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IMPLEMENTING MARRIAGE EQUALITY IN AMERICA

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INTRODUCTION

In June, the Supreme Court held that state proscriptions on same-sex marriage violate the Fourteenth Amendment. *Obergefell v. Hodges*[1] declared that same-sex couples possess a fundamental right to marry but left implementation's daily particulars to federal, state, and local officials. Because formal recognition of marriage equality is a valuable first step but realizing actual marriage equality will necessitate careful implementation of the Justices' mandate, this effectuation deserves analysis.

Part I principally reviews *Obergefell*'s rationale for formal marriage equality. Part II assesses implementation of the Court's mandate. Detecting that a few states and numerous localities have yet to provide comprehensive marriage equality, Part III proffers suggestions for attaining complete equality.

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

I. BRIEF HISTORY OF MARRIAGE EQUALITY

Marriage equality's origins and growth warrant limited review here as they have been analyzed elsewhere,[2] and recent developments have greatest relevance. Justice Kennedy, writing for the majority in *United States v. Windsor*,[3] held that section three of the Defense of Marriage Act (DOMA) contravened the Fourteenth Amendment[4] because it harmed same-sex couples and their children, but he did not expressly address the constitutionality of state bans on same-sex marriage.[5]

Relying on *Windsor*, nearly thirty district courts invalidated these restrictions, and four appeals courts affirmed district-court judgments, holding that state bans violated the Due Process Clause or the Equal Protection Clause.[6] The Sixth Circuit, however, reversed district-court decisions overturning bans.[7] The Supreme Court resolved the case in June.

Justice Kennedy, writing for the *Obergefell* majority, declared that the Constitution promises all individuals "liberty . . . to define and express their identity," which petitioners sought "by marrying

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2. *See generally* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999) (analyzing the American legal issues concerning gender and sexual nonconformity); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013) (chronicling the American gay rights and marriage equality movements); MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON (2014) (describing the political history of marriage equality).

3. United States v. Windsor, 133 S. Ct. 2675 (2013); *see* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 866–74 (2014) (discussing the ruling in *Windsor*). Two earlier cases involving homosexuality presaged *Windsor*: *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 588 (2003).

4. *Windsor*, 133 S. Ct. at 2695; *see* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 140–41 (2013).

5. *Windsor*, 133 S. Ct. at 2694–96 ("By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages."); *see id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage." (citation omitted)). *But see id.* at 2697 (Scalia, J., dissenting) (stating that he had "heard such 'bald, unreasoned disclaimer[s]' before" (alteration in original) (citing *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting))).

6. *See generally* ALLIANCE FOR JUSTICE, LOVE AND THE LAW: FEDERAL CASES CHALLENGING STATE BANS ON SAME-SEX MARRIAGE (2015), http://www.afj.org/reports/same-sex-marriage-report [http://perma.cc/N7AM-XP4Q] (reviewing judicial actions on same-sex marriage in each circuit prior to *Obergefell*).

7. *Id.* at 8–11.

someone of the same sex and having their marriages deemed lawful" similarly to opposite-sex couples.[8] The opinion stated that history reveals marriage's "transcendent" significance and the institution's "continuity and change" across time.[9] It also observed that evolving appreciation defines a nation in which "new dimensions of freedom become apparent to new generations," a "dynamic" that lesbian and gay rights witness,[10] as lesbian and gay persons have begun living more openly, provoking substantial discussion and enhanced tolerance.[11]

The majority primarily invoked due process which safeguards fundamental liberties, encompassing most of the Bill of Rights and "personal choices [that are] central to individual dignity and autonomy."[12] The opinion deemed identifying and protecting those rights "an enduring part of the judicial duty to interpret the Constitution."[13] Justice Kennedy stated that the drafters and ratifiers of the Bill of Rights and Fourteenth Amendment "did not presume to know the extent of freedom in all of its dimensions," thereby choosing to entrust future generations with a basic charter protecting liberty even as its meaning evolved.[14] For decades the Court has "appl[ied] these established tenets" of due process to hold that the Constitution safeguards the right to marry.[15] The opinion contended that "the Court must respect the basic reasons why the right . . . has

8. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015). For helpful analyses of *Obergefell*, see Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19–28 (2015); Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 162–79 (2015). Plaintiffs' factual situations showed their cases' urgency. *Obergefell*, 135 S. Ct. at 2594–95.

