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Nicholas J. Schilling Jr.

*Notre Dame Law School, JD Candidate 2017*

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# ANALYSIS OF STATUTORY RELIGIOUS ACCOMMODATIONS FOR STATE-EMPLOYED RELIGIOUS OBJECTORS TO SAME-SEX MARRIAGE SOLEMNIZATION

NICHOLAS J. SCHILLING, JR.\*

“Americans like to think of themselves as uncompromising. But our true genius is our compromise. Our whole government’s founded on it.”<sup>1</sup>

## ABSTRACT

*The Supreme Court’s landmark decision in Obergefell v. Hodges legalized same-sex marriage. The decision aggravated a tension between advocates of protection of religious beliefs that reject as wrong same-sex marriage and sponsors of the new legal norm of same-sex marriage as a fundamental right.*

*Prior to—and in response to—the Supreme Court’s decision in Obergefell, at least ten state legislatures debated bills that would provide exemptions for state officials who, on religious grounds, objected to the certification of marriage licenses for same-sex couples. Unless otherwise established by state law, officials who swear an oath to protect and defend the Constitution must carry out the legal duties imposed by that oath—including certifying same-sex marriages. In North Carolina and Utah, these religious exemption bills passed and are now operational. In Alabama, Arkansas, Louisiana, Missouri, Minnesota, Oklahoma, South Carolina, and Texas, similar such bills failed to become law through the legislative process.*

*This Note proposes model legislation for states seeking to implement a religious accommodation scheme that respects the contours of the right articulated in the Obergefell decision. Before introducing the model statute, the Note provides insight into several preliminary matters. First, the Note provides background on the propriety of religious accommodations schemes and then explores why states may seek to implement such a scheme. Moreover, the Note analyzes the accommodation schemes adopted by the state legislatures in North Carolina and Utah, and the inferred accommodation scheme promoted by the Texas Attorney General. The treatment of these*

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1. GEOFFREY C. WARD, *THE CIVIL WAR* 216 (1994) (quoting Southern historian Shelby Foote).

*issues serves as the foundation for the Note's proposed model statutory accommodation scheme.*

## INTRODUCTION

The landmark constitutional decision of *Obergefell v. Hodges* recognized a constitutional right to marry for same-sex couples.<sup>2</sup> Justice Kennedy's majority opinion declared, "[t]he Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States."<sup>3</sup> In many ways, the decision marked the pinnacle of the Supreme Court's gradual "vindication of same-sex couples' right to equal treatment."<sup>4</sup> Despite this holding, many questions still remain regarding the interaction between the fundamental right to marriage and other fundamental rights, such as the free exercise of religion. As Justice Thomas lamented in his dissenting opinion, "[i]t appears all but inevitable that [governmental and religious understandings of marriage] will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."<sup>5</sup>

The decision received enormous media attention. Many publications addressed the new marriage landscape and the place of religious objectors in that new environment. One example, particularly poignant to the topic of this Note, was an article written by the *New York Times* editorial board two weeks after the *Obergefell* decision. The editorial responded to the religious resistance of state government officials to the issuance of same-sex marriage licenses in Texas, Alabama, and Louisiana, among others. The editorial board argued that the numerous state public officials who expressed a religious objection to certifying a same-sex marriage should face a Hobson's choice: the public officials either certify such marriages contravening their religious convictions or quit their jobs as public servants.<sup>6</sup> Put to this choice, local elected government officials could possibly lose retirement and other benefits that they have built up over a career if they feel "forced to exit [their position] rather than violate a religious conviction."<sup>7</sup> This Note will address

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

3. *Id.* at 2607.

4. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1166 (2014). See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

5. *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting).

6. See Editorial, *Illegal Defiance on Same-Sex Marriage*, N.Y. TIMES (July 10, 2015), <http://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html> ("If doing that job violates their religious beliefs, the best solution is to find another job.").

7. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1484 (2012). Another suggestion is that individuals who oppose same-sex marriage should not be allowed to run for office; however, such a requirement would seem to contradict the Constitution's prohibition under art. VI, cl. 3, which has been interpreted to mean "that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion." See *Torcaso v. Watkins*, 367 U.S.

a third option available to public officials like those mentioned in the *New York Times* editorial.

Statutory religious accommodation<sup>8</sup> schemes represent a viable alternative to the Hobson's choice advocated by some same-sex marriage proponents, such as the one voiced by the *New York Times*' editorial board. This Note addresses the following issues. Part I provides a background on the propriety of religious accommodations schemes and the desirability of such accommodations. Part II discusses various reasons why a state legislative accommodation scheme is desirable. Part III introduces statutory accommodation schemes for state officials with religious objections to same-sex marriage adopted or proposed in several states. Part III, A–B analyzes the enacted statutory schemes of North Carolina and Utah. Then, Part III, C briefly analyzes the accommodation scheme that Texas's Attorney General argued might be inferred from existing statutory provisions. Finally, Part IV proposes a model statute for future legislative enactment.<sup>9</sup>

## I. JURISPRUDENCE OR RELIGIOUS ACCOMMODATIONS

A difficulty underlying discussions of religious accommodations is the interaction of the two “Religion Clauses” of the First Amendment. In the realm of accommodations, an argument that religious conduct must be protected as a free exercise of religion may cause the government to violate the Establishment Clause by giving a special benefit to religion. In *Locke v. Davey*, the Supreme Court acknowledged the tension<sup>10</sup> between these two clauses, but reinforced the idea that “there is room for play in the joints.”<sup>11</sup> In other words, the Establishment Clause may permit particular governmental actions that are not necessarily required by the Free Exercise Clause.<sup>12</sup> This Part briefly covers this play in the joints between the Establishment Clause and the Free Exercise Clause, while also analyzing state implementations of Religious Freedom Restoration Acts (“RFRAs”) and the Civil Rights Act's protection of religious employees.<sup>13</sup>

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488, 495 (1961). To require an individual to renounce a religious conviction contrary to the right of same-sex married couples would seem to contravene this notion.

8. This Note adopts the definition of “accommodation” as “a special provision exempting conduct from regulation. See MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 121 (3d ed. 2011).

9. For additional treatment of the appropriateness of some kinds of religious exemptions in the marriage context, see generally Kent Greenwalt, *Granting Exemptions from Legal Duties: When Are They Warranted and What is the Place of Religion?*, 93 U. DET. MERCY L. REV. 89 (2016).

10. See, e.g., *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (citing *Tilton v. Richardson*, 403 U.S. 672, 677 (1971)); *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669 (1970).

11. *Locke v. Davey*, 540 U.S. 712, 718 (2004).

12. *Id.* at 718–19.

13. The material condensed into this Part is of exceptional scope; this Note simply provides a very basic introduction so that the discussion of particular legislative accommodation schemes is accessible to a wider audience.

### A. Establishment Clause Context

The First Amendment to the United States Constitution states, in relevant part, “Congress shall make no law respecting an establishment of religion . . . .”<sup>14</sup> The Establishment Clause, as it is popularly known, was incorporated to the states in *Everson v. Board of Education*.<sup>15</sup> The application of this constitutional principle against the states raises a preliminary question that must be answered: can a state enact a religious accommodation scheme without violating the Establishment Clause?

