ARTICLES

WHEN ONE'S RIGHT TO MARRY MAKES OTHERS "UNMERRY"

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The Supreme Court's ruling in *Obergefell v. Hodges* recognized the constitutional right of same-sex couples to marry in all fifty states. The Court premised its ruling on the understanding that a person's ability to marry another person of his or her choosing is one of the most fundamental liberties protected by the Constitution. Some regard the Court's ruling in *Obergefell* as the end of a long fight for the liberation of the institution of marriage from the shackles of tradition. Yet others, who oppose same-sex marriage for religious reasons, regard it as another ultra-liberal intervention by the state—one which further weakens their ability to exercise their values and beliefs. The Court's decision, therefore, may be regarded as a contemporary peak in a seemingly endless, centuries-long clash between liberal states and diverse cultures and religions characterized by illiberal norms. Critics argue that it sharpens a perceived conflict between the constitutional rights of human liberty and freedom of religion. In contrast, this essay suggests that *Obergefell* should be seen as a step toward reconciling this ongoing tension. By pointing to the implicit consensus reached by all Supreme Court Justices, this essay argues that *Obergefell* manifests the state's pluralistic obligation to ensure a diverse society. This obligation maintains a balance between the goals of ensuring equal rights of all citizens and recognizing the limited ability of religious communities to reject liberal norms while preserving their social legitimacy.

I. INTRODUCTION

In *Obergefell v. Hodges*,[1] the United States Supreme Court recognized the constitutional right of same-sex couples to marry in

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

all fifty states.[2] The Court held that a person's ability to marry a person of his or her choice is a fundamental liberty guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] Viewing marriage as a fundamental liberty, the state must accord it respect.[4]

The Court's decision in *Obergefell* garnered widespread public acclaim.[5] President Obama said the decision "will strengthen all of our communities by offering to all loving same-sex couples the dignity of marriage across this great land."[6]

Nevertheless, while some view *Obergefell* as the end of a long journey to liberate the institution of marriage from the shackles of tradition, those who oppose same-sex marriage for religious reasons regard it as another ultra-liberal intervention by the state—one which further weakens their ability to exercise their values and beliefs.[7] Opponents worry that recognition of same-sex marriage as a constitutional right will require religious (or other cultural) communities, which oppose same-sex marriage or homosexuality in general, to embrace the practice and absorb it into their internal community norms.[8] This concern is not hypothetical or far-fetched—the Court's decision could have genuine ramifications for religious communities. For example, would churches be forced to perform same-sex marriage ceremonies or face prosecution or lawsuits

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[2] *Id.* at 2607.

[3] *Id.* at 2591.

[4] *Id.* at 2598 (citing Poe v. Ullman, 367 U.S. 497, 542 (1961)).

[5] *See, e.g.*, Paul Abrams, *Scalia's Dissent in* Obergefell *(Same-Sex Marriage) Case Would Criminalize Justice Thomas's Marriage*, HUFFINGTON POST (June 30, 2015, 1:04 PM), http://www.huffingtonpost.com/paul-abrams/scalias-dissent-in-oberge_b_7697224.html; Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR (June 26, 2015, 10:05 AM), http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages; Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html; David G. Savage, *Same-Sex Marriage Ruling Highlights Supreme Court Quandary: Restraint or Intervention?*, L.A. TIMES (June 29, 2015, 3:00 AM), http://www.latimes.com/nation/la-na-court-marriage-analysis-20150629-story.html#page=1; *Supreme Court—Same-Sex Marriage Has Our Blessing*, TMZ (June 26, 2015, 7:12 AM), http://www.tmz.com/2015/06/26/gay-marriage-supreme-court-same-sex-legal-constitutional-right/.

[6] Gregg Stohr, *Gay Marriage Legalized by Top U.S. Court in Landmark Ruling*, BLOOMBERG (June 26, 2015, 10:03 AM), http://www.bloomberg.com/news/articles/2015-06-26/gay-marriage-legalized-nationwide-by-u-s-supreme-court-ibdovxv1.

[7] *See, e.g.*, Michael Cheshire, *Supreme Court Ruling and Christian Outrage*, HUFFINGTON POST (June 26, 2015, 2:15 PM), http://www.huffingtonpost.com/michael-cheshire/supreme-court-ruling-and-_b_7673010.html; Sarah Eekhoff Zylstra & Morgan Lee, *'Outrage and Panic' Are Off-Limits, Say Evangelical Leaders on Same-Sex Marriage*, CHRISTIANITY TODAY (June 26, 2015), http://www.christianitytoday.com/ct/2015/june-web-only/evangelical-leaders-react-supreme-court-same-sex-marriage.html.

[8] Zylstra & Lee, *supra* note 7.

alleging discrimination?[9] Would religious schools be able to forbid same-sex relationships or marriages and retain their tax-exempt status?[10] Would religious businesses owners in the wedding industry—such as bakers, photographers, and florists—be sanctioned for refusing to host or serve same-sex couples?[11] And what would be the implication of the expansion of gay rights for the ability of various communities to realize their shared conception of the good? Religious communities across the United States have raised these concerns,[12] as did the dissenting justices in *Obergefell*.[13] However, the Court in its majority opinion gave no defining answer, which leaves the decision's implications for America's social fabric highly

[9] That fear was raised by a commentator discussing an alleged threat to enforce a non-discrimination ordinance against ordained ministers in Idaho. Ryan T. Anderson, *Government to Ordained Ministers: Celebrate Same-Sex Wedding or Go to Jail*, DAILY SIGNAL (Oct. 18, 2014), http://dailysignal.com/2014/10/18/government-ordained-ministers-celebrate-sex-wedding-go-jail/.

[10] *See, e.g.*, Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html; Michael Farris, *Flashback: Christian Schools Will Have no Choice About Gay Marriage*, USA TODAY (June 26, 2015, 10:48 AM), http://www.usatoday.com/story/opinion/2015/05/10/same-sex-marriage-christian-college-column/26883351/.

[11] *See, e.g.*, Liz Halloran, *No Cake For You: Saying 'I Don't' To Same-Sex Marriage*, NPR (Dec. 11, 2013, 11:46 AM), http://www.npr.org/2013/12/10/250098572/no-cake-for-you-saying-i-dont-to-same-sex-marriage.

[12] Communities that have released statements raising concerns about the *Obergefell* decision include a coalition of evangelical leaders assembled by the Ethics and Religious Liberty Commission, the Orthodox Union (an orthodox religious Jewish community), and the United States Conference of Catholic Bishops. *Here We Stand: An Evangelical Declaration on Marriage*, CHRISTIANITY TODAY (June 26, 2015), http://www.christianitytoday.com/ct/2015/june-web-only/here-we-stand-evangelical-declaration-on-marriage.html; *Orthodox Union Statement on Supreme Court's Ruling in* Obergefell v. Hodges, ORTHODOX UNION ADVOC. CENT. (June 26, 2015, 10:15 AM), http://advocacy.ou.org/2015/orthodox-union-statement-supreme-courts-ruling-obergefell-v-hodges/ ("In the wake of today's ruling, we now turn to the next critical question for our community, and other traditional faith communities—will American law continue to uphold and embody principles of religious liberty and diversity, and will the laws implementing today's ruling and other expansions of civil rights for LGBT Americans contain appropriate accommodations and exemptions for institutions and individuals who abide by religious teachings that limit their ability to support same-sex relationships?"); *Supreme Court Decision On Marriage "A Tragic Error" Says President of Catholic Bishops' Conference*, U.S. CONF. CATHOLIC BISHOPS (June 26, 2015), http://www.usccb.org/news/2015/15-103.cfm.

[13] Obergefell v. Hodges, 135 S. Ct. 2584, 2625–26 (2015) (Roberts, C.J., dissenting) ("Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. . . . Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." (citation omitted)); *id.* at 2638 (Thomas, J., dissenting) ("Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.").

uncertain.

Obergefell therefore may be regarded as a case that emphasizes the tension between liberal states and illiberal communities. While liberalism in the Western world expanded in the last century,[14] many communities and individuals within liberal states have rejected outright a variety of liberal norms endorsed by their governments and most of their states' citizens.[15] The emergence of liberal states led to a lasting conflict with citizens who wished to retain preexisting religious or cultural worldviews, which were inconsistent with liberal norms.[16] Liberals often argue that liberalism does not oppose the realization of multiple conceptions of the good within a society and may even value traditional norms and cultural heritages.[17] However, the willingness of liberals to legitimize such traditions vanishes when the traditions fail to satisfy liberal norms, or worse, when they reject them outright.[18]

To resolve this tension, liberal states struggled to set up an intervention policy which sets guidelines for permissible intervention in the conduct of illiberal communities.[19] Liberal thinkers have offered several approaches for determining when states may

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[14] *See* Mark F. Plattner, *Liberalism and Democracy: Can't Have One Without the Other*, FOREIGN AFFS., Mar.–Apr. 1998, at 171.

[15] *See* Mark D. Rosen, *Liberalism and Illiberalism: "Illiberal" Societal Cultures, Liberalism, and American Constitutionalism*, 12 J. CONTEMP. LEGAL ISSUES 803, 804 (2002).

