REMOVING STATE CONSTITUTION BADGES OF INFERIORITY

by
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Our state constitutions contain archaic, ineffective, and unnecessary provisions that assign badges of inferiority to some citizens. Using Thomas Jefferson's standard for when constitutional imperfections justify amendment, this Article identifies two groups of clauses. The first are provisions that were substantially exclusionary as enacted and relate to unconstitutional practices. Included are provisions relating to religious tests for public office, segregated schools, bars to marriage equality, and religious tests for witness competency. The second group are provisions that were symbolically exclusionary as enacted and are redolent of a prejudiced history. Examples involve the use of gendered language, clauses which make inappropriate substantive distinctions based on gender, clauses which differentiate based on religious belief, and provisions relating to the Rebellion. Vestiges of the discrimination and bigotry that allowed these provisions remain. To prevent continuing injury to those to whom the provisions assign badges of inferiority, these archaic, ineffective, and unnecessary provisions should be removed from our state constitutions.

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INTRODUCTION

> *The answer of Solon on the question, "Which is the most perfect popular government," has never been exceeded by any man since his time, as containing a maxim of political morality. "That," says he, "where the least injury done to the meanest individual, is considered as an insult on the whole constitution."*
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> *—Thomas Paine*[1]

If the most perfect form of popular government is one where injury done to disfavored groups and individuals is an insult to the entirety, what of the situation where the constitution itself is the mechanism of injury? How should we respond when archaic, ineffective, and unnecessary provisions in our state constitutions assign badges of inferiority to some citizens?

The problem was illustrated by a recent local election in Texas. In 2014, Greg Casar ran for the Austin city council.[2] His opponent, Laura Pressley, made an issue of their religious beliefs. In a campaign brochure, Pressley compared the two candidates based on their "Faith," claiming for herself a "strong belief in God" while calling Casar a "self-admitted atheist."[3] Her bigoted stance was objectionable enough standing alone, but to compound the offense Pressley invoked the Texas constitution:

> As someone who's on record saying he doesn't believe in God, Casar can't legally represent North Austin's District 4 on the City Council, Pressley told the [Austin] *American-Statesman*. Pressley pointed to a section of the Texas Constitution's Bill of Rights that says there are no religious qualifications for holding public office,

[1] 4 THOMAS PAINE, THE AGE OF REASON: PARTS I & II 186–87 (Moncure Daniel Conway ed., Merchant Books 2010) (1794).

[2] Lauren McGaughy, *Behold! Atheists CAN Run for Office in Texas*, TEXAS POLITICS (December 4, 2014), http://blog.chron.com/texaspolitics/2014/12/behold-atheists-can-run-for-office-in-texas/; Dan Solomon, *Is It Legal for an Atheist to Hold Public Office in Texas?*, TEXAS MONTHLY: THE DAILY POST (Dec. 3, 2014), https://www.texasmonthly.com/the-daily-post/is-it-legal-for-an-atheist-to-hold-public-office-in-texas/.

[3] Solomon, *supra* note 2. Pressley apparently had her facts wrong. Her characterization of Casar's religious beliefs was based on an undergraduate paper he wrote at the University of Virginia about discussing Russian literature with young corrections inmates. *Id.* He stated that he considered himself a Catholic. *Id.*

> provided that the official "acknowledge the existence of a Supreme Being."[4]

On its face, Pressley was right. The Texas constitution bars from public office anyone who does not "acknowledge the existence of a Supreme Being."[5] But the provision upon which Pressley relied is clearly unenforceable under the Federal Constitution.[6] In fact, the issue was litigated thirty-five years ago and Texas agreed that its provision violated the Establishment Clause and would not be enforced.[7] Greg Casar was elected to the city council in 2014[8] and reelected in 2016.[9] But to this day, the Texas constitution purports to bar from office any citizen who does not "acknowledge the existence of a Supreme Being."[10]

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[4] *Id.*

[5] TEX. CONST. art. I, § 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, *provided he acknowledge the existence of a Supreme Being.*") (emphasis added).

[6] Allan W. Vestal, *The Lingering Bigotry of State Constitution Religious Tests*, 15 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 55, 67–68 (2015). *See also* O'Hair v. White, 675 F.2d 680 (5th Cir. 1982) (dismissing the case without expressing an opinion as to the constitutionality of the Texas religious test provision). The Fifth Circuit indicated that "it is difficult to distinguish this case from *Torcaso v. Watkins*" and quoted from the *Torcaso* opinion:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions rounded on beliefs.

O'Hair v. White, 675 F.2d 680, 696 (5th Cir. 1982) (quoting Torcaso v. Watkins, 367 U.S. 488, 495 (1961). *See also* McGaughy, *supra* note 2; Solomon, *supra* note 2.

[7] Solomon, *supra* note 2 (reprinting 2008 news report that Madalyn Murray O'Hair and Texas Attorney General Jim Mattox "signed an agreement in federal court that contained this line: 'The parties hereby agree that the last phrase, '. . . provided he acknowledge the existence of a Supreme Being.' is void and of no further effect in that it is in violation of the Establishment Clause of the First Amendment of the United States Constitution,'" and that "Mattox agreed on behalf of the state not to enforce it . . . .").

[8] Michael King, *Pressley Ups the Ante*, THE AUSTIN CHRONICLE: DAILY NEWS (Mar. 11, 2015), https://www.austinchronicle.com/daily/news/2015-03-11/pressley-ups-the-ante/ (reporting Casar defeated Pressley by 1,291 votes in the December 16, 2014 runoff election, a margin of 65% to 35%).

[9] Casar was reelected in 2016 with over 62% of the vote in a three-person field. *Joint General and Special Elections, Travis County, Unofficial Results, City of Austin Cumulative Results* (Nov. 8, 2016), https://www2.traviscountytx.gov/county_clerk/election/20161108/Run6/20161108coacume.pdf. He continues to serve on the Austin city council. *Council Member Gregorio Casar*, AUSTINTEXAS.GOV, http://www.austintexas.gov/department/council-member-gregorio-casar-biography (last visited Aug. 18, 2018).

[10] TEX. CONST. art. I, § 4. This type of bigotry, an attempt to use a state

What should be done with provisions such as the Texas ban on non-believers in public office, constitutional clauses that assign badges of inferiority to some citizens? Thomas Jefferson believed that not every imperfection in our laws and constitutions requires correction. "I am certainly not an advocate for frequent and untried changes in laws and constitutions," he wrote, "I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects."[11]

To be sure, our state constitutions contain some archaic provisions which need not particularly concern us. For example, the current constitutions of seven states have provisions on dueling.[12] Such provisions surely could be removed without controversy—six states have removed language on dueling[13]—but clearly, they are the kind of moderate imperfections that under Jefferson's standard do not require amendment.[14]

Jefferson also spoke to constitutional imperfections that are not moderate, advocating that our constitutions and laws be updated to keep pace with our progress:

> But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat

constitution to bar a candidate for office based on the candidate's religious beliefs, is not limited to Texas. Vestal, *supra* note 6, at 58–59, 69–70 (tracing unsuccessful 2009 attempt to bar Cecil Bothwell from a seat on the Asheville, North Carolina city council based on an unconstitutional section of the North Carolina constitution which purports to bar from public office "any person who shall deny the being of Almighty God.") (citing N.C. CONST. art. VI, § 8).

[11] Letter, Thomas Jefferson to H. Tompkinson (aka Samuel Kercheval), July 12, 1816, Library of Congress, https://www.loc.gov/resource/mtj1.049_0255_0262/ [hereinafter Jefferson Letter].

[12] *See, e.g.*, ALA. CONST. art. IV, § 86; ARK. CONST. art. IX, § 2; KY. CONST. §§ 228, 239, 240; OR. CONST. art. II, § 9; S.C. CONST. art. XVII, § 1B; TENN. CONST. art. IX, § 3; W. VA. CONST. art. IV, § 10.

[13] *See* COLO. CONST. art. XII, § 12 (repealed 1991); IOWA CONST. art. I, § 5, *repealed by* IOWA CONST. amend. 43; MD. CONST. art. III, § 41 (repealed 1978); MISS. CONST. art. III, § 19 (repealed 1978); OHIO CONST. art. XV, § 5 (repealed 1976); WIS. CONST. art. XIII, § 2 (repealed 1975).

[14] It is possible that some Second Amendment fetishists would see removal of the anti-dueling provisions as a vindication of gun rights, although it should be noted that the National Rifle Association's Institute for Legislative Action does not include state constitution anti-dueling provisions in its listing of "State Gun Laws." *State Gun Laws* , NRA-ILA (June 9, 2014), https://www.nraila.org/gun-laws/state-gun-laws/.

> which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.[15]

What types of archaic, ineffective, and unnecessary state constitutional provisions that cause injury are inconsistent with the progress we have made, the enlightenment we have experienced? Which provisions require amendment, not mere accommodation, under Jefferson's standard? Justice Ruth Bader Ginsburg made an observation that suggests a way of approaching the Jeffersonian insight. Speaking in Egypt about how that nation might model a new constitution, she noted: "[W]e have the oldest written constitution still enforced in the world. And it's a Constitution that starts out with three wonderful words: It's we, the people."[16] She continued:

> [T]he genius of the Constitution[,] I think[,] is that it has this notion of who, who composes "we the people." It has expanded and expanded over the years. So now it includes people who were left out in the beginning: Native Americans were left out, certainly people held in human bondage, women, and people who were newcomers to our shores.[17]

Which archaic, ineffective, and unnecessary state constitution provisions meet Jefferson's standard for amendment because they are inconsistent with the progress we have made and the enlightenment we have experienced? Surely, we should include those that conflict with our ever more perfect conception of who comprises "we the people."

Thus, I start with the proposition that at a minimum our state constitutions should not retain archaic, ineffective, or unnecessary language that is prejudiced. We should remove state constitutional provisions that are badges of inferiority for some of our citizens; provisions that cause "injury done to the meanest individual" and are "an insult on the whole constitution," in Solon's observation. We should revise our fundamental documents to reflect our evolving conception of who we are as a nation.[18]

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[15] Jefferson Letter, *supra* note 11.

[16] David Lyle, *Selective (And Misplaced) Outrage: The Right-Wing Freakout Over Justice Ginsburg's Comments in Egypt*, MEDIA MATTERS FOR AM. (Feb. 9, 2012), https://www.mediamatters.org/blog/2012/02/09/selective-and-misplaced-outrage-the-right-wing/186144.

[17] *Id.*

[18] There is an analysis that suggests a different conclusion, an argument that we should retain such provisions as a reminder of our imperfect past. Justice Ginsburg, in the same Egyptian interview, discussed the treatment of slavery in the Federal Constitution:

> [W]e are still forming a more perfect union, and if you go back to when the Constitution was new, in the 1780's, we still had slavery in the United States. The Constitution, of course, has changed in important respects, but in the pocket constitution that I carry around, it still has that the slave trade was preserved until the year 1808, that there was what we called the "fugitive slave provision," if a slave escaped from a slave state into a free state, the master would have the

The following discussion considers eight types of state constitution provisions, which it can be argued meet Jefferson's standard for amendment. These provisions fall into two groups. The first group includes four types of provisions that were substantively exclusionary as enacted and relate to unconstitutional practices. The second group includes four types of provisions that were symbolically exclusionary as enacted and are redolent of a prejudiced history. This Article closes by considering whether these provisions meet Jefferson's standard for amendment.

I. PROVISIONS THAT WERE SUBSTANTIVELY EXCLUSIONARY AS ENACTED AND RELATE TO UNCONSTITUTIONAL PRACTICES

The following discussion identifies four types of state constitution provisions that are at odds with our evolved sense of "we the people." They are religious tests for public office, the authorization of segregated public schools, bars to marriage equality, and religious tests for witness competency. In each case, the provisions were exclusionary as enacted, and the practices to which they relate have been found unconstitutional.

A. Religious Tests for Office

The first type of state constitutional provisions are religious tests for public office, the type of provision used against Greg Casar in his campaign for the Austin city council.[19] Today, eight states retain religious tests for public office in their constitutions: Arkansas,[20] Maryland,[21] Mississippi,[22] North Carolina,[23] Pennsylvania,[24] South Carolina,[25] Tennessee,[26]

> right to sue in the Free State to get his property returned. *We keep those provisions although they are no longer enforced just so people would see how imperfect we were and how much more perfect, we're still not all the way there, but the genius of the Constitution.*

Id. (emphasis supplied). While Justice Ginsburg's position is certainly reasonable, I am not persuaded. Leaving such provisions in place as a reminder of how imperfect we were depends upon readers' understanding that the provisions are unenforceable. While that may be true in the case of the fugitive slave provision of the Federal Constitution, it was not true in the case of the religiously prejudiced provision of the Texas constitution used against Greg Casar. Nor would it be true of many of the other provisions we consider below.

[19] Vestal, *supra* note 6, at 58–70.

[20] AR. CONST. art. 19, §1 ("No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.").

[21] MD. CONST. Declaration of Rights, art. 37 ("That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.").

[22] MISS. CONST. art. XIV, § 265 ("No person who denies the existence of a Supreme Being shall hold any office in this state."). *But see* MISS. CONST. art. III, § 18 ("No religious test as a qualification for office shall be required.").

[23] N.C. CONST. art. VI, § 8 ("The following persons shall be disqualified for office:

and Texas.[27] In form, these contemporary state constitution religious tests for office are straightforward. Four states require a belief in God;[28] three a belief in a Supreme Being.[29] Two states add language relating to belief in a future state of rewards and punishments.[30]

Religious tests for office have not been the norm: thirty-two states have, or had, constitutional prohibitions on religious tests for public office.[31] Nor have our state constitutions always been either neutral or favorable toward office holding by religious citizens. Eight states had constitutional provisions barring members of the clergy from public office, none of which survived into the 20th Century.[32]

First, any person who shall deny the being of Almighty God.").

