"I WILL NOT PRONOUNCE YOU HUSBAND AND HUSBAND": JUSTICE AND THE JUSTICE OF THE PEACE

Same-sex marriage is one of the most controversial social issues facing our nation today.[1] Same-sex marriage involves cultural, historical, legal, and religious implications. Advocates of same-sex marriage argue that denying same-sex couples the right to be legally married infringes their Equal Protection, Due Process, and First Amendment rights,[2] and labels them as inferior.[3] Its opponents offer a variety of historical, legal, and religious arguments, including the notion that same-sex marriage infringes religion by altering the definition of marriage.[4] These arguments focus on the rights of same-sex couples, and on the rights of people who believe their religious freedom is infringed by legalizing same-sex marriage. But

1. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) ("Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors.").

2. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

3. Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 135 (2000) (describing Vermont's civil union statute as creating a "condition of legal inferiority").

4. *See generally* ROBIN FRETWELL WILSON, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008).

what about the rights of the government official whose duty it is to perform a marriage ceremony for a same-sex couple? Are his free exercise rights violated if he is obligated to perform a marriage ceremony that is against his religious views? The state cannot control the choices of religious organizations and officials with respect to solemnizing same-sex marriages because the Constitution already limits control of such religious functions.[5] But the same limitation does not apply to government officials. With more states legalizing same-sex marriage, this issue will become more pressing as some Justices of the Peace face the difficult decision of whether to perform these ceremonies if same-sex marriage is contrary to the values of their religion.[6]

How the question is characterized likely makes a significant difference to the outcome. There are several possible ways to frame this issue. A justice of the peace who refuses to perform a same-sex marriage and gets removed from office could bring a lawsuit against the state. In that case, the question for the court would be whether removal of the justice violates his Free Exercise rights. Conversely, the state could enact legislation providing that justices may opt out of performing same-sex marriages for religious reasons. Then the question for the courts would be whether such legislation violates the Establishment Clause. This Note will explore both scenarios.

This Note will discuss the state of same-sex marriage laws in the United States (and other nations that have legalized same-sex marriage) and the extent to which they have addressed the issue of possible infringement of government officials' free exercise of religion. In addition, this Note will analyze whether forced compliance infringes justices' free exercise rights, and conversely, whether a law granting a religious exemption could be in violation of the Establishment Clause of the Constitution. Finally, this Note will address the public policy reasons that the government has more of an interest than private sector employers in compelling employees to perform duties which go against their religious views.

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5. *Id*. at 253 n.181 (2008) ("The state may not inquire into or review the internal decision making or governance of a religious institution.") (citing Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).

6. This Note will not address the rights of clerks who refuse to issue marriage licenses to same-sex couples. Since most counties have several clerks, refusal to issue a license rarely constitutes a denial of access to marriage, which removes the constitutional battle between fundamental rights. See WILSON, *supra* note 4, at 99.

I. BACKGROUND

A. United States

Currently, Iowa, New Hampshire, Vermont, Massachusetts, and Connecticut are the only states that allow same-sex marriages.[7] The California Supreme Court issued an opinion in *In re Marriage Cases*[8] holding that "limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional"[9] and "making the designation of marriage available both to opposite-sex and same-sex couples."[10] However, in November of 2008, the voters of California passed Proposition 8, a referendum which amended the state constitution to define marriage as between a man and a woman.[11] Thanks to a directive issued by Governor David Paterson, New York recognizes same-sex marriages legally performed in other states.[12] Vermont, New Hampshire, and New Jersey have legalized civil unions for same-sex couples.[13] In Oregon, same-sex domestic partnerships offer all the rights associated with marriage.[14] Domestic partnerships with limited rights are legal in Hawaii, Maine, Washington, and the District of Columbia.[15] By contrast, "forty-two states have laws prohibiting same-sex marriage."[16]

Massachusetts became the first state to allow same-sex marriage after the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*[17] declared it against the state constitution to allow only heterosexual marriage. State officials then declared that justices of the peace would be required to perform such marriages or face possible legal action

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7. As of the date of this Note, Iowa, Massachusetts, Connecticut, New Hampshire, and Vermont allow gay marriage. The District of Columbia's same-sex marriage bill is currently in the congressional review period, New Jersey and Washington both extend homosexual couples the same rights as heterosexual couples, and New York recognizes same-sex marriages performed in other states. *See* NPR.org, State By State: The Legal Battle Over Gay Marriage, http://www.npr.org/templates/story/story.php ?storyId=112448663 (last visited May 13, 2010).

8. 183 P.3d 384 (Cal. 2008).

9. *Id.* at 453.

10. *Id.*

11. CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); *see also* Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, at A15, *available at* http://www.nytimes.com/2008/11/06/us/politics/06 ballot.html.

12. Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, N.Y. TIMES, May 29, 2008, at A1, *available at* http://www.nytimes.com/2008/05/29/nyregion/29marriage.html.

13. 15 VT. STAT. ANN. tit. 23, § 1204 (2000); N.H. REV. STAT. ANN. § 457-A:1 (2007); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

14. Oregon Family Fairness Act, 11 OR. REV. STAT. ANN. § 99.1–9 (2008).

15. Robin Cheryl Miller & Jason Binimow, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. FED. 2d 1 (2005).

16. Ben Schuman, Note, *Gods & Gays: Analyzing the Same Sex Marriage Debate From A Religious Perspective*, 96 GEO. L.J. 2103, 2108 (2008).

