legislative authority to both collect and spend tax dollars.¹⁸⁵ The Court also found that the second condition was met because a nexus existed between the plaintiff's status as a taxpayer and the allegation that government funds were spent on an outlay for religion in contravention of the Establishment Clause.¹⁸⁶

The Court's finding that the plaintiffs satisfied Article III's standing requirements was based on a specific constitutional limitation of Congress's taxing and spending power. The Court found that the Establishment Clause "specifically limit[s] the taxing and spending power conferred by Article I, section 8 of the Constitution, and where such specific limitations exist, a taxpayer has a clear stake in assuring that those constitutional limits are not breached by Congress."¹⁸⁷ The *Flast* decision is limited to Establishment Clause violations, but left open the question of whether the Constitution contained other specific limits on Congress's taxing and spending power.¹⁸⁸ Since *Flast*, the "Court has 'declined to lower the taxpayer standing bar in suits alleging violation of any constitutional provision apart from the Establishment Clause.'"¹⁸⁹

In *Winn*, the plaintiffs argued that standing was satisfied under the *Flast* exception because the STO tax credit should be understood as a government expenditure. The Court's majority rejected this argument and explained that tax credits are not equivalent to government expenditures.¹⁹⁰ Although the majority acknowledged that "tax credits and government expenditures . . . have similar economic consequences," it distinguished the two on the basis that tax credits do not "implicate individual taxpayers in sectarian activities."¹⁹¹ The Court explained that unlike government expenditures where a "dissenter whose tax dollars are 'extracted and spent'

¹⁸⁵ *Winn*, No. 09-987, slip op. at 11.

¹⁸⁶ *Id.* at 23.

¹⁸⁷ *Flast*, 392 U.S. at 105-06.

The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power. Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.

Id. at 106.

¹⁸⁸ *See id.* at 105 ("Whether the Constitution contains other specific limitations can be determined only in the context of future cases. However, whenever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress.").

¹⁸⁹ *Winn*, 131 S. Ct. at 1445 (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 609 (2007) (plurality opinion)).

¹⁹⁰ *See id.* at 1447.

¹⁹¹ *Id.*

knows that he has in some small measure been made to contribute to an establishment in violation of conscience,” with tax credits, “there is no such connection between [the] dissenting taxpayer and [the] alleged establishment.”¹⁹²

Although the Court’s decision addressed a challenge to a tax-credit, and not a tax-exemption, it is likely that the Court would have similarly decided that a tax-exemption to a parochial school is not a government expenditure. Tax-exemptions, along with tax credits, deductions, and exclusions are special tax mechanisms designed to indirectly finance certain social, fiscal, and economic policy initiatives.¹⁹³ Whether this indirect financing amounts to a government expenditure is dealt with through the “tax expenditure analysis” created by Stanley S. Surrey, Assistant Secretary of Treasury during the 1960s.¹⁹⁴ Surrey’s “tax expenditure analysis” starts by drawing a line between taxpayers and non-taxpayers.¹⁹⁵ The distinction amounts to whether the entity exists for the purpose of generating income or for serving some social welfare service – i.e., religious, charitable, educational, and scientific organizations.¹⁹⁶ Accordingly, organizations that exist to provide some social welfare service, and not to generate income, are not considered taxpayers.¹⁹⁷ These organizations “are not considered part of the ‘natural’ tax base because they have no income to subject to taxation,”¹⁹⁸ and because they have no income in the first place, “they are not really being ‘exempted’ from paying income tax.”¹⁹⁹

Conversely, the § 170 contribution deduction granted to those that

¹⁹² *Id.*

¹⁹³ See NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* 103 (2011); see, e.g., Nancy A. McLaughlin, Article, *Increasing Tax Incentives for Conservation Easement Donations: A Responsible Approach*, 31 *ECOLOGY L.Q.* 1 (2004) (examining the tax incentives, such tax deductions, designed to encourage people to donate conservation easements and suggesting increasing these tax incentives so as to further such donations).

¹⁹⁴ See CRIMM & WINER, *supra* note 193, at 103. “The debate over whether tax exemptions and deductions are the equivalent of tax subsidies has [existed] for many years . . .” *Id.* at 103. The argument on one side is that “tax-exemptions and subsidies are equivalent.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 43 (1989). “Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become ‘indirect and vicarious donors.’” *Id.* at 14. On the other side, the argument follows that “[b]y perpetually declining to impose taxes on nonprofits, government targets only general classes of organizations, not particular entities, and only ‘passively’ assists them.” CRIMM & WINER, *supra* note 193, at 106.