As one might imagine, the Supreme Court’s jurisprudence in this arena is conflicting. First, *Texas Monthly v. Bullock*<sup>16</sup> invalidated a state sales tax law that included an exception for periodicals containing religious teachings distributed by a religious faith. Despite this holding, the Court recognized that government policies with secular objectives may incidentally benefit religion. In fact, Justice Brennan’s plurality opinion<sup>17</sup> states that legislative accommodations are acceptable when the accommodations will not “impose substantial burdens on non-beneficiaries . . . or are designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause.”<sup>18</sup>

Nearly twenty years later, the Supreme Court upheld statutory religious exemptions. In *Cutter v. Wilkinson*,<sup>19</sup> the Court rejected the proposition advanced by state prison officials opposing protections granted by the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) that “the Act improperly advance[d] religion in violation of the First Amendment’s Establishment Clause.” The challenged section provided that the government could not “impose a substantial burden on the religious exercise of a person” unless the government “demonstrate[d] that imposition of the burden on th[e] person” furthered a compelling governmental interest and utilized the least restrictive means in pursuing that interest.<sup>20</sup> Justice Ginsburg’s majority opinion argued that RLUIPA fit “within [the recognized] corridor between the Religion Clauses . . . qualify[ing] as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”<sup>21</sup> Justice Ginsburg further noted that RLUIPA’s accommodation scheme did not impose marked burdens on non-beneficiaries and the Act could be neutrally administered among members of different faiths.<sup>22</sup>

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14. U.S. CONST. amend. I.

15. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

16. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

17. The Court in *Texas Monthly* reached a majority for the result, but divided on the reasoning.

18. *Tex. Monthly*, 489 U.S. at 18 n.8.

19. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

20. 42 U.S.C.A. § 2000cc-1(a)(1)–(2) (West, Westlaw through Pub. L. No. 114-114 (excluding Pub. L. No. 114-92, 114-94, 114-95, and 114-113)).

21. *Cutter*, 544 U.S. at 720.

22. *Id.*

Despite the mixed results at the Supreme Court, the current doctrine of Establishment Clause jurisprudence presumes that religious accommodations are acceptable so long as the government “acts with the proper purpose of lifting a regulation that burdens the exercise of religion” without seeking directly to advance or inhibit religion.<sup>23</sup>

### B. *Free Exercise Clause Context*

The Free Exercise Clause<sup>24</sup> has a long history of being interpreted to *require* religious accommodation.<sup>25</sup> Although the requirement of religious accommodation was the traditional interpretation of the Free Exercise Clause, the Supreme Court did not embrace the idea until *Sherbert v. Verner*<sup>26</sup> in 1963. In *Sherbert*, a Seventh-Day Adventist was faced with the Hobson’s choice of “choos[ing] between following the precepts of her religion and forfeiting [unemployment] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”<sup>27</sup> The Court determined that putting the religious individual in such a situation “effectively penalize[d] the free exercise of her constitutional liberties.”<sup>28</sup> The significant holding of the Court was that when evaluating the need for an exemption, courts should determine whether the government imposes a burden on a claimant’s free exercise right. If such a right is burdened, then the government must show that the regulation pursues a compelling government interest and must show that no less restrictive alternative means of regulation exist.<sup>29</sup>

The constitutional requirement of a free exercise exemption was eliminated (mostly) in *Employment Division v. Smith*.<sup>30</sup> Justice Scalia penned the majority opinion, which held that neutral, generally applicable laws do not implicate the Free Exercise Clause. The *Smith* Court held that “a nondiscriminatory religion-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required” or that courts are the proper institution for creating such exemptions.<sup>31</sup> In fact, the Supreme Court encouraged legislatures to enact accommodations through a political process of democratic governance by weighing the social importance of particular “laws against the centrality of all religious beliefs.”<sup>32</sup>

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23. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987). See generally *Walz*, 397 U.S. 664 (discussing that tax exemptions neither advance nor inhibit religion).

24. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion].”).

25. See generally McCONNELL, *supra* note 8, at 122–39.

26. *Sherbert v. Verner*, 374 U.S. 398 (1963).

27. *Id.* at 404.

28. *Id.* at 406.

29. This framework was employed in numerous circumstances during the 1970s and 1980s, but the “high water mark” for mandatory free exercise exemptions was *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See generally McCONNELL, *supra* note 8, at 169–73.

30. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

31. *Id.* at 890.

32. *Id.*

The *Smith* decision altered *Sherbert's* presumption of required accommodations and determined that religious exemptions like the kind advocated for in this Note are not constitutionally required, but that they are constitutionally permissible. Therefore, a state legislature's determination that protection of the religious belief of local government officials outweighs requiring all such officials to solemnize marriages is consistent with the Free Exercise and Establishment Clauses.

### C. *Response to Smith: Religious Freedom Restoration Acts*

Legislatures accepted the Supreme Court's invitation and quickly adopted legislative responses—Religious Freedom Restoration Acts, or RFRA's. Congress adopted RFRA with the stated purpose of restoring *Sherbert's* compelling interest and least restrictive means test. Congress's application of RFRA to the states via the § 5 enforcement power of the Fourteenth Amendment was found to be unconstitutional in *City of Boerne v. Flores*.<sup>33</sup> After the federal RFRA was struck down as inapplicable to the states, eighteen states adopted RFRA's with similar language to the federal statute, and thirteen more state courts instituted heightened protections for the free exercise of religion.<sup>34</sup>

These legislative reactions demonstrate that motivated majorities in state legislatures may be able to pass religious accommodations of the sort discussed in this Note. The enactments display further that religious exemptions are an allowable exercise of state legislative authority, notwithstanding the decision in *Smith*.

### D. *Title VII of the 1964 Civil Rights Act*

Finally, Title VII of the Civil Rights Act of 1964<sup>35</sup> exhibits a broader commitment to reasonably accommodate the religious beliefs of employees. By its clear terms, Title VII prohibits employment discrimination based on an employee's race, color, *religion*, sex, or national origin. The Civil Rights Act's definition of religion includes "all aspects of religious observance and practice, as well as belief."<sup>36</sup> An employer can only discriminate—or burden—an employee's religion if "an employer demonstrates that [it] is unable to reasonably accommodate to an employee's . . . religious observance . . . without *undue hardship* on the conduct of the employer's business."<sup>37</sup> At the very least, this prescrip-

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33. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

34. Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/>. For scholarly discussion of these state RFRA's see, e.g., Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV., 513 (1999); Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411 (2000).

35. 42 U.S.C.A. § 2000e (West, Westlaw through Pub. L. No. 114-244) ("Title VII of the Civil Rights Act of 1964" or "Title VII").

36. 42 U.S.C.A. § 2000e(j) (West, Westlaw through Pub. L. No. 114-244).

37. *Id.* (emphasis added).

tion seems to stand for an expectation that an employer will make a reasonable attempt to accommodate an employee's religious belief unless such an accommodation would be unreasonable or impose an undue hardship.<sup>38</sup> An accommodation is required even if "the objector does not *directly facilitate* the activity to which she objects."<sup>39</sup> Title VII protection of religious liberty is just one example of the "various sorts" of conscience protections "strewn about the federal legal corpus."<sup>40</sup>

Part II shows that state governments can attempt to reasonably accommodate their employees' religious beliefs without imposing an undue hardship on those seeking marriage solemnization.