17. 798 N.E.2d 941 (Mass. 2003).

for discrimination.[18] In addition, justices of the peace may face removal from office for refusing to marry a couple based on any protected status including race or sexual orientation.[19] Justices of the peace who oppose same-sex marriage often get around performing such ceremonies by claiming to be busy or booked when same-sex couples try to engage their services.[20] Massachusetts has not yet faced legal action from any justices of the peace over this issue.

On October 10, 2008, Connecticut's Supreme Court decided in *Kerrigan v. Commissioner of Public Health*[21] that any statute restricting marriage to heterosexual couples violates the same-sex couples' equal protection rights provided in the state constitution. Attorney General Richard Blumenthal then released a series of legal opinions on the ruling, including a statement that justices of the peace will not be permitted to refuse to perform a marriage ceremony for discriminatory reasons.[22] Connecticut also has passed legislation prohibiting state agencies from discriminating based on sexual orientation in performing its duties.[23] As of this writing, Connecticut courts have not addressed the issue of whether justices of the peace may refuse to perform a marriage for religious reasons.

The Iowa legislature, like many states around that time, passed a Defense of Marriage Act (DOMA) in 1998. Lambda Legal, a gay-rights activist group, filed suit in Polk County, Iowa in 2005, challenging the DOMA as violating the state equal protection clause; the district court struck down the Act in 2007.[24] The case, *Varnum v. Brien*,[25] was appealed

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18. Katie Zezima, *Obey Same-Sex Marriage Laws, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15, *available at* http://www.nytimes.com/2004/04/26/us/obey-same-sex-marriage-law-officials-told.ht ml.

19. The Official Website of the Governor of Massachusetts, Justice of the Peace Summary of Duties, http://www.mass.gov/?pageID=gov3modulechunk&L=1&L0=Home&sid=Agov3&b=terminalcontent&f=justice_of_peace&csid=Agov3 (last visited May 13, 2010).

20. Alaine Griffin, *Many Details 'Twixt Gay & Marriage*, HARTFORD COURANT, Oct.28, 2008, at A1.

21. 957 A.2d 407 (Conn. 2008).

22. Press Release, Connecticut Attorney General's Office, Attorney General Releases Series Of Legal Opinions Related To Same-Sex Marriage Ruling (Oct. 28, 2008), *available at* http://www.ct.gov/ag/cwp/view.asp?A=2795&Q=425976. In a formal opinion to the Department of Public Health, Attorney General Blumenthal stated:

> Section 46b-22 does not impose a duty on persons authorized to perform marriages to perform a marriage for any particular couple or establish a right for couples seeking to marry to have the ceremony performed by a particular authorized person. However, as is currently the case, public officials who have been authorized to perform marriages may not refuse to perform a marriage for discriminatory reasons, in violation of the Connecticut Constitution.

Richard Blumenthal, Op. Att'y. Gen. (Oct. 28, 2008), http://www.ct.gov/ag/lib/ag/opinions/opinion publichealthoct28.pdf.

23. CONN. GEN. STAT. ANN. § 46a-81i(a) (1991) ("All services of every state agency shall be performed without discrimination based upon sexual orientation.").

24. Monica Davey, *Judge Overturns Iowa Ban on Same-Sex Marriage*, N.Y. TIMES, Aug. 31, 2007, at A15, *available at* http://www.nytimes.com/2009/04/04/us/04iowa.html.

to the Iowa Supreme Court. The Iowa Supreme Court upheld the district court's decision on April 3, 2009.[26] A constitutional amendment banning same-sex marriage was proposed, but did not pass, in 2008. Since the legalization of same-sex marriage in Iowa is so recent, the state has not faced the issue of what to do with religiously-objecting justices of the peace and clerks of courts.

During the brief period in which same-sex marriage was legal in California, the state began to face the issue of government officials' religious views going up against same-sex couples' right to marry. At least three counties in California, faced with the decision to force all JPs to perform same-sex marriage or to offer an exemption or some other solution, chose to cease solemnizing marriages at all in their counties.[27] Kern County made the decision to stop performing marriages just days before the California Supreme Court decision legalizing them became official.[28] County Clerk Ann K. Barnett cited "administrative and budgetary concerns," but most gay rights activists felt the decision reflected county officials' "distaste for same-sex marriage."[29] Two other counties made similar moves, but claimed the decision had been made long before the gay marriage issue was decided in the California Supreme Court.[30] County officials in both decisions got off the hot seat when Proposition 8 reversed the California Supreme Court's decision on gay marriage. But these instances demonstrate the urgency of a decision in this area and the ways in which counties opposing gay marriage will attempt to get around state laws.

B. International

In 2004, the Supreme Court of Canada issued an opinion in *In re Same-Sex Marriage* declaring that defining marriage is the exclusive responsibility of the federal government.[31] While several provinces had already legalized gay marriage, the Canadian federal government did not legislate on the matter until July 20, 2005, when Parliament passed the Civil Marriage Act.[32] Among other questions, the Court in *In re Same-Sex Marriage* addressed the issue of whether religious officials could be com-

25. 763 N.W.2d 862 (Iowa 2009).

26. Monica Davey, *Iowa Court Voids Gay Marriage Ban*, N.Y. TIMES, Apr. 4, 2009, at A1, *available at* http://www.nytimes.com/2009/04/04/us/04iowa.html.

27. *See* WILSON, *supra* note 4, at 98.