¹⁹⁵ CRIMM & WINER, *supra* note 193, at 105.

¹⁹⁶ See *id.* at 105–06.

¹⁹⁷ See *id.* at 100–01.

¹⁹⁸ *Id.* at 106.

¹⁹⁹ *Id.* The reasoning advanced to support the distinction between tax-exemptions and government expenditures “comports with the idea that government’s ‘simple’ abstention from imposing taxes, and hence its foregoing receipt of tax revenue, is formally different qualitatively from government’s giving as direct grants public funds ‘exact[ed] from taxpayers as a whole.’” *Id.* (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 690 (1970) (Brennan, J. concurring)).

contribute to 501(c)(3) organizations is treated as a tax subsidy to the contributing individual. The reason for this different treatment is that the contributing individual is a part of the "natural" tax base because he or she generates income. Therefore when the government offers the § 170 deduction, it is choosing to forego tax revenue that it otherwise could collect from a claimant taxpayer who unquestionably is part of the "natural" federal income tax base."²⁰⁰

c. Standing Argument under *Allen v. Wright*

The Court's decision in *Winn* appears to foreclose a plaintiff's ability to use the *Flast* exception to gain standing in federal court to challenge a federal tax credit or exemption as a violation of the Establishment Clause. Although the Court's decision serves a major blow to taxpayer standing, there may remain some room to maneuver. In *Winn* the Court rejected the plaintiffs' argument for standing because the plaintiffs based their claim for standing on the sole basis that they were Arizona taxpayers.²⁰¹ Where a plaintiff can allege a more cognizable injury, it is possible that courts may reach a different conclusion.²⁰²

In *Allen v. Wright*, the Supreme Court addressed the standing issue in a case brought by parents of African American children attending public schools during the desegregation era.²⁰³ The parents challenged the I.R.S.'s grant of tax-exempt status to discriminatory private schools across the country, claiming that the I.R.S.'s failure to deny tax-exempt status to these private schools thwarted the desegregation effort in the public schools. Consequently, they argued, the I.R.S.'s failure injured their children.²⁰⁴ The parent's theory was that so long as private schools were permitted to continue discriminatory practices, the desegregation efforts in public schools would be undermined because white families that resisted desegregation could simply send their children to discriminatory private

²⁰⁰ See *id.* at 105, 108. The reduction in tax liability enjoyed by the donating taxpayer under section 170 acts as a direct government grant or subsidy to the donating taxpayer and is therefore treated as a tax expenditure.

²⁰¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1447 (2011).

²⁰² *Id.* ("Some plaintiffs may demonstrate standing based on the direct harm of what is claimed to be an establishment of religion, such as a mandatory prayer in a public school classroom. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 224, n. 9 (1963). Other plaintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax-exemption is conditioned on religious affiliation. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) (plurality opinion).")

²⁰³ *Allen v. Wright*, 468 U.S. 737, 739-40 (1984).

²⁰⁴ *Id.*

schools.²⁰⁵ The Court held that the plaintiffs failed to show how the I.R.S.'s grant of tax-exempt status to racially discriminatory private schools across the country resulted in their children's direct personal injury.²⁰⁶ The Court stated that a finding of actual injury could only have been found for "persons who [were] personally denied equal treatment" by the challenged discriminatory conduct."²⁰⁷ Because the Court failed to find an inquiry fairly traceable to the alleged illegal conduct of the I.R.S., it never reached the redressability prong.²⁰⁸

In *McGlotten v. Connally*, the United States District Court for the District of Columbia ruled that a plaintiff challenging the tax-exempt status of an organization satisfied both the injury, and redressability requirements of standing.²⁰⁹ The plaintiff, McGlotten alleged that the funds generated by such tax benefits enabled segregated fraternal orders to maintain their racist membership policies, and that such benefits constituted endorsements of blatantly discriminatory organizations by the federal government."²¹⁰ The main difference between this case and *Allen* is that here, McGlotten was able to allege a clear injury.²¹¹ Unlike in *Allen*, McGlotten's claim stemmed from an actual injury—he was denied membership in Local Lodge #142 of the Benevolent and Protective Order of Elks solely because of his race.²¹²

In the case of a child who is denied admissions to a parochial school because his/her parent(s) are homosexual, there are arguments that the standing requirements should be satisfied. An actual injury exists because the child was a victim of the parochial school's discriminatory practice. The family should allege that the funds generated by tax benefits enable the parochial school to maintain its discriminatory practices. The alleged injury here is "fairly traceable" to the school's tax-exempt status. The federal government's grant of tax benefits to a discriminatory organization serves as an endorsement of the discriminatory behavior and therefore condones

²⁰⁵ *Id.* at 746. The plaintiffs alleged that because contributions to discriminatory private schools are deductible from income taxes under §§ 170(a)(1) and (c)(2) of the Internal Revenue Code, these "deductions facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts." *Id.*

²⁰⁶ *Id.* at 753.

