

**ICING ON THE WEDDING CAKE: SAME-SEX MARRIAGE  
AND RELIGIOUS OBJECTIONS—IS THERE AN  
ACCOMMODATION THAT WILL MAKE EVERYONE  
EQUALLY HAPPY (OR UNHAPPY)?**

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ABSTRACT

On June 26, 2015, the Supreme Court issued its highly anticipated ruling in *Obergefell v. Hodges*, making same-sex marriage the “law of the land” throughout the United States.<sup>1</sup> *Obergefell* culminated, at least for now, a four-decades long legal war, but it hardly ended the accompanying legal and political battles. Those battles had started well before the *Obergefell* decision, as states, and sometimes municipalities, had enacted either same-sex marriage *per se*<sup>2</sup> or some sort of marriage-like recognition

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605, 2607–08, 2632 (2015).

2. The first state to authorize same-sex marriage *per se* was Massachusetts because of two decisions by the Massachusetts Supreme Judicial Court: *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that exclusion of same-sex couples from civil marriage violated the Massachusetts Constitution), and *In re Ops. to the Senate*, 802 N.E.2d 565, 577 (Mass. 2004) (ruling that an act to create “civil unions” for same-sex couples with all the legal attributes of civil marriage would not cure the violation of rights found in *Goodridge*). By the time of the *Obergefell* decision, 11 states, plus the District of Columbia, had enacted same-sex marriage laws. See *Obergefell*, 135 S. Ct. at

for same-sex couples—with names such as “reciprocal beneficiaries”<sup>3</sup> or “civil unions.”<sup>4</sup> Opposition has come from state and local officials (refusing to issue marriage licenses, refusing to perform weddings, refusing to issue documents listing same-sex spouses, etc.)<sup>5</sup> and from private businesses providing public accommodations (wedding venues, photographers, florists, etc.).<sup>6</sup> By the time this Article is published, the Supreme Court will have heard oral argument in the *Masterpiece Cakeshop* case in which a bakery owner is asserting the constitutional right to refuse—on religious and free speech grounds—to make and decorate a wedding cake for a same-sex couple.<sup>7</sup>

This Article will: examine the *Obergefell* majority and dissenting opinions, recount the various battles being waged by opponents of legal recognition of same-sex couples and those entities which do not want to provide wedding-related services to same-sex couples, consider our political divide on gay rights issues, and finally attempt, with great trepidation, to posit a way forward that might satisfy—or dissatisfy—both camps equally.

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2611, app. B (listing state legislation and judicial decisions legalizing same-sex marriage). Multiple other states authorized same-sex marriage because they were mandated to do so by a federal or state court order. See *Obergefell*, 135 S. Ct. at 2608–10, app. A (listing state and federal decisions on same-sex marriage).

3. See 1997 Haw. Sess. Laws 1211 (codified at HAW. REV. STAT. § 572C-1 (2016)) (“The purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.”). Hawaii created the category of “reciprocal beneficiaries” for same-sex couples in 1997 as part of its response to the ongoing litigation regarding same-sex marriage in *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (“holding ‘that sex is a ‘suspect category’ for purposes of equal protection analysis” under the Hawaii State Constitution).

4. Vermont enacted civil unions in 2000 in response to the Vermont Supreme Court’s decision in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (Vt. 1999). See VT. STAT. ANN. tit. 15, § 1201(2) (2016) (“‘Civil union’ means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.”); see also 2000 Vt. Acts & Resolves 72–73 (“The purpose of this act is to respond to the constitutional violation found by the Vermont Supreme Court in *Baker v. State*, and to provide eligible same-sex couples the opportunity to ‘obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples’ as required by Chapter I, Article 7th of the Vermont Constitution.”).

5. Cheryl Wetzstein, *States Rebel Against Supreme Court Gay Marriage Ruling*, WASH. TIMES (July 6, 2015), <http://www.washingtontimes.com/news/2015/jul/6/states-rebel-against-supreme-court-gay-marriage-ru/>.

6. See *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53, 62–63 (N.M. 2013) (holding that it is discriminatory for a commercial wedding photographer to refuse service based on sexual orientation).

7. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), cert. granted sub nom. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm’n*, 137 S. Ct. 2290 (2017). Interestingly, a similar challenge is making its way to the U.K. Supreme Court in a case from Northern Ireland, *Lee v. McArthur* [2016] NICA (Civ) 39 (N. Ir.).

I. THE *OBERGEFELL* DECISION

As noted, on June 26, 2015, the Supreme Court delivered its highly anticipated decision in *Obergefell v. Hodges*, and, by a vote of 5-4, held that: (1) states must permit same-sex couples to marry; and (2) a state may not refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.<sup>8</sup> Justice Kennedy wrote the majority opinion, as he had in *Romer v. Evans* (1996)<sup>9</sup> (striking down a state constitutional amendment barring the state and its political subdivisions from protecting homosexuals against discrimination), *Lawrence v. Texas* (2003)<sup>10</sup> (striking down a state law criminalizing private homosexual conduct between consenting adults), and *United States v. Windsor* (2013)<sup>11</sup> (striking down the provision in the federal Defense of Marriage Act (DOMA) barring the federal government from recognizing same-sex marriages that were valid under state law). Justices Ginsburg, Breyer, Sotomayor, and Kagan joined *Obergefell*'s majority opinion.<sup>12</sup> Each of the four dissenting Justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—wrote a separate dissenting opinion in which one or more of the other dissenters joined.<sup>13</sup> Each opinion merits attention.

*Obergefell* was actually four consolidated cases in which plaintiffs challenged the respective laws of Michigan, Kentucky, Ohio, and Tennessee, restricting marriage to one man and one woman.<sup>14</sup> Plaintiffs won their case in each federal district court.<sup>15</sup> The defendant states appealed,<sup>16</sup> and the Court of Appeals for the Sixth Circuit reversed and upheld the challenged statutes.<sup>17</sup> This put the Sixth Circuit at odds with other recent federal circuit court decisions, thus creating a “circuit split,” making the issue ripe for review by the Supreme Court.<sup>18</sup>

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8. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

9. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

10. *Lawrence v. Texas*, 539 U.S. 558, 562, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

11. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

12. *Obergefell*, 135 S. Ct. at 2591.

13. *Id.* at 2611 (Roberts, C.J., dissenting); *id.* at 2626 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

14. *Id.* at 2584 (majority opinion).

15. *Id.* at 2593.

16. *Id.*

17. *Id.*

18. *DeBoer v. Snyder*, 772 F.3d 388, 402 (6th Cir. 2014).

*A. The Majority Opinion*

Justice Kennedy's majority opinion started with a brief history of the institution of marriage, noting the "transcendent importance" of that institution.<sup>19</sup> Kennedy correctly acknowledged that, "[i]t is fair and necessary to say these references [to the historical importance of marriage] were based on the understanding that marriage is a union between two persons of the opposite sex."<sup>20</sup> He proceeded to relate the stories of three of the sets of plaintiffs and the difficulties they had encountered, which were caused by application of the challenged statutes.<sup>21</sup>

The majority noted that "[t]he history of marriage is one of both continuity and change."<sup>22</sup> We have abandoned (at least in the United States, with isolated exceptions) arranged marriages based on political, religious, and financial concerns.<sup>23</sup> A married woman is no longer considered to be a *femme covert* without legal rights.<sup>24</sup>

Likewise, society's views of homosexuality have evolved from the time when "[s]ame-sex intimacy [was] a crime in many States."<sup>25</sup> The American Psychiatric Association has long since abandoned the view announced in its first *Diagnostic and Statistical Manual of Mental Disorders* in 1952 that homosexuality was a mental disorder.<sup>26</sup> The Court's own views of homosexuality have evolved since *Bowers v. Hardwick* in 1986,<sup>27</sup> which upheld the crime of sodomy, with recognition of various gay rights in *Romer* (1996),<sup>28</sup> *Lawrence* (2003),<sup>29</sup> and *Windsor* (2013).<sup>30</sup>

Addressing the Due Process Clause of the Fourteenth Amendment, the majority noted that the Court has long held that the right to marry is a fundamental right or liberty of which one cannot be deprived without due process of law.<sup>31</sup> In *Loving v. Virginia* (1967), the Court unanimously struck down bans on interracial marriage, holding that marriage is "one of

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19. *Obergefell*, 135 S. Ct. at 2593–94.

20. *Id.* at 2594.

21. *Id.* at 2594–95.

22. *Id.* at 2595.

23. *Id.*

24. *Id.*

25. *Id.* at 2596.

26. *Id.*

27. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

28. *Romer v. Evans*, 517 U.S. 620, 635 (recognizing the right of equal protection for gay and lesbian persons).

29. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (providing that the right to liberty includes private sexual conduct).

30. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (finding the portion of the Defense of Marriage Act, which excluded same-sex partners from the definition of "spouse," unconstitutional).

31. *Obergefell*, 135 S. Ct. at 2600, 2604–05, 2607–08.

the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>32</sup> In *Zablocki v. Redhail* (1978), the Court struck down a law preventing “deadbeat dads” from marrying.<sup>33</sup> In *Turner v. Safley* (1987), the Court struck down a prison regulation which permitted a prison inmate to marry only after the superintendent found a compelling reason to grant the inmate such permission.<sup>34</sup> While the *Obergefell* majority acknowledged its 1972 summary affirmance in *Baker v. Nelson*, which denied a right to same-sex marriage,<sup>35</sup> it conveniently neglected to mention two other cases in which it had upheld marriage impediments: *Butler v. Wilson* (1974)<sup>36</sup> (prohibition on marriage for prisoners serving a life sentence), and *Califano v. Jobst* (1977)<sup>37</sup> (termination of certain Social Security benefits upon marriage).

The *Obergefell* majority distilled four principles or premises from its precedents: (1) “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,”<sup>38</sup> (2) “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals,”<sup>39</sup> (3) “[marriage] safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education,”<sup>40</sup> and (4) “marriage is a keystone of our social order.”<sup>41</sup> Denying these benefits to same-sex couples who wish to marry violates the Fourteenth Amendment’s guarantee that “no State shall ‘deprive any person of . . . liberty . . . without due process of law.’”<sup>42</sup>

Additionally, denial of the right of same-sex couples to marry also violates the Fourteenth Amendment’s guarantee that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>43</sup> Notably, although there is very extensive jurisprudence concerning the standard to be applied when a statute is challenged on equal

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

33. *Zablocki v. Redhail*, 434 U.S. 374, 375, 382, 390–91 (1978).

34. *Turner v. Safley*, 482 U.S. 78, 82, 100 (1987).

35. *Obergefell*, 135 S. Ct. at 2598; *see also Baker v. Nelson*, 409 U.S. 810, 810 (1972) (dismissing appeal “for want of a substantial federal question”).

36. *Butler v. Wilson*, 415 U.S. 953 (1974) (mem.) (upholding a New York statute prohibiting prisoners serving a life sentence from marrying).

37. *Califano v. Jobst*, 434 U.S. 47, 48 (1977) (finding that termination of certain Social Security benefits upon marriage did not violate due process).

38. *Obergefell*, 135 S. Ct. at 2599.

