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Post-Obergefell America

*The Impact of the
Supreme Court Ruling*

ALSO IN THIS ISSUE

- Some Thoughts on Law School Grades *by Michael P. Schutt*
- Are You Called to be an Evangelist for the Ministry of Law? *by Zale Dowlen*
- Let Your Light Shine Before Others *by Ken Liu*



David Nammo,
Executive Director
and CEO

The Balance

Christians and Christian leaders are struggling to find “balance” following the recent same-sex marriage decision. Everywhere I travel, people want to talk about the implications for their church, organization, or school. They do not want to give in to fear, but rather they want to continue showing the love of Christ to a lost culture. They are worried, however, about their ability to continue practicing biblical “Christianity,” else how will they reach that same lost culture?

It is a struggle. And it seems the divide in this country between those who would support religious liberty and those who support gay rights is insurmountable and still growing. The original draft cover of this magazine pictured a gavel on a fractured “America,” representing judicial activism and the damage it may do to the country and its founding principles. Chief Justice Roberts, in his dissenting opinion in *Obergefell*, expressed that same frustration:

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial ‘caution’ and omits even a pretense of humility, openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’ As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the

Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

Justice Alito also declared his worry for religious liberty in a similar dissent:

The decision . . . will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent. Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The authors in this issue also are trying to find a way forward. Religious liberty and those who cherish it are rightly worried about its future, as it is one of the greatest gifts that America gives to the world. CLS and others will continue to fight to protect it, but unless all Americans value it—its future may be tenuous. Time will tell.

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Post-Obergefell America

*The Impact of the
Supreme Court Ruling*



A Post-Obergefell America: Is a Season of Legal and Social Strife Inevitable?

BY PROFESSOR CARL H. ESBECK

O*bergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), declared that the right to marry is fundamental. The U.S. Supreme Court thereby struck down the laws in approximately thirty states that denied a marriage license to all but opposite-sex couples. The Court mentioned no standard of review, but convention is that a “fundamental right” gets strict scrutiny.¹

This is a Fourteenth Amendment ruling and the Fourteenth Amendment requires “state action.” Accordingly, the direct and immediate impact of *Obergefell* is only on governmental actors: local, state, and federal.² The private sector, including religious organizations, other NGOs, and commercial enterprises, are not directly and immediately implicated. Thus, for example, to hold a license to operate issued by the government, to be awarded a government social-service grant, or to enter into a government contract does not make one a state actor.³

There is also no requirement that state and local governments affirmatively implement *Obergefell* in the private sector. While a state may choose to implement “marriage equality” in various ways, such steps go beyond the requirements of *Obergefell*. That said, it must be expected that the Court’s rhetoric concerning the harm incurred by same-sex couples when denied the ability to marry will motivate some state and local officials to seek to extend marriage equality.⁴

Obergefell did not extend the rigor of the Equal Protection Clause to “sexual orientation” as a protected class. That would have threatened further damage to religious liberty. *Obergefell* is about the right to marry by obtaining a license from the state, not a right to be free of discrimination on the basis of sexual orientation. However, as previously acknowledged (*supra*, note 4), the “demean” and “disparage” litany by the Supreme Court will give a boost to state and local officials eager to take the next step, as they see it, for sexual equality. So expect a push in more liberal jurisdictions to challenge all remaining classifications by authorities based on sexual orientation. Not only did *Obergefell* speak of gays and lesbians as a class and wrote empathetically about them, but in *obiter dicta* Justice Kennedy twice said that being gay or lesbian is an immutable characteristic. *Id.* at 2594, 2596. A class formed around an unchangeable characteristic, one that historically was a badge of invidious discrimination,

is a typical prerequisite to courts declaring a class of persons as specially protected as a matter of equal protection. Accordingly, it can be expected that a few lower court judges—ones liberally inclined—will declare sexual orientation a “suspect class” under the Equal Protection Clause. True, the Court in *Obergefell* was intentional in not taking this step. But, from experience, we should assume that a few liberal jurists will be unable to restrain themselves and they will take the step not taken in *Obergefell*.

Although any such step is still pursuant to the Fourteenth Amendment and thus binding only on state actors, there are adverse consequences for religious organizations. If the class of gays and lesbians is a “suspect class” under the Equal Protection Clause, then progressive government officials can argue there is a “compelling interest” in affirmatively attacking such discrimination in the private sector. Further, when the discrimination is by a person or organization acting on a religious belief, then there is a clash of two fundamental rights. In such a contest, does gay equality or religious liberty prevail? The answer is not clear, but likely it will be case-by-case as influenced by what is at stake and the particular equities at hand.

No Longer E Pluribus Unum

The worldviews and religious values of Americans are diverse and becoming more so. Given our deepening differences, reflective citizens are quietly asking if it is no longer prudent to take for granted domestic tranquility. American politics is polarized and vitriolic. So is our public discourse. We often do not actually talk to those with whom we disagree, spend time in the same room with them, or even personally know any of them.

Americans who hold to the beliefs and practices of historic Christianity seek to live in peace amidst this widening diversity. These Christians want to exercise their faith free of regulation and censorship, not just within the seclusion of home and house of worship but also in public settings like the workplace, the campus, the professions, the charities, and main street’s trades and commerce. Many have only recently come to grips with the fact that they are a minority in their own country. Even as others disagree with them, people who take their faith seriously expect to be treated with respect and dignity. They

are still surprised when this does not happen. Their self-image is as a child of God, flawed but by grace forgiven and actively trying to discern and obey his will. They are assured that God has a plan for their life, one that will bring good rather than ill if only they will follow the revealed truths in the Bible. To submit to God's will is not understood by them as a loss of liberty, though this is a paradox to others. Submission, rather, is seen as embarking on a new journey that frees the Christian to live aligned with the natural order of how things were meant to be. As an incident to God's plan—not its center—is the proper use of one's body, not to frustrate or deny pleasures, but to do what is best for one physically and emotionally, and to enable sexually fulfilling and stable relationships. Sexuality is a gift, but it can be abused. We are embodied souls; what is done to the body can't help but affect the spirit. God loves his children and does not want any harm to come to them by their making choices at odds with his created order.

Roughly in parallel to the aspirations of these Christian claimants, Justice Anthony Kennedy's opinion in *Obergefell v. Hodges* describes gays and lesbians as also wanting to live in peace amidst America's cultural diversity. As Justice Kennedy describes it, they too seek respect and dignity by having their identity as couples legitimated by the state. 135 S. Ct. at 2593. The liberty elevated in *Obergefell* is, we are told, the product of self-definition, in this instance a union of two women or two men who are committed to one another and wanting society to publicly ascribe jural meaning to that union. Kennedy writes that “[a]s the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects... . With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right imposes stigma and injury of the kind prohibited by our basic charter.” *Id.* at 2601-02. In some instances, homosexual identity does go much deeper than sexual pleasure. At its best, the gay and lesbian movement has many qualities we associate with the church. There is a broad acceptance of others, a strong sense of common cause, and a thirst for justice. They are passionate about sharing their views and unashamed to be recognized for what they believe.

In this matter, arguments for equality are merely instrumental and thus unhelpful. Equality can be powerful rhetoric, but adds nothing of substance and can evoke emotions that cloud reason.

In prior cases, Justice Kennedy has characterized religious liberty in terms strikingly similar to his description of gay rights. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), Kennedy joined the Court's opinion but filed a separate concurrence. In doing so, he wrote about religious liberty in words identical to those used in *Obergefell* concerning the right to marry.

“In our constitutional tradition, freedom means that all persons have the right to believe ... in a divine creator and a divine law. For those who **choose this course**, free exercise is essential in **preserving their own dignity and in striving for a self-definition** shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. ... It means, too, the right to **express those beliefs and to establish one's religious** (or nonreligious) **self-definition** in the political, civic, and

economic life of our larger community. ... “[T]he American community is today, as it long has been, a rich mosaic of religious faiths.’ ... Among the reasons the United States is **so open, so tolerant, and so free is that no person may be restricted or demeaned by government for exercising his or her religion**” (*Id.* at 2785, 2786; emphasis added, citations omitted).

As can be seen, both sides of this religion/gay divide make powerful rights claims. And, without endorsing Kennedy's parity of these two rights, it must be admitted that the claims are in

some respects parallel. The religious individual as a child of God, and the gay or lesbian individual with same-sex attraction, want to take his or her self-understanding and live true to it. This understanding is the totality through which each sees all reality. And there is a desire to be true to that basic identity not just in private but in open public settings. In all their interactions with government, both groups desire to avoid rejection or embarrassment or penalty such that each can live out his or her sense of self in public peace.

Rights in Conflict?

What we have, from the Court's point of view, are two vigorous assertions to a substantive right that, when honored, necessarily limits and checks government. Are these two fundamental



rights necessarily in conflict? No. The civil law can protect the right of same-sex couples to marry while at the same time safeguard the right of religious persons and organizations not to recognize these marriages.

Obergefell is a Fourteenth Amendment case. It operates only against the government. So same-sex couples, say a majority of the Justices, have a right to civil marriage. The right is against only the government. They also enjoy all the incidental privileges and benefits of married couples, from tax breaks, to inheritance and pension rights, to medical decision-making authority as to one's spouse. 135 S. Ct. at 2601. But government does not occupy the universe of public social space. There is a civil society, variously called the private sector or the public square of ideas and NGOs and commerce. This is that big social space devoid of "state action." To be sure, affirmative government is ever whittling away at this social space. But it still remains a big space. And here is the arena where these two fundamental rights do not need to be in juridical conflict. Both religious individuals and gay and lesbian individuals can believe in and practice their core identity, even as they reject that of the other. They are in conflict as to beliefs, but not in conflict of laws.

We have to do this right, however. This will entail, if not moral agreement or even mutual civility, a devotion to the principle that neither claimant should enlist the power of the state to get the other to renounce their core beliefs or to act contrary to them.

In this matter, arguments for equality are merely instrumental and thus unhelpful. Equality can be powerful rhetoric, but adds nothing of substance and can evoke emotions that cloud reason. Equality requires a preferred class to which a claimant wants to be elevated. The formula is "Like things must be treated alike, while different things may be treated differently." The question remains: Are these two things like one another? Only if they are "like" one another does fairness require equal treatment. The question of whether two things are alike is ultimately substantive. *Obergefell* answered in the affirmative as to same and opposite-sex marriages. (Wrongly, I believe.) It held that for same-sex couples to enter into a marriage recognized by the state is a fundamental right as a matter of Substantive Due Process. However, with its express placement in the text of the First Amendment religious freedom is also a fundamental right. Under the law, therefore, the two are seemingly equivalent. Both are substantive rights, and both enjoy the highest protection from the government's regulation in the form of licensing, certifying, accrediting, taxing, funding, and the like.