²⁰⁷ *Id.* at 755; see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–67 (1972) (holding that the plaintiff had no standing to challenge a club's racially discriminatory membership policies because he had never applied for membership).

²⁰⁸ *Allen*, 468 U.S. at 759 n.24; Upton, *supra* note 10, at 824–25.

²⁰⁹ *McGlotten v. Connally*, 338 F. Supp. 448, 452 (D.D.C. 1972).

²¹⁰ *Id.*

²¹¹ Upton, *supra* note 10, at 825.

²¹² *McGlotten*, 338 F. Supp. at 450.

the continuation of the discriminatory practice. The redressability prong should also be satisfied because the revocation of a parochial school's tax-exempt status will likely encourage the school to conform to the norms of fundamental public policy in order to regain its tax-exempt status.

1. Congress Should Adopt Regulations that will Compel the I.R.S. to Affirmatively Revoke an Organization's Tax-exempt Status Where that Organization's Policies and Practices Violate Fundamental Public Policy

Notwithstanding the potential arguments to achieve standing for claims against a third party's tax-exempt status, current jurisprudence indicates a strong likelihood that such claims will make it before federal courts.²¹³ In recognizing these limitations, the path forward should focus on tightening the I.R.S.'s enforcement of discriminatory tax-exempt organizations. If private parties cannot obtain standing in federal court to challenge a third-party's tax status, then the I.R.S. should be compelled to play a greater role in ensuring that these organizations are not running afoul of the common law concept of "charity." The most practical solution is for Congress to enact legislation that will prompt the I.R.S. to exercise greater scrutiny over organizations that receive and maintain tax-exempt status, and compel the I.R.S. to affirmatively revoke an organization's tax-exempt status in the event that an organization continues policies or practices that violate fundamental public policy.

D. Free Exercise Defense against Challenges to Revoke the Parochial School's Tax-exempt Status

In the event that the I.R.S. decides to revoke a parochial school's tax-exempt status, the school will likely raise a Free Exercise defense under the First Amendment. The Free Exercise defense is unique in this area because the denial or revocation of a tax-exempt status is not the equivalent of the state prohibiting the right to exercise a religious belief as the loss of tax-exempt status will not prevent the parochial school from observing its religious tenets. Thus, the free exercise question is whether the state's interest in prohibiting the discrimination of children of homosexual families outweighs the burden that the denial of tax benefits places on the

²¹³ The fact that the I.R.C. does not provide an express private right of action to challenge the tax liability of a third party, combined with a private party's unlikely chance of satisfying the standing requirements, makes this avenue improbable.

parochial school's right to free exercise.²¹⁴ In *Bob Jones University* the Court ruled that the state's interest in eradicating racial discrimination outweighed any burden that these schools would be faced with as a result of having their tax-exempt status revoked.²¹⁵ The question here is whether courts would reach the same result where the discriminatory practice is against children of non-traditional families instead of racial discrimination.

The answer requires a balancing of the government's interest in eradicating discrimination of children from non-traditional families and the parochial school's interest in maintaining its tax-exempt status. In *Bob Jones University* the Court found the government's interest compelling and therefore concluded that the schools' interest was outweighed. The discussion in Part II. B. 1 of this Note demonstrates that the government has an interest in eradicating discrimination of children from non-traditional families.²¹⁶ Based on the Supreme Court's classification of non-marital children as a suspect class, and federal and state legislation that protects non-marital children and undocumented children, there is a strong argument that the government has a compelling interest in eradicating discrimination against children of non-traditional families.²¹⁷

IV. PROPOSAL FOR NEW FEDERAL LEGISLATION

The most complete solution for challenging the parochial school is new legislation that includes children of non-traditional families as a protected class under federal anti-discrimination law. Ideally, this legislation would amend the Civil Rights Act of 1964 by adding children of non-traditional families to the list of protected groups. This proposal represents the best way to eliminate, or at least inhibit, parochial schools from discriminating against children of homosexual parents for three reasons. First, federal law would provide a uniform approach across the country to fighting a discriminatory parochial school. Individual state or local law may protect a family in some circumstances, but the goal is for all families across the country to have uniform legal recourse. Second, when families bring claims under this statute against a parochial school, they would have a strong chance of overcoming the school's First Amendment defenses.²¹⁸ The school would not be able to make a sound argument that the forced

²¹⁴ See *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

²¹⁵ *Id.*

²¹⁶ See discussion *supra* Part II.B.1.