39. *Id.* Despite its repeated references to marriage as a two-person union, the majority never explains the two-person limitation.

40. *Id.* at 2600.

41. *Id.* at 2601.

42. *Id.* at 2597 (quoting U.S. CONST. amend XIV).

43. U.S. CONST. amend XIV; *Obergefell*, 135 S. Ct. at 2602.

protection grounds—strict scrutiny, intermediate scrutiny, or rational basis—the majority never even mentioned, much less explained, what standard it was applying.<sup>44</sup> Based on the foregoing holdings concerning due process and equal protection, “*Baker v. Nelson* must be and now is overruled . . . .”<sup>45</sup>

The majority explained why the judiciary must act to correct this situation rather than wait on the democratic process. “[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.”<sup>46</sup> Because fundamental rights were being denied to same-sex couples who could not marry, a cautious approach was unwarranted.

Briefly addressing the second issue, the majority ruled that because same-sex couples have a fundamental right to marry in all states, it follows that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>47</sup>

In rather ambiguous language, the majority opined on what was already a hot-button issue in states permitting same-sex marriage—religiously based objections—as follows:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>48</sup>

To what extent religious objectors may go beyond advocating and teaching to demonstrate their position remains a deeply divisive issue.

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44. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying the “most rigid scrutiny” standard—a functional analog of “strict scrutiny”—to a statute barring interracial marriage (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))); *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (applying “intermediate scrutiny,” rather than strict scrutiny, to a statute discriminating on the basis of illegitimacy); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 450 (1985) (applying “rational basis” scrutiny to an ordinance discriminating against intellectually disabled persons).

45. *Obergefell*, 135 S. Ct. at 2604–05.

46. *Id.* at 2605.

47. *Id.* at 2607–08.

48. *Id.* at 2607.

*B. The Dissenting Opinions*

The four dissenting opinions authored by Chief Justice Roberts and Justices Scalia, Thomas, and Alito are notable for going far beyond expressing a mere disagreement with the decision and how that case should have been decided on the merits. Rather, they accused the majority of usurping the power of the people, being destructive of democracy itself, and attacking the sacred principle of religious freedom.<sup>49</sup>

Chief Justice Roberts, joined by Justices Scalia and Thomas, began by acknowledging a fundamental right to marry, but disputed that the right “include[s] a right to make a State change its definition of marriage.”<sup>50</sup> He pointed out that advocates of same-sex marriage have had “considerable success [in recent years] persuading their fellow citizens—through the democratic process—to adopt their view.”<sup>51</sup> “Five lawyers,” i.e., the Justices in the majority, have closed off that democratic process in “an act of will, not legal judgment.”<sup>52</sup> Citing *Windsor*, he correctly noted that “[t]he Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with ‘[t]he whole subject of the domestic relations of husband and wife.’”<sup>53</sup> He asserted that the majority’s reasoning was based upon two of the most reviled and repudiated decisions in our constitutional history: *Dred Scott v. Sanford* (1857),<sup>54</sup> and *Lochner v. New York* (1905).<sup>55</sup>

The Chief Justice raised the question of whether restrictions on plural marriage can survive under the majority’s reasoning: “Although the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.”<sup>56</sup> He described the majority’s approach as “dangerous for the rule of law.”<sup>57</sup>

Addressing religious freedom, he pointed out that the First Amendment’s guarantee is “the freedom to ‘exercise’ religion,” not merely to teach and advocate religious principles, and that the majority

49. *Id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–27 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting); *id.* at 2640–43 (Alito, J., dissenting).

50. *Id.*, at 2611 (Roberts, C.J., dissenting).

51. *Id.*

52. *Id.* at 2612.

53. *Id.* at 2613–14 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013)).

54. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (striking down the Missouri Compromise on slavery and ruling that people of African descent are not citizens and have no rights).

55. *Lochner v. New York*, 198 U.S. 45, 45 (1905) (striking down a New York statute limiting the work week in a bakery to 60 hours).

56. *Id.* at 2621 (Roberts, C.J., dissenting).

57. *Id.* at 2622.

“[o]minously” failed to use that word.<sup>58</sup> He bemoaned the lack of accommodations for religious practice enunciated by the majority, and pointed to an acknowledgement by the Solicitor General of the United States at oral argument that some religious institutions might lose their tax-exempt status if they opposed same-sex marriage.<sup>59</sup>

Justice Scalia, joined by Justice Thomas, attacked the majority with his usual hyperbolic language, saying the majority’s decision constituted a “threat to American democracy.”<sup>60</sup> It lacked “even a thin veneer of law” and consisted of “mummeries and straining-to-be-memorable passages . . . .”<sup>61</sup> Rather than join an opinion with language like that of the majority, Scalia “would hide [his] head in a bag.”<sup>62</sup> The Court has descended “to the mystical aphorisms of the fortune cookie.”<sup>63</sup> The majority’s decision “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”<sup>64</sup>

Justice Thomas, joined by Justice Scalia, echoed the same themes, although he used more temperate language. The majority’s decision was a “distortion of our Constitution . . . .”<sup>65</sup> “By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority.”<sup>66</sup> He cited the Magna Carta, Blackstone, and the Framers (of the Constitution) for the proposition that the word “liberty,” as used in the Fifth Amendment, merely means “freedom from physical restraint.”<sup>67</sup> Same-sex couples denied the right to marry have not been deprived of such liberty nor of “freedom from governmental action more broadly . . . .”<sup>68</sup> Rather, the states have merely “refused to grant them governmental entitlements.”<sup>69</sup> The “decision threatens the religious liberty our Nation has long sought to protect,”<sup>70</sup> and it is “all but inevitable” that such liberty and the right of same-sex marriage “will come into conflict, particularly as individuals and churches are

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58. *Id.* at 2625.

59. *Id.* at 2625–26.

60. *Id.* at 2626 (Scalia, J., dissenting).

61. *Id.* at 2628.

62. *Id.* at 2630 n.22.

63. *Id.*

64. *Id.* at 2627.

65. *Id.* at 2631 (Thomas, J., dissenting).

66. *Id.*

67. *Id.* at 2633.

68. *Id.* at 2635.

69. *Id.*

70. *Id.* at 2638.



confronted with demands to participate in and endorse civil marriages between same-sex couples.”<sup>71</sup>

Finally, Justice Alito, joined by Justices Scalia and Thomas, also bemoaned that “[t]oday’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.”<sup>72</sup> “[A]ll Americans, whatever their thinking on [same-sex marriage], should worry about what the majority’s claim of power portends.”<sup>73</sup>

## II. THE FALLOUT FROM *OBERGEFELL* (AND SAME-SEX MARRIAGE IN GENERAL)

It was inevitable that the *Obergefell* decision, whichever side won, would produce strong reactions. As set forth in detail in the first part of this Article, the issue of same-sex marriage had been increasingly argued, litigated, and legislated over the prior two decades.<sup>74</sup> All sides agree that marriage has a central role in our society,<sup>75</sup> and any decision affecting the rights of large numbers of previously excluded people to enter into that institution is momentous.<sup>76</sup> Even had the Court spoken with one voice, it would not have put the matter to rest.

Consider the Court’s decision in *Loving v. Virginia* in 1967,<sup>77</sup> ruling that states may not prohibit interracial marriage. At the time of that decision, there were still 16 states that prohibited and punished interracial marriage.<sup>78</sup> It would take 33 years, a full third of a century, before the last of those states, Alabama, managed to repeal its unenforceable “miscegenation” statute,<sup>79</sup> and when that was finally done by popular referendum in 2000, over 40% of Alabamians voted to maintain the ban.<sup>80</sup> As recently as November 2009, a Louisiana justice of the peace resigned

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71. *Id.*

72. *Id.* at 2642 (Alito, J., dissenting).

73. *Id.* at 2643.

74. *See supra* Part I (discussing and analyzing the evolution of the case law surrounding same-sex marriage leading up to *Obergefell*).

75. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

76. *Id.*

77. *See id.* at 12 (explaining that the freedom to marry a person of another race rests with the person, not the state).

78. *Id.* at 6.

79. Tom Head, *Interracial Marriage Laws History & Timeline*, THOUGHTCO. (Aug. 12, 2017), <https://www.thoughtco.com/interracial-marriage-laws-721611/>.

80. *Id.*

rather than having to perform an interracial marriage, saying, “I found out I can’t be a justice of the peace and have a conscience.”<sup>81</sup> And, unlike *Obergefell*, the *Loving* decision was unanimous; *Loving* did not have four Justices, including the Chief Justice, filing strongly worded dissents indicating that the Court had made an unprincipled power grab, destructive of democracy and religious liberty.<sup>82</sup>

### A. Controlling Precedent

Undoubtedly the easiest legal question to answer post-*Obergefell* should have been whether that decision constitutes precedent that is binding on lower federal courts and on the states, generally. Article VI of the U.S. Constitution (the Supremacy Clause) provides, “[t]his Constitution . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”<sup>83</sup> In the seminal case of *Marbury v. Madison* in 1803, the Court announced that, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>84</sup> In 1958, in *Cooper v. Aaron*, involving the desegregation of Central High School in Little Rock, Arkansas, the Court unanimously rejected the argument that the governor and legislature of that state were not bound by the Court’s rulings.<sup>85</sup> “No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.”<sup>86</sup> Yet, that is precisely what has happened after *Obergefell* in Puerto Rico, Alabama, and other jurisdictions.<sup>87</sup>

In Puerto Rico, in the case of *Conde-Vidal v. Garcia-Padilla*, decided in 2014 before *Obergefell*, federal district judge Pérez-Giménez had upheld Puerto Rico’s statutory ban on same-sex marriage.<sup>88</sup> This was not

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81. *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN (Nov. 3, 2009, 10:47 PM), <http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage/index.html>.

82. *Compare Loving*, 388 U.S. at 2 (writing for a unanimous court, the Chief Justice’s opinion held a miscegenation statute unconstitutional), *with Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) (leading the dissenters, the Chief Justice wrote a scathing rebuttal joined by three other justices).

83. U.S. CONST. art. VI, § 2.

84. *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

85. *Cooper v. Aaron*, 358 U.S. 1, 4, 9 (1958).

86. *Id.* at 18.