## II. WHY ACCOMMODATE?

This Part argues that accommodations for religious objectors in the same-sex marriage certification process are politically and socially desirable. First, it will explore the power of the states to regulate marriage as a general matter. Second, this Part presents a number of "secular" reasons for introducing a religious accommodation of the kind promoted by this Note. Finally, this Part discusses the way in which solemnizing same-sex marriage is said to contravene sincerely held religious beliefs and introduces possible significant hardships faced by those seeking same-sex marriage solemnization within an accommodation framework.

### A. State Authority to Accommodate

Prior to engaging a discussion of state statutory religious accommodations, it is necessary to establish that states possess the authority to regulate marriage. Notwithstanding *Obergefell's* federal judicial definition of marriage—contravening the norms allowing states to define marriage—the states still retain the power to regulate marriage.

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38. In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court narrowed this interpretation in light of the importance of collective bargaining agreements to national labor policy. In dissent, Justice Marshall asserted, "[if] an accommodation [under this section] can be rejected simply because it involve[d] preferential treatment, then the regulation and the statute, while brimming with 'sound and fury,' ultimately 'signify[] nothing.' The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Id.* at 87 (Marshall, J. dissenting). See McCONNELL, *supra* note 8, at 281. Another significant interpretation of Title VII came in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), in which the Supreme Court determined that providing accommodations for religious reasons without providing exemptions for secular reasons was acceptable under the Act. Thus, state legislatures can adopt religious accommodation schemes for same-sex marriage solemnization based on religious belief without extending an accommodation to those who may oppose same-sex marriage on philosophical, biological, or other grounds.

39. Wilson, *supra* note 7, at 1464–65 (emphasis added) (noting that Title VII protections extend to nurses who object to assisting with abortions, clerks with conscientious objections to filing draft registrations at the post office, and IRS agents who refuse to process tax-exemption applications from abortion providers).

40. GERARD V. BRADLEY, *Emerging Century Challenges to Religious Liberty*, in *ESSAYS ON LAW, MORALITY AND RELIGION* 159, 168 (2014).

In *United States v. Windsor*, the Supreme Court case that struck down the Defense Of Marriage Act (“DOMA”), Justice Kennedy’s majority opinion stated, “[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”<sup>41</sup> Historically, and at the time of the Founding, states regulated fully the subject of marriage and divorce without any intervention by the federal government.<sup>42</sup> A state’s authority to solemnize civil marriages is a foundational aspect of the state’s sovereign authority to regulate domestic relations law.<sup>43</sup> Therefore, one reason that DOMA failed was that Congress exceeded its authority by regulating an action that was within the province of the states.<sup>44</sup> So long as state regulation of marriage respects citizens’ constitutional rights, the “‘regulation of domestic relations’ is ‘an area that has long been regarded as a *virtually exclusive province of the States.*’”<sup>45</sup>

### B. *Reasons for Accommodation*

Therefore, while acting within the province of marriage regulation, state legislatures adopting religious accommodations for local government officials objecting to solemnizing same-sex marriages must articulate a vision for why such accommodations are appropriate. While the sponsors of the bills considered in this Note provide broad justifications for their state statutes, legal scholars have pursued a theoretical discussion of reasons for accommodating. This scholarship assumed that the redefinition of marriage would require state legislative action, which is unnecessary in light of *Obergefell*, but the validity of the underlying reasons for religious accommodations in the marriage context remains.

The primary sponsors of the bills in North Carolina and Utah provided the following explanations for their introduction and support of their respective bills. In North Carolina, Senate President *Pro Tem*, Philip Berger, asserted the importance of adopting a tailored approach

41. *United States v. Windsor*, 133 S. Ct. 2675, 2689–90 (2013) (emphasis added).

42. See *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (“[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . . [And] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.”); see also *In re Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).

43. See *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.”).

44. See generally *Windsor*, 133 S. Ct. at 2689–93 (discussing the authority of the states to regulate and define marriage and Congress’s lack of authority to prescribe particular definitions of marriage by proscribing that state authority).

45. *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). See also *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Others considering the rights of government officials have considered religious liberty rights only in the context of constitutional principles; therefore, these analyses, while useful scholarship, are not directly applicable to the subject addressed here, in which a state provides a legislative accommodation to government officials. Cf. Vincent J. Samar, *Toward a New Separation of Church and State: Implications for Analogies to the Supreme Court Decision in Hobby Lobby by the Decision in Obergefell v. Hodges*, 36 B.C. J.L. & Soc. Just. 1 (2016).

to changing circumstances regarding marriage solemnization.<sup>46</sup> Senator Berger framed the North Carolina statute<sup>47</sup> as “a reasonable solution to protect the First Amendment rights of magistrates and register of deeds employees while complying with the marriage law ordered by the courts—so they are not forced to abandon their religious beliefs to save their jobs.”<sup>48</sup>

Utah State Senator, Stuart Adams, echoed the sentiment of establishing policies for the regulation of marriage as consistent with state sovereign power and in light of new definitions of marriage. While introducing his bill<sup>49</sup> to the Utah Senate, Senator Adams expressed his motivations for bringing his bill to the floor: “[T]olerance, respect, compassion, [and] equal treatment [are] the thing[s] . . . we are trying to accomplish here, in a *balanced* approach.”<sup>50</sup>

The sponsors’ statements provide an insight into the general approach adopted by state legislators supporting religious accommodations to marriage certification. By their expressions, the state legislators are motivated not by animus, but by a concern for the balance between religious liberty and changing attitudes towards marriage.

Prior to the *Obergefell* decision and the actions taken by the North Carolina and Utah state legislatures, many legal commentators believed that same-sex marriage would be achieved through legislative means. As part of a proposed legislative redefinition of marriage, these commentators argued that any redefinition of marriage should be accompanied by religious accommodations—a kind of political compromise in which opposing factions do not operate in a binary relationship.<sup>51</sup> Despite the fact that these commentators assumed that same-sex marriage would be achieved legislatively, rather than judicially, the reasons they promoted for wedding same-sex marriage expansions and religious liberty accommodations remain relevant to the post-*Obergefell* legislative terrain. The justifications for the provision of religious accommodations include principle, civic practicality, and political process.

## 1. Principle

The principles underlying religious accommodations post-*Obergefell* include “respect for liberty generally” and “respect for conscience.”<sup>52</sup>

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46. J. Andrew Curliss, *NC Senate Leader Berger Seeks a “Balance” on Religion*, THE NEWS & OBSERVER (Apr. 5, 2015, 12:00 AM), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article17291543.html>.

47. See *infra* Part III.A.

48. Editor in Family, *Berger Files Bill to Protect First Amendment Rights, Jobs of N.C. Magistrates, Registers of Deeds’ Staff*, N.C. POLITICAL NEWS (Jan. 28, 2015), <http://www.ncpoliticallnews.com/?p=12531>.

49. See *infra* Part III.B.

50. SB 297, 60th S., Gen. Sess. (Utah 2015) (emphasis added), [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=18843&meta\\_id=550629](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18843&meta_id=550629) (3:36:04–15).

51. See, e.g., Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485 (2014).

52. Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 N.W. J.L. & SOC. POL’Y. 260, 262 (2010).