[16] *See, e.g.*, NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 109–10 (2d prtg. 2000).

[17] *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 231–33 (1985) (stressing the importance of the cultural structure in providing the conditions necessary to make imaginative decisions about how to lead our lives); Avigail Eisenberg & Jeff Spinner-Halev, *Introduction*, in MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 1 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) ("Groups have had a role in liberalism since its inception. John Locke argued that churches ought to be voluntary associations, with members freely choosing to join or leave. Tocqueville celebrated the associations he found in America, contending that they were a crucial site where citizens learn[ed] democratic virtues. James Madison argued that factions were an important element in maintaining democratic freedom. The existence of factions, along with the protection of freedom of association, ensured that no enduring majority would dominate over any minority because, . . . to advance their interests, factions constantly form and re-form alliances with other factions."); WILL KYMLICKA, LIBERALISM COMMUNITY AND CULTURE 79 (1989) (arguing that cultural pluralism is a prerequisite to freedom); JOHN RAWLS, A THEORY OF JUSTICE 288 (rev. ed. 1999) ("For while the persons in the original position take no interest in one another's interests, they know that they have (or may have) certain moral and religious interests and other cultural ends which they cannot put in jeopardy. Moreover, they are assumed to be committed to different conceptions of the good and they think that they are entitled to press their claims on one another to further their separate aims.").

[18] *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 423 (1986) ("First, the perfectionist policies must be compatible with respect for autonomy. They must, therefore, be confined to the creation of the conditions of autonomy.").

[19] *See* Shai Stern, *Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities*, 23 J.L. & POL'Y 141, 172–73 (2014).

intervene in an illiberal community's conduct; all rely on different liberal minimum requirements ("LMRs") that, when not met, may legitimize state action.[20] In a nutshell, an LMR intervention policy regards constitutional principles and rights as the standard for determining a community's social legitimacy.[21] Accordingly, any community which follows that standard should be recognized as legitimate, regardless of its internal norms and beliefs. However, a community which fails to follow that standard should be considered illegitimate, regardless of the reasons for the failure.

Against this background, one may understand the concerns raised by religious leaders and religious communities across the United States following the *Obergefell* decision. As Chief Justice Roberts noted in his dissent, "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . . ."[22] The main concerns are that religious communities will be forced to observe or implement the right of gay couples to marry—even though the right stands in conflict with these communities' religious norms—under threat of discrimination charges or denial of state financial support.[23] In this sense, *Obergefell* is a contemporary peak in a seemingly endless, centuries-long clash between liberal states and diverse cultures and religions that have embraced illiberal norms.

This Article suggests a different, more optimistic, reading of *Obergefell*. It suggests that the decision is a step toward reconciling the ongoing tension between the liberal state and illiberal communities. By pointing to the implicit consensus reached by all Supreme Court Justices, I argue *Obergefell* manifests the state's pluralistic obligation to ensure a plural and diverse society. Such a society should allow for coexisting conceptions of the good, which promote both liberal and illiberal values. It therefore rejects the LMR-based intervention policy approach and requires the establishment of a different standard, which strikes a balance between ensuring equal rights of all citizens and recognizing the limited ability of religious communities to reject liberal norms without sacrificing their social legitimacy. However, the Court in

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[20] *See id.* at 173.

[21] *See* Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. PUB. AFFS. 3, 17, 35–36, 38 (2011).

[22] Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

[23] *See id.* at 2525–26; Farris, *supra* note 10; Goodstein & Liptak, *supra* note 10; *Here We Stand: An Evangelical Declaration on Marriage*, *supra* note 12; *Orthodox Union Statement on Supreme Court's Ruling in* Obergefell v. Hodges, *supra* note 12; Zylstra & Lee, *supra* note 7.

Obergefell left the state's pluralistic obligation devoid of any substantial meaning and avoided setting an alternative standard for state intervention in illiberal communities' conduct. In the discussion that follows, I propose to develop this standard further.

A standard for state intervention rooted in the state's pluralistic obligation should encourage the continued development of liberal human rights but also allow illiberal communities (mainly religious communities) to realize their conceptions of the good, even if their worldviews are fundamentally wrong in the eyes of the state. However, the state's pluralistic obligation, as I argue, should have limits. These limits should not be ethical in nature but structural. The state should focus on the boundaries that buffer the community from the external liberal space. Thus, the state should (1) prevent the illiberal norms established within the communities from escaping into the surrounding liberal society; and (2) ensure that illiberal communities allow their members to belong simultaneously to multiple communities. Recognition of a structurally restricted governmental pluralistic obligation, I argue, may provide a balanced and practical policy to govern the state's intervention in illiberal communities' conduct.

Part II will briefly review the long history of the legal battle for recognition of same-sex marriages and discuss the Supreme Court's ruling in *Obergefell v. Hodges*. Although the legal and public debates concerning the ruling are far from over, I believe the Court laid out both the opportunities and the risks that American society faces in light of its ruling. This Part will point to the implicit consensus among all Supreme Court justices in *Obergefell*, who recognized the obligation of the state to ensure a diverse society in which different conceptions of the good may coexist. While the Court in *Obergefell* rejects the extant LMR-based intervention policy, it nevertheless refrains from setting an alternative standard for such intervention. In view of the challenges facing American society, it seems that the creation of a new, more pluralistic-minded standard for social legitimacy is of primary importance.

In Part III, I argue that in spite of the negative reaction of American religious communities to the *Obergefell* decision, both liberals and religious communities should celebrate it. The reason is that the 5-4 decision regarding the constitutionality of same-sex marriage bans overshadowed an equally important unanimous decision by the *Obergefell* Court to reject an LMR-based intervention policy and to set a new standard rooted in the state's pluralistic

obligation to ensure a diverse society.[24]

In Part IV, I examine the limits that should be imposed on a liberal state's pluralistic obligation. I identify two limits on this duty. The first is a pluralistic embrace of John Stuart Mill's harm principle.[25] According to this principle, a person who enjoys the ability to exercise his values and beliefs should not prevent others from doing so.[26] The principle would require the prevention of illiberal communities' internal norms from expanding beyond the boundaries of the community. The second limit demands an expansion of community members' right to exit, as an instrument to mitigate the potential harm they might suffer as a result of the state's lack of intervention in the communities' internal practices.[27]

Part V concludes by putting theory into practice and exploring how to implement the newly recognized standard for state intervention in religious communities' conduct. This Part identifies three dimensions of the state's pluralistic obligation to ensure a diverse society and sets forth guidelines for state intervention in each of these dimensions.

II. THE RIGHT TO MARRY: THE COURT'S RULING IN *OBERGEFELL V. HODGES* AND ITS RAMIFICATIONS FOR ILLIBERAL COMMUNITIES

The struggle of same-sex couples to achieve marriage equality has a long history. In 1970, Richard Baker and James Michael McConnell, two gay student activists from the University of Minnesota, applied for a marriage license in Minneapolis.[28] They were denied the request, solely on the ground that Baker and McConnell were of the same sex.[29] The couple petitioned the district court for a writ of mandamus to force the clerk to issue the license.[30] The trial court quashed the writ and ordered the clerk not to issue the license.[31] The Minnesota Supreme Court affirmed the district

[24] *See infra* Part III.

[25] *See* JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859).

[26] *See id.*

[27] *See* Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POLIT. THEORY 105, 116–118, 127–29, 133–34 (1992).

[28] WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 11, 12 (2006).

[29] Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); ESKRIDGE & SPEDALE, *supra* note 28, at 12.

[30] *Baker*, 191 N.W.2d at 185.

[31] *Id.*

court's dismissal of the case.[32] The Court first concluded the state's marriage statute did not authorize same-sex marriage.[33] The Court then held this restriction did not deny the plaintiffs equal protection or due process, referring to the historical roots of marriage as a union between man and woman for the purposes of procreation and raising children.[34] The United States Supreme Court upheld that ruling in an order dismissing the appeal "for want of substantial federal question."[35]

The gay and lesbian community's struggle for equality has come a long way from *Baker* to *Obergefell*. During the intervening years, many state and local governments, both in Europe and the United States, legalized same-sex marriages, whether by legislation, court decision, or popular vote.[36] Not until June 2015, more than forty-three years after *Baker*, did the Supreme Court recognize that the Constitution guarantees the right of same-sex couples to marry in all fifty states.[37] The Court grounded its ruling that marriage is a fundamental human right in the Due Process Clause of the Fourteenth Amendment.[38] Therefore, any ban on a person's ability to marry his or her partner—whether from the opposite sex or the same sex—is a violation of that person's constitutional rights.[39]

Although many praised the decision as an important step toward the liberation of the institution of marriage from the chains of tradition,[40] not everyone shared in the exhilaration. Religious communities across the United States view *Obergefell* as a warning sign for further intervention of the liberal state into their internal conduct.[41] Such communities, which oppose same-sex marriage as a tenet of their faith, may find themselves struggling to maintain their social legitimacy on the one hand, while continuing to uphold their

[32] *Id.*

[33] *Id.* at 186.

[34] *Id.* (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 875 (1979).

[35] Baker v. Nelson, 409 U.S. 810, 810 (1972).