87. *Id.*

88. *See Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157, 158, 168 (D.P.R. 2014) (dismissing the plaintiff’s claim that Article 68 unlawfully violated the Equal Protection and Due Process Clauses, because it recognized marriage only as between a man and a woman), *vacated sub nom.*, *Conde-Vidal v. Rius-Armendariz*, No. 14-2184, 2015 WL 10574261 (1st Cir. July 8, 2015).

problematic because neither its circuit court of appeals (the First Circuit) nor the Supreme Court had yet spoken directly on the issue.<sup>89</sup> But within days of the *Obergefell* decision, the First Circuit vacated the district court's judgment and remanded the case, noting that it agreed "with the parties' joint position that the ban is unconstitutional."<sup>90</sup> This should have been the end of the matter, but it was not. On remand, despite *Obergefell*, the First Circuit's ruling, and the fact that the parties to the case had filed a joint motion for entry of judgment in favor of the plaintiffs, Judge Pérez-Giménez again upheld the statutory ban, finding that Puerto Rico was not bound by the Supreme Court's decision.<sup>91</sup> Within a month, the First Circuit again reversed, stating that "[t]he district court's ruling errs in so many respects that it is hard to know where to begin."<sup>92</sup> The circuit court remanded the case with instructions that it be reassigned to a different district court judge to enter judgment promptly for plaintiffs.<sup>93</sup>

It should not be thought that the issue of *Obergefell* as controlling precedent has been otherwise uniformly acknowledged by the judiciary. In a same-sex divorce case discussed below, two justices of the Mississippi Supreme Court opined in dissent that *Obergefell* does not stand as legitimate legal authority because, citing Chief Justice Roberts' dissent, it "has no basis in the Constitution or [United States Supreme Court] precedent."<sup>94</sup> They further relied on a "Statement Calling for Constitutional Resistance to *Obergefell v. Hodges*," issued by the American Principles Project and signed by various prominent legal academics.<sup>95</sup>

### *B. Issuance of Marriage Licenses: Precedent and Religious Objection*

Marriage licenses are normally issued by a low-level county or state employee who may be called a county clerk or some other ministerial

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89. Christopher Coble, *U.S. District Judge Upholds Puerto Rico Ban on Same-Sex Marriage*, FINDLAW: COURTSIDE (Mar. 10, 2016, 1:57 PM), <http://blogs.findlaw.com/courtside/2016/03/us-district-judge-upholds-puerto-rico-ban-on-same-sex-marriage.html>.

90. *Conde-Vidal v. Rius-Armendariz*, No. 14-2184, 2015 WL 10574261, at \*1 (1st Cir. July 8, 2015).

91. *Conde-Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 280, 287 (D.P.R. 2016).

92. *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016).

93. *Id.* at 767.

94. *Czekala-Chatham v. State ex rel. Hood*, 195 So. 3d 187, 199 (Miss. 2015) (en banc) (Coleman, J., dissenting) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting)).

95. *Statement Calling for Constitutional Resistance to Obergefell v. Hodges*, AQUILA REP. (Oct. 15, 2015), <http://theaquilareport.com/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges%E2%80%AF/>. One of the signatories to this document recently informed the author that he has abandoned this position and now recognizes that Supreme Court authority, however distasteful to him, is binding.

title.<sup>96</sup> Thus, in Pennsylvania, for example, marriage licenses are issued at the county level.<sup>97</sup> A couple applies by filling out a detailed application form and paying a fee.<sup>98</sup> There is a rather perfunctory oral examination to ascertain whether the couple is eligible to marry, and, assuming they are, the license is issued after a three-day waiting period (subject to exceptions).<sup>99</sup> Although issued at the county level, it is a state license authorizing the parties to be married anywhere within the state.<sup>100</sup>

In Alabama, notorious Alabama Supreme Court Chief Justice Roy Moore (he had previously been removed from the same office for violating a federal court order in another matter)<sup>101</sup> asserted that he and the state are not necessarily bound by *Obergefell*, and he therefore ordered state probate judges not to issue licenses to same-sex couples.<sup>102</sup> Prior to *Obergefell*, the United States District Court for the Southern District of Alabama had declared unconstitutional Alabama's ban on same-sex marriage.<sup>103</sup> Despite the Supremacy Clause, the Alabama Supreme Court issued a decision in another case upholding the ban.<sup>104</sup> Notwithstanding the Supreme Court's subsequent *Obergefell* ruling, as well as subsequent orders from the federal district court, Chief Justice Moore continued to direct Alabama probate judges not to issue marriage licenses to same-sex couples.<sup>105</sup> In an "administrative order," issued January 6, 2016, Moore asserted that the U.S. Supreme Court's *Obergefell* decision has caused "[c]onfusion and uncertainty [to] exist among the probate judges" as to whether to obey that decision,<sup>106</sup> bizarrely citing four federal court decisions, all of which held that *Obergefell* dictates that state laws barring same-sex marriage are unconstitutional.<sup>107</sup> Moore reiterated that "the existing orders of the

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96. See, e.g., 23 PA. CONS. STAT. § 102 (1990) (describing that, in Pennsylvania, the clerk is the personnel of the office that has jurisdiction).

97. See 23 PA. CONS. STAT. § 1104 (1990) (stating that all forms are processed by the county throughout the entire commonwealth).

98. 23 PA. CONS. STAT. § 1302(b) (2005); 23 PA. CONS. STAT. § 1105(a) (1990).

99. 23 PA. CONS. STAT. § 1303(a) (2005), 23 PA. CONS. STAT. § 1306 (2006).

100. 23 PA. CONS. STAT. § 1301(b) (1990).

101. Moore v. Judicial Inquiry Comm'n, 891 So. 2d 848, 862 (Ala. 2004).

102. Campbell Robertson, *Roy Moore, Alabama Judge, Suspended Over Gay Marriage Stance*, N.Y. TIMES (May 6, 2016), <https://www.nytimes.com/2016/05/07/us/judge-roy-moore-alabama-same-sex-marriage.html>.

103. Searcy v. Strange, 81 F. Supp. 3d 1285, 1286 (S.D. Ala. 2015).

104. *Ex Parte State ex rel. Ala. Policy Inst.* (API), 200 So. 3d 495, 552 (Ala. 2015).

105. Administrative Order of the Chief Justice of the Alabama Supreme Court, at 4 (Jan. 6, 2016), [https://www.splcenter.org/sites/default/files/roy-moore-adminorder\\_jan6-2016.pdf](https://www.splcenter.org/sites/default/files/roy-moore-adminorder_jan6-2016.pdf).

106. *Id.* at 2.

107. *Id.* at 3 (first citing Jernigan v. Crane, 796 F.3d 976 (8th Cir. 2015); then citing Waters v. Ricketts, 798 F.3d 682 (8th Cir. 2015); then citing Rosenbrahn v. Daugaard, 799 F.3d 918 (8th Cir. 2015); and then citing Marie v. Mosier, 122 F. Supp. 2d 1085 (D. Kan. 2015)).

Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license [to same-sex couples] . . . remain[s] in full force and effect.”<sup>108</sup> As a result of Moore’s continued refusal to adhere to binding federal law, the Alabama Judicial Inquiry Commission filed ethics charges against him on May 6, 2016,<sup>109</sup> and he was automatically suspended from office pending a resolution of the matter.<sup>110</sup> On September 30, 2016, after a hearing on the matter, the Commission suspended Moore from office for the remainder of his term for his continued defiance of binding precedent from the Supreme Court.<sup>111</sup> While Moore continued to fight his removal before a specially empaneled Alabama Supreme Court,<sup>112</sup> he announced that he would run for the seat left vacant in the U.S. Senate when Jeff Sessions became Attorney General.<sup>113</sup>

Shortly after *Obergefell* was handed down, the issue arose as to whether an individual county clerk, or an entire county clerk’s office, may refuse to issue marriage licenses to same-sex couples on religious grounds. The most highly publicized case was that of Kim Davis, the elected county clerk of Rowan County, Kentucky.<sup>114</sup> Davis, a self-proclaimed Apostolic Christian, professes a sincerely held religious objection to same-sex marriage.<sup>115</sup> Davis announced within hours of the *Obergefell* ruling that her

108. *Id.* at 4.

109. See Robertson, *supra* note 102 (discussing how Chief Justice Moore blatantly abused his authority by disregarding *Obergefell*, and issuing an administrative order instructing probate judges to enforce the state’s same-sex marriage ban).

110. *Id.*

111. See Alabama Chief Justice Roy Moore off Bench for Defying Feds on Same-Sex Marriage, CBS NEWS (Sept. 30, 2016, 12:35 PM), <https://www.cbsnews.com/news/alabama-chief-justice-roy-moore-suspended-defying-feds-same-sex-marriage/> (reporting that Moore was forced from the bench for his continued and outright refusal to recognize the binding effect of *Obergefell*).

112. See Chip Brownlee, *Chief Justice Files Reply Brief in Judicial Ethics Appeal*, ALA. POL. REP. (Feb. 8, 2017), <http://www.alreporter.com/2017/02/02/chief-justice-files-reply-brief-in-judicial-ethics-appeal/> (stating that Moore filed a final brief with the Alabama Supreme Court, argued that the Court of the Judiciary had no authority to review his contentious Administrative Order, and declared that power rests solely with the Alabama Supreme Court).

113. Jenny Jarvie, *Suspended Alabama Chief Justice Roy Moore is Running for Senate to ‘Make America Good Again’*, L.A. TIMES (Apr. 26, 2017, 6:05 PM), <http://www.latimes.com/nation/la-na-alabama-senate-moore-20170426-story.html>.

114. See Colin Dwyer, *Gay Couple’s Lawsuit Against Kentucky Clerk Kim Davis Is Back On After Court Ruling*, NAT’L PUB. RADIO (May 3, 2017, 2:19 AM), <http://www.npr.org/sections/thetwo-way/2017/05/03/526615385/gay-couples-lawsuit-against-kentucky-clerk-is-back-on-after-appeals-court-ruling> (stating that Kim Davis “grabbed headlines in 2015”).

115. Many have questioned Davis’s bona fides as an advocate for the sanctity of traditional marriage as she has been divorced three times, married four times, and had twins out of wedlock. See *Revealed: Kentucky Clerk Refusing to Issue Gay Marriage Licenses Has Been Married FOUR Times and Gave Birth to Twins Out of Wedlock*, DAILY MAIL (Sept. 2, 2015, 11:19 AM), <http://www.dailymail.co.uk/news/article-3219147/Kentucky-clerk-Kim-Davis-married-FOUR-times->

office would no longer issue marriage licenses to *any* couples.<sup>116</sup> Four of her deputies shared her religious objection, and another was undecided on the issue.<sup>117</sup> The remaining deputy was willing to issue same-sex marriage licenses, but Davis forbade it because her name would appear on them.<sup>118</sup> Davis was acting in contravention of two directives from Governor Beshear to all county clerks directing them to issue same-sex marriage licenses, and:

[I]f you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, th[e]n obviously an honorable course to take is to resign and let someone else step in who feels that they can fulfill those duties.<sup>119</sup>

Several couples, including an opposite-sex couple, sued Davis in federal district court and sought a preliminary injunction ordering her to issue marriage licenses, arguing that her policy substantially interfered with their right to marry because it prevented them from getting licenses in their home county.<sup>120</sup> Davis argued that her right to free exercise of religion trumped the interference with their right to marry, which was “incidental,” since they could obtain licenses in several surrounding counties.<sup>121</sup>

On August 12, 2015, federal district court judge David Bunning issued a preliminary injunction against Davis, which was subsequently upheld by the Sixth Circuit Court of Appeals.<sup>122</sup> The U.S. Supreme Court denied a stay on August 31, 2015,<sup>123</sup> and, after Davis refused to comply, Judge Bunning jailed her for contempt.<sup>124</sup> Five days later, Judge Bunning released her from jail, after finding that five of her deputies were issuing marriage licenses as promised under oath, on condition that she not interfere with the

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gave-birth-wedlock.html (reporting court records showing she gave birth to twins after the first of three divorces).

