

WHEN FUNDAMENTAL RIGHTS COLLIDE, WILL WE TOLERATE DISSSENT? WHY A JUDGE WHO DECLINES TO SOLEMNIZE A SAME-SEX WEDDING SHOULD NOT BE PUNISHED

INTRODUCTION

On July 6, 2015, two women walked into the Toledo Municipal Courthouse and obtained a marriage license.¹ They went to the chambers of the duty judge, Judge C. Allen McConnell, and asked him to marry them.² While they were waiting, the judge's bailiff informed them that Judge McConnell does not perform "these type of marriages."³ The couple consulted with the court clerk and another employee, who found Judge William M. Connelly, Jr. to perform the ceremony.⁴ The couple was married after approximately 45 minutes.⁵

The next day, the Toledo news outlet *The Blade* reported that the women found the incident "embarrassing" and that it "put a damper on the day."⁶ The head of EqualityToledo, a local LGBT advocacy group,⁷ went further, declaring that the couple did not deserve to be "humiliated" and that the judge's conduct was "just wrong, and we won't tolerate it. It is his duty to perform this ceremony, and if he's not willing to perform his duties, he needs to step down."⁸ On July 8, Judge McConnell issued a statement explaining that his decision to not perform the ceremony was based on his "Christian beliefs established over many years."⁹ He apologized for the delay and wished the best for the couple.¹⁰ He also noted that the courthouse had established a process to ensure that in the future homosexual couples would be married without delay, and that he had requested an advisory opinion from the Supreme Court of Ohio about whether he could "opt out of the [marriage]

¹ Lauren Lindstrom, *Judge Wouldn't Marry Us, Same-Sex Pair Says*, BLADE (July 8, 2015), <http://www.toledoblade.com/Courts/2015/07/08/Judge-wouldn-t-marry-us-same-sex-pair-says.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Road Map to Equality*, EQUALITYTOLEDO, <http://www.equalitytoledo.org/mission-vision-1/> (last visited Feb. 23, 2017).

⁸ Lindstrom, *supra* note 1.

⁹ Press Release, Judge C. Allen McConnell, Toledo Mun. Court, Statement of Judge C. Allen McConnell (July 8, 2015), <http://www.toledoblade.com/attachment/2015/07/08/Judge-C-Allen-McConnell-s-statement-July082015.pdf>.

¹⁰ *Id.*

rotation.”¹¹ Dissatisfied, the couple filed an ethics complaint against Judge McConnell, while EqualityToledo filed a similar grievance against another municipal judge.¹² The Ohio Supreme Court’s Office of Disciplinary Counsel (“the Disciplinary Counsel”) dismissed the complaint, along with a similar complaint against Judge Timothy Kuhlman, but only because the Disciplinary Counsel found it acceptable for the judges to wait for an official opinion from the Supreme Court of Ohio’s Board of Professional Conduct (“the Board”) before taking further action.¹³

On August 7, 2015, the Board issued an opinion that addressed two questions: (1) “whether a judge . . . may refuse to marry same-sex couples based on personal, moral, or religious beliefs, but continue to marry opposite-sex couples;” and (2) “whether a judge may decline to perform all marriages to avoid marrying same-sex couples.”¹⁴ The Board’s answer was “no” on both counts, stating that such a refusal would be a violation of several judicial ethics rules.¹⁵ In his statement on July 8, Judge McConnell declared his intention to abide by the guidance of the advisory opinion.¹⁶ As of this writing, he has not been asked to perform any more same-sex ceremonies.¹⁷

Should Judge McConnell, or any other judge with a conscientious objection to officiating a same-sex wedding ceremony, be punished for violating ethics rules?¹⁸ This note proposes that they should not, for three reasons: First, because it is possible to accommodate both the marriage rights of same-sex couples and the conscience rights of judges. Second, because attempting to enforce Opinion 2015-1 in Ohio, or any

¹¹ *Id.*

¹² Ryan Dunn, *Judge: Toledo Court Weddings Will Have ‘Dignity They Deserve’*, BLADE (July 10, 2015), <http://www.toledoblade.com/news/Courts/2015/07/10/Judge-Toledo-court-weddings-will-have-dignity-they-deserve.html>; Lauren Lindstrom, *Claims Against Two Judges Dismissed*, BLADE (Oct. 12, 2015), <http://www.toledoblade.com/Courts/2015/10/12/Claims-against-2-judges-dismissed.html>.

¹³ Lindstrom, *supra* note 12.

¹⁴ Supreme Court of Ohio Bd. of Prof’l Conduct, Opinion 2015-1, at 1 (Aug. 7, 2015) [hereinafter Opinion 2015-1].

¹⁵ *Id.* at 3–5, 7.

¹⁶ See Press Release, Statement of Judge C. Allen McConnell, *supra* note 9.

¹⁷ Telephone Interview with the Hon. C. Allen McConnell, Toledo Mun. Court (Dec. 21, 2015).

¹⁸ Opinions of the Board are not binding, but explain how the Board thinks the rules should be interpreted in the event of an ethics violation hearing. Opinion 2015-1, *supra* note 14, at 7. A judge facing a disciplinary hearing would have to defend his or her actions through a series of hearings, ultimately culminating in a hearing before the Supreme Court of Ohio, to “show cause” why the judge should not be disciplined in accordance with the Disciplinary Board’s recommendations. *Disciplinary Process*, SUPREME COURT OF OHIO, BD. OF PROF’L CONDUCT, http://www.supremecourt.ohio.gov/Boards/BOC/Flowchart_legal.pdf (last visited Mar. 17, 2017).

similar opinion in another state, would violate the U.S. Constitution. Third, because punishing judges for attempting to live a life consistent with their faith would be bad public policy.

In Part I, after outlining the conflict of rights created by the U.S. Supreme Court's recent decision in *Obergefell v. Hodges*,¹⁹ this Note proposes a reasonable accommodation²⁰ that preserves both the right of same-sex couples to civil marriage and the conscience rights of judges. This accommodation complies with the principal holding in *Obergefell*,²¹ without forcing a judge to engage in conduct that violates her sincerely held religious beliefs.²² Part II of this Note discusses logical and constitutional problems in the Board's Opinion 2015-1. Specifically, in Section II.A., this Note points out three weaknesses in the reasoning undergirding Opinion 2015-1; weaknesses caused by misinterpreting *Obergefell* and applying faulty analogies. In Section II.B., this Note explains the constitutional defenses a judge should raise if he or she faces discipline for declining to perform a same-sex ceremony on religious grounds in Ohio or any other jurisdiction.²³ These defenses arise from the First Amendment prohibition against the establishment of religion, and the Article VI prohibition against religious tests for public officials.²⁴ In Part III, this Note briefly discusses concerns about potential racial discrimination. Finally, this Note concludes by

¹⁹ 135 S. Ct. 2584, 2603–05 (2015) (holding that the right to marry is a fundamental right and same-sex couples are to be extended that right); *id.* at 2642 (Alito, J., dissenting) (discussing how the decision in this case violates the people's right to define marriage democratically).

²⁰ Although "religious accommodation" is a term of art normally applied to Title VII workplace discrimination claims, and even though Title VII does not apply to elected judges, the author will use the term "accommodation" throughout this Note simply because the process and outcome are functionally the same. U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, DIRECTIVES TRANSMITTAL, SECTION 12 OF THE EEOC COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION (2008); 42 U.S.C. § 2000e(f) (2012).

²¹ Simply stated, the principal holding is that same-sex couples must be allowed to marry on the same terms as opposite-sex couples. *Obergefell*, 135 S. Ct. at 2604–05.

²² See discussion *infra* Section II.B.1.a.

²³ Several other states have published similar ethics opinions. See, e.g., Neb. Jud. Ethics Comm., Opinion 15-1 (June 29, 2015) (stating that the refusal to marry a same-sex couple because of their sexual orientation manifests bias and prejudice and is prohibited under the Nebraska Revised Code of Judicial Conduct); Stipulation, Agreement, and Order of Admonishment at 3–4, *In Re Tabor*, Case No. 7251-F-158, Wash. St. Comm. on Jud. Conduct (Oct. 4, 2013) (stating that the judge in that case was required by the Code of Judicial Conduct to solemnize weddings "in a way that does not discriminate or appear to discriminate against a statutorily-protected class of people").

²⁴ Section II.B. assumes a complaint filed under Ohio law, but discusses constitutional defenses that would apply anywhere. Other defenses might be available to judges in states with their own version of a Religious Freedom Restoration Act (RFRA). The author chose Ohio as an example primarily because of Judge McConnell's story and the associated media attention, and the fact that Ohio does not have a state RFRA.

explaining why accommodating the conscientious objections of judges, while still extending civil marriage to same-sex couples, is a sound public policy compromise supported both by legal precedent and history.

I. THE PROBLEM AND A SOLUTION

The problem Judge McConnell faced was predictable, and it is not limited to Toledo.²⁵ By creating a constitutional right to same-sex marriage, the U.S. Supreme Court's decision in *Obergefell v. Hodges* created a conflict between the marriage rights of same-sex couples and the conscience rights of some public officials who perform wedding ceremonies. On one side are groups like EqualityToledo, which will not tolerate any attitude or behavior they see as interfering with marriage equality.²⁶ These groups openly call for the resignation or removal of officials like Judge McConnell who seek to preserve their conscience rights.²⁷ On the other side of the debate are public officials, some who seek to defend their own rights of conscience, and others who appear to be engaged in a broader resistance against what they see as an unjust ruling by the Supreme Court.²⁸ This Note contends that a solution can be

²⁵ See, e.g., Rose Hackman, *Meet the Alabama Judges Who Refuse to Issue Marriage Licenses – Gay or Straight*, GUARDIAN (July 12, 2015), <https://www.theguardian.com/us-news/2015/jul/12/alabama-judges-gay-marriage-licenses> (discussing judges in Alabama who have chosen not to issue any marriage licenses in response to the Supreme Court's *Obergefell* ruling); Jason Whitley, *Judge Refuses to Marry Couples as New Chapter Begins*, WFAA.COM (June 30, 2015), <http://www.wfaa.com/news/local/judge-refuses-to-marry-couples-as-new-chapter-begins/301988262> (explaining incidents in Texas where judges, justices of the peace, and county clerks have objected to officiating same-sex ceremonies or issuing marriage licenses to same-sex couples).