Framing the Question Properly

That is not all. Gay and lesbian groups insist that respectful treatment by the government is not enough. In certain important private transactions, such as employment, housing, commerce, and education, both the religious and gay claimants want not to be judged adversely on account of their core

understanding, religious, in one instance, homosexual, in the other. Our society has responded by enacting statutes to regulate these important venues in the private sector. These statutes, of course, are known as Civil Rights Acts requiring nondiscrimination in these transactions in regard to certain historically oppressed classes. Given our nation's history, racial and religious minorities immediately come to mind. Also gender and disability are, as of late, protected classes.

And, now, we arrive at the legislative efforts to add "sexual orientation" to our nation's venerable civil rights laws. If our legislators do so, then what is to be done when the protection of the class of sexual orientation conflicts with the protection of religion freedom?

The response by Christians thus far, as is well known, is to insist that religious individuals and organizations be exempt from these new nondiscrimination laws protecting sexual orientation.

This framing of the issue has had the unfortunate effect of shifting the debate away from a clash of human rights that have to be balanced and toward one of equal treatment or equality. The rejoinder from the gay and lesbian community is to characterize the insistence on religious exemptions as seeking an elevation above generally applicable law. It is said that Christians are seeking to avoid a law all others must obey, indeed, a "right to discriminate," the latter now a synonym for homophobic hate.

Anyone who has endured the first year of law school learns that the first step to legal clarity is not getting the right answer but it is asking the right question. This is an instance where framing the question properly is important.

When there are two human rights being claimed and they appear to be colliding, there are two ways of posing the conflict of laws question. The first is to concede that both are legitimate rights-claims and the task is to balance the two with the aim that both rights be harmonized where possible so that both are substantially realized. The second is that, for the common good, society has promulgated a rule of equality as to certain oppressed claimants defined by a class to which the other claimants—the religious—want a special dispensation.

The first framing is more just because it avoids the bias that it is the religious rights-claimant who is against the common good, that is, in the second framing it is as if the religious is asking for a special privilege to be excused from a law that is binding on everyone else. But the religious are not asking to be elevated above the common good, and it is anti-religious prejudice to so presume. The religious claimants are only asking that their claim to liberty be weighed on the merits over against the liberty claim asserted by gays and lesbians.

Is Religion Special?

Secular scholars are asking: Why is religion special? Why should religious claims get special protection? Have not we, as an American polity, outgrown the First Amendment's special carve-out for religion? What these scholars really mean is: Religion is not special, indeed it is unprogressive

and thereby harmful. Or, more precisely, they mean religion is not special to public intellectuals, that small class of Americans from which these scholars come. Thus, they advocate that government stop giving religion First Amendment protection, as if their opinions and beliefs should be preferred and negate the First Amendment. They, of course, are not so blunt as to ask the courts to ignore the First Amendment. So they devise clever ways for the courts to limit and otherwise construe the text away.

Religion is not special to public intellectuals ... thus, they advocate that government stop giving religion First Amendment protection, as if their opinions and beliefs should be preferred and negate the First Amendment.

But religion is special. It was right to recognize religious freedom in the Bill of Rights in 1789-91, and it remains right to do so in the twenty-first century. Human beings are meaning-seeking creatures. Religion is intrinsic to our nature, not a choice, not a lifestyle, not a social construct. We ask, indeed, we can't help but ask: Where did we come from? Why are we here? Is there meaning or purpose to life? What happens after we die? The answers humans give constitute the definition of what law means when we protect "religion." The answers given are what people believe is worth sacrificing for, even dying for. And that's why religion has, and should retain, the highest protection the civil law can give to life's ultimate beliefs and practices.

Radical Pluralism

This is hardly the first time a western society, one significantly shaped by historic Christianity, has divided over absolutes. One of John Locke's (1688) insights was that a nation's unity is not to be found in agreement in creedal specifics. In an open and free society, and given the inevitable differences in human opinion, a nation-state organized on unity in a particular biblical creed is unattainable. Civic unity, rather, is found in the operative rule that when one faction is attacked all are threatened and all will come to the defense of the faction being menaced by government. A faction's assurance that when pressured by government the other factions will rally to its defense is what in time leads to each faction's sense of juridical and domestic security, perhaps even a patriotic affection for that nation and its laws.

Dissenting in *Obergefell*, Justice Samuel Alito predicted that the marriage ruling "will be used to vilify Americans who are unwilling to assent to the new orthodoxy." 135 S. Ct. at 2642. Everyone has an interest in that not happening, even the gay and lesbian community. Christian advocacy groups, or the better ones, have over time learned the Lockean principle that, "When all are protected, Christians are protected." That has to now be broadened to, "When all fundamental rights are protected, religious freedom is protected." The same principle works for gay rights.

In the turmoil after *Obergefell*, the one optimistic note is the frequent call by Christians to pluralism as an organizing principle. Pluralism does not see American diversity as a problem. Rather, it sees diversity as inevitable, as a given, as the human condition. But the necessary project to educate American citizens in a mature pluralism so as to peacefully govern ourselves is in its infancy.

This will not be easy. Christians, who understandably feel threatened by what's coming downstream to *Obergefell*, will have to come to believe that gays and lesbians will rise in defense of their religious exercise. In turn, when gays and lesbians are threatened, Christians will have a duty to rally to the defense of their liberty—not a defense of the moral rightness of their sexual practices, but that they have a civil right to

engage in their sexual practices even as Christians think their conduct morally wrong.

This is pluralism; radical pluralism. We are asking Christians to love their neighbors, even those who seek to harm them. Indeed, especially those who seek, as a matter of pay-back, to harm them. This will take a maturity in the Christian community that it does not presently have. And that means civic education in our churches and para-church organizations. There is work to be done and, to be honest, resistance to overcome within the very ranks of the church. But, then, as a radical teacher once observed: "If we do good only to those who do good to us, of what credit is that to us? Even sinners do that." (Luke 6:33).



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ENDNOTES

- 1 The opinion implicitly puts to one side marriage among three adults, incestuous marriage, and the minimum age to marry without parental consent, all current state restrictions on the right to marry. Presumably these familiar limitations and others will be tested in the future and will have to pass strict scrutiny.
- 2 The federal government is not strictly a "state actor," but nevertheless is bound by the Court's holding via the Due Process Clause of the Fifth Amendment. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court struck down as a violation of the Fifth Amendment a congressional act limiting the federal definition of marriage to opposite-sex couples. Although not ordered in *Windsor* to do so, the Obama Administration proceeded to aggressively alter the definition of "marriage," "spouse," "wife," and "husband" throughout federal law. Accordingly, *Obergefell* will have limited impact on federal law as many alterations have already been made by the executive branch.
- 3 *Blum v. Yaretsky*, 457 U.S. 991 (1982) (government licensure); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (government funding).
- 4 Rather than attribute an invidious motive to those who opposed same-sex marriage, including religious opposition, the *Obergefell* Court, 135 S. Ct. at 2602, focused on the effects of that opposition—using various action verbs: stigmatize, disrespect, subordinate, exclude, deprive, disparage, diminish, demean, disable, deny, wound, injure, harm, humiliate. The Court's rhetoric is an impressive thesaurus, managing to avoid only the action verb "discriminate."

The Future for Defenders of Marriage: Treated as Bigots or Pro-Lifers?

BY RYAN T. ANDERSON

With its decision in *Obergefell v. Hodges*, the Supreme Court has brought the sexual revolution to its apex—a redefinition of our civilization’s primordial institution, cutting marriage’s link to procreation and declaring sex differences meaningless. The court has usurped the authority of the people, working through the democratic process, to define marriage. And it has shut down debate just as we were starting to hear new voices—gay people who agree that children need their mother and their father, and children of same-sex couples who wish they knew both their mom and dad.

If the polls are right, there has also been an astonishingly swift change in public opinion. Most Americans now think that justice and equality, or at least good manners, require redesigning marriage to fit couples (at this point, *just* couples) of the same sex. Or at least they’ve been intimidated into saying so.

I argue in my just-released book, *Truth Overruled: The Future of Marriage and Religious Freedom*, that we are sleepwalking into an unprecedented cultural and social revolution. A truth acknowledged for millennia has been overruled by five unelected judges. The consequences will extend far beyond those couples newly able to obtain a marriage license.

If our society teaches a falsehood about marriage, it is harder for people to live out the truth of marriage. Marital norms make no sense, as a matter of principle, if what makes a marriage is merely intense emotional attachment, an idea captured in the bumper-sticker slogan “Love makes a family.” There is no reason that mere consenting adult love has to be permanent or limited to two persons, much less sexually exclusive. And so, as people internalize this new vision of marriage, marriage will be less and less a stabilizing force.

And if fewer people live out the norms of marriage, then fewer people will reap the benefits of the institution of marriage—not only spouses, but also children. Preserving the man-woman definition of marriage is the only way to preserve the benefits of marriage and avoid the enormous societal risks accompanying a genderless marriage regime. How can the law teach that fathers are essential, for instance, when it has officially made them optional?

There is nothing “homosexual” or “gay” or “lesbian,” of course, about the new vision of marriage that Justice Kennedy enshrined in law. Many heterosexuals have bought into it over the past fifty years. This is the vision of marriage that came out of the sexual revolution. Long before there was a debate about same-sex anything, far too many heterosexuals bought into a liberal ideology about sexuality that makes a mess of marriage: cohabitation, no-fault divorce, extramarital sex, non-marital childbearing, pornography, and the hook-up culture all contributed to the breakdown of the marriage culture. The push for the legal redefinition of marriage didn’t cause any of these problems. It is, rather, their logical conclusion. The problem is that it’s the logical conclusion of a bad train of logic.

If the sexual habits of the past fifty years have been good for society, good for women, good for children, then by all means let’s enshrine that vision of marriage in law. But if the past fifty years haven’t been so good for society, for women, for children—indeed, if they’ve been, for many people, a disaster—then why would we lock in a view of marriage that will make it more difficult to recover a more humane vision of human sexuality and family life?