9. *Obergefell*, 135 S. Ct. at 2593–94. For a recounting of the deep changes in marriage's structure over time, which ultimately strengthened it, see *id.* at 2595–96.

10. *Id.* at 2596.

11. *Id.* (observing that lesbian and gay rights litigation has coincided with a "shift in public attitudes toward greater tolerance").

12. *Id.* at 2597. The opinion identified "intimate choices that define personal identity and beliefs" as examples of "personal choices central to individual dignity." *Id.*; *see generally* Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CALIF. L. REV. CIRCUIT 117 (2015) (demonstrating "how *Obergefell* shifts dignity's focus from respect for the freedom to choose toward the respectability of choices and choice makers"); Tribe, *supra* note 8, at 17 (propounding the "equal dignity" concept that *Obergefell* articulates).

13. *Obergefell*, 135 S. Ct. at 2598. Judges must use "reasoned judgment" to detect interests "so fundamental that the State must accord them its respect." *Id.*

14. *Id.*; *see* Tribe *supra* note 8, at 24 (emphasizing the "importance of dialogue, both among people and institutions . . . across the centuries").

15. *Obergefell*, 135 S. Ct. at 2598.

been long protected" when evaluating whether its cases' rationales apply to same-sex couples.[16]

This assessment drove the majority's conclusion that these "couples may exercise the right to marry."[17] More specifically, "[t]he four principles and traditions" that show the reasons why marriage is considered fundamental "apply with equal force to same-sex couples."[18] The first of these four principles and traditions is that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy," because marriage-related decisions rank "among the most intimate [choices] that an individual can make."[19] A second principle revealing the marriage right's fundamental nature is that "it supports a two-person union unlike any other in its importance to the committed individual[s]."[20] "[S]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association."[21]

The majority proclaimed the third principle was that the right to marry provides children and families benefits.[22] For instance, "[e]xcluding same-sex couples from marriage" stigmatizes their children with the belief that "their families are somehow lesser."[23] Finally, the opinion identified the fourth principle: "[M]arriage is a keystone of our social order," a notion witnessed in the increasing advantages, responsibilities, and rights which states bestow on married couples.[24] Exclusion from marriage makes same-sex couples forfeit this "constellation of benefits," despite there being "no difference between same- and opposite-sex couples with respect to this principle."[25] This contravenes the fundamental right to marry

16. *Id.* at 2599.

17. *Id.*

18. *Id.* For an analysis of these principles and traditions, see Yoshino, *supra* note 8, at 164.

19. *Obergefell*, 135 S. Ct. at 2599. They resemble choices on "contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution." *Id.*

20. *Id.* Marriage "dignifies couples who 'wish to define themselves by their commitments to each other.'" *Id*. at 2600 (quoting United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).

21. *Id.* (citing Lawrence v. Texas, 539 U.S. 588, 597 (2003)).

22. *Id.* The right to marry "draws meaning from related rights of childrearing, procreation, and education," all of which can be characterized as a "unified whole." *Id.* (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

23. *Id.* (emphasizing that families without marriages are susceptible to stigma because they lack "the recognition, stability, and predictability [that] marriage offers").

24. *Id.* at 2601 (listing some of the benefits afforded to married couples).

25. *Id.*

while inflicting stigma and injury that the Due Process Clause prohibits.[26]

Justice Kennedy admitted that *Washington v. Glucksberg*[27] mandated a narrow definition of liberty in the Due Process Clause "with central reference to specific historical practice[],"[28] but the marriage opinions employed the right "in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right."[29] Justice Kennedy concomitantly maintained that defining rights by those who formerly enjoyed them would allow historical practices to "serve as their own continued justification" and stop new groups from "invok[ing] rights once denied."[30] The majority deemed "[t]he right to marry . . . fundamental as a matter of history and tradition," but it found that fundamental rights also emanate from a "better informed understanding of how constitutional imperatives define a liberty" that is vital today.[31]

Justice Kennedy stated that many individuals and groups premise resistance to same-sex marriage on "decent and honorable religious or philosophical" ideas;[32] however, once "sincere, personal opposition becomes enacted law and public policy," it places government's stamp on "an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[33] Denying the right to marry to same-sex couples "disparage[s] their choices and diminish[es] their personhood."[34]

The opinion argued that the Equal Protection Clause also safeguards same-sex couples' right to marry because it is intimately connected to the Due Process Clause even though they comprise

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26. *Id.* at 2602.