[24] The Pennsylvania provision is not a test, *per se*, but rather extends protection against a religious test for office only to those who acknowledge "a God" and future rewards and punishments. PA. CONST. art. I, § 4 ("No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.").

[25] S.C. CONST. art. VI, § 2 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution."); S.C. CONST. art. XVII, § 4 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution.").

[26] TENN. CONST. art. IX, § 2 (1870) ("No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."). *But see* TENN. CONST. art. I, § 4 ("That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state.").

[27] TEX. CONST. art. I, § 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.").

[28] MD. CONST. Declaration of Rights, art. 37; N.C. CONST. art. VI, § 8; TENN. CONST. art. IX, § 2. Pennsylvania protects only those who acknowledge "the being of a God" from religious tests for office. PA. CONST. art I, §4.

[29] MISS. CONST. art. XIV, § 265; S.C. CONST. art. VI, § 2; and TEX. CONST. art. I, § 4.

[30] PA. CONST. art. I, § 4; TENN. CONST. art. IX, § 2.

[31] Vestal, *supra* note 6, at 61–62, 117–19. The states are Alabama, Arizona, Arkansas, California, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[32] The states are Delaware (DEL. CONST. of 1776, art. 29; DEL. CONST. of 1792, art. I, § 9; DEL. CONST. of 1831, art. VII, § 9; but not DEL. CONST. of 1897), Florida (FLA. CONST. of 1839. art. VI, § 10; but not FLA. CONST. of 1861), Georgia (GA. CONST. of 1777, art. LXII; and GA. CONST. of 1789, art. I, § 18; but not GA. CONST. of 1798), Kentucky (KY. CONST. of 1799, art. II, § 26; but not KY. CONST. of 1850), Maryland (MD. CONST. of 1851, art. III, § 11; but not MD. CONST. of 1864), Mississippi (MISS. CONST. of 1817, art. VI, § 7; but not MISS. CONST. of 1832), New York (N.Y. CONST. of

Religious tests for public office are clearly unconstitutional as a violation of the Establishment Clause. The leading case is *Torcaso v. Watkins*, which involved a Maryland requirement that to become a notary one had to declare "belief in the existence of God."[33] In striking down the Maryland requirement, Justice Black spoke of the meaning of the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[34]

Justice Black rejected an argument that the Court's opinion in *Zorach v. Clauson*[35] allowed the Maryland practice, and rejected the religious test for office:

> Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of proving religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept."[36]

In addition to the Maryland statute in *Torcaso*, the Arkansas,[37] Mississippi,[38] South Carolina,[39] and Texas[40] statutes have been challenged, lead-

1777, art. XXXIX; and N.Y. CONST. of 1821, art. VII, § 4; but not N.Y. CONST. of 1846), South Carolina (S.C. CONST. of 1790, art. I, § 23; but not S.C. CONST. of 1895).

[33] Torcaso v. Watkins, 367 U.S. 488 (1961); MD. CONST. Declaration of Rights, art. 37.

[34] *Torcaso*, 367 U.S. at 492–93 (quoting Everson v. Board of Education, 330 U.S. 1, 15–16 (1947)).

[35] 343 U.S. 306 (1952).

[36] *Torcaso*, 367 U.S. at 494; Vestal, *supra* note 6, at 65–67.

[37] Flora v. White, 692 F.2d 53, 54 n.2 (8th Cir. 1982) ("Although we do not reach the merits of appellants' constitutional claim given the procedural posture of this case, we note that the challenged section would appear to be inconsistent with *Torcaso v. Watkins* . . . .").

[38] Tirmenstein v. Allain, 607 F. Supp. 1145, 1146 (S.D. Miss. 1985) ("[I]t is clear that under the analysis of the Supreme Court in *Torcaso v. Watkins* . . . that this provision of the Mississippi State Constitution is constitutionally infirm.").

[39] Silverman v. Campbell, 486 S.E.2d 1, 2 (S.C. 1997).

[40] O'Hair v. White, 675 F.2d 680, 696 (5th Cir. 1982) (citing *Torcaso*, 367 U.S. at 495). Although not a decision on the merits, the Fifth Circuit stated that "it is difficult

ing to decisions that either found them unconstitutional or clearly indicated that they would be found unconstitutional if the issue were appropriately before the court. While they have not been specifically challenged, the North Carolina, Pennsylvania, and Tennessee religious test for office provisions are clearly unconstitutional for the same reasons.

The state constitution provisions establishing religious tests for office place a clear badge of inferiority on a historically disfavored group. By declaring non-believers unfit for public office, these religious tests relegate them to second-class status. The prejudice is heightened in situations where the provision disqualifying non-believers reinforces the discriminatory message. For example, the North Carolina disqualification statute groups "any person who shall deny the being of Almighty God" with "any person who has been adjudged guilty of treason or any other felony" and "any person who had been adjudged guilty of corruption or malpractice in any office."[41]

These provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." State constitution religious tests for public office are badges of inferiority which should be removed.

B. Segregated Schools

The second type of state constitutional provision is an Alabama section authorizing segregated public schools. As passed in 1901, the current Alabama constitution included a provision requiring the legislature to provide segregated schools:

> The Legislature shall establish, organize, and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years. . . . Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.[42]

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to distinguish this case from *Torcaso v. Watkins*" and quoted *Torcaso*:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Id.

[41] N.C. CONST. art. VI, § 8.

[42] ALA. CONST. § 256. The 1901 provision was a modification of a provision included in the Alabama constitution of 1875: "The General Assembly shall establish, organize, and maintain a system of public schools throughout the State, for the equal benefit of the children thereof between the ages of seven and twenty-one years; *but separate schools shall be provided for the children of citizens of African descent.*" ALA. CONST. of

In 1956, in the wake of *Brown v. Board of Education*,[43] Amendment 111 was adopted, revising the language of § 256 to provide in part an authorization of segregated schools:

> To avoid confusion and disorder and to promote effective and economical planning for education, *the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race*, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.[44]

The Alabama segregated schools provision is clearly unconstitutional as a violation of the Equal Protection Clause. Segregated public schools were found to be an unconstitutional deprivation of equal protection under the 14th Amendment in *Brown v. Board of Education of Topeka*, over six decades ago, before the segregated schools charge of Amendment 111 was added to the Alabama constitution.[45] The Supreme Court's opinion in *Brown* was motivated by a finding that the segregation of school children generated feelings of inferiority among the separated students: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[46] The *Brown* court quoted with approval a finding in the Kansas case that the detrimental effect was greater because of the official nature of the policy:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.[47]

If the detrimental effect of segregated schools came from both the practice of *de jure* segregation and the legal sanction for the policy, it must be true that there is a residual detrimental effect when the practice of *de jure* segregation ends but the legal sanction remains.

The Alabama state constitution provision allowing for segregated public schools places a clear badge of inferiority on a historically disfavored group. The provision meets Jefferson's standard for removal, and is at odds with our evolved sense of "we the people." The Alabama segregated schools provision is a badge of inferiority which should be removed.

1875, art. XII, § 1 (emphasis added).

[43] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[44] ALA. CONST. of 1901, *amended by* ALA. CONST. amend. 111 (emphasis added).

[45] *Brown*, 347 U.S. at 495.

[46] *Id.* at 494.

[47] *Id.*

C. Bars to Marriage Equality

The third type of state constitutional provisions are provisions that define marriage to exclude same-sex couples. An example of this type of provision is the Kansas provision that "[m]arriages shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void."[48] Starting in 2002, in an attempt to block marriage equality, thirty-one states adopted state constitutional provisions defining marriage, or allowing marriage to be defined, to exclude same-sex couples. They were: Alabama,[49] Alaska,[50] Arizona,[51] Arkansas,[52] California,[53] Colorado,[54] Florida,[55] Georgia,[56] Hawaii,[57] Idaho,[58] Kansas,[59] Kentucky,[60] Louisiana,[61] Michigan,[62] Mississippi,[63] Mis-

[48] KAN. CONST. art. XV, § 16.

[49] ALA. CONST. of 1901, *amended by* ALA. CONST. amend. 774 ("Marriage is inherently a unique relationship between a man and a woman. . . . A marriage contracted between individuals of the same sex is invalid in this state.").

[50] ALASKA CONST. art. 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

[51] ARIZ. CONST. art. XXX, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state.").

[52] ARK. CONST. of 1874, *amended by* ARK. CONST. amend. 83 ("Marriage consists only of the union of one man and one woman.").

[53] CAL. CONST. art. 1, § 7.5, *amended by* Ca. Const. prop. 8 ("Only marriage between a man and a woman is valid or recognized in California.").

[54] COLO. CONST. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state.").

[55] FLA. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.").

[56] GA. CONST. art. I, § IV, ¶ I(a) ("This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.").

[57] HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

[58] IDAHO CONST. art. III, § 28 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.").

[59] KAN. CONST. art. XV, § 16 ("Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.").

[60] KY. CONST. gen. prov., § 233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.").

[61] LA. CONST. art. XII, § 15 ("Marriage in the state of Louisiana shall consist only of the union of one man and one woman.").

[62] MICH. CONST. art. I, § 25 ("[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.").

[63] MISS. CONST. art. 14, § 263A ("Marriage may take place and may be valid under the laws of this State only between a man and a woman.").

souri,[64] Montana,[65] Nebraska,[66] Nevada,[67] North Carolina,[68] North Dakota,[69] Ohio,[70] Oklahoma,[71] Oregon,[72] South Carolina,[73] South Dakota,[74] Tennessee,[75] Texas,[76] Utah,[77] Virginia,[78] and Wisconsin.[79]

Under *Obergefell v. Hodges*, these provisions were found unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[80] The state constitution provisions defining marriage to exclude same-sex couples placed a clear badge of inferiority on a historically disfavored group. As the *Obergefell* Court found, the ex-

[64] MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.").

[65] MONT. CONST. art. XIII, § 7, *amended by* initiative 96 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

[66] NEB. CONST. art. I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska.").

[67] NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state.").

[68] N.C. CONST. art. XIV, § 6 ("Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State.").

[69] N.D. CONST. art. XI, § 28 ("Marriage consists only of the legal union between a man and a woman.").

[70] OHIO CONST. art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.").

[71] OKLA. CONST. art. II, § 35(A) ("Marriage in this state shall consist only of the union of one man and one woman.").

[72] OR. CONST. art. XV, § 5(a) ("[O]nly a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

[73] S.C. CONST. art. XVII, § 15 ("A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State.").

[74] S.D. CONST. art. XXI, § 9 ("Only marriage between a man and a woman shall be valid or recognized in South Dakota.").

[75] TENN. CONST. art. XI, § 18 ("The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state.").

[76] TEX. CONST. art. I, § 32(a) ("Marriage in this state shall consist only of the union of one man and one woman.").

[77] UTAH CONST. art. I, § 29(1) ("Marriage consists only of the legal union between a man and a woman.").

[78] VA. CONST. art. I, § 15-A ("That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.").

[79] WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

[80] Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

> These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.

Id.

clusion from marriage of same-sex couples imposed stigma and injury upon them[81] and served to disrespect and subordinate them.[82]

That badge of inferiority was diminished, but not eliminated, when the state constitution provisions were rendered unenforceable but not removed from the state constitutions. As the *Obergefell* court noted, looking to the repudiation of *Bowers* in *Lawrence*, the substantial effects of such injuries linger even after the unconstitutional provision is overruled.[83] "Dignitary wounds," the *Obergefell* court observed, "cannot always be healed with the stroke of a pen."[84] Or, as a Montana ACLU representative cast the problem: "Words do matter. Even though the ban can't be enforced any longer, keeping them on the books is sending the message that gay and lesbian citizens are second class."[85]

These provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." The state constitutional provisions defining marriage to exclude same-sex couples are badges of inferiority which should be removed.

D. Religious Tests for Witness Competency

The fourth type of state constitutional provisions are religious tests for witness competency. Only two states have constitutional religious tests for witness competency, Arkansas and Maryland.[86] The Arkansas provision is: "No person who denies the being of a God shall . . . be competent to testify as a witness in any Court."[87] The Maryland provision is:

> [N]or shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or the world to come.[88]

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[81] *Id.* at 2602 ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.").

[82] *Id.* at 2604 ("The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

[83] *Id.* at 2606 ("Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled.").

[84] *Id.*

[85] Matt Volz, *Montana's Unenforceable Same-Sex Marriage Ban to Remain in State Constitution*, LGBTQ NATION (July 3, 2015) (quoting Niki Zupanic of the Montana American Civil Liberties Union), https://www.lgbtqnation.com/2015/07/montanas-unenforceable-samesex-marriage-ban-to-remain-in-state-constitution/.

[86] ARK. CONST. art. XIX, § 1; MD. CONST. Declaration of Rights, art. 36; Vestal, *supra* note 6, at 70–92.

[87] ARK. CONST. art. XIX, § 1.

[88] MD. CONST. Declaration of Rights, art. 36.

Religious tests for witness competency are clearly unconstitutional as a violation of the Establishment Clause. In *Flora v. White*, the Eighth Circuit identified the Arkansas religious test for witness competency and noted "that the challenged section would appear to be inconsistent with *Torcaso v. Watkins*."[89] The Maryland religious test for witness competency would be invalidated in the same way that courts have held against the related religious test for jurors.[90]

The state constitution provisions establishing religious tests for witness competency place a clear badge of inferiority on a historically disfavored group. By declaring non-believers unworthy of belief, the statutes align with a bigoted tradition that extends back to Pope Innocent III and the Fourth Lateran Council in 1215.[91] In rejecting the testimony of non-believers, the rules treated their testimony equal to that of mental defectives:

> The law is wise in requiring the highest attainable sanction for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. . . . The atheist is also rejected, because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause, or the manner of avowal.[92]

These provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." The state constitutional provisions establishing religious tests for witness competency are badges of inferiority which should be removed.