²⁶ See Lindstrom, *supra* note 1.

²⁷ Lindstrom, *supra* note 1. The most blatant example of this effort can be seen in Wyoming, where the Wyoming Commission on Judicial Conduct and Ethics filed a formal recommendation to the Wyoming Supreme Court that they remove a sitting municipal court judge from the bench based only on the fact that she responded to a reporter's question about same-sex marriage by stating that she would not be able to perform a ceremony but would instead defer to the other judges in her courthouse who are happy to do so. Notice of Commencement of Formal Proceedings at 4–7, Inquiry re: Hon. Ruth Neely, No. 2014-27 (Wyo. Comm'n on Jud. Conduct & Ethics Mar. 4, 2015). The Wyoming Supreme Court held on March 7, 2017, by a 3–2 vote, that the judge would be violating the state's code of judicial conduct by refusing to perform same-sex marriages. Pete Williams, *Wyoming Judge Censured for Refusing to Perform Same-Sex Marriages*, NBC NEWS (Mar. 7, 2017), <http://www.nbcnews.com/news/us-news/wyoming-judge-censured-refusing-perform-same-sex-marriages-n730351>.

²⁸ See Linda B. Blackford, *Rowan Clerk Testifies She 'Prayed and Fasted' over Decision to Deny Marriage Licenses*, LEXINGTON HERALD-LEADER (July 20, 2015), <http://www.kentucky.com/news/politics-government/article44610921.html> (describing county clerk Kim Davis's conscientious objection to issuing marriage licenses to same-sex couples with her name on them, even if issued by her subordinates); see also David French, *For an Example of Lawlessness, See the Supreme Court, Not Kim Davis*, NAT'L REV. (Sept. 4, 2015), <http://www.nationalreview.com/article/423579/example-lawlessness-see-supreme-court-not-kim-davis-david-french> (advocating that Davis and any other public official's first

found that should satisfy both sides of this conflict, both the same-sex couple seeking a civil marriage, and a judge who believes that officiating such a ceremony would be an immoral act.

A. Obergefell: *Rights in Conflict*

On June 26, 2015, the U.S. Supreme Court ruled that the fundamental right to marry must be extended to same-sex couples.²⁹ The Court's opinion recognized those with religious opposition to same-sex marriage with only a brief acknowledgment that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to *teach the principles* that are so . . . central to their lives and faiths."³⁰ But as Chief Justice Roberts pointed out in his dissent, the extension of an *unenumerated* right (marriage) to same-sex couples creates a conflict with the *enumerated* rights guaranteed to all Americans by the First Amendment.³¹ The Chief Justice carefully noted that the majority's decision did not, and could not, create any accommodation for religious practice.³² He was especially bothered by the majority's use of the words "advocate" and "teach" (describing the freedom retained by those with religious objection to same-sex marriage), while ominously failing to mention the actual guarantee of the First Amendment to *exercise* religion.³³ Justice Alito was more direct in expressing his concern, noting that the majority's comparison of traditional marriage laws to those that denied equal treatment for African-Americans and women "will be exploited by those . . . determined to stamp out . . . dissent,"³⁴ and expressing concern that those with different beliefs about marriage "will be able to whisper their thoughts in . . . their homes, but if they repeat those views in public, they will risk being labeled as bigots *and treated as such* by governments, employers, and schools."³⁵

Ironically, the impact of the decision on the religious liberty of judges or other civil officials was not addressed in any of the *Obergefell* opinions, but that issue arose almost immediately. Within weeks of the

duty is to the United States Constitution, even if that means defying a Supreme Court ruling).

²⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

³⁰ *Id.* at 2607 (emphasis added).

³¹ *See id.* at 2625–26 (Roberts, C.J., dissenting). Chief Justice Roberts specifically mentions free exercise rights. *Id.* As pointed out in Section II.B., *infra*, the conflict extends to Establishment Clause problems as well.

³² *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

³³ *Id.*

³⁴ *Id.* at 2642 (Alito, J., dissenting).

³⁵ *Id.* at 2642–43 (emphasis added).

decision, county clerks,³⁶ justices of the peace,³⁷ and judges³⁸ across the country found themselves in the same position as Judge McConnell: trying to resolve the conflict between this new, judicially-declared right to same-sex marriage and their sincerely-held religious conviction that it would be immoral for them to participate in, solemnize, or otherwise facilitate a same-sex ceremony. As these public officials attempted to navigate the conflict through various means,³⁹ the response to their efforts showed exactly how right Justice Alito was: Advocates claiming to speak for equality and tolerance vilified these public officials as bigots unfit for public service.⁴⁰

Despite the strong opinions on both sides of this conflict, it is possible to protect both marriage rights and religious liberty. Our nation has a long history of accommodating conscientious objectors, both private citizens and public employees.⁴¹ Preserving the rights of conscience of judges is important, and there is no legal reason not to provide them with a religious accommodation in this circumstance.

B. The Solution: A Reasonable Accommodation

A judge with a conscientious objection to officiating same-sex ceremonies must simply ask, privately, in whatever manner suits his or her particular work environment, to be excused from performing same-sex ceremonies and ask other judges to perform them.⁴² As is the case

³⁶ Blackford, *supra* note 28.

³⁷ See Whitley, *supra* note 25 (describing how justices of the peace and county clerks in Texas have handled the fallout of the *Obergefell* decision).

³⁸ See Hackman, *supra* note 25 (referring to judges in Alabama in similar circumstances to justices of the peace).

³⁹ Most of these officials have attempted to arrange for others to perform their function, while others have engaged in a broader defense of traditional marriage by stopping their subordinates from issuing documents with their names on them. *E.g.*, Whitley, *supra* note 25; Blackford, *supra* note 28.

⁴⁰ Lindstrom, *supra* note 1; see also Blackford, *supra* note 28 (describing county clerks who refused to issue marriage licenses to same-sex couples and were told to either do so or resign).

⁴¹ See *Selective Draft Law Cases*, 245 U.S. 366, 389–90 (1918) (holding that exemptions to compulsory military service for select individuals morally opposed to engaging in war neither establishes nor interferes with religion); *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 774, 776–77 (9th Cir. 1986) (holding that postal workers with a moral objection to processing draft cards were entitled to a reasonable accommodation of their religious beliefs, as long as it did not impose an undue hardship on the Postal Service).

⁴² Different courthouses handle wedding duties differently depending on their manning and schedule. See *infra* text accompanying notes 68–71. Accommodating an objecting judge may require some creative problem solving, but solutions are not beyond the reach of officials who are equally committed to preserving both freedom of conscience and marriage rights. Among other possible solutions, local ministers from various religious

with any other circumstance where a judge may need to recuse himself, other judges can substitute, and performing a discretionary duty like officiating a wedding ceremony is a simple task, easy to substitute one judge for another.⁴³ The details of any duty rotation may safely be left up to the local presiding judge,⁴⁴ or whoever handles those responsibilities in the jurisdiction.

When requesting this accommodation, a judge must clearly state that the objection is based solely on his or her sincerely held religious belief that it is immoral for him or her to *participate in* or otherwise facilitate a same-sex *wedding ceremony*, because of his or her religious conviction that marriage is an exclusive covenant between one man and one woman. The objection has nothing to do with the judge's feelings about the sexual orientation of the individuals involved, only the act of officiating the ceremony. If ordered to officiate a same-sex ceremony, a judge with a sincere religious belief that marriage can only be between one man and one woman is forced to make statements that directly

denominations who have no objection to same-sex marriage might be invited to perform ceremonies.

⁴³ Performing wedding ceremonies is a discretionary function for judges in nearly every jurisdiction. For instance, Ohio state law lists a judge as one of many officials who "may" solemnize marriages, along with ministers and mayors. OHIO REV. CODE ANN. § 3101.08 (LexisNexis, LEXIS through 131st Gen. Assembly). Use of the term "may" rather than "shall" is generally interpreted to grant discretion and render optional the provision to which it applies. State *ex rel.* City of Niles v. Bernard, 372 N.E.2d 339, 341 & n.1 (Ohio 1978). Several states with similar statutes also interpret performance of wedding ceremonies as discretionary. For example, see the relevant statute from Arkansas, ARK. CODE ANN. § 9-11-213 (LexisNexis, LEXIS through 2016), and Texas, TEX. FAM. CODE ANN. § 2.202(a) (West, Westlaw through 2015 Reg. Sess. 84th Leg.). Both states' attorneys general have recently opined that judges in their states are authorized, but not required, to perform marriages. Leslie Rutledge, *Opinion Regarding the Authority of Justices of the Peace to Solemnize Weddings*, Ark. Att'y Gen. Op. No. 2015-075, at 4 (Aug. 5, 2015); Ken Paxton, *Rights of Government Officials Involved with Issuing Same-sex Marriage Licenses and Conducting Same-sex Wedding Ceremonies*, Tex. Att'y Gen. Op. KP-0025, at 2-3 (June 28, 2015). A similar interpretation of Ohio's code would not be unreasonable.