²¹⁷ See discussion *supra* Part II.

²¹⁸ See discussion *infra* Part III.A.1.

inclusion of these children into its school infringes on its free speech and free exercise rights. Third, without a statutory right, children have difficulty gaining standing to enjoin the I.R.S. to revoke a discriminatory parochial school's tax-exempt status.²¹⁹ If a child is protected by a federal statute, there is a better chance that the child can prompt the I.R.S. to enjoin a school's tax-exempt status by demonstrating that a federal statute was violated.

This legislation would serve the greater purpose of protecting children from all types of non-traditional families. The purview of this protection would ensure that children with divorced parents, unmarried parents, foster parents, disabled parents, or imprisoned parents will not be treated differently because they are not from the traditional family. Discrimination of children from any of these families is wrong, and this legislation should serve to prevent it.

CONCLUSION

Currently, a family impacted by a parochial school's decision to deny admission to children on account of that child's gay or lesbian parent(s) has limited legal recourse. The legal implications of a private religious school discriminating against children of homosexual parents are complex. First, private actors are not governed by constitutional law; therefore, a family's equal protection, substantive due process, or free exercise claims are not available. Second, the discriminatory act is unique; the discrimination is based on account of homosexuality, but the victim of the discrimination is a child who is not homosexual. Third, where statutory law exists to protect homosexuals, it is incomplete. Finally, the discriminatory actor is a religious organization that has First Amendment rights to free exercise and freedom of association. So how can an injured party navigate these obstacles in order to find a just result? This Note has demonstrated that the law currently fails to provide protection. The road ahead offers signs that homosexuals will gain greater equality within our society. Indicators specifically include the recent repeal of the "Don't Ask, Don't Tell," and constitutional challenges to the Defense of Marriage Act.²²⁰ If and when the day comes, families that are harmed by this type of discrimination may

²¹⁹ See discussion *supra* Part II.C.1.a.

²²⁰ See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Tex.*, 539 U.S. 558 (2003); see Charlie Savage and Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), available at http://www.nytimes.com/2011/02/24/us/24marriage.html?_r=2; see Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, N.Y. TIMES (Dec. 22, 2010), available at <http://www.nytimes.com/2010/12/23/us/politics/23military.html>.

find relief through federal or state anti-discrimination law. However, the question remains, why should an innocent child have to wait until homosexuals receive complete equality in this country before he or she can have the same rights and benefits as a child born into a traditional family? This issue presents more than just discrimination against homosexuals. It involves an important public policy concern for innocent children being denied the same rights of children born into a traditional family.

In response to the current inability of constitutional and statutory law to protect families from this form of discrimination, this Note has proposed two alternative solutions. The first alternative is to seek the revocation of a discriminatory parochial school's tax-exempt status. The Supreme Court's decision in *Bob Jones University* demonstrated how a religious organization's discriminatory practice can be challenged through this approach. When a church or religious organization is granted tax-exempt status by the federal government, that organization must adhere to the common law definition of a charity. When the activities of that organization contradict fundamental public policy, that organization is no longer worthy of receiving tax-exemption because that organization is no longer providing a public benefit. The parochial schools that deny admission to innocent children on account of the child's homosexual parents violate a public policy against discriminating against a child of a non-traditional family. Revoking the tax-exempt status of a parochial school does not directly prohibit the school's right to continue its discriminatory practice, however, it sends messages that the community does not support the school's practices and the government will not support the organization with tax-exemptions so long as the discriminatory practices continue.

The second and more complete solution is a proposal for new federal legislation. Legislation that includes children of non-traditional families as a protected class under federal anti-discrimination law would provide uniform protection to families throughout the country. Defining the protected class as children of non-traditional families is important because it takes the focus away from the child's parents' behavior, and emphasizes that a child should not be singled out for being born or adopted into a particular family. This type of legislation is idealistic, but in order to adequately address this problem its enactment is essential.

From a legal, moral, and theological standpoint, this issue represents a glaring violation of fundamental public policy. Congress must take action to ensure that innocent children are not being harmed within our society on account of their parent's lifestyle. Congress has responded before with

legislation directed at curbing discriminatory practices, and it is time for it to respond again.