II. PROVISIONS THAT WERE SYMBOLICALLY EXCLUSIONARY AS ENACTED AND ARE REDOLENT OF A PREJUDICED HISTORY

The following discussion identifies four types of state constitution provisions that are at odds with our evolved sense of "we the people." They are provisions which were symbolically exclusionary as enacted and are redolent of a prejudiced past. These are provisions which inappropriately use gendered language, substantive provisions which establish inappropriate differences in substantive treatment based on gender, provisions which make inappropriate religious references and distinctions, and provisions which make unnecessary references to the Rebellion.

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[89] Flora v. White, 692 F.2d 53, 54 n.2 (8th Cir. 1982).

[90] Vestal, *supra* note 6, at 82–84.

[91] *Id.* at 71–75.

[92] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 412 n.2 (1st ed. 1842) (quoting S.G., *Exclusion of Witnesses for Unbelief,* 1 L.REP. 345, 346–47 (1839)).

These provisions meet Jefferson's standard and should be amended or removed from our state constitutions.

A. Gendered Language

The first type of state constitutional provisions are those provisions which used gendered language where such language is unnecessary and inappropriate. The history of two Texas Governors illustrates the use of gendered language. Miriam A. Ferguson was elected Governor of Texas in 1924, the first woman chosen in a general election to be governor of an American state.[93] She served from 1925 to 1927 and again from 1933 to 1935.[94] Her service took place under a Texas constitution that was written in 1876, a time when women were not eligible to vote in Texas, much less presumably to serve as governor.[95] Half a century later, when Governor Ferguson was elected, the Texas constitution still described the office of governor in gendered language suggesting that it was inconceivable that any woman would ever be elected to the position. Consider, for example, the constitutional provision which bars the governor from holding other office or receiving supplemental compensation:

> During the time *he* holds the office of Governor, *he* shall not hold any other office: civil, military or corporate; nor shall *he* practice any profession, and receive compensation, reward, fee, or the promise thereof for the same; nor receive any salary, reward or compensation or the promise thereof from any person or corporation, for any service rendered or performed during the time *he* is Governor, or to be thereafter rendered or performed."[96]

Ann Richards was the second woman elected governor of Texas, serving from 1991 to 1995.[97] The Texas constitution during Governor Richards' term still contained gendered language with respect to the of-

[93] Ctr. for Am. Women and Politics, *History of Women Governors,* EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY (2018), http://www.cawp.rutgers.edu/history-women-governors. *See also* Shelley Sallee, *"The Woman of It": Governor Miriam Ferguson's 1924 Election,* 100 SW. HIST. Q. 1, 15 (1996).

[94] John D. Huddleston, *Ferguson, Miriam Amanda Wallace [Ma]*, TEX. ST. HIST. ASS'N (Jan. 21, 2017), https://tshaonline.org/handbook/online/articles/ffe06.

[95] TEX. CONST. art. VI, § 2 (1876) (qualified electors limited to "every male person" otherwise qualified). Interestingly, the 1876 Texas constitution required that senators and representatives be qualified electors, but required of the governor only that "He shall be at least thirty years of age, a citizen of the United States, and shall have resided in this State at least five years immediately preceding his election." Tex. Const. art. III, §§ 6–7 (senators and representatives); art. IV, §4 (governor).

[96] *Id.* (emphasis added).

[97] Ed Lavandera, *Former Texas Gov. Ann Richards, 73, Dies*, CNN (Sep. 14, 2006, 12:26 AM), http://www.cnn.com/2006/POLITICS/09/14/richards.obit.

fice of governor. It continues to contain such language today, over nine decades after Governor Miriam Ferguson proved its premise incorrect.[98]

Sometimes gendered language is found in the choice of personal pronouns, which accurately reflected the prevailing discrimination against women when the provisions were written. For example, the 1874 Arkansas provision, accurate when written but long since overtaken by events, reads: "No Senator or Representative shall, during the term for which *he* shall have been elected, be appointed or elected to any civil office under this State."[99] But sometimes, exclusionary personal pronoun choices were never accurate, even when drafted. For example, the Arizona constitutional provision against self-incrimination which provides: "No person shall be compelled in any criminal case to give evidence against *himself* . . . ."[100]

But the inappropriate use of gendered language is not limited to the choice of personal pronouns. Sometimes the use of gendered language directly reflects the fundamentally prejudiced assumptions of the constitutional drafters as to who is included within "we the people." Thus the 1965 Connecticut provision: "All *men* when they form a social compact, are equal in rights; and no *man* or set of *men* are entitled to exclusive public emoluments or privileges from the community."[101]

The state constitution provisions using gendered language place a clear badge of inferiority on a historically disfavored group. In all its forms, gendered language is nearly ubiquitous; forty-two states have instances of gendered language in their current constitutions.[102]

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[98] TEX. CONST. art. IV, §§ 4–6, 7, 9–10, 11(b), 14.

[99] *Compare* ARK. CONST. art. V, § 10 (emphasis added), *with* the Georgia provision, that "the officer shall be immediately reinstated to the office from which he was suspended[,]" which was inaccurate even when written in 1983. GA. CONST. art. II, § 3, ¶ I(b).

[100] ARIZ. CONST. art. II, § 10 (emphasis added). It is unclear whether the drafters assumed that no woman would ever be a defendant in a criminal case or knew that there would be female defendants but intended that women not be protected from compelled self-incrimination.

[101] CONN. CONST. art. I, § 1 (emphasis added).

[102] All of the states but California, Delaware, Florida, Hawaii, Iowa, Maine, Rhode Island and Vermont have inappropriately gendered language (California, Iowa, Florida, and Vermont removal of gendered language occurred in the last 50 years). *See, e.g.*, ALA. CONST. art. IV, § 80 ("Any person who shall . . . offer . . . any money . . . to any executive or judicial officer, or member of the general assembly, to influence *him* in the performance of *his* public or official duties, shall be guilty of bribery . . . .") (emphasis added); ALASKA CONST. art. IV, § 16 ("[T]he chief justice of the supreme court shall be the administrative head of all courts. He may assign . . . ."); ARIZ. CONST. art. II, § 10 ("No person shall be compelled in any criminal case to give evidence against himself . . . ."); ARK. CONST. art. V, § 10 ("No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State."); Cal. Const. art. I, §1 (1879) ("All men are by nature free and independent, and have certain inalienable rights . . .

.") (amended 1974); COLO. CONST. art. II, § 18 ("No person shall be compelled to testify against himself in a criminal case . . . ."); CONN. CONST. art. I, § 1 ("All men when they for a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community."); Fl. Con., Art. I., §9 (1968) ("No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.") (amended 1998); GA. CONST. art. II, § III, ¶ I(b) ("[T]he officer shall be immediately reinstated to the office from which he was suspended."); IDAHO CONST. art. I, § 1 ("All men are by nature free and equal . . . ."); ILL. CONST. art. I, § 1 ("All men are by nature free and independent . . . ."); IND. CONST. art. II, § 4 ("No person shall be deemed to have lost his residence in the State, by reason of his absence, either on business of this State or of the United States."); IA. CON., art. I., §1 (1857) ("All men are, by nature, free and equal, and have certain inalienable rights . . . .") (amended 1998); KAN. CONST. art. III, § 15 ("[B]y the supreme court nominating commission that such justice is so incapacitated as to be unable to perform adequately his duties."); KY. CONST. Bill of Rights, § 11 ("In all criminal prosecutions the accused has the right to be heard by himself and counsel . . . ."); LA. CONST. art. I, § 13 ("[H]e shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel."); MD. CONST. Declaration of Rights, art. 13 ("That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner."); MASS. CONST. pt. 1, art. XII ("No subject shall be held to answer for any crime . . . until the same is fully and plainly, substantially and formally described to him . . . ."); MICH. CONST. art. I, § 17 ("No person shall be compelled in any criminal case to be a witness against himself . . . . "); MINN. CONST. art. I, § 6 ("The accused shall enjoy the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defense."); MISS. CONST. art. III, § 12 ("The right of every citizen to keep and bear arms in defense of his home . . . ."); MO. CONST. art. I, § 18(a) ("That in criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf . . . ."); MONT. CONST. art. II, § 23 ("No person shall be imprisoned for the purpose of securing his testimony in any criminal proceeding longer than may be necessary in order to take his deposition."); NEB. CONST. art. I, § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf . . . ."); NEV. CONST. art. I, § 9 ("Every citizen may freely speak, write and publish his sentiments on all subjects . . . ."); N.H. CONST. art. LXIX ("The Secretary of State shall, at all times, have a Deputy, to be by him appointed; for whose conduct in office he shall be responsible . . . ."); N.J. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor; and to have the assistance of counsel in his defense."); N.M. CONST. art. II, § 15 ("No person shall be compelled to testify against himself in a criminal proceeding . . . ."); N.Y. CONST. art. I, § 6 ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."); N.C. CONST. art. I, § 18 ("[E]very person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ."); N.D. CONST. art. I, § 9 ("All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law . . . ."); OHIO CONST. art. I, § 16 ("All courts shall be open, and every person, for an injury done him in his

These provisions meet Jefferson's standard for amendment or removal and are at odds with our evolved sense of "we the people." The use of inappropriately gendered language is a badge of inferiority and thus should be corrected.

B. Provisions Which Differentiate by Gender

The second type of state constitutional provisions are sections that use gender references to make substantive differences in treatment. An example of this type of provision is Missouri's use of gendered language

land, goods, person or reputation, shall have remedy by due course of law . . . ."); OKLA. CONST. art. II, § 11 ("Every person elected or appointed to any office . . . shall give personal attention to the duties of the office to which he is elected or appointed."); OR. CONST. art. I, § 12 ("No person shall be put in jeopardy twice for the same offence [sic], nor be compelled in any criminal prosecution to testify against himself."); PA. CONST. art. I, § 9 ("In all criminal prosecutions the accused hath a right to be heard by himself . . . ."); S.C. CONST. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself."); S.D. CONST. art. IV, § 3 ("The Governor shall be responsible for the faithful execution of the law. He may . . . ."); TENN. CONST. art. I, § 8 ("That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."); TEX. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof."); UTAH CONST. art. I, § 12 ("In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf . . . ."); VT. CONST. ch. I, art. IV ("Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.") (amended 1994); VA. CONST. art. I, § 8 ("That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty."); WASH. CONST. art. I, § 9 ("No person shall be compelled in any criminal case to give evidence against himself . . . ."); W. VA. CONST. art. III, § 14 ("Trials of crimes, and of misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men . . . ."); WIS. CONST. art. I, § 9 ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . . ."); WYO. CONST. art. I, § 11 ("No person shall be compelled to testify against himself in any criminal case, nor shall any person be twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.").

in a provision giving women special consideration with respect to jury service: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."[103]

These provisions do not use gender to provide lesser treatment for women. Rather, they provide additional protections for women that reflect either a condescending assumption that women needed additional protections because of their fragility, or a sense that women needed additional protections because of past discriminatory treatment.

Thus, twelve states use gendered language in the context of constitutional provisions dealing with the property rights of women.[104] These provisions reflect a history of discrimination against women as to employment rights and ownership of and control over property. Assuming removal of these provisions would not return us to the pre-existing discriminatory regime, they should be removed.

Reflecting a history of exclusion, two states use gendered language in sections that affirmatively provide that women may be notaries public.[105] South Carolina has a constitutional provision that makes an exception to the rule that elective and appointive office is limited to individuals qualified to be electors and allows "any woman, a resident of the State for two years, who has attained the age of twenty-one years" to serve in "the offices of State Librarian and Departmental Clerks."[106] These provisions ought to be removed.

Reflecting most directly assumptions about the frail nature of women, two states use gendered language in constitutional provisions specifically allowing their legislatures to enact statutes on the employment and working conditions of women.[107] These provisions ought to be removed.

Perhaps the most unusual example of gendered language is the following provision in the Hawaii constitution, as to which I am agnostic on the question of amendment:

> The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State's concern for public safety.

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[103] MO. CONST. art. I, § 22(b).

[104] ARK. CONST. art. IX, §§ 7, 8; FLA. CONST. art. X, § 5; KAN. CONST. art. XV, § 6; MICH. CONST. art. X, § 1; MISS. CONST. art. IV, § 94; NEB. CONST. art. XV, §8 (1875); N.C. CONST. art. X, § 4; N.D. CONST. art. XI, § 23; OR. CONST. art. XV, § 5; S.C. CONST. art. XVII, § 9; S.D. CONST. art. XXI, § 5; W. VA. CONST. art. VI, § 49.

[105] MASS. CONST. amend. LVII; N.M. CONST. art. XX, § 11.

[106] S.C. CONST. art. XVII, § 1.

[107] NEB. CONST. art. XV, § 8; UTAH CONST. art. XVI, § 8.

> The State shall have the power to provide for the safety of the people from crimes against persons and property.[108]

The state constitution provisions which used gendered language to make substantive differentiations among citizens place a clear badge of inferiority on a historically disfavored group. These provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." These unnecessary gendered provisions are badges of inferiority which should be removed.

C. Provisions Which Differentiate by Religion

The third type of state constitutional provisions are various provisions that evidence preferential treatment of the dominant Christian religion in contrast to other faith traditions. Included in this religiously discriminatory group are some state constitution preambles, oaths of office, witness oaths, and religious freedom provisions. At one time in our history two of these types of provisions were used to substantively discriminate against members of disfavored faith traditions. Religiously discriminatory witness oaths were used to exclude non-Christian witnesses.[109] The oath of office provisions were intended to exclude non-Christian office holders, although their efficacy is impossible to determine.[110] But now that such oaths have been declared unconstitutional and unenforceable, the importance of all these provisions is simply in their symbolic force.

1. Preambles

The first type of provisions which evidence preferential treatment of the dominant Christian religion in contrast to other faith traditions are the preambles of many state constitutions.[111] An example of such a preamble is the Alabama language: "We the people of the State of Alabama . . . invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution. . . ."[112] Clearly, the reference to "Almighty God" in the Alabama preamble is a reference to the Christian

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[108] HAW. CONST. art. IX, § 10. *See also Ke K n wai M malahoe, The Law of the Splintered Paddle,* UNIV. OF HAW. AT MANOA, WILLIAM S. RICHARDSON SCH. OF LAW, https://www.law.hawaii.edu/ke-kanawai-mamalahoe (last visited Oct. 19, 2018).