⁴⁴ See OHIO REV. CODE ANN. § 1901.15 (LexisNexis, LEXIS through 131st Gen. Assembly) (granting authority to presiding judges to "distribute among the judges the business pending in the court"). Title VII protections are not available to elected officials. See 42 U.S.C. § 2000e(f) (2012) (excluding elected officials from the definition of "employee" under Title VII). Therefore, Title VII standards requiring that accommodations impose only a "de minimus" burden on the "employer" are similarly not applicable. Thus presiding judges have significant leeway to distribute the workload or make other arrangements to ensure that both marriage rights and rights of conscience are protected, including soliciting volunteer or paid ministers to be available to perform ceremonies on days when a judge is not available. In Judge McConnell's situation described in the introduction, the presiding judge quickly directed such a re-allocation of duties, demonstrating exactly how simple this accommodation would be to implement. *Presiding Judge of Toledo Municipal Court Orders All Marriages to Go Through Her Court*, BLADE (July 9, 2015) <http://www.toledoblade.com/Courts/2015/07/09/Presiding-judge-of-Toledo-Municipal-Court-orders-all-marriages-to-go-through-her-court.html>.

conflict with fundamental tenets of his faith,⁴⁵ and thus officiating the ceremony is an immoral act. Acting contrary to her beliefs in this way requires the judge to dis-integrate her moral and professional philosophies in a way that goes far beyond simply subordinating her personal preferences to follow the law. It violates her conscience as much as working on Saturday violates the conscience of a strict Seventh-day Adventist,⁴⁶ or working in a factory making war material violates the conscience of a Jehovah's Witness.⁴⁷ Not even state governments can force an individual to violate his or her conscience as a condition of keeping his or her job.⁴⁸

This accommodation is completely in keeping with the central holding in *Obergefell*, that same-sex couples are entitled to civil marriage on the same terms as opposite-sex couples.⁴⁹ No couple has a right to demand that a particular judge or other public official perform their ceremony at a particular time or place.⁵⁰ Therefore, any scheduling procedure or duty rotation that ensures same-sex couples have their ceremonies on the same terms as opposite-sex couples has no impact on the right protected by the *Obergefell* decision. The one non-negotiable aspect of any arrangement is that it must be invisible to any couple requesting marriage, because to do otherwise would not be "on the same terms" as opposite-sex couples.⁵¹ As long as every couple approaching the

⁴⁵ Performing a gay marriage ceremony would require the judge to make statements such as: "We are gathered today . . . for the joining in bond of matrimony," and "I pronounce you spouses for life." *Short Civic Wedding Service for Gay Couples*, GAYWEDDINGVALUES.COM, <http://www.gayweddingvalues.com/weddingshortcivic.html> (last visited Mar. 9, 2017). These statements are unquestionably a positive affirmation of ideas that are contrary to the judge's religious beliefs, and the judge is forced to say them when officiating the ceremony. This active involvement of the judge in the ceremony, where he or she is forced to affirm the union through actions (even if only in the name of the state), distinguishes officiating a ceremony from the administrative function of issuing a marriage license, which "merely signifies that a couple has met the legal requirements to marry." *Miller v. Davis*, 123 F. Supp. 3d 924, 943 (E.D. Ky. 2015), *stay denied*, 136 S. Ct. 23 (2015).

⁴⁶ See *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996) (holding that California may not discriminate against a Seventh-day Adventist because of his request to not work on Saturday).

⁴⁷ See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718–19 (1981) (holding that a worker who quit his job over religious objection to working on a tank production line was entitled to unemployment benefits).

⁴⁸ *Opuku-Boateng*, 95 F.3d at 1467–68.

⁴⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

⁵⁰ See *infra* notes 68–71 and accompanying text.

⁵¹ In Judge McConnell's situation, another judge married the couple with minimal delay, but the accommodation was not invisible to the couple because the bailiff told them Judge McConnell did not perform "these types of marriages." Lindstrom, *supra* note 1. This is unacceptable in practice, but also serves to illustrate how easy it is to implement the proposed solution. Without the bailiff's comment, the couple would have been married and gone on their way with absolutely no idea that the judges involved had swapped duties for a brief period of time. Unless there is some ulterior motive to try to identify a dissenting

courthouse is able to marry on the same terms, everyone's rights to civil marriage will be preserved without the need to infringe on any judge's conscience.⁵² Because both the right to civil marriage identified in *Obergefell* and the conscience rights of dissenting judges can be protected in this way, judges should not be punished for requesting such an accommodation.

II. PROBLEMS WITH OPINION 2015-1

There are two major problems with Opinion 2015-1: (1) it is based in questionable legal reasoning and (2) enforcement would violate the Establishment Clause of the United States Constitution, as well as the constitutional ban on religious tests for public office. Although Opinion 2015-1 is non-binding, it provides guidance to all members of the Ohio Bar as to how the Rules of Judicial Conduct and Rules of Professional Conduct should be interpreted.⁵³ The opinion's clear intention is to convince judges that they have a duty⁵⁴ to perform same-sex ceremonies, regardless of their conscientious objections, and to put judges on notice that refusal to perform a same-sex ceremony will be treated as judicial misconduct.⁵⁵ In fact, Opinion 2015-1 declares that a judge who refuses to "perform civil marriages"⁵⁶ for same-sex couples, while continuing to

judge and expose him to public attack, such an outcome should be completely satisfactory to any couple because their legal rights are completely preserved.

⁵² This proposal is similar to North Carolina Session Law 2015-75, Senate Bill 2, enacted in June of 2015. 2015 N.C. Sess. Laws 160. This law allows magistrates and certain other public officials to recuse themselves from duties related to wedding ceremonies because of any sincerely held religious objection, and it also includes direction to the Administrative Office of the Courts to ensure that a magistrate is made available in the event that all of the magistrates in any jurisdiction recuse themselves simultaneously. *Id.* It requires the magistrate to recuse from performing all wedding ceremonies. *Id.* The law was recently challenged in federal court, but the case was dismissed due to lack of standing. Gary D. Robertson, *Judge Dismisses Challenge to N. Carolina Gay-Marriage Law*, AP: THE BIG STORY (Sept. 21, 2016), <http://bigstory.ap.org/article/82179190eebe4602869636c27d3710b6/judge-dismisses-challenge-n-carolina-gay-marriage-law>.

⁵³ Opinion 2015-1, *supra* note 14, at 7.

⁵⁴ In a phone interview, the Ohio Board staff attorney used this language. Telephone Interview with Staff Attorney, Ohio Bd. of Prof'l Conduct (Sept. 10, 2015). Opinion 2015-1 skirts the question of whether performing weddings is a mandatory function or discretionary, calling that a legal question beyond the board's authority and simply labeling the performance of weddings as a "judicial duty." Opinion 2015-1, *supra* note 14, at 2. The author contends that both Ohio case law and reasonable interpretation of other state statutes show that performing weddings is a discretionary power that judges are authorized, but not required, to perform. *See supra* note 42 and accompanying text (describing a proposed accommodation for judges with religious objections).

⁵⁵ Such misconduct is subject to severe sanction, including suspension or even disbarment. OHIO SUP. CT. R. FOR GOV'T. BAR. R. V § 12(A)(1)–(5) (LEXIS through Dec. 15, 2016).

⁵⁶ Opinion 2015-1, *supra* note 14, at 2. The opinion uses the phrase "perform civil marriages" throughout its text. *Id.* This language confuses the issue unnecessarily, because

officiate over opposite-sex ceremonies, acts contrary to his or her judicial oath of office,⁵⁷ and violates several Rules of Judicial Conduct.⁵⁸ The opinion also states that judges who decline to perform all ceremonies in order to avoid performing same-sex ceremonies could be perceived as “manifesting an improper bias or prejudice toward a particular class,” which could require the judge’s disqualification from cases “where sexual orientation is at issue.”⁵⁹

However, the opinion contains several examples of questionable legal reasoning, and its use in support of disciplinary action should fail either one of two possible constitutional challenges. As such, neither Opinion 2015-1 in Ohio, nor any similar opinion in other states,⁶⁰ should be used as grounds to punish a judge for declining to perform a same-sex wedding ceremony.

A. Problems with the Legal Reasoning in Opinion 2015-1

A detailed analysis of every issue raised in Opinion 2015-1 is beyond the scope of this Note, but there are three significant problems worth mentioning. First, the opinion states that refusal to perform a same-sex marriage ceremony while continuing to perform opposite-sex ceremonies is “contrary to the holding in *Obergefell*,” and thus a violation of a judge’s duty to “comply with the law.”⁶¹ But the opinion overstates the central holding in *Obergefell*, leading to a faulty conclusion. The second problem lies in some very tenuous analogous reasoning about what actually constitutes a violation of the judicial oath, and what it means to uphold the law. Finally, and perhaps most significantly, the opinion misinterprets Ohio’s own standard for evaluating potential bias in a judge.

1. Refusal to Officiate a Ceremony Does Not Contradict *Obergefell*

The relevant holding in *Obergefell* simply announces that same-sex couples must be afforded the right to be married under the same conditions as opposite-sex couples, and declares state laws prohibiting

a judge does not “perform a marriage.” A judge officiates a ceremony; marriage is an institution entered into by individuals. *Ceremony*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4th ed. 1999) (“a formal act or set of formal acts established by custom or authority as proper to a special occasion, such as a wedding, religious rite, etc.”).

⁵⁷ Opinion 2015-1, *supra* note 14, at 2–3, 7 (describing violation of the judicial oath, and Judicial Conduct Rule 1.1).

⁵⁸ *Id.* at 3–5, 7 (describing violations of Judicial Conduct Rules 1.2, 2.2, 2.3, 2.4, 2.11(A), and (A)(1), and other functions or duties of judicial office).

⁵⁹ *Id.* at 7.

⁶⁰ See *supra* note 23.

⁶¹ Opinion 2015-1, *supra* note 14, at 3.

same-sex marriage invalid.⁶² This holding clearly changes the law regarding who may be civilly married across the entire nation, but it says nothing about who must perform the ceremonies.⁶³ The decision does not prescribe any duty to individual local officials,⁶⁴ and it would be unreasonable to infer that the *Obergefell* opinion grants any same-sex couple the right to demand that a particular judge marry them at a particular time, or that all officials with the authority to officiate at weddings now have an absolute duty to do so any time they are asked.

No citizen of Ohio may demand that a particular judge marry him or her at a particular time, and anyone who tried to make such an unreasonable demand would be turned away by the clerk of the court.⁶⁵ Some courthouses publish specific times when judges will perform weddings, and citizens must accept those available times or find some other official to conduct their ceremony.⁶⁶ Others do not publicize a regular schedule, but accept requests to hold weddings on a “space available/docket permitting” basis.⁶⁷ Some courthouses, especially in rural areas with only one judge, never perform weddings because their schedules do not allow for it.⁶⁸ Others do them on only specialized schedules and at irregular intervals, referring couples to other courthouses, local ministers, or mayors if they desire to be married before the next time the judge will be available.⁶⁹ Allowing any judge to withdraw from performing weddings, regardless of the reason, might cause a courthouse to adjust its schedule for performing ceremonies, but that change impacts all couples desiring to get married. Allowing an individual judge to decline to perform wedding ceremonies, or even only some wedding ceremonies, does not deprive any couple of access to civil

⁶² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015). The other holding in the case regarding state recognition of out-of-state marriages is irrelevant to the subject of this Note.

⁶³ *Id.*

⁶⁴ *See supra* note 43.

⁶⁵ Telephone interview with Sue Behnfeldt, Court Administrator, Fulton County Court of Common Pleas (Nov. 6, 2015).

⁶⁶ *See, e.g., Clerk’s Office Circuit Court for Calvert County, MD, Marriage Licenses*, MARYLAND COURTS (2017), http://www.courts.state.md.us/clerks/calvert/marriage_license.html.