The essence of marriage as a permanent, exclusive male-female union, however, has become an unwelcome truth. Indeed, a serious attempt is well under way to define opposition to same-sex marriage as nothing more than irrational bigotry. If that attempt succeeds, it will pose the most serious threat to the rights of conscience and religious freedom in American history.

Bigots or Pro-Lifers?

Will the defenders of marriage be treated like bigots? Will our society and our laws treat Americans who believe that marriage is the union of husband and wife as if they were the moral equivalent of racists?

Perhaps not. Think about the abortion debate. Ever since *Roe v. Wade*, our law has granted a right to abortion. And yet, for the most part, pro-life citizens are not treated as though they are “anti-woman” or “anti-health.” Those are just slurs from abortion activists.



After *Roe*, there was a political push to make all citizens pay for abortion and to force all healthcare workers and facilities—pro-life doctors and nurses, and Catholic hospitals—to perform abortions. The argument was that abortion was a constitutionally protected right, and thus for the poor to exercise this right they needed taxpayer subsidies. And, further, abortion was a standard medical procedure, so all medical professionals and facilities should perform abortion, and all healthcare plans pay for abortion.

The abortion activists lost that debate. The pro-life movement won. Through legal protections such as the Hyde Amendment and the Church Amendment, tax-payer funds were prohibited from being used to pay for abortion, and pro-life citizens were protected from being forced to perform abortion. Until the HHS insurance-coverage mandates imposed under Obamacare, at least, there was wide agreement that pro-life citizens shouldn't be forced by the government to be complicit in what they see as the evil of abortion. Pro-life taxpayers, for example, haven't been forced to fund elective surgical abortions, and pro-life doctors haven't been forced to perform them. Even the HHS mandate only extended to abortifacient drugs and devices, not surgical abortion.

I saw this dynamic as an undergraduate at Princeton University. Even many of those who disagree with the pro-life cause can understand what motivates our concern. As a result, they tend to respect pro-lifers and recognize that the pro-life position has a legitimate place in the debate over public policy. And—this is crucial—it's *because of that respect* that pro-choice leaders generally respect the religious liberty and conscience rights of their pro-life fellow citizens.

Will the same tolerance be shown to those who believe the truth about marriage? Will the government respect their rights

of conscience and religious liberty? It doesn't look good. So far, the trend has been in the opposite direction. We must now work to reverse that trend. And our work must start by helping our neighbors at least understand why we believe what we believe about marriage. Only if they can understand what motivates us will they respect our freedom to act on such motivation.

The False Analogy of Interracial Marriage

For years, the refrain of the Left has been that people who oppose same-sex marriage are just like people who opposed interracial marriage—and that the law should treat them just as it treats racists. Indeed, the *New York Times* reported that while the amicus briefs filed with the Supreme Court in *Obergefell* were evenly divided between supporters and opponents of state marriage laws, no major law firm had filed a brief in support of marriage as the union of a man and a woman. “In dozens of interviews, lawyers and law professors said the imbalance in legal firepower in the same-sex marriage cases resulted from a conviction among many lawyers that opposition to such unions is bigotry akin to racism.”

Same-sex marriage advocates insist that the court's *Obergefell* ruling is not like *Roe v. Wade*, which engendered undying controversy, but like *Loving v. Virginia*, the universally accepted decision that struck down bans on interracial marriage—a decision now so uncontroversial that most Americans have never heard of it. If that is true, then anyone who opposes *Obergefell* is an irrational bigot—the moral and legal equivalent of a racist.

But as I explain in my book, great thinkers throughout human history—and from every political community until about the year 2000—thought it reasonable and right to view marriage as a gendered institution, a union of male and female. Indeed, this aspect of marriage has been nearly a human universal—even while many other aspects about marriage have been subjects of contention. Viewing marriage as a gendered institution has been shared by the Jewish, Christian, and Muslim traditions; by ancient Greek and Roman thinkers untouched by the influence of these religions; and by Enlightenment philosophers. It is affirmed by canon law as well as common and civil law.

Bans on interracial marriage, by contrast, have no such historical pedigree. They were part of an insidious system of racial subordination and exploitation that denied the equality and dignity of all human beings and forcibly segregated citizens based on race. When these interracial marriage bans first arose in the American colonies, they were inconsistent not only with

the common law of England but with the customs of every previous culture throughout human history.

As for the Bible, while it doesn't present marriage as having anything to do with race, it insists that marriage has everything to do with sexual complementarity. From the beginning of Genesis to the end of Revelation, the Bible is replete with spousal imagery and the language of husband and wife. One activist Supreme Court ruling cannot overthrow the truth about marriage that is expressed in faith and reason and universal human experience.

We must now bear witness to the truth of marriage with more resolve and skill than ever before. We must now find ways to rebuild a marriage culture. The first step will be protecting our right to live in accordance with the truth. The key question, again, is whether liberal elites who now have the upper hand will treat their dissenting fellow citizens as they treat racists or as they treat pro-lifers. While liberal elites disagree with the pro-life position, most understand it. With the exception of the most hardened Planned Parenthood supporter, the recent videos have shocked the consciences even of liberals—and they certainly can understand why pro-lifers are concerned. They can see why a pro-life citizen defends unborn life—so,

for the most part, they agree that government shouldn't coerce citizens into performing or subsidizing abortions. The same needs to be true for marriage. And we need to make it true by making the arguments in defense of marriage.

What Do We Do Now?

In January 1973, the U.S. Supreme Court created a constitutional right to abortion throughout all nine months of pregnancy in *Roe v. Wade* and *Doe v. Bolton*. Pro-lifers were told that they had lost, that the issue was settled. The law taught citizens that they had a new right, and public opinion quickly swung against pro-lifers by as much as a two-to-one margin. One after another, formerly pro-life public figures—Ted Kennedy, Jesse Jackson, Al Gore, Bill Clinton—“evolved” in their thinking to embrace the new social orthodoxy of abortion on demand. Pundits insisted that all young people were for abortion, and elites ridiculed pro-lifers for being on the “wrong side of history.”

The pro-lifers were aging, their children increasingly against them. The only people who continued to oppose abortion, its partisans insisted, were a few elderly priests and religious fundamentalists. They would soon die off, and abortion would

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be easily integrated into American life and disappear as a disputed issue.

But courageous pro-lifers put their hand to the plow, and today we reap the fruits. My generation is more pro-life than my parents' generation. A majority of Americans support pro-life policies, more today than at any time since the *Roe* decision. More state laws have been enacted protecting unborn babies in the past decade than in the previous thirty years combined.

What happened?

The pro-life community woke up and responded to a bad court ruling. Academics wrote the books and articles making the scientific and philosophical case for life. Statesmen like Henry Hyde, Edwin Meese, and Ronald Reagan crafted the policy and used the bully pulpit to advance the culture of life. Activists and lawyers got together, formed coalitions, and devised effective strategies. They faithfully bore witness to the truth.

Everything the pro-life movement did needs to be done again, now on this new frontier of marriage. There are three lessons in particular to learn from the pro-life movement that I explore at length in *Truth Overruled*:

1. We must call the court's ruling in *Obergefell v. Hodges* what it is: judicial activism.

Just as the pro-life movement successfully rejected *Roe v. Wade* and exposed its lies about unborn life and about the U.S. Constitution, we must make it clear to our fellow citizens that *Obergefell v. Hodges* does not tell the truth about marriage or about our Constitution.

Nothing in the Constitution justifies the redefinition of marriage by judges. In imposing on the American people its judgment about a policy matter that the Constitution leaves to citizens and their elected representatives, the court has inflicted serious damage on the institution of marriage and the Constitution. Our Constitution is silent on what marriage is. It protects specific fundamental rights and provides the structure of deliberative democracy by which we the people, retaining our authority as full citizens and not subjects of oligarchic rule, decide important questions of public policy, such as the proper understanding of marriage and the structure of laws defining and supporting it. The majority of the court, however, has simply replaced the people's opinion about what marriage is with its own—without any constitutional basis whatsoever.

2. We must protect our freedom to speak and live according to the truth.

The pro-life movement accomplished this on at least three fronts. First, it ensured that pro-life doctors and nurses and pharmacists and hospitals would never have to perform abortions or dispense abortion-causing drugs. Second, it won the battle—through the Hyde Amendment—to prevent taxpayer money from paying for abortions. And third, it made sure that pro-lifers and pro-life organizations could not be discriminated against by the government.

Pro-marriage forces need to do the same: ensure that we have freedom from government coercion to lead our lives, rear our children, and operate our businesses and charities in accord with the truth about marriage. Likewise, we must ensure that the government does not discriminate against citizens or organizations because of their belief that marriage is the union of husband and wife.

3. We must redouble our efforts to make the case in the public square.

We have to bear witness to the truth in a winsome and compelling way. The pro-life movement accomplished this on different levels. Specialists in science, law, philosophy, and theology laid the foundations of the pro-life case with research and writing in their disciplines, while advocacy groups tirelessly appealed to the hearts of the American people. Pro-lifers did much more than preach, launching a multitude of initiatives to help mothers in crisis pregnancies make the right choice.

Now we must employ reason to make the case for the truth about marriage, communicate this truth to our neighbors, and embody this truth in our families and communities. Just as the pro-life movement discovered the effectiveness of ultrasound and letting women speak for themselves, the pro-marriage movement will, I predict, find the social science on marriage and parenting and voices of the victims of the sexual revolution to be particularly effective. And just as grassroots pregnancy centers exposed the lie that abortion is a compassionate response to unplanned pregnancy, we must show what a truly loving response is to same-sex attraction.

The Church

The Church—either through action or inaction—will play a major role in the debate over the meaning of marriage. Here I

suggest four things the church in particular should do to help rebuild a strong marriage culture.

1. Present an appealing and engaging case for biblical sexuality.

The virtues of chastity and lifelong marriage are enriching, but after fifty years, the church has still not devised a compelling response to the sexual revolution. The legal redefinition of marriage could take place when and where it did only because the majority of Americans lacked a sound understanding of the nature of man and the nature of marriage.

The church needs to find a way to capture the moral imagination of the next generation. It needs to make the truth about human sexuality and its fulfillment in marriage not only attractive and appealing, but noble and exhilarating. This is a truth worth staking one's life on.