116. *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015).

117. *Id.* at 932.

118. *Id.*

119. *Id.* (quoting Governor Beshear).

120. *Id.* at 929–30.

121. *Id.* at 929, 935.

122. *Id.* at 924, 929, 944 (granting the preliminary injunction); *Miller v. Davis*, No. 15-5880, 2015 U.S. App. LEXIS 23060, at \*4 (6th Cir. Aug. 26, 2015) (denying motion to stay the preliminary injunction).

123. *Davis v. Miller*, 136 S. Ct. 23, 23 (2015) (mem.).

124. *Defiant Ky. Clerk Jailed in Same-Sex Marriage Fight*, 84 U.S.L.W. No. 8, at 310 (Sept. 8, 2015).

efforts of her deputies to issue those licenses.<sup>125</sup> Davis's release became a big media event, with two prominent Republican candidates for President, Mike Huckabee and Ted Cruz, in attendance to support her.<sup>126</sup> It is clear that Davis publicly proclaimed victory and defiance while quietly accepting defeat.<sup>127</sup> In July 2017, Judge Bunning further ordered Kentucky to pay the attorneys who had sued Davis over her refusal to issue the licenses over \$200,000 in fees.<sup>128</sup>

In a less well-publicized case, Linda Summers, an Indiana deputy county clerk, refused to input data for a same-sex couple to be issued a marriage license in defiance of a memorandum from the Office of the Indiana Attorney General after Indiana's ban on same-sex marriage had been struck down by the federal court pre-*Obergefell*.<sup>129</sup> Her boss, Sally Whitis, the elected county clerk, directed Summers to do her job, but she still refused.<sup>130</sup> As a direct result, Whitis fired Summers, who proceeded to file a federal civil rights action against Whitis, claiming religious discrimination.<sup>131</sup> In December 2016, the court dismissed the lawsuit, reasoning that Summers was not fired for her religious beliefs, but for failure to carry out the duties of her job.<sup>132</sup>

After lower court rulings issued prior to *Obergefell* required North Carolina to permit same-sex marriage, its state legislature enacted a

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125. Andrew Wolfson, *Ky. Clerk Kim Davis Thanks Supporters on Release From Jail*, USA TODAY (Sept. 8, 2015), <http://www.usatoday.com/story/news/politics/2015/09/08/kim-davis-released-jail/71882274/>.

126. Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released From Kentucky Jail, Won't Say If She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html>.

127. In a similar vein, shortly after the Supreme Court's ruling, Texas Attorney General Ken Paxton declared that county clerks may refuse to grant marriage licenses on grounds of religious objections. See Sam Frizell, *Texas Attorney General Defies Same-Sex Marriage Ruling*, TIME (June 29, 2015), <http://time.com/3939652/texas-attorney-general-same-sex-marriage/> (reporting that the Texas Attorney General did not believe the Court was faithful to the Constitution).

128. *Kentucky Taxpayers Ordered to Pay \$222,695 in Attorney Fees in Same-Sex Marriage Case*, FLA. TIMES-UNION (July 25, 2017, 11:51 AM), <http://jacksonville.com/news/national/2017-07-25/kentucky-taxpayers-ordered-pay-222695-attorney-fees-same-sex-marriage-case/>; see also *Ermold v. Davis*, 855 F.3d 715, 719–20 (6th Cir. 2017) (holding that the plaintiffs' damages claim was not mooted by the Governor's signing of Senate Bill 216, which amended the Kentucky marriage license issuance process to no longer require that county clerks' names appear on the forms).

129. *Summers v. Whitis*, No. 4:15-cv-00093, 2016 WL 7242483, at \*1–2 (S.D. Ind. Dec. 15, 2016).

130. *Id.* at \*1.

131. *Id.*

132. See *id.* at \*7–8 (granting Whitis's motion for summary judgment).

“Religious Freedom Restoration Act” in 2015 over the Governor’s veto,<sup>133</sup> which provided *inter alia* that:

Every assistant register of deeds and deputy register of deeds has the right to recuse from issuing all lawful marriage licenses under this Chapter based upon any sincerely held religious objection. Such recusal shall be upon notice to the register of deeds and is in effect for at least six months from the time delivered to the register of deeds. The recusing assistant or deputy register may not issue any marriage license until the recusal is rescinded in writing. The register of deeds shall ensure for all applicants for marriage licenses to be issued a license upon satisfaction of the requirements as set forth in Article 2 of this Chapter.<sup>134</sup>

Thus, it appears that in North Carolina an assistant or deputy register of deeds may refuse on religious grounds to issue marriage licenses,<sup>135</sup> but he or she cannot do so selectively and issue licenses to some eligible couples and not to others.<sup>136</sup> Moreover, the register of deeds does not enjoy such a religious exemption.<sup>137</sup>

### *C. Judges Performing Wedding Ceremonies and Hearing Adoption Cases*

It is typical that a state marriage law will list various categories of civil officials who can solemnize marriages, in addition to members of the clergy.<sup>138</sup> These officials may include current and former state and federal judges, as well as mayors and other more or less prominent officials.<sup>139</sup> As with issuance of marriage licenses, the question quickly arose as to whether judges who are authorized by state law to perform weddings may opt not to

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133. *Ansley v. Warren*, No. 1:16-cv-00054, 2016 WL 5213937, at \*2 (W.D.N.C. Sept. 20, 2016), *aff'd* by 861 F.3d 512 (4th Cir. 2017).

134. N.C. GEN. STAT. § 51-5.5(b) (2015).

135. *Id.*

136. *See id.* (providing assistant or deputy register of deeds the opportunity to recuse themselves from “issuing all lawful marriage licenses . . .” (emphasis added)).

137. *See id.* § 51-5.5(d) (granting religious exclusions only to magistrates, assistant register of deeds, and deputy register of deeds).

138. *See* Robert E. Rains, *Marriage in the Time of Internet Ministers: I Now Pronounce You Married, But Who Am I To Do So?*, 64 U. MIAMI L. REV. 809, 838 (2010) (providing examples of the many different officials approved by state laws to solemnize marriages).

139. *See, e.g.*, 23 PA. CONS. STAT. § 1503(a) (1990) (listing the persons qualified to solemnize marriages).



perform same-sex weddings.<sup>140</sup> There is currently a split of (nonbinding) authority on the subject.<sup>141</sup>

Within three days of the *Obergefell* decision, the Nebraska Judicial Ethics Committee issued an advisory opinion that a judge or clerk magistrate who performs marriages may not refuse to perform same-sex marriages.<sup>142</sup> Such refusal would manifest “bias or prejudice based on sexual orientation” in violation of the Nebraska Revised Code of Judicial Conduct.<sup>143</sup> Referring the couple to another judge who would perform the marriage would not solve the problem, as that would likewise demonstrate bias.<sup>144</sup> However, “[a] judge or clerk magistrate may avoid such personal or religious conflicts by refusing to perform all marriages, because the performance of marriage ceremonies is an extrajudicial activity and not a mandatory duty.”<sup>145</sup>

In August 2015, the Supreme Court of Ohio Board of Professional Conduct issued an even stronger Advisory Opinion on the subject.<sup>146</sup> “A judge’s unilateral decision to refuse to perform same-sex marriages based on his or her own personal, religious, or moral beliefs ignores the holding in *Obergefell* and thus, directly contravenes the oath of office.”<sup>147</sup> Nor, contrary to the Nebraska opinion, if the judge had been performing marriages prior to *Obergefell*, could he or she simply stop performing them:

Regardless of whether the statutes authorizing the performance of civil marriages are deemed mandatory or permissive, the statutes reflect the legislative intent to grant citizens the opportunity to obtain a civil marriage from designated public officials. . . . A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs,

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140. Gabrielle Banks, Jayme Fraser & Mihir Zaveri, *Some Judges Stop Officiating Marriages After Same-Sex Ruling*, HOUS. CHRON. (Aug. 26, 2015, 2:21 PM), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Some-judges-stop-officiating-marriages-after-6465325.php>.

141. Anne Blythe, *NC Same-Sex Marriage Dispute Revived After Federal Ruling*, CHARLOTTE OBSERVER (Nov. 6, 2014, 1:55 PM), <http://www.charlotteobserver.com/news/local/article9228818.html>.

142. Neb. Jud. Ethics Comm., Op. 15-1, 1, 3 (2015), [https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1\\_0.pdf](https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1_0.pdf).

143. *Id.* at 1–2.

144. *Id.* at 2.

145. *Id.*

146. Ohio Bd. of Prof. Conduct, Op. 2015-1, 7 (2015), [https://www.supremecourt.ohio.gov/Boards/BOC/Advisory\\_Opinions/2015/Op\\_15-001.pdf](https://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf).

147. *Id.* at 3.

may be interpreted as manifesting an improper bias or prejudice toward a particular class.<sup>148</sup>

Less than two weeks later, the Supreme Court of Wisconsin Judicial Conduct Advisory Committee issued an opinion in line with that of Nebraska.<sup>149</sup> While a judicial officer who performs marriages cannot decline to do so for same-sex couples, he or she may simply decline to perform any marriages since “the performance of marriage ceremonies by judicial officers is a discretionary versus mandatory duty of those officers.”<sup>150</sup>

The North Carolina Religious Freedom Restoration Act, referenced above, permits individual magistrates to refuse to conduct marriages based on any sincerely held religious belief in opposition to same-sex marriage.<sup>151</sup> The statute further provides that if all the magistrates in a given county refuse to perform marriages, the North Carolina Administrative Office of the Courts (NCAOC) will arrange to bring in a willing magistrate from another county to perform marriages.<sup>152</sup> When three couples sued in federal court challenging these provisions,<sup>153</sup> alleging that the state had expended taxpayer money bringing out-of-county magistrates into a county where no magistrate would perform marriages,<sup>154</sup> the federal district court dismissed their complaint for lack of standing, and the Fourth Circuit has upheld that dismissal.<sup>155</sup>

In late April 2017, a Kentucky family court judge, W. Mitchell Nance, issued an order, stating that “he will recuse himself from adoption cases involving ‘homosexual parties . . . .’”<sup>156</sup> He asserted that this was “‘a matter

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148. *Id.* at 6–7.

149. *See* Wis. Jud. Conduct Advisory Comm., Op. 15-1, 1 (2015), <https://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878> (stating that “a judicial officer” may not “decline to be the ‘officiating person’ at the marriage of two persons of the same sex” based on “his or her own religious or personal beliefs”).

150. *Id.* at 4.

151. N.C. GEN. STAT. § 51-5.5(a) (2015).

152. *Id.* § 51-5.5(c).

153. *Ansley v. Warren*, 861 F.3d 512, 515 (4th Cir. 2017).

154. *Id.* at 516.