⁶⁷ Telephone Interview with Assistant Clerk, Ashtabula Cty. Court of Common Pleas (Nov. 6, 2015).

⁶⁸ Zach Mitcham, *Probate Court No Longer Performing Marriage Ceremonies*, MADISON J. TODAY (July 12, 2015), <http://www.madisonjournaltoday.com/archives/7760-Probate-court-no-longer-performing-marriage-ceremonies.html>.

⁶⁹ Telephone Interview with Lisa Deters, Court Administrator, Lima Mun. Court, Lima, Ohio (Nov. 6, 2015). One of two judges at the Lima Municipal Court performs weddings, and the docket is such that they can only make time to do so every other week. *Id.*

marriage on the same terms as any other couple, so seeking such an accommodation does not contradict the central holding in *Obergefell*.

2. Trying to Follow One's Conscience Is Not Analogous to Fixing Tickets or a DUI

In addition to misconstruing the central holding in *Obergefell*, Opinion 2015-1 uses a pair of flawed analogies to declare that judges who decline to perform a same-sex ceremony are either violating their judicial oath or failing to uphold the law.⁷⁰ The Board opines that a judge's "personal, moral, and religious beliefs . . . should never factor into the performance of any judicial duty,"⁷¹ and then cites *Mississippi Judicial Performance Commission v. Hopkins*⁷² as an example to illustrate the fact that judges "yield[] the prerogative" to fulfill their responsibilities in any way other than by "fair and impartial and competent application of the law."⁷³ In that case, however, Judge Hopkins was removed from office not for allowing his religious beliefs to influence his conduct on the bench, but for a years-long pattern of severe misconduct that included: fixing tickets; allowing his clerks to dismiss tickets and covering it up by not signing his docket; dismissing criminal charges and fixing tickets in exchange for promises of information; and making a disparaging comment about a law enforcement officer to a local paper.⁷⁴ The misconduct and criminal activity⁷⁵ described in *Hopkins* hardly seems analogous to a judge who requests to be excused from performing a discretionary duty.

In addition to *Hopkins*, the opinion cites *Disciplinary Counsel v. Connor*⁷⁶ to illustrate a judge who fails to uphold the law.⁷⁷ In this case, an Ohio judge was convicted of driving under the influence twice in five years, and had a string of other alcohol- and drug-related misconduct going back fifteen years before he was subjected to any professional discipline.⁷⁸ Again, it seems patently unreasonable to draw an analogy that would label an otherwise honorable judge, who is simply seeking to

⁷⁰ Opinion 2015-1, *supra* note 14, at 2–3.

⁷¹ *Id.* at 2.

⁷² 590 So. 2d 857, 862 (Miss. 1991) (holding that allowing clerks and other officials to not comply with standard court procedures constitutes willful misconduct).

⁷³ Opinion 2015-1, *supra* note 14, at 2.

⁷⁴ *Hopkins*, 590 So. 2d at 864–66.

⁷⁵ *Id.* at 866 (discussing how Judge Hopkins was also charged with, and pled *nolo contendere* to, malicious mischief before his dismissal).

⁷⁶ 105 Ohio St. 3d 100, 103, 2004-Ohio-6902, ¶ 16, 822 N.E.2d 1235, 1238.

⁷⁷ Opinion 2015-1, *supra* note 14, at 3.

⁷⁸ *Connor*, 105 Ohio St. 3d at 100–101, 2004-Ohio-6902, ¶¶ 3–5, 822 N.E.2d at 1236–37. These multiple violations of criminal statutes warranted only a six-month suspension, which was stayed as long as he completed an alcohol abuse treatment program. *Id.* at 104, 2004-Ohio-6902, ¶ 21, 822 N.E.2d at 1239.

define the limits of his or her religious liberty rights, as a “lawbreaker” in the same vein as one guilty of multiple criminal violations of several statutes. This is especially true in the current context, where such a radical change has been wrought on the legal landscape.⁷⁹ But this is exactly the logical leap that the Ohio Board of Professional Responsibility seems to take: declining to perform a discretionary duty, for religious reasons that in virtually any other context would unquestionably be protected by the Constitution, is behavior analogous to chronic substance abuse and habitual driving under the influence. Such reasoning should not serve as a basis for disciplining a judge in any jurisdiction.

3. Refusal to Perform a Ceremony Does Not Meet Ohio’s Standard for “Manifesting Bias”

The opinion also asserts that a judge who does not perform same-sex weddings “may reasonably be perceived as having a personal bias or prejudice based on sexual orientation,” which might call his or her objectivity into question and by extension threaten public confidence in the judiciary.⁸⁰ However, in Ohio (and most other jurisdictions) judges enjoy a strong presumption of objectivity.⁸¹ By the standards established in Ohio case law, mere refusal to perform a wedding ceremony could not reasonably be considered sufficient evidence to overcome this presumption.⁸² It is therefore *unreasonable* for anyone, either a member of the public or a member of the bar, to question the objectivity of an individual judge, much less question the integrity of the judiciary as a whole, based solely on a judge’s request to not perform a same-sex wedding ceremony.

Presuming judicial bias directly contradicts Ohio’s basic rule regarding judicial impartiality, articulated in *State v. Brown*: “[b]ias or prejudice on the part of a judge will not be presumed. . . . [T]he law presumes that a judge is unbiased . . . and bias or prejudice must be strong enough to overcome the presumption of . . . integrity.”⁸³ A party seeking to disqualify a judge based on concerns about potential bias must present an affidavit with evidence that the judge has “a hostile feeling or spirit of ill-will . . . toward one of the litigants or his attorney,

⁷⁹ See *supra* note 29–35 and accompanying text.

⁸⁰ Opinion 2015-1, *supra* note 15, at 4–5.

⁸¹ *E.g.*, *State v. Brown*, 100 Ohio St. 3d 1232, 1235, 2002-Ohio-7479, ¶¶ 15–17, 798 N.E.2d 17, 19; *State v. Herrmann*, 364 Wis. 2d 336, 348, 2015 WI 84, ¶ 24, 772 N.W.2d 772, 778.

⁸² See *infra* notes 83–92 and accompanying text.

⁸³ *Brown*, 100 Ohio St. 3d at 1235, 2002-Ohio-7479, ¶ 16, 798 N.E.2d at 19 (quoting *State v. Baker*, 495 N.E.2d 976, 978 (Ohio 1984)).

with the formation of a fixed anticipatory judgment”⁸⁴ In order to overcome the assumption of impartiality the evidence must be “compelling.”⁸⁵

In one noteworthy case, *In re Disqualification of Olivito*, a prosecutor sought to have a judge removed.⁸⁶ There was uncontroverted evidence that the judge in question had made disparaging comments about the prosecutor and humiliated both the prosecutor and his assistants in open court.⁸⁷ The Supreme Court of Ohio declared that the judge’s previous actions were “egregious,” “unworthy of a judge,” and “distasteful.”⁸⁸ However, despite this declaration, the court refused to remove him from the pending cases at issue in the complaint.⁸⁹ The complaining prosecutor had an overall conviction rate of 92.9 percent in front of this particular judge, which was comparable to that achieved by other prosecutors.⁹⁰ Despite the judge’s history of bad behavior and personal insults directed at the prosecutor, the consistency in conviction rates was enough to convince the Supreme Court of Ohio that the judge’s feelings about the prosecutor could not have “manifested themselves in his official duties to the extent that his disqualification . . . is warranted.”⁹¹

If a history of personal attacks against a litigant in open court is not enough to manifest bias and get a judge removed from a case, what is?⁹² Because of the strong presumption of impartiality, involuntary disqualifications are extremely rare, but one case provides some insight as to what evidence might be required to disqualify a judge. In *State v.*

⁸⁴ *Id.* at 1233, 1235, 2002-Ohio-7479, ¶¶ 1, 14, 798 N.E.2d at 17, 19.

⁸⁵ *Id.* at 1235, 2002-Ohio-7479, ¶ 17, 798 N.E.2d at 19; *see also In re Disqualification of Hunter*, 137 Ohio St. 3d 1201, 1201, 1203, 2013-Ohio-4467, ¶¶ 2, 10–12, 997 N.E.2d 541, 541–43 (explaining that an email from the judge accusing a lawyer of forgery of court documents was insufficient evidence of bias against that lawyer).

⁸⁶ 657 N.E.2d 1361, 1361 (Ohio 1994).

⁸⁷ *Id.* at 1361–62.

⁸⁸ *Id.* at 1362.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* In *State v. Brown*, 100 Ohio St. 3d at 1235–36, 2002-Ohio-7479, ¶¶ 18–19, 798 N.E.2d 17, 19, the Ohio Supreme Court described facts that were *not* sufficient to overcome the presumption of impartiality. The judge in question told a lawyer “never appear in [my] courtroom again.” *Id.* at 1233, 2002-Ohio-7479, ¶ 3, 798 N.E.2d at 17. At the time of the filing of the request for disqualification, the judge was in the midst of a misconduct proceeding initiated after a separate complaint filed by the lawyer requesting disqualification. *Id.* at 1233, 2002-Ohio-7479, ¶ 4, 798 N.E.2d at 17. Despite this, the judge was still presumed to be objective and was *not* removed. *Id.* at 1235–36, 2002-Ohio-7479, ¶ 18–19, 798 N.E.2d at 19.

⁹² *In re Disqualification of Olivito*, 657 N.E.2d 1361, 1362 (Ohio 1994). The ninety-two percent conviction rate in Olivito was sufficient to defeat a claim of bias against the prosecutor, but the court gave no indication of what rate *would* be evidence of bias. *Id.*

Mackey (In re Disqualification of Maschari), the lawyer requesting the judge's removal had been that judge's election opponent.⁹³ He had filed grievances against the judge regarding election conduct, and both he and his law firm partners would be witnesses in disciplinary hearings that were pending against the judge as a result of those grievances.⁹⁴ The Supreme Court of Ohio considered this situation sufficient to create an appearance of impropriety if the judge was not disqualified from the case, so the judge was removed.⁹⁵ Note that even this evidence did not lead to an *assumption of bias*, just concern about the appearance of impropriety.

