

Summer 2013

Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification

Michelle L. Jones

Indiana University Maurer School of Law, jones821@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [First Amendment Commons](#), [Judges Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Jones, Michelle L. (2013) "Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification," *Indiana Law Journal*: Vol. 88: Iss. 3, Article 7.

Available at: <http://www.repository.law.indiana.edu/ilj/vol88/iss3/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Religiously Devout Judges: A Decision-Making Framework for Judicial Disqualification

MICHELLE L. JONES*

INTRODUCTION

Consider carefully what you do, because you are not judging for man but for the Lord, who is with you whenever you give a verdict. Now let the fear of the Lord be upon you. Judge carefully, for with the Lord our God there is no injustice or partiality or bribery.¹

— 2 Chronicles 19:6–7

I, ____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [a judge] under the Constitution and laws of the United States. So help me God.²

— Oath[] of [federal] justices and judges

Religiously devout judges are bound by both the sacred text(s)³ of their particular religion and the oaths of office⁴ they take upon induction into the judiciary. Typically, these devotions do not clash; however, at times the interaction between positive law and religious law may create an internal conflict or the appearance of an internal conflict. Federal and state judicial disqualification statutes, constitutions, and professional standards require recusal and/or disqualification in such instances.⁵

† Copyright © 2013 Michelle L. Jones.

* J.D. Candidate, Indiana University Maurer School of Law, 2013; M.S.Ed. College Student Affairs, Purdue University, 2005; B.A. Communication, Purdue University, 2002. Thank you to Professor Daniel Conkle, Professor Charles Geyh, Jerod Adler, Caleb Chaplain, and Audrey Hagedorn for their comments and suggestions on previous drafts of this Note. Additionally, thank you to all staff members of the *Indiana Law Journal* for their excellent work throughout the editing process.

1. 2 *Chronicles* 19:6–7 (New International Version [hereinafter NIV]).

2. 28 U.S.C. § 453 (2006).

3. *See, e.g., supra* note 1 and accompanying text; *Mosiah* 29:11 (Book of Mormon) (“Therefore I will be your king the remainder of my days; nevertheless, let us appoint judges, to judge this people according to our law; and we will newly arrange the affairs of this people, for we will appoint wise men to be judges, that will judge this people according to the commandments of God.”).

4. *See, e.g., supra* note 2 and accompanying text (federal oath); *see also infra* note 141 (state oaths).

5. *See, e.g.,* TENN. CONST. art. VI, § 11; 28 U.S.C. § 455(a) (2006); ALA. CODE § 12-1-12 (LexisNexis 2005); CONN. GEN. STAT. ANN. § 51-39 (West 2005); GA. CODE ANN. § 15-1-8 (2012); HAW. REV. STAT. § 601-7 (West 2008); OR. REV. STAT. § 14.210, .250 (2011); UTAH CODE ANN. § 78A-2-222 (LexisNexis 2008); VT. STAT. ANN. tit. 12, § 61 (2002); WIS.

The terms judicial recusal and judicial disqualification are frequently used interchangeably; however, some choose to distinguish between the two.⁶ When this distinction is made, judicial recusal typically refers to judges' voluntary decisions to remove themselves from proceedings because of conflicts of interest,⁷ while disqualification refers to judges' decisions to remove themselves in response to parties' motions for disqualification.⁸ For the purposes of this Note, the term "disqualification" will encompass the concepts of both voluntary recusal and disqualification in response to a motion to disqualify. The term "recusal" will only be used when directly quoting from or summarizing another source.

Judicial disqualification has drawn considerable attention from the academic community. Many have proposed changes to current disqualification law,⁹ while others have focused on whether judges should be disqualified in particular narrowly defined situations.¹⁰ In spite of the existing legal scholarship, little guidance has been offered to assist judges in making legally, ethically, and religiously appropriate decisions, in a vast array of scenarios. This Note attempts to fill that gap.

Religiously devout judges face particularly difficult disqualification determinations, including but not limited to participation in judicial bypass decisions¹¹ and capital sentencing proceedings. Complicating these disqualification decisions is the myriad of conflicting sources—including case law, legislative history, and professional codes of conduct—from which judges draw upon when interpreting judicial disqualification statutes.¹² Not only is there no bright-line rule regarding religiously based judicial disqualification, but religiously devout judges are also left to make these important decisions in a legal arena in which disqualification decisions are rarely overturned or even seriously challenged. In

STAT. ANN. § 757.19(2)(g) (West 2001); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007); *infra* note 147.

6. CHARLES GARDNER GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 2* (2d ed. 2010).

7. BLACK'S LAW DICTIONARY 1390 (9th ed. 2009).

8. GEYH, *supra* note 6, at 2.

9. *See, e.g.*, Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671 (2011) (evaluating several suggested changes to judicial disqualification law). *But cf.* Rebekah L. Osborn, Note, *Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895, 905 (2006) (arguing that the Model Code of Judicial Conduct effectively addresses the issue of recusal for religious reasons).

10. *See, e.g.*, John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998) (arguing that Catholic judges should recuse themselves from all capital cases). *Compare* Eric Parker Babbs, Note, *Pro-Life Judges and Judicial Bypass Cases*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 473, 505 (2008) (arguing that, if possible, pro-life judges should recuse themselves from judicial bypass cases as a sign of conscientious objection), *with* Paul Danielson, Note, *Judicial Recusal and a Minor's Right to an Abortion*, 2 NW. J.L. & SOC. POL'Y 125, 145 (2007) (arguing that recusal in judicial bypass proceedings is problematic).

11. In judicial bypass proceedings, judges must assess minors' maturity levels to determine if they may obtain abortions without parental consent. Babbs, *supra* note 10, at 474–77.

12. *See infra* Parts I–III.

most situations, judges can facially defend their decisions—to disqualify or not—without fear of being overturned. However, judges should do more than merely make decisions that will not be overturned. Instead, judges should aspire to make truly ethical disqualification decisions that take into consideration a multitude of legal and personal factors. This Note proposes a decision-making framework designed to assist judges through the process of making religiously based disqualification determinations.

Part I reviews the history of judicial disqualification, beginning with early Roman law and ending with current federal disqualification law. Part II then discusses possible meanings of judicial impartiality, focusing on Justice Scalia’s opinion in *Republican Party of Minnesota v. White*.¹³ Part III reviews three recent cases concerning the narrower category of religiously based judicial disqualification. Next, Part IV explains the necessity of a decision-making framework to assist religiously devout judges in making religiously based disqualification determinations. Finally, Part V proposes a decision-making framework, including examples of how the framework can be used in various scenarios.

I. THE HISTORY OF JUDICIAL DISQUALIFICATION

A. Roman Law and English Common Law

The concept of judicial disqualification existed as early as AD 530.¹⁴ Under Justinian, a Byzantine emperor, any litigant who believed that a judge was “under suspicion” could petition for disqualification,¹⁵ allowing disqualification based on perceived bias—a concept that reoccurs throughout history.¹⁶

The English common law, however, did not adopt the liberal, perceived-bias approach of the Justinian Code. To the contrary, William Blackstone observed that, “the law [would] not suppose a possibility of bias or favour in a judge, who [was] already sworn to administer impartial justice, and whose authority greatly depend[ed] upon that presumption and idea.”¹⁷ Impartiality was central to the self-identity of common law judges.¹⁸ Thus, to assert that common law judges were biased was to accuse judges of relinquishing their roles as impartial arbitrators of justice.¹⁹ Disqualification did exist under the English common law in a limited form—that of disqualification for financial interest.²⁰ However, the English differentiated between conflict of interest and bias. Disqualification was required for financial conflicts of interest, regardless of whether judges were actually

13. 536 U.S. 765 (2002). The clause deemed unconstitutional in *White* was modeled after the ABA’s 1972 Model Code of Judicial Conduct. *Id.* at 768.

14. CODE JUST. 3.1.16 (Justinian 530).

15. *Id.*

16. *See, e.g., infra* Part I.C.