28. Jesse McKinley, *'I Do'? Oh, No. Not Here You Don't*, N.Y. TIMES, June 13, 2008, at A18, *available at* http://www.nytimes.com/2008/06/13/us/13marriage.html.

29. *Id.*

30. Marisa Lagos, *2 Counties to Halt All Weddings Gay or Not*, S.F. CHRON., June 11, 2008, at A1, *available at* http://articles.sfgate.com/2008-06-11/news/17161480_1_lesbian-couples-same-sex-marriages-county-clerks (Butte and Merced Counties both decided to stop solemnizing wedding vows; Merced County later reversed the decision).

31. [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.).

32. 2005 S.C., ch. 33 (Can.).

pelled to perform same-sex marriages.[33] The Court concluded that such compulsion would violate the freedom of religion guaranteed by Canada's Charter of Rights and Freedoms.[34] The Court did not discuss the options of government officials charged with performing such marriages, however.

The Netherlands has recognized same-sex marriage since 2000.[35] Belgium became the second country to legalize same-sex marriage in 2003.[36] Since 2004, Spain also recognizes same-sex marriage.[37] Norway began recognizing same-sex marriages in 2008.[38] South Africa began recognizing same-sex civil unions (which can also be called marriages) in 2006.[39]

II. JPs' FREE EXERCISE RIGHTS

The United States Constitution states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[40] The words after the comma mean that "government must guard against activity that impinges on religious freedom . . . ."[41] Marriage is usually accepted as an exercise of one's religious beliefs.[42] As many as 80% of highly committed religious Americans oppose gay marriage,[43] and it is likely that a proportionate fraction of justices of the peace hold similar views. Therefore, some justices of the peace are likely to object to performing a marriage ceremony that is directly opposed to their religious beliefs. But when they refuse, can they be removed from office, or must the state grant them an exemption?

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33. [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.).

34. *Id.* Canadian Charter of Rights and Freedoms, Schedule B to the Canada Act 1982, ch. 11 (U.K.), guarantees individual rights and freedoms much like the U.S. Constitution. In pertinent part, it provides for "freedom of conscience and religion," "freedom of thought, belief, opinion and expression," and freedom from discrimination based on religion.

35. Robert Wintemute, *Same-sex Marriage: When Will It Reach Utah?*, 20 BYU J. PUB. L. 527, 534 (2005–2006) (citing Act of 21 Dec. 2000, Act on the Opening Up of Marriage, Stb. 2001, 9 (Neth.)). *See* also *Same-Sex Marriages To Be Allowed in Netherlands*, ALBANY TIMES UNION, Sept. 13, 2000, at A3, *available at* 2000 WLNR 281337.

36. Wintemute, *supra* note 35, at 534 (citing Article 143 of the Belgian Civil Code (Book I, Title V, Chapter I)) ("Two persons of different sex or of the same sex may contract marriage."). *See also Belgium recognizes same- sex marriages*, GLOBE & MAIL, Jan. 31, 2003, at A9, *available at* 2003 WLNR 14019711.

37. Renwick McLean, *Spain Legalizes Same-Sex Marriage*, N.Y. TIMES, June 30, 2005.

38. The Associated Press, *Norway: Same-Sex Marriage Permitted*, N.Y. TIMES, June 18, 2008, at A11, *available at* 2008 WLNR 11453714.

39. Bradley S. Smith & J. A. Robinson, *The South African Civil Union Act 17 of 2006: A Good Example of the Dangers of Rushing the Legislative Process*, 22 BYU J. PUB. L. 419, 426 (2008).

40. U.S. CONST. amend. I.

41. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985).

42. News Release, The Pew Research Ctr. for the People & the Press, The Pew Forum on Religion & Public Life, Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality 2 (Nov. 18, 2003), *available at* http://pewforum.org/publications/surveys /religion-homosexuality.pdf.

43. *Id.*

A. Modern Exemptions

Sometimes it is appropriate to grant exemptions when a generally applicable law burdens an individual's exercise of religious beliefs. There are two aspects of the law governing exemptions: the interest the individual has in exercising his religion freely, and the government's interest in maintaining order in society. At a minimum, the individual must have a sincere religious belief that is burdened by an action of the government. However, a valid government interest can sometimes outweigh the burden on the individual.

1. Government Justifications

A law that burdens religious practice must have a valid government justification. However, there are various degrees of "valid," and, as in Equal Protection and Due Process cases, there are several possible standards of scrutiny under which to evaluate an alleged government justification.

In *United States v. Lee*,[44] the plaintiff was a member of the Old Order Amish. He refused to pay the employer's share of social security taxes for the Amish employees in his carpentry shop. His objection, based on the Free Exercise Clause, was that the Amish religion requires followers to provide for their own needy and elderly, and that he and other members of his faith refused social security benefits. The Court determined that the law conflicted with Lee's religion but stated that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[45] The Court held that the government's justification was sufficient because of the necessity of the tax system and the inherent impossibility of accommodating the vast number of claims that would arise were the Court to open the door to any one religious exception.[46] Allowing employers to refuse to pay social security taxes also necessarily forces the employer's religion upon the employee. Finally, the Court noted that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[47]

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44. 455 U.S. 252, 254 (1982), *superseded by statute*, 26 U.S.C. § 3127 (West 2002).
45. *Id.* at 257 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)).
46. *Id.* at 260.
47. *Id.* at 261.