[36] *Gay Marriage Around the World*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013 (providing an overview of the legalization of same-sex marriage outside of the U.S.); *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ (providing a brief historical chronology of the legalization of same-sex marriage in the U.S.).

[37] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[38] *Id.* at 2604–05.

[39] *See id.* at 2604–05, 2607.

[40] *See, e.g.*, Chappell, *supra* note 5.

[41] *See supra* note 7 and accompanying text.

values and beliefs on the other.[42] These concerns are not hypothetical. In October 2014, Donald and Evelyn Knapp, ordained ministers who run the Hitching Post Wedding Chapel in Coeur d'Alene, Idaho, argued that they had been threatened with charges by city officials for violating the city's nondiscrimination statute after they refused to marry same-sex couples.[43] In the end, no charges were filed against the Knapps, but many religious communities fear the Knapps' story may turn out to be a harbinger of a new round of clashes between the liberal state and the illiberal communities that reside within it.[44]

In fact, these concerns stood at the core of the dissenting opinions in *Obergefell*. Chief Justice Roberts, for example, argued in his dissent that the majority opinion "creates serious questions about religious liberty."[45] This is because the decision, unlike legislation in many states, lacks "[r]espect for sincere religious conviction" and therefore offers no "accommodations for religious practice."[46] Justice Thomas also argued in his dissent that the majority ignored the difficulties religious communities may suffer as a result of the decision.[47] According to Thomas, the Court consciously threatened the religious liberty of communities and individuals, since "[r]eligious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice."[48]

But the dissenters were not the only ones to recognize the potential of the Court's decision to infringe on religious liberties. Justice Kennedy, writing the majority opinion, addressed these concerns as follows:

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so

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[42] *See Orthodox Union Statement on Supreme Court's Ruling in* Obergefell v. Hodges, *supra* note 12.

[43] Anderson, *supra* note 9.

[44] *See* Jessica Robinson, *Coeur d'Alene Says Hitching Post is Exempt From Gay Rights Law*, BOISE STATE PUBLIC RADIO (Oct. 24, 1015), http://boisestatepublicradio.org/post/coeur-dalene-says-hitching-post-exempt-gay-rights-law.

[45] Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (Roberts, C.J., dissenting).

[46] *Id.*

[47] *Id.* at 2638 (Thomas, J., dissenting).

[48] *Id.* at 2638.

> fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[49]

However, the majority opinion creates ambiguity over the ruling's implications for America's social fabric. Many regard the passage quoted above as an insincere statement designed to quell public outrage in conservative religious communities, and nothing more.[50] Justice Thomas criticized the majority for its insensitivity towards religious communities and accused the majority of making "only a weak gesture toward religious liberty in a single paragraph . . . [a]nd even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition."[51] The dissenting opinions' characterizations of the majority opinion in *Obergefell* indeed posit this ruling as the latest clash in a long-running battle between liberal values and illiberal religious norms.

Yet, as I will argue, this reading of *Obergefell* is overly pessimistic and fails to reflect the great opportunities this decision offers to American society. The focus on the close and contentious 5-4 decision concerning the constitutionality of same-sex marriage bans camouflages an important consensus reached by *all* of the justices, namely, that the state has a pluralistic obligation to ensure a diverse society.[52] Such a society should allow for coexisting conceptions of the good, which may promote liberal or illiberal values. The

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[49] *Id.* at 2607 (majority opinion).

[50] *See, e.g.*, Morgan Lee & Jeremy Weber, *Here's What Supreme Court Says About Same-Sex Marriage and Religious Freedom*, CHRISTIANITY TODAY (June, 26, 2015, 9:03 AM), http://www.christianitytoday.com/gleanings/2015/june/supreme-court-states-cant-ban-same-sex-marriage.html; Erik Stanley, *What Your Church Needs to Know—and Do—About the Court's Marriage Ruling*, GOSPEL COALITION (June 27, 2015), https://www.thegospelcoalition.org/article/what-your-church-needs-to-knowand-doabout-the-courts-marriage-ruling.

[51] *Id.* at 2638 (Thomas, J., dissenting).

[52] *Compare id.* at 2607 (majority opinion) ("Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate."), *with id.* at 2612 (Roberts, C.J., dissenting) ("But as this Court has been reminded throughout our history, the Constitution 'is made for people of fundamentally differing views.'") (quoting Lochner v. New York, 198 U.S. 45, 76 (1905)), *and Obergefell*, 135 S. Ct. at 2643 (Alito, J., dissenting) ("The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation.").

pluralistic approach rejects the LMR-based intervention policy, which has prevailed in the United States, and requires the establishment of a different standard which allows a balance between the goals of ensuring equal rights of all citizens and recognizing religious communities' limited ability to reject liberal norms while preserving their social legitimacy.[53] However, the *Obergefell* Court left the state's pluralistic obligation devoid of any substantial meaning and failed to articulate an alternative standard for state intervention in illiberal communities' conduct. In the following section of this Article, I introduce and further develop this standard.

III. WHY LIBERALS AND RELIGIOUS COMMUNITIES SHOULD CELEBRATE *OBERGEFELL*: THE RISE OF THE STATE'S PLURALISTIC OBLIGATION

The *Obergefell* ruling was decried by religious communities across the United States.[54] Many religious leaders hastened to declare that the ruling would not affect how their communities addressed same-sex marriage.[55] According to some, the decision "serves as a defacto and legal catalyst for the marginalization of Americans who embrace a biblical worldview."[56] Others raised concerns that the ruling will increase the intervention of the state in the internal conduct of religious communities, threaten community members' ability to exercise their religion, and put religious people at risk of prosecution.[57] The threat to freedom of religion was also acknowledged in Chief Justice Roberts' dissent. Roberts wrote that the majority overlooked the constitutional right to free exercise of religion guaranteed in the First Amendment.[58]

While one can understand the fear spreading among religious communities that oppose same-sex marriage, I believe that a sympathetic reading of *Obergefell* reveals that this pessimism is misplaced. The existing policy for state intervention in communities' internal conduct may warrant the concerns expressed by members of religious communities. These critics, however, appear to ignore the change in this policy brought about by *Obergefell*. I argue that

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[53] *See supra* text accompanying notes 19–21; RAZ, *supra* note 18, at 58.

[54] *See supra* notes 7, 12 and accompanying text.

[55] *See supra* note 12 and accompanying text.

[56] Heather Sells, *Gay Marriage Ruling Fallout: Christian Leaders React*, CBN NEWS (June 28, 2015), http://www.cbn.com/cbnnews/us/2015/June/Christian-Leaders-React-to-Gay-Marriag-Ruling/.

[57] *See supra* note 7–12 and accompanying text.

[58] Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

Obergefell has done more than establish the right of same-sex couples to marry. This dramatic decision downplayed an equally consequential decision of the Court—one which was unanimous—that recognized the state's pluralistic obligation to ensure the coexistence of various conceptions of the good.[59] Recognition of the state's pluralistic obligation should unite both liberals and non-liberals in celebrating *Obergefell.*

To understand this change, I begin by describing the current intervention policy and its implications for the tense relationship between the state and religious communities. Liberal states struggle to establish intervention policies that will maintain their liberal character on the one hand, and will allow the existence of illiberal communities on the other.[60] Liberal philosophers struggle to reconcile liberalism with pluralism.[61] Both concepts share the cooperative goal of allowing a person to become the author of her life story.[62] However, while pluralism may be a call for almost unlimited recognition of diverse conceptions of the good,[63] liberal thinkers often regard this approach as overly tolerant.[64]

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[59] *Id.* at 2607 (majority opinion); *see infra* note 83 and accompanying text.

[60] *See* MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS 178 (2003).

[61] *See, e.g.*, JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 5 (2011) ("The puzzle which political liberalism is meant to solve is this: how is the public justification of liberal rules and institutions possible in light of the deep pluralism or disagreement that is a permanent feature of free societies?"); Isaiah Berlin & Bernard Williams, *Pluralism and Liberalism: A Reply*, 41 POL. STUD. 306, 306 (1994); George Crowder, *From Value Pluralism to Liberalism*, 1 CRITICAL REV. INT'L SOC. & POL. PHIL. 2, 2 (1998); George Crowder, *Pluralism and Liberalism*, 42 POL STUD. 293, 293 (1994).

[62] *See, e.g.*, ISAIAH BERLIN, THE POWER OF IDEAS 13 (Henry Hardy ed., 2d prtg. 2002) ("If pluralism is a valid view, and respect between systems of values which are not necessarily hostile to each other is possible, then toleration and liberal consequences follow . . . ."); RAZ, *supra* note 18, at 155 ("Another aspect of autonomy concerns the quality of the options open to agents. Their choices must not be dictated by personal needs. One is a part author of one's world only if one is not merely serving the will of another."); Brian Barry, *Liberalism and Want-Satisfaction: A Critique of John Rawls*, 1 POL. THEORY 134, 152 (1973) ("Liberalism rests on a Faustian vision of life. It exalts self-expression, self-mastery, and control over the natural and social environment, the active pursuit of knowledge and the clash of ideas; the acceptance of personal responsibility for the decisions that shape one's life.").