The right to same-sex marriage hinges on the Constitution's promise of "liberty to all within its reach, a liberty that includes certain specific rights to allow persons . . . to *define and express their identity*."<sup>53</sup> Over seventy-five percent of Americans define or express their identity through religious means.<sup>54</sup> Denying the rights of a religious person to define and express his or her identity in this way would contradict the essential civil libertarian underpinnings of the federal recognition of a right to marry for all two-person couples, regardless of sexual orientation. Therefore, as a means of reinforcing the liberty interest vindicated by *Obergefell*, citizens should seek to protect the liberty interest of religious citizens. As Professor Robin Wilson noted, "[t]he same fundamental values of personal liberty that support an individual's right to live according to his or her religious convictions also support an individual's right to follow and fulfill his or her essential identity, including sexual identity and same-sex relationships."<sup>55</sup>

Moreover, the principle of respect for conscience undergirds the protection of religious expression, as well as other essential liberties, such as the freedoms of speech, of the press, and of peaceful assembly.<sup>56</sup> Allowing the government to subtly and gradually erode the protection of any one of these rights of conscience may jeopardize the safety of other rights. Thomas Jefferson wrote, after serving as president, "[n]o provision in our [C]onstitution ought to be dearer to man, than that which protects the rights of conscience against the enterprizes [sic] of the civil authority."<sup>57</sup>

## 2. Civic Practicality

The Supreme Court's decision did not resolve the underlying tensions between religious liberty and same-sex marriage proponents. Justice Samuel Alito warned that the *Obergefell* decision may be "used to

53. *Obergefell*, 135 S. Ct. at 2593 (emphasis added).

54. *Religious Landscape Study*, PEW RESEARCH CENTER (last visited Feb. 7, 2016), <http://www.pewforum.org/religious-landscape-study/>.

55. Wilson, *supra* note 4, at 1176. See generally *id.* at 1176 n.59. Professor Douglas Laycock echoes the similarity between sexual and religious minorities arguing that "[i]n resisting legal and social pressures to conform to majoritarian norms, [sexual and religious minorities] make essentially parallel and mutually reinforcing claims against the larger society. They claim that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. No human being should be penalized because of her religious practice, or because of her choice of sexual partners, unless her conduct is actually inflicting significant and cognizable harm on some other person." See Douglas Laycock, *Afterword, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 189 (Douglas Laycock et al. eds., 2008). See also EMILY R. GILL, *AN ARGUMENT FOR SAME-SEX MARRIAGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND PUBLIC EXPRESSIONS OF CIVIC EQUALITY* 44 (2012) ("[S]exual orientation, like religious belief, is a central facet or constituent of personal identity . . .").

56. See U.S. CONST. amend. I.

57. Letter from Thomas Jefferson, President of the United States, to Richard Douglas, Member of the Society of the Methodist Episcopal Church at New London, Connecticut, (Feb. 4, 1809), available at: FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Jefferson/99-01-02-9714> (last updated Dec. 30, 2015).

vilify Americans who are unwilling to assent to the new orthodoxy [namely, religious objectors to same-sex marriage] . . . . By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas.”<sup>58</sup> Religious accommodation would help to “allay concerns” of those who oppose same-sex marriage, while not limiting the recognition of same-sex marriages.<sup>59</sup>

In many jurisdictions that adopted same-sex marriage prior to the *Obergefell* decision, “religious liberty protections for religious objectors who adhere[d] to a heterosexual view of marriage—exempting [the objectors] from requirements to facilitate” same-sex marriages was essential to the legislation’s success.<sup>60</sup> In fact, the *New York Times* recognized the centrality of this compromise in the success of same-sex marriage legislation in New York,

[expansive religious liberty protections] proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage. Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive protections . . . and helped pull the legislation over the finish line . . . .<sup>61</sup>

The tolerance demonstrated by an accommodation scheme is arguably necessary to maintaining the fabric of civic society.<sup>62</sup> An appropriate religious accommodation framework would avoid the typical cycle of the culture war dynamic between sexual minority and religious liberty seekers, which tends to progress in the following manner:

Securing important ground more often leads to new and escalated demands and to more aggressive efforts against remaining pockets of resistance . . . [it] seems safe to assume . . . that legal recognition of same-sex marriage would lead to further efforts to secure affirmative support from both the public and private sectors and the elimination or narrow confinement of any right to conscientious objection to the new regime.<sup>63</sup>

This tolerance involves an element of moral sympathy in which the political winners acknowledge the importance of vibrant social discussion and show a concern for those who have lost in the political arena.<sup>64</sup> In essence, the question after *Obergefell* is “whether champions

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58. *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting).

59. Gallagher, *supra* note 52, at 260.

60. Wilson, *supra* note 4, at 1168.

61. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES (June 25, 2011), [http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html?\\_r=0](http://www.nytimes.com/2011/06/26/nyregion/religious-exemptions-were-key-to-new-york-gay-marriage-vote.html?_r=0).

62. For an extended treatment of feasible accommodation in a pluralistic society, see WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 295 (1991) (arguing that the state should accommodate religious belief and practice as much as possible limited only by the needs of social cohesion).

63. Laycock, *supra* note 55, at 194.

64. See WILLIAM STACY JOHNSON, *A TIME TO EMBRACE: SAME-GENDER RELATIONSHIPS IN RELIGION, LAW, AND POLITICS*, 192–93 (2006) (“Commitment to equality and liberty

of tolerance are prepared to tolerate proponents of a different ethical vision.”<sup>65</sup> Cases in which courts impose legal penalties and civil liabilities upon religious objectors to same-sex marriage “will further inflame the opponents of same-sex marriage . . . empower[ing] the most demagogic opponents of same-sex marriage.”<sup>66</sup> The creation of religious martyrs of this kind will, more likely than not, “delay social acceptance of gay marriages, [and] not [ ] hasten it.”<sup>67</sup> Therefore, as proponents of same-sex marriage continue to seek the acceptance of same-sex married couples, it would be in the movement’s best self-interest to accept religious accommodations as means of gathering support from citizens concerned about religious liberty.

### 3. Political Process

Finally, many opponents of same-sex marriage argued that legislation presented the appropriate method of redefining marriage. State legislative enactments of religious accommodations in the solemnization of same-sex marriage may reflect local preferences and reclaim the importance of legislative action in the marriage context.

Even for those who do not support same-sex marriage, state legislative enactments of a broader definition were preferable to judicial decisions because the judicial proclamations are “fraught with risk for religious dissenters precisely because it leaves no meaningful opportunity for balancing competing goods, namely, marriage equality with religious liberty. Six of the seven states recognizing same-sex marriage by judicial decision [as of January 14, 2014] gave *no* new protections to religious objectors.”<sup>68</sup>

Dissenting opinions in *Obergefell* reflected the preference for legislative action regarding marriage. Chief Justice Roberts recognized that Mr. Obergefell, and those bringing challenges to state laws with him, made “strong arguments rooted in social policy and considerations of fairness” but the “[Supreme] Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”<sup>69</sup> Justice Thomas echoed the Chief Justice’s discomfort with judicial definition of marriage stating, “[h]ad the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition [of marriage] as part of their deliberative process.”<sup>70</sup>

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requires that we be especially zealous to protect groups that happen to be unpopular.”). Although William Johnson was referencing sexual minorities, in the post-*Obergefell* climate, his sentiments may fairly be attributed to the traditional, religious majority.

65. Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 57 (Douglas Laycock et al. eds., 2008).