A variation of the issue at hand was presented to the Supreme Court of Vermont in *Brady v. Dean*,[48] in which town clerks challenged Vermont's same-sex civil union law on the grounds that compelling clerks to issue marriage licenses to same-sex couples burdened the clerks' sincerely held religious beliefs. The court noted that it is a "highly questionable proposition that a public official . . . can retain public office while refusing to perform a generally applicable duty of that office on religious grounds."[49] However, the court did not have to analyze that issue, as the Vermont statute provided that an assistant town clerk could issue marriage licenses, thus providing a viable alternative to the alleged burden on the clerks' religious beliefs.[50]

The government's interest in refusing to grant exemptions to justices of the peace is in having a uniform marriage system. Furthermore, the government has an interest in having government officials who will administer the laws regardless of their personal beliefs.

2. Generally Applicable Laws

After the Supreme Court's decision in *Sherbert v. Verner*,[51] in which the Supreme Court held that the government must prove a compelling interest in order to burden religion, Free Exercise protection remained strong until 1990. At that point, the Supreme Court heard the case of *Employment Division, Department of Human Resources of Oregon v. Smith*,[52] in which the plaintiffs were denied unemployment compensation because they had been fired for violating a state law against possession of peyote, which they used for religious purposes. In a controversial opinion by Justice Scalia, the Court noted that neutral, generally applied laws had never been struck down where they involved only Free Exercise claims; claims involving Free Exercise plus another fundamental right, however, sometimes required the Court to invalidate such laws.[53] In the absence of another fundamental right, the Court refused to find that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regula-

48. 790 A.2d 428, 433 (Vt. 2001).

49. *Id.* at 434.

50. *Id.* at 434–35 (noting that a "burden on religion is not substantial if . . . 'one can avoid it without violating one's religious beliefs'") (quoting Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 926 (Cal. 1996)).

51. 374 U.S. 398 (1963) (holding that the state could not apply the eligibility requirements for unemployment compensation so as to burden plaintiff's religious beliefs).

52. 494 U.S. 872 (1990) (holding that Free Exercise accommodations are not required for neutral laws of general applicability).

53. *Id.* at 881–83 (creating the famous and oft-criticized "hybrid rights" theory, in which neutral, generally applicable laws may be subject to heightened scrutiny if they infringe Free Exercise rights plus another fundamental right, such as marriage or the right of parents to raise their children as they see fit).

tion. We have never held that, and decline to do so now."[54] Justice Scalia noted, "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[55]

Since the Supreme Court's decision in *Smith*, Free Exercise litigation goes in two directions. Federal law is governed by the Religious Freedom Act of 1993 (RFRA),[56] whose purpose is "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ,"[57] even for laws that are neutral towards religion. Some states have enacted "mini-RFRAs" to apply the same principals to state laws. Portions of RFRA applying to state and local governments were overturned by *City of Boerne v. Flores*,[58] but the Supreme Court confirmed in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*[59] that the compelling interest test still applied to federal actions. In states without mini-RFRAs, the court still follows the *Smith* holding, focusing on whether the legislation is neutral and of general applicability.

The Supreme Court clarified the idea of neutrality in *Church of the Lukumi Babalu Aye v. City of Hialeah*; "[a]lthough a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[60] The Court first looked at the text of the statute,[61] and found that the narrow way it was written targeted specifically the type of animal sacrifice employed by followers of the Santeria religion, and as such could not be considered neutral. The Court also examined the law's legislative history, which included statements by the law's proponents that exhibited their hostility toward the religion and its practices.[62] The Court then further defined general applicability, finding that a law which is underinclusive to achieve legitimate secular purposes is not generally applicable.[63] The Court stated that "inequality results when a legislature decides

54. *Id.* at 882.
55. *Id.* at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).
56. 42 U.S.C. § 2000bb (1993).
57. 42 U.S.C. § 2000bb(b)(1) (1993).
58. 521 U.S. 507 (1997).
59. 546 U.S. 418 (2006).
60. 508 U.S. 520, 533 (1993) (holding that a law narrowly targeting ritualistic animal sacrifice was not neutral or generally applicable and thus violated the Establishment Clause) (citations omitted).
61. *Id.* at 533 ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.").
62. *But see id.* at 559–60 (Scalia, J., concurring) (expressing disinclination to examine the legislative history of any law, stating, in effect, that law itself, and not the legislative intent underlying it, is what prohibits the free exercise of religion).
63. *Id.* at 543 (The ordinances in question "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.").

that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[64]

The *Smith* test requires that the government's law be neutral and generally applicable. A law prohibiting justices of the peace from refusing to perform a marriage for discriminatory reasons is probably neutral and generally applicable. Such a law is facially neutral because it does not single out religious activity, instead requiring all justices of the peace to refrain from discrimination. The purpose of the law is not to force justices of the peace to make a choice between following their religion and complying with the law. The purpose is to ensure that all couples who are legally allowed to marry have equal access to the legal process. The law is not overly narrow and does not specifically target a religious practice; instead, it treats all justices of the peace equally, subject to the same professional requirements.

3. Other Employment Exemptions

The Supreme Court has, in the past, recognized religious exemptions related to employment. In *Sherbert v. Verner*,[65] the Supreme Court held that the appellant could not be denied unemployment benefits based on her religiously motivated refusal to take Saturday work. The appellant in *Sherbert* was a Seventh-Day Adventist who was discharged for refusing to work on Saturday, as that is the Sabbath Day of her religion. The appellant challenged a state law that required applicants for unemployment benefits to be "available for work"[66] on grounds that the statute burdened her religious beliefs by rendering her ineligible for benefits by reason of her refusal to work on Saturdays.