In the face of the seduction of cohabitation, no-fault divorce, extra-marital sex, non-marital childbearing, pornography, and the hook-up culture, what can the church offer as a more fulfilling, more humane, more liberating alternative? Until it finds an answer, the church will make no headway in the same-sex marriage debate, which is the fulfillment of those revolutionary sexual values.

A proper response to the sexual revolution also requires engaging—not ignoring—the best of contemporary thought, especially the best of contemporary secular thought. What visions of the human person and sex, of marriage and personal wholeness do today's thinkers advance? Exactly where and why do their ideas go wrong? The church needs to show that the truth is better than a lie. And that the truth can defeat all lies. I provide a philosophical defense of the truth in *Truth Overruled*, we need theologians to continue developing theological defenses.

In these efforts, we shouldn't discount the potential of slumbering Christian communities to wake up. It's easy to forget that, in 1973, the Southern Baptists were in favor of abortion rights and supported *Roe v. Wade*. Today they are at the forefront of the pro-life movement. Christians who are on the wrong side of the marriage debate today can change their minds if we help them.

2. Develop ministries for those with same-sex attraction & gender identity conflicts.

People with same-sex attractions or gender identity conflicts, for whom fidelity to the truth about human sexuality requires

special courage, need our loving attention. Pope Francis's description of the church as a field hospital after a battle is especially apt here.

These ministries are like the pro-life movement's crisis pregnancy centers. Abortion is sold as the most humane and compassionate response to an unplanned pregnancy. It's not. And pro-lifers' unprecedented grassroots response to women gives the lie to that claim. Likewise, those who believe the truth about marriage should be the first to walk with men and women dealing with same-sex attraction or gender identity conflicts, showing what a truly humane and compassionate response looks like.

Young people experiencing same-sex desire can face isolation and confusion as their peers first awaken to the opposite sex. They suffer humiliation if they say too much, but they bear the heavy burden of a secret if they keep silent. Parents and teachers must be sensitive to these struggles. We should fight arbitrary or abusive treatment of them. As relatives, coworkers, neighbors, and friends, we must remember that social hardship isn't limited to youth.

A shining example of ministry to those with same-sex attraction is Courage, an international apostolate of the Catholic Church, which has produced the documentary film *The Desire of Everlasting Hills*. Every community needs groups like this to help their neighbors with same-sex-attraction discern the unique life of loving service to which God calls each of them and find wholeness in communion with others. But this work can't just be out-sourced to special groups and ministries. Each of us needs to be willing to form deep friendships with men and women who are attracted to their own sex or struggle with their identity, welcoming them into our homes and families, especially when they aren't able to form marriages of their own.

After all, the conjugal view of marriage—that it is inherently ordered to one-flesh union and hence to family life—defines the limits of marriage, leaving room for meaningful non-marital relationships, especially deep friendships. This is liberating. Those with same-sex attraction, like everyone else, should have strong and fulfilling relationships. Marriage isn't the only relationship that matters. The conjugal view of marriage doesn't denigrate other relationships. Those who would redefine marriage as a person's most intense or deepest or most important relationship devalue friendship by implying that it's simply *less*: less meaningful, less fulfilling. The greatest of Justice Kennedy's errors may be his assertion that without

same-sex marriage some people are “condemned to live in loneliness.” His philosophy of marriage is anemic. And as our society has lost its understanding of marriage, it has suffered a corresponding diminution, even cheapening, of friendship.

We all need community, and those who for whatever reason never marry will know certain hardships that the married are spared. We should bring those left dry by isolation into other forms of community—as friends, fellow worshippers, neighbors, comrades in a cause, de facto members of our families, big siblings to our children, and regular guests in our homes.

3. Defend religious liberty and help conscientious Christians witness to the truth.

This task is especially imperative since a radical sexual agenda has become a nonnegotiable public policy. What should bakers and florists and photographers do? What should directors of local Catholic charities or Evangelical school teachers do?

There is no one single answer for every circumstance. Each person’s situation will require a unique response, based on his vocation and the challenges he faces. The answers for schools and charities and professionals may vary with a thousand particulars, but the church will need to teach Christians the moral principles to apply to their own circumstances.

The church also has to help the rest of society understand the importance of freedom, particularly religious freedom. The national conversation on this important civil liberty hasn’t been going well, and Indiana revealed how extreme a position

the corporate and media establishments have staked out. They have the money and the megaphones. We have the truth.

4. Live out the truth about marriage and human sexuality.

This fourth task of the church is the most important and the most challenging. Husbands and wives must be faithful to one another for better and for worse till death do them part. Mothers and fathers must take their obligations to their children seriously. The unmarried must prepare now for their future marital lives so they can be faithful to the vows they will make. And they need the encouragement of pastors who are not afraid to preach unfashionable truths.

Saints are the best evangelists. The same thing is true when it comes to marriage. The beauty and splendor of a happy family is our most eloquent testimony.

In *Truth Overruled*, I explain, in clear and sober terms, the enormous task before us of defending our families, churches, schools, and businesses from opponents who now wield coercive power in government, commerce, and academia. My goal is to equip everyone, not just the experts, to defend what most of us never imagined we’d have to defend: our rights of conscience, our religious liberty, and the basic building block of civilization—the human family, founded on the marital union of a man and a woman.



Ryan T. Anderson is the William E. Simon Senior Research Fellow at The Heritage Foundation and author of the just-released book, *Truth Overruled: The Future of Marriage and Religious Freedom*, from which this essay is adapted.

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Religious Liberty and Same-Sex Wedding Ceremonies

BY MARK DAVID HALL

Over the past decade, the legalization of same-sex marriage and the adoption of laws prohibiting discrimination on the basis of sexual orientation have resulted in cases that force or may force some religious citizens to choose between their livelihoods and their religious convictions. Photographers, bakers, and florists, among others, have faced ruinous fines because they could not in good conscience participate in same-sex wedding ceremonies.

Proponents of religious liberty regularly argue that such citizens should be protected by the First Amendment or robust state religious freedom restoration acts. Homosexual rights advocates usually oppose such protections because they fear they will undermine the State's interest in preventing discrimination on the basis of sexual orientation.

There is a robust academic literature about the appropriateness and constitutionality of creating religious accommodations. While important, this academic literature is just that—academic. In the real world, American legislators have largely ignored these arguments and have regularly exempted citizens of faith from neutral, generally applicable statutes. Of course not all convictions can be accommodated, but historically Republicans and Democrats have worked together to protect religious actors unless there are good or compelling reasons not to do so.

This article considers just a few of the more than 2,000 accommodations that legislators have crafted. Although separationists have argued that these protections violate the Establishment Clause, these challenges have rarely been successful. I discuss legislative rather than judicial accommodations to emphasize that elected officials have often worked across party lines to protect religious liberty and that these protections have rarely been detrimental to the common good.

Military Service

Among the civil government's many roles, few are as important as national security. In the modern era, states and nations have regularly relied upon compulsory militia service or conscription to raise armies. Religious pacifists often ask to be excused from such service, but many countries reject these pleas.

Most American colonies required adult males to serve in the militia. Members of the Society of Friends, better known as Quakers, were often pacifists who refused to do so. As early as the 1670s, they asked to be excused from military service. Rhode Island, North Carolina, and Maryland granted their requests, provided these pacifists paid a fine or hired a substitute.

Many colonies followed these examples in the 18th century, often expanding accommodations to include other religious pacifists. During the War for Independence, the Continental Congress supported this practice with the following 1775 resolution:

“As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.”

Fourteen years later, during Congressional debates over the Bill of Rights, James Madison proposed a version of what became the Second Amendment that stipulated that “no person religiously scrupulous, shall be compelled to bear arms.” Largely forgotten today, this provision provoked almost as much recorded debate as the First Amendment's religion provisions. Although it did not become part of the Bill of Rights, Madison convinced Congress to include similar language in the first national militia bill.

Throughout the 19th century, states often accommodated religious pacifists by permitting them to hire a substitute or pay a fine instead of performing military service. The Selective Draft Act of 1917 exempted from combat service members of “any well-recognized religious sect or organization at present organized and existing whose creed or principles forbid its members to participate in war in any form.”

A serious objection to this accommodation is that it protected members of historic peace churches but not pacifists from other traditions. In *Arver v. United States* (1918), the Supreme Court rejected the argument that this exemption violated the Establishment Clause. To the relief of other religious pacifists,

Congress broadened the accommodation in the Selective Training and Service Act of 1940 to include anyone “who, by reason of religious training and belief, is conscientiously opposed to participation to war in any form.”

The United States government has a significant interest in ensuring that personnel needs are met during time of war and that the burdens of conscription are shared fairly. The military’s needs were severely stretched in World War I and World War II, yet Congress saw fit to exempt religious pacifists from military service and America, along with her allies, was able to win both conflicts. Personnel needs were met more easily in the Korean and Vietnam Wars as the nation was far from full mobilization. If the United States did not win these wars, it was not due to accommodations granted to religious pacifists.

Swearing Oaths

Historically, oaths have been seen as essential for ensuring the loyalty and fidelity of citizens and elected officials. They were also viewed as critically important for the effective functioning of judicial systems. In his famous Farewell Address, President George Washington wrote that:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indisputable supports.... A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?

Members of the Society of Friends objected to the taking of oaths as early as the 1650s. Simply put, they took (and take) literally such biblical passages as Matthew 5:33–5:37, where Jesus says: “Swear not at all.... But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.”

The lot of Quakers and other groups who refused to take oaths varied widely in early America. Pennsylvania, which was founded by the Quaker William Penn, permitted citizens to offer an affirmation rather than take an oath. New York permitted Quakers to testify by affirmation in civil cases in 1691, and other colonies soon adopted similar or broader accommodations. By the American Founding, all states permitted Quakers and other religious minorities to affirm rather than swear.

The most famous oath accommodation from this era is found in the United States Constitution. Articles I, II, and VI permit

individuals either to swear or to affirm. The best-known of these provisions is Article II, Section 1, which reads: “Before he [the President] enter on the execution of his office, he shall take the following oath or affirmation: ‘I do solemnly swear, (or affirm,) that I will faithfully execute....’” Of course one does not need to be religious to take advantage of these provisions, but in the context in which they were written there is little doubt that they were intended to protect citizens who have religious objections to taking oaths.

There is no reason to believe that exempting Quakers and others from oath requirements has had a detrimental effect on the judicial system at either the state or national levels. Nor is there evidence that these citizens have been less loyal to America than other groups.