17. 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

18. Geyh, *supra* note 9, at 679.

19. *Id.*

20. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947).

biased.²¹ This system allowed disqualification to occur without addressing judges' impartiality.²²

B. The United States: Statutory Conflicts of Interest & Procedural Disqualification

At the country's inception, the United States, like England, recognized only financial interest as a reason for disqualification. And in 1792, the federal government enacted legislation that simply codified the common law—including disqualification for district judges who were “concerned in interest” (referring to financial conflicts of interest), as well as those who had served as counsel for either party.²³ State legislatures then began to specify many additional conflicts of interest that required disqualification, such as judges' familial relations to parties and judges' prior representation of parties.²⁴ Courts began to turn away from the common law and focus on the ever-expanding, state-created disqualification statutes.²⁵ Before long, Congress modified federal disqualification law through a series of statutory enactments and amendments.²⁶ Throughout this period, the presumption of impartiality prevented disqualification on the grounds of bias unless a specific conflict of interest statute specifically provided otherwise.²⁷

In the 1800s, a few jurisdictions began allowing bias-based disqualification.²⁸ In spite of this, because of the then prevailing presumption of impartiality, trial judges were hesitant to disqualify themselves for bias, and appellate judges seldom questioned the trial judges' self-determinations.²⁹ In order to prevent judges from

21. Geyh, *supra* note 9, at 680.

22. *Id.*

23. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79. This enactment would eventually evolve into the present-day federal disqualification statute, codified at 28 U.S.C. § 455 (2006).

24. *See, e.g.*, *McCauley v. Weller*, 12 Cal. 500, 523 (1859).

25. Geyh, *supra* note 9, at 680.

26. *See* Act of Mar. 3, 1911, ch. 231, § 20, 36 Stat. 1090 (requiring disqualification where the judge had been of counsel for either party or was a material witness for either party) (codified at 28 U.S.C. § 455); Act of Feb. 9, 1893, ch. 74, § 6, 27 Stat. 434, 435 (forbidding a judge from hearing the appeal of a case that the judge had tried) (codified as amended at 28 U.S.C. § 47 (2006)); Act of Mar. 3, 1821, ch. 51, 3 Stat. 643 (adding that relationship to a party was grounds for disqualification) (codified at 28 U.S.C. § 455).

27. Geyh, *supra* note 9, at 681.

28. Early states announcing such bias-based disqualification included Wisconsin, Florida, and Kentucky. *See* Act of Mar. 29, 1853, ch. 51, § 1, 1853 Wis. Gen. Acts 51 (stating that a party who believes the judge is prejudiced may request a change of venue); *Conn v. E. Chadwick & Co.*, 17 Fla. 428, 440–41 (1880) (stating that an act of the legislature provides that a judge shall be disqualified from a case if a party in a suit pending in the supreme court believes the judge to be prejudiced); *Massie v. Commonwealth*, 20 S.W. 704, 704 (Ky. 1892) (stating that a judge should vacate if affidavits prove the judge is prejudiced against the defendant).

29. *See, e.g.*, *Thomas v. State*, 6 Miss. (5 Howard) 20, 30 (1840) (“[M]uch as we may deplore the example . . . of a judge who will boldly venture to sit in judgment upon the life, the liberty or the property of the citizen, in circumstances calculated to create an interest deeper than that which arises out of a sense of the duty and responsibility of his station, we,

thwarting bias-based disqualification, the federal government, as well as some states, developed procedural approaches to bias-based disqualification³⁰—referred to in this Note as “procedural disqualification.” A few state procedures went as far as to initiate automatic disqualification if the complaint was facially sufficient.³¹ In 1911, Congress enacted a law that, while not explicitly requiring automatic disqualification upon submission of a facially sufficient affidavit,³² was interpreted as such by the Supreme Court.³³

Procedural disqualification of the late 1800s and early 1900s did not stop the judiciary from refusing to disqualify. Judges simply dismissed motions for such indiscretions as the attorney, as opposed to the party, submitting the affidavit;³⁴ the movant filing more than one affidavit;³⁵ the certificate of counsel only certifying the party’s—not the counsel’s—good faith;³⁶ or the allegations not containing sufficient particularity.³⁷

C. The United States: Disqualification for Perceived Bias

Beginning in the 1900s, the judicial disqualification landscape began to change drastically as concern about appearances of judicial partiality began to rise. Major authority figures voiced their concerns regarding the public’s declining confidence in the court system and the widespread lack of respect for the law.³⁸ In response to

yet, have no power to interpose.”); *Hungerford v. Cushing*, 2 Wis. 397, 401–08 (Wis. 1853) (upholding trial judge’s denial of change of venue motion despite the fact that the judge had previously been retained by a party to the suit and was paid fifty dollars for his services).

30. Geyh, *supra* note 9, at 682–83.

31. *See, e.g., McGoon v. Little*, 7 Ill. (2 Gilm.) 42, 43 (1845) (“[D]efendant . . . brought himself within the provisions of the statute, and the court erred in refusing the motion.”); *Turner v. Commonwealth*, 59 Ky. (2 Met.) 619, 628 (1859) (“[A]ny party litigant is entitled as a matter of right whenever he demands [a change of venue] and makes such necessity apparent.”).

32. Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090 (“Whenever a party to any action . . . shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein . . .”).

33. *See, e.g., Berger v. United States*, 255 U.S. 22, 35 (1921) (holding that an affidavit giving information and stating belief of bias or prejudice satisfies the statute and that if the affidavit shows “the objectionable inclination or disposition of the judge . . . it is his duty to ‘proceed no further’ in the case”).

34. *See, e.g., In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987) (“[N]o party filed an affidavit . . . Rather, the affidavit was filed by an attorney.” (emphasis in original)); *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980) (denying motion to recuse because counsel, not plaintiff, signed and filed the affidavit).

35. *See, e.g., United States v. Merkt*, 794 F.2d 950, 961 (5th Cir. 1986) (“[The second] affidavit violates the one-affidavit rule . . . and need not be considered.”).

36. *See, e.g., Morrison v. United States*, 432 F.2d 1227, 1229 (5th Cir. 1970) (denying motion for disqualification because there was no certificate of good faith by counsel).

37. GEYH, *supra* note 6, at 83–84.

38. Roscoe Pound, distinguished legal scholar and eventual dean of the Harvard Law School, addressed the American Bar Association in 1906, expressing his concern over “the real and serious dissatisfaction with courts . . . which exists in the United States today.” Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*,

this alleged public dissatisfaction with the judicial system, and judges in particular, the ABA adopted the 1924 Canons of Ethics.³⁹ The canons advised judges to steer clear of appearance issues that could invoke public distrust in the courts or even create suspicion of misbehavior.⁴⁰ While these canons did not call for disqualification for perceived bias, they “laid the foundation for such a move later.”⁴¹

By the mid-twentieth century, it was evident that, “[t]he nearly ironclad presumption of impartiality was gradually being eroded—first by a growing list of exceptions for financial and relational conflicts of interest, and more recently, by a patchwork of approaches to disqualify judges for bias that did not fall within the scope of specified conflicts.”⁴²

Concern about the appearance of partiality, and thus a desire for the “appearance of impartiality,” soon became evident in Supreme Court jurisprudence. In 1955, the Court described a “fair tribunal” as one lacking both bias and the appearance of bias.⁴³ Shortly thereafter, the Court held that an arbitrator’s “appearance of bias” required disqualification.⁴⁴ “By 1968, a majority of jurisdictions made some provision to disqualify judges for bias. The multiplicity of approaches those states employed, however, reflected the ongoing search for an acceptable regime.”⁴⁵

Soon, both the ABA and the federal legislature made moves to codify appearance of bias measures. The Canons of Ethics were replaced by the Model Code of Judicial Conduct in 1972 and included a rule requiring judicial disqualification when judges’ “impartiality might reasonably be questioned.”⁴⁶ But, as with other attempts to encourage judicial disqualification, the judiciary pushed back—this time by declaring a “duty to sit.” In one of the most well-known cases referencing this concept, *Edwards v. United States*,⁴⁷ the Fifth Circuit Court of Appeals stated that “[i]t is a judge’s duty to refuse to sit when he is disqualified but

20 J. AM. JUDICATURE SOC’Y 178, 178 (1937) (publishing Pound’s 1906 address). Soon thereafter, in 1908, the president of the ABA stated that, “[j]udicial judgments are not accorded the same reception as formerly” resulting in declined confidence in the courts and a “subservient judiciary.” Jacob M. Dickinson, President, American Bar Association, Address of the President, 31st Annual Meeting of the American Bar Association (1908), in 33 ANN. REP. A.B.A. 353, 359 (1908).