66. Wilson, *supra* note 7, at 1433–34 (quoting a letter from Professor Douglas Laycock to Professor Wilson).

67. *Id.* at 1434.

68. Wilson, *supra* note 4, at 1173.

69. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

70. *Id.* at 2639 (Thomas, J., dissenting).

Legislative accommodations—or, at the very least, discussions of such accommodations—bring the social conversation of these competing goods of same-sex marriage and religious liberty back into the realm of representative politics. Encouraging this kind of state lawmaking “allows [for] local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting States in competition for a mobile citizenry.’”<sup>71</sup> Suggested accommodations may present a marriage of both access to government solemnization and religious freedom in order to avoid zero-sum propositions in the political arena.

### C. *Rights of Conscientious Objectors and Significant Hardships*

State legislative accommodations for state-employed religious objectors to same-sex marriage solemnization should try to make a sensible balance between the protection of “the right of conscientious objectors to refuse to facilitate same-sex marriages, except where such a refusal imposes significant hardship on the same-sex couple.”<sup>72</sup> In this scenario, moral integrity of the government official trumps the inconvenience of receiving service from a different, nearby provider.

Justification for an accommodation arises when a sincerely held religious belief is implicated by some compelled act. In this regard, religious objectors to same-sex marriage solemnization argue that, while they are not directly facilitating sinful activity, certifying a same-sex couple’s marriage implicates moral complicity.<sup>73</sup> The question concerns “the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.”<sup>74</sup> “[W]ith other actions, ideas of complicity and vicarious moral responsibility have not seemed so far-fetched. They underpinned, for example, boycotts of companies doing business in South Africa during apartheid.”<sup>75</sup>

The argument of moral complicity parallels ideas of criminal complicity. To be criminally complicit, an individual “need only facilitate the [criminal] scheme to some (even slight) degree with knowledge of the scheme’s intended result.”<sup>76</sup> The Supreme Court recently reinforced this notion of complicity stating that criminal law “reflects a centuries-old view of culpability: that a person may be responsible for a

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71. *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

72. *Laycock*, *supra* note 55, at 198.

73. *See generally* *Wilson*, *supra* note 7, at 1462 (arguing that state legislative exemptions in the marriage context clearly recognized “claims of facilitation as worthy of respect”).

74. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

75. *Wilson*, *supra* note 7, at 1462.

76. Brief of Former Justice Department Officials Supporting Petitioners at 4, *Zubik v. Burwell*, 778 F.3d 422 (3d Cir. 2015), *vacated*, 136 S. Ct. 1557 (2016) (No. 14-1418) [hereinafter “Brief of Former Justice Department Officials”], <http://www.scotusblog.com/wp-content/uploads/2016/01/Former-Justice-Department-Officials-LSP-Amicus.pdf>.

crime he has not personally carried out if he helps another to complete its commission.”<sup>77</sup>

The parallel between moral and criminal complicity contains a scienter requirement that the aider or abettor possess knowledge that he or she is helping to facilitate an illicit act. In the context of same-sex marriage, no local government official is directly engaging in an act that his or her religion would hold to be sinful. However, those government officials “have advance knowledge” that their actions “will result in conduct that, to them, is deeply immoral.”<sup>78</sup>

The final remaining piece for the facilitation of sinfulness is the existence of a sincerely held religious belief implicated by same-sex marriage. This is presumptively the case, but it is still important to understand why religious objectors “feel that they are being asked to promote or facilitate sin in a way that makes them personally responsible for the sin that ensues.”<sup>79</sup> As the largest religious belief system in the United States, Christianity serves as a useful example.<sup>80</sup> Many Christian religious groups oppose homosexuality or homosexual conduct in some way. These Christians regard acting on same-sex attraction as a sinful choice . . . . [For example, the Catholic Church] acknowledged that because same-sex attraction is an innate predisposition or unchosen condition, it cannot be a sin . . . . [N]evertheless, the tendency toward a morally evil practice is itself an ‘objective disorder.’<sup>81</sup>

If an accommodation scheme is enacted by a state legislature, one must consider whether same-sex couples wanting to marry will suffer a significant hardship. Challenges to religious accommodations for government officials objecting to solemnizing same-sex marriages will likely argue that such schemes send “a deliberate, purposeful and malicious message to gays and lesbians that they are not full citizens.”<sup>82</sup> The harm complained of here is a dignitary harm, which inflicts an injury on a person’s reputation or honor. Although the existence of an accommodation may be offensive, it would likely fail to rise to the level of a justiciable injury. Therefore, a dignitary harm that is justiciable will likely arise from an actual denial of service. For example, a dignitary harm would be caused if a same-sex couple arrived at the county clerk’s office and requested a solemnization of their marriage, but no member of the office was willing to perform such a service. This would obviously be a problem and would impose a significant hardship on a same-sex

77. *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

78. Brief of Former Justice Department Officials, *supra* note 76, at 10. It would be an inappropriate inquiry for a court to analyze whether even such a slight facilitation of immoral conduct is sinful because that would border on adjudging the tenets of a religion. See *Employment Division v. Smith*, 494 U.S. 872, 887 (1990) (“Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims.”) (internal citations omitted).

79. Laycock, *supra* note 55, at 195.

80. PEW RESEARCH CENTER, *supra* note 54 (displaying that 70.6% of Americans identify as Christians).

81. Gill, *supra* note 55, at 163.

82. Complaint for Declaratory Judgment at 14, *Ansley v. North Carolina*, No. 1:15-cv-274 (W.D.N.C. Dec. 9, 2015).

couple. A less clear scenario is one in which the person at the counter, who objects on religious grounds to solemnization, redirects the couple to another member of the office who does not have such objections. Would such a transfer, with minimal delay, impose a significant burden?<sup>83</sup> A properly tailored religious accommodation scheme can avoid such a danger and ensure that same-sex marriages are couples have the marriages solemnized.

While same-sex couples will almost certainly argue that such a dignitary harm exists in all circumstances, many arguments fail to recognize that there are two potential dignitary harms at play: “the possible affront to lesbian and gay couples who are turned aside, and the affront to religious believers who are told that their beliefs are not to be tolerated, at least not in the public sphere.”<sup>84</sup> State statutes accommodating conscientious objectors should try to balance these interests because “appropriately crafted exemptions need not ask same-sex couples to bear the cost of protecting others’ religious beliefs. The protections for individual objectors . . . have proposed to seek to balance two competing concerns—marriage equality and religious liberty.”<sup>85</sup>

### III. STATE STATUTORY SCHEMES

Prior to the *Obergefell* decision, two state legislatures adopted accommodations for state government officials who opposed performing same-sex marriage ceremonies because of religious objections.<sup>86</sup> These accommodations provide an insight into what a statutory accommodation for religious individuals could look like in the context of same-sex marriage. There are three characteristics of the statutory language that, if analyzed separate of one another, will enhance the review of these statutory schemes. The first characteristic is the allowable reasons for and scope of recusal. The second feature is the protected class of government officials to whom the accommodation extends. The third consideration is the mechanisms in place to assure the speedy administration of marriage requests.

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83. Laycock, *supra* note 55, at 198 (Professor Laycock argues that in this scenario, the same-sex couple has not suffered a significant hardship but faces a larger problem, an insult that reminds them “that some [of their] fellow citizens vehemently disapprove of what they are doing . . . Hurt feelings or personal offense are so far not a basis for censorship of ideas in American law.”).