Applying Ohio case law to a situation where a judge had previously refused to perform a same-sex wedding ceremony, it is simply unreasonable to reach the conclusion that the judge is "manifesting bias" to the extent that he or she should even be disqualified from a pending case, let alone disciplined. Assuming for the sake of argument that a judge's objection to officiating same-sex wedding ceremonies became public knowledge, even if a party in a subsequent case believed that the judge might be biased against him or her based on his or her sexual orientation, mere belief or perception of bias on the part of a litigant is not sufficient to force the judge's disqualification.⁹⁶ Following the standard articulated in *Brown* (evidence must point to a "fixed anticipatory judgment")⁹⁷ as applied in *Olivito*, a complaining party would have to show evidence that the judge's alleged bias had *previously manifested itself* in the form of unequal outcomes for gay litigants in earlier proceedings before that judge.⁹⁸ Ohio precedent provides no clear indication of how frequently the judge would have to rule against a gay litigant in order to demonstrate a fixed anticipatory outcome.⁹⁹ Even more troubling for anyone trying to establish bias on the part of a particular judge, it is difficult to see how data to support such a claim would even be gathered. Under these conditions it appears unreasonable that a litigant should succeed in disqualifying a judge based solely on knowledge that the judge refused to perform a same-sex wedding ceremony at some point in the past. That single act should not be considered compelling evidence of a fixed anticipatory outcome against a homosexual litigant in a later proceeding, and the presumption of the judge's objectivity should stand. The judiciary should not abandon its historic presumptions of impartiality and trust simply because a

⁹³ 723 N.E.2d 1101, 1101 (Ohio 1999).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Brown*, 100 Ohio St. 3d at 1235, 2002-Ohio-7479, ¶¶ 16–17, 798 N.E.2d at 19.

⁹⁷ *Id.*

⁹⁸ *See supra* notes 90–91 and accompanying text.

⁹⁹ *See supra* note 92.

member's sincere and long-standing religious beliefs have become politically unpopular.

Even if a judge's objection to performing ceremonies was somehow construed as interfering with public confidence in the objectivity of the judiciary, the judicial recusal process provides an alternative means of assuring the public of objectivity in any given proceeding, without infringing on the conscience of any judge. In the highly unlikely event that a homosexual litigant somehow learned that the judge presiding over his case had requested to be exempt from performing same-sex weddings,¹⁰⁰ and if he honestly believed that the judge could not rule objectively in the case,¹⁰¹ he could request that the judge recuse himself. Granting the request based solely on the litigant's concerns, without any further evidence, would of course be contrary to existing precedent for recusal,¹⁰² but doing so would reassure the public without forcing the judge to act contrary to his conscience. Recusal is an acceptable way to remove judges from a case they might not be able to adjudicate fairly for *any* reason, and it could be a workable solution that preserves judges' rights of conscience while avoiding any possible concern on the part of the litigant. Recusal is never seen as an act that threatens public confidence in the judiciary; in fact, it is required for the very purpose of preserving it.¹⁰³

B. Constitutional Problems with Opinion 2015-1

If an Ohio judge faced an ethics complaint for declining to perform a same-sex wedding ceremony,¹⁰⁴ that judge would be forced to defend

¹⁰⁰ This fact pattern raises the question, "how would a litigant know?" This fact would not be public knowledge under the accommodation outlined in Section I.B.

¹⁰¹ Also, the judge would have to know that the party was homosexual. This would not be obvious unless the party made it so, or the case involved a domestic matter where both parties were homosexual. Such a hypothetical is recounted in Opinion 2015-1. Opinion 2015-1, *supra* note 14, at 6. However, in a case where both parties are homosexual, it is hard to see where any bias on the part of the judge would compromise her ability to rule fairly between the parties.

¹⁰² See *supra* notes 83–92 and accompanying text. This example is provided primarily to illustrate the absurd reasoning employed in opinion 2015-1 and the untenable situation that would result if it was followed. If merely objecting to perform a wedding ceremony was considered sufficient evidence to overcome the presumption of objectivity, then the standard articulated in *Brown* and *Olivito* has essentially been reversed. Under a standard based purely on a litigant's "perception of possible bias," the state could see a vast increase in judicial disqualifications, a situation that is surely untenable and presumably not the outcome sought by the Board of Professional Conduct.

¹⁰³ See OHIO SUP. CT. R. FOR GOV'T JUD. II.11 (LEXIS through Dec. 15, 2016) (explaining how judges have the ability to recuse themselves in matters where there is a conflict of interest).

¹⁰⁴ If courts followed the proposed accommodation from Section I.B. of this Note, there is no logical reason why any member of the public would even know that a particular judge had declined to perform a particular ceremony. However, the potential remains that

himself through a series of hearings before the Ohio Board of Professional Conduct, culminating at the Ohio Supreme Court.¹⁰⁵ Opinion 2015-1 is a good indicator of how a disciplinary board might view a judge's actions, and how it might try to apply the Ohio Rules of Judicial Conduct and the Ohio Rules of Professional Conduct in those hearings.¹⁰⁶ Lawyers and judges facing disciplinary action may challenge that discipline on constitutional grounds.¹⁰⁷ Two constitutional defenses could be raised regarding Opinion 2015-1: (1) Punishing a judge for refusing to perform a same-sex ceremony violates the Establishment Clause of the First Amendment by favoring one set of religious beliefs over another;¹⁰⁸ and (2) such punishment also creates a religious test for public office that violates Article VI of the U.S. Constitution.¹⁰⁹ Either of these defenses should succeed, making sanction under Opinion 2015-1 futile as well as unnecessary.

1. The Establishment Clause Requires Neutral Treatment of Religions

Forcing a judge to perform a same-sex wedding ceremony would violate the Establishment Clause of the First Amendment. By threatening to punish judges who are unwilling to speak and act contrary to the tenets of their faith, the State of Ohio has abandoned official neutrality regarding religion, and instead is favoring one set of theological beliefs over another, in violation of the Establishment Clause.

The U.S. Supreme Court has said many times that government neutrality towards religion is the "clearest command of the

a fellow member of the bar with knowledge of the courthouse's internal organization and an axe to grind against dissenters might attempt to take action. Or, as recent events in Wyoming reveal, members of the media might target "undesirable" judges with questions and hypothetical situations in an effort to create controversy and stir up reasons to file a complaint. *Supra* note 27. The unfortunate reality is that individuals who dissent from the politically correct dogma on this issue are already being targeted, just as Justice Alito described. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting).

¹⁰⁵ OHIO SUP. CT. R. FOR GOV'T JUD. R. II (LEXIS through Dec. 15, 2016).

¹⁰⁶ Opinion 2015-1, *supra* note 14, at 7.

¹⁰⁷ In *Lathrop v. Donohue*, 367 U.S. 820, 825 (1961), the U.S. Supreme Court held that a Wisconsin attorney could challenge the constitutionality of an order that he pay mandatory bar dues because the order of the Supreme Court establishing an integrated bar was an act "legislative in nature" and arose out of cooperation between the court and the legislature to fashion a policy for organizing the legal profession in the state. *See also* *Hayes v. N.Y. Att'y Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, 161 (2d Cir. 2012) (hearing the appeal of a First Amendment challenge to a New York rule of professional conduct brought by a New York attorney).

¹⁰⁸ *See* U.S. CONST. amend. I (prohibiting the government from actions that constitute the establishment of religion).

¹⁰⁹ *See* U.S. CONST. art. VI, cl. 3 (forbidding a religious test as a requirement for holding a governmental position).

Establishment Clause”¹¹⁰ and that the First Amendment requires the state be

neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.¹¹¹

This requirement of neutrality means that states cannot show preference for one religion over another, or one sect over another,¹¹² especially when those preferences are based on criteria that involve intrusive judgments about religious belief or practice.¹¹³ Discrimination among and within religions based on favored or disfavored beliefs or practices constitutes an excessive entanglement between government and religion.¹¹⁴

a. The Belief or Practice in Question: Integrating Faith and Vocation

To fully explain this Establishment Clause violation, we must briefly explore the concept of integrating faith and vocation. For many Christians, the idea of integrating faith with all aspects of their life is an essential religious belief. Christian institutions of higher learning,¹¹⁵ popular church leaders,¹¹⁶ and even international ministry

¹¹⁰ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

¹¹¹ *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

¹¹² *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008).

¹¹³ *Id.* at 1261.

¹¹⁴ *Id.*

¹¹⁵ Gordon College teaches students to “strive to integrate their faith into their studies and into their lives.” *The Great Conversation*, GORDON COLL., <http://www.gordon.edu/greatconversation> (last visited Jan. 14, 2017). Similarly, Notre Dame is “committed to unite and integrate its aspirations to academic excellence and religious faith.” Michael O. Garvey, *Tuition, Room and Board Announced for 2006-07*, UNIV. OF NOTRE DAME (Feb. 23, 2006), <http://news.nd.edu/news/tuition-room-and-board-announced-for-2006-07/>. Their mission statement says: “The aim is to create a sense of human solidarity and concern for the common good that will bear fruit as learning becomes service to justice.” *Mission Statement*, UNIV. OF NOTRE DAME, <https://www.nd.edu/about/mission-statement/> (last visited Jan. 14, 2017).

¹¹⁶ In Timothy Keller’s book, *Every Good Endeavor*, Keller refers to “the transformative and revolutionary connection between Christian faith and the workplace.” TIMOTHY KELLER & KATHERINE LEARY ALSDORF, *EVERY GOOD ENDEAVOR: CONNECTING YOUR WORK TO GOD’S WORK 2* (2012). Keller discusses at length the wide variety of approaches to work advocated by different faith groups and different branches of Christianity. *Id.* at 3–5. Keller proffers the idea that “Christianity gives us very specific teachings about human nature and what makes human beings flourish. We must ensure that our work is done in line with these understandings.” *Id.* at 4–5. Ultimately, Keller calls his readers to a new conception of work: a concept where the Christian’s labor, in

organizations¹¹⁷ all teach Christians that they should not leave their faith at home, or confine it only to church on Sunday morning, but instead should live it out in their communities. These groups are inspired by passages from the Bible: “Whatever you do, work at it with all your heart, as working for the Lord, not for men, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Christ you are serving.”¹¹⁸

It is important to point out that these commands are not meant only for the clergy. Professionals in all fields are called to serve God through vocational excellence, with schools like Regent University School of Law and Liberty University School of Law leading the way in teaching new lawyers to integrate their faith with the practice of law.¹¹⁹ Regent Law’s Center for Ethical Formation and Legal Education Reform conducts significant research exploring the importance of an integrated approach to the legal profession, and its faculty publish scholarship on professional identity formation nationwide.¹²⁰ The Center advocates a Christian lawyer’s “duty to integrate his personal moral commitment into his vocational life”¹²¹ because lawyers who try to bifurcate their personal moral abilities from their professional roles engage in a “problematic form of self-deception.”¹²² The Center also highlights a wide variety of research to support the position that lawyers cannot achieve

whatever vocation he or she chooses, is an extension of God’s creative work, is oriented towards God Himself, and must be done distinctively and for His glory. *Id.* at 200–01.