39. Geyh, *supra* note 9, at 686–87.

40. CANONS OF JUDICIAL ETHICS Canons 4, 19, 24–28, 30–31, 33–34 (1924).

41. Geyh, *supra* note 9, at 687.

42. *Id.* at 685–86.

43. *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” (citation omitted)).

44. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 148–50 (1968).

45. Geyh, *supra* note 9, at 686 (footnote omitted) (citing Comment, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 332 (1969)).

46. MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972).

47. 334 F.2d 360, 362 n.2 (5th Cir. 1964) (citing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 860 (2d Cir. 1962), *rev’d*, 376 U.S. 398 (1964)).

it is equally his duty to sit when there is no valid reason for recusal.”⁴⁸ By 1972, the duty to sit had been accepted by most circuit courts.⁴⁹ In 1974, the federal legislature, frustrated with the judiciary’s declaration and widespread adoption of the duty to sit, amended the federal disqualification statute to require judicial disqualification in any case that would create an appearance of impropriety,⁵⁰ abolishing the duty to sit.⁵¹ As recently as 2007, the ABA retained the appearance-based disqualification standard in its rules,⁵² which, as of 2008, had been adopted by forty-eight states.⁵³

D. The United States: Current Disqualification Law

Federal judicial disqualification is presently governed by 28 U.S.C. §§ 144 and 455.⁵⁴ Under § 144, a party wishing to disqualify a federal district court judge for prejudice against a party must file a disqualification motion along with an affidavit that establishes a factual basis for the allegations.⁵⁵ The challenged judge must then examine the affidavit to determine if disqualification is warranted—looking at both the timeliness and the legal sufficiency of the motion.⁵⁶ If the judge determines that he or she is disqualified, another judge will be assigned to the proceeding.⁵⁷ Section 455 calls for both sua sponte⁵⁸ recusal and disqualification resulting from a properly filed motion.⁵⁹ Judges are disqualified when their impartiality may reasonably be questioned⁶⁰ or when they hold personal bias or prejudice.⁶¹ Thus, judges must decide if they should be disqualified on either of two distinct grounds.

Under federal law, judges have the responsibility of making their own disqualification determinations. This procedure of self-determination is not unique to the federal judiciary: the majority of states also leave the decision of whether to grant or deny a motion for disqualification within discretion of the challenged judge.⁶² State judicial disqualification is governed by state constitutions, statutes,

48. *Id.*

49. *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (mem. on recusal by Rehnquist, J.).

50. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 594 (1987). The federal judicial disqualification statute states, in part, that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (2006).

51. Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 828–29 (2009).

52. MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

53. ABA Judicial Disqualification Project, *Taking Disqualification Seriously*, 92 JUDICATURE 12, 14 (2008).

54. 28 U.S.C. §§ 144, 455 (2006).

55. *Id.* § 144.

56. *Authority of the Trial Judge*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 597, 599–600 (2010).

57. 28 U.S.C. § 144.

58. “Without prompting or suggestion; on its own motion” BLACK’S LAW DICTIONARY 1560 (9th ed. 2009).

59. *See* 28 U.S.C. § 455.

60. *Id.* § 455(a).

61. *Id.* § 455(b)(1).

62. Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL.

and professional codes of conduct.⁶³ While judicial disqualification law varies from state to state, the underlying concepts are similar to those of federal disqualification. Thus, although the remainder of the Note will focus primarily on federal disqualification law, all concepts—in particular, the proposed decision-making framework—also apply to state judicial disqualification.

II. THE MEANING OF JUDICIAL IMPARTIALITY

As history reveals, the concept of “impartiality” is the driving force behind judicial disqualification.⁶⁴ Although this term has been used for centuries, the ABA’s Judicial Code of Conduct had not defined “impartiality” prior to 2003.⁶⁵ However, in response to Justice Scalia’s opinion in *Republican Party of Minnesota v. White*,⁶⁶ the ABA revised the Judicial Code of Conduct to include a definition of impartiality.⁶⁷ *White* involved a First Amendment challenge to a provision of the Minnesota Code of Judicial Conduct, which stated that “a candidate for judicial office[, including an incumbent judge,] shall not ‘announce his or her views on disputed legal or political issues.’”⁶⁸ The Eighth Circuit upheld the provision, finding that “preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary” were sufficiently compelling state interests;⁶⁹ the Supreme Court, however, reversed, holding that the provision violated the First Amendment.⁷⁰ In reviewing the Eighth Circuit’s holding, Justice Scalia found it necessary to gain clarity regarding the definition of impartiality in order to determine whether impartiality was indeed a compelling state interest.⁷¹ Justice Scalia proposed three possible meanings of judicial impartiality: (1) the traditional/due process meaning, (2) the lack of preconception meaning, and (3) the open-mindedness meaning.⁷²

Justice Scalia equated the traditional/due process meaning of impartiality to “lack of bias for or against either *party* to the proceeding.”⁷³ This definition of

U. L. REV. 543, 545 (1994).

63. See *supra* note 5 and accompanying text; *infra* note 147.

64. Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1083 (2004).

65. Honorable Howland W. Abramson & Gary Lee, *The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications*, 20 Touro L. REV. 729, 732 (2004).

66. 536 U.S. 765 (2002). The clause deemed unconstitutional in *White* was modeled after the ABA’s 1972 Model Code of Judicial Conduct. *Id.* at 768.

67. See STANDING COMM. ON JUDICIAL INDEPENDENCE & STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, AM. BAR ASS’N., REPORT OF THE WORKING GROUP 5 (2003) [hereinafter ABA WORKING GROUP REPORT], available at <http://www.mnbar.org/committees/judiciary/ABA%20Report.pdf>.

68. *White*, 536 U.S. at 770 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2002)).

69. *Id.* at 775.

70. *Id.* at 788.

71. *Id.* at 775.

72. *Id.* at 775–78.

73. *Id.* at 775 (emphasis in original).

impartiality included both the common dictionary definition⁷⁴ and the proposition that impartiality is central to due process, as evidenced by the many cases cited in Justice Scalia's opinion.⁷⁵ The primary concern of traditional/due process impartiality is equal application of the law.⁷⁶ This concept of impartiality "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party."⁷⁷

Justice Scalia's second possible meaning of impartiality is the "lack of preconception in favor of or against a particular *legal view*."⁷⁸ As opposed to the traditional/due process meaning, which focuses on the equal application of the law to all *parties*, this meaning guarantees litigants an "equal chance to persuade the court on the *legal points* in their case."⁷⁹ Justice Scalia quickly dismissed this meaning of impartiality, stating that it was insufficient to meet the compelling state interest requirement of strict scrutiny.⁸⁰ Justice Scalia subsequently laid out the concept's downfalls. First and foremost, Justice Scalia noted that judges' lack of preconceptions regarding legal issues had not historically been considered a requirement of equal justice.⁸¹ Additionally, Justice Scalia stated that such a constraint would be unworkable—to find judges who lack preconceptions of the law would be nearly impossible.⁸² Justice Scalia then quoted Chief Justice William Rehnquist:

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to

74. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1960) (defining impartial as "[n]ot partial; esp., not favoring one more than another; treating all alike; unbiased; equitable; fair; just").

75. *White*, 536 U.S. at 776 (citing *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (holding it a violation of due process for a judge to be disposed to rule against defendants who did not bribe him in order to cover up the fact that the judge regularly ruled in favor of defendants who did bribe him); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822–25 (1986) (holding that a judge violated due process by sitting in a case in which it was in his financial interest to find against one of the parties); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 58–62 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215–16 (1971) (per curiam) (holding that a judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *In re Murchison*, 349 U.S. 133, 137–39 (1955) (holding that a judge violated due process by sitting in the criminal trial of defendant whom he had indicted); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (holding that a judge violated due process by sitting in a case in which it would be in his financial interest to find against one of the parties)).