84. Wilson, *supra* note 7, at 1505.

85. *Id.* at 1479.

86. In Louisiana, Governor Bobby Jindal issued an Executive Order on May 19, 2015 that protected religious individuals and institutions from adverse action by the state because of their definition or understanding of marriage. Governor Jindal’s action is notable as an example of the concerns highlighted by Justice Thomas’s dissenting opinion about the tension between religious and governmental definitions of marriage. However, because the law was accomplished through an executive order, and because the order does not address directly government officials seeking recusal from same-sex marriage ceremonies for religious reasons, Governor Jindal’s action is beyond the scope of this Note. *See* Exec. Order No. BJ 15-8 (2015).

### A. North Carolina's Adopted Statute<sup>87</sup>

The North Carolina statute (N.C. S. 2) was passed under the title, “An Act to Allow Magistrates, Assistant Registers of Deeds, and Deputy Registers of Deeds to Recuse Themselves From Performing Duties Related to Marriage Ceremonies Due to Sincerely Held Religious Objection.”<sup>88</sup> The bill passed through the North Carolina House and Senate, but was vetoed by Governor Pat McCrory on May 28, 2015.<sup>89</sup> Then, on June 1, the Senate overrode the veto by a vote of 32–16,<sup>90</sup> and on June 11, the House overrode the veto by a vote of 69–41,<sup>91</sup> and the act became law.

In North Carolina, the requisites of a valid and sufficient marriage solemnization are the following: “[T]he consent of [two adults],” who consent to marriage “freely, seriously, and plainly expressed by each” in the presence of a witness, and that witness be either an ordained minister or a magistrate.<sup>92</sup> The final requirement—that of the presence of a magistrate in the absence of an ordained minister—is statutorily defined as a collective duty, and not one imposed upon a single, individual magistrate.<sup>93</sup>

#### 1. Recusal Components

Under N.C. S. 2, the designated officials possess “the right to recuse from performing *all* lawful marriages . . . based upon any *sincerely held religious objection*.”<sup>94</sup> The North Carolina scheme allows government officials to recuse themselves for any sincerely held religious objection. Because of the difficulty and dangers posed by adjudicating the sincerity—or legitimacy—of a religious objection, very few stated religious objections would be challenged. However, the statute provides protection from conviction or disciplinary action so long as the government official in question pursues “a good-faith recusal” in accordance with the requirements of the statute.<sup>95</sup> This provision means

87. The North Carolina statute’s return provisions are beyond the scope of this Note. Under these provisions, magistrates that resigned after the *Obergefell* decision, but prior to the adoption of the bill, were reassigned to their positions.

88. 2015 N.C. Sess. Laws 75 [hereinafter N.C. Statute], <http://www.ncleg.net/Applications/BillLookup/LoadBillDocument.aspx?SessionCode=2015&DocNum=16&SeqNum=0>.

89. Governor McCrory’s Veto of the Legislation (N.C. May 28, 2015), <http://www.ncleg.net/Applications/BillLookup/LoadBillDocument.aspx?SessionCode=2015&DocNum=5074&SeqNum=0>.

90. N.C. GEN. ASSEMBLY, *Record of the Senate Vote*, June 1, 2015, 7:59PM, <http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015&sChamber=S&RCS=346>.

91. N.C. GEN. ASSEMBLY, *Record of the House Vote*, June 11, 2015, 10:10AM, <http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2015&sChamber=H&RCS=721>.

92. N.C. GEN. STAT. § 51-1 (2012) (The bracketed language replaces the statute’s designation of a “man and woman” in order to reflect the changed marriage requirements enshrined in the Supreme Court’s *Obergefell* opinion.).

93. See N.C. Statute, *supra* note 88, at § 7A-292(b).

94. *Id.* at § 51-5.5(a) & (b) (emphasis added).

95. *Id.* at § 51-5.5(d).

that government officials may be criminally or disciplinarily liable for failing to solemnize a marriage if the government officials either (a) recuse themselves in bad faith—the absence of good faith—or (b) do not recuse themselves but still maintain a religious objection to solemnizing marriages contrary to their religious beliefs.

The requirement that the government official forego the solemnization of all marriages, not just the marriages to which he or she possesses a religious objection, is a further noteworthy element of the recusal provisions. In practice, this means that no same-sex couple would be discriminated against by virtue of the couple's composition; rather, the recusal requires a blanket prohibition of the government official's participation in any marriage.

## 2. Protected Class of Government Officials

The North Carolina scheme extends to every “magistrate,” “assistant register of deeds,” and “deputy register of deeds.” Eligible government officials may recuse themselves in the following ways. A magistrate may initiate recusal upon “notice to the chief district court judge.”<sup>96</sup> Assistant registers of deeds and deputy registers of deeds may recuse themselves from marriage solemnization by providing notice to the register of deeds.<sup>97</sup> Any of these government officials may rescind his or her recusal by writing to the official to whom they must provide notice of such recusal.

## 3. Alternative Mechanism for Solemnization

Regardless of the position of the government official seeking recusal, state officials are required to ensure that marriage licenses will be issued.<sup>98</sup> If magistrates who have not recused themselves are available, the chief district court judge “shall ensure that marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week.”<sup>99</sup> If, however, all magistrates in a particular jurisdiction recuse themselves under the accommodation scheme, the chief district court judge shall ensure this availability by notifying the Administrative Office of the Courts (AOC). The AOC shall make magistrates “available in that jurisdiction for performance of marriages for the times required [by the statute].”<sup>100</sup> In

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96. *Id.*

97. In North Carolina, the register of deeds is an elected official. *See, e.g., Register of Deeds, MECKLENBURG COUNTY NC*, <http://charmeck.org/mecklenburg/county/ROD/Pages/default.aspx> (last visited Feb. 3, 2015); *Biography of Register of Deeds, GUILFORD COUNTY*, <http://www.myguilford.com/rod/biography-of-register-of-deeds/> (last visited Feb. 3, 2015). The register's office serves a number of record-keeping services. Most relevant for the purposes of this Note is the office's authority to issue marriage licenses. *See* N.C. Statute, *supra* note 88, at § 7A-292(a)(9).

98. N.C. Statute, *supra* note 85, at § 51-5.5(a) & (b) (“The chief district court judge shall ensure that all individuals issued a marriage license seeking to be married before a magistrate may marry.”) (“The Register of Deeds shall ensure for all applicants for marriage licenses to be issued a license upon satisfaction of the [state's] requirements.”).

99. *Id.* at § 7A-292(b).

100. *Id.* at § 51-5.5(c).

the circumstance that the AOC's designation of a magistrate is not immediate, the chief district court judge will either assume the marriage designation functions of a magistrate or shall designate another district court judge to serve in that capacity.

### B. *Utah's Adopted Statute*

Unlike the North Carolina statute, Utah's religious protection law breezed through the legislative process. Governor Gary Herbert signed the Act, entitled "Protections for Religious Expression and Beliefs about Marriage, Family, or Sexuality,"<sup>101</sup> into law on March 20, 2015.<sup>102</sup> The governor placed his signature on the legislation after the bill passed unanimously through the Senate Business and Labor and the House Judiciary Committees. The bill found similar support in both chambers of the state legislature, passing the Senate by a vote of 24–5 on March 9, 2015 and the House by a vote of 66–9 on March 11, 2015.<sup>103</sup> The statute is most notable for the sweeping breadth of discretion that it imbues in local government officials.