[63] *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1 (1993) ("People experience the world as infused with many different values. . . . Our evaluative experiences, and the judgments based on them, are deeply pluralistic."); BERLIN, *supra* note 62, at 11 ("I came to the conclusion that there is a plurality of ideals, as there is a plurality of cultures and of temperaments.").

[64] While most liberal theories may endorse a multiplicity of legitimate conceptions of the good, they nevertheless tend to limit this recognition. *See*, *e.g.*, JOHN KEKES, THE MORALITY OF PLURALISM 199 (1996) ("[T]here are good reasons for supposing that pluralism and liberalism are incompatible. As a first approximation of these reasons, we may note that pluralism is committed to the view that there is no particular value that, in conflicts with other values, always takes justifiable precedence over them. By contrast, if liberalism is to avoid the charge of vacuity, it must be committed to holding that in cases of conflict the particular values

One cannot speak of liberalism, however, without acknowledging its multiple meanings. Liberalism has been subject to many different interpretations, which diverge both on the philosophy's aims and the values it promotes.[65] However, an exhaustive review of the different liberal theories is unnecessary and beyond the scope of this Article. All core liberal theories share a common notion of how liberal states should handle non-liberal communities.[66] Hence, both political liberalists and liberal perfectionists seek to legitimize illiberal communities through the imposition of LMRs in the inner-space of the community.[67]

The imposition of LMRs as a precondition to the legitimacy of non-liberal communities may be justified for three reasons. First, for a society to function, there needs to be a minimal foundation of shared values.[68] Second, and equally important, the LMR policy seeks to ensure a minimal zone of individual autonomy for each citizen, including non-liberal community members.[69] This minimal zone is guaranteed by providing each citizen with sufficient instruments to live his life as he chooses.[70] Finally, the LMR policy is also intended to be an expressive instrument the state uses to announce "rights" and "wrongs."[71] In this sense, the LMRs are not designed to lead to actual change in the inner-space of the community, but rather to express the state's opinion about the community's norms.

In order to better understand how an LMR intervention policy operates, we must first examine the social framework of non-liberal communities. A non-liberal community, as a social institution, can be defined as having three components. The first is the external

liberals favor do take justifiable precedence over other values. How, then, could liberalism and pluralism be compatible?"); Crowder, *supra* note 61, at 10 ("Of course, liberalism cannot be limitlessly hospitable to diversity, since many cultures are mutually hostile, and some are explicitly antiliberal. However, for the purpose of the argument from diversity, liberals do not have to claim a limitless commitment to diversity, merely a greater capacity to promote diversity than that possessed by the alternatives. And, while it is true that liberal constraints must place limits on non-liberal cultures, they do so in order to enable such cultures to coexist peacefully with others.").

[65] *See* FRIEDMAN, *supra* note 60, at 182.

[66] *See* Menachem Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 609, 610 (2008).

[67] *See supra* notes 19–21 and accompanying text.

[68] *See* STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 189 (2000).

[69] *See, e.g.*, Stephen Deets & Sherrill Stroschein, *Dilemmas of Autonomy and Liberal Pluralism: Examples Involving Hungarians in Central Europe*, 11 NATIONS & NATIONALISM 285, 286 (2005).

[70] *See id.* at 286–87.

[71] *See supra* notes 19–21 and accompanying text; *see generally* Stern, *supra* note 19, at 176 (noting that if the government makes a rule, they are inherently evaluating rights and wrongs).

space—the society—where liberal norms and values are prevalent.[72] The second component is the inner-community space, in which each community functions according to its members' shared conception of the good, including non-liberal norms.[73] And finally there is the borderline which distinguishes the community from its liberal surroundings.[74]

An LMR intervention policy seeks to penetrate the walls which surround the community and to influence morality within the inner space of the community. The state's attempt to invade this inner space morally leads to strong opposition from the community. The community's main concern is that allowing even a minimal intrusion will lead to further intervention in the community's inner space. Such an expansion of moral interference will prevent the community from realizing its members' shared conception of the good.[75] Consider for example a religious community that regards homosexuality as a sin. Such a community may worry that the constitutional right to same sex marriage announced in *Obergefell* may affect its ability to hold this view of homosexuality. The community may believe that if it continues to hold its view regarding homosexuality, teach it to children or believers, or act according to its beliefs (by, for example, refusing to perform wedding ceremonies for same-sex couples), members of the community will be vulnerable to legal action leading to personal or financial losses.[76] Yet, if the community were to subject itself to certain liberal norms recognized by courts as constitutional, it may find that it needs to sacrifice its own internal norms, even if those norms are fundamental to the community's realization of its conception of the good.[77]

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[72] *See* Gurpreet Mahajan, *Can Intra-group Equality Co-exist with Cultural Diversity?: Re-examining Multicultural Frameworks of Accommodation*, *in* MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY, *supra* note 17, at 108.

[73] *See id.* at 108; Jeff Spinner-Halev, *Autonomy, Association and Pluralism*, *in* MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY, supra note 17, at 170.

[74] *See, e.g.*, *Amish*, RELIGIONFACTS.COM (Mar. 17, 2015), http://www.religionfacts.com/amish.

[75] *See* Spinner-Halev, *supra* note 73, at 157, 171.

[76] *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html (discussing how a clerk in Kentucky, Kim Davis, subjected herself to legal action by not complying with the Supreme Court's decision on same-sex marriage, and thus the rule of law).

[77] *See, e.g.*, Janet McConnaughey et al., *Federal Judge Orders Alabama to Comply with Gay Marriage Ruling*, TIME (July 1, 2015), http://time.com/3943562/alabama-gay-marriage-federal-judge/ (discussing how some counties in Alabama refused to grant marriage licenses for same-sex couples, but a federal judge ruled that all counties must abide by the applicable federal court decisions).

As mentioned, most liberals may not regard such intervention as problematic. Indeed, some may even argue that social change depends greatly on the ability to enforce progressive political or philosophical views on those who oppose them the most. It was not by mistake that many compared *Obergefell's* implications for American society to those of the landmark case *Brown v. Board of Education*.[78] The argument is that *Brown* was once considered a revolutionary ruling which was forced on communities that opposed any racial integration.[79] Yet, if we analyze *Brown* through the lens of contemporary social norms, we tend to view it as quite conservative and restrained. The legitimacy of same-sex marriage as recognized by *Obergefell*, so goes the argument, must be embraced by all levels of American government—regardless of voters' personal and communal perspective on homosexuality—because otherwise, no true change will be possible.[80]

Nevertheless, this liberal view about the need for the general applicability of fundamental liberties to all segments of society—regardless of their internal norms, values, and beliefs—leaves little space for diverse conceptions of the good to exist and flourish. Indeed, a liberal policy based on enforcement of LMRs on all communities alike undermines the values and beliefs of many illiberal communities. To the extent we, as a liberal society, accept that these communities have a right to exist, can we demand they relinquish their fundamental values? I believe that the all nine judges of the Supreme Court answered this question with a clear "no!"

Obergefell represented a dramatic policy change with respect to state intervention in religious communities' conduct. Justice Kennedy's majority opinion rejected the LMR intervention policy, emphasizing that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be

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[78] Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see, e.g.*, Raffy Ermac, *Biden Says Marriage Equality Case Could Be Next* Brown v. Board of Education, ADVOCATE (May 4, 2015, 1:44 PM), http://www.advocate.com/politics/marriage-equality/2015/05/04/listen-biden-says-marriage-equality-case-could-be-next-brown-v.

[79] *See* Will Bredderman, *Biden: Gay Marriage Ruling as Important as* Brown v. Board of Education, OBSERVER (July 9, 2015, 10:03 PM), http://observer.com/2015/07/biden-gay-marriage-ruling-as-important-as-brown-v-board-of-education.

[80] *See, e.g.*, Peter Whoriskey, *On 50th Anniversary, 'Little Rock Nine' Get a Hero's Welcome*, WASH. POST (Sept. 26, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/25/AR2007092502147.html (discussing an event in American history where the State of Arkansas refused to comply with an instrumental holding of the Supreme Court but the federal government legitimized said holding and forced them to comply with it).

condoned."[81] This statement clarifies that although the right to marry a person of the same sex should be recognized in all fifty states, no state should use this right to restrict a community's ability to live by its internal norms.[82] In other words, the Court unanimously recognized the right of religious communities to realize their conceptions of the good, even to the extent they include illiberal norms. Equally important, the Court implicitly recognized the obligation of state governments to ensure the existence of such a diverse society.[83]

Both liberals and non-liberals should celebrate the Court's recognition of the state's pluralistic obligation as the new standard for intervention in communities' internal conduct. Both sides should welcome an intervention policy that does not force norms on those who reject them because of their religious conception of the good. This standard also strengthens the liberal commitment to pluralism. Elizabeth Anderson argues that the state's proper aim is to "expand the range of significant opportunities open to its citizens by supporting institutions that enable [citizens] to govern themselves by the norms internal to the modes of valuation appropriate to different [definitions] of goods."[84] This obligation means that a liberal state should ensure a pluralistic society where different conceptions of the good can legitimately coexist.[85] However, in contrast to the liberal theories discussed above, this obligation should recognize and tolerate the profound differences that exist between conceptions of the good. The liberal theories presented above legitimize various conceptions of the good to the extent these conceptions are consistent with particular LMR's.[86] The pluralistic obligation of the state, however, must go beyond legitimizing only liberal conceptions of the good. As Anderson observes, we live in a deeply pluralistic society, in which everyone is "experience[ing] the world as infused with many different values."[87] A foundational pluralistic society cannot be established where the state legitimizes only liberal values. The alternatives the state should ensure, therefore, need to include other

[81] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[82] *See id.*

[83] *See id.*; *see supra* notes 58–59 and accompanying text.