Laws Banning Alcohol and Drug Use

The abuse of alcohol and drugs has led to untold problems throughout American history. Colonial Americans sought to regulate alcohol, and in the 19th century, a powerful movement arose to ban it altogether. In 1919, the U.S. Constitution was amended to prohibit alcohol and Congress passed the Volstead Act to implement it. Sensitive to religious traditions that believe sacramental wine must be used in religious ceremonies, Congress specifically permitted priests, rabbis and other clerics to use wine in religious rituals.

Far more difficult for legislators and courts have been the claims of citizens who contend that the use of narcotics is part of their religious practices. Particularly well known is the case of Native Americans who use peyote in religious ceremonies. Although peyote is a controlled substance, the national government recognized its legitimate use in “bona fide religious ceremonies of the Native American Church” in 1966. Some states adopted similar accommodations, but Oregon did not.

In *Oregon v. Smith* (1990), the Supreme Court ruled that the First Amendment does not shield Native Americans or others who use peyote in religious ceremonies from neutral, generally applicable laws. Shortly after *Smith*, Oregon passed a statute protecting the right of individuals (not just Native Americans) to use peyote in religious ceremonies. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act in 1993 to better protect religious citizens. It is noteworthy that the bill was passed in the House without a dissenting vote, was approved 97 to 3 by the Senate, and was signed into law by President Bill Clinton. The following year, without any recorded objections, Congress amended the American Indian

Religious Freedom Act to protect Native Americans in 22 states that did not permit Native Americans to use peyote in religious ceremonies.

The abuse of drugs and alcohol has caused a great deal of damage throughout American history. But there is no reason to believe that accommodations crafted by legislatures to permit the sacramental use of wine, peyote, or other controlled substances have been detrimental to public health.

Laws Requiring Medical Treatment

Traditionally, states and the national government have deferred to individuals and families to make their own medical decisions. As medical knowledge improved during the 19th century, it became evident that the decisions of some individuals could have an impact on others. Particularly contested in the late 19th and early 20th centuries were laws mandating vaccinations.

Advocates of vaccinations contended that they are necessary both for the health of the individuals vaccinated and for the well being of others. If some individuals and families refuse vaccinations, the argument went, others would suffer from the spread of disease.

Today, all 50 states have laws requiring specified vaccines for students. States usually require vaccination as a prerequisite to attending school, but every state except Mississippi, West Virginia, and California grants exemptions for parents who have religious convictions against immunizations. Eighteen states also accommodate parents who object to immunizations because of personal, moral, or other beliefs

The health and safety of citizens is a vital state interest, yet there is little evidence that accommodating citizens who have religious objections to vaccinations has caused significant harm. However, a 2015 spike in measles cases in California linked to unvaccinated adults and children clearly caused *some* harm. In response to several outbreaks, state legislators revoked the religious and philosophical exemptions to California's vaccination requirement.

Reconsidering previously granted accommodations is certainly appropriate, but a better option for California might have been to remove only the philosophical exemption and make the religious one more difficult to obtain. This would have protected both the state's interest in public health and the religious liberty of the relatively few citizens who have sincere religious



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objections to vaccination requirements. An added benefit is that it would prevent some families from withdrawing their children from schools to avoid the vaccination requirement.

Of course not all religious convictions should be accommodated. In the early to mid-20th century, followers of Mary Baker Eddy, commonly known as Christian Scientists, lobbied successfully for exemptions from state laws that require parents to provide medical treatment for their children. Tragically, hundreds of children died because of easily treatable diseases. As a result, many states properly repealed or revised their exceptions.

Medical Providers

Perhaps the most contentious and difficult political/moral/legal issue over the past half-century has been abortion. Large numbers of Americans consider it tantamount to murder, whereas others insist that access to the procedure is a fundamental constitutional right. Some activists believe that the state or private employers should be able to force medical providers to perform abortions even if they have sincere religious beliefs against doing so.

In 1973, shortly after *Roe v. Wade* was decided, Congress passed the Church Amendment to protect health care professionals. The legislation prohibits any court or public official from using the receipt of federal aid to require a person or institution to perform an abortion or sterilization contrary to their “religious beliefs or moral convictions.” The amendment also makes it illegal for health care organizations to discriminate against individuals who refuse to perform these procedures. In arguing in favor of these protections, Senator Frank Church (D-ID) remarked that:

[N]othing is more fundamental to our national birthright than freedom of religion. Religious belief must remain above the reach of secular authority. It is the duty of Congress to fashion the law in such a manner that no Federal funding of hospitals, medical research, or medical care may be conditioned upon the violation of religious precepts.

Subsequent Congresses have expanded these protections

Like Congress, numerous states protect health care providers who have objections to performing certain procedures. According to the National Abortion Rights Action League (NARAL), “47 states and the District of Columbia [have] passed laws that permit certain medical personnel, health facilities, and/or institutions to refuse to provide abortion care.” Only Alabama, New Hampshire, and Vermont do not have such laws.

Time and experience may reveal that some of these accommodations are harmful. Although some advocacy groups fear that they will lead to great harm, there has been little evidence that this is the case. If substantial evidence arises that they are detrimental to the well being of patients, legislatures may have to rethink them. If such evidence does not surface, however, legislatures in states without accommodations should move quickly to protect the religious liberty of all citizens more effectively.

Conclusion

Religious liberty is a core American principle—not a Democratic or Republican one. As we have seen, state and federal legislators regularly go to great lengths to protect religious convictions unless they have good or compelling reasons not to do so.

If states determine that laws prohibiting discrimination the basis of sexual orientation are necessary to promote the common good, they should craft narrow accommodations to protect small business owners who have sincere religious objections to participating in same-sex wedding ceremonies. These accommodations would protect religious liberty without raising the specter of widespread discrimination. Moreover, if history is any guide, there is little reason to believe that they will undermine the common good.



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PRACTICAL STEPS that Religious Institutions Should Consider in the Post-Obergefell World

BY KIM COLBY

In the wake of the Supreme Court's decision in *Obergefell v. Hodges*, the Christian Legal Society prepared three guidance documents and presented three webinars to help religious institutions consider minimizing their legal exposure with the advent of same-sex marriage, the expansion of non-discrimination laws to include protections for gender identity and sexual orientation (commonly referred to as "SOGI" laws, an acronym for "Sexual Orientation, Gender Identity"), and the existence of some limited religious liberty protections. The first webinar provided guidance for churches, the second for schools and colleges, and the third for other religious non-profit institutions. An article that gives a broad overview of the current legal landscape regarding same-sex marriage and SOGI law is found in the accompanying *Journal of Christian Legal Thought* and should be read in tandem with this article.

Substantial overlap exists as to the guidance given the three types of religious institutions, which is distilled in the practical

steps below. While the guidance is general in nature and cannot address the specific legal needs of a specific institution – and therefore legal advice should be sought for the specific situation that a particular religious institution faces – there are some basic practical steps that can be taken by any religious institution that is concerned about its legal exposure regarding same-sex marriage and SOGI laws. The practical steps are also useful considerations for legal problems that religious institutions face outside that particular context.

These practical steps are offered because many of the readers of this article are attorneys who serve on the boards of religious non-profit institutions and may be looked to for guidance on these matters. The webinars and guidance documents remain available for viewing on the website at religiouslibertyguidance.org or through the CLS website. Sample policies are also available on the websites.

Five Basic Actions

To optimize their religious liberty protections, religious non-profit institutions need to take at least the following five basic actions:

1. **Adopt** thoughtful, detailed theological statements regarding the following basic religious doctrines:
 - **Theological beliefs** -- what the church, school, college, or other religious nonprofit institution believes regarding marriage, human sexuality (sexual conduct outside of marriage including, but certainly not limited to homosexual conduct), and gender identity;
 - **Where spiritual authority resides** -- the person or entity within the institution who has the ultimate say as to what the institution's doctrine is on these issues and how the doctrine is applied in specific contexts (e.g., employment, student conduct, housing, facilities use);
 - **Christian dispute resolution** -- the institution's belief that Christians should not take one another to court, as well as the alternative dispute resolution mechanism to be used; and
 - **Explaining grace** -- the essential Christian concepts of sin, grace, repentance, and restoration are increasingly foreign concepts to judges, political leaders, and reporters, who may mistake the extension of grace in one instance as evidence of inconsistency in applying doctrine or even of discrimination among employees or students;
2. **State** clearly in organizational documents the religious nature of the institution, including a concise statement of the institution's biblical philosophy of Christian education that emphasizes the integration of biblical principles and Scripture into every subject, if it is a school, or its biblical philosophy of Christian ministry to the underprivileged if it is a religious non-profit, or its biblical philosophy of Christian marriage ceremonies if it is a church that performs marriages;
3. **Train** staff and volunteers, so that those who apply the policies are trained in the institution's theological understanding underpinning its governing documents, policies, and ministries, and the proper application of those

policies, including who makes the final decisions to determine how the policies apply in particular contexts;

4. **Apply** the policies consistently, because even solid policies will appear weak if they are not applied consistently, with their specific applications documented in writing, particularly if an application involves the extension of grace or acknowledgement of repentance; and
5. **Get** legal advice from a lawyer who is familiar with the applicable laws in the state and local jurisdiction in which the school, church, or non-profit operates. Because state and local laws vary widely, any guidance must by nature be very general and not sufficiently specific to a religious institution's situation. Good legal counsel is a wise investment.

Checklist for upgrading a religious non-profit's documentation, policies and practices

1. Check the corporate charter and bylaws and modify as needed

A key starting place is an institution's governing documents. An institution's articles of incorporation, constitution, bylaws, and written policies should contain not only the institution's purpose, but also should integrate that purpose into an overall religious purpose statement. Detailed statements of faith should use doctrinal language to explain at least four main doctrinal issues.

First, the institution should adopt a detailed, thoughtful statement reflecting biblical standards for human sexuality in all of its dimensions, including not just homosexual conduct, but also marriage, sexual conduct outside of marriage, and gender identity. The theological statement should be rooted in the Bible with specific Scripture references. The statement should also incorporate historical Church documents on these topics, including specific applicable denominational documents. If appropriate, consult contemporary books and documents outlining basic Christian doctrine on these matters.