[109] Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL'Y 443, 443(2016). *See, e.g.,* United States v. Miller, 236 F. 798, 799 (W.D. Wash. 1916).

[110] It is simply impossible to know how many elected officials who have taken religious oaths of office have been professing non-believers, atheists or agnostics who professed the dominant religious beliefs to avoid discrimination.

[111] Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQ. L. REV. 757, 761 (2017); Allan W. Vestal, *Religious State Constitution Preambles*, 123 PENN ST. L. REV. 151, 154.

[112] ALA. CONST. pmbl. § 1.

God.[113] By declaring that "[w]e the people of the State of Alabama" invoke "the favor and guidance of Almighty God," the preamble either implies incorrectly that all Alabamians are Christians or excludes non-Christians from the group "we the people of the State of Alabama." Either way, the preamble denies non-Christian citizens equal treatment.[114]

This is a widespread problem. The constitutions of forty-five states have preambles that include religious references that are, given the histories of the documents, clearly Christian.[115] The nomenclature varies. Seven states use the simple "God."[116] By far the most popular choice is "Almighty God," used by thirty states.[117] Five states use "Supreme Being,"[118] "Supreme Ruler of the Universe,"[119] or "Sovereign Ruler of the Universe."[120] Two states speak in terms of "Divine goodness"[121] or "Divine Guidance."[122] Perhaps the most creative is the Massachusetts preamble, which refers to God as "the great Legislator of the universe."[123]

2. Oaths of Office

The second type of provisions which evidence preferential treatment of the dominant Christian religion in contrast to other faith traditions are the oaths of office in many of our state constitutions.[124] An example of a preferential oath of office is the Kentucky language:

> Members of the General Assembly and all officers . . . shall take the following oath or affirmation: I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United

[113] *See* Smith & Tuttle, s*upra* note 111, at 823 ("As we have demonstrated, the history of references to God in state constitutional preambles reveals the significant influence of the Second Great Awakening in shaping understandings of the relationship between religion and civil government.").

[114] One could make the argument that the "Almighty God" reference of the Alabama preamble does not necessarily exclude Jewish or Muslim citizens, although the provenance of the 1901 constitution makes that argument unconvincing. There is no argument that the Almighty God of the Alabama preamble relates to non-Abrahamic religions, or that the reference is in any way consistent with the inclusion of atheists and agnostics in "we the people."

[115] Three states do not have preambles to their state constitutions. *See* N.H. CONST., VT. CONST., VA. CONST. Two states have preambles that do not contain religious references. *See* OR. CONST. pmbl.; TENN. CONST. pmbl.

[116] Vestal, *supra* note 111.

[117] *Id.* at 154–55.

[118] *Id.* at 155.

[119] *Id.* at 155–56.

[120] *Id.*

[121] *Id.* at 156.

[122] *Id.*

[123] *Id.* at 156–57. (quoting MASS. CONST. pmbl. ("[W]e, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence . . . .").

[124] Allan W. Vestal, *Regarding Oaths of Office*, 37 PACE L.Rev. 292, 300–01 (2016).

> States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of . . . according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.[125]

In terms of providing unequal treatment on religious grounds the states have done a creditable job with their constitutional provisions on oaths of office. Forty-seven states have constitutional provisions on oaths of office.[126] The constitutions typically provide that the person taking the oath of office will support the state constitution,[127] support the Federal Constitution,[128] faithfully discharge the duties of the office,[129] and act to the best of the maker's ability.[130] No state constitution oath of office provision contains religious language other than the nomenclature to "swear" and the phrase "so help me God."[131] All provide for an affirmation alternative to swearing.[132]

The state constitution oath of office provisions could clearly be worse. Of course, some of the constitutions require the incongruity of having takers who elect the non-religious affirmation conclude with the religious "so help me God," as in the Kentucky example.[133] But one can ascribe this to bad drafting, not religious prejudice.

But there is unequal treatment to historically disfavored citizens in how the oath of office provisions treat individuals of non-Christian faith traditions. Where the constitutions provide for either an oath or affirmation, but include a reference to God in the oath alternative, the non-Christian office holder is faced with the choice of taking a Christian oath or a non-religious affirmation. But these statutes make no provision for a religious oath that is not Christian. Thus, a religious but non-Christian

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[125] KY. CONST. § 228.

[126] Vestal, *supra* note 124, at 307.

[127] All forty-seven provide that the maker will support the state constitution. *Id.*

[128] Forty-five of the forty-seven, all but Massachusetts and Vermont, provide that the maker will support the Federal Constitution. *Id.* at 307 n.46.

[129] Thirty-nine of the forty-seven provide that the maker promises to faithfully discharge the duties of the office or act with fidelity. *Id.* at 308.

[130] Twenty-four of the forty-seven provide that the maker will discharge the office to the best of the maker's ability. *Id.* at 307–08.

[131] *Id.* at 308.

[132] *Id.*

[133] KY. CONST. § 228.

office holder is denied the ability to do what a Christian office holder can: take an oath within his or her faith tradition.

To accord equal treatment to historically disfavored citizens in their oath of office provisions, states ought to amend their constitutions. They should move beyond the binary choice of Christian religious trappings—where one swears and concludes "so help me God"—and a non-religious affirmation. Religious Muslims, druids, Hindus, Wiccans, and the rest should be allowed to have equivalent trappings of their religions.[134]

Another alternative to accord equal treatment to historically disfavored citizens is to use the "oath or affirmation" language without a concluding reference to God and interpreting the "oath" alternative as allowing non-Christians to swear in a manner consistent with their faith tradition. This is already done by twenty-seven states.[135]

The final alternative to accord equal treatment to historically disfavored citizens would be to adopt a single affirmation of office which does not include even the minimal religious references of the current model and simply focuses on what unites all citizens: support for the state and Federal constitutions.[136]

3. Witness Oaths

The third type of provisions which evidence preferential treatment of the dominant Christian religion in contrast to other faith traditions are the witness oaths in a few of our state constitutions.[137] An example of a preferential witness oath is the Maryland provision:

> That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being.[138]

Unlike oaths of office, witness oaths are primarily statutory and not constitutional.[139] Only seven states have provisions on witness oaths in

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[134] *See* Vestal, *supra* note 124, at 306.

[135] ALASKA CONST. art. XII, § 5; ARK. CONST. art. XIX, § 20; CAL. CONST. art. XX, § 3; COLO. CONST. art. XXI, § 8; GA. CONST. art. III, § 4, ¶ II; *Id.* art. V, § 1, ¶ VI; HAW. CONST. art. XVI, § 4; IDAHO CONST. art. III, § 25; ILL. CONST. art. XIII, § 3; IOWA CONST. art. XI, § 5; KAN. CONST. art. XV, § 14; MICH. CONST. art. XI, § 1; MINN. CONST. art. IV, § 8; MO. CONST. art. III, § 15; NEB. CONST. art. XV, § 1; N.J. CONST. art. VII, § 1; N.M. CONST. art. XX, § 1; N.Y. CONST. art. XIII, § 1; N.C. CONST. art. II, § 12; *Id.* art. III. § 4; OHIO CONST. art. XV, § 7; OKLA. CONST. art. XV, § 1; PA. CONST. art. VI, § 3; S.D. CONST. art. XXI, § 3; TENN. CONST. art. X, §§ 1–2; UTAH CONST. art. IV, § 10; W. VA. CONST. art. IV, § 5; WIS. CONST. art. IV, § 28; WYO. CONST. art. VI, § 20.

[136] *See* Vestal, *supra* note 124, at 316.

[137] *See* Vestal, *supra* note 109, at 444.

[138] MD. CONST. Declaration of Rights, art. 39.

[139] Vestal, *supra* note 109, at 447 n.17.

their constitutions, and five of these speak of witness oaths in unobjectionable terms.[140] For example, Oregon provides: "The mode of administering the oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered."[141]

Two of the seven, Kentucky and Maryland, have religious references in their constitutional provisions on witness oaths. Kentucky provides: "The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed by the General Assembly the most solemn appeal to God."[142] Maryland provides: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being."[143]

4. Religious Freedom Provisions

The fourth type of provisions that evidences preferential treatment of the dominant Christian religion in contrast to other faith traditions are, ironically enough, the religious freedom guarantees in many of our state constitutions. The problem typically comes not in the substance of the provisions, but rather, in the language in which they are framed.

The substantive object of guaranteeing each citizen the right to free exercise does not require any unequal language. For example, the New York state constitution provision on free exercise of religion provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . . ."[144] Better still is the Washington provision which clearly brings non-believers within the ambit of the language: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion . . . ."[145]

Many states, however, use a conscience formulation but cast it in terms that are inappropriate to some faith traditions and can be read as excluding non-believers. One example is the Georgia formulation: "Each person has the natural and inalienable right to worship God, each ac-

[140] ARIZ. CONST. art. II, § 7; IND. CONST. art. I, § 8; OR. CONST. art. I, § 7; TEX. CONST. art. I, § 5; WASH. CONST. art. I, § 6.

[141] OR. CONST. art. I, § 7.

[142] KY. CONST. General Provisions, § 232.

[143] MD. CONST. Declaration of Rights, art. 39.

[144] N.Y. CONST. art. I, § 3.

[145] WASH. CONST. art. I, § 11.

cording to the dictates of that person's own conscience . . ."[146] Twenty-four states have parallel constructions that exclude some faith traditions.[147]

[146] GA. CONST. art. I, § I, ¶ 3.

[147] ARK. CONST. art. II, § 24 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); GA. CONST. art. I, § I, ¶ 3 ("Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience . . . ."); IND. CONST. art. I, § 2 (amended 1984) ("All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences."); KAN. CONST. Bill of Rights, § 7 ("The right to worship God according to the dictates of conscience shall never be infringed . . . ."); KY. CONST. Bill of Rights, § 1, cl. 2 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . the right of worshiping Almighty God according to the dictates of their consciences."); ME. CONST. art. I, § 3 ("All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences . . . ."); MICH. CONST. art. I, § 4 ("Every person shall be at liberty to worship God according to the dictates of his own conscience."); MINN. CONST. art. I, § 16 ("The right of every man to worship God according to the dictates of his own conscience shall never be infringed."); MO. CONST. art. I, § 5 ("That all men and women have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); NEB. CONST. art. I, § 4 ("All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."); N.H. CONST. Bill of Rights, art. V ("Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason . . . ."); N.M. CONST. art. II, § 11 ("Every man shall be free to worship God according to the dictates of his own conscience . . . ."); N.J. CONST. art. I, § 3 ("No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience . . . ."); N.C. CONST. art. I, § 13 ("All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences . . . ."); OHIO CONST. art. I, § 7 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience."); OR. CONST. art. I, § 2 ("All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."); PA. CONST. art. I, § 3 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); R.I. CONST. art. I, § 3 ("[W]e, therefore, declare . . . that every person shall be free to worship God according to the dictates of such person's conscience . . . ."); S.D. CONST. art. VI, § 3 ("The right to worship God according to the dictates of conscience shall never be infringed."); TENN. CONST. art. I, § 3 ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . . ."); TEX. CONST. art. I, § 6 ("All men have a natural and indefeasible right to worship God according to the dictates of their own consciences."); VT. CONST. ch. 1, art. III ("That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God . . . ."); VA. CONST. art. I, § 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."); WIS. CONST. art. I, § 18 ("The right of every man to worship Almighty God according to the dictates of conscience, shall never be infringed . . . .").

Seven states, including four of the twenty-four which use the conscience formulation, have other language that is inappropriate to some faith traditions and can be read as excluding non-believers or endorsing Christianity. Rhode Island includes an affirmation of divine creation: "Whereas Almighty God hath created the mind free . . . ."[148] Massachusetts[149] and Ohio[150] include statements as to the role of religion in society. Delaware,[151] Maryland,[152] and Massachusetts[153] speak of the duty of individuals to worship. Vermont includes direction as to religious observance, that "every sect or denomination of Christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."[154] Massachusetts limits the protection of the law to Christians: "And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law . . . ."[155]

These state constitution provisions which evidence preferential treatment of the dominant Christian religion in contrast to other faith traditions place a clear badge of inferiority on historically disfavored groups. As such, these provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." They are badges of inferiority and should be removed.

D. References to the Rebellion

The final type of state constitutional provisions are two substantively unnecessary references to the Rebellion: one in the South Carolina constitution, the other in the Arkansas constitution. The South Carolina section provides pensions for indigent or disabled Confederate soldiers and

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[148] R.I. CONST. art. I, § 3.

[149] MASS. CONST. pt. 1, art. III ("As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community, but by the institution of public worship of God and of the public instructions in piety, religion, and morality . . .").

[150] OHIO CONST. art. I, § 7 ("Religion, morality and knowledge . . . being essential to good government . . .").

[151] DEL. CONST. art. I, § 1 ("[I]t is the duty of all men frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted . . .").

[152] MD. CONST. Declaration of Rights, art. 36 ("[I]t is the duty of every man to worship God in such manner as he thinks most acceptable to Him . . .").

[153] MASS. CONST. pt. 1, art. II ("It is the right, as well as the duty, of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe.").

[154] VT. CONST. ch. 1, art. III.

[155] MASS. CONST. pt. 1, art. III.

their indigent widows.[156] The Arkansas section which references the Rebellion also deals with Confederate pensions. It excepts funds used "to pay Confederate pensions" from a constitutional appropriations limit.[157] These sections no longer serve any purpose because the last pension recipients from the Rebellion are dead. But it is a closer call than one might imagine. Nationally, although the last Confederate veteran died on the last day of 1951,[158] the last widow of a Confederate veteran died only in 2004, one hundred thirty-nine years after the rebels were vanquished.[159]

The state constitution provisions that reference the Rebellion place a clear badge of inferiority on a historically disfavored group. They are constitutional reminders that South Carolina and Arkansas engaged in armed rebellion against the nation and in defense of slavery, and that following the defeat of the Rebellion, legislators in those states granted pensions to reward those who participated in treason.