27. Washington v. Glucksberg, 521 U.S. 702 (1997).

28. *Obergefell*, 135 S. Ct. at 2602 (observing that this "approach may have been appropriate" for the right of physician-assisted suicide at issue in *Glucksberg*).

29. *Id.*; *see* Yoshino, *supra* note 8, at 149 (contrasting *Glucksberg*'s "closed-ended formulaic approach" with the Court's preference in *Obergefell* for an "open-ended common law approach widely associated with Justice Harlan's dissent in *Poe v. Ullman*").

30. *Id.*; *see* Tribe, *supra* note 7, at 18–19 (arguing that Kennedy "deftly demonstrated" the circularity of the dissenters' argument that "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage").

31. *Obergefell*, 135 S. Ct. at 2602.

32. *Id.*

33. *Id.*; *see id.* at 2607 (stressing that the First Amendment protects religion and adherents to religious doctrines, who continue opposing marriage equality).

34. *Id.* at 2602.

independent precepts.[35] In particular situations, each may rest on different tenets and identify the right's essence more accurately, even while both may converge to pinpoint and define the right.[36] That dynamic, the Court held, "also applies to same-sex marriage," as the "challenged laws [not only] burden the liberty of same-sex couples" but also infringe equality's "central precepts."[37] In particular, "same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."[38] Accordingly, equal protection, like due process, "prohibits this unjustified infringement of the fundamental right to marry."[39]

These ideas prompted the majority's conclusions that the "right to marry is a fundamental right inherent in . . . liberty," and under due process and equal protection same-sex couples "may not be deprived of that right and that liberty."[40] The Court held that same-sex couples have this right and invalidated state laws which excluded "same-sex couples from civil marriage."[41]

Justice Kennedy addressed the notion that jurists should proceed cautiously and await more "legislation, litigation, and debate."[42] He stated that the Constitution views "democracy [a]s the appropriate process for change" when it does not violate fundamental rights,[43] but

35. *Id.* at 2602–03. For further analysis of this language, see Tribe, *supra* note 8, at 17 ("*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* . . . ."); Yoshino, *supra* note 8, at 148 ("Where *Loving* emphasized equality over liberty, *Obergefell* made liberty the figure and equality the ground . . . [and] placed a far stronger emphasis on the[ir] intertwined nature . . . .").

36. *Obergefell*, 135 S. Ct. at 2603. The Court also noted that "[t]his interrelation . . . furthers our understanding of what freedom is and must become," and that its prior opinions on the right to marry, invidious sex-based classifications in marriage, and lesbian and gay rights "reflect this dynamic." *Id.*; *see id.* at 2603–04 (discussing prior cases including *Loving*, *Zablocki*, *Reed v. Reed*, and *Lawrence*).

37. *Id.* at 2604.

38. *Id.* The Court stressed that these laws impose a "disability . . . [that] disrespect[s] and subordinate[s] [gays and lesbians]." *Id.*

39. *Id.*; *see also* Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIRCUIT 107, 113 (2015) (noting that *Obergefell* was decided on both liberty and equality grounds).

40. *Obergefell*, 135 S. Ct. at 2604.

41. *Id.* at 2604–05 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972), which summarily dismissed an early marriage equality case for lack of a substantial federal question).

42. *Id.* at 2605 (deeming Sixth Circuit evaluation of that idea "cogent" but finding considerably more deliberation than was acknowledged). For an argument that waiting causes harm, see Tribe, *supra* note 8, at 24–25.

43. *Obergefell*, 135 S. Ct. at 2605.

constitutional freedom secures a person's right not to be harmed by unlawful governmental action.[44] "[N]otwithstanding the more general value of democratic decisionmaking," the majority remarked that the Constitution demands judicial redress when the government infringes individual rights.[45] Thus, injured people can vindicate in court "their own direct, personal stake" in the Constitution, "even if the broader public disagrees and . . . the legislature refuses to act," because the Constitution "withdr[e]w certain subjects" from politics.[46]

In sum, *Obergefell* extends the Court's homosexuality jurisprudence, which emphasizes government intrusions on dignity and liberty. The opinion formally recognizes national marriage equality by holding that bans violate the fundamental right to marry on due process and equal protection grounds,[47] even as it deemphasizes traditional doctrinal Fourteenth Amendment jurisprudence, such as levels of scrutiny and the tests associated with them.[48]

II. IMPLEMENTATION OF MARRIAGE EQUALITY

Part II analyzes the effectuation of *Obergefell*'s mandate. This section evaluates implementation by federal, state, and local government officials.