¹¹⁷ The London Institute for Contemporary Christianity states on their website that they were founded by John Stott “with the core belief that every part of our lives comes under the lordship of Christ and that all of life is a context for worship, mission, ministry and active Christian engagement.” *About LICC*, LONDON INST. FOR CONTEMP. CHRISTIANITY, <http://www.licc.org.uk/about-licc> (last visited Jan. 14, 2017). Their philosophy of work is: “Our work matters to God because we matter to God, and he has given us a creative role to play in his world.” *WorkForum*, LONDON INST. FOR CONTEMP. CHRISTIANITY, <http://www.licc.org.uk/resources/resources-2/work-forum/> (last visited Jan. 14, 2017).

¹¹⁸ *Colossians* 3:23–24 (New International Version).

¹¹⁹ Regent University School of Law teaches that “[l]aw is more than a profession, it’s a calling.” *Faculty Overview*, REGENT UNIV. SCH. OF LAW, http://www.regent.edu/acad/schlaw/faculty_staff/home.cfm (last visited Jan. 14, 2017). Regent encourages its students to “engage the world through Christian legal thought and practice.” *Mission Statement*, REGENT UNIV. SCH. OF LAW, <http://www.regent.edu/acad/schlaw/whyregentlaw/mission.cfm> (last visited Jan. 14, 2017). Liberty University School of Law promotes a similar philosophy, teaching law “[t]hrough the integration of faith and reason” to prepare students to “make an impact on [their] community, nation, and the world.” *LIFE Demands ACTION*, LIBERTY UNIV. SCH. OF LAW, <http://www.liberty.edu/christian-law-school/> (last visited Jan. 14, 2017).

¹²⁰ *About Us*, CEFLER, <http://www.cefler.org/about/> (last visited Jan. 14, 2017).

¹²¹ Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U. L. REV. 233, 259 (2004).

¹²² *Id.* at 250.

meaningful success in practice unless they integrate their personal moral framework into their professional decision-making.¹²³ The Center teaches that every Christian lawyer has a duty to honor God through professional excellence and a commitment to justice.¹²⁴ This integration of faith and work is a religious belief that cannot be confined to one's home, or church on Sunday mornings; it is meant to be lived out day to day. Perhaps inadvertently, the statute defining the Ohio Judicial Oath of Office seems to recognize the importance of such an integrated approach to judicial service by allowing an optional closing line at the end of the oath: "This I do as I shall answer unto God."¹²⁵

For the judge who seeks to integrate his faith and profession, officiating a same-sex wedding ceremony puts faith and work in direct conflict. He views officiating the ceremony as an immoral act in itself, and forcing a judge who holds this belief to officiate at a same-sex ceremony would be the equivalent of forcing a doctor with moral objections to abortion to actually perform an abortion,¹²⁶ forcing Seventh-Day Adventist to work on a Saturday, or forcing a pacifist to serve in combat. Of course, not all Christian judges hold to this practice of integrating faith and vocation, and some Christians have no problem at all with same-sex marriage. In the same manner, not all doctors have a moral opposition to abortion, not all Seventh-day Adventists are strict adherents to their Saturday Sabbath, and not all pacifists object to military service.¹²⁷ But the First Amendment protects religious belief based on the sincerity of the believer; it does not allow the state to distinguish between different levels of "religiosity" or promote preferred beliefs over other less preferred ones.¹²⁸

b. Opinion 2015-1 Disfavors One Belief While Favoring Another

In *Colorado Christian University v. Weaver*, the Tenth Circuit reviewed a Colorado law that distinguished between religious beliefs in a way that favored one over another.¹²⁹ Colorado had established a scholarship program that was open to students who attended secular universities, or religious universities that were sectarian, but prohibited

¹²³ *Id.* at 250 & n.100.

¹²⁴ Jeffrey A. Brauch, *Questions of Professional Identity*, BEYOND THE RULE, <http://beyondtherule.blogspot.com/2016/02/questions-of-professional-identity.html> (last visited Feb. 21, 2017).

¹²⁵ OHIO REV. CODE ANN. § 3.23 (LexisNexis, LEXIS through 131st Gen. Assembly).

¹²⁶ The Church Amendments and other subsequent legislation prevent healthcare workers from being forced to perform medical procedures they find morally objectionable. *See infra* note 203.

¹²⁷ *See infra* note 197.

¹²⁸ *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008).

¹²⁹ *Id.*

the use of scholarship funds at schools deemed “pervasively sectarian.”¹³⁰ Because the law distinguished between religiously affiliated schools based on their “degree of religiosity,”¹³¹ the court determined that it constituted discrimination *among* religions,¹³² based on criteria that required the state to make “judgments regarding matters of religious belief and practice.”¹³³ The Tenth Circuit struck down the Colorado law, finding that the discrimination among religions was a violation of the Establishment Clause even if it was unintentional, or not based on animus toward one set of beliefs.¹³⁴ The Tenth Circuit cited several Supreme Court decisions to illustrate this point, noting that favoring one set of beliefs or practices (the less sectarian over the “pervasively sectarian” school) “collides with . . . decisions that . . . prohibit[] governments from discriminating in the distribution of public benefits based upon religious . . . sincerity.”¹³⁵ The Tenth Circuit also reiterated the Supreme Court’s direction that “‘religious liberty is a right to government neutrality,’ . . . not just . . . avoidance of bigotry”¹³⁶ and that the First Amendment prohibits “official action that targets religious conduct for distinctive treatment.”¹³⁷

Following the ruling from *Weaver* and the supporting cases cited therein, any state action that punishes one judge rather than another based on the strength of that judge’s desire to integrate her faith with her professional life, or the depth of his commitment to his church’s teachings about the immorality of same-sex wedding ceremonies, is a violation of the Establishment Clause. Punishing a judge who asks not to officiate a same-sex wedding ceremony because she believes that performing the ceremony would be immoral, and because her desire to integrate her faith and her profession demands that she act morally in all aspects of her work life, constitutes a clear action by the state to disfavor that judge’s particular religious beliefs.¹³⁸ Just as the Colorado law conferred a benefit to schools that were “sectarian” but not “pervasively sectarian,” this kind of application of the judicial ethics

¹³⁰ *Id.* at 1250, 1256.

¹³¹ *See id.* at 1259 (holding that such discrimination is forbidden).

¹³² *Id.* at 1256; *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (holding that such discrimination between religions is forbidden).

¹³³ *Weaver*, 534 F.3d at 1256.

¹³⁴ *Id.* at 1259–61.

¹³⁵ *Id.* at 1258 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

¹³⁶ *Id.* at 1260 (quoting Douglas Laycock, Comment, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004) (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990)).

¹³⁷ *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993)).

¹³⁸ *Id.* at 1258.

rules favors judges who are non-religious, or only “slightly religious,” by singling out for sanction any judge who is “too religious” and who believes that his faith must impact his public life, rather than being simply a private matter confined to home and church. The Establishment Clause prohibits such disfavor of religion.

2. Opinion 2015-1 Creates a Religious Test for Public Office

The other defense a judge should raise at a hearing based on Opinion 2015-1 is that requiring a judge to “check [his] personal beliefs at the door”¹³⁹ and act in violation of his conscience in order to avoid dismissal is an unconstitutional religious test for public office.

The U.S. Constitution states that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”¹⁴⁰ Although Ohio has not created a facial religious test or “test oath[,]” a rule that threatens judges with dismissal based on their desire to integrate their faith and work constitutes a religious test as applied to them.

The Supreme Court addressed the issue of religious tests for public officials in *Torcaso v. Watkins* in 1961.¹⁴¹ In that case, the State of Maryland attempted to deny an atheist his commission as a notary public because he refused to affirm a belief in the existence of God.¹⁴² The Court struck down Maryland’s law requiring such an affirmation,¹⁴³ pointed out that test oaths are “abhorrent to our tradition,”¹⁴⁴ and discussed the relationship between Article VI and the First Amendment.¹⁴⁵ The Court explained the close connection between these two constitutional provisions by reaffirming the rule that no state can impose any requirements that aid religious believers over non-believers, or that aid religions based on a belief in God over other forms of belief.¹⁴⁶

Later, in *McDaniel v. Paty*, the Supreme Court struck down a Tennessee law that prohibited clergy members from running for office, and further discussed the nexus between religious practice and religious tests.¹⁴⁷ Tennessee had retained its clergy disqualification statute out of

¹³⁹ Telephone Interview with Staff Attorney, Ohio Bd. of Prof'l Conduct (Sept. 10, 2015).

¹⁴⁰ U.S. CONST. art. VI, cl. 3.

¹⁴¹ 367 U.S. 488, 490–91 (1961).

¹⁴² *Id.* at 489.

¹⁴³ *Id.* at 496.

¹⁴⁴ *Id.* at 491.

¹⁴⁵ *See id.* at 490–92 (describing how the founders included anti-establishment and free exercise protections to complement the religious test prohibition, and the historical reasons for both).

¹⁴⁶ *Id.* at 495.