[84] ANDERSON, *supra* note 63, at 149.

[85] This is not to say that a state must be denied from promoting one or several conceptions of good; rather, it should be obligated to ensure the effective possibility of the right to those who do not regard themselves as supporters of the state's promoted conceptions of good to realize their conceptions of good. *See* GEORGE CROWDER, LIBERALISM & VALUE PLURALISM 238 (2002).

[86] *See supra* Part III; *see supra* notes 19–21 and accompanying text.

[87] ANDERSON, *supra* note 63, at 1.

values, beliefs, and conceptions of the good as well. As Kennedy stated for the majority in *Obergefell*, America should endorse such a standard.[88]

The critics of *Obergefell* failed to recognize the important change the ruling brought about with respect to the standard governing state intervention policy. Yet, they were correct to argue that the ruling left ambiguity in terms of how it would be implemented in practice.[89] In the following section, I discuss the practical implications of endorsing the state's pluralistic obligation as the standard for intervention in illiberal communities' conduct.

IV. STATE'S PLURALISTIC OBLIGATION: FROM THEORY TO PRACTICE

Should a liberal state recognize the ability of illiberal communities to flourish? Although critics and scholars in different research fields have debated over this question,[90] a clear and affirmative answer appears to have been reached in *Obergefell*.[91] Yet, as Chief Justice Roberts wondered, to what extent will this right be recognized post-*Obergefell* and how will illiberal communities continue to realize their conceptions of the good in light of the constitutionalization of liberal norms?[92]

In this Part, I argue that recognizing the state's pluralistic obligation to ensure the existence of a diverse society requires us to change our point of view about treatment given to illiberal communities by liberal states. This change flows from the idea that this pluralistic obligation, if it is to be taken seriously, requires the state to exempt illiberal communities from the universal application of liberal norms only to the extent these communities need such an exemption to realize their conceptions of the good.[93] In this way, the state's pluralistic obligation narrows the scope of the exemption and, equally important, reduces concerns that it will be misused by those whose rejection of liberal norms is motivated purely by racial (or

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[88] *Obergefell*, 135 S. Ct. at 2607.

[89] *See, e.g.*, Mary Beth Braitman et al., *Governmental Plans: Moving Forward After the Obergefell Decision*, ICEMILLER (July 10, 2015), www.icemiller.com/ice-on-fire-insights/publications/governmental-plans-moving-forward-after-the-oberge/.

[90] *See, e.g.*, Nomi Maya Stolzenberg, *Liberalism and Illiberalism: The Return of the Repressed: Illiberal Groups in a Liberal State*, 12 J. CONTEMP. LEGAL ISSUES 897, 898–99 (2002).

[91] *See Obergefell*, 135 S. Ct. at 2607.

[92] *See id.* at 2625–26 (Roberts, C.J., dissenting).

[93] *See* Abigail M. Hinchcliff, Unequal Before the Law: Moral Authority and Pluralism 7, 71–72 (Apr., 2008) (unpublished B.A. thesis, Wesleyan University) (on file with http://wesscholar.wesleyan.edu/).

other forms of) hatred.

Although a community may need an exemption from the universal application of liberal norms to continue realizing its conception of the good, two limits should be placed on the state's pluralistic obligation. These limitations are crucial to maintaining a critical balance between the liberal character of the state and its commitment to foundational pluralism.[94] As I demonstrate below, these two restrictions allow illiberal communities to realize their values and beliefs but prevent them from imposing these values on those, inside and outside the community, who do not share them. Although a liberal state should allow illiberal communities to adhere to their conceptions of the good, even if those conceptions contradict liberal norms, the state nevertheless should use a strict monitoring mechanism to prevent communities' illiberal norms from escaping the community and pervading the external liberal space. By doing so, it follows that the state prevents harm to individuals who are not members of the community. Yet, the state's pluralistic obligation should also be sensitive to the rights of community members. Although the state should not impose liberal norms on the community or its members due to its commitment to pluralism, it cannot abandon community members to the tyranny of a community's internal leadership. Therefore, the state's pluralistic obligation should expand the right of the individual to leave a community.

A. Protecting Outsiders: Applying the Harm Principle

Recognizing illiberal communities' right to continue to exist and to realize their conceptions of the good should be limited in that those outside the communities, who support the expansion of liberal norms, will not become subjected, in any way, to the internal norms of those communities. This limitation is consistent with the harm principle enunciated by John Stuart Mill.[95] According to this principle, a person who enjoys the ability to exercise his values and beliefs should not prevent others from doing so.[96]

Consider, for example, a community that views homosexuality as a sin and therefore opposes same-sex marriages. While the state's pluralistic obligation should allow the community to adhere to its

[94] *See infra* Parts IV.A–B.

[95] *See* Owen Fiss, *A Freedom Both Personal and Political*, *in* ON LIBERTY: JOHN STUART MILL 179 (David Bromwich & George Kateb eds., 2003).

[96] *Id.*

conception of the good, the pluralistic obligation should nevertheless resist the externalization of these illiberal norms to the surrounding liberal space. Here, one should distinguish between religious communities' right to express their views and their ability to act on their illiberal views.[97] While the liberal state should protect the exercise of free speech by members of religious communities—out of the understanding that a dialog between diverse opinions facilitates the testing of competing claims and assures diverse input into political decision making[98]—it nevertheless should be careful not to allow these views to turn into action that affects the liberal society's ability to function according to its norms. The state should accomplish this through strict monitoring of the community's activity to prevent any attempt to influence others' ability to exercise their (now constitutional) right. For example, the state should thwart communities' attempts to prevent institutions or service providers in the wedding industry from providing services to same-sex couples. It should also prevent any attempt to interfere with such services.

B. Protecting Insiders: Expanding the Right to Exit

By denying illiberal communities the ability to externalize their illiberal norms to the general society, the state's pluralistic obligation protects its ongoing liberal progress as well as individuals who might otherwise become subject to norms they oppose.[99] Yet, this first restriction is not enough. A liberal state may find itself in a complicated situation in its attempt to fulfill its pluralistic obligation.[100] On the one hand, the state should recognize an illiberal community's ability to realize its conceptions of the good, while on the other, it should be aware that this recognition may interfere with community members' fundamental rights and liberties. By focusing on the protection of outsiders, the state may leave those who belong

[97] The Supreme Court has repeatedly affirmed that the First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed. *See,* e.g., Virginia v. Black, 538 U.S. 343, 358–59 (2003) (quoting R. A. V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)); *id.* at 382–83 (1992) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[98] *See, e.g.*, Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502–03 (1997); Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 281–82 (1991); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 497 (2009); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 544–45 (2006).

[99] Stern, *supra* note 19, at 175–77; *see supra* Part IV.A.

[100] *See id.* at 173.

to the community at the mercy of community leaders or of the inner community majority.[101] The state is able, of course, to enforce liberal norms on all communities alike to allay this concern, but again, by doing so it will interfere with illiberal communities' internal conduct, leaving their ability to realize their conceptions of the good quite hollow.[102]

In this Part, I offer a more balanced solution for this complicated situation, which is based on the expansion of the right of individual community members to step out of their communities. My solution is not a call to deny communities their ability to impose any conditions on a member's right to exit the community, but rather to strengthen this right by providing substantive assurances that it can be exercised. For this purpose, I argue that as a precondition for the enforcement of the state's pluralistic obligation, illiberal communities should allow their members to belong at the same time to several other communities, or as the German sociologist Georg Simmel described it, "Multiple Community Belonging" ("MCB").[103] By establishing MCB as a precondition for an illiberal community's ability to enjoy the protection of the state's pluralistic obligation, the state expands community members' right to exit in two ways: First, it allows community members to engage in self-reflection, which is critical to a person's ability to make decisions about his or her own life.[104] Second, since the community members are now able to join and participate in other communities, they have several social affiliations that will be available to them if they decide to exercise their right to exit.[105]

Let me just briefly demonstrate the role of MCB in the expansion of an individual right to exit, and therefore its importance to the state's obligation toward community members. Consider for example Ron, who is a member of an ultra-orthodox community. Ron's community, which operates in accordance with the biblical restriction on homosexuality, opposes any sexual (or romantic) interaction involving same-sex couples. Now assume that Ron found out in his early teens that he is attracted to other men, but he suppresses his sexual orientation because he was taught that homosexuality is a sin and he is aware that exposing his sexual orientation would lead to unbearable scrutiny and criticism of him and his family. Is the recent

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[101] *See* Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 14 (1991).
[102] *See, e.g.*, Stern, *supra* note 19, at 179–80.
[103] *Id.* at 173–74.
[104] *See id.* at 175.
[105] *Id.* at 174.

ruling in *Obergefell* expected to liberate Ron from his communal chains and to lead him to live his life as he desires, embracing his sexual orientation? One does not need to become an insider in any religious community to understand that the answer is probably no. Ron, and others living in illiberal communities who find themselves romantically attracted to the same sex, will not be liberated by *Obergefell* and one should not expect to find them among those who are celebrating the decision. Instead, it is reasonable to assume that Ron and others in his position will continue to suppress their sexual or romantic desires, now even more so than before, as their communities become more wary of any potential threat to their way of living. Indeed, for many who were born and raised in illiberal communities, *Obergefell* suggests almost no change. Entirely confined within these communities, these individuals have no real ability to seek change and may not even be cognizant of the possibility of seeking it.