76. *Id.* at 775–76.

77. *Id.* at 776.

78. *Id.* at 777 (emphasis in original).

79. *Id.* (emphasis added).

80. *Id.*

81. *Id.*

82. *Id.*

constitutional issues in their previous legal careers. . . . Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.⁸³

Justice Scalia also pointed out that, since evading preconceptions of legal issues is not possible, avoiding the appearance of this type of impartiality would no more be a compelling state interest than avoiding actual impartiality based on preconceptions of legal issues.⁸⁴

Justice Scalia's final possible meaning of impartiality, open-mindedness, demands "not that [judges] have no preconceptions on legal issues, but that [judges] be *willing to consider views that oppose [their] preconceptions*, and remain open to persuasion, when the issues arise in [] pending case[s]."⁸⁵ This meaning would guarantee each party *some* chance at winning legal issues in a case, not necessarily an *equal* chance of winning.⁸⁶ Unfortunately, Justice Scalia did not fully develop the open-mindedness meaning in the opinion because the Court determined that Minnesota's announce clause was not adopted for the purpose of securing judicial open-mindedness.⁸⁷

On the same day the Supreme Court announced its decision in *White*, the president of the ABA released a statement disagreeing with the decision,⁸⁸ and soon thereafter, the ABA revised its Model Code of Judicial Conduct.⁸⁹ In particular, the ABA added a definition of impartiality to the Model Code—defining the term as the "absence of bias or prejudice in favor of, or against, particular *parties* or classes of parties, as well as maintenance of an *open mind* in considering issues that may come before a judge."⁹⁰ Notably, the ABA did not include Justice Scalia's second possible meaning of impartiality (lack of preconception regarding a legal issue), but did include Justice Scalia's first and third possible meanings (traditional/due process and open-mindedness).

83. *Id.* at 777–78 (emphasis in original) (citing *Laird v. Tatum*, 409 U.S. 824, 828, 835 (1972) (mem. on recusal by Rehnquist, J.) (finding that the federal judicial disqualification statute did not require Justice Rehnquist to recuse himself where he had not "participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in [the Supreme] Court, in the government's conduct of the case" in which motion to recuse was made)).

84. *Id.* at 778.

85. *Id.* (emphasis added).

86. *Id.*

87. *See id.*

88. Robert E. Hirshon, President of the ABA, warned that as a result of the *White* decision, "now we are going to have judicial candidates running for office by announcing their positions on particular issues. They will know that the voters will evaluate their performance in office on how closely their rulings comport with those positions. This is not impartial justice." Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 34, 39 (Matthew J. Streb ed., 2007).

89. *See* ABA WORKING GROUP REPORT, *supra* note 67, at 5.

90. MODEL CODE OF JUDICIAL CONDUCT Terminology 6 (2003) (emphasis added). The term "impartiality" is used in R 2.11 Disqualification, as well as in other Rules and Canons.

III. RECENT CASE LAW ON RELIGIOUSLY BASED JUDICIAL DISQUALIFICATION

The cases, statutes, professional standards, and interactions between the bench, the bar, and legislatures, of which disqualification history is comprised,⁹¹ in addition to the multitude of current views of impartiality,⁹² establish a frame of reference from which to explore the narrower category of religiously based judicial disqualification. A review of recent disqualification decisions involving allegations of religious bias will highlight how disqualification law has been applied in the religiously based disqualification context.

The following three opinions are the most well-known and frequently cited opinions involving motions for disqualification based on allegations of religious partiality.⁹³ The cases represent disqualification challenges involving an array of substantive legal disputes against judges holding various religious beliefs—exemplifying just a few of the many scenarios that present issues of religiously based disqualification.⁹⁴ The purpose of this section is not to analyze the validity of the judges' reasoning, but to provide a survey of the different arguments expressed in recent religiously based disqualification decisions.⁹⁵

In *Feminist Women's Health Center v. Codispoti*, an abortion clinic filed a civil action against protesters.⁹⁶ At the appellate level, the lower court's judgment in favor of the clinic was reversed in part and vacated in part.⁹⁷ Subsequently, the abortion clinic, on petition for rehearing, renewed its motion that one of the appellate judges, Judge Noonan, be disqualified⁹⁸—stating that the judge's “fervently-held [Catholic] beliefs would compromise [his] ability to apply the law.”⁹⁹

Judge Noonan denied the motion for disqualification based primarily on the belief that Article VI of the U.S. Constitution prevents religious belief from being a basis for disqualification.¹⁰⁰ The question of whether incapacitating prejudice flows

91. *See supra* Part I.

92. *See supra* Part II.

93. While all of the opinions included in Part III involve cases in which judges denied motions for disqualification, judges do, in fact, both voluntarily recuse and grant motions for disqualification. However, under neither of those circumstances, do judges write opinions. Therefore, this Note does not include an analysis or review of recent grants of motions for disqualification or voluntary recusal.

94. The majority of cases referenced in this Note, as well as the majority of hypothetical scenarios included herein, involve Catholic and/or Judeo-Christian judges, closely reflecting the makeup of the judiciary. *See* Ellen L. Rosen, *The Nation's Judges: No Unanimous Opinion*, NAT'L L.J., Aug. 10, 1987, at S-2, S-18 (reporting that 29% of judges surveyed self-identified as Catholic, 56% as Protestant, and 7% as Jewish).

95. It is important to note that all three cases were decided prior to both Justice Scalia's opinion in *White* and the ABA's introduction of its definition of impartiality.

96. 63 F.3d 863, 865 (9th Cir. 1995).

97. *Id.* at 865 (holding that the district court erred by failing to dismiss the action on grounds of res judicata).

98. *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 399–400 (9th Cir. 1995).

99. *Id.* at 400.

100. *Id.*

from religious belief is to be judged using an objective standard.¹⁰¹ Judge Noonan stated that “[n]o thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not.”¹⁰² Under Article VI, which states that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States,”¹⁰³ religious belief does not disqualify, according to Judge Noonan.¹⁰⁴ He contended the following: judges who belong to abortion-denouncing religious denominations¹⁰⁵ cannot be disqualified from all abortion-related cases because, if they were, it would follow that judges of those denominations would be disqualified from a “broad class of cases that have arisen frequently in the last quarter of a century.”¹⁰⁶ Judge Noonan concluded that, as a result of the broad class of cases from which religious judges would be disqualified, judges’ “sphere[s] of action” would be reduced and their ability to sit would become limited, effectively imposing a religious test.¹⁰⁷

Judge Noonan also noted that, if disqualification were to be required in the present case, he likewise should have been disqualified in *Johnston v. Koppes*—where he upheld the constitutional rights of an abortion advocate.¹⁰⁸ It can be assumed that Judge Noonan’s point, in referring to *Johnston*, was that his holding in favor of an abortion rights advocate proves that he is capable of remaining impartial despite his religious views.

In *Idaho v. Freeman*,¹⁰⁹ the denial of a motion for disqualification focused not on Article VI of the U.S. Constitution but instead solely on the “reasonable person” standard, which is implicit in the wording of the federal disqualification statute.¹¹⁰ In *Freeman*, the state was seeking both a declaratory judgment that would rescind the state legislature’s prior ratification of the Equal Rights Amendment and a judgment that congressional legislation, which proposed a ratification deadline extension, was unconstitutional.¹¹¹ The First Presidency of the Church of Jesus Christ of Latter-Day Saints (“the LDS Church”) opposed the extension of the

101. *Id.* (citing *Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir. 1995)).

102. *Id.*

103. U.S. CONST. art. VI, cl. 3.

104. *Codispoti*, 69 F.3d at 400.

105.

[T]he Catholic Church . . . holds that the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor. Orthodox Judaism also holds that in most instances abortion is a grave offense against God. The Church of Jesus Christ of Latter-Day Saints proscribes abortion as normally sinful.

Id. at 400.

106. *Id.* at 400–01.

107. *Id.* at 401.

108. 850 F.2d 594 (9th Cir. 1988).