These provisions meet Jefferson's standard for removal and are at odds with our evolved sense of "we the people." The South Carolina and Arkansas state constitutional references to pensions for Confederate veterans are badges of inferiority and should be removed.

III. WHERE DO WE GO FROM HERE?

Where do we go from here? The choice with which we are confronted is the same as was before the citizens of California sixty-five years ago. In 1952, the citizens of California voted whether to remove Article XIX from their state constitution.[160] That Article, entitled simply "Chinese,"

[156] S.C. CONST. art. XIII, § 5 (directing the legislature to pass "proper and liberal legislation as will guarantee and secure an annual pension to every indigent or disabled Confederate soldier and sailor of this State and of the late Confederate States who are citizens of this State, and also to the indigent widows of Confederate soldiers and sailors.").

[157] ARK. CONST. art. V, § 39.

[158] Pleasant Riggs Crump, who is credibly claimed to be the last living Confederate veteran, died on December 31, 1951 at age 104. The Union won this contest as well. Albert Henry Woolson, the last living Union veteran, died on August 2, 1956, at age 106. *The Last Man Standing*, STRANGE HISTORY (Aug. 1, 2013), http://www.strangehistory.org/cms/index.php/popular/87-the-last-man-standing.

[159] *Alberta Martin, 97, Confederate Widow, Dies*, N.Y. TIMES (June 1, 2004), http://www.nytimes.com/2004/06/01/us/alberta-martin-97-confederate-widow-dies.html. Alberta Martin married Confederate veteran William Jasper Martin in the 1920s, when she was a 20 and he was 81. Mr. William Jasper Martin died four year later. Two months after the death of William Jasper Martin, Alberta Martin married Charlie Martin, William Jasper Martin's grandson. That marriage lasted 52 years until Charlie Martin's death in 1983. Dennis McLellan, *Alberta Martin, 97; Believed to Be Last Confederate Widow*, L.A. TIMES (June 1, 2004), http://articles.latimes.com/2004/jun/01/local/me-martin1.

[160] *California Proposition 14, Repealing Constitutional Restrictions on Chinese*, U.C.

was included in the constitution as adopted in 1879. It contained racist and discriminatory provisions regarding the ethnically Chinese population of California. The constitution's bigoted treatment of the Chinese began with Article II, which excluded from suffrage anyone who was a "native of China."[161] The constitution adopted a finding of fact that Article XIX was necessary "for the protection of the State . . . from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the State . . . ."[162] Article XIX contained provisions barring corporations from hiring "any Chinese or Mongolian,"[163] and barring Chinese from working for the government.[164]

One of the individuals who suffered discrimination under Article XIX was Hong Yen Chang who came to the United States from China in 1872.[165] Having graduated from Phillips Andover Academy, he studied at Yale College, graduated from Columbia Law School in 1886, and was admitted to the New York bar.[166] Chang thus became "the only regularly admitted Chinese lawyer in this country" according to contemporary reports.[167]

Chang was described as being "a very bright young man" who "passed a very creditable examination, and was deservedly awarded a di-

HASTINGS REPOSITORY, http://repository.uchastings.edu/ca_ballot_props/533.

[161] CAL. CONST. of 1879, art. II, § 1 granted suffrage to "every native male citizen of the United States" and naturalized male citizens who were residents and 21 years of age, but then excluded anyone who was a "native of China," and did so in a way that grouped such individuals in disparaging terms: "*provided*, no native of China, no idiot, insane person, or person convicted of any infamous crime, and no person hereafter convicted of embezzlement or misappropriation of public money, shall ever exercise the privileges of an elector in this State." (emphasis in original).

[162] CAL. CONST. of 1879, art. XIX, § 1. The article contained a second finding: "The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this State, and all contracts for coolie labor shall be void."

[163] CAL. CONST. of 1879, art. XIX, § 2 ("No corporation . . . shall . . . employ, directly or indirectly, in any capacity, any Chinese or Mongolian.").

[164] CAL. CONST. of 1879, art. XIX, § 3 ("No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.").

[165] Gabriel J. Chin, *Hong Yen Chang, Lawyer and Symbol*, 21 UCLA ASIAN PAC. AM. L.J. 1, 1 (2016).

[166] *Id.* at 1–3. The author reports that Chang "was the only Asian student on campus" at Columbia. Chang was first denied admission because of his ethnicity, but was ultimately admitted pursuant to a special law passed by the New York legislature.

[167] *A Chinese Lawyer: Hong Yen Chang and a Colored Student Admitted to the Bar*, N.Y. TIMES (May 18, 1888).

ploma."[168] At his graduation, the Columbia Dean observed to Chang's fellow graduates: "You cannot have failed to recognize in this stranger a gentleman fit in every respect to be a professional brother to any one of us."[169]

Two years later, having relocated to California and associated with a law firm there, Chang applied for admission to the California bar.[170] The California Supreme Court rejected his application.[171] The basis for Chang's exclusion was a statute passed pursuant to Article XIX of the California constitution of 1879, which barred "any alien not eligible to become an elector of this State" from holding any business or occupational license.[172] Chang died in California in 1926, never having been admitted to the California bar.[173]

Article XIX was subject to challenge even before Chang applied for admission to the bar. In 1880, just a year after the constitution was ratified, the provision barring the employment of "any Chinese or Mongolian" was struck down.[174] In 1931, the specific rule which barred Chang was modified to remove the citizenship requirement.[175]

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[168] *Id.* Reflecting the bigotry of the age, the same article said of Chang: "In appearance he has a decidedly Chinese look, but he speaks excellent English. He is of medium height [and is] rather stout . . . ." *Id.*

[169] Chin, *supra* note 165, at 2.

[170] *Id.* at 3.

[171] *In re* Hong Yen Chang, 24 P. 156, 165 (Cal. 1890).

[172] 1880 Cal. Stat. 39 ("No license to transact any business or occupation shall be granted or issued by the State, or any county, or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of this State."). Immigrants from China were ineligible to become California electors under the California constitution of 1879. CAL. CONST. of 1879, art. II, § 1.

[173] *In re* Hong Yen Chang, 344 P.3d 288, 288–89 (Cal. 2015) (In 2015, the California Supreme Court granted Chang "posthumous admission as an attorney and counselor at law in all courts of the state of California.").

[174] *In re* Parrott, 1 F. 481, 484 (Cir. Ct., D. Cal., 1880). The *Parrott* court found two bases for invalidity. First, the statute barring the hiring of Chinese employees was a violation of the 14th Amendment due process rights of the *shareholders* of the employer, not the Chinese employees. *Id.* at 493. Second, the statute conflicted with Article 5 of the Burlingame Treaty between the United States and the Chinese Empire. *Id.* at 498–99. It might be noted that Judge Hoffman, the author of the opinion, did not dispute the racist sentiment underlying the statute:

> That the unrestricted immigration of the Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that, if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons.

Id. at 498.

[175] *In re* Hong Yen Chang, 344 P.3d 288, 289 (Cal. 2015) (noting that CAL. CIV. PROC. CODE § 279 (1872) (limiting admission of non-residents to citizens and persons with a bona fide intention to become a citizen) was "repealed by Stats. 1931, ch. 861,

By 1952, when the matter was submitted to the citizens of California, Article XIX had ceased to have any but symbolic importance, as was made clear by the official commentary.[176] After a very critical section-by-section analysis,[177] the conclusion of the official commentary traced the effect of the outdated and antiquated provisions on the dignity and prestige of California:

> The growth and progress of the State of California could be traced directly or indirectly, to an appreciable extent, to the help and cooperation of the Chinese people. To allow Article 19 to stand in the Constitution of the great state of California is to allow an antiquated and outmoded piece of legislation to adversely affect the dignity and prestige of our state.[178]

The commentary linked continued inclusion of Article XIX with racial hatred and discrimination: "To those without sufficient understanding as to the legal effect of these outdated provisions it may even serve to bring about [a] certain amount of racial hatred and discrimination."[179]

The commentary called for the removal of Article XIX as a means of fostering understanding and trust among the citizens of California:

> At this time when the peace of the world is still hanging in an uneasy balance, we can ill afford to permit any legislation to stand either in our statute books or in our state constitution which might foster misunderstanding and mutual distrust between people of different racial groups.[180]

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§2. P. 1762."). Chinese immigrants became eligible for citizenship in the United States only in 1943 with passage of the Chinese Exclusion Repeal Act of 1943, ch. 344, Pub. L. 78-199, 57 Stat. 600 (1943).

[176] *See California Proposition 14, Repealing Constitutional Restrictions on Chinese,* at 16–19, U.C. HASTINGS REPOSITORY, http://repository.uchastings.edu/ca_ballot_props/533. (*Argument in Favor of Assembly Constitutional Amendment No. 59* written by Speaker Pro Tempore Thomas A. Maloney).

[177] As to §1 of Article XIX, the official commentary was deservedly very negative:

> This section is very unfair to a great number of Chinese aliens who were most law-abiding and led quiet and peaceful lives at all times. This section is certainly misleading and is of no benefit whatsoever to the people of the State of California other than to create a false impression of the majority of Chinese residents here in California.

Id. at 16. As to §2 of Article XIX, the official commentary, presumably referring to one part of the *Parrott* analysis, simply noted that "This provision is void because it violates a treaty between the United States and China." As to §3 of Article XIX, the official commentary declared: "This section is now outdated and antiquated and therefore should be abolished from the State's Constitution." As to §4 of Article XIX, the official commentary was clear: "Again, this section accomplishes nothing except that of promoting ill feelings between distinctive racial groups." *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

On November 4, 1952, sixty-four years after Hong Yen Chang was denied admission to the California bar and twenty-one years after the way was cleared for Chinese to practice law in California, the citizens of California voted to remove Article XIX from their constitution.[181]

Each of these state constitution badges of inferiority meets Jefferson's standard for amendment. Each offends, in his formulation, the enlightened progress of the human mind that has disclosed new truths.[182] These new truths, as to who constitutes "we the people," require that these badges of inferiority be removed from our state constitutions.

Removing some of these provisions should be non-controversial; the removal of others would be highly controversial. Among the least contentious should be the revision of the constitutions to adopt non-gendered language. Such a revision would not implicate the substance of the gendered provisions, for courts and legislatures have adopted workaround measures to avoid exclusionary results.[183] The removal of gendered language would be wholly symbolic. The provisions are simply redolent of a prejudiced past.

A few states have squarely addressed the problem of gendered language. To its credit, Delaware adopted a series of constitution amendments in 1999 to make its constitution gender neutral.[184] The result is a constitution that is not disrespectful to over half of its citizens. For example, the Delaware constitutional provision on the qualifications to be a state senator reads:

> No person shall be a Senator who shall not have attained the age of twenty-seven years and have been a citizen and inhabitant of the State three years next preceding the day of his or her election and the last year of that term an inhabitant of the Senatorial District in which he or she shall be chosen, unless he or she shall have been absent on the public business of the United States or of this State.[185]

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[181] *California Proposition 14, Repeal of Anti-Chinese Provisions in State Constitution* (1952), BALLOTPEDIA, https://ballotpedia.org/California_Proposition_14,_Repeal_of_Anti-Chinese_Provisions_in_State_Constitution_(1952). Sixty-two years later, in 2014, the California Senate passed a resolution acknowledging this history of the Chinese population in California, recognizing their contributions, and apologizing for past discriminatory laws. The resolution specifically noted Article XIX. S. Con. Res. 122, 2014 Leg. (Cal. 2014). Today, Article XIX of the California constitution deals with motor vehicle revenues. CAL. CONST. art. XIX ("Motor Vehicle Revenues").

[182] *See* Jefferson Letter, *supra* note 11.

[183] For example, Florida has a rule of construction that: "Unless qualified in the text the following rules of construction shall apply to this constitution [. . .] The masculine includes the feminine." FLA. CONST. art. X, § 12. Of course, such a stopgap does nothing to alter the exclusionary symbolism of the gendered language.

[184] S. 69, 140th Gen. Assemb., Reg. Sess. (Del. 1999).

[185] DEL. CONST. art. II, § 3.

Hawaii,[186] Maine,[187] and Rhode Island[188] also have acted to remove gendered language from their state constitutions.

The revision of gender-differentiated substantive provisions should be as non-controversial. Some of the gender-differentiated provisions are unnecessary. For example, of the twelve states with gender-differentiated provisions on property, only two still have common-law dower.[189] Other gender-differentiated provisions may be substantively justified, but are imprecise as drafted. Consider the Missouri provision on jury service: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror."[190] If the reason for the provision is a generalized belief that women are frail, the provision should be removed. If, on the other hand, the reason for the provision is a reasonable determination that potential jurors with minor children should be excused upon request, then the provision should be improved by a simple revision substituting parental status for gender.[191]

Another badge of inferiority, the removal of which should be non-controversial, are the references to the Rebellion found in two constitutions. Neither the South Carolina constitutional provision on pensions for Confederate veterans and their widows,[192] nor the Arkansas constitutional provision which exempts Confederate pensions from appropriations limits,[193] have any substantive purpose now that the last beneficiaries of such pensions have passed away. One might hope that the removal of

[186] HAW. CONST.

[187] ME. CONST.

[188] R.I. CONST.

[189] Common-law dower survives in only Arkansas, Kentucky, Michigan, and Ohio. JESSE DUKENMINIER ET AL., WILLS, TRUSTS AND ESTATES 476 (8th ed. 2009). Arkansas and Michigan have gendered state constitution provisions on property. ARK. CONST. art. IX, §§ 7, 8; MICH. CONST. art. X, § 1. The other ten states with gendered state constitution provisions on property do not have common-law dower. FLA. CONST. art. X, § 5; KAN. CONST. art. XV, § 6; MISS. CONST. art. IV, § 94; NEB. CONST. art. XC, § 8; N.C. CONST. art. X, § 4; N.D. CONST. art. XI, § 23; OR. CONST. art. XV, § 5; S.C. CONST. art. XVII, § 9; S.D. CONST. art. XXI, § 5; W. VA. CONST. art. VI, § 49.