Second, the governing documents should also be clear as to where the spiritual authority to make decisions on different issues resides. A well-written statement about where the spiritual authority to determine *what* the institution's doctrine is and *how* that doctrine applies in specific contexts should be adopted. Again, the statement should draw on denominational or

historical materials that explain why the spiritual authority resides in a particular person (e.g., the church pastor or the school headmaster) or in a governing body (e.g., the church board or school board). As a general rule, courts are not supposed to second-guess religious institutions' spiritual decision-making, so it is important to make clear who has the spiritual authority on an issue. The spiritual authority for making decisions may vary within the same institution depending on the particular issue, but the policies should be clear as to where the final spiritual authority on a particular issue is within the institution.

Third, the governing documents or policy manual should contain a clear exposition of the religious doctrine of Christian dispute resolution, if the school sincerely holds such a doctrine. The religious basis for the belief that Christians should not go to court against one another, based on *Matthew 18* and *I Corinthians 6*, should be explained. Historical and current documents, as well as denominational documents, that explain the doctrine should be incorporated into the statement. It is important that this be more than a requirement that alternative dispute resolution be used; the theological basis for the requirement must be explained and followed. This was an important factor in a church's and its school's defense against

a claim of discrimination in the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

Fourth, in particular, the governing documents should explain the doctrines of sin, grace, repentance, and restoration. While these doctrines are at the heart of the Christian faith and govern Christian actions, they are increasingly foreign concepts in our society. A judge or jury is much more likely to find that a religious institution engaged in unlawful discrimination if policies are applied inconsistently. The inconsistency can be used to argue that the institution is not sincere in its claims as to what its sincerely held religious beliefs are regarding marriage and sexuality. Or the institution's actions may appear discriminatory if it seems to punish one employee for a particular action but does not punish another employee for the same action. The institution must explain its beliefs regarding sin, grace, repentance, and restoration in its written documents if it hopes to explain to a judge or jury that what looks like inconsistency is actually the legitimate application of basic Christian doctrine. Careful written documentation of each situation and its resolution is critical. Balancing the need to avoid legalism with the need for consistency is a delicate, but crucial, goal.

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2. Develop a facility-use policy, along with written use agreements

An institution should have a written facility-use policy that includes a requirement that its facility may be used **only** for purposes and in ways consistent with its doctrinal beliefs as reflected in the Bible and its governing documents. Permitted uses need not necessarily all be religious instruction or related activity, but they should at least be in furtherance of the institution's educational and religious mission. The policy should include specific statements about how the institution understands the Bible's teachings on specific issues that might arise, with references to the Bible and specific governing documents.

In addition, an institution should have a written agreement with each user of its facility that includes language reflecting how such facility use ties into the institution's mission and understanding of biblical teachings. A practice of charging fees may have implications regarding "public accommodation" and property tax exemption issues that need to be carefully evaluated by experienced legal counsel.

3. Update employment policies and practices to clearly reflect the religious institution's religious identity, especially on marriage and sexual issues

Religious non-profit employers should reflect their religious nature in their employment documents and practice. Potential options include identifying religious aspects in written job descriptions, inserting statements of faith or other doctrinal language in employee handbooks, using written codes of conduct requiring all staff to serve as a Christian role model and defining what this means biblically, and emphasizing regular prayer time at staff meetings, prayer with and spiritual mentoring of others, integration of faith and learning, and other religious expressions on a daily basis. Contracts, where used with staff, should require agreement with the Statement of Faith and serving as a Christian role model. Specifically, written explanations of each position's religious significance, the religious requirements of the job, and the religious standards of conduct for the employee should be written into job notices, applications, job descriptions, employee contracts, employee handbooks, employee reviews, and termination documents. Employees should be required to sign documents on an annual basis indicating that they agree with the institution's beliefs, standards of conduct, and all religious requirements of their position, and

that they understand that violation of such standards constitutes cause for termination of their employment.

Biblical standards regarding sexual behavior (not just related to homosexual behavior) should be expected and followed for all employees, with appropriate accompanying staff training regarding the expectation that employees will live according to these biblical standards of conduct. In addition, employees should be required to submit to the institution's disciplinary protocols as a condition of employment, such as using Christian mediation and arbitration for all disputes.

When appropriate, staff members should be identified as "ministers" to the degree appropriate. Some religious leaders may be reluctant to identify staff positions as "ministers," but the term has an important legal meaning that should not be lightly forfeited. All positions that legitimately fit the ministerial exception's legal definition of "minister" should be thoughtfully and carefully identified as such.

Employment documents should describe in detail the substantial religious dimensions of job duties (*e.g.*, daily class devotions, occasional chapel devotions, Bible teaching, prayer, spiritual discipleship of students, incorporation of biblical teaching into the curriculum, etc.) and should provide the biblical basis for the religious institution's understanding of the ministerial role the employee performs. The religious training required to be a staff member should be described and met by employees and evaluated by employers.

The above safeguards may be particularly helpful because a "ministerial" position is generally exempt from federal and state anti-discrimination prohibitions. Further lessons from the Supreme Court's *Hosanna-Tabor* decision for qualifying a position as "ministerial" are as follows: (1) include an objective rationale (*e.g.*, per Scripture and/or church history) in written job descriptions; (2) use job titles that incorporate "ministerial" aspects; (3) use job descriptions and performance criteria that support a "ministerial" designation; (4) reflect ministerial criteria in job evaluations and disciplinary standards; (5) require an employee to affirm in writing (*e.g.*, in contract, annually) his or her agreement with the religious institution's religious doctrine and willingness to abide by the institution's standards of conduct as a condition of employment; and (6) require such employee (as well as all other employees) to affirm in writing his or her agreement to abide by the alternative dispute resolution mechanism that the institution requires and the biblical basis for the requirement.

4. Tax-exempt status

At the *Obergefell* oral argument, Justice Alito asked Solicitor General Verrilli whether religious schools may lose their tax exempt status if they prohibit same-sex conduct among their students. Senator Verrilli responded that might well be an issue. While the IRS Commissioner recently claimed that religious schools' tax exempt status would not be questioned for at least 2-3 years, it is nevertheless important for all religious institutions to monitor legislation, particularly legislation regarding tax exemption at the state and local levels.

5. Monitor government actions

Our elected leaders are people, too, and they need to hear from their constituents. Consequently, Christians should consider contacting their legislators about moral aspects of pending legislation. When voting for political candidates, believers should seriously consider those candidates who affirm and protect religious liberties. Religious institutions, of course, must be careful about political campaign prohibitions and lobbying restrictions for nonprofits. Political campaign activity may be done in a personal capacity, but is absolutely prohibited when done as a paid employee on duty on behalf of a specific nonprofit. Lobbying may be done corporately but only to a limited extent.

6. Seek legal counsel

This legal guidance can only be provided on a general level. Accordingly, Christian non-profit institutions are encouraged to seek out attorneys who are knowledgeable and experienced in these legal areas, for specific application within their own jurisdictions and suited to their own organizational structure, programs, and concerns.



Kim Colby is the Director of the Center for Law & Religious Freedom. She is a graduate of Harvard Law School.

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Are You Called to be an Evangelist for the Ministry of Law?

BY ZALE DOWLEN

In 2014 the Lord put a calling on my life to encourage attorneys to start Christian Legal Society chapters. At the time, I didn't even have an attorney chapter near me. And I wasn't even a CLS member.

I started by contacting other attorneys and scheduling planning sessions. The turnout was lackluster, at best, so I reached out to some attorneys who had started attorney chapters in the past. Their recommendation was to take a new approach.

The new approach was to gather groups of Christian attorneys to pray over each other and to ask the Lord whether we should start a CLS chapter. We did not assume that we knew what those chapters needed to look like. We were open to doing something different. We were open to localized chapters. We were open to super regional chapters. We did not assume that

the typical CLS model would fit us. We did not assume that we knew what the Holy Spirit wanted to do.

For what we were doing, CLS made sense. Why would we reinvent the wheel? CLS had the model and infrastructure needed for organizing and supporting a local group of Christian Attorneys. No other Christian attorney group was really designed to serve this specialized need.

Attorneys that I did not contact showed up. Attorneys that I expected to be pillars of the groups, with reputations as "Christian Attorneys," never even darkened the door. Attorneys I thought would be on fire for the new chapter unsubscribed from emails. Attorneys I didn't even think would consider themselves "Christian" showed an interest. In some areas, God moved active CLS members in from other areas

of the country, primed and ready for a place to plug in. God moved.

After a year of meeting and praying, the first group officially formed. As it formed, two other groups were taking the same path, meeting and praying over what they should do.

We are not called as Christian attorneys merely to turn our legal fees into a Sunday morning contribution. What about reaching those in a meeting of creditors, in a holding cell, or in a divorce trial? Too often we see ministry in the soup kitchen, but not in the courtroom.

How about you? Are you called to be an evangelist for the ministry of law? Are you called to make an impact on the legal community around you? Are you called to leave a legacy that's more than just legal fees and your name on the letterhead?

The need for local CLS chapters comes in many forms. It may be a specific case. It may be the need for a community of like-minded attorneys. It may be a community that needs a legal clinic, but can't afford a private attorney. It may be a cause, such as ending human trafficking. It may be that you need to mentor a new attorney. It may be that you are a new attorney who needs mentoring. It may be a firm looking for, but not able to find, a new Christian associate. It may be a Kingdom issue that needs to be litigated. It may be an impoverished church or ministry that simply needs some guidance from a Kingdom perspective. Unfortunately, many of these needs will not be met without the organization or mobilization of local Christian attorneys.

We are called to be the embodiment of Christ to a lost and dying world (I Cor. 12:27). We are not called as Christian attorneys merely to turn our legal fees into a Sunday morning contribution. We are not on this earth as Christian attorneys merely to revise our church's bylaws or sit on a board. What about reaching those in a meeting of creditors, in a holding cell, or in a divorce trial? Too often we see ministry in the soup kitchen, but not in the courtroom.

We are called to serve those who are unserved (Matt 25:34-40). We cannot be so arrogant as to think that we know how the legal ministry of serving the unserved is going to come about. We cannot be so conceited as to think we can handle it on our own. We need community. We need organization.

We need relationships with like-minded Christian attorneys. History tells us that community, organization, and relationships don't appear by accident. They have to be cultivated. We have to pursue them with purpose.

We know that "where two or more are gathered" that Lord is with them (Matt 18:20). Have you ever considered that your meeting with likeminded attorneys is a gathering of the body? Have you ever considered worship that does not occur only in a church building or your prayer closet, but in the courtroom or a law office?