109. 478 F. Supp. 33 (D. Idaho 1979).

110. “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned.” 28 U.S.C. § 455(a) (1994) (emphasis added).

111. *Freeman*, 478 F. Supp. at 33–34.

ratification deadline¹¹² and made a public statement opposing the Equal Rights Amendment.¹¹³ Judge Callister, at the time of this proceeding, was serving as a regional representative of the LDS Church.¹¹⁴ The defendant moved to disqualify Judge Callister from further involvement in the action because there was a “reasonable basis to conclude that the Court’s ability to consider the action before it in an impartial manner” may have been, or appeared to have been, impaired.¹¹⁵

Judge Callister opined that the reasonable person standard for testing a judge’s impartiality boiled down to the balancing of several factors: the right of parties to have their case decided by an impartial tribunal (including the appearance of impartiality), the presumption of qualification/impartiality, and the need to prevent parties from judge shopping.¹¹⁶ Comparing the sufficiency of the defendant’s contentions against this test, Judge Callister believed the defendant failed to realize that “religion and government operate in separate spheres[,] . . . [that] the churches’ jurisdiction . . . extends only to [their members’] standing in the church, [and that] . . . religious societies have never claimed, nor have they been given, the right to interfere with the relationship between governments and their citizens.”¹¹⁷ Judge Callister acknowledged his “dual citizenship” in the LDS Church and the United States (each with its own obligations), but he saw no conflict between the obligations.¹¹⁸ He stated that, while the LDS Church teaches members to pursue the enactment of laws that protect morality, the LDS Church does not teach that judges’ religious beliefs should trump their duty to uphold the law.¹¹⁹ He further asserted that many judges uphold a variety of laws with which they disagree, but they have been trained to do just that.¹²⁰ Judge Callister held that these facts, taken together, would not lead a reasonable person to conclude that he was partial for the purposes of presiding over the *Freeman* case, and thus he denied the motion for disqualification.¹²¹

Judge Callister later held, in regards to the original complaints, that the ratification by Idaho of the proposed Equal Rights Amendment was properly rescinded and that Congress’s attempt to extend the ratification deadline was null

112. *Id.* at 35.

113. The statement of the First Presidency, issued on October 22, 1976, read:

While the motives of its supporters may be praiseworthy, ERA as a blanket attempt to help women could indeed bring them far more restraints and repressions. We fear it will even stifle many God-given feminine instincts. It would strike at the family, humankind’s basic institution. ERA would bring ambiguity and possibly invite extensive litigation.

Id.

114. *Id.*

115. *Id.* (citing Brief for Defendant at 2–3).

116. *Id.* at 35–36.

117. *Id.* at 36.

118. *Id.*

119. *Id.* at 37.

120. *Id.*

121. *Id.*

and void.¹²² This decision was later vacated and remanded by the Supreme Court with instructions to dismiss the complaints as moot.¹²³

In *United States v. El-Gabrowny*, Judge Mukasey's opinion relied partially on the "reasonable person" test but focused primarily on the need to prevent parties from judge shopping.¹²⁴ The defendant in *El-Gabrowny* was one of fifteen defendants charged with conspiracy against the United States—primarily for the bombing of the World Trade Center in 1993.¹²⁵ The government's theory of the case was that these actions were intended to demonstrate hostility toward the United States' support of the State of Israel.¹²⁶ The defendant claimed that Judge Mukasey followed the teachings of Orthodox Judaism and held Zionist political beliefs,¹²⁷ which created a personal bias or, at minimum, "rais[ed] sufficient suspicion that a reasonable person would question [the judge's] impartiality."¹²⁸

Judge Mukasey denied the motion for disqualification, avoiding what the judge saw as the defendant's attempt to evade an expected adverse decision¹²⁹—in other words, to prevent judge shopping. "Nothing in [the federal disqualification statute] should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial."¹³⁰ Neither should the statute be read to require disqualification when a litigant creates any argument that there is an appearance of bias, even when unreasonable, stated Judge Mukasey.¹³¹ "That someone with an imagination or a motive might hallucinate relevance is not the standard, and therefore cannot provide the basis for decision."¹³²

At a subsequent suppression hearing, Judge Mukasey admitted into evidence documents seized at the time of the defendant's arrest.¹³³ After a nine-month jury trial, El-Gabrowny, along with nine other defendants, was "convicted of seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism . . . [These included] assistance to those who bombed the World Trade Center, planning to bomb bridges and tunnels in New York City,

122. See *Idaho v. Freeman*, 539 F. Supp. 1107, 1146–54 (D. Idaho 1981).

123. *Carmen v. Idaho*, 459 U.S. 809 (1982).

124. 844 F. Supp. 955, 961 (S.D.N.Y. 1994).

125. *Id.* at 957.

126. *Id.*

127. Political Zionism is

[t]he approach to Zionism favored by Theodor Herzl, which aimed at securing a charter for a Jewish national home from a great power. The Jewish national home would be guaranteed in accordance with international law This was the avowed aim . . . as expressed in the resolution of the first Zionist Congress at Basle in 1897

Zionism and Israel—Encyclopedic Dictionary: Political Zionism—Definition, ZIONISM & ISRAEL INFO. CTR., http://www.zionism-israel.com/dic/Political_Zionism.htm.

128. *El-Gabrowny*, 844 F. Supp. at 958.

129. *Id.* at 961.

130. *Id.* at 961 (citing *Lamborn v. Dittmer*, 726 F. Supp. 510, 516 (S.D.N.Y. 1989) (quoting S. REP. NO. 419, 93d Cong., 1st Sess. 5 (1973))).

131. *Id.* (quoting *Lamborn*, 726 F. Supp. at 516).

132. *Id.* at 962.

133. *United States v. El-Gabrowny*, 876 F. Supp. 495, 496 (S.D.N.Y. 1994).

murdering Rabbi Meir Kahane, and planning to murder the President of Egypt.”¹³⁴ The Second Circuit Court of Appeals affirmed all defendants’ convictions and sentences, with the exception of defendant El-Gabrowny’s sentence, which was remanded for further consideration.¹³⁵ Whether, based on mitigating circumstances, a judge had authority to make a downward departure from the applicable sentencing guidelines was an issue that had not been settled in the Second Circuit at the time of the original sentencing.¹³⁶ Therefore, at trial, Judge Mukasey had sentenced El-Gabrowny to fifty-seven years in prison—noting that a thirty-three year sentence was appropriate but he did “not believe that the [sentencing] guidelines [left him] free to impose that sentence.”¹³⁷ The court of appeals held that such a downward departure was permissible, and, on remand, El-Gabrowny was resentenced to thirty-three years by Judge Mukasey.¹³⁸ The Second Circuit Court of Appeals affirmed Judge Mukasey’s second sentence for defendant El-Gabrowny, finding that it fell well below the statutory maximum.¹³⁹

IV. THE NEED FOR A DECISION-MAKING FRAMEWORK

The disqualification decisions in Part III were all decided by federal judges who had taken the federal judicial oath of office and were subject to the current federal judicial disqualification statute. Article VI of the U.S. Constitution requires that all federal and state judicial officers take an oath to uphold the Constitution.¹⁴⁰ In addition, the oath applicable to federal judicial officers requires them to swear to impartially discharge their duties.¹⁴¹

134. *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999) (citations omitted).

135. *Id.* at 103.

136. *Id.* at 157.

137. *Id.* at 158 (quoting Tr. 149 (Jan. 17, 1996)).

138. *United States v. Elgabrowny*, 10 Fed. App’x. 23, 24–25 (2d Cir. 2001).

139. *Id.* at 25.