In Utah, two individuals over the age of eighteen may be married if two adult witnesses are present and the solemnization of the marriage is performed by any variety of religious minister or government official.<sup>104</sup>

#### 1. Recusal Components

Utah's statute does not provide explicit recusal processes or for allowable reasons for recusal. Rather, the statute provides a significant amount of local autonomy. A county clerk must simply establish a policy to ensure that legal marriages can be solemnized during business hours when one is sought. This open policy allows for any number of government officials to recuse themselves from solemnizing marriages—or only from marriages with which they disagree—for any reason, so long as another government official is available to provide the certification service.

A government official who takes advantage of a recusal practice established by a county clerk is protected from "government retaliation" if the government official is exercising the protection provided by Utah Law 1953 § 17-20-4. The statute's provisions clearly create a framework in which a county clerk who recuses his or herself from solemnizing particular marriages is protected from prosecution by any government entity. Reinforcing the protective nature of the statute's language is the bill's requirement that the statutory text be construed

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101. 2015 Utah Laws 297 [hereinafter Utah Statute], <http://le.utah.gov/~2015/bills/static/sb0297.html>.

102. Utah Senate Bill 297 amended, in relevant part, the following sections: UTAH CODE ANN. 1953 § 17-20-4 and § 30-1-6 (West 2015). Furthermore, the bill enacted the following relevant sections: UTAH CODE ANN. 1953 § 63G-20-103, and § 63G-20-202 (West 2015).

103. Bill voting records, <http://le.utah.gov/~2015/bills/static/SB0297.html>.

104. UTAH CODE ANN. 1953 § 30-1-6 (West 2015) (listing the eligible religious ministers and the eleven allowable government officials).

“in favor of a broad protection of religious beliefs, exercises, and conscience to the maximum extent permitted” within constitutional limits.<sup>105</sup>

## 2. Protected Class of Government Officials

The Utah Statute does not expressly limit itself to the protection of county clerks, but from the text and structure of the legislation, it may be inferred that the statutory recusal protection extends only to county clerks.<sup>106</sup> Utah Law 1953 § 17-20-4 requires the county clerk to establish policies for the issuance of marriage licenses and for the availability of a government official to solemnize such marriages.<sup>107</sup> If a county clerk recuses his or herself, the county clerk must designate a willing individual who would be available to issue marriage licenses during normal business hours. The statute does not provide guidance for who qualifies to be the county clerk’s designee or the procedures by which the county clerk must select such a designee. Furthermore, the statute fails to provide a process by which the county clerk would make known his or her recusal.

## 3. Alternative Mechanisms for Solemnization

Finally, the statute does not envision a need for alternative mechanisms for solemnization because the county clerk’s statutory responsibility is to ensure the “solemniz[ation] [of] a legal marriage for which a marriage license has been issued . . . .”<sup>108</sup> That said, the state of Utah allows a number of individuals to solemnize a marriage including: ministers, rabbis, or priests of any religious denomination maintaining certain qualifications; the governor or lieutenant governor; mayors or county executives; a justice, judge, or commissioner of a state court; or a United States judge or magistrate *inter alia*.<sup>109</sup> In an effort to presumably facilitate a smooth solemnization process, counties in Utah have provided a list of eligible and available officials that may solemnize a marriage outside of the county clerk.<sup>110</sup>

### C. Texas’s Accommodation by Inference

Unlike the schemes adopted in North Carolina and Utah, Texas’s asserted accommodation scheme was inferred from preexisting statutory requirements and a base assumption that individuals have the freedom to exercise their religion, even in government positions. Because Texas’s accommodation was not enacted by new legislation—or by

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105. *Id.* at § 63G-20-103.

106. County clerks are elected officials. *See County Clerks*, ELECTIONS.UTAH.GOV (last visited Feb. 3, 2015), <http://elections.utah.gov/election-resources/county-clerks>.

107. UTAH CODE ANN. 1953 § 17-20-4(2) (West 2015).

108. *Id.*

109. UTAH CODE ANN. 1953 § 30-1-6(1)(a)-(l) (West 2015).

110. *See, e.g., County Clerks*, *supra* note 106; *Marriage Officials*, DAVISCOUNTY-UTAH.GOV (last visited Feb. 3, 2015), <http://www.daviscountyutah.gov/docs/librariesprovider11/default-document-library/list-of-available-marriage-officials38832d4f13296568a4f7ff3c0015e574.pdf?sfvrsn=0>.

amendment of preexisting statutes—the scheme is slightly anomalous for this Note, but is still worth discussing as an example of state behavior in the same-sex marriage realm.

Immediately following the *Obergefell* decision, county clerks and magistrates in Texas refused to provide certification services to same-sex couples because of religious objections to performing such acts.<sup>111</sup> The Texas Attorney General, Ken Paxton, submitted to the government officials' objections in order to "protect the religious liberties of hundreds of local officials whose job it is [to] issue marriage licenses."<sup>112</sup> In a statement, Attorney General Paxton stated, "[in *Obergefell*], the Supreme Court did not diminish, overrule, or call into question the First Amendment rights to free exercise of religion . . . [the] federal constitutional right to same-sex marriage should peacefully coexist alongside longstanding constitutional and statutory rights . . ."<sup>113</sup>

Attorney General Paxton concluded that the county clerks and their employees' religious freedoms allowed for an exemption from issuing same-sex marriage licenses. This conclusion rested upon an interpretation of state law governing the issuance of marriage licenses. Statutorily, county clerks could delegate any of their official responsibilities to others.<sup>114</sup> Because of this ability to delegate authority, Attorney General Paxton opined that a county clerk could delegate same-sex marriage licensing responsibilities to deputy clerks. He also argued that these local officials had discretion to perform such functions.<sup>115</sup> Effectively, Ken Paxton maintained that the statute's allowance for delegation of functions impliedly allows the clerks to delegate work to their deputies for any reason under any circumstance, especially to protect the exercise of their religion in scenarios requiring the solemnization of same-sex marriages. The question remains, however, of whether Texas needed to explicitly adopt a recusal scheme for religious accommodations.

#### IV. MODEL STATUTORY SCHEME

This Part articulates a scheme that ensures a balance between the solemnization of legal same-sex marriages and the protection of the

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111. See generally Philip Bump, *Can a Texas County Clerk Refuse to Issue a Gay Marriage License? It's Complicated.*, WASH. POST (June 29, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/29/can-a-texas-county-clerk-refuse-to-issue-a-gay-marriage-license-its-complicated/>; see also Sandhya Somashekhar, *Texas AG: County Workers Don't Have to Issue Same-Sex Marriage Licenses*, WASH. POST (June 28, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/28/texas-ag-county-workers-can-opt-out-of-same-sex-marriage/>.

112. Somashekhar, *supra* note 111.

113. Texas Attorney Gen. Ken Paxton, Statement (June 28, 2015), <https://www.texasattorneygeneral.gov/static/5144.html>.

114. TEX. LOC. GOV'T. CODE ANN. § 82.005(c) (West 2008) ("A deputy clerk acts in the name of the county clerk and *may perform all official acts that the county clerk may perform.*") (emphasis added).

