ISSUE BRIEF

A Legal Perspective: Does Same-Sex Marriage Mean the End of Tax Exemption for Churches and Religious Institutions?

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Tax exemption for religious institutions "is going to be an issue."[1]

These are the words of President Obama's Solicitor General Donald Verilli when he was asked during oral argument in *Obergefell v. Hodges*[2] whether a school could retain tax exempt status after engaging in "discrimination" for not approving of same-sex marriage.

In the wake of *Obergefell*, in which the Supreme Court held that states must license same-sex marriages and recognize such licenses issued by other states, some advocates quickly moved on to new territory, calling for the revocation of tax exemption for religious institutions and churches that do not support same-sex marriage.[3]

But do those calling for tax exempt status to be revoked really have a case?

It has already been pointed out that the arguments of those advocating for the revocation of tax exemption are flawed.[4] Moreover, the Court's holding in *Obergefell* does not mean that the loss of tax exemption for religious institutions that do not affirm same-sex marriage is inevitable or necessary. Regardless, it is certainly not a good idea.

Same-sex marriage may indeed mean many changes for American society, but the end of tax exemption for religious institutions is not (and should not be) one of them—for the following six reasons:

1. Religious institutions provide a societal benefit

Mark Oppenheimer admits that hospitals serve the public good and agrees they should be tax exempt, but claims churches and other religious institutions do not so they should lose their tax exempt status.[5] This claim is in error. Hospitals are not the only non-profits from which society derives a benefit. Churches actually offer all kinds of social benefits including the two most commonly recognized social benefits: the provision of social services and the provision of diversity within American society.

In *Walz v. Tax Commission*, the Supreme Court upheld a decision by the New York City Tax Commission which relied on the state constitution to grant tax exemption to churches because of the social benefits provided by churches to community life. In that case, the Court stated, "Government may properly include religious institutions among the variety of . . . groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."[6]

2. Tax exemption for religious institutions does not violate the Establishment Clause

Tax exemption for religious institutions is an indirect benefit given through a neutral law which benefits all non-profit organizations. Indirect benefits are permissible and constitutional under the Establishment Clause of the First Amendment. As the Supreme Court has said, "the fact that religious groups benefit incidentally does not deprive the [tax exemption] of the secular purpose and primary effect mandated by the Establishment Clause."[7]

Indeed, to the contrary, the Establishment Clause (along with the Free Exercise Clause) proactively grants churches protection under the Ministerial Exemption (providing them complete freedom to hire and fire pastors as they wish)[8] and the Church Autonomy Doctrine (which insulates internal church decisions from government review).[9]

3. "Noncontroversial" is not a standard for tax exemption

In addition to arguing that hospitals should continue to receive tax exemption because they benefit society, Oppenheimer also reasons that their status as "noncontroversial" entitles them to continued tax exemption. However, being noncontroversial is not a requirement for receiving tax exempt status. In fact, the allowance of tax exemption for *a diversity* of organizations which contribute to the *diversity* of American society is implicitly a recognition that tax exemption can be given to what some might deem "controversial" organizations. Just as we advance free speech by protecting all speech (whether offensive or "desirable"), tax exemption is given to a range of organizations in order to protect diversity of viewpoint, whether popular or not. A small segment of civil society may have constructive things to say and noteworthy benefits to offer in spite of what the majority deems "acceptable."

4. Same-sex marriage is *not* established national public policy

Tax exempt status can be removed "only where there can be no doubt that the activity involved is contrary to a fundamental [or established] public policy."[10] This is an extremely strict standard, and the Supreme Court has only held that it is met in cases of racial discrimination. In *Bob Jones University v. United States*, the Court held that a university's prohibition on interracial dating and marriage violated established public policy, and upheld the revocation of the university's tax exempt status.[11] It is quite apparent that this legal standard is much, much narrower than simply classifying something as "controversial."

While *Obergefell* requires states to issue same-sex marriage licenses and recognize the marriage licenses of other states, it does not transform same-sex marriage into an established national public policy. The more than thirty states with constitutional amendments or statutes affirming marriage between a man and a woman are evidence of that. While the Supreme Court can try to fashion new constitutional rights, it cannot presume to change the minds of Americans overnight.