Are you called to be an Evangelist for the Ministry of Law? Are you called to start a local chapter of the Christian Legal Society? Are you called to participate in your local chapter that already exists? Are you called to travel to nearby cities to pray with other attorneys about starting a chapter there? Are you involved in a local chapter that needs to look beyond its city to promote nearby chapters?


I was called to start CLS chapters around me. I was called, in part, because I saw the need. I was also called because my practice as a solo attorney allowed me flexibility. But you do not need to be a sole practitioner to do this. You just have to be open to the moving of the Holy Spirit.

The need is there. God has already shown me in two different cities that He will move people in if He has to. The question is whether you will heed the call to spread the Gospel through your profession of Law. Will you use the CLS chapter model to spread the Word to your city and cities near you?



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JD from the Nashville School of Law, an MBA from the University of Arkansas at Little Rock, and his BA from Harding University. Mr. Dowlen is an active participant with Compassionate Counsel, providing free legal advice to the less fortunate and homeless. He is of course also active in the Christian Legal Society, serving as secretary of the Greater Nashville attorney chapter and traveling around the region to pray with Christian lawyers.



Some Thoughts on LAW SCHOOL GRADES

BY MICHAEL P. SCHUTT, DIRECTOR OF LAW STUDENT MINISTRIES

The legal academy is generally a pretty competitive place. If you are a law student, you are surrounded by those who are collectively smarter than your colleagues in college and high school and who all score just as well as you do on standardized tests. These peers are also driven, analytical, vocal, and accustomed to coming out on top. When you hang out with these people, you are in turn invigorated, intimidated, inspired, amazed, and disgusted. It is a challenging world.

And then grades are posted.

In this world—a world in which grades seemingly determine everything from law school social life to student club pecking order to study group membership to career options—it is sometimes difficult to keep a proper perspective. I want to affirm three truths about law school grades that may help you move toward a faithful (as opposed to fearful) perspective on law school grades.

First, grades are not an absolute measurement of your success before God

To understand this, we need to understand that God does not measure success the way the world does. God's Word does

not generally advocate “winning” or “succeeding” as we understand those things. Instead, Jesus and the apostles speak of things like faithfulness, stewardship, and virtue. Yes, Christ expects some of us to return to Him with ten talents earned on what He has given us. But with others, He rewards the return of five, or even three talents. God does not measure us by our success, but rather by our faithfulness.

I once taught a student who was admitted to law school despite a very low LSAT score on the strength of her proven work ethic and maturity that impressed the admissions committee (she came to law school after another career). When first semester grades were posted, she was devastated because she was ranked just above the middle of the class. She had not had the “success” she had hoped for. Measured by grades as an absolute standard, she was mediocre. But when she described to me her habits and her approach to studying, I told her that I thought she should be pleased—that she had done very well.

She had applied herself to her studies by briefing cases, reading the assignments, and attending class. She outlined her courses and diligently dropped other concerns to memorize rules, practice hypos, and prepare for finals. She had not abandoned her husband or children during the semester to maximize her

performance, but rather had decided with them what sacrifices they could make—and not make—together so that she could study as much as possible.

For her, B's and a C's in her first-year courses were pretty good evidence of an excellent first semester. Of course, for some of my students in that very same class, a handful of B's and C's would have constituted feedback on a job *poorly* done. I might have asked them how they might change their study habits, priorities, outlining method, and course prep.

Yet it is clear to me that we come to law school with different natural gifts, with different responsibilities before God outside of school, and with different circumstances to which we must respond during the course of the year.

Being successful, in God's economy, means being a faithful steward of what He gives you. Grades can be a measure of whether we are good stewards, but they are never completely so. A "B" in Contracts is the result of excellent stewardship by one student and the result of faithless sloth in another. Grades are not an absolute measurement of our faithfulness before God.

Second, grades do not ultimately shape your identity as a law student

I have a non-lawyer friend who ministers to law students. She told me how surprised she was to find that "law school is just like high school"—a rigid social strata and accompanying pecking order; cliques of the cool kids, nerds, and rebels; and honors and awards that mean little in the real world but are nonetheless cause for arrogance and condescension in the artificial school culture.

My wife likes to say that honors and status in high school are like Chuck E. Cheese tickets—they spend great in the Chuck E. Cheese economy, but are worthless in the real world. Likewise, much of what we chase after in law school is akin to hosting the coolest lunch table in the high school cafeteria. It seemed worth pursuing at the time, but has little value in itself.

Your identity is not based on your class rank, what study group you are invited to join, what journal you work for, or which school clubs you serve. Your identity is in Christ, Who has redeemed you for life in this world to His glory and to an everlasting inheritance with Him. When you think of yourself solely through the lens of your law school "status," you risk losing the perspective that keeps you grounded in Christ and His call to steward your gifts in law school.

This is important because your grades, your law school relationships, and your engagement of the law school campus *do indeed have great and eternal significance*. You are created to do good works in this world (Eph. 2:10). You are called to use your gifts to serve others (1 Pet. 4:10). Law school is the training ground for developing those gifts and discovering those around you who might benefit from them. In other words, law school is the place to find out who your neighbors are and what good works you might be able to do for them. Pressing in to those tasks alters your perspective dramatically.

Finally, your law school grades do not determine your life course

The sovereign God of the universe determines your life course, and He is able to use your grades, good and bad, to open and close doors to His liking. After all, He is "able to do far more abundantly than all that we ask or think, according to the power at work within us..." (Eph. 3:20).

Live your life in law school, then, trusting that God is indeed the all-powerful, all-knowing King of your life and legal career. Live your law school life knowing your identity is shaped by Jesus and not by your status. Walk out your calling as a student understanding that He calls you to faithful stewardship, not "success" measured by grades and class rank alone.



Michael P. Schutt is the Christian Legal Society Director of Law Student Ministries.



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Let Your Light Shine Before Others



BY KEN LIU

I recently had the chance to speak to the president of a bar association about Christian legal aid (CLA), explaining that CLA clinics are faith-based programs providing pro bono legal services. His first words to me were: “A faith-based legal aid program? What about separation of church and state?!”

I was dumbfounded. Putting aside the larger issues regarding the concept of “separation of church and state,” why would he even assume that there might be any violation of the separation of church and state?

I remembered that most secular legal aid programs are funded by the Legal Services Corporation, an organization created and funded by federal dollars. So I explained, “Christian legal aid clinics are private, nonprofit organizations that generally do not receive any government funds.”

That seemed to put him a little more at ease. He then recounted once visiting a religious law school that had a criminal law clinic which had a policy against representing clients whom the staff believed were guilty. Apparently that encounter quite negatively colored his perception of faith-based legal clinics. Although I had my doubts about whether any legal clinic would really have such a policy, I told him that I strongly disagreed with that policy, and in fact I interned for a public

defender’s office in law school and believe that all defendants deserve representation, regardless of their guilt or the severity of their crime.

We started to develop a rapport, and he asked a question that many people ask about CLA programs, “Do you serve only Christians?”

I explained, “Of course not! We welcome anyone who walks in the door. We are happy to help people of all faiths or no faith at all. I’ve personally helped people of all backgrounds, including Muslims and atheists.”

He went on to ask, “So, what distinguishes a faith-based legal clinic?”

I explained that “CLA attorneys try to serve clients holistically. We believe clients’ legal problems are usually just the tip of the iceberg. Underneath a legal issue is often a huge web of relational, psychological, emotional, and spiritual issues. For instance, in addition to helping with their legal needs, we try to be a friend and lend a compassionate ear. We also refer clients to other resources, such as homeless shelters, centers for domestic abuse, counseling services, and various other ministries. And if they are open to it, we will also pray with them and invite them to attend a church if they don’t belong to one.”

“But do you condition your services on them agreeing to it?” he prodded.

“No, if a client is not interested in visiting a church, or doesn’t want us to pray for them, we would never push it on them or condition our legal help on it. We believe in serving people simply because God calls us to it. Scripture tells us, ‘Speak up for those who cannot speak for themselves, for the rights of all who are destitute.’”

“That’s from the Old Testament, right?”

“Yes, Proverbs chapter 31.” I said that the Old Testament is full of exhortations to do justice and serve the needy. I quoted Micah 6:8, “And what does the Lord require of you? To act justly, to love mercy, and to walk humbly with your God.”

“Yes, that’s a great verse!”

By the end of the conversation, he was eager to help. He admitted that before he became the president of the bar association, he had no idea about the huge lack of affordable legal services. He is now a big champion for state access to justice programs. After understanding what Christian legal aid is (and is not), he offered to assist in whatever way he could.

We make a huge mistake when we assume that non-Christians are predisposed against Christian ministries. The media does a great job at portraying Christians in a negative light (sometime, perhaps deservedly), so naturally there is much misunderstanding of who we are. But Jesus calls us to “let your light shine before others, that they may see your good deeds and glorify your Father in heaven.” Matthew 5:16.

What better way for Christian attorneys to live out this verse than through Christian legal aid? CLA is all about blessing people with good deeds and glorifying our Father by sharing His love with all those whom we encounter.

There are those who want to shut down Christian ministries and will try to do so under the cover of “separation of church and state.” But there are also many who operate out of misconceptions of who we are because we fail to live out Matthew 5:16. Let’s stop hiding our light under a bushel, and instead go out and glorify God through our good deeds.



Ken Liu is the Christian Legal Society Director of Legal Aid Ministries.



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LETTER TO THE EDITOR

After Obergefell

Those of us in the legal profession committed to traditional views on marriage and family have little trouble defending these views in our faith communities and in our social circles. But how do we react in public life to the legalization of gay marriage, whether through legislative enactment, as in Illinois, or through a Supreme Court decision applicable to all states?

Kim Davis, the Kentucky County Clerk who went to jail for refusing to issue marriage licenses to same-sex couples, was celebrated by many conservative Christians, including Republican Presidential Candidates Mike Huckabee and Ted Cruz. Mat Staver and Keith Fournier, writing on *The Stream* following the publication of an opinion by the Board of Professional Conduct of the Supreme Court of Ohio that, in essence, judges may not refuse to perform same-sex marriages, entitled their article “Faithful Christians Cannot Be Judges In Ohio.”