Would MCB allow such change? I believe so. Consider a scenario in which Ron's community leaders allow MCB for their members. In this scenario, Ron continues to live in the community, and yet, every morning, he takes an hour-long train ride to the office where he works in a liberal environment. Whether he realizes it or not, Ron is now being exposed to norms he never knew existed. He discovers that people, regardless of their gender, race, or sexual orientation, may be treated equally with respect to their opportunities for promotion. Women, for example, may have complete freedom to publicly express their opinions, even if they contradict those of men.[106] He may also discover that people of different religions and cultures can work

[106] This assumption ignores, quite rudely, the inequality existent in a liberal society as well. *See* Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 622 (1993). Nomi Maya Stolzenberg brought up such claim, arguing that:

> Among the most challenging claims against secular humanism are the assertions that it constitutes a form of totalitarianism or authoritarianism, or is an alternative kind of religion. In the eyes of the fundamentalist critics, secular humanism is dehumanizing and liberalism is intolerant. Fundamentalist political leaders capitalize on these paradoxical charges that seem to require liberalism's opposition to authoritarianism and intolerance to turn against itself.

Id.

For recent evidence of inequality in liberal society see PRUDENCE L. CARTER, STUBBORN ROOTS: RACE, CULTURE, AND INEQUALITY IN U.S. AND SOUTH AFRICAN SCHOOLS at xi, 31, 129 (2012); Meghan Casserly, *The Global Gender Gap is Closing, but the U.S. is Still Failing its Women*, FORBES (Oct. 24, 2012, 8:58 AM), http://www.forbes.com/sites/meghancasserly/2012/10/24/the-global-gender-gap-is-closing-but-the-u-s-is-still-failing-its-women; Megan Willett, *A New Report Shows that the Gender Gap has Gotten Wider in the US*, BUSINESS INSIDER (Oct. 24, 2012, 8:12 PM), http://www.businessinsider.com/us-ranks-22-in-global-gender-gap-report-2012-10.

together, respect each other, and cooperate successfully. During coffee breaks, Ron may unwittingly be exposed to different opinions regarding gay rights and management of intimate relationships. When Ron returns to his home at the end of the day, he has three options. First, he can decide to leave his community because he no longer accepts the norms according to which it operates. Second, he can decide to stay in his community and try to change those norms. Finally, he can decide to stay in his community and conform to its values.

MCB therefore has a crucial effect on Ron's right to exit. Although it does not force him to exercise this right, it nevertheless allows him to engage in meaningful self-reflection and to make an informed decision of whether to exit.[107] The MCB condition on the state's pluralistic obligation contributes to community members' right to exit not only by expanding their alternatives, but also by making each alternative realistic.[108] It is one thing to say that someone has a right to leave his community, and another to make this right practically available. The application of the MCB condition on the state's pluralistic obligation will infuse a member's right to exit with content, as it allows a member to establish social ties outside the community before exiting.[109] One of the main obstacles in front of a person deciding whether to exercise his right to exit a community is the fear of losing social affiliations.[110] Community members may decide to stay in the community simply because they do not want to destroy the only social ties they have.[111] MCB mitigates this concern by creating the conditions for the formation of additional relationships outside of the community.[112]

V. WHAT DOES TAX HAVE TO DO WITH IT?

To take the state's pluralistic obligation from theory into practice, we should identify three categories of the state's potential intervention in religious communities' conduct. The first layer relates to the internal conduct of the community.[113] Here, the

[107] Stern, *supra* note 19, at 175.

[108] *See id.* at 174–75.

[109] *See id* at 175.

[110] *See* Kukathas, *supra* note 27, at 134 ("The most important condition which makes possible a substantive freedom to exit from a community is the existence of a wider society that is open to individuals wishing to leave their local groups.").

[111] *See id.*

[112] *See, e.g.*, J. Miller McPherson et al., Social Networks and Organizational Dynamics, 57 AM. SOC. REV. 153, 165–66 (1992).

[113] *See infra* Part V.A.

question is whether a religious community that rejects the greater society's liberal norms may continue to realize its conception of the good without interference from the state.[114] The second layer relates to the interactions that members or institutions of a religious community have with outsiders.[115] The question here is whether members or institutions of a religious community should be exempt from complying with liberal norms established by society, even though this exemption may affect outsiders.[116] Finally, the third layer deals with religious communities' ability to continue to enjoy different forms of state support—mostly in the form of tax exemptions—despite their rejection of liberal norms established by society outside the community sphere.[117] These three categories represent different levels of interaction between the illiberal community, the general society, and the state. They should therefore be examined through the lens of the state's pluralistic obligation.

A. First Layer: Internal Conduct

Should a religious community that, according to its conception of the good, rejects homosexuality and views it as a sin, be obligated to endorse homosexuality as an acceptable behavior or lifestyle? The majority opinion in *Obergefell* addressed this concern by saying that "it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[118] Indeed, a positive answer to the above question wholly undermines the pluralistic obligation of a liberal state by directly interfering with each religious community's ability to exercise its own beliefs.[119] If we are to take the pluralistic obligation of the state seriously, we should not intervene in the internal conduct of the community, even if this conduct is inconsistent with liberal norms

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[114] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); *see infra* Part V.A.

[115] *See infra* Part V.B.

[116] *See, e.g.*, Mullins v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 Colo. App. Lexis 1217, at *1 (Colo. App. 2015); *see infra* Part V.B.

[117] *See, e.g.*, Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 IND. J. GLOBAL LEGAL STUD. 503, 540–41 (2006) ("[T]he United States has [two] competing conceptions of religious liberty . . . one . . . [which] would have government give nondiscriminatory financial support to religious schools and charities . . . [and another, which] would permit no government money for any religiously affiliated activity . . . and would regulate religious behavior on substantially the same terms as nonreligious behavior."); *see infra* Part V.C.

[118] *Obergefell*, 135 S. Ct. at 2607.

[119] *See* Stern, *supra* note 19, at 152–53, 153 n.40.

accepted by most of society.

Yet, even at this level, the state should not implement its pluralistic obligation without the restrictions described above.[120] First, the state should provide no exemption from complying with liberal norms unless the community proves that its conception of the good is inherently inconsistent with certain liberal standards.[121] Most religious communities have a clear set of norms and values rooted in their scriptures and religious laws, which should make this task easy.[122] The requirement that communities come forward with this evidence ensures that the exemption is available only to communities that genuinely adhere to a conception of the good that departs from liberal principles.[123]

Second, the exemption should be carefully monitored so it does not leak to the space surrounding the community.[124] For example, a community's educational institutions should generally be free to teach about the "sin" of homosexuality (without teaching alternative views) only if those institutions do not include outsiders. In cases where nonmembers are involved, the community should be obligated to teach other points of views on homosexuality, or alternatively, to avoid addressing it at all. Finally, the state should exempt only religious communities that comply with MCB. By doing so, the state will maintain the careful balance between its commitment to pluralism and its commitment to allow each individual citizen to exercise his or her fundamental rights.

The most prominent case in which the Supreme Court addressed such a situation was *Wisconsin v. Yoder*.[125] The state of Wisconsin convicted three Amish parents of violating the state's compulsory school attendance law, which required them to send their children to public school or private school until the children reached the age of sixteen.[126] The parents failed to enroll their children in any school

[120] *See supra* Part IV.

[121] *See, e.g.*, Wisconsin v. Yoder 406 U.S. 205, 217 (1972) ("[T]he values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict."); ROSENBLUM, *supra* note 16, at 101.

[122] *See* Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369, 2373 (2009); *Scripture*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Scripture (last visited Apr. 7, 2016).

[123] *See, e.g.*, ROSENBLUM, *supra* note 16, at 101.