¹⁴⁷ 435 U.S. 618, 628–29 (1978) (plurality opinion).

concern that allowing ministers to hold legislative office would endanger the separation of church and state, because the ministers, if elected, might use legislative power to promote the interests of one church, or thwart those of another.¹⁴⁸ A plurality of the court found the Tennessee law a violation of only the Free Exercise Clause and did not specifically reach a decision regarding an Establishment Clause violation.¹⁴⁹ In a brief survey of the history of clergy-disqualification laws, the Court noted that the rest of the country had long since determined that decisions about whether clergymen could be trusted to legislate fairly were best left up to the voters.¹⁵⁰ In a concurring opinion, Justices Brennan and Marshall added that the law also violated the Establishment Clause because it manifested hostility (not neutrality) towards religion by forcing a minister to abandon his ministry in order to seek public office.¹⁵¹ Such a law had the principal effect of inhibiting religion.¹⁵² Justices Brennan, Marshall, and Stewart also found the Tennessee law to be a religious test virtually identical to that in *Torcaso*, because disqualifying an individual from public office based on his or her level of religious involvement (his or her status as a minister) or intensity of belief constitutes just as much of a religious test as one favoring those that belong to a particular denomination, or who will profess a particular belief.¹⁵³

In another significant point from *Torcaso*, Maryland claimed that its oath was acceptable and did not compel anyone to believe or disbelieve anything because *no one is compelled to hold office*.¹⁵⁴ An Ohio Board of Professional Responsibility staff attorney expressed a similar philosophy during a phone interview with the author, stating that nobody is forced to be a judge.¹⁵⁵ But this reasoning was flatly rejected by the Court in *Torcaso*: “the fact . . . that a person is not compelled to hold

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (the state failed to provide any evidence showing that its fear of clergymen legislating their theology was still valid).

¹⁵⁰ *Id.* at 622–25.

¹⁵¹ *Id.* at 636 (Brennan, J., concurring).

¹⁵² *Id.*

¹⁵³ *See id.* at 632 (Brennan, J., concurring) (“A law which limits political participation to those who eschew prayer, public worship, or the ministry as much establishes a religious test as one which disqualifies Catholics, or Jews, or Protestants.”). Three of the justices concurred that *Torcaso* should control in *Paty* and that the law was a religious test. *Id.* at 629, 642–43. The rest of the court agreed that the clergy disqualification law was unconstitutional but on free exercise grounds. *Id.* at 629.

¹⁵⁴ *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

¹⁵⁵ Telephone Interview with Staff Attorney, Ohio Bd. of Prof'l Conduct (Sept. 10, 2015).

public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.”¹⁵⁶

As described in Section II.B.1.a, a judge’s request to be excused from officiating same-sex weddings is rooted in his or her religious duty to integrate faith and vocation, a duty which requires him to act morally at all times. Punishing a judge because he is unwilling to act contrary to his beliefs in order to keep his job is no different than forcing him to act contrary to his beliefs in order to get the job in the first place. Any lawyer who meets the statutory qualifications in Ohio has the right to run for the office of judge.¹⁵⁷ If the Ohio Supreme Court applies the reasoning in Opinion 2015-1 to punish a judge whose belief in integrating her faith and work requires that she ask to be excused from performing same-sex weddings, then the Court has effectively “conditioned the exercise of one [right] on the surrender of the other.”¹⁵⁸ Or, in James Madison’s words, the state is “punishing a religious profession with the privation of a civil right.”¹⁵⁹ Such a practice is a religious test for public office and violates Article VI of the Constitution.

III. WHAT ABOUT RACE?

Opponents of allowing liberty for judges in this kind of situation are quick to draw analogies between judges objecting to same-sex weddings and those who objected to interracial marriage before and during the civil rights era.¹⁶⁰ The authors of one paper opposing religious-based exemptions such as the one this Note proposes even found an example of a Louisiana justice of the peace who resigned in 2009 in the face of a lawsuit over his refusal to officiate an interracial wedding.¹⁶¹ Such examples, while undoubtedly very rare, must still be addressed. There is a simple reason an objection to performing a same-sex wedding ceremony should be treated differently than an objection to performing an interracial ceremony: sexual orientation and race are not analogous characteristics.

¹⁵⁶ *Torcaso*, 367 U.S. at 495–96.

¹⁵⁷ See, e.g., OHIO REV. CODE ANN. § 1901.06 (LexisNexis, LEXIS through 131st Gen. Assembly) (describing qualifications for judges in Ohio Municipal Courts); OHIO REV. CODE ANN. § 2301.01 (LexisNexis, LEXIS through 131st Gen. Assembly) (describing qualifications for judges in Ohio Courts of Common Pleas).

¹⁵⁸ *Paty*, 435 U.S. at 626.

¹⁵⁹ JAMES MADISON, *Observations on the “Draught of a Constitution for Virginia”*, in 5 THE WRITINGS OF JAMES MADISON 284, 288 (Gaillard Hunt ed., 1904).

¹⁶⁰ Ronald Turner, *Same-Sex Marriage and Loving v. Virginia: Analogy or Disanalogy?*, 71 WASH. & LEE L. REV. ONLINE 264, 266 (2015), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss4/4>.

¹⁶¹ Memorandum from the Public Rights/Private Conscience Project, *Religious Exemptions & Racial Justice: A Preliminary Exploration/Discussion Paper 6–7* (June 2015) (on file with the Columbia Law School Library).

Race is undisputedly innate and immutable,¹⁶² but sexual orientation is neither. In its brief supporting the petitioners in *Obergefell*, the American Psychological Association (“APA”) did not even assert that sexual orientation is innate or immutable. It noted only that sexual orientation is “Generally Not Chosen” and “Highly Resistant to Change.”¹⁶³ Regarding causation, the APA acknowledges that multiple factors, both biological and environmental, contribute to sexual orientation in varying degrees from individual to individual.¹⁶⁴ Evidence regarding immutability is also inconsistent. The APA is on the record stating that changes in sexual orientation are rare, and efforts to effect change by therapeutic means are “unlikely to succeed.”¹⁶⁵ However, work by other researchers has challenged the conclusions of the 2009 APA task force report¹⁶⁶ and found some changes in sexual orientation to be possible in some circumstances.¹⁶⁷ An additional study shows some changes in sexual orientation occurring naturally over time, with no outside influence of any kind.¹⁶⁸ Taken collectively, this research shows that meaningful change in sexual orientation is possible for some people, along a continuum and in response to various psychotherapeutic means.¹⁶⁹ Because the current scientific research shows sexual orientation to be a product of multiple factors, not all of which are biological, and subject to varying degrees of change for a variety of

¹⁶² Webster’s distinguishes these terms, defining “innate” as “existing naturally rather than acquired” and “immutable” as simply “never changing or varying; unchangeable.” Compare MICHAEL AGNES & DAVID B. GURALNIK, WEBSTER’S NEW WORLD COLLEGE DICTIONARY 736 (4th ed. 1999), with *id.* at 714. Judicial precedent seems to combine the ideas, defining immutability not just as something unchangeable, but also a characteristic “determined solely by accident of birth.” *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (1991) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 229 n.11 (1981)).

¹⁶³ Brief of the American Psychological Ass’n et al. as Amici Curiae in Support of Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713 [hereinafter Brief of the APA].

¹⁶⁴ See AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 2 (2008), <http://www.apa.org/topics/lgbt/orientation.pdf> (discussing the complex roles that nature and nurture both play in sexual orientation).

¹⁶⁵ Brief of the APA, *supra* note 163, at 9 (citing AM. PSYCHOL. ASS’N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009)).

¹⁶⁶ See, e.g., Stanton L. Jones & Mark A. Yarhouse, *Sexual Orientation and Skin Color: Deconstructing Key Assumptions in the Debates about Gay Marriage and the Church*, in HOMOSEXUALITY, MARRIAGE, AND THE CHURCH 413, 429 (Roy E. Gane et al. eds., 2012) (suggesting that a change of sexual orientation for some individuals may be possible, based on studies reviewed by the APA task force).

¹⁶⁷ *Id.* at 431.

¹⁶⁸ *Id.* at 427–28.

¹⁶⁹ *Id.* at 432.

reasons, it is impossible to say that sexual orientation is either innate or immutable.

According to the APA, it is not even correct to describe sexual orientation as an individual characteristic.¹⁷⁰ In another section of its *Obergefell* amicus brief, the APA stated that sexual orientation is not an individual characteristic “because sexual orientation necessarily involves *relationships* with other people Indeed, it is only by acting with another person—or desiring to act—that individuals express” their sexual orientation.¹⁷¹ This requirement for interaction with another person to express the characteristic in question, i.e. sexual orientation, is another distinction between orientation and race. No person needs to interact with another person to manifest his or her race or skin color.

Activists advance the flawed analogy between race and sexual orientation so often that it has permeated the media almost unchallenged.¹⁷² It even influences legal discussions like one between Solicitor General Verrilli and Justice Alito during oral argument in *Obergefell*. In that exchange, Justice Alito asked the Solicitor General about the possible impact that recognition of same-sex marriage might have on religious colleges who uphold Biblical ideas about sexual ethics, and expect students, faculty, and staff to do the same in their behavior.¹⁷³ Mentioning *Bob Jones University v. United States*,¹⁷⁴ where the Supreme Court upheld the IRS decision to strip Bob Jones University of its tax exempt status for maintaining racially discriminatory policies about student dating, Justice Alito asked the Solicitor General if religious institutions might face the same government sanction if they persist in opposing same-sex marriage.¹⁷⁵ In an answer that caused quite a stir among the community of religiously affiliated education institutions, Solicitor General Verrilli acknowledged, “[I]t is going to be an issue.”¹⁷⁶ This entire exchange, and especially General Verrilli’s response, was based on an assumption that race and sexual orientation are the same kind of individual characteristic, and

¹⁷⁰ Brief of the APA, *supra* note 163, at 10.

¹⁷¹ *Id.*

¹⁷² See, e.g., Kurt Eichenwald, *Blaming People for Being Gay is Like Blaming Them for Being Left-Handed*, NEWSWEEK (May 15, 2015), <http://www.newsweek.com/2015/05/15/gay-choice-science-homosexuality-328285.html>.

¹⁷³ Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter *Obergefell* Oral Argument Transcript].

¹⁷⁴ 461 U.S. 574 (1983).

¹⁷⁵ *Obergefell* Oral Argument Transcript, *supra* note 173, at 38.

¹⁷⁶ *Id.*; see also Albert Mohler, *It’s Going To Be an Issue: Obama Admin Admits to Supreme Court that Gay ‘Marriage’ Threatens Religious Liberty*, LIFE SITE (Apr. 29, 2016), <https://www.lifesitenews.com/opinion/its-going-to-be-an-issue-obama-admin-admits-to-supreme-court-that-gay-marri> (expressing concern over General Verrilli’s answer to Justice Alito’s question).

should be treated the same way for the purposes of legal analysis. The same assumption underlies the idea that “renouncing interracial marriage [is] very similar to . . . the objections currently raised against same-sex marriages”¹⁷⁷ and thus should be treated the same way. That assumption is flawed, because whatever kind of characteristic sexual orientation might be, it is decidedly *not* the same as race. Therefore, objections to same-sex ceremonies (religious or otherwise) are decidedly *not* the same as objections to interracial weddings, at least not in the way that same-sex marriage supporters have been advocating.¹⁷⁸ Weak analogies might pass muster in media advocacy, but they have no place in legal reasoning, especially when deciding questions about fundamental liberties.