Leaving aside the fact that the Supreme Court no longer uses the *Sherbert* test in analyzing religious exemptions, the issue at hand can be further distinguished from *Sherbert*. There is a strong probability that almost any job might require an individual to work on his chosen Sabbath day. This particular type of infringement has the possibility of infringing religious practice on a broad scale. By contrast, the particular religious practice infringed by forcing an individual to solemnize a marriage that violates his religious views is very narrow in scope. It touches a very small segment of government employees, rather than, potentially, employees in any field, both in the private and public sector. The case can also be distinguished because the employee in *Sherbert* was not a government employee; she was not charged with carrying out the laws of the state. The government's provision of an exemption for the appellant did

64. *Id.* at 542–43.
65. 374 U.S. 398 (1963).
66. *Id.* at 400.

not constitute a message that the government placed the appellant's right to free religious practice over the fundamental rights of another individual.

In Illinois, the pending House Bill 2234, the Religious Freedom Protection and Civil Union Act, would legalize civil unions between same-sex couples.[67] The proposed legislation contains a provision stating that nothing about the act "shall interfere with or regulate the religious practice of any religious body" and that any religious body "is free to choose whether or not to solemnize or officiate a civil union."[68] This vague provision has engendered much discussion among the legal community. Recently, the discussion has been featured on the Chicago Law Faculty Blog.[69] Douglas Laycock,[70] Yale Kamisar Collegiate Professor of Law at the University of Michigan, recently proposed that the religious freedom provision is too narrow.[71] He opined that the provision should protect not only religious officials and religious groups from participating in same-sex marriages, but also individual religious objectors. He would support a statutory exemption allowing wedding planners, church counselors, and religious adoption agencies to refrain from supporting, planning, and celebrating a union that is, to them, sinful. However, these exemptions would seem to be covered by the Free Exercise Clause.

Laycock's opinion has faced fierce opposition. Geoffrey Stone, (Edward H. Levi Distinguished Service Professor at the University of Chicago School of Law), in his response brings up several points of contention.[72] First, he addresses the problem that Laycock's proposed exemption would legally recognize the right to discriminate against people that objectors view as "sinners" in much the same way that broad religion was used to discriminate on the basis of race. Next, Stone acknowledges the need for religious organizations to be exempt from some generally applicable laws, but he draws the line at "allow[ing] any tomdickandharry who claims his objection to civil unions or to gays and lesbians is grounded in his religion to discriminate against them at will."[73] He and other objectors make the "slippery slope" argument: if wedding planners and counselors can refuse to facilitate a same-sex marriage, can hotels and restaurants refuse to host them? May bridal shops refuse to sell to same-sex couples? Laycock argues that the "tie . . . goes to the gay;" that is, under his pro-

67. H.B. 2234, 96th Gen. Assem. (Ill. 2009).
68. H.B. 2234, 96th Gen. Assem., § 15 (Ill. 2009).
69. University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/.
70. Co-editor of SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (2008).
71. Posting of Douglas Laycock to University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-protecting-gays-lesbians-and-religious-objectors.html (May 5, 2009).
72. Posting of Geoffrey Stone to University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-a-response-to-garnett-and-laycock.html (May 5, 2009).
73. *Id.* at § 4.

posed provision, objectors may only refuse service where there is an alternative available.[74] However, this is basically the equivalent of legislating "separate but equal" treatment for same-sex couples. And, as we found out during the civil rights movement, separate but equal is not a viable system for equality but a pervasive system of discrimination.

Though this exemption is intended for private-sector employees, many of Stone's arguments may be applied to justices of the peace. Stone appropriately distinguishes religious exemptions that burden the state (for example, exemptions from military combat) from those that burden other individuals.[75] Stone also points out the problems with subjective standards: it is impossible to determine whether an individual's objection to same-sex marriage is really motivated by sincere religious beliefs.[76] Finally, though the slippery-slope argument does not apply, Stone's concern that an exemption would legislate discrimination is even more applicable to justices of the peace than it is to private sector service providers; the government has a higher interest in making sure its representatives do not discriminate than it does in controlling the behavior of private individuals.[77]

B. Opting Out of an Affirmative Duty

An option to refuse to perform same-sex marriages for religious reasons would amount to the ability to opt out of an affirmative duty of one's position as a justice of the peace. This situation could be characterized as somewhat similar to conscientious objection from conscriptive military service, which may be for religious or nonreligious reasons. The Military Selective Service Act of 1967 allows a citizen to refuse to participate in military service "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[78]

However, there are enormous differences between conscientious objection and exemption from performing marriages. First, conscientious objectors are protected by federal statute.[79] Conversely, most states have rules which prevent justices of the peace from refusing to perform a marriage for discriminatory reasons.[80] Second, the Supreme Court has held that conscientious objection may be motivated by religious or nonreligious

74. Geoffrey Stone, posting to University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-when-reasonable-isnt-reasonable.html (May 8, 2009). *See also* Douglas Laycock, posting to University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-and-religious-liberty-a-response-to-stone.html (May 6, 2009).

75. *See* Stone, *supra* note 72.

76. *Id.*

77. *Id.*

78. 50 U.S.C. app. § 456(j) (1990).