Though it legalized same-sex marriage in every state (in a holding that affects state governments, not private actors), the Court did not (and cannot) declare that same-sex marriage must be accepted and approved by every American. While almost all Americans accept the rights contained in the text and plain meaning of the Constitution, the moral convictions of tens of

millions of Americans remain unmoved by the Court's declaration that same-sex marriage is a constitutional right.

No doubt the country is deeply divided on this issue, and will likely remain that way for years to come. Whatever this split means, it certainly does not support the idea that there is an established national public policy of same-sex marriage.

5. Conditioning tax exemption on approval of same-sex marriage will chill freedom of expression

Religious institutions can express their beliefs—even unpopular ones, like the rejection of same-sex marriage—and are protected in doing so by the First Amendment protections for freedom of expression. Speech cannot be restricted simply because it is offensive to some—or even a majority—in society. In *Boy Scouts of America v. Dale*, the Supreme Court addressed the issue of speech about homosexuality in particular:

> Indeed, it appears homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.[12]

Popularity is never a basis for protecting views and speech. The Supreme Court more recently observed in *Snyder v. Phelps* that "'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'"[13] Without this breathing space, people become scared to speak lest their speech become the focus of negative attention by government authorities. This extends beyond anything related to homosexuality but to a wide range of issues that are or might become controversial. As the Court also recognized,

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[14]

The Supreme Court has again and again—in a variety of contexts—reaffirmed its rejection of the idea that offensive speech provides grounds for a constitutional claim.[15] Views on same-sex marriage, no matter how unpopular, cannot serve as a basis to revoke tax exempt status without chilling the free expression protected by the First Amendment and which is at the heart of American civil society.

6. Conditioning tax exemption on approval of same-sex marriage will interfere with the free exercise of religion

The First Amendment protects against the government substantially burdening the free exercise of religion. This burden can occur by tying certain conditions (which infringe religious exercise) to tax exempt status. As explained in *Branch Ministries v. Rossotti* (a case featuring the revocation of a church's tax exemption), if tax exemption is denied "because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs," it is an impermissible burden on the free exercise of religion protected by the First Amendment.[16] If the government were to condition religious institutions' tax exemption on their approval of same-sex marriage, their free exercise would be substantially burdened.

The tax exempt status of religious institutions is an area of concern following *Obergefell*, but that does not mean that the loss of tax exemption should be advocated for or is imminent as Oppenheimer argues. Instead, religious institutions can be confident they will continue to receive tax exemption because churches provide a social benefit, their activity (regardless of how "controversial" it is) is consistent with and protected by the First Amendment, and the *Obergefell* decision did not automatically make same-sex marriage a "fundamental public policy."

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[1] Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (No. 14-556), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_2dq3.pdf.
[2] *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).
[3] Mark Oppenheimer, *Now's the Time To End Tax Exemptions for Religious Institutions*, TIME, June 28, 2015, http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/; Felix Salmon, *Does your church ban gay marriage? Then it should start paying taxes*, Fusion, June 29, 2015, http://fusion.net/story/158096/does-your-church-ban-gay-marriage-then-it-should-start-paying-taxes/.
[4] *See* Rob Schwarzwalder, *The Legalization of Same-Sex Marriage Isn't an Excuse to Attack Churches*, TIME, July 1, 2015, http://time.com/3943511/same-sex-marriage-churches/; Rob Schwarzwalder, *Issue Analysis: Tax Exemption for Churches: An American Value, a Social Imperative*, Family Research Council, July 2015, http://downloads.frc.org/EF/EF15G88.pdf.
[5] Mark Oppenheimer, *Now's the Time To End Tax Exemptions for Religious Institutions*, TIME, June 28, 2015, http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/.
[6] *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970).
[7] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989).
[8] *See Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 132 S. Ct. 694 (2012).
[9] *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952).
[10] *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).
[11] *Id.*
[12] *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) (internal citations omitted).
[13] *Snyder v. Phelps*, 562 U.S. 443, 475 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).
[14] *Snyder*, 562 U.S. at 475.
[15] *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014) ("Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.").
[16] *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).