[190] MO. CONST. art. I, § 22(b).

[191] The provision might be rewritten: "No citizen shall be disqualified from jury service because of parental status, but the court shall excuse any citizen who is the sole custodial parent of a minor child who requests exemption therefrom before being sworn as a juror."

[192] S.C. CONST. art. XIII, § 5 (directing the legislature to pass "proper and liberal legislation as will guarantee and secure an annual pension to every indigent or disabled Confederate soldier and sailor of this State and of the late Confederate States who are citizens of this State, and also to the indigent widows of Confederate soldiers and sailors.").

[193] ARK. CONST. art. V, § 39.

these provisions could be done without controversy, but surely some Confederate partisan would join the issue.[194]

One might think that the removal of the Alabama segregated-schools provision would be non-controversial. The Alabama constitutional provision on segregated schools, Amendment 111,[195] ceased to have any substantive purpose after segregated schools were struck down in *Brown*.[196] The provision harkens back to an aspect of Alabama history that is inconsistent with the self-image of civic-minded residents of the state. As one proponent of removal commented: "Like it or not, Alabama still has a reputation for racism. That seems to be what a lot of people think of when they think of Alabama."[197] The continued presence of Amendment 111 in the Alabama constitution causes what one commentator described as the "eyebrow-raising moments when outsiders discover that Alabama's most shameful law is still on the books . . . ."[198]

Given Amendment 111's lack of substantive importance and its unfortunate symbolism, one might assume that the removal of the provision sixty years after *Brown* would not be controversial. But that assumption would be incorrect: measures to repeal Amendment 111 have been defeated by the voters of Alabama twice in the last fifteen years.

In 2004, Alabamians considered Amendment 2, to repeal the provisions of Amendment 111 concerning "separation of schools by race," and

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[194] In this regard, one reaction to the recent removal of Confederate monuments from public locations is instructive. *See* Ed Pilkington, *Mississippi Lawmaker Calls for Lynchings After Removal of Confederate Symbols*, GUARDIAN (May 22, 2017), https://www.theguardian.com/us-news/2017/may/22/mississippi-confederate-symbols-karl-oliver-lynching-comments. Pilkington quoted Mississippi Republican legislator Karl Oliver following the removal of a statue of Robert E. Lee in New Orleans:

> The destruction of these monuments, erected in the loving memory of our family and fellow Southern Americans, is both heinous and horrific. If the . . . "leadership" of Louisiana wishes to, in a Nazi-ish fashion, burn books or destroy historical monuments of OUR HISTORY, they should be LYNCHED!

Id.

[195] ALA. CONST. art XIV, § 256 (". . . the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.").

[196] Brown v. Board of Education, 347 U.S. 483, 495 (1954).

[197] *Alabama Segregation Reference Ban Amendment, Amendment 4* (2012), BALLOTPEDIA, https://ballotpedia.org/Alabama_Segregation_Reference_Ban_Amendment,_Amendment_4_(2012)#cite_note-advertiser-4 (quoting State Senator Bryan Taylor).

[198] Tim Lockette, *Alabama Segregation Amendment Could Put Voters in a Bind*, ANNISTON STAR (Oct. 14, 2012), http://www.annistonstar.com/view/full_story/20488879/article-Alabama-segregation-amendment-could-put—voters-in-a-bind?instance=home_news [https://web.archive.org/web/20130531151701/http:/www.annistonstar.com/view/full_story/20488879/article-Alabama-segregation-amendment-could-put—voters-in-a-bind?instance=home_news].

other constitutional provisions concerning the poll tax.[199] Passage of the amendment was complicated because it would also have repealed portions of Amendment 111 "concerning constitutional construction against the right to education."[200] It is reported that: "Critics of the amendment were concerned because the 2004 proposal would have repealed portions of Amendment 111, a 1956 measure that declares that 'nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense.'"[201] Amendment 2 was opposed by some Alabama Republicans and conservatives: "[T]he measure ran afoul of the state's conservative activists. Former Chief Justice Moore . . . saw in the amendment a path to court-mandated education spending increases."[202] "The state took a black eye,"[203] one proponent observed, when Amendment 2 was defeated by fewer than two thousand votes.[204]

The repeal of Amendment 111 was raised again, in 2012, when Alabamians considered Amendment 4 to "delete those remaining 'Jim Crow' provisions of the Constitution of Alabama of 1901, which have not been expressly repealed by vote of the people," including the segregated schools charge of Amendment 111.[205] One proponent of Amendment 4 referred to the failed 2004 repeal attempt: "It's important to address this issue and show that Alabama is a much different place than it was in the past . . . . The last time, the national news reported that Alabama had failed to reject segregation. It played into all the negative stereotypes of our state."[206] But this time, repeal of Amendment 111 was opposed by the Democrats, including black Democratic leaders:

> . . . this time, it's Democrats who are skeptical of the measure . . . . "It seems to be about integration, but a lot of stuff in there is bad," said Joe L. Reed, chairman of the Alabama Democratic Conference, one of the state's most influential black political groups. Reed said that in sample ballots the group sends out, the ADC will urge its

[199] *Alabama Separation of Schools, Amendment 2* (2004), BALLOTPEDIA, https://ballotpedia.org/Alabama_Separation_of_Schools,_Amendment_2_(2004).

[200] *Id.*

[201] Lockette, *supra* note 198.

[202] *Id.* Judge Moore had been removed from office of Chief Justice of the Alabama Supreme Court for the first time the year before, on the basis of a complaint filed by the Alabama Judicial Inquiry Commission and a ruling of the Alabama Court of the Judiciary, based on his defiance of a Federal court order over the placement of the Ten Commandments in the state judiciary building.

[203] *Id.* (quoting Arthur Orr, a Republican state senator from Decatur).

[204] *Alabama Separation of Schools, Amendment 2*, *supra* note 199.

[205] Julia Zebley, *Alabama Voters Decline to Remove Racist Language From Constitution Over Right to Education Concerns*, JURIST (November 7, 2012), http://www.jurist.org/paperchase/2012/11/alabama-voters-decline-to-remove-racist-language-from-constitution-over-right-to-education-conerns.php.

[206] Lockette, *supra* note 198 (quoting Arthur Orr, a Republican state senator from Decatur).

> supporters to vote no. There's no concrete loss to the black community if the constitution stays as it is, he said. "This has already been overturned by federal decree," he said.[207]

The proposed repeal failed by a 22% margin.[208] Amendment 111 remains in the Alabama constitution.

The religious tests for office, religious tests for witness competency, and the provisions which differentiate by religion—the preambles, oaths of office, witness oaths, and religious freedom provisions—present essentially the same arguments for removal. The public office tests in eight state constitutions[209] ceased to have any substantive purpose after they were struck down over a half-century ago in *Torcaso*.[210] The witness competency tests in the two state constitutions[211] are unconstitutional and long ago ceased to have any substantive purpose.[212] The only possible reason to retain these provisions would be to perpetuate the religious bigotry upon which they were based. Of course, notwithstanding the requirements of the Constitution, there are those who would presumably oppose the removal of religious tests because they believe that citizens with disfavored views on matters of religion should be barred from public service and from giving testimony. In short, they adopt the religious bigotry of times long past.

Opponents to removal of these provisions which endorse Christian belief over other religious beliefs and non-belief need deal with a policy argument based on the anti-preference provisions of the state constitutions. Thirty-one states have constitutional provisions that guarantee that the state will not prefer one faith tradition over another.[213] For example, the Wisconsin language that ". . . nor shall . . . any preference be given by law to any religious establishments or modes of worship . . . ."[214] The anti-preference provisions are inconsistent with each of the cited provisions,

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[207] *Id.* (quoting Chairman of the Alabama Democratic Conference Joe L. Reed).

[208] *Alabama Segregation Reference Ban Amendment, Amendment 4* (2012), BALLOTPEDIA, https://ballotpedia.org/Alabama_Segregation_Reference_Ban_Amendment_Amendment_4_(2012)#cite_note-advertiser-4; Ugonna Okpalaoka, *Alabama Voters Keep Jim Crow Language in Constitution*, GRIO (November 8, 2012), https://thegrio.com/2012/11/08/alabama-voters-keep-jim-crow-language-in-constitution/.

[209] ARK. CONST. art. VIII, § 3; MISS. CONST. art. XIV, § 265; N.C. CONST. art. VI, § 8; PA. CONST. art. I, § 4; S.C. CONST. art. VI, § 2; S.C. CONST. art. XVII, § 4; TENN. CONST. art. IX, § 2; TEX. CONST. art. I, § 4.

[210] Torcaso v. Watkins, 367 U.S. 488 (1961); MD. CONST. Declaration of Rights art. 37.

[211] ARK. CONST. art. XIX, § 1; MD. CONST. Declaration of Rights, art. 36.

[212] Flora v. White, 692 F.2d 53, 54 n.2 (8th Cir. 1982) ("[T]he challenged section would appear to be inconsistent with *Torcaso v. Watkins* . . . ."); Vestal, *supra* note 6, at 82.

[213] Vestal, *supra* note 109, at Appendix C.

[214] WIS. CONST. art. I, § 18.

and the inconsistencies are widespread. Of the forty-five states that have preambles that differentiate by religion, twenty-eight also have an anti-preference clause.[215] Of the eighteen states that have oaths of office that differentiate by religion, twelve also have an anti-preference clause.[216] Of the two states that have witness oaths that differentiate by religion, one also has an anti-preference clause.[217] Of the twenty-four states that have religious freedom provisions that differentiate by religion, seventeen also have an anti-preference clause.[218]

[215] Alabama (ALA. CONST. pmbl.; ALA. CONST. art. I, § 3 (preference)); Arkansas (ARK. CONST. pmbl; ARK. CONST. art. 2, § 24 (preference)); California (CAL. CONST. pmbl.; CAL. CONST. art. I. § 4 (preference)); Colorado (COLO. CONST. pmbl.; COLO. CONST art. II, § 4 (preference)); Connecticut (CONN. CONST. pmbl.; CONN. CONST art. I. § 3 (preference)); Delaware (DEL. CONST. pmbl.; DEL. CONST. art. I, § 1 (preference)); Idaho (IDAHO CONST. pmbl.; IDAHO CONST. art. I, § 4 (preference)); Illinois (ILL. CONST. pmbl.; ILL. CONST. art. I, § 3 (preference)); Indiana (IND. CONST. pmbl.; IND. CONST. art. I, § 4 (preference)); Kansas (KAN. CONST. pmbl.; KAN. CONST., Bill of Rights § 7 (preference)); Kentucky (KY. CONST. pmbl.; KY. CONST., Bill of Rights § 5 (preference)); Maine (ME. CONST. pmbl.; ME. CONST. art. I, § 3 (preference)); Massachusetts (MASS. CONST. pmbl.; MASS. CONST., Articles of Amendment, art. XI (preference)); Minnesota (MINN. CONST. pmbl.; MINN. CONST. art. I, § 16 (preference)); Mississippi (MISS. CONST. pmbl.; MISS. CONST. art. I, § 18 (preference); Missouri (MO. CONST. pmbl.; MO. CONST. art. I, § 7 (preference)); Nebraska (NEB. CONST. pmbl.; NEB. CONST. art. I, § 4 (preference)); Nevada (NEV. CONST. pmbl.; NEV. CONST. art. I, § 4 (preference)); New Mexico (N.M. CONST. pmbl.; N.M. CONST. art. II, § 11 (preference)); New York (N.Y. CONST. pmbl.; N.Y. CONST. art. I, § 3 (preference)); North Dakota (N.D. CONST. pmbl.; N.D. CONST. art. I, § 3 (preference)); Ohio (OH. CONST. pmbl.; OH. CONST. art. I, § 7 (preference)); Pennsylvania (PA. CONST. pmbl.; PA. CONST. art. I, § 3 (preference)); South Dakota (S.D. CONST. pmbl.; S.D. CONST. art. VI, § 3 (preference); Texas (TEX. CONST. pmbl.; TEX. CONST. art. I, § 6 (preference)); West Virginia (W. VA. CONST. pmbl.; W. VA. CONST. art. III, § 15 (preference)); Wisconsin (WIS. CONST. pmbl.; WIS. CONST. art. I, § 19 (preference)); Wyoming (WYO. CONST. pmbl.; WYO. CONST. art. I, § 18 (preference)).

[216] Alabama (ALA. CONST. art. I, § 3 (preference); ALA. CONST. art. XVI, § 279 (oath)); Connecticut (CONN. CONST. art. I, § 3 (preference); CONN. CONST. art. XI. § 1 (oath)); Delaware (DEL. CONST. art. I, § 1 (preference); DEL. CONST. art. XIV, § 1 (oath)); Kentucky (KY. CONST., Bill of Rights, § 5 (preference); KY. CONST. § 228 (oath)); Maine (ME. CONST. art. I, § 3 (preference); ME. CONST. art. IX, § 1 (oath)); Massachusetts (MASS. CONST., Articles of Amendment, art. VI (oath); MASS. CONST., Articles of Amendment, art. XI (preference)); Mississippi (MISS. CONST. art. I, § 18 (preference); MISS. CONST. §§ 40, 155, 268 (oath)); Nevada (NEV. CONST. art. I, § 4 (preference); NEV. CONST. art. XV, § 2 (oath)); New Hampshire (N.H. CONST. art. 1, § 6 (preference); N.H. CONST. art. 84 (oath)); North Dakota (N.D. CONST. art. I, § 3 (preference); N.D. CONST. art. XI, § 4 (oath)); Texas (TEX. CONST. art. I, § 6 (preference); TEX. CONST. art. XVI, § 1 (oath)); Virginia (VA. CONST. art. I, § 16 (preference); VA. CONST. art. II, § 7 (oath).