155. *Id.*

156. Terry Carter, *Kentucky Judge Recuses Himself from All Adoption Cases Involving Same-Sex Partners*, A.B.A. (May 1, 2017, 12:34 PM), [http://www.abajournal.com/news/article/kentucky\\_judge\\_recuses\\_himself\\_from\\_adoption\\_cases\\_involving\\_same\\_sex\\_partn/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/kentucky_judge_recuses_himself_from_adoption_cases_involving_same_sex_partn/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) (quoting Andrew Wolfson, *Judge Says He Won't Hear Gay Adoptions Because It Could Never Be in Child's Best Interest*, COURIER-J. (Apr. 28, 2017, 1:07 PM), <http://www.courier-journal.com/story/news/local/2017/04/28/judge-says-he-wont-hear-gay-adoptions-because-could-never-childs-best-interest/307579001/>).

of conscience' because [] 'under no circumstance' would 'the best interest of the child be promoted by the adoption by a practicing homosexual.'"<sup>157</sup>

*D. Other Governmental Benefits (and Detriments)*

With all the controversies involving governmental officials carrying out their duties toward same-sex couples, it is worthwhile to consider some of the many governmental benefits (and sometimes detriments) that flow from same-sex marriage. In the various state court cases addressing same-sex marriage prior to *Obergefell*, it was common for judges to allude to or list some of the various economic and legal rights that flow from state and federal recognition of a marriage, above and beyond any intangible benefits such as emotional commitment.<sup>158</sup> Thus, for example, in *Goodridge v. Department of Public Health*,<sup>159</sup> the Massachusetts decision that led to the state becoming the first to allow same-sex marriage, the Massachusetts Supreme Judicial Court (MSJC) stated: "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that 'hundreds of statutes' are related to marriage and to marital benefits."<sup>160</sup>

"With no attempt to be comprehensive," the MSJC then referenced property ownership, income taxation, homestead protection, inheritance rights, business rights, health insurance, pensions, etc.<sup>161</sup> Similarly, in *United States v. Windsor*, the Defense of Marriage Act (DOMA) case which itself involved federal estate taxation, the U.S. Supreme Court referenced multiple federal rights and duties flowing from federal recognition of a marriage,<sup>162</sup> including non-dischargeability of domestic support obligations under the Bankruptcy Code, burial rights for spouses of veterans, federal taxation, dependents' Social Security benefits, etc.<sup>163</sup> The *Windsor* decision, striking down Section 3 of federal DOMA, meant that the federal government would, in most instances, recognize as married same-sex couples who were validly married according to the law of their

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157. *Id.* (quoting Wolfson, *supra* note 156).

158. *See, e.g.*, Griego v. Oliver, 316 P.3d 865, 888 (N.M. 2013) (alluding to "federal and state benefits and protections" flowing from civil marriage); Baker v. State, 170 Vt. 194, 220, 744 A.2d 864, 883–84 (Vt. 1999) (listing the "benefits and protections" afforded by civil marriage); Lewis v. Harris, 908 A.2d 196, 215–16 (N.J. 2006) (outlining the "rights afforded to married couples").

159. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that exclusion of same-sex couples from civil marriage violated the Massachusetts Constitution).

160. *Id.* at 955.

161. *Id.* at 955–56.

162. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

163. *Id.* at 2694.

state.<sup>164</sup> Hence, Edie Windsor was entitled to a refund of the federal estate tax she had had to pay upon her spouse's death.<sup>165</sup>

It is worth mentioning that another case involving a same-sex couple was decided by the Supreme Court after *Obergefell*, but that case did not involve a marriage. In *V.L. v. E.L.*, two Alabama women were in a long-term relationship, during which one of them had three children (whom the two women raised together) through assisted reproduction technology.<sup>166</sup> During the relationship they rented a house in Georgia so the other woman could adopt the children there, as they were unable to have a same-sex adoption in Alabama.<sup>167</sup> At some time after the adoption, the women split up, and the mother who had given birth denied her former partner access to the children.<sup>168</sup> The former partner sued in Alabama, asking the Alabama court to register the Georgia adoption judgment and grant her "some measure of custody or visitation" (access) with the children.<sup>169</sup> The trial court granted the relief requested, but on appeal the Alabama Supreme Court ruled that the Georgia adoption decree was invalid because the Georgia court had lacked subject-matter jurisdiction over the case.<sup>170</sup>

In a brief, *per curiam* opinion, issued in March 2016, the U.S. Supreme Court unanimously reversed.<sup>171</sup> The Court ruled that Alabama was bound by the Full Faith and Credit Clause of the U.S. Constitution<sup>172</sup> to give legal effect to the Georgia court's adoption decree.<sup>173</sup> Because the two women were never married in any jurisdiction, the Court had no occasion to reference either *Windsor* or *Obergefell*.

In another visitation (access) case in state court with similar facts, *Obergefell* had a direct bearing and indeed dictated the result. In *Stankevich v. Milliron*, two Michigan women had been married in Canada in 2007.<sup>174</sup> One had been artificially inseminated and had a child whom the two women

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164. *Id.* at 2695–96.

165. *Id.* at 2686.

166. *V.L. v. E.L.*, 136 S. Ct. 1017, 1019 (2016) (*per curiam*).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1019–20.

171. *Id.* at 1022 (finding jurisdiction was proper and stating that there was "no established Georgia law to the contrary"). Justice Scalia died in February 2016, so it is impossible to know whether he would have joined the decision. See Jamie Gangel et al., *Antonin Scalia, Supreme Court Justice, Dies at 79*, CNN (Feb. 15, 2016, 7:22 AM), <http://www.cnn.com/2016/02/13/politics/supreme-court-justice-antonin-scalia-dies-at-79/index.html> (chronicling the life of Justice Antonin Scalia and his conservative opinions).

172. U.S. CONST. art. IV, § 1.

173. *V.L.*, 136 S. Ct. at 1019, 1022.

174. *Stankevich v. Milliron*, 882 N.W.2d 194, 195 (Mich. Ct. App. 2015).

raised together.<sup>175</sup> After the women separated, the biological mother denied her former partner access to the child, and the former partner sued.<sup>176</sup> The Michigan courts initially denied her suit because she had not adopted the child, and Michigan did not recognize the Canadian same-sex marriage.<sup>177</sup> But, after the *Obergefell* decision, the Michigan Supreme Court remanded the case to the Michigan Court of Appeals, which reversed itself and ruled that *Obergefell* dictated that Michigan recognize the Canadian marriage, giving the former partner standing to proceed with her claim.<sup>178</sup>

*Obergefell* also directly implicates adoption rights for same-sex couples, which were allowed in some states,<sup>179</sup> but prohibited in others. In *Campaign for Southern Equality v. Mississippi Department of Human Services*, a federal district court struck down Mississippi's statutory ban on adoptions by same-sex couples, relying directly on *Obergefell*'s reasoning that same-sex couples cannot be deprived of "marriage-related benefits."<sup>180</sup> "It . . . seems highly unlikely that the same court that held a state cannot ban gay marriage because it would deny benefits—expressly including the right to adopt—would then conclude that married gay couples can be denied that very same benefit."<sup>181</sup>

Additionally, *Obergefell* has been used, properly, to attack states that have refused to list same-sex spouses on death certificates as surviving spouses<sup>182</sup> and on birth certificates as second parents.<sup>183</sup> A federal court in Indiana has applied *Obergefell* to order the state to recognize children born to a birth mother in a same-sex marriage as being born in wedlock and to list her spouse as the other parent.<sup>184</sup> However, in December 2016, the

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175. *Id.*

176. *Id.*

177. *Id.* at 196.

178. *Id.* at 196, 199. A similar result was reached in *McLaughlin v. Jones*, 382 P.3d 118, 119–20 (Ariz. Ct. App. 2016), in which the biological mother unsuccessfully tried to deny parental rights to her estranged wife whom she had married in California in 2008.

179. See *In re Adoption of R.B.F.*, 803 A.2d 1195, 1196–97, 1202 (Pa. 2002) (holding that a legal parent is not required to relinquish parental rights in cases where a same-sex partner seeks to adopt the legal parent's child).

180. *Campaign for S. Equal. v. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016).

181. *Id.*

182. *Birchfield v. Armstrong*, No. 4:15-cv-00615, 2017 U.S. Dist. LEXIS 56276, at \*7–8 (N.D. Fla. Mar. 23, 2017) (holding that same-sex surviving spouse, upon presenting proper documentation, must be permitted to amend death certificate without the need for a court order).

183. See Brandi Grissom, *Texas to Allow Gay Spouses' Names on Birth, Death Certificates*, DALL. MORNING NEWS (Aug. 10, 2015), <http://www.dallasnews.com/news/politics/headlines/20150810-texas-to-allow-gay-spouses-names-on-birth-death-certificates.ece> (reporting a successful challenge to Texas's policy against same-sex spouses on birth and death certificates).

184. *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1079 (S.D. Ind. 2016).

Supreme Court of Arkansas reached a contrary conclusion in the case of *Smith v. Pavan* based on a narrow reading of *Obergefell*.<sup>185</sup> That decision did not stand long. In June 2017, the U.S. Supreme Court clarified this issue in a *per curiam* decision, summarily reversing the Arkansas Supreme Court, stating:

As this Court explained in *Obergefell v. Hodges*, the Constitution entitles same-sex couples to civil marriage “on the same terms and conditions as opposite-sex couples.” In the decision below, the Arkansas Supreme Court considered the effect of that holding on the State’s rules governing the issuance of birth certificates. When a married woman gives birth in Arkansas, state law generally requires the name of the mother’s male spouse to appear on the child’s birth certificate—regardless of his biological relationship to the child. According to the court below, however, Arkansas need not extend that rule to similarly situated same-sex couples: The State need not, in other words, issue birth certificates including the female spouses of women who give birth in the State. Because that differential treatment infringes *Obergefell*’s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage,” we reverse the state court’s judgment.<sup>186</sup>

It is noteworthy that Chief Justice Roberts, who had dissented in *Obergefell*, joined the majority in *Pavan*.<sup>187</sup> Newly confirmed Justice Gorsuch dissented in an opinion joined by Justices Thomas and Alito.<sup>188</sup>

In Kansas, a federal district court utilized *Obergefell* to enjoin state officials from, *inter alia*, refusing to allow same-sex married couples to file joint state tax returns as married persons, refusing to allow a member of a same-sex married couple to obtain a driver’s license in her married name,

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185. *Smith v. Pavan*, 505 S.W.3d 169, 183 (Ark. 2016). In a rather unusual move, Arkansas Chief Justice Brill began his partial dissent quoting from Nobel Laureate Bob Dylan’s song, “The Times They Are a-Changin’.” *Id.* (quoting BOB DYLAN, *The Times They Are a-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964)).

186. *Pavan v. Smith*, 137 S. Ct. 2075, 2076–77 (2017) (*per curiam*); *see also* Ayala v. Armstrong, No. 1:16-cv-00501-BLW, 2017 U.S. Dist. LEXIS 137277, at \*1–3, \*14 (internal citations omitted) ¶(D) (Idaho Aug. 24, 2017) (granting permanent injunction to former same-sex partner to be listed on birth certificate where state law had prevented the parties’ marriage).

187. *Compare Pavan*, 137 S. Ct. at 2079 (striking down differential treatment of same-sex spouses, with a dissenting opinion written by Justice Gorsuch, with whom only Justices Thomas and Alito joined), *with* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) (disputing that the fundamental right to marry requires a state to change its definition of marriage).