As a Christian attorney who holds traditional views on marriage and family, I must say that I cannot celebrate Kim Davis and I cannot agree with the authors of the article suggesting that faithful Christians cannot be judges in Ohio. Both Ms. Davis and the authors are too tied into a Constantinian view of church and state epitomized in the political belief among too many conservative Christian Americans that we should fight for the restoration of a Christian America.

I am concerned that Ms. Davis and the authors of the article all have failed to adequately develop a theory of the Christian’s role in pluralistic public life – a theory that distinguishes public service from service in our faith communities. The redefinition of marriage by the Supreme Court was a Constitutional travesty, but not because it interfered with anyone’s freedom of religion. Here in Illinois the redefinition of marriage was already the democratically adopted law of the state. While I can condemn the former, I can only disagree with the latter and maintain my disagreement in civil discourse, as I have done.

As citizens, we all enter the public square with differing political, social, economic, religious and ethical views and even world views. All citizens have disagreements with some legislative action or inaction. As Christian citizens, we not only have the right but the duty to complain about well intentioned laws that have become misshapen with age or are misused and abused. These badly need reform because they produce awful

results. A great example is the drug war, supported by most of us, and its devastating consequences on the African American male population as so well chronicled in Michelle Alexander’s book “*The New Jim Crow*”. The death penalty is another example. The Catholic Church has come out with a consistent pro life position that clearly believes the death penalty is immoral as part of its consistent pro life ethic. While I personally have never been opposed to the death penalty on principled grounds, I have become an opponent because of its unfair application primarily to minorities and marginalized individuals and because of our inability to apply it quickly. But whether it is a Catholic judge trying to follow the church’s position or a judge who sees it my way, either would be reprimanded if he or she reversed jury imposed death sentences on nothing other than his or her religiously informed conscience.

Many situations do permit judges and public officials to exercise judgment – hopefully Christ centered judgment in the case of Christian judges and officials – in reaching decisions or in applying laws. Some actions of public officials reflect hateful bigotry, personal prejudice or greed; others reflect sensitivity and concern for the weak and marginalized.

But many other situations do not lend themselves to judgment. While most of the pastors I know have had occasion to refuse to marry couples who they believed were “unequally yoked” or clearly not ready for marriage, I doubt that the Kentucky County Clerk would argue that she had the right to make the same judgments as the pastors in issuing marriage licenses to a badly paired male and female. I think the same can be said for judges or justices of the peace or anyone else authorized by statute to administer the oath of marriage following the issuance of a license. But the difference between a pastor who is asked to sanctify and bless a marriage and a clerk and judge who merely license and administer oaths of marriage ought to be clear to all. The pastor who declines to perform a marriage is protecting the sanctity of marriage within his or her faith community. A judge could decline to administer oaths, a right recognized long ago which has changed the nature of many oaths, but doing so only for a particular type of marriage is not a valid declination.

This is difficult terrain. Numerous American citizens still would vote in favor of making America a civilly Christian nation, given that opportunity. This is not much different than

Muslim nations that merely tolerate other religions or the State of Israel that clearly privileges Jews in a Jewish nation. Despite the fact that America for the first 150 years of its existence was a Christian nation (principally Protestant Christian), culturally speaking, it never has been a Christian nation civilly or politically speaking.

We at Christian Legal Society are in a better position than any other group to help people, like the Ohio judge and the county clerk, come to grips with the fact that they are neither sinning nor checking their faith at the door when issuing marriage licenses or administering marriage oaths, whether to immoral or immature heterosexual couples or to same sex couples. We bring our faith to the public square at all times. But whether as ordinary citizens or as public officials in the public square, we interact with or govern people with very different political, moral and religious world views. This is where we as Christians have to have a perspective that was referred to as principled pluralism by followers of Abraham Kuyper in the Netherlands and other early promoters of Christian Democracy in Europe when 19th Century Europe was overrun by anti-Christian world views, whether communist, socialist or secularist, much

of this following the aggressive secularization of the French Revolution which rolled across Europe in the early 1800's. Most of that did not have much impact in the United States until the 1960's!

Liberal Christians have too often been accommodationists (Christ in Culture). Fundamentalist Christians too often have been separationists (Christ against Culture). As Orthodox Christians from a variety of Christian traditions, we at CLS must see ourselves as culturally engaged from an alternate, Christ centered world view (Christ transforming Culture). (I'm using categories here outlined some 60 years ago by Richard Niebuhr in "Christ and Culture".) Being engaged in culture, including political culture, in an extremely pluralistic world does force us to deal with messiness galore. *Obergefell* forced that on Ohio and Kentucky. In Illinois, our democratically elected legislature forced that on us a year before *Obergefell*. Nevertheless, this remains God's world – every square inch belongs to Him!

–Case Hoogendoorn
Hoogendoorn & Talbot, Chicago, Illinois

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President and
Chairman of the Board

Great Accomplishments in 2015 and Greater Needs for 2016

As I look back on 2014-2015, our considerable accomplishments are a remarkable reflection of God's provision and blessing. As many of you know, over the past few years we have been in rebuilding mode at CLS. While our budget remains anemic, in my opinion, we continue to achieve these great accomplishments through God's blessings and many of you working hard. We have balanced the budget and been in the positive for two years in a row and have had two of the most successful national conferences in CLS history in Boston and New Orleans in both numbers and quality. We have had great victories in the Law Center, greatly expanded Christian Legal Aid and are serving 15,000 Christian lawyers and law students through our many chapters and outreaches throughout the nation.

However, I cannot help but think about how much more effective CLS could be with additional financial resources. So this summer, the CLS Board made the decision to hire a Director of Development and Communications and to identify other positions and places where CLS needs help. Specifically, we want to better accomplish CLS's critical mission to integrate our Christian faith into the practice of law through legal aid, religious liberty work, and direct ministry to lawyers and law students. Our informal motto—**change the lawyer, change the law, change the culture**—captures our passion for Christian lawyers making a difference through CLS.

These leadership decisions for accomplishing the CLS mission were important steps. I believe it shows we are taking the future of CLS very seriously. The timing could not have been more appropriate; in the same month that we hired a Development Director, the *Obergefell* decision was thrust upon us. CLS immediately took the

lead to educate churches, Christian schools and colleges, Christian businesses, and other faith based nonprofits on how to navigate the changing legal landscape involving same-sex issues.

Obergefell changed the world in which we live. Much like *Roe vs. Wade* in the pro-life context, it is a defining event in our country's history, with enormous implications. We hope you are one of the thousands who have benefited from CLS' three webinars and written materials, but if not, you can still listen to the podcasts and download the important materials at ReligiousLibertyGuidance.org. You, your churches, and faith-based organizations will be blessed and better protected if these recommendations are implemented.

One thing was made clear in these 2015 CLS leadership decisions: we must never stop fighting for the values we hold dear. Our students are facing constant persecution on campuses nationwide—we must be present and active to defend them. The number of Americans in poverty is increasing, and 80% of those in poverty are struggling with legal needs for which they can find no assistance. To be true to our Biblical mandate, we must be there to help.

There is a great demand and need for CLS's ministries in our culture today, a demand which will only grow in years to come. As the demand increases, so must our commitment to ensure CLS is able to grow to meet these needs.

CLS has been through some rough financial periods in past years. Like me, you are well aware of this, and you have stood by CLS's side through thick and thin. The critical importance of that support cannot be overstated; we are forever grateful for it. The great news is that, as of this

summer, **CLS has no debt**. This is a significant accomplishment that was only possible because of God's provision and your faithfulness. Being debt-free was a vital step on CLS' road to rebuilding, and we are now confident we can build for the future and its heightened challenges.

As our next step, we must maximize and help expand CLS's funding base. While many enhanced fundraising efforts are already beginning, one of the most important pieces of this puzzle—prospect-ing—cannot be done without additional support. In fact, there are a number of things I believe are critical in CLS's next phase of rebuilding and expansion.

As our leadership sees it, **CLS needs at least an additional \$500,000 a year for each of the next 3 years to usher CLS into a new era of effectiveness to accomplish its mission.**

Here are the specific areas for which additional funding is needed to accomplish current goals:

- **Christian Legal Aid:** CLA Director Ken Liu needs to be brought on the CLS team as a full time employee. We also need to enhance our services to clinics to include, amongst other things, database-technology training and fundraising training. This will help ensure CLA-networked clinics can be self-sustaining, which is a critical component to the success of the CLA program. **Cost: \$130,000 annually**
- **Center for Law and Religious Liberty:** The Center is currently operating as a one-man shop; we are desperately in need of a new attorney and paralegal to help Director Kim Colby manage the incoming requests for legal assistance on religious liberty issues. This demand is only increasing at schools and universities, churches, and Bible-believing non-profit organizations and from Christian lawyers themselves. **Cost: \$170,000 annually**
- **Law Student and Attorney Ministries:** Both Law Student and Attorney Ministries are currently operating under the direction of Mike Schutt, who is also responsible for CLS publications and The Institute for Christian Legal Study. Each of these critical CLS programs needs a full-time, devoted director and funds for the director to travel to campuses and chapters and to invest in CLS members' lives and law practices. **Cost: \$100,000 annually**



Law Student Mentoring Lunch, New Orleans, LA

- **Communications and Development:** Let's face it. CLS needs vastly increased national visibility. While CLS already blesses thousands upon thousands, far too many are not even aware of CLS, what CLS offers, and all that is accomplished through each of our ministries. Improved ministry communications will bring connections with more supporters, to help CLS become self-sustaining. Specifically, we seek to promote CLS's financial well-being with at least \$2 million a year in revenues and to fully fund CLS's endowment, upon which the clock is ticking. This critical component will help ensure our ministry's future. As CLS's strongest longtime supporters, you and we together are the ones to commit to this task. **Cost: \$100,000 annually**

I am sharing this with you today because I wholeheartedly believe that you are critical to CLS's future. If you are reading the Christian Lawyer and my column, you have undoubtedly proven that you agree that CLS has a significant part to play in our profession and our culture. In my term as President of CLS, I have spent many hours praying over CLS and working to move it into the next era. I believe, without question, that it is my duty and my calling to ask you and our Board to stand with CLS again today to achieve the goals of raising pledges of \$500,000 per year for three years and to ask each of you to bring other Christian lawyers into partnership with CLS. God bless you and may you have a God honoring new year of 2016.

JOIN US IN OUR NATION'S CAPITAL THIS OCTOBER!

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