140. U.S. CONST. art. VI, cl. 3 (“[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .”).

141. *See supra* note 2 and accompanying text. The oaths applicable to state judicial officers similarly require judges to uphold state constitutions and impartially discharge their duties; thus, while the Note focuses on federal judicial disqualification law, all concepts are applicable to state judges as well. For examples of state judicial oaths, see ALA. CONST. art. XVI, § 279; ALASKA CONST. art. XII, § 5; CAL. CONST. art. XX, § 3; HAW. CONST. art. XVI, § 4; IND. CONST. art. XV, § 4; KAN. CONST. art. XV, § 14; MD. CONST. art. I, § 9; MISS. CONST. art. VI, § 155; MONT. CONST. art. III, § 3; NEV. CONST. art. XV, § 2; N.Y. CONST. art. XIII, § 1; N.D. CONST. art. XI, § 4; OKLA. CONST. art. XV, § 1; TEX. CONST. art. XVI, § 1; UTAH CONST. art. IV, § 10; W. VA. CONST. art. IV, § 5; WYO. CONST. art. VI, § 20; CONN. GEN. STAT. ANN. § 1-25 (West 2007); FLA. STAT. ANN. § 876.05 (West Supp. 2012); IDAHO CODE ANN. § 1-2005(7) (2010); IOWA CODE ANN. § 602.10106 (West 1996); MASS. ANN. LAWS ch. 217, § 5 (LexisNexis 2011); N.J. STAT. ANN. § 41:1-1 (West 2004); N.C. GEN. STAT. ANN. § 11-7 (West 2000); OR. REV. STAT. § 1.212 (2011); 42 PA. CONS. STAT. ANN. § 3151 (West 2004); WASH. REV. CODE ANN. § 35.20.180 (West Supp. 2012); WIS. STAT. ANN. § 757.02 (West 2001).

Any analysis of disqualification should begin by determining exactly what presumption the judicial oath creates. One possible presumption is that judges who take the oath have promised to set aside their religious convictions and follow the law. However, this presumption would require judges to preside in all proceedings despite conflicts, essentially reinstating the duty to sit, which was eliminated by the 1974 amendments to the federal disqualification statute.¹⁴² Additionally, if judges were legally required to preside in all cases, there would be no reason to have a judicial disqualification statute, which not only allows but actually requires disqualification in certain instances. An alternative presumption is not that judges must always set aside religious or other ideological convictions in an attempt to impartially follow the law but instead that judges must disqualify in any proceeding where religious or ideological convictions prevent them from remaining impartial. Under this presumption, judges who disqualify in a few select cases (or classes of cases) do not fail to abide by the oath of office, but instead fulfill their duty to impartially uphold the Constitution.

When disqualification issues do arise, judges must look to appropriate disqualification law.¹⁴³ Judges should turn first to the applicable federal or state statutes. In interpreting those statutes, judges may look to the plain language of the statute and the history of judicial disqualification—including, but not limited to, the common law, Congressional intent in passing various pieces of legislation, historical push-back from the bench, courts' recent interpretations of disqualification statutes, the various meanings of impartiality,¹⁴⁴ and professional standards.¹⁴⁵ When taken together, however, these authorities do not always provide clear answers. Without a bright-line rule regarding religiously based judicial disqualification, religiously devout judges are left with broad discretion and very little threat of being overruled, as evidenced by the lack of reversals of religiously based judicial disqualification decisions. It is hoped, however, that religiously devout judges desire more than just lack of reversal but to make truly ethical decisions that take into consideration a multitude of legal and personal factors. A decision-making framework is thus necessary to assist judges through the process of making these critical determinations.

V. PROPOSED DECISION-MAKING FRAMEWORK

This Note proposes a decision-making framework consisting of three considerations. While the framework is primarily designed for religiously devout judges making decisions regarding religiously based disqualification, the same framework could easily be used by either religiously devout judges making nonreligiously based disqualification determinations or by nonreligiously devout judges attempting to make any type of disqualification determination.¹⁴⁶ The

142. *See supra* text accompanying notes 50–51.

143. The following analysis will focus on federal law; however, for state disqualification law, see *supra* note 5.

144. *See generally supra* Parts II & III.

145. *See generally supra* Part II.

146. In *Perry v. Schwarzenegger*, an openly gay judge presided over a case regarding the constitutionality of a voter-enacted state constitutional amendment restricting marriage to

decision-making framework consists of the following three considerations: (1) party neutrality, (2) the appearance of impartiality, and (3) effect on religious life. As mentioned previously, the federal disqualification statute, as well as many state judicial codes of conduct,¹⁴⁷ requires disqualification on either of two distinct grounds: (a) when judges' impartiality may reasonably be questioned,¹⁴⁸ requiring an outward analysis or (b) when judges hold personal bias or prejudice,¹⁴⁹ requiring an inward analysis. Each of the three considerations addresses one or both grounds for disqualification. Thus, the decision-making framework as a whole involves both inward and outward analysis.

A. Party Neutrality

The first consideration is the duty to be party neutral, which is an uncontroverted aspect of judicial disqualification.¹⁵⁰ When motions for disqualification alleging religiously based party bias have been denied, the opinions have focused on judges' personal assessments of their ability to remain party neutral.¹⁵¹ While challenged judges have the greatest knowledge of the information required to assess party neutrality—because much of the relevant information is highly personal in character—some aspects of party neutrality require an outward analysis as well.

Concern for lack of party neutrality typically arises in scenarios in which a judge shares the religious beliefs of one party but not the other¹⁵² or when a party's

exclude same-sex couples. 702 F. Supp. 2d 1132 (N.D. Cal. 2010). A motion to vacate the judgment was later submitted “on the ground that [the judge] was disqualified from presiding over the case because his same-sex relationship was, or reasonably appeared to be, a non-pecuniary interest that could be substantially affected by the outcome of the case.” *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1121 (N.D. Cal. 2011). The decision-making framework proposed in this Note would be appropriate to use in this scenario, in addition to religiously based disqualification decisions.

147. For example, the Codes of Judicial Conduct of Alaska, Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Nevada, New Jersey, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia replicate the wording contained in the 2007 ABA Model Code of Judicial Conduct, which states that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality[] might reasonably be questioned” and further calls for disqualification when a “judge has a personal bias or prejudice.” MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

148. 28 U.S.C. § 455(a) (2006).

149. *Id.* § 455(b)(1).

150. *See supra* Parts I–II.

151. *See, e.g.*, *United States v. El-Gabrowni*, 844 F. Supp. 955 (S.D.N.Y. 1994).

152. *See, e.g.*, *Poplar Lane Farm LLC v. Fathers of Our Lady of Mercy*, No. 08-CV-509S, 2010 WL 3303852, at *1 (W.D.N.Y. Aug. 19, 2010) (alleging impartiality based on judge’s Catholic faith when one party was an order of Catholic priests); *Petruska v. Gannon Univ.*, No. 1:04-cv-80-SJM, 2007 WL 3072237, at *1–2 (W.D. Pa. Oct. 19, 2007) (alleging partiality based on judge’s Catholic faith when one party was a Catholic university); *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. App. 2006) (alleging partiality based on judge’s Catholic faith when one party was a Catholic father).

actions or religious/organizational affiliation stands in opposition to a judge's religious affiliation.¹⁵³ Judges faced with either of these scenarios will need to look at several factors in order to fully address their ability to remain party neutral. First, judges should ask: Does the substance of the claim involve religion in any way? A claim that substantively involves religion may affect party neutrality to a greater degree than a claim that does not. For instance, a Jewish judge's party neutrality may be affected differently when presiding over a case involving the fate of a neo-Nazi defendant (who allegedly committed a hate crime against a Jewish individual) than when presiding over a case involving a defendant synagogue that allegedly breached a contract. This is not to say that all religiously devout judges should be disqualified from every hate crime case involving members of their own religion; then again, when the substantive issues in a particular case involve religion it is more likely that a judge should be disqualified.¹⁵⁴

A judge addressing religiously based judicial disqualification must also consider any impact that their own and/or the parties' religious or organizational affiliations may have on the judge's ability to remain party neutral. A judge should reflect on whether the particular religious group to which the judge belongs has been subject to persecution or other negative treatment in the past. Is there present persecution? Is either party a member of the persecuting group? Has the judge been personally affected by such persecution or negative treatment? How has that treatment positively or negatively affected the judge's ability to interact with persecutors in the judge's personal and professional life?