188. *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting).

and refusing to add same-sex spouses to a state employee's healthcare plan.<sup>189</sup>

The right to divorce is implicated, as well. Prior to *Obergefell*, some states that did not recognize same-sex marriage had refused to grant divorces to individuals who had entered into a same-sex marriage out of state on the theory that to do so would be to recognize the marriage.<sup>190</sup> While *Obergefell* was pending, just such a case was working its way through the Mississippi state court system.<sup>191</sup> A woman who had been lawfully married to another woman in California sought and was denied a divorce in Mississippi based on Mississippi's ban on same-sex marriage.<sup>192</sup> In November 2015, the Mississippi Supreme Court reversed because *Obergefell* mandated that result.<sup>193</sup> More recently, the Pennsylvania Superior Court ruled that two women, who had entered into a civil union in Vermont, could proceed with a divorce action in Pennsylvania, reasoning that a Vermont civil union should be considered the legal equivalent of a marriage under the Pennsylvania Divorce Code.<sup>194</sup>

Further, *Obergefell* has implications for restrictions on marriage for opposite-sex couples. In *Riker v. Lemmon*, a former prison cafeteria worker who lost her job and was barred from the prison after it was discovered that she had violated prison policy by engaging in a romantic relationship with a prisoner, subsequently sought permission to marry the inmate.<sup>195</sup> That permission was denied largely based on security concerns, and she sued in federal court, seeking *inter alia* "a single visit to the institution, of a short duration, for the limited purpose of marrying her fiancé."<sup>196</sup> In a decision issued before the Court decided *Obergefell*, the district court denied all relief, pertinently reasoning that the burden on Ms. Riker's right to marry was not substantial or direct because she "has not been absolutely prevented from marrying a large portion of the eligible population of spouses."<sup>197</sup> After the *Obergefell* decision, the Circuit Court of Appeals reversed and

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189. *Marie v. Mosier*, 122 F. Supp. 3d 1085, 1112–13 (D. Kan. 2015).

190. See Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce*, UTAH L. REV. 393, 413, 415–16 (2012) (describing cases where a same-sex divorce was refused because the reciprocal right to same-sex marriage was not recognized by that state).

191. *Czekala-Chatham v. State ex rel. Hood*, 195 So. 3d 187, 187 (Miss. 2015) (en banc).

192. *Id.* at 196.

193. *Id.* at 187.

194. *Neyman v. Buckley*, 153 A.3d 1010, 1011 (Pa. Super. Ct. 2016).

195. *Riker v. Lemmon*, 798 F.3d 546, 548 (7th Cir. 2015).

196. *Id.* at 550–51.

197. *Riker v. Lemmon*, No. 1:13-cv-00571, 2014 U.S. Dist. LEXIS 103558, at \*21–23 (S.D. Ind. July 30, 2014) (dismissing the complaint), *rev'd*, 798 F.3d 546 (7th Cir. 2015).

remanded the case, citing *Obergefell* for the proposition that “[t]he right to marry includes the right to select one’s spouse.”<sup>198</sup>

In a somewhat similar case, the Eastern District of Kentucky ruled that a county clerk could not refuse to grant a marriage license on the grounds that the man’s intended wife could not appear at the clerk’s office in person because of her incarceration.<sup>199</sup> Likewise, the Eastern District of Louisiana ruled that the state could not deny a marriage license to an opposite-sex couple simply because the man, who was a refugee, had never been issued a birth certificate by any country.<sup>200</sup>

It should not be supposed that state or federal recognition of marriage always confers benefits on one or both of the parties. The *Windsor* opinion provided some examples of detriments and duties.<sup>201</sup> Thus, “federal law takes into consideration a spouse’s income in calculating a student’s federal financial aid eligibility,” but until *Windsor*, this simply did not apply to same-sex couples validly married under state law.<sup>202</sup> Shortly after the *Obergefell* decision, the Congressional Research Service issued a report on the federal tax treatment of same-sex married couples.<sup>203</sup> Among its findings was that: “Marriage penalties are more likely among couples where both partners earn similar incomes. . . . A couple where both partners earn \$100,000, having a combined income of \$200,000, would experience a marriage [income] tax penalty of \$855.”<sup>204</sup> Moreover, “[m]arriage penalties may be more likely for couples with children for several reasons” (largely because of diminished eligibility for various tax credits).<sup>205</sup>

In short, and none too surprisingly, legal recognition of marriage is not necessarily an unalloyed blessing for one or both of the partners. An example of a situation in which one party to a same-sex union benefits, but the other loses as a result of *Obergefell*, occurred recently in Kentucky. Two women had entered into a civil union in New Jersey at a time when

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198. *Riker*, 798 F.3d at 555, 558 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015)).

199. *Jones v. Perry*, 215 F. Supp. 3d 563, 565 (E.D. Ky. 2016).

200. *Viet Anh Vo v. Gee*, No. 16-15639, 2017 U.S. Dist. LEXIS 125016, \*2-4 (E.D. La. Aug. 8, 2017).

201. *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013).

202. *Id.* at 2695.

203. See generally MARGOT L. CRANDALL-HOLLOCK ET AL., CONG. RES. SERV., R43157, THE FEDERAL TAX TREATMENT OF MARRIED SAME-SEX COUPLES (2015), <http://fas.org/sgp/crs/misc/R43157.pdf> (examining the broad-ranging tax implications of federally recognized same-sex marriage).

204. *Id.* at 5-6. In the vernacular, such couples are sometimes referred to as “DINK[s],” an acronym of “Dual Income, No Kids.” Melissa R. O’Rourke, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 S.D. L. REV. 343, 343 (1992).

205. CRANDALL-HOLLOCK ET AL., *supra* note 203, at 7 (describing that penalties are more likely for couples with children largely related to diminished eligibility for various tax credits, but also because of changes in filing status).



one of them was already pregnant.<sup>206</sup> They agreed to name the non-biological mother as the child's "father" on the birth certificate.<sup>207</sup> The parties filed for divorce in Kentucky.<sup>208</sup> After *Obergefell* was decided, the trial court granted the divorce and ruled that the non-biological mother was a legal parent, and ordered her to pay child support even though the parties had produced an affidavit from a man stating that he was the biological father.<sup>209</sup> The Kentucky Court of Appeals affirmed as a matter of law and equity.<sup>210</sup>

### *E. Religious Exemptions for Private Persons and Companies*

Probably the most contentious issues surrounding same-sex marriage involve whether private individuals and companies can, primarily on religious grounds, legally refuse to provide services they generally provide to other couples.<sup>211</sup> May a private chapel or other venue refuse to host a same-sex wedding, a florist refuse to provide flowers, a bakery refuse to bake a wedding cake, a professional photographer refuse to photograph the reception, a transportation service refuse to rent a limo, a caterer refuse to cater, a bridal boutique refuse to provide gowns,<sup>212</sup> etc.? These issues were already cropping up around the United States well before *Obergefell* in those jurisdictions that permitted same-sex marriage, and they have since escalated.<sup>213</sup>

No reasonable person would seriously contend that an American religious body can be ordered by any civil authority to perform weddings in violation of the tenets of that religion. Officiants in a church, mosque, or

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206. *Legg v. Commonwealth*, 500 S.W.3d 837, 839 (Ky. Ct. App. 2016).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 840 (finding that a father cannot be permitted in equity to claim a title inconsistent with his past conduct, and if the appellate court were to hold otherwise it would deny equal legal treatment to same-sex couples).

211. The U.S. Supreme Court, interpreting the federal Religious Freedom Restoration Act, ruled that a closely held corporation is a protected person that may exercise a religious objection to a federal requirement—in that case, certain mandates under the Affordable Care Act ("Obamacare"). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762, 2785 (2014).

212. See Curtis M. Wong, *Pennsylvania's W.W. Bridal Boutique Under Fire For Reportedly Turning Away Lesbian Brides-To-Be*, HUFFPOST: QUEER VOICES (Feb. 2, 2016), [http://www.huffingtonpost.com/2014/08/11/ww-bridal-boutique-lesbia\\_n\\_5668645.html](http://www.huffingtonpost.com/2014/08/11/ww-bridal-boutique-lesbia_n_5668645.html) (reporting on a bridal salon that refused to help a lesbian couple seeking to purchase wedding gowns).

213. See, e.g., *Gifford v. McCarthy*, 137 A.D.3d 30, 33–34 (N.Y. App. Div. 2016) (describing a venue owner who refused same-sex ceremony in 2012); *Knapp v. City of Coeur d'Alene*, 172 F. Supp. 3d 1118, 1120 (D. Idaho 2016) (involving private chapel who owners challenged anti-discrimination statute); Wong, *supra* note 212 (describing a bridal boutique that turned away same-sex brides).

synagogue will perform marriages according to the tenets of their religion, and the state has no say in the matter.<sup>214</sup> But, the issue becomes a great deal murkier when owners or operators of a wedding chapel that is open to the public decide to pick and choose what marriages they will and will not host or perform.

In Idaho, a married couple, who assert that both partners are “ordained ministers with the International Church of the Foursquare Gospel,” operating the for-profit Hitching Post Wedding Chapel, were confronted with a local nondiscrimination ordinance.<sup>215</sup> After the Ninth Circuit Court of Appeals struck down Idaho’s ban on same-sex marriage, they temporarily closed down the chapel and have since refused to perform or allow same-sex weddings on the premises.<sup>216</sup> Although the ordinance contained a religious exemption and the city asserted that the religious exemption would apply to them, they sued in federal court, asserting that they were in fear of its enforcement.<sup>217</sup> On March 25, 2016, the federal district judge dismissed all of their claims except for economic injuries for the single day of October 15, 2014, when they might have had a reasonable fear of enforcement.<sup>218</sup>

Other private wedding chapels have also refused to permit or perform same-sex weddings.<sup>219</sup> Even some Elvis-themed chapels in Las Vegas, the “[M]arriage [C]apital of the [W]orld,” have refused on religious grounds!<sup>220</sup>

Although the issue of wedding venues’ refusal to perform or permit same-sex marriage has been widespread, it appears that there has been only one reported merits decision on that subject to date. Cynthia and Robert Gifford own and operate Liberty Ridge Farm, LLC, in New York and rent

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214. See U.S. CONST. amend. I (prohibiting Congress from establishing a religion or enacting laws preventing free exercise of religion); see also *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–16 (1947) (outlining the First Amendment protections for religious freedom).

215. See Zack Ford, *For-Profit Wedding Chapel Sues After Idaho Legalizes Same-Sex Marriage*, THINKPROGRESS (Oct. 20, 2014, 4:40 PM), <http://thinkprogress.org/lgbt/2014/10/20/3581733/idaho-marriage-chapel-adf/> (reporting on the couple’s lawsuit against the City of Coeur D’Alene).

216. See *Knapp v. City of Coeur d’Alene*, 172 F. Supp. 3d 1118, 1133, 1135 (D. Idaho 2016) (noting the couple’s “insistence that they will refuse to perform same-sex wedding ceremonies”).

217. *Id.* at 1120.

218. *Id.* at 1120, 1134.