[217] KY. CONST. General Provisions, § 232 (witness oath); KY. CONST., Bill of Rights § 5 (preference).

[218] Arkansas (ARK. CONST. art. II, § 24); Indiana (IND. CONST. art. I, § 2 (freedom); IND. CONST. art. I, § 4 (preference)); Kansas (KAN. CONST., Bill of Rights, §

Events less than a decade ago in Arkansas suggest that removing these provisions might not be easy. A bill to remove the Arkansas religious tests for public office and witness competency was introduced in 2009.[219] The bill was referred to committee, where it died without further action upon the adjournment of the legislative session.[220]

The final state constitution badge of inferiority, provisions that define marriage to exclude same-sex couples, would undoubtedly prove the most controversial. This is because *Obergefell* was relatively recently decided, and a significant—but diminishing—group of citizens oppose the marriage equality regime that *Obergefell* heralded.

Progress on repealing the state constitution definitions of marriage adopted to block marriage equality has been slow. Following *Obergefell*, states which had adopted constitutional definition of marriage provisions in an attempt to block marriage equality faced a question of how to proceed. Virginia illustrates the situation in which these states found themselves. With the assistance of University of Virginia Constitutional law professor A.E. Howard, a reporter outlined the options before the Commonwealth:

> The question that remains is what is going to happen with [Virginia's] marriage amendment, backed by 57 percent of Virginia voters in 2006, after the highest court in the land has deemed it unconstitutional.
>
> To remove it would require a new amendment, which the state legislature would have to pass twice, with one House of Delegates

7); Kentucky (KY. CONST., Bill of Rights, § 1 (freedom); KY. CONST., Bill of Rights, § 5 (preference)); Maine (ME. CONST. art. I, § 3); Minnesota (MINN. CONST. art. I, § 16); Missouri (MO. CONST. art. I, § 5 (freedom); MO. CONST. art. I, § 7 (preference)); Nebraska (NEB. CONST. art. I, § 4); New Hampshire (N.H. CONST. art. V (freedom); N.H. CONST. art. I, § VI (preference)); New Mexico (N.M. CONST. art. II, § 11); Ohio (OHIO CONST. art. I, § 7); Pennsylvania (PA. CONST. art. I, § 3); South Dakota (S.D. CONST., art. VI, § 3); Tennessee (TENN. CONST. art. I, § 3); Texas (TEX. CONST. art. I, § 6); Virginia (VA. CONST. art. I, § 16); Wisconsin (WIS. CONST. art. I, § 18).

[219] The bill was introduced by Representative Richard Carroll, a first term member of the legislature, a boilermaker by trade, a Catholic, and a member of the Green Party who switched to the Democratic party. Arkansas State Legislature, *Representative Richard Carroll*, http://www.arkleg.state.ar.us/assembly/2009/R/Pages/MemberProfile.aspx?member=Carroll; David Waters, *Atheist Revival in Arkansas*, ONFAITH (February 13, 2009) http://www.faithstreet.com/onfaith/2009/02/13/an-advocate-for-atheists-in-ar/8289 (reporting on HJR 1009, to repeal the Arkansas constitution prohibition on atheists holding office and testifying).

[220] HJR 1009, *Amending the Arkansas Constitution to Repeal the Prohibition Against an Atheist Holding Any Office in the Civil Departments of the State of Arkansas or Testifying as a Witness in Any Court*, http://www.arkleg.state.ar.us/assembly/2009/R/Pages/BillInformation.aspx?measureno=HJR1009.

> election in between, before it would be put before voters on a ballot.[221]

It was Howard's analysis that the barrier to removal of the marriage definition was the legislature, not the popular vote:

> "If it were to be on the ballot, I can imagine that public sentiment has evolved to a point where an amendment to repeal the existing amendment would pass," U.Va.'s Howard said. "But even assuming that, it is hard for me to imagine the present makeup of the legislature to put that repeal on the ballot. That's dangerous terrain for many of those folks."[222]

A parallel was drawn to the Commonwealth's delay in removing segregation provisions from its constitution following *Brown*:

> After 1954's Brown v. Board of Education ruling, in which the Supreme Court ruled school desegregation unconstitutional, the Virginia Constitution continued to have a provision that required segregation by race in public education.
>
> "That wasn't taken out of the Constitution until the revision in 1971," Howard said. "But it was null and void all the same. I would think that no official in Virginia should be dull enough to point at the state Constitution as a cover for refusing [a] license to a same-sex couple."[223]

Two months later, the Washington Post editorialized about the need to remove Virginia's state constitution definition of marriage:[224]

> Scrapping dead-letter laws is mostly a symbolic move. But the symbolism is meaningful to the thousands of gay Virginians entitled to equality in every aspect of their lives and in their state's laws. What's more, by giving democratic backing to an edict handed down by the Supreme Court, a legislative rollback of restrictions on same-sex couples would lend additional legitimacy to what is already the law of the land.[225]

Members of the Virginia legislature introduced bills to amend the constitution to remove the Virginia definition of marriage designed to block

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[221] Markus Schmidt, *After Gay Marriage Ruling, State Law Requires Update*, RICHMOND TIMES-DISPATCH (June 28, 2015), http://www.richmond.com/news/virginia/government-politics/after-gay-marriage-ruling-state-law-requires-update/article_60990341-dfa6-5119-a267-089305ab6348.html.

[222] *Id.*

[223] *Id.*

[224] Editorial Board, *Same-Sex Marriage is Legal Virginia's Constitution Should Catch Up with the Law*, WASH. POST (Aug. 25, 2016), https://www.washingtonpost.com/opinions/same-sex-marriage-is-legal-virginias-constitution-should-catch-up-with-the-law/2016/08/25/14d23804-58ec-11e6-9aee-8075993d73a2_story.html?utm_term=.6344b7b94851.

[225] *Id.*

marriage equality.[226] One of the sponsors described the justification for amending the constitution in terms of respect for gay and lesbian citizens:

> The code of Virginia should accurately reflect the law of the land . . . . Gay and lesbian couples deserve the same respect as other citizens. . . . It's a stain on the Constitution of Virginia, a document that guarantees liberties rather than limits them.[227]

Another sponsor of the Virginia amendment cast the need for removal in terms of equality:

> By continuing to allow antiquated language to remain in our constitution and code, we tell the world that only certain folks are welcome here . . . and many are not fully equal under the law . . . . This is an insult to so many Virginia citizens.[228]

The House of Delegates bill, which had twenty-six sponsors out of the one hundred members of the House of Delegates, died in committee,[229] as did the Senate bill, which had five sponsors out of the forty members of the Senate.[230]

Repeal efforts in other states that adopted constitutional definitions of marriage in an attempt to block marriage equality have also been unavailing.[231] Only one state, Hawaii, has removed the provision intended to

[226] Patricia Sullivan, *Virginia Still has Laws Banning Gay Marriage. Should That Matter?*, WASH. POST (July 29, 2016), https://www.washingtonpost.com/local/virginia-politics/virginia-still-has-laws-banning-gay-marriage-should-that-matter/2016/07/28/44afec36-542a-11e6-b7de-dfe509430c39_story.html?tid=a_inl&utm_term=.b4ce97b87b1d.

[227] *Id.* (quoting State Senator Adam P. Ebbin, sponsor of the bill in the Virginia Senate).

[228] *Id.* (quoting Delegate Mark D. Sickles, sponsor of the bill in the Virginia House of Delegates).

[229] The House of Delegates bill was H.B. 5. It was referred to the Committee for Courts of Justice, assigned to the Subcommittee on Constitutional Law, which laid it on the table. Virginia's Legislative Information System, 2016 Session: HB 5 Same-Sex Marriages; Civil Unions, https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+HB5.

[230] The Senate bill was SJ 9. It was referred to the Committee on Privileges and Elections, and continued to 2017. Virginia's Legislative Information System, 2016 Session: SJ 9 Constitutional Amendment (first resolution); Marriage, http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SJ9.

[231] Attempts to repeal the Alabama constitutional marriage definition died in committee in 2014 and 2015. LegiScan, Alabama House Bill 40 (2014), https://legiscan.com/AL/bill/HB40/2014; LegiScan, Alabama House Bill 249 (2014), https://legiscan.com/AL/bill/HB249/2015. An attempt to use a ballot initiative to remove the Arkansas constitutional marriage definition failed in 2013. Zack Ford, *The Slow, Risky Road to Repealing Arkansas' Ban on Same-Sex Marriage*, THINK PROGRESS (Sept. 20, 2013, 1:53 PM), https://thinkprogress.org/the-slow-risky-road-to-repealing-arkansas-ban-on-same-sex-marriage-e494aa25b9a2/. In 2014, California repealed its statutory prohibition on same-sex marriages, but not its constitutional

block marriage equality from its constitution, and it did so before *Obergefell*.[232]

Opposition to removing marriage definitions from state constitutions is in part due to the *revanchist* sentiments of marriage equality opponents, such as the representative of the Montana Family Foundation who, when referring to that state constitution's marriage definition said: "I absolutely think it should be left in [. . .] We believe the court eventually will be proved wrong and revisit the issue. It should remain there until the people choose to repeal it."[233]

Nor has the activity of marriage equality opponents been limited to opposing repeal of state constitution marriage definitions. In 2017, Republican lawmakers in North Carolina introduced the "Uphold Historical Marriage Act."[234] The bill asserted that in the *Obergefell* decision the Supreme court "overstepped its constitutional bounds"[235] and also exceeded "the authority of the Court relative to the decree of Almighty God that 'a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh' (Genesis 2:24, ESV) and abrogates the clear

prohibition. Hunter Schwarz, *California Has Officially Repealed the Marriage Law that Led to Prop. 8*, WASH. POST (July 7, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/07/07/california-has-officially-repealed-the-marriage-law-that-led-to-prop-8/?utm_term=.85b5f0929920. An attempt to repeal the Kansas constitutional marriage definition, is the topic of a current repeal bill that has been in committee for over a year. HCR 5006, KANSAS 2017-2018 LEGISLATIVE SESSIONS, http://kslegislature.org/li/b2017_18/measures/hcr5006/ (last visited Aug. 21, 2018). An attempt to repeal the Kentucky constitutional marriage definition died in committee in 2016. HB 156, KENTUCKY LEGISLATURE, http://www.lrc.ky.gov/record/16RS/HB156.htm (last visited Aug. 21, 2018). A 2014 attempt to repeal the Texas state constitutional marriage definition died in committee. *SJR 13*, TEXAS LEGISLATURE ONLINE, https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=SJR13 (last visited Aug. 21, 2018) (as to SJR 13); *HJR 34*, TEXAS LEGISLATURE ONLINE, http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=84R&Bill=HJR34 (last visited Aug. 21, 2018) (as to HJR 34).

[232] Hawaii adopted Constitutional Amendment 2 in 1998, granting the Legislature the power to reserve marriage to opposite-sex couples. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples") (amended 1998). In 2013 the Legislature passed and the Governor signed the Hawaii Marriage Equality Act. Haw. Rev. Stat. §572-3 (2017).

[233] Matt Volz, *Montana's Unenforceable Same-Sex Marriage Ban to Remain in State Constitution*, LGBTQ NATION (July 3, 2015), https://www.lgbtqnation.com/2015/07/montanas-unenforceable-samesex-marriage-ban-to-remain-in-state-constitution/.

[234] Joshua Barajas, *GOP Lawmakers in North Carolina Introduce Bill to Restore Ban on Same-Sex Marriage*, PBS NEWS HOUR (April 12, 2017) https://www.pbs.org/newshour/nation/gop-lawmakers-north-carolina-introduce-bill-restore-ban-sex-marriage.

[235] Uphold Historical Marriage Act, H.R. 780, 2017 Gen. Assemb., Gen. Sess. (N.C. 2017) ("[T]he United States Supreme Court overstepped its constitutional bounds when it struck down Section 6 of Article XIV of the North Carolina Constitution in its *Obergefell v. Hodges* decision of 2015. . ."), https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H780v0.pdf.

meaning and understanding of marriage in all societies throughout prior history"[236] The bill affirmed "that Section 6 of Article XIV of the North Carolina Constitution is the law of the state,"[237] and contained a declaration of dubious historical provenance:

> The General Assembly of the State of North Carolina declares that the Obergefell v. Hodges decision of the United States Supreme Court of 2015 is null and void in the State of North Carolina, and that the State of North Carolina shall henceforth uphold and enforce Section 6 of Article XIV of the North Carolina Constitution, the opinion and objection of the United States Supreme Court notwithstanding.[238]

The bill was referred to the Committee on Rules, Calendar, and Operations of the House, from which, by the end of 2017, it had not emerged.[239]

In his *Obergefell* dissent, Justice Alito warned of an unfortunate use to which he predicted the majority decision would be put:

> Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.
>
> It 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 . . . 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.[240]

It can be argued that Justice Alito continued to muddle the issue by failing to distinguish between private belief and public policy. He did a disservice by refusing to acknowledge that many marriage-equality advo-

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[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Uphold Historical Marriage Act, House Bill 780 2017-2018 Session – North Carolina General Assembly*, N.C. GEN. ASSEMB., https://www2.ncleg.net/BillLookup/2017/HB780 (last visited August 2018).

[240] Obergefell v. Hodges, 135 S.Ct. 2584, 2642–43 (2015) (Alito, J. dissenting).

cates are not "determined to stamp out every vestige of dissent;" they are concerned only with public policy and are resigned to let a dwindling number of their fellow citizens "cling to old beliefs" that society increasingly sees as bigoted.