115. Texas Attorney General Paxton Opinion Letter to Texas Lieutenant Governor Dan Patrick (June 28, 2015), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2015/kp0025.pdf>.

religious beliefs of individual government officials by drawing upon the strengths and weaknesses of the North Carolina and Utah statutes.<sup>116</sup>

### A. *Recusal Components*

First, provision of a process for recusal must be made. The rigidity of the recusal process in the North Carolina statute avoids the unwanted surprise that may result from Utah's localized discretionary recusal scheme. A proper recusal scheme will allow the specified government official to register his or her objection with the Administrative Office of the Courts. The public recusal process will allow voters to operate with full information regarding potential candidates in those counties where officials responsible for solemnizing marriages are elected. In order to qualify for registration, the government officials must complete the following tasks: (1) maintain a sincerely held religious objection to the solemnization of same-sex marriages and (2) verify that a member of his or her office will be available to solemnize any marriages—regardless of the sexual orientation of the couple.

The limitation of the exemption to only objections based on a sincerely held religious belief vindicates the free exercise rights of religious individuals and can be applied neutrally among believers of different faiths. While there may be concerns about whether the exemption should extend to those who object to solemnizing same-sex marriage on philosophical or other non-religious grounds, only a religious accommodation scheme can fit nicely in the “play in the joints” between the Establishment and Free Exercise Clauses as reaffirmed by the Supreme Court in *Cutter*.<sup>117</sup>

The second prong of the recusal process will ensure that non-beneficiaries of the accommodation do not suffer an increased hardship by requiring the government official, prior to publicly recusing him or herself, to ensure that a replacement is available from the office. If no such member of the office exists, the government official in charge of the office has the responsibility to ensure that his or her absence is remedied prior to registering his or her recusal with the Administrative Office of the Courts. In this way, a government official can refuse to solemnize a marriage “*only if* another government official is promptly available and willing to do so without inconvenience . . . .”<sup>118</sup> Therefore, religious liberty would yield in the face of an unavoidable conflict with marriage equality thus ensuring that no “state official may ever act as a chokepoint on the path to marriage.”<sup>119</sup>

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116. For an example of a more general religious accommodation scheme, see Letter to Minnesota State Legislature Representatives from Constitutional Law Professors, at 10–11, <http://mirrorofjustice.blogspot.com/files/mn-main-letter-pdf-1.pdf>.

117. In dealing with this difficulty, Professor Michael McConnell contends, “[t]he unifying principle is that the religious life of the people should be insulated, to the maximum possible degree, from the effect of governmental action, whether favorable or unfavorable. To extend this principle to all other beliefs and activities[,] [i.e., non-religious reasons] would be impossible.” See McConnell, *supra* note 8, at 121.

118. Wilson, *supra* note 7, at 1480.

119. *Id.*

### B. *Protected Class of Government Officials*

The technical terms for the appropriate government official varies from state to state, but the protected class of government officials will include county clerks (or a state's equivalent, e.g., "Justice of the Peace") and the clerks' deputies. This will provide accommodation coverage to government officials lower than judicial actors involved with the marriage process. If a county clerk chooses not to recuse herself, that does not prevent a deputy clerk from recusing himself. However, if a county clerk and her deputy clerks all decide to recuse themselves, then the county clerk must, consistent with the second prong of the statute, make provisions for a qualified individual to be available in the office to solemnize marriages. While it may be said that one of the county clerk's duties is to solemnize marriages, there is no evidence that a particular county clerk "or other official authorized to officiate is under a statutory duty to perform marriages when requested, and [it is likely] that no such specific duty exists."<sup>120</sup> The limitation of the recusal accommodation to county clerks—or a particular state's equivalent—and to deputy clerks will help to facilitate the alternative mechanisms for solemnization.

### C. *Alternative Mechanisms for Solemnization*

The scope of recusal should extend to *all* marriages—as in North Carolina—rather than from only those marriages to which the government official has a religious objection. By this standard, a homosexual couple and a heterosexual couple would receive the same treatment by the recusing government official, namely, the introduction of the other office employee who is designated to solemnize marriages. Recusing oneself from all marriages avoids the unequal application of solemnization by a government official based on the couples' sexual orientation. Moreover, to ensure that no couple is turned away because of the absence of a solemnizing official, the clerk's office should establish timeframes during which marriage licenses may be solemnized. This procedure would provide additional assurance that marriages could be solemnized conveniently and without delay. Such a practice could reflect the explicit requirements established in the North Carolina statute.<sup>121</sup>

Furthermore, the state may—and should—provide alternative mechanisms for solemnization beyond the clerk's office. Other government officials may be authorized by the state to solemnize marriages. This authorization will increase the likelihood that couples seeking

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120. *Id.* at 1471 n.209 (referencing Ira C. Lupu & Robert W. Tuttle, *Same-Sex Equality and Religious Freedom*, 5 Nw. J.L. & Soc. POL'Y 274, 294 (2010)); *see id.* at 1474 ("[T]he claim that government employees must perform all services offered by a government office conflates the public's legitimate claim to receive the service from the state with a claimed entitlement to receive it from *each* employee of the office.").

121. *See* N.C. Statute, *supra* note 88, at § 7A-292(b) (explaining if magistrates who have not recused themselves are available, the chief district court judge "shall ensure that marriages before a magistrate are available to be performed at least a total of 10 hours per week, over at least three business days per week").

marriage solemnization will be able to find a government official nearby who is available to perform the government service. This type of authorization may reflect the scheme in Utah in which religious ministers; the governor, or lieutenant governor; mayors or county executives; a justice, judge, or commissioner of a state court; or judge of a United States judge or magistrate *inter alia* is sanctioned to certify marriages.<sup>122</sup> County clerks can further facilitate a smooth solemnization process by providing a list of eligible officials outside the county clerk's office and their availability to solemnize a marriage.<sup>123</sup>

## V. CONCLUSION

The Supreme Court's *Obergefell v. Hodges* decision decided the significant question of whether states are constitutionally required to allow marriages between same-sex couples. Despite this determination, many questions abound regarding the interaction between the newly recognized fundamental right to marry for all consenting, adult couples and religious liberty. While the federal definition of marriage will prevail, the states still retain sovereign authority over the regulation of marriage. Therefore, states should institute religious accommodations for government officials with sincerely held religious beliefs contradictory to the *Obergefell* definition of marriage. Accommodations of this kind are motivated by principles of liberty embodied in the Supreme Court's treatment of religious liberty and marriage rights, the practical implications of the tension between religion and same-sex marriage in the civic arena, and a commitment to proper procedural practice in the realm of religious protections and marriage recognition.

States seeking to pass an accommodation scheme should focus on explicit recusal practices that carefully detail the reasons for allowable recusal, the process by which a recusal is identified, and the steps that must be taken by the relevant government officials once a recusal is initiated. A recusal of this kind should be from all marriages, not just from the marriages that the government official finds objectionable. Furthermore, the statutes should identify clearly a limited class of government officials who may qualify for the accommodation. Finally, states may identify other individuals who are capacitated to solemnize a marriage. A religious accommodation scheme done well can permit conscientious refusals while maintaining access to marriage; in this way, protections for conscience do not arise at the expense of access to marriage.

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122. UTAH CODE ANN. 1953 § 30-1-6(1)(a)-(l) (West 2015).

123. See, e.g., *County Clerks*, *supra* note 106.