[124] *See, e.g.*, *id.* at 101–02

[125] *See* Steven D. Smith, Wisconsin v. Yoder *and the Unprincipled Approach to Religious Freedom*, 25 CAP. U.L. REV. 805, 805 (1996)

[126] Wisconsin v. Yoder 406 U.S. 205, 207, 213 (1972).

after they finished eighth grade.[127] The question before the court, in terms of pluralistic obligation, was "whether exempting Amish children from mandatory school attendance to the age of sixteen would interfere with their ability to leave the separatist community and participate in the wider society."[128] In other words, the court was required to decide whether the community's ability to realize its religious conception of the good should overcome liberal norms embodied in Wisconsin's compulsory school attendance law that were designed to foster each individual's ability to choose his or her way of life in the future.[129] Chief Justice Burger answered this question in the affirmative.[130] He rejected the argument that relieving the Amish children from the additional period of formal education would render them incapable of fulfilling the social and political responsibilities of citizenship.[131] As Nancy Rosenblum put it, Chief Justice Burger's decision was basically pragmatic, as he balanced the ability of the community to survive, or to realize its conception of the good, with the constraints on the freedom and opportunities of future generations of the Amish.[132] Chief Justice Burger's decision to exempt the Amish children from the additional period of mandatory education was informed by a recognition that these restraints are modest.[133]

The Court's decision in *Yoder* was unique in its restraint from applying the state's liberal norms to religious communities.[134] As such, it was harshly criticized[135] and has effectively not served as precedent in similar cases that followed.[136] Yet, according to the

[127] *Id.* at 207.
[128] ROSENBLUM, *supra* note 16, at 101.
[129] *See id.* at 101–02.
[130] *Yoder*, 406 U.S. at 236.
[131] ROSENBLUM, *supra* note 16, at 101.
[132] *See id.*
[133] *See id.*
[134] *See Yoder*, 406 U.S. at 235–36.
[135] *See* Smith, *supra* note 125, 805–06.
[136] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which [the Supreme Court has] held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children."); James D. Gordon III., Wisconsin v. Yoder *and Religious Liberty*, 74 TEX. L. REV. 1237, 1240 (1996) ("The Court essentially abandoned *Yoder* and the compelling interest test in *Employment Division v. Smith*."). "Technically, the Court distinguished *Yoder* on the ground that *Yoder* also involved the right of parents to direct their children's education." *Id.* at 1240; *see also* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion*: *Meyer, Pierce and the Origins of* Wisconsin v. Yoder, 25 CAP. U.L. REV. 887, 890 (1996) (explaining that *Yoder* used the First Amendment with other constitutional rights like a parent's right to choose the path of their child's education).

pluralistic intervention policy presented in this Article, should the decision of the *Yoder* majority be considered just? Although a pluralistic intervention policy should not entirely reject the type of reasoning employed in *Yoder*, it nevertheless cannot justify the outcome in that case. While the respondents in *Yoder* proved the contradiction between the state's liberal norms and their ability to realize their conception of the good, and although they had not attempted to externalize their values to the wider society, they nevertheless failed to comply with the third limitation, *i.e.*, their readiness to allow their members to belong, simultaneously, to other communities.[137] The Amish community is an insular community that prevents its members from belonging to other communities simultaneously.[138] Therefore, it should not be exempted from the state's liberal norms because this exemption would place too heavy a burden on the rights of individual community members. Pursuant to a pluralistic intervention policy, it follows that *Yoder* should have been decided differently.

B. Second Layer: Effects on Outsiders

If we insist on expanding the ability of community members to exit their community—which may not entirely safeguard them from any infringement of fundamental liberties, but would nevertheless provide them more state protection than they enjoyed in the past[139]—it seems that the question of whether to allow religious communities to act in accordance with their beliefs within the boundaries of the community is a simple one. But what if the community, or its members, refuse to comply with liberal norms with respect to others outside the community? Consider once again the case of Donald and Evelyn Knapp, ordained ministers at the Hitching Post Wedding Chapel in Coeur d'Alene, Idaho.[140] The Knapps refused to marry same-sex couples and therefore were threatened by city officials with charges for violating the city's nondiscrimination statute, which covers sexual orientation and gender identity.[141] Should the Knapps be exempted from performing ceremonies that they considered to be completely contrary to their conception of the good, or should they be

[137] *See Yoder*, 406 U.S. at 216–17.

[138] *Id.* at 210.

[139] *See, e.g.*, ROSENBLUM, *supra* note 16, at 103 ("[T]he Fair Labor Standards Act . . . insists that citizens have rights, even if they choose not to exercise them in the context of religious community.").

[140] Anderson, *supra* note 9.

[141] *Id.*

obligated to provide the service to those who see it as their constitutional right? And what about the Knapps' situation is different, if at all, from the refusal of Jack Phillips, the owner of Masterpiece Cakeshops, to sell Charlie Craig and David Mullins a wedding cake because of Phillips' belief "that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way?"[142]

I believe that grounding the state's intervention policy in the pluralistic obligation standard allows us to distinguish among these cases and to offer a nuanced and balanced policy. According to the state's pluralistic obligation, the state should ensure a religious community's ability to continue to realize its conceptions of the good.[143] Yet, it prohibits the state from allowing religious communities to export their illiberal norms to the wider society.[144] Therefore, when religious communities, or individual members of the community, decide to interact with the general society—for example, through involvement in commerce or assuming public positions—they cannot take their community's internal illiberal norms with them and impose these norms on outsiders.[145] This is why, according to the state's pluralistic obligation standard, Jack Phillips could not refuse to sell a gay couple a wedding cake, even if he truly believes "that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way."[146] When Phillips decided to conduct a business that provides a service to the general public, he actually gave up his ability to fully exercise his religious

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[142] Mullins v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 2, 3 (Office of Administrative Courts Dec. 6, 2013), https://www.aclu.org/sites/default/files/field_document/initial_decision_case_no._cr_2013-0008.pdf. A similar case occurred in Oregon, where Aaron and Melissa Klein, religious owners of "Sweet Cakes By Melissa" bakery, refused to bake a cake for a lesbian couple's wedding. *'It's Just Ridiculous': Bakery Fined $135K for Refusing to Serve Gay Wedding*, FOX NEWS INSIDER (July 7, 2015, 11:00PM), http://insider.foxnews.com/2015/07/07/bakery-owners-fined-135000-refusing-make-gay-wedding-cake. "The state ruled that the owners were discriminating against the couple based on their sexual orientation." *Id.* The state "ordered the Kleins to pay $135,000 in damages to the [] couple and issued a gag order, which bans them from 'speaking publicly about their refusal to participate in or bake wedding cakes for same-sex unions.'" *Id.*; Kelsey Harkness, *State Silences Bakers who Refused to Make Cake for Lesbian Couple, Fines Them $135K*, DAILY SIGNAL (July 2, 2015), http://dailysignal.com/2015/07/02/state-silences-bakers-who-refused-to-make-cake-for-lesbian-couple-fines-them-135k/ ("In the ruling, Avakian placed an effective gag order on the Kleins, ordering them to 'cease and desist' from speaking publicly about not wanting to bake cakes for same-sex weddings based on their Christian beliefs.").

[143] *See* Kukathas, *supra* note 27, at 121.

[144] *See, e.g.*, *id.* at 132.

[145] *See id.* at 133 ("The immigrant community, while entitled to try to live by their ways, have no right here to expect the wider society to enforce those norms against the individual.").

[146] *Mullins*, No. CR 2013-0008, at 3.

beliefs.[147] He may decide not to engage in any activity that will present him with such a challenge, but as the court in that case noted, it would be "a matter of personal choice and not a result compelled by the state."[148]

But is the case of the Knapps different? I believe the answer should depend on the actual position of the Knapps' church. The Knapps own a small "for-profit wedding chapel in Coeur d'Alene, Idaho, but say they cannot marry same-sex couples because of their faith."[149] While the Knapp case resembles that of Masterpiece Cakeshops, there are distinctions, not the least of which is that designing a wedding cake is significantly different from performing a religious marriage ceremony. Selling cakes is primarily a commercial activity while performing religious wedding ceremonies is primarily a religious activity. Performance of a religious act or ceremony goes to the roots of religious communities' conduct. In that sense, forcing pastors, rabbis, or imams to perform a religious ceremony that fundamentally contradicts the norms of their religious conceptions of the good not only threatens their religious freedom, but also pulls the rug out from under the state's commitment to pluralism.[150]

But it is important to understand the service that the religious institution actually offers. The Knapp case presents a good example of this distinction. Before the Knapps were accused of discrimination, their church website offered to "perform wedding ceremonies of other faiths as well as civil weddings."[151] Right after the Knapps were threatened with charges, they changed their website to state, "[t]he Hitching Post specializes in small, short, intimate, and private weddings for couples who desire a traditional Christian wedding ceremony."[152] This change reveals that determining the scope of the state's pluralistic obligation is complicated, and it cannot be decided by form, but rather by substance. While the Knapps seemingly should have been exempted from performing same-sex marriages ceremonies because the practice would be contrary to the values of the church, they nevertheless should lose this protection to the extent they perform ceremonies for people of other faiths as well as civil

147 *See id.* at 4.

148 *Id.* at 12.

149 David Badash, *Almost Everything You've Been Told About the Idaho Wedding Chapel Story is a Lie*, NEW C.R. MOVEMENT (Oct. 21, 2014, 12:20 PM), http://www.thenewcivilrightsmovement.com/davidbadash/how_many_lies_is_the_religious_right_willing_to_tell_in_the_idaho_for_profit_wedding_chapel_story.

150 *See* Anderson, *supra* note 9.