Public support for marriage equality has grown dramatically. Justice Alito's group of "Americans who are unwilling to assent to the new orthodoxy," those "who cling to old beliefs," is growing smaller and smaller. Americans now favor allowing same-sex couples to marry by a margin of nearly two to one.[241] It is reported that marriage equality has the support of majorities of baby boomers,[242] African Americans,[243] whites,[244] Hispanics,[245] Catholics,[246] white mainline Protestants,[247] and the religiously unaffiliated.[248] Americans at all educational levels[249] and in all regions[250] support marriage equality. Majorities in support of marriage equality are found among all age cohorts born after 1946;[251] even in the cohort born between 1928 and 1945 there is not a majority opposed to marriage equality.[252] A majority of Republicans do not oppose marriage equality.[253]

[241] Pew Research Center, U.S. Politics & Policy, *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical: For First Time, as Many Republicans Favor as Oppose Gay Marriage*, PEW RES. CTR. (June 26, 2017) http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/ (reporting that 62% of Americans support same-sex marriage, with 32% opposing).

[242] *Id.* (56% of Baby Boomers support marriage equality, an increase from 46% in 2016).

[243] *Id.* (51% of African Americans support marriage equality, an increase from 39% in 2015).

[244] *Id.* (64% of whites support marriage equality).

[245] *Id.* (60% of Hispanics support marriage equality).

[246] *Id.* (67% of Catholics support marriage equality).

[247] *Id.* (68% of white mainline Protestants support marriage equality).

[248] *Id.* (85% of the religiously unaffiliated support marriage equality).

[249] *Id.* The percentages supporting marriage equality are 53% for those with a high school education or less, 62% for those with some college, 72% for college graduates, and 79% for those with some post-graduate education.

[250] Pew Research Center, U.S. Politics & Policy, *Same-Sex Marriage Detailed Tables 2017*, PEW RES. CTR. (June 26, 2017) http://www.people-press.org/2017/06/26/same-sex-marriage-detailed-tables-2017/ (reporting that the percentages supporting marriage equality are 73% in the Northeast, 68% in the West, 62% in the Midwest, and 54% in the South).

[251] *Id.* (74% of those born after 1980 favor marriage equality, 23% are opposed. 65% of those born between 1965 and 1980 favor, 29% are opposed. 56% of those born between 1946 and 1964 favor, 39% are opposed).

[252] *Id.* (49% of those born between 1928 and 1945 oppose marriage equality; 41% favor, which is an increase from 24% who favored marriage equality when polled in 2007).

[253] *Id.* (48% of Republicans and Republican-leaning independents oppose marriage equality; 47% favor marriage equality).

Although it is difficult to estimate with any precision,[254] it appears that there have been in excess of half a million same-sex marriages in the nation.[255]

Against this widespread support for marriage equality, and the presence of same-sex married couples in communities large and small across the nation, the *revanchist* dream of a return to the bigotry of pre-*Obergefell* America seems fanciful. Perhaps it is time to chart a different direction.

In their dissents, the *Obergefell* minority stressed that the holding in that case foreclosed the process of persuasion and democratic reform. Taking them at their words, the dissenters suggested that the proponents of marriage equality were missing an opportunity to create a consensus. Thus, Chief Justice Roberts wrote:

> Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.[256]

Justice Scalia wrote to the same effect,[257] as did Justice Alito.[258]

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[254] Quoctrung Bui, *The Most Detailed Map of Gay Marriage in America*, N.Y. TIMES (Sept. 12, 2016) https://www.nytimes.com/2016/09/13/upshot/the-most-detailed-map-of-gay-marriage-in-america.html ("[N]o one has a definitive count of gay married couples in the United States. One reason it's hard to get a fix on the marriages is that detailed marriage records are not tracked at the federal level. They're managed by counties and states, which report the count of marriages and not much else. The Census Bureau isn't always a lot of help either. Methodological problems like sample size and false positives have long plagued census estimates of this relatively small group."). Bui reports on a Treasury Department research paper that uses tax returns of same-sex couples who filed jointly to estimate that there were 183,280 same-sex marriages in 2014, a year before *Obergefell*. *Id.*

[255] Paola Scommegna, *Existing Data Show Increase in Married Same-Sex U.S. Couples*, POPULATION REFERENCE BUREAU (Dec. 7, 2016), http://www.prb.org/Publications/Articles/2016/Increase-in-Married-Same-Sex-US-Couples.aspx (estimating that there were 486,000 married same-sex couples by October of 2015, up from 230,000 in 2013); Richard Wolf, *Gay Marriages up 33% in Year Since Supreme Court Ruling*, USA TODAY (June 22, 2016) https://www.usatoday.com/story/news/politics/2016/06/22/same-sex-marriage-gay-lesbian-supreme-court/86228246/ (citing Gallup estimates of 981,000 adults in gay or lesbian marriages).

[256] Obergefell v. Hodges, 135 S.Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

[257] *Id.* at 2627 (Scalia, J., dissenting).

> Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. . . . Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.

Id. It is fair to say that Justice Scalia's characterization of the policy debate as

Revisiting the issue, in the form of amendments to remove the constitutional definitions of marriage with which the opponents of marriage equality attempted to forestall it, would permit the development of the consensus which the *Obergefell* minority claimed to desire. It would offer an opportunity, admittedly imperfect, for reconciliation.

CONCLUSION

We can anticipate one argument that will be made against amending these constitutional provisions. They no longer have any substantive legal significance, it will be asserted, and can be ignored rather than cause a contentious debate over amendment. The argument would suggest that the provisions are, in Thomas Jefferson's typology, moderate imperfections to which we would best accommodate ourselves, defects that have no ill effects and can best be borne with.[259]

There is, of course, an element of truth in the argument. The substantive legal rules that implemented these discriminatory and bigoted constitutional provisions are no longer of effect. Non-believers are no longer barred from office by religious tests. Black children are no longer excluded from public schools because of *de jure* segregation. Same-sex couples can marry. Witnesses are no longer excluded based on their religious beliefs. Women are no longer excluded from voting and holding public office. Public funds are no longer used to support veterans of the Rebellion and their survivors.

But in each case, vestiges of the discrimination and bigotry linger. Non-believers are not formally barred from office, and yet a substantial group of Americans would not vote for an atheist candidate.[260] Black children are no longer barred from schools because of *de jure* segregation, but our schools are largely segregated in fact.[261] We have marriage equality as a matter of law even as same-sex couples face discrimination

"respectful" is disputable. Russell Shorto, *What's Their Real Problem with Gay Marriage? (It's the Gay Part)*, N.Y. TIMES (June 19, 2005), http://www.nytimes.com/2005/06/19/magazine/whats-their-real-problem-with-gay-marriage-its-the-gay-part.html.

[258] *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting) ("Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage.").

[259] Jefferson Letter, *supra* note 11.

[260] Nick Gass, *Poll: Most Americans Unwilling to Vote for a Socialist*, POLITICO (June 22, 2015), https://www.politico.com/story/2015/06/poll-voters-socialist-atheist-catholic-119273 ("58 percent [of Americans] said they would have no problem voting for an atheist in their party [for President]").

[261] Abel McDaniels, *A New Path for School Integration,* CTR. FOR AM. PROGRESS (Dec. 19, 2017), https://www.americanprogress.org/issues/education-k-12/news/2017/12/19/444212/new-path-school-integration/) ("[A]merica's public school system remains deeply segregated and unequal in terms of both race and income. More than a third of all students attend a school in which 90 of their peers are of the same race.").

by public officials charged with administering the law and by some fellow citizens who refuse them public accommodations incident to their marriage.[262] Witnesses are not excluded on grounds of religious belief, and jurors are charged to not allow such beliefs to influence their credibility determinations, but witnesses are on occasion not believed because of their faith.[263] Women can hold public office, but do so at rates lower than their numbers would predict.[264] We no longer fund pensions for veterans of the Rebellion and their survivors, but we have yet to remove monuments celebrating their treason from our public squares.[265]

I do not lightly term these provisions "badges of inferiority." The label harkens back to the first use by the United States Supreme Court of the term in *Plessy v. Ferguson*.[266] In his opinion upholding Louisiana's statute segregating railway coaches, Justice Brown rejected the argument that such public policy placed a badge of inferiority on black citizens:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[267]

By 1966, Justice Douglas wrote on behalf of the Court that the *Plessy* formulation had become discordant: "Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear."[268]

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[262] Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage License, Defying Court,* N.Y. TIMES (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html; The Denver Post Editorial Board, *Let Them Have Cake: Lakewood Baker Discriminated Against Gay Couple: The U.S. Supreme Court Should Rule that a Cake Shop that Sells Wedding Cakes Must Sell Those Cakes to Everyone,* DENVER POST, June 27, 2017, https://www.denverpost.com/2017/06/27/let-them-have-cake-lakewood-baker-discriminated-against-gay-couple/.

[263] Vestal, *supra* note 109, at 450–51.

[264] Janie Boschma, *Why Women Don't Run for Office*, POLITICO (June 12, 2017), https://www.politico.com/interactives/2017/women-rule-politics-graphic/.

[265] Benjamin Wallace-Wells, *The Fight Over Virginia's Confederate Monuments*, THE NEW YORKER (Dec. 4, 2017), https://www.newyorker.com/magazine/2017/12/04/the-fight-over-virginias-confederate-monuments.

[266] Plessy v. Ferguson, 163 U.S. 537, 551 (1896). There is one much earlier use of the term in a case before the Supreme Court. Talbot v. Janson, 3 U.S. 133 (1795). But the use in *Talbot*, a case involving privateering, was by counsel, not by the Court. *Id.* at 141 ("Citizenship is the character of equality; allegiance is a badge of inferiority ").

[267] *Plessy*, 163 U.S. at 551. Justice Brown concluded: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 552.

[268] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (quoting *Plessy*, 163 U.S. at 551).

By the time of *Planned Parenthood v. Casey* in 1992, the Court was clear that whether the challenged provisions constituted badges of inferiority was at least in part a function of contemporary knowledge and conditions. The *Casey* opinion quoted Yale Law School Professor Charles Black:

> [T]he question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and common knowledge about the facts of life in the times and places aforesaid."[269]

The *Casey* court found that *Plessy* had been wrongly decided in 1896 and that the facts had so changed by the time of *Brown* that a reconsideration of *Plessy* was required:

> The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy's* time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the fact apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground along not only justified but required.[270]

The state constitution provisions we have considered relate to times in our history when women, gays and lesbians, people of color, and people with unpopular beliefs on matters of religion were the subjects of prejudice and formalized discrimination. These provisions are the legal remnants of those unfortunate times. Like the separate but equal doctrine of *Plessy*, they were wrong the days they were written. The evolution of our society has made it increasingly clear that they are at odds with who we are, but that evolution has not been so advanced as to cure us of our underlying bigotry and prejudice. Because of that, these provisions remain badges of inferiority, the reexamination of which is not only justified, but required.

When she was a high school student in Tennessee, Sarah Green remembers "feeling like she didn't belong in her own state after discover-

[269] Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 863 (1992) (quoting Charles L. Black, Jr., *The Lawfulness of Segregation Decisions*, 69 YALE L.J. 421, 427 (1960)).

[270] *Id.* at 863 (citations omitted).

ing that Tennessee's constitution bars people who don't believe in God from holding public office."[271] Green's knowledge of the prejudiced Tennessee constitutional provision placed her at a remove from her fellow citizens:

> Green stumbled across the ban in high school while studying the state constitution. At the same time, Green, who grew up in a family with Southern Baptist beliefs, was coming to the realization that she did not believe in God. "You feel rejected for something that on a certain level that you cannot help," Green said.[272]

Her awareness of the constitutional provision effected Green: "It was one of the things that made me realize how unwelcome it could be for an atheist, especially in the South. It pretty much informed my decision to stay closeted, if you will, for almost 15 years."[273]

Speaking of religious tests for public office, one ACLU official observed that "[t]heir presence in the constitution is troubling because it is a symbolic form of discrimination."[274] The chair of a secularist organization argued that such religious tests are inappropriate because of the message they send. "They basically tell people that they're second-class citizens in their state," he observed, "These are right there in the laws for everybody to read that our government doesn't like you."[275] He continued:

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[271] Holly Meyer, *Atheists Want Law Removed that Bars Them from Office*, TENNESSEAN (March 19, 2015) (quoting Hedy Weinberg, Executive Director of the American Civil Liberties Union of Tennessee) (quoting Sarah Green), http://www.tennessean.com/story/news/politics/2015/03/19/atheists-want-law-removed-bars-office/24999851/. The problem is even more acute in the age of the internet. No longer must one know to consult the right dusty book in a library to find these prejudiced state constitutional provisions. In the modern age, they are only a few keystrokes away. For example, the first result from a Google search for "atheists barred from public office" was an article listing the seven states with constitutional religious tests for public office, with no indication that they are unconstitutional and unenforceable. Olivia Crellin, *Atheists Are Banned From Holding Public Office In Seven US States*, VICE NEWS (Dec. 10, 2014), https://news.vice.com/article/atheists-are-banned-from-holding-public-office-in-seven-us-states. Thus, the author describes the religious test provisions as "long-standing," "old-fashioned," and "outdated" but does not indicate that they are unconstitutional. Indeed, the lead paragraph indicates the provisions are enforceable:

> If you're an atheist and interested in becoming a city council member or a juror in Maryland, well you can forget it: the East Coast state is one of seven in the US, which thanks to long-standing provisions in their state constitution, prohibits those who don't believe in God from holding public office.

Id.

[272] Meyer, *supra* note 271 (quoting Sarah Green).

[273] *Id.* (quoting Sarah Green).

[274] *Id.*

[275] *Id.* (quoting Todd Stiefel, chair of Openly Secular).

> We need to be treated fairly just like anyone else. If you're a student or a young adult reading your state constitution for the first time, there's no asterisk in there saying this is unconstitutional, it just says you're not allowed to hold public office.[276]

These archaic, ineffective, and unnecessary provisions are badges of inferiority. They are needlessly divisive and gratuitously disrespectful of our fellow citizens, the mechanisms of injury to historically disfavored groups among us. They are, in the words of Solon and Tom Paine, "an insult on the whole constitution," and should be removed.[277]

[276] *Id.*

[277] PAINE, *supra* note 1, at 187.