CONCLUSION: WHY WE SHOULD MAKE ROOM FOR CONSCIENTIOUS
OBJECTORS

At this point a reader might wonder: Why make an issue of this? Why go to this trouble? Why not just leave this as a simple choice and make judges perform all ceremonies, or resign from the bench? Certainly some groups, such as EqualityToledo, find this to be the only possible way forward, and they have said so publicly.¹⁷⁹ But to make such a broad statement would be to force people from a wide swath of our culture out of public service. Public opinion may be shifting in favor of allowing same-sex couples to marry,¹⁸⁰ but support for protection of the religious liberty of those objecting to same-sex marriage remains even higher.¹⁸¹ As Justice Kennedy pointed out when writing for the Court in *Obergefell*,

¹⁷⁷ BRIAN POWELL ET AL., *COUNTED OUT: SAME-SEX RELATIONS AND AMERICANS' DEFINITIONS OF FAMILY* 101 (Diane Barthel-Bouchier et al. eds., 2010).

¹⁷⁸ Another objection frequently raised is that “discrimination is still discrimination” and it “should not be tolerated.” Elizabeth Baier, *Proposal Protects Transgender Rights*, SUN SENTINEL (Sept. 16, 2007), http://articles.sun-sentinel.com/2007-09-16/community/0709130323_1_transgender-anti-discrimination-policy-commissioners. This is another line that gets traction in the media, but has no business in serious legal discourse. States already discriminate (for the purposes of issuing marriage licenses) based on age, familial status (cousins & siblings are generally not allowed to marry), and marital status (polygamy remains illegal, at least for now). A broader examination of status-based discrimination, regulation of and objections to behaviors (as opposed to individual status) and anti-discrimination law is beyond the scope of this Note, but any serious discussion of these issues must get beyond simply lumping all reasons for alleged “discrimination” together and condemning them all. When evaluating claims based on conflicting rights, different justifications and characteristics must be evaluated individually in order to achieve truly just results.

¹⁷⁹ Lindstrom, *supra* note 1.

¹⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

¹⁸¹ David Crary & Emily Swanson, *Sharp Divisions After High Court Backs Gay Marriage*, AP-GFK POLL (July 18, 2015), <http://ap-gfkipoll.com/featured/findings-from-our-latest-poll-22> (“While 39 percent said it’s more important for the government to protect gay rights, 56 percent said protection of religious liberties should take precedence.”).

“fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”¹⁸² The clearly enumerated rights of all Americans to be free from official establishment of religion, and to hold public office without submitting to a religious test, are at least as fundamental as same-sex couples’ right to civil marriage.¹⁸³ There are compelling lessons from history that show the positive impact of religious ideas on public policy, and the benefit of allowing people with a wide variety of faiths to participate as full members of society. We have a long tradition in this country of accommodating conscientious objectors,¹⁸⁴ and it would be bad public policy to abandon that tradition now.

Religion had a profound impact on the founders of our nation, and the religious or theistic worldview that undergirded the American Revolution was the primary philosophical distinction between it and the French Revolution.¹⁸⁵ Our revolution was premised on the idea that all persons are “endowed by their Creator with certain unalienable Rights,”¹⁸⁶ while its continental counterpart was based in pure reason and overt hostility toward religion of any kind.¹⁸⁷ History reflects the different outcomes of these two systems: the French Revolution soon devolved into bloody anarchy and counter-revolution while America, despite its shortcomings and struggles, prospered to become a beacon of freedom and prosperity to the world.

Outside observers like Alexis de Tocqueville also noted the impact religion had on American society at the founding, observing that religion “not only tended to anchor the souls of individuals, but contributed to the well-being of society.”¹⁸⁸ Indeed, the influence of religion on politics and on the founders’ ideas about the form of government at the time of our nation’s birth is impossible to deny.¹⁸⁹ The concept of “private morality” separate from a public official’s work was completely foreign to the

¹⁸² *Obergefell*, 135 S. Ct. at 2606, (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁸³ *Id.* at 2597, 2607. The irony should not be lost that Justice Kennedy supported the Court’s discovery of a new fundamental right, which is clearly in conflict with existing religious liberty rights, while referring to the First Amendment’s free exercise of religion. *Id.* at 2607.

¹⁸⁴ See *infra* notes 197–201 and accompanying text.

¹⁸⁵ See JOSHUA CHARLES, *LIBERTY’S SECRETS: THE LOST WISDOM OF AMERICA’S FOUNDERS* 87 (2015) (noting that the American Revolution was advanced on the doctrine of unalienable rights supplied by the Creator, while the French Revolution contended that the rights of man were based on reason, not religion).

¹⁸⁶ THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

¹⁸⁷ CHARLES, *supra* note 185, at 87.

¹⁸⁸ *Id.* at 93.

¹⁸⁹ *Id.* at 100–01.

founders.¹⁹⁰ Even Thomas Jefferson, in his famous letter to the Danbury Baptists, pointed out that man has “no natural right in opposition to his social duties.”¹⁹¹ This statement immediately follows the famous “wall of separation” clause in that letter that has given rise to the false idea that religion and public life were supposed to be totally separated.¹⁹² The philosophical “godfather” of the separation of church and state was actually advocating for two ideas simultaneously: that the church and the government should be *institutionally* separated, while individuals’ religious freedom (one of their “natural rights”) in no way conflicted with their social duties (i.e. how they function in society).¹⁹³

Most importantly, Jefferson and the rest of the founders advocated for separation of church and state precisely to avoid the kind of forced uniformity and blind obedience that existed across Europe at the time, which the colonists had fled in the first place.¹⁹⁴ They built protections into both the Free Exercise Clause and the Establishment Clause, so that America would not see practices like those forced on European Jews who had been required to “convert” to Catholicism in public and were forced to practice their Jewish faith only in private.¹⁹⁵ Jefferson knew that forcing a person to act in public in a way that contradicted his faith made “half the world fools, and the other half hypocrites.”¹⁹⁶

Throughout our history, America has protected the consciences of a variety of believers. We have allowed those with religious objections to avoid bearing arms in combat by serving as medics,¹⁹⁷ and even to avoid military service altogether.¹⁹⁸ We created civil rights protections based on religion in our employment laws,¹⁹⁹ and applied those rights to both private employment²⁰⁰ and public service.²⁰¹ In recent years, we have

¹⁹⁰ *Id.* at 115.

¹⁹¹ THOMAS JEFFERSON, *Reply to the Danbury Baptist Association*, in 36 THE PAPERS OF THOMAS JEFFERSON 253, 258 (Barbara B. Oberg ed., 2009).

¹⁹² *Id.*

¹⁹³ CHARLES, *supra* note 185, at 123.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 124.

¹⁹⁶ *Id.*

¹⁹⁷ A well-known example is that of Desmond Doss, a Seventh-day Adventist who objected to bearing arms or killing but served as an Army medic in World War II and was awarded the Medal of Honor. *Desmond Doss: The Real Story*, DESMOND DOSS, <http://www.desmonddoss.com/bio/bio-real.php> (last visited Jan. 27, 2017). Doss’s story was recently told in the film *Hacksaw Ridge*, released in theaters nationwide in November of 2016. HACKSAW RIDGE (Summit Entertainment 2016).

¹⁹⁸ Selective Draft Law Cases, 245 U.S. 366, 376 (1918).

¹⁹⁹ See 42 U.S.C. § 2000e-2(a)(2) (2012) (identifying religion as a class protected from discrimination in employment).

²⁰⁰ TWA v. Hardison, 432 U.S. 63, 66 (1977).

²⁰¹ Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 774 (9th Cir. 1986).

recognized more unenumerated rights through substantive due process,²⁰² and when those rights have come in conflict with enumerated rights we have found ways to accommodate both sides of the conflict.²⁰³ This conflict should be no different.

With minimal effort, judges with religious objections to performing same-sex wedding ceremonies can be accommodated in a way that neither denies same-sex couples their right to civil marriage, nor endangers the public's faith in the impartiality of the judiciary. Assuming, with no other evidence, that a judge who wishes not to perform same-sex weddings, or any weddings, would be unable to rule objectively in another case or controversy involving a homosexual litigant violates Ohio's own standards for evaluating a judge's objectivity. To sanction a judge under such an assumption demonstrates a clear bias against judges who are trying to live and work according to their religious beliefs, and favoritism towards those who do not hold similar beliefs, in violation of the Establishment Clause of the First Amendment. As applied in this type of situation, a policy of "perform the ceremony or step down" constitutes nothing less than a religious test for holding judicial office, in violation of Article VI.

Writing for the Court in *West Virginia State Board of Education v. Barnette*,²⁰⁴ Justice Jackson articulated well the concerns of modern proponents of religious liberty:

Struggles to coerce uniformity of sentiment in support of some end thought essential . . . have been waged by many good as well as . . . evil men. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.²⁰⁵

As we move forward, we need only ask ourselves if we are going to find a way to live together in a pluralistic society, with room for those who think differently about the issue of same-sex marriage to participate fully in public life, or if we will become a nation like Justice Alito warns us about, where those whose faith points them in a different direction

²⁰² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481, 485–86 (1965) (identifying the right to privacy that applied to the use of contraceptives); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (identifying a right of personal privacy).

²⁰³ E.g., 42 USC § 300a-7 (2012) ("No individual shall be required to perform or assist in the performance of any part of a health service program . . . if his performance . . . of such . . . activity would be contrary to his religious beliefs or moral convictions.").

²⁰⁴ 319 U.S. 624 (1943). In *Barnette*, a group of Jehovah's Witness school children were suspended for refusing to recite the pledge of allegiance—an act which they perceived as idolatry and which was therefore in conflict with their religious beliefs. *Id.* at 629. The Court held that the students could not be forced to recite the pledge in violation of their conscience. *Id.* at 637–38, 642.

²⁰⁵ *Id.* at 640–41.

are free only to “whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”²⁰⁶ Let it be the former.

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²⁰⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting).

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