The answers to those questions require both inward and outward analysis, and judges of the same faith may come to different conclusions regarding the impact of religious affiliation on their ability to remain party neutral. For example, Jews have been persecuted throughout history, and one might assume that this history of persecution affects all Jewish judges in the same way. However, one Jewish judge may have grown up in an area where he or she was sheltered from personal persecution or discrimination, while another Jewish judge may have been subject to excessive persecution or discrimination. Thus, persecution may affect each of these Jewish judges differently. Even with information regarding levels of persecution, it is not evident which judge is more or less likely to be party neutral. On the one hand, a judge who has personally experienced excessive discrimination may still be grappling with feelings of resentment and thus be incapable of remaining party neutral; on the other hand, a judge who has been subject to excessive

153. See, e.g., *United States v. Nelson*, No. CR-94-823 (DGT), 2010 WL 2629742, at *1 (E.D.N.Y. June 28, 2010) (alleging partiality based on judge's Orthodox Jewish faith when defendant was accused of a hate crime resulting in the death of an Orthodox Jew); *El-Gabrownny*, 844 F. Supp. at 957 (alleging partiality based on judge's Orthodox Jewish faith when government's theory of the case is that defendants' actions were taken in opposition to the United States' support of the State of Israel).

154. This statement should not be construed to mean that judges should never be disqualified when the substantive issues of the case do not involve religion. Judges must still be disqualified if presiding would violate appearance of impartiality considerations, see *infra* Part V.B., or financial interest concerns. For example, judges who may be asked to increase donations to their churches (because adverse decisions would require their churches to pay a substantial amount in monetary damages) may be disqualified.

discrimination may have learned how to disassociate current relationships and interactions from past experiences and maintain positive relationships with members of persecuting groups.

Judges should take a holistic approach to assessing their own party neutrality—asking a series of questions, regarding both the substance of the legal proceedings and the impact that their own and the parties’ religious and organizational affiliations may have on party neutrality. Party neutrality should then be contemplated in conjunction with the following two considerations.

B. The Appearance of Impartiality

The desire that the judicial system appear impartial has been echoed throughout the centuries, in case law, legislative history, and professional standards.¹⁵⁵ Whether one agrees or disagrees with this notion is not the issue—the appearance of impartiality is settled doctrine in American jurisprudence. It is important to note that the standard for assessing “appearance of impartiality” is one of reasonableness,¹⁵⁶ a highly subjective standard indeed. While some judges may be tempted to err on the side of caution—disqualifying themselves at the slightest possibility of appearing partial—the proposed decision-making framework suggests that judges seek to consider the “appearance of impartiality” in a holistic manner. Judges should take into consideration the implications of disqualification decisions on both present and long-term appearances of impartiality.

In some circumstances, a present day disqualification, while temporarily boosting appearances of impartiality, may come at the sacrifice of the long-term enhancement of the judicial system’s appearance of impartiality. For instance, some may presume that Catholic judges should be disqualified from all capital cases¹⁵⁷ due to traditional Catholic teachings against both the death penalty¹⁵⁸ and cooperation with evil.¹⁵⁹ Nevertheless, an individual Catholic judge may disagree with the Church’s teachings on the death penalty and/or cooperation with evil. Under such circumstances, disqualification of this particular judge, while protecting present appearances of impartiality, would also reinforce the stereotype that Catholic judges, as a class, cannot be impartial in capital cases. To the contrary, if this particular judge does not disqualify and instead goes on to establish a record of fair decision making in capital cases, this judge would enhance both his or her own appearance of impartiality and the entire judiciary system’s appearance of impartiality.¹⁶⁰

155. *See supra* Parts I–III.

156. “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might *reasonably* be questioned.” 28 U.S.C. § 455(a) (2006) (emphasis added).

157. *See, e.g.*, Garvey & Coney, *supra* note 10 (arguing that Catholic judges should recuse themselves from all capital cases).

158. *Id.* at 303.

159. *Id.* at 317–20. Cooperation with evil is “where one person (‘the cooperator’) gives physical or moral assistance to another person (‘the wrongdoer’) who is doing some immoral action.” *Id.* at 318.

160. There are risks associated with focusing on judges’ judicial track records. For a

Judges should not completely ignore immediate appearance of partiality concerns, however, immediate concerns should only be one part of a broader approach to appearing impartial—an approach that weighs both the present and future impact of any disqualification decision on a judge’s and the judiciary’s appearance of impartiality. As with other considerations, the appearance of impartiality should be contemplated, not in isolation, but along with the other two prongs of the decision-making framework.

C. Effect on Religious Life

The final consideration of the decision-making framework is the effect that judges’ disqualification decisions will have on their religious lives. Judicial disqualification decisions may affect judges’ religious lives in a variety of ways, depending on the content of the religious doctrine to which judges’ ascribe. For instance, in disqualifying or declining to disqualify, judges may be left with feelings of guilt, a Catholic concept,¹⁶¹ or feelings of conviction, an Evangelical Christian concept.¹⁶² The levels of guilt or conviction may vary depending upon the steadfastness with which judges hold to their religions’ teachings regarding guilt or conviction and to their religions’ teachings on both the particular legal issues at hand and legal authority in general.

In order to explore the consideration of effect on religious life in regard to religiously based judicial disqualification, an example is helpful. Many judges are assigned to judicial bypass proceedings, where they must assess minors’ maturity levels in order to determine if the minors may obtain abortions without parental consent.¹⁶³ Concerning the legal issue itself (abortion), the Catholic Church, many Evangelical Christian churches,¹⁶⁴ and Scientology¹⁶⁵ all teach that termination of a

more detailed discussion of this concern, see the text following note 180, *infra*.

161. “Guilt is both a cognitive and an emotional experience that occurs when a person realizes that he or she has violated a moral standard and is responsible for that violation.” THE GALE ENCYCLOPEDIA OF PSYCHOLOGY 285 (Bonnie Strickland ed., 2d ed. 2001). “[Catholic] guilt is a warning against performing or persisting in evil actions, because committing evil strains or breaks our friendship with God and damages our interior peace and integrity” Father John Bartunek, *Is “Catholic Guilt” Bad? What About Those Who Use It to Criticize the Church?*, ROMAN CATHOLIC SPIRITUAL DIRECTION (Sept. 7, 2009), <http://rcspiritualdirection.com/blog/tags/catholic-guilt>. See generally JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT (2002).

162.

Conviction of sin . . . is the beginning of an understanding of God. Jesus Christ said that when the Holy Spirit came He would convict people of sin. And when the Holy Spirit stirs a person’s conscience and brings him into the presence of God, it is not that person’s relationship with others that bothers him but his relationship with God

OSWALD CHAMBERS, *Repentance: December 7, in MY UTMOST FOR HIS HIGHEST: AN UPDATED EDITION IN TODAY’S LANGUAGE* (James Reimann ed., 1992) (internal citations omitted).

163. Babbs, *supra* note 10, at 474–77.

164. “[T]he Catholic Church . . . holds that deliberate termination of a normal pregnancy is a sin” *Feminist Women’s Health Ctr. v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995). “Thou shalt not kill.” *Exodus* 20:13 (King James).

normal pregnancy is a sin. One might think, in light of the guilt or conviction that judges may feel as a result of their particular religion's stance on abortion, that judges have adequately addressed the effect on religious life consideration and should be disqualified. But, the inquiry must go deeper. It is also important for judges to consider their religion's teachings on legal authority and its interaction with religious principles.

Continuing the analysis of legal authority using the previous example, Catholic judges may find that disqualification in a judicial bypass proceeding is necessary based on the concept of cooperation with evil. However, even this determination will be affected by whether a particular judge perceives the judicial bypass decision as formal or material cooperation with evil.¹⁶⁶ "A person formally cooperates with another person's immoral act when he shares in the immoral intention of the other."¹⁶⁷ On the other hand, a person materially cooperates with another person's immoral act when the act "has the effect of helping a wrongdoer, where the cooperator does not share in the wrongdoer's immoral intention."¹⁶⁸ Formal cooperation is always considered immoral by the Catholic Church.¹⁶⁹ However, material cooperation is not always considered immoral; instead, a moral-balancing test is used to weigh "the importance of doing the act against the gravity of the evil, its proximity, the certainty that one's act will contribute to it, and the danger of scandal to others."¹⁷⁰ Thus, the granting of access to abortion via judicial bypass may be considered either formal or material cooperation depending on judges' intentions. If Catholic judges deem their actions to be either formal cooperation with evil or material cooperation that fails the balancing test, judges may be severely afflicted with guilt, while Catholic judges deeming this action to be material cooperation that passes the balancing test would not be similarly affected. Hence, judges having the same religious affiliation may be personally affected by their choices—to disqualify or not to disqualify—in very different ways.