151 Badash, *supra* note 149.

152 *Id.*

marriages. By providing goods or services to the general public, the Knapps—just like the owner of Masterpiece Cakeshops—waive their right to rely on religious arguments to justify illiberal conduct.[153] The outcome should be different, however, if the Knapps, or any other religious community, limited its marriage services to community members only. In such a case, religious officials should not be forced to perform same-sex marriage ceremonies in the same way they should be free not to conduct opposite-sex marriages for those who are not members of the community.

C. Third Layer: State Support

Finally, the third layer of the state's pluralistic obligation toward illiberal communities relates to state support of such communities. The most common form of support is tax exemption.[154] "The federal revenue acts of 1909, 1913, and 1917" provided tax exemptions for nonprofits.[155] During the same period, Congress enabled individuals to take tax deductions for charitable contributions.[156] In the ensuing years, most if not all states have enacted similar laws exempting nonprofits from income and property taxes.[157] "This system of tax exemptions and deductions took shape partly during World War I, when it was feared that the new income tax, with top rates as high as 77%, might choke off charitable giving."[158]

Tax exemptions have many implications and this is not the proper place to discuss them all.[159] For the purposes of this Article, it should be enough to recognize that religious communities (through the

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[153] Mullins v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶40 (citing Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 19, 309 P.3d 53).

[154] *See* Laycock, *supra* note 117, at 540–41.

[155] 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/.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] For a better understanding of the implications of tax exemptions see, for example, Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 588 (1998) (exploring the broad financial relationship between the public and charitable sectors); Vaughn E. James, *Reaping Where They Have not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. L. 29, 48 (2004) (questioning American churches' satisfaction of the requirements for religious tax exemptions due to their engagement in lobbying and political activities); Wilber G. Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 94, 98 (questioning the balance made in *Walz* by the Court regarding recognition of eligibility for exemptions); Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 261 (1982) (reviewing the controversy over tax exemptions for racially discriminatory schools).

establishment of religious organizations) often enjoy tax exemptions pursuant to section 501(c)(3) of the Internal Revenue Code.[160] These exemptions contribute (in some instances, greatly) to religious communities' ability to flourish.[161] However, should religious communities enjoy this kind of state support when they reject liberal norms? Or more specifically, should religious institutions that refuse marriage services to same-sex couples be eligible for tax exemptions?

I argued earlier that this question reveals a third layer of the state's pluralistic obligation toward its citizens.[162] This is because while the first layer (communities' internal rejection of liberal norms) and the second one (refusal to provide services to nonmembers) do not involve direct or indirect state support of religious communities, the third layer does.[163] In this sense, the third layer not only requires governmental restraint but actually imposes a (financial) burden on the state to support the existence of illiberal communities.[164] Could such a demand be justified under the state's pluralistic obligation? Anderson argues that to fulfill its pluralistic obligation, the liberal state may be required not only to tolerate, or agree with, the existence of different conceptions of the good, but also to support them.[165] According to Anderson's foundational pluralistic theory, ensuring a diverse society—a main objective of the liberal state—requires more than mere acceptance of existing social conditions.[166] It necessitates a continuous effort to maintain that diversity.[167] Therefore, the state may well be required to support the existence of illiberal communities. However, the pluralistic obligation should require the state to support only those religious communities that cannot survive and flourish independently.

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[160] 26 U.S.C.A. § 501(c)(3) (2015). *See Exempt Purposes - Internal Revenue Code Section 501(c)(3)*, IRS (July 7, 2015), http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Purposes-Internal-Revenue-Code-Section-501%28c%29%283%29 ("The exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term *charitable* is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.").

[161] *See* Walz v. Tax Comm'r of New York, 397 U.S. 664, 672–73 (1970).

[162] *See supra* note 157 and accompanying text.

[163] *See supra* notes 114, 116 and accompanying text.

[164] *See supra* note 157 and accompanying text.

[165] *See, e.g.*, ANDERSON, *supra* note 63, at 149.

[166] *See id.*; Stern, supra note 19, at 145 n.9.

[167] *See, e.g.*, *id.*

Applying these insights to the practice of providing tax exemptions to religious organizations, the first question should be: What is the purpose of these exemptions? As the Supreme Court observed in *Walz v. Tax Commission of City of New York*,[168] tax exemptions were historically designed to safeguard religious communities and organizations from the dangers inherent in the imposition of taxes by intolerant governments.[169] Tax exemptions for religious organizations were intended to help religious communities flourish, out of the recognition that these groups are beneficial and have stabilizing influences on community life.[170] It seems therefore that the *Walz* Court could not make a clearer argument for the pluralistic obligation of the liberal state to ensure the existence of a multiple conceptions of the good, even those that consist of illiberal norms.

Yet, in subsequent cases, the pluralistic theory underlying *Walz* Court's ruling eroded. In *Bob Jones University v. United States*,[171] the Court held that to be exempted from tax payment under 501(c)(3), the "institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred"[172] The ruling in *Bob Jones* changed the meaning of the social requirements imposed on charitable organizations by limiting an organization's ability to reject norms prevalent in the greater society.[173] This interpretation of the tax exemption given to religious organizations under 501(c)(3) undermines the original motivation of that exemption.[174] If tax exemptions were needed to safeguard religious organizations from an intolerant government, then conditioning an exemption on compliance with social norms approved by the government turns the benefit into an empty shell.

Taking seriously the historical origins of tax exemptions, I argue we should regard them not as a state "advancement nor inhibition of religion,"[175] but as a recognition that the state has a responsibility to

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[168] Walz v. Tax Comm'r of New York, 397 U.S. 664 (1970).

[169] *Id.* at 673.

[170] *Id.* at 672–73.

[171] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[172] *Id.* at 591–92.

[173] *Id.* at 586 ("Section 501(c)(3) therefore must be analyzed and construed within the framework of the Internal Revenue Code and against the background of the congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.").

[174] *See Walz*, 397 U.S. at 673, see supra notes 173–74 and accompanying text.

[175] *Id.* at 672.

ensure a diverse society in which any citizen will be able to realize his or her conception of the good. Tax exemptions for religious organizations, according to this understanding, regain their original role as a safeguard of minority communities or those with less political clout.[176] Conditioning tax exemptions on an organization's compliance with societal norms turns the exemptions from a safeguard into a coercive measure.

Accordingly, religious communities that operate through religious organizations such as churches, synagogues, and mosques should not lose their eligibility for tax exemptions, even if they resist compliance with the universal right to marry recognized in *Obergefell*. Forcing religious communities to comply with norms that contradict their conceptions of the good in order to maintain eligibility for tax exemptions would negate the purpose of these exemptions as an instrument to ensure a pluralistic and diverse society.[177] Yet, this recognition should be limited in two ways: First, the community should have to prove that its rejection of liberal values is based on the irreconcilable conflict of those values with the community's own established norms. As the court in the *United States v. Kuch*[178] concludes, "[t]here is need to develop a sharper line of demarkation [sic] between religious activities and personal codes of conduct that lack spiritual import."[179] Second, the organizations that enjoy tax exemptions should focus their activity within the boundaries of the community and be prohibited from exporting their norms to the public sphere. I have summarized the practical guidelines for implementing the pluralistic obligation standard in Table 1.

[176] *See id.* at 673.
[177] *See id.*
[178] United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968).
[179] *Id.* at 443.

Table 1: Practical Guidelines for Implementing the Pluralistic Obligation Standard[180]

	First layer Internal community activity	**Second layer Interaction with outsiders**	**Third layer State support**
Religious community that complies with liberal norms	No limitations	No limitations	No limitations
Community that rejects liberal norms but complies with MCB	1. Should prove the inconsistency with its internal norms 2. Limited in imposing values on outsiders	Would not be considered discriminatory unless: 1. provides services for general public 2. holds public office	1. Proof of conflict with religious norms 2. Provides services to community members only
Community that rejects liberal norms as well as MCB	No exemption	No exemption	No exemption

VI. CONCLUSION

The *Obergefell* decision opens the door to a new conceptualization of the state's pluralistic obligation to protect and foster the opportunity of diverse communities to define alternative conceptions of the good. By rejecting a policy of LMR-based intervention in favor of a standard that recognizes the limited right of illiberal communities to adhere to their own values, the Court protected both the social legitimacy of illiberal communities and the values that are at the core of the liberal state.

[180] *See supra* Part V.A–C.

To assure that diverse conceptions of the good are given the opportunity to co-exist, LMR policies must give way to pluralistic policies that exempt illiberal communities from the imposition of liberal norms within their own communities. At the same time, the state must take care to prevent illiberal norms from doing harm to members of the state who are beyond the boundaries of the illiberal community. Protecting liberal progress outside of the illiberal community while respecting the right of illiberal communities to shape their own norms strikes an appropriate balance that is consistent with both the majority and the dissenting opinions in *Obergefell*.

In addition, since a liberal state has an obligation to protect the fundamental rights of all its citizens, including those who live within an illiberal community, the illiberal community's enjoyment of exemption from liberal norms should be conditioned on the community's willingness to allow its members to belong to multiple communities. Community members who are not shielded from exposure to liberal norms will be better positioned to make informed choices about staying in, working to change, or leaving the illiberal community.