79. *Id.*

80. *See supra* notes 19, 22.

reasons, so long as the person has a legitimate ethical or moral objection to the taking of human life or to participating in war.[81] Any nonreligious reason given for objecting to perform a same-sex marriage would necessarily be discriminatory in nature. In addition, performing a marriage against one's religious beliefs does not rise to the level of sacrifice required by fighting for one's country, particularly when it comes to the obligation, as a soldier, to be prepared to take a human life. Finally, the military service from which the conscientious objection provision allows exemption is mandatory, whereas the duty to perform same-sex marriages is an obligation that goes with a civil service position that a justice of the peace takes on by choice. Therefore, a comparison to conscientious objection does not aid the cause of the justice of the peace who refuses to perform same-sex marriages.

III. RELIGIOUS EXEMPTIONS AS ESTABLISHMENT

Robin Fretwell Wilson suggests that states could enact "[i]nformation-forcing rules—that is, rules that require refusing parties to direct couples to others who will perform the service"[82] in order to protect the religious views of objectors while still allowing same-sex couples access to the legal process. Her suggestion is basically an exemption. A law allowing justices of the peace to opt out of performing same-sex marriages for religious reasons runs the risk of violating the Establishment Clause. While the Free Exercise Clause protects people from government hindrance of their religious freedom, the Establishment Clause prevents government from actions which benefit religion. Allowing an exemption to accommodate justices' religious beliefs is equivalent to the government valuing the religious beliefs of these individuals over the rights the state has granted to same-sex couples to marry. Such a law could only have a religious purpose and has the primary effect of advancing religion; it also constitutes government endorsement of religion.

A. Establishment Jurisprudence

The Establishment Clause means, among other things, that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[83] Several tests have been used to determine whether government actions violate this prin-

81. Welsh v. United States, 398 U.S. 333, 344 (1970) (explaining that section 6(j) of the Military Service Act "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war").

82. WILSON, *supra* note 4, at 98.

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

ciple. However, the Supreme Court has not established a single controlling test. Instead, different tests are sometimes used for different government functions, and lower courts are forced to use all available tests due to the impossibility of predicting which test the Supreme Court would deem appropriate for a particular issue.

The most famous Establishment Clause test was established by Chief Justice Burger in *Lemon v. Kurtzman*[84] in 1971. In evaluating legislation or other government actions, the Court gave three requirements which must be met. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[85] Using these factors, the Supreme Court found that giving government aid to parochial schools fostered excessive entanglement.[86]

A more recently articulated test is the Endorsement Test, first proposed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*.[87] O'Connor suggests that the principles underlying the *Lemon* test can be clarified by "[f]ocusing on institutional entanglement and on endorsement or disapproval of religion . . . ."[88] O'Connor suggests that the analysis turns on the message the government intends to send. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[89] O'Connor makes it clear, however, that the full context of any government action is necessary to a proper determination of its validity. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion."[90]

B. Applying the Lemon *Test*

The first prong of the *Lemon* test is that the statute must have a secular purpose.[91] However, Justice O'Connor suggests that the mere existence of any secular purpose is not necessarily sufficient to satisfy the purpose prong.[92] For example, in *Stone v. Graham*[93] the Court "held that posting

84. 403 U.S. 602 (1971).
85. *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
86. *Id.* at 625.
87. 465 U.S. 668 (1984).
88. *Id.* at 689 (O'Connor, J., concurring).
89. *Id.* at 688.
90. *Id.* at 694.
91. *Lemon*, 403 U.S. at 612.
92. *Lynch*, 465 U.S. at 690–91 (O'Connor, J., concurring).
93. 449 U.S. 39 (1980).

copies of the Ten Commandments in schools violated the purpose prong of the *Lemon* test, yet the State plainly had some secular objectives."[94] It has been argued that this prong clashes with Free Exercise accommodations, as such accommodations are necessarily in favor of religion.[95]

The second prong of the *Lemon* test is that the statute's primary effect neither advances nor inhibits religion.[96] The Supreme Court has overturned laws providing for religious exemptions from certain laws because their primary effect was to advance religion. In *Estate of Thornton v. Caldor, Inc.*,[97] the Court held invalid a Connecticut statute which provided that "[n]o person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[98] The Court used the *Lemon* test to determine whether the statute violated the Establishment Clause.[99] The Court noted that the statute provided no exceptions for special circumstances or cases where compliance would cause the employer a substantial burden.[100] As such, "[t]his unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . ," and results in a "primary effect that impermissibly advances a particular religious practice."[101]

The final prong of the *Lemon* test is that the statute must not lead to excessive government entanglement with religion.[102] The *Lemon* case itself addressed a Pennsylvania statute that allowed the government to reimburse nonpublic schools for expenses incurred in teaching nonreligious subjects, and a Rhode Island statute allowing the government to subsidize the salaries of teachers of secular subjects in nonpublic schools. The Pennsylvania statute required the school to account for spending for secular subjects and religious subjects separately, subject to state audit. The Supreme Court held the statutes invalid because they created a relationship between state and religion that violated the excessive entanglement prong of the test.[103]

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94. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

95. *See* Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) ("It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause.").

96. *Lemon*, 403 U.S. at 612.

97. 472 U.S. 703 (1985).

98. *Id.* at 706 (quoting CONN. GEN. STAT. § 53-303e(b) (1985)).

99. *Id.* at 708.

100. *Id.* at 709–10.

101. *Id.* at 710.

102. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

103. *Id.* at 613–14 (noting the government supervision is necessary to ensure that the government does not inadvertently fund religious instruction);

> [T]he program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much

The Rhode Island statute, by directing funding to teachers, ran the risk of creating a situation in which the government was paying for religious instruction because of the overall religious character of the schools and the prevalence of religion in and out of the classroom and throughout all subjects.[104] The Pennsylvania statute required the state to audit schools' accounting practices to determine which portions of the curriculum were considered religious.[105] In both cases, "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state."[106]

A law exempting justices of the peace from performing same-sex marriages for religious reasons likely runs afoul of the Establishment Clause when analyzed under the *Lemon* test. Under the first prong of *Lemon*, a law must have a secular purpose.[107] While on its face, the primary purpose of any law allowing religious exemptions would be to advance religion, a state legislature might be able to find a secular purpose for such laws. However, such a law's purpose would be to accommodate religious beliefs at the expense of the right of same-sex couples to marry. Under the second prong of *Lemon*, the primary effect of a law must not be to advance or inhibit religion.[108] This is the aspect of *Lemon* that gives a religious exemption the most trouble. The law would allow justices of the peace to put their religious beliefs above their governmental duties, and above the rights of same-sex couples to be married. It would also create a culture in which the religious preference of an individual could be used to deny a fundamental right that the state has deemed to extend to all people equally, regardless of sexual orientation. While the third prong of *Lemon*, excessive entanglement between the government and religion,[109] does not appear to be violated by an exemption, the other two prongs are sufficient to condemn such a law.

> to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

Id. at 620.

104. *Id.* at 617–18 ("The schools are governed by the standards set forth in a 'Handbook of School Regulations,' which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: 'The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher * * * .' The Handbook also states that: 'Religious formation is not confined to formal courses; nor is it restricted to a single subject area.' Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work.").

105. *Id.* at 620 ("According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose.").

106. *Id.* at 620–21.

107. *Id.* at 612.

108. *Id.*

109. *Id.* at 613.

C. Applying the Endorsement Test

O'Connor's Endorsement Test has at times been stated as an addition to the *Lemon* test, but it has also been viewed as a simplification of *Lemon*. In *Lynch*, O'Connor used the Endorsement Test to determine whether government display of a crèche as part of a Christmas display violated the Establishment Clause.[110] O'Connor concluded that the crèche was merely displayed as an acknowledgement of a government holiday, and that displaying the crèche, a traditional symbol of such holiday, would not be seen as government endorsement of religion.[111] O'Connor distinguished endorsement from mere acknowledgements, such as "government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'"[112] Such acknowledgments serve "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[113] The display of a crèche serves the legitimate secular purpose of celebrating a national holiday. O'Connor pointed out that mere acknowledgement of religious traditions and values does not necessarily "communicate[] government approval" of any religion or of religion in general.[114]

Judge Learned Hand famously stated that "[t]he First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities."[115] While an exemption does not require anyone to conform his conduct to the justice of the peace's necessities, Hand's statement encapsulates the spirit of the delicate balance between the government and religion. While the government cannot infringe anyone's religious beliefs, religion does not give anyone blanket permission to refuse to perform tasks obligated to them. Allowing government officials to refuse to perform same-sex marriages based on their religious beliefs would infringe on the equality rights of same-sex couples.[116]

A law providing exemptions for justices of the peace whose religious views conflict with same-sex marriages would likely not pass the En-

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110. Lynch v. Donnelly, 465 U.S. 668, 688–94 (1984) (O'Connor, J., concurring).
111. *Id.* at 692.
112. *Id.* at 693.
113. *Id.*
114. *Id.*
115. Otten v. Balt. & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953).
116. Janice Stein, *Reflections on Rights and Religion*, TORONTO STAR, June 2, 2007 (noting that allowing clerks to opt out of performing same-sex marriage ceremonies for religious reasons "would permit freedom of religion to trump the right to equality, . . . compromise equality rights in the most fundamental way by allowing public officials to invoke their private religious views to refuse to perform their public duties . . . [and] legalize discrimination in public spaces").

dorsement Test. By allowing justices of the peace to discriminate based on a couple's sexual orientation, and couching it in terms of religious conviction, the government is sending a message that the religious preferences of those justices of the peace are more important than the same-sex couple's right to marry. This is equivalent to the government endorsing religion over nonreligion, and more specifically, endorsing those religious views that condemn homosexuality and same-sex marriage.

IV. PUBLIC POLICY

In the jurisdictions that have legalized same-sex marriage, courts and legislatures have declared that same-sex couples deserve the right to marry as much as their heterosexual counterparts.[117] While the Supreme Court has not officially stated that sexual orientation is a suspect classification deserving strict scrutiny, they have struck down some laws that discriminate based on sexual orientation.[118] If it is not acceptable for the government to deny marriage rights to same-sex couples, then it should not be acceptable for an individual acting in his capacity as a government official to refuse to perform a particular marriage merely because of the same-sex status of the couple. The Supreme Court of Vermont acknowledged in *Brady v. Dean* that it is at least "highly questionable" that a public official could refuse on religious grounds to carry out his official duty.[119] Such refusal constitutes discrimination on the basis of sexual orientation.

In 1967, the Supreme Court held unconstitutional laws prohibiting interracial marriage because such laws violated the equal protection rights of interracial couples.[120] However, there are still people in this country who feel that interracial marriage is wrong. Religion was often used as a justification for racial discrimination. But, if today a justice of the peace refused to perform a marriage for an interracial couple, even citing sincere religious beliefs against interracial marriage would not be a justification for such discrimination.