219. See, e.g., Grant Rodgers, *Grimes’ Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, DES MOINES REG. (Jan. 28, 2015, 6:49 PM), <http://www.desmoinesregister.com/story/news/investigations/2015/01/28/gortz-haus-owners-decide-stop-weddings/22492677/> (reporting on a private wedding venue in Iowa refusing a same-sex couple).

220. See Cavan Sieczkowski, *Elvis-Themed Las Vegas Chapel Refuses to Hold Gay Weddings*, HUFFINGTON POST (Oct. 20, 2014, 12:07 PM), [http://www.huffingtonpost.com/2014/10/20/elvis-themed-vegas-gay-weddings\\_n\\_6014550.html](http://www.huffingtonpost.com/2014/10/20/elvis-themed-vegas-gay-weddings_n_6014550.html) (reporting at least one Elvis-themed Las Vegas chapel refusing to marry same-sex couples “for Biblical reasons”). It is, of course, impossible to know what “the King’s” position on this subject would be.

out part of the farm for both religious and secular wedding ceremonies and receptions.<sup>221</sup> In October 2011, they refused to host a wedding of two women on religious grounds.<sup>222</sup> The women filed a discrimination complaint with the New York State Division of Human Rights, which awarded each of them \$1,500 in compensatory damages, imposed a \$10,000 fine, and ordered the Giffords to cease and desist their discriminatory practices.<sup>223</sup> The New York State Supreme Court, Appellate Division, upheld the Division's of Human Rights judgment against multiple challenges, including the Giffords' free exercise of religion.<sup>224</sup>

Likewise, there appears to be only one reported judicial decision on the refusal of a wedding photographer to be hired for a same-sex ceremony. In *Elane Photography v. Willock*, a private company in New Mexico, which acknowledged that it is a public accommodation, refused to be hired for a same-sex "commitment ceremony."<sup>225</sup> (This was not a wedding *per se*, as the state of New Mexico had not yet authorized same-sex marriages.<sup>226</sup>) One of the women who had been denied service filed a discrimination complaint with the New Mexico Human Rights Commission, which ruled in her favor.<sup>227</sup> *Elane Photography* appealed through the state courts to the New Mexico Supreme Court, which upheld the decision.<sup>228</sup> The court rejected all of *Elane's* defenses, including free speech and free exercise of religion.<sup>229</sup>

In February 2017, the Washington State Supreme Court upheld damages and an injunction against a flower shop and its owner for refusal to provide flowers for a same-sex wedding.<sup>230</sup> The court rejected the owner's claims of violation of her rights to free speech (i.e., against "compelled speech"), free exercise of religion, and free association.<sup>231</sup>

The Oregon Bureau of Labor and Industry ordered bakery owners to pay an astonishing \$135,000 in damages for emotional suffering to a same-

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221. *Gifford v. McCarthy*, 137 A.D.3d 30, 33 (N.Y. App. Div. 2016).

222. *Id.* at 34.

223. *Id.*

224. *Id.* at 40–42 (finding no violation of First Amendment rights).

225. *Elane Photography v. Willock*, 309 P.3d 53, 58–59, 61 (N.M. 2013).

226. *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (redefining civil marriage in December of 2013 to include same-sex couples).

227. *Elane Photography*, 309 P.3d at 60.

228. *Id.*

229. *Id.* at 60.

230. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548, 568 (Wash. 2017).

231. *Id.* at 556, 568.

sex couple to whom they had denied service.<sup>232</sup> While such a large fine seems grossly disproportionate, it was clearly meant to send a signal to business owners in general not to discriminate against same-sex couples or risk grave consequences.<sup>233</sup>

Similarly, in *Craig v. Masterpiece Cakeshop*, a Colorado court of appeals upheld the decision of that state's Human Rights Commission that a "cakeshop" violated that state's Anti-Discrimination Act by refusing to design and create a cake to celebrate a same-sex wedding.<sup>234</sup> The owner, Phillips, had asserted that requiring him to do so violated his rights to free exercise of religion and to free speech—in this case, his alleged right not to be compelled to speak (i.e., tacitly approve of the wedding).<sup>235</sup> In June 2017, the U.S. Supreme Court agreed to hear the case to resolve the following question:

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.<sup>236</sup>

This high-profile case has attracted multiple amici, with, among others, the United States supporting petitioner Masterpiece Cakeshop<sup>237</sup> and the American Bar Association supporting the respondents.<sup>238</sup>

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232. *Sweet Cakes by Melissa' Pays \$135,000 Fine to Outraged Gay Couple*, BREITBART NEWS (Dec. 28, 2015), <http://www.breitbart.com/big-government/2015/12/28/sweet-cakes-by-melissa-pays-135000-fine-to-outraged-gay-couple/>.

233. See Casey Parks, *Oregon Lawyers: Sweet Cakes by Melissa \$135,000 Damage Award was Justified*, OREGONIAN (Aug. 25, 2016, 10:42 AM), [http://www.oregonlive.com/portland/index.ssf/2016/08/oregon\\_lawyers\\_sweet\\_cakes\\_by.html](http://www.oregonlive.com/portland/index.ssf/2016/08/oregon_lawyers_sweet_cakes_by.html) (discussing damage awards in a variety of cases involving same-sex discrimination).

234. See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276, 280 (Colo. App. 2015) (explaining that the Colorado appellate court upheld the Commission's finding that the refusal to serve the couple was because of the couple's sexual orientation).

235. *Id.* at 276, 283.

236. See *Petition for Writ of Certiorari, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111), at i (stating the question presented); *Masterpiece Cakeshop*, 137 S. Ct. at 2290 (granting writ of certiorari).

237. Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111).

238. Brief of the Am. Bar Ass'n as Amicus Curiae Supporting Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 137 S. Ct. 2290 (2017) (No. 16-111).

*F. Religious Freedom Restoration Acts*

In 1993, Congress enacted the federal Religious Freedom Restoration Act (RFRA) to prohibit the federal government from taking any action that substantially burdens the free exercise of religion, unless that action constitutes the least restrictive means of serving a compelling public interest.<sup>239</sup> Then, in 1997, the Supreme Court ruled in *City of Boerne v. Flores*, that the federal RFRA was unconstitutional to the extent that it tried to control the actions of state and local government.<sup>240</sup> As a result, by 2015, 21 states had enacted their own varying versions of religious freedom legislation.<sup>241</sup>

Pennsylvania's Religious Freedom Protection Act, enacted in 2002, provides that (with certain exceptions) neither the Commonwealth nor its political subdivisions may "burden a person's free exercise of religion, including any burden which results from a rule of general applicability."<sup>242</sup> But the government may impose such a burden, provided that the burden is "[i]n furtherance of a compelling [state] interest" and is "[t]he least restrictive means of furthering th[at] compelling [state] interest."<sup>243</sup>

In the *Elane Photography* case, discussed above,<sup>244</sup> Elane argued that compelling her to photograph a same-sex couple's ceremony would violate New Mexico's Religious Freedom Restoration Act (NMRFRA).<sup>245</sup> The New Mexico Supreme Court disagreed because the NMRFRA was not meant to apply to suits between private litigants, but is rather a restriction on actions by government agencies that interfere with free exercise.<sup>246</sup>

In response to same-sex marriage rulings, rulings against businesses refusing to extend their services to same-sex couples, local ordinances protecting sexual minorities against discrimination, and a now-rescinded

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239. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (applying the RFRA standard, the Court held that the action did not constitute the least restrictive means of serving the government's interest).

240. See *City of Boerne v. Flores*, 521 U.S. 507, 534, 536 (1997) (explaining that RFRA upset the separation of powers and the federal balance by intruding on the states' general authority).

241. *2015 State Religious Freedom Restoration Legislation*, NAT'L CONF. STATE. LEGISLATORS (Sept. 3, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx>.

242. Religious Freedom Protection Act, 71 PA. STAT. AND CONS. STAT. ANN. § 2404(a) (West 2002).

243. *Id.* § 2404(b).

244. See *supra* notes 225–29 and accompanying text (discussing *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013)).

245. *Elane Photography*, 309 P.3d at 60.

246. *Id.* at 76. Elane may well have had a telling argument as the U.S. Supreme Court has ruled that a state court's enforcement of a private restrictive covenant constitutes state action. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

Obama administration federal interpretation concerning school bathrooms for transgender students,<sup>247</sup> several states have considered, and some have enacted, new versions of state religious freedom laws intended to protect such businesses. The governor of North Carolina, who signed such a law in March 2016, intended, *inter alia*, to nullify provisions in a Charlotte ordinance expanding protections for gays and lesbians.<sup>248</sup> A few days later, the governor of Georgia vetoed a similar measure that would have insulated businesses refusing service to same-sex couples on religious grounds.<sup>249</sup>

In April 2016, Mississippi Governor Phil Bryant signed into law the “Protecting Freedom of Conscience from Government Discrimination” Act.<sup>250</sup> The Act was intended to protect persons who refuse to provide services to people because of religious objection to same-sex marriage.<sup>251</sup> Thirteen individuals and two organizations promptly sued in federal court to enjoin the law from taking effect.<sup>252</sup> On June 30, 2016, the day before the law was to go into effect, federal Judge Carlton W. Reeves issued a preliminary injunction to block it.<sup>253</sup> Judge Reeves found that the law established preferred religious beliefs in violation of the Establishment Clause, and that its broad religious exemption comes at the expense of other citizens.<sup>254</sup> Governor Bryant has indicated that there will be an “aggressive appeal” of the ruling.<sup>255</sup>

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247. See *Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF JUSTICE, EDUC. (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (summarizing schools’ obligations under Title IX during the Obama administration).

248. Steve Harrison, *N.C. Gov Pat McCrory Signs into Law Bill Restricting LGBT Protections*, CHARLOTTE OBSERVER (March 23, 2016, 5:48 PM), <http://www.charlotteobserver.com/news/local/article67845317.html>.

249. *Georgia Governor Vetoes Religious Exemptions Bill*, TELEGRAPH HERALD (March 28, 2016), [http://www.thonline.com/news/national\\_world/article\\_ce5d679a-f4fa-11e5-ac9f-07236633ff48.html/](http://www.thonline.com/news/national_world/article_ce5d679a-f4fa-11e5-ac9f-07236633ff48.html/).

250. Camila Domonoske, *Mississippi Governor Signs “Religious Freedom” Bill Into Law*, NAT’L PUB. RADIO (Apr. 5, 2016, 12:55 PM), <http://www.npr.org/sections/thetwo-way/2016/04/05/473107959/mississippi-governor-signs-religious-freedom-bill-into-law/>.

251. *Id.*

252. *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016).

253. *Id.* at 724.

254. *Id.* at 719, 721.