Judges of other religious denominations will also be personally affected in differing ways. Evangelical Christian judges subscribing to various portions of the Bible may, depending upon their interpretations, come to varying conclusions about the role they should or should not play in access to abortion. These conclusions will likely influence the magnitude of conviction judges feel, in turn affecting their relationships to the Creator. For instance, when considering the Bible's teaching on the legal issue in this scenario, many judges will believe that the Bible takes a traditional, hard-line stance against abortion and any assistance thereof.¹⁷¹ However, judges should also take into consideration the Bible's teaching on legal authority. Evangelical Christian judges may understand the Bible's command that all Christians are to submit to the authority of the government as

165. See L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* 161 (2007) ("[A]ny judge . . . recommending an abortion should be instantly deprived of position and practice, whatever his 'reason.'").

166. See generally Garvey & Coney, *supra* note 10, at 317–20.

167. *Id.* at 318.

168. *Id.* at 318–19.

169. *Id.* at 318.

170. *Id.* at 319.

171. "You have heard that it was said to the people long ago, 'You shall not murder, and anyone who murders will be subject to judgment.'" *Matthew* 5:21 (NIV).

overriding any stance the Bible takes against abortion.¹⁷² Some Evangelical Christians go so far as to believe that “[w]hen acting on behalf of a governing authority, a believer’s obligations differ somewhat from what they would be in an individual capacity,”¹⁷³ likening a judge’s role to that of Joab’s role in Uriah’s death. King David ordered Joab, a commander of David’s army,¹⁷⁴ to place Uriah on the front lines of battle and then withdraw the army from around Uriah, ensuring Uriah’s death.¹⁷⁵ Joab followed David’s order, and Uriah was subsequently killed.¹⁷⁶ These events displeased the Lord,¹⁷⁷ and David was punished for his actions.¹⁷⁸ However, Joab was not subject to penalty because he was following the orders of the governing authority.¹⁷⁹ To the contrary, other Evangelical Christian judges may understand the commandment to not kill as overriding the teaching regarding submission to government authority. Clearly, judges’ personal interpretations of various Biblical passages will affect the amount of conviction, if any, that judges may feel when presiding in judicial bypass cases.

It is critical that judges take into account the impact that guilt or conviction, resulting from judicial decisions, will have on their religious practices and personal relationships with God. Judges attempting to rule with clarity must not be hindered by extreme guilt, nor should judges’ personal lives be hindered by excessive guilt resulting from their judicial roles. If they are so hindered, disqualification would be necessary. However, the point here is not as simple as it first appears. The fact that a judge feels some guilt would not necessitate disqualification. The level of guilt, and thus the intensity of its effect on a judge, is essential to the analysis. In the same way that people choose to participate in guilt-inducing actions on a daily basis, in order to experience gratification, judges are also capable of choosing to engage in minimally guilt-inducing decision making. At the same time, a substantial level of guilt should indeed factor into the analysis, tipping the scale in favor of disqualification.

After considering the effects of judicial disqualification decisions on religious life, in connection with the considerations of party neutrality and the appearance of impartiality, judges should be well equipped to make ethical disqualification decisions.

172. “Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.” *Romans* 13:1–2 (NIV).

173. Karin A. Moore, Essay, *God’s Law and Man’s Law: Can They Peacefully Co-Exist in the Life of a Christian Appellate Judge?*, 2 U. ST. THOMAS L.J. 224, 229 (2004).

174. 2 *Samuel* 8:15–16 (NIV).

175. *Id.* at 11:14–15. King David ordered Uriah’s death because David had slept with Uriah’s wife, Bathsheba, and she had become pregnant. *Id.* at 11:2–5.

176. *Id.* at 11:16–17.

177. *Id.* at 11:27.

178. “[B]ecause by doing this [David] made the enemies of the Lord show utter contempt, the son born to [David died].” *Id.* at 12:14.

179. Joab continued to succeed as commander of David’s army, capturing the royal citadel. *Id.* at 12:26.

D. Continuing Evaluation

It is important to note that the three decision-making considerations should be addressed not only the first time judges are faced with disqualification decisions based on particular religiously charged scenarios or legal issues, but also at the outset of all similar proceedings thereafter. This continuing evaluation is necessary for several reasons: (1) to assess prior disqualification decisions, (2) to ensure that disqualification determinations are appropriately adjusted as judges' religious views change over time, and (3) to ensure that each disqualification determination is viewed in light of each case's unique fact pattern.

Continuing evaluation provides the opportunity to assess the accuracy of prior disqualification decisions and thus prevent the occurrence of subsequent erroneous decisions. For example, an individual Catholic judge may have initially felt that his or her involvement in capital cases would not reinforce the appearance of impartiality; but, after repeatedly presiding over capital cases, it may become evident that the judge's decisions overwhelmingly disfavor the death penalty. This judge must evaluate any future capital case disqualification decisions with this knowledge, and the judge should disqualify from future capital proceedings, based on appearance of impartiality considerations.¹⁸⁰ Admittedly, there is a substantial risk that scrutinizing a judge's tendency to decide a particular type of case in a specific manner may put pressure on that judge to decide future cases in the opposite direction—in order to avoid a track record that requires disqualification. This type of pressure is not the intent of continuing evaluation, and such pressure should be avoided. Instead, recognizing the tendency to rule in a particular way should serve only as an indicator that continuing in-depth evaluation is necessary.

Moving on to the second reason for continuing evaluation, it is essential to acknowledge that judges may change their religious views on particular legal issues or legal authority in general. Moreover, judges previously identifying with specific religions may convert to entirely different religions or may become agnostic or atheist. Any change in religious views or identity, regardless of the magnitude, may necessitate a change in the outcome of religiously based disqualification decisions under the proposed framework.

Finally, it is important that judges make disqualification decisions using the decision-making framework on a case-by-case basis, even when the judge has previously made a disqualification decision in a similar proceeding. Judges are frequently assigned to cases that resemble cases they have previously been assigned to; yet, each case comes with its own unique fact pattern. Even small differences in the facts of cases can result in disqualification for some cases and not for other similar cases; therefore, each case requires individual evaluation. Considering the three separate and individually sufficient reasons for continuing evaluation, it is evident that continuing evaluation is an essential element of the decision-making framework.

180. Disqualification should likewise occur in instances where judges take a principled, nonreligious stance opposing the death penalty or other positive law and are thus unable to rule impartially.

CONCLUSION

When disqualification issues arise, judges must make these important determinations by interpreting federal or state disqualification statutes. These interpretations are informed by the plain language of the statutes,¹⁸¹ Congressional intent, the meaning of impartiality,¹⁸² recent case law,¹⁸³ and professional standards¹⁸⁴—all viewed within the context of disqualification history.¹⁸⁵

Given the ever changing and somewhat ambiguous judicial disqualification landscape, religiously devout judges are in need of a tool to assist them in making religiously based disqualification determinations.

By addressing the considerations of party neutrality, the appearance of impartiality, and effect on religious life, the three-pronged decision-making framework incorporates the historical underpinnings of judicial disqualification, as well as current statutory, ethical, and religious law.¹⁸⁶ Additionally, the framework emphasizes the necessity of continual evaluation, to ensure that judges continue to preside over cases in an impartial manner.¹⁸⁷ As a whole, the framework facilitates the balancing of various considerations and can ultimately assist judges in reaching the most legally, ethically, and religiously appropriate disqualification determinations.

181. *See generally supra* Part II.D; note 5.

182. *See generally supra* Parts II & III.

183. *See generally supra* Part III.

184. *See generally supra* Part II.

185. *See generally supra* Part I.

186. *See generally supra* Part V.A–C.

187. *See generally supra* Part V.D.