Marriage is a fundamental right, and legalizing same-sex marriage is an important step in ensuring that homosexuals are treated equally under the law. Until the middle part of the last century, a pervasive system of laws and customs reinforced "invidious racial discrimination[]"[121] through segregation and other means of making nonwhites "inferior." Gradually,

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117. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 957–70 (Mass. 2003) (defining marriage as a "civil right," and holding that same-sex couples have an equal interest in that civil right).

118. *See* Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional a Colorado amendment prohibiting any legislative, judicial, or executive action designed to protect homosexuals).

119. 790 A.2d 428, 434 (Vt. 2001).

120. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

121. *Id.* at 8.

these laws were changed, and people of all races were granted equal rights under the law.[122] Though this did not eliminate racism, it created a legal culture in which it is clear that no one can be denied access to fundamental rights or equal protection from the law based upon the color of their skin. Even though there are plenty of people with racist views, a generation of Americans exists that has never known government endorsement of racism. The increased racial tolerance in our nation is at least partially due to the removal of the government "stamp of approval" on racism. There is a growing voice in our country that sees the day coming when it will no longer be considered socially acceptable to be homophobic or deny homosexuals the rights to which they are legally entitled, just as racism is now considered taboo. Refusing to allow discrimination against homosexuals by government officials is an important step in that direction.

One who takes a job as a civil servant has the duty to effectuate the laws of that jurisdiction, whether or not he agrees with them. "[A]s taxpayers, same-sex couples would likely be indignant to learn that their taxes support employees who will not provide them a service to which they are entitled."[123] If same-sex marriage conflicts with one's religious or personal viewpoint, the vast majority of available jobs will never force anyone to perform a marriage for a homosexual couple. This particular form of religious infringement is specific to the public office of justice of the peace, unlike infringement suffered by those who are forced to work on their chosen Sabbath. While there might be some good reason to "grandfather in" justices of the peace who were already in office before same-sex marriage was legalized in their jurisdiction,[124] new justices of the peace should not take office unless they are willing to perform any marriage that is legally recognized by their state. Just like a doctor has an obligation to offer the best medical care possible to every patient, regardless of whether he agrees with their beliefs or their lifestyle, a justice of the peace, whose main function is to solemnize marriages, should be required and willing to perform any marriage that is legally recognized in his state, putting aside his own beliefs as to its "morality."

In addition, allowing justices of the peace to "opt out" of performing same-sex marriages would provide a unique weapon for antihomosexual groups. Radical antihomosexual groups, with enough support and motivation, could conceivably fill all the justice of the peace positions in a particular county. Then, each justice could use his right to "opt out" of performing a same-sex marriage, effectively denying marriage to all homo-

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122. U.S. CONST. amend. XIV, § 1.

123. WILSON, *supra* note 4, at 99.

124. *Id.* (recognizing that existing "[c]lerks and other celebrants may . . . have a reliance interest in their professions and jobs; many started at a time when they never would have imagined they would be asked to issue licenses to, or to marry, same-sex couples").

sexual couples in the county. It might be tempting to think that one justice of the peace opting out is not a big deal; the situation certainly looks different if each of the justices in a particular county were to refuse to perform same-sex marriages.

One interesting way to think about this issue is to consider whether the actions of a justice of the peace constitute government speech. The government speech doctrine, first implied in *Wooley v. Maynard* in 1971, provides that the government may advance or regulate its own speech in a way that would clearly violate the First Amendment if it were regulating the speech of a private individual.[125] While the First Amendment protects private speech endorsing or promoting religion, government speech that promotes religion is a violation of the Establishment Clause.[126] The Supreme Court recently held, in *Pleasant Grove City v. Summum*, that the erection of monuments in a public park is a form of government speech and not subject to First Amendment scrutiny.[127] As such, the government is entitled to control the religious content of such monuments, and to accept or deny privately donated monuments no matter what their religious content.[128] However, the line between individuals' speech and government speech is not easy to determine. Government speech generally covers speech by government employees and even speech made on government property with government support. A representation made to the public by a government employee in his official capacity probably constitutes government speech, but it is questionable whether the act of refusing to solemnize a certain marriage constitutes "speech." However, if it were to be considered "speech," these actions by justices of the peace would have to comply with the Establishment Clause.

CONCLUSION

As same-sex marriage becomes legal in more jurisdictions, some justices of the peace will face a decision when same-sex marriage conflicts with their religious views. Most jurisdictions do not allow justices of the peace to refuse to perform marriages for discriminatory reasons. Therefore, a justice of the peace would be subject to removal from office for refusing to perform a particular marriage.

Justice of the peace is a low-paying government service job. It requires the individual to carry out duties obligated by the government. The justice of the peace is an extension of the government and responsible for executing the laws of the state. Public officials, at least to some degree,

125. 430 U.S. 705, 716 (1977).
126. Pleasant Grove City v. Summum, 129 S.Ct. 1125, 1132 (2009).
127. *Id.* at 1138.
128. Id.

are the face of the government, and may not change the application of laws to suit their own views. If justices of the peace were allowed to opt out of performing certain marriages because they don't agree with them, for religious or other reasons, the government's interest in having marriages performed efficiently and without conflict would not be served. Furthermore, allowing justices of the peace to refuse to perform same-sex marriages amounts to government endorsement of discrimination. Though the reasons for such refusal are couched in religious terms, the effect is the same: allowing a government employee to refuse service based on what the state has termed a suspect classification.

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