255. Neely Tucker, *U.S. District Judge Strikes Down Mississippi’s “Religious Freedom” Law*, WASH. POST (July 1, 2016), [https://www.washingtonpost.com/lifestyle/style/us-district-judge-strikes-down-mississippi-religious-freedom-law/2016/07/01/f98dc2ca-3ec9-11e6-a66f-aa6c1883b6b1\\_story.html?utm\\_term=.766ae8a6d48b](https://www.washingtonpost.com/lifestyle/style/us-district-judge-strikes-down-mississippi-religious-freedom-law/2016/07/01/f98dc2ca-3ec9-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.766ae8a6d48b). Judge Reeves had already struck down application of the law to protect clerks who refused to provide same-sex marriage licenses on religious grounds. *Id.*

## III. THE FUTURE?

It should by now be abundantly clear that *Obergefell* has not ended the battles surrounding same-sex marriage. Even had the decision been unanimous, it would have been controversial. But the fact that four Justices, including the Chief Justice, attacked the decision as a judicial usurpation of power striking at the very heart of democracy has given impetus and imprimatur to those who oppose it.<sup>256</sup> Arguably, the four dissenters have harmed the status of the Court itself by giving fodder to those who oppose not only *Obergefell*, but other decisions as well, and consider themselves not bound by decisions with which they disagree. This would be extremely unfortunate.

At this writing, the United States is in political and legal flux. Justice Scalia, a reliable vote against all decisions advancing gay rights,<sup>257</sup> died in February 2016.<sup>258</sup> The next month, President Obama nominated Circuit Court Judge Merrick Garland to replace Scalia on the Court, but Senate Republicans refused to even consider the nomination.<sup>259</sup>

As the 2016 presidential election approached, the two main political parties officially took diametrically opposing views on these issues in their official party platforms. The Republican Platform included the following language:

[O]nly by electing a Republican president in 2016 will America have the opportunity for up to five new constitutionally-minded Supreme Court justices appointed to fill vacancies on the Court. Only such appointments will enable courts to begin to reverse the long line of activist decisions—including . . . *Obergefell* . . . that have usurped Congress's and states' lawmaking authority . . . . We support the right of the people to conduct their businesses in accordance with their religious beliefs and

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256. See Mark Strasser, *Obergefell, Dignity, and the Family*, 19 J. GENDER RACE & JUST. 317, 348–49 (2016) (discussing the future implications of the four vehemently written dissents in *Obergefell* as possible grounds for undermining non-unanimous opinions).

257. See Robert E. Rains, *The Future of Justice Scalia's Predictions of Family Law Doom*, 29 BYU J. PUB. L. 353, 353–55 (2015) (listing “vehement dissent[s]” from Justice Scalia in several gay-rights cases).

258. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

259. Stephen Collinson et al., *Obama Nominates Merrick Garland to Supreme Court*, CNN (March 16, 2016, 5:09 PM), <http://www.cnn.com/2016/03/16/politics/obama-supreme-court-announcement/index.html>.

condemn public officials who have proposed boycotts against businesses that support traditional marriage.<sup>260</sup>

In stark contrast, the 2016 Democratic Party Platform stated:

Democrats applaud last year's decision by the Supreme Court that recognized that LGBT people—like other Americans—have the right to marry the person they love. . . . Democrats will fight for the continued development of sex discrimination law to cover LGBT people. . . . We support a progressive vision of religious freedom that respects pluralism and rejects the misuse of religion to discriminate.<sup>261</sup>

Within days of his inauguration, newly elected President Trump nominated Judge Neil M. Gorsuch to fill Scalia's vacant seat on the Court.<sup>262</sup> Gorsuch was confirmed by the U.S. Senate after that body changed its rules to permit confirmation to a Supreme Court seat by a simple-majority vote.<sup>263</sup> Gorsuch is widely viewed as sharing Scalia's legal philosophy (and to some extent his writing style).<sup>264</sup> He quickly fulfilled his supporters' hopes by dissenting from the summary reversal of Arkansas's refusal to automatically list same-sex spouses as second parents on birth certificates.<sup>265</sup>

Moreover, several of the remaining justices are hardly young. Kennedy was born in 1936, Ginsburg in 1933, and Breyer in 1938.<sup>266</sup> All three have been staunch supporters of gay rights and were in the majority on *Obergefell*.<sup>267</sup> Actually, it is not unlikely that President Trump will have

260. REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016 10, 12 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).

261. DEMOCRATIC NAT'L COMM., 2016 DEMOCRATIC PARTY PLATFORM 17 (2016), [http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016\\_DNC\\_Platform.pdf](http://s3.amazonaws.com/uploads.democrats.org/Downloads/2016_DNC_Platform.pdf).

262. Julie Hirschfield et al., *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), [https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?\\_r=0](https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0).

263. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

264. Adam Liptak, *In Judge Gorsuch, an Echo of Scalia in Philosophy and Style*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/neil-gorsuch-supreme-court-nominee.html>.

265. See *supra* notes 185–88 and accompanying text (discussing the Court's opinion in *Pavan v. Smith*, 137 S. Ct. 2075, 2076–77, 2079 (2017) (per curiam)).

266. Biographies of Current Justices, U.S. SUP. CT., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 4, 2017).

267. Scott Patrick Johnson, *An Analysis of the U.S. Supreme Court's Decision Making in Gay Rights Cases (1985-2000)*, 27 OHIO N.U. L. REV. 197, 225–26 (2001).



more than one seat on the Court to fill, which could change its overall ideological balance.<sup>268</sup> Only one thing is certain: the struggles for and against gay rights in the United States will continue far into the indefinite future.

#### IV. A WAY FORWARD?

Advocates for the rights of sexual minorities quite reasonably want the same rights, on the same terms, as everyone else. Unquestionably, that wish runs counter to many persons' sincerely held religious or moral beliefs. Either side can, and often does, take an absolutist approach.<sup>269</sup> Sexual minorities often want to compel all people to recognize and deal with them as equals in all matters, including matters with religious overtones.<sup>270</sup> People who object for sincere religious reasons (or possibly less sincere and less religious reasons) often want not only to refuse to accommodate sexual minorities, but, as in the cases of Roy Moore and Kim Davis, to prevent others from doing so.<sup>271</sup>

Cogent arguments can be made on each side of this divide. Sexual minorities may justifiably argue that private prejudices can never be the basis for public policy.<sup>272</sup> They may assert that public officials are sworn to uphold the law, and if they feel they cannot do so, their duty is to resign. They may argue that private individuals or entities, for-profit or otherwise, which enter into the stream of commerce, must make their services available to all individuals on an equal basis. Further, should it become acceptable for public officials or private entities providing public accommodations to discriminate on the basis of sexuality, this will readily lead to other forms of divisive discrimination. For instance, could a baker refuse to bake a cake or a florist refuse to provide flowers for a marriage involving an interracial couple, an interfaith couple, a Jewish or Muslim or Greek couple, a second marriage, a marriage where the parties are "living in sin," a marriage that has already produced a child, a marriage where the bride is pregnant, a marriage where one of the parties is not a virgin, etc.? Recognizing that prejudice will not end overnight with or without a Supreme Court decision, is it not better to enforce nondiscrimination with

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268. Eric Segall, Opinion, *What Will Trump's Supreme Court Look Like?*, NEWSWEEK (Nov. 17, 2016, 7:50 AM), <http://www.newsweek.com/what-will-trumps-supreme-court-look-521581/>.

269. See Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 62–63 (2006) (explaining how opposing groups "tend to talk past each other").

270. *Id.*

271. *Id.* at 63.

272. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such [racial] prejudices but neither can it tolerate them.").

the hope that, over time, prejudice will dissipate? Probably relatively few Americans today really believe that stores should be allowed to refuse service based on race or religion, or that black Americans should have to sit in the back of the bus, as was the law in many places until our country took a firm stand on these matters a half century ago.<sup>273</sup>

On the other side, persons of certain religious beliefs may assert that they should not be compelled to commit acts that force them to commit what they believe to be sin, nor be complicit in sin, and that the Free Exercise Clause was specifically designed to prevent such a result. They may assert that at least as long as sexual minorities have other options readily available to them to achieve their desired ends (for instance, a marriage license issued by the clerk at the next window or bouquets from another local florist), those with religious objections should be allowed to adhere to their sincere beliefs. They may assert that they should be protected against compelled speech they find objectionable.<sup>274</sup> They might ask whether, if they can be forced to bake a cake for a same-sex marriage, a bakery owned by a same-sex couple could be compelled to bake a cake with an anti-gay message.<sup>275</sup> They may assert that compelling individuals to act against their sincere beliefs or risk a heavy fine or going out of business will only heighten antagonisms, not diffuse them.

Recognizing that no solution to this dilemma will please everyone, I offer the following as a possible roadmap:

1. All government officials, at all levels, must perform the same services for same-sex couples they perform for all other couples, **unless**:
  - a. the service is immediately made available by another government official,
  - b. with no delay or inconvenience to the applicant(s), and
  - c. at no or insignificant expense to the public.
2. Private entities operating public accommodations (wedding chapels, florists, photographers, bakers, seamstresses, etc.) must accommodate the entire public, **unless**:

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273. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (striking down “separate but equal” segregation laws in public education on equal protection grounds under the Fourteenth Amendment).

274. *See* *Glickman v. Wileman Bros. & Elliott, Inc.*, 512 U.S. 457, 470–72 (1997) (distinguishing forced participation of financing generic advertising from impermissible actions that require individuals to seemingly subscribe to an ideological message, even if they personally object).

275. This is not a fanciful hypothetical. The Colorado Court of Appeals in the *Masterpiece Cakeshop* case distinguished prior decisions of the Colorado Civil Rights Division that bakeries had not violated the Colorado Anti-Discrimination Act when they had refused, for example, to bake bible-shaped cakes with inscriptions such as, “Homosexuality is a detestable sin. Leviticus 18:2.” *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 282 n.8 (Col. App. 2015).

a. a religious objector would be compelled to make **explicit** speech contrary to his or her sincerely held religious beliefs, such as:

i. an officiant being compelled to perform a marriage ceremony contrary to his or her religious beliefs, or

ii. a baker being compelled to explicitly endorse same-sex marriage (not merely bake and decorate a cake).

Unquestionably, the compromise above would leave many people, on both sides of our cultural/religious divide, unhappy, and leave many questions to be litigated. How much public expense is insignificant, when does nonverbal speech become explicit, etc.?

On the other hand, a clear ruling by the Supreme Court in the pending *Masterpiece Cakeshop* case that bakers have no constitutional right to refuse their services for same-sex weddings would have the advantage of providing a relatively clear rule for bakeries and most other private businesses, although wedding chapels and venues might perhaps have stronger claims for an exception.<sup>276</sup> But such a ruling would also invite a hodgepodge of state and local legislation trying to carve out exceptions to the nondiscrimination rule.<sup>277</sup>

A ruling that bakers do have a constitutional right not to provide their services would likewise settle that matter, but leave unclear the status of florists, photographers, etc. Advocates for same-sex couples could reasonably argue that making a floral arrangement or sewing a wedding dress does not entail the sort of expressive conduct involved in making icing on the cake saying, for instance, “God Bless the Marriage of Mary and Sue.”

No solution will satisfy all parties. Perhaps it is time to look for compromise.

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276. Terri R. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86, 88 (2017) (arguing that cases like *Masterpiece Cakeshop* will improve insight into future cases); see also Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL’Y REV. 25, 46–47 (2015) (asserting that existing institutions such as chapels may be exempted).

277. See *supra* nn.239–255 and accompanying text (describing the rise of new religious freedom legislation in response to rulings, laws, and executive action on nondiscrimination).