A. *Federal Government*

President Barack Obama's administration has rather promptly and felicitously implemented complete marriage equality.[49] For

44. *Id.* (citing Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014)).

45. *Id.* (citing *Schuette*, 134 S. Ct. at 1637). The Court also declared that this principle applies even if rights protection touches crucial, sensitive matters. *Id.*

46. *Id.* at 2605–06 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). The Constitution "place[s] [fundamental rights] beyond the reach of majorities and officials and . . . establish[es] them as legal principles to be applied by the courts." *Id.* at 2606 (quoting *Barnette*, 319 U.S. at 638). For an analysis of the *Obergefell* majority's reliance on *Barnette*, see Tribe, *supra* note 8, at 26.

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

48. *Id.* at 2623 (Roberts, C. J., dissenting); *see* Baskin v. Bogan, 766 F.3d 648, 655 (7th Cir. 2014) (employing an approach that "is straightforward but comes wrapped . . . in a formidable doctrinal terminology—the terminology of rational basis, of strict, heightened, and intermediate scrutiny, of narrow tailoring, fundamental rights, and the rest"); Hunter, *supra* note 39, at 113–14.

49. Fully surveying marriage equality's effectuation is daunting, but I can posit representative treatment by analyzing federal efforts and fully assessing state and local ones in states that had bans.

instance, the national government effectuated *Windsor*'s invalidation of DOMA.[50] The federal government also rapidly and easily granted federal benefits to same-sex couples in states with bans after courts struck them down.[51]

B. *State Constitutional and Legislative Bans*

A substantial majority of the jurisdictions that imposed same-sex marriage proscriptions have seemingly implemented comprehensive marriage equality relatively expeditiously and smoothly. Numerous states have thoroughly assessed their laws and modified any provisos that deny full marriage equality or have instituted processes to survey and change those laws.[52] However, a rather small number of states have yet to effectuate complete equality. In some, much time will be needed to alter constitutional provisions, as the revision process is complex. For example, substituting marriage equality for the ban could require several years under Virginia's constitutional amendment process.[53]

A number of jurisdictions apparently have not reviewed their measures. Some legislatures, such as Idaho, South Carolina and Virginia which preferred to await *Obergefell*'s final resolution, have left their provisos intact. The Justices' clear invalidation of marriage

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50. Memorandum from U.S. Atty. Gen. Eric Holder to President Obama on Implementation of *U.S. v. Windsor* 1–3 (June 20, 2014), http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf [http://perma.cc/V94M-3R2A]; *see* Justin Snow, *As Obama Administration Concludes DOMA Ruling Implementation, Focus Returns to Congress*, METRO WEEKLY (June 20, 2014), http://www.metroweekly.com/2014/06/obama-administration-doma-ruling-implementation/ [http://perma.cc/ZLU6-BKXQ].

51. *E.g.*, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, After Supreme Court Declines to Hear Same-Sex Marriage Cases, Attorney General Holder Announces Federal Government to Recognize Couples in Seven New States (Oct. 17, 2014), http://www.justice.gov/opa/pr/after-supreme-court-declines-hear-same-sex-marriage-cases-attorney-general-holder-announces [http://perma.cc/C8FF-JQKW]. The marriage equality rhetoric in the GOP presidential debates suggests that the next President may be less receptive than Obama. Amy Davidson, *What Does Marriage Equality Have To Do With Dred Scott?*, NEW YORKER (July 8, 2015), http://www.newyorker.com/news/amy-davidson/what-does-marriage-equality-have-to-do-with-dred-scott [http://perma.cc/37D7-TRBK]; Tom LoBianco, *Huckabee Compares Ky. Clerk Jailing To Slavery Ruling In Dred Scott*, CNN (Sept. 6, 2015, 11:17 AM), http://www.cnn.com/2015/09/06/politics/mike-huckabee-gay-marriage-slavery/ [http://perma.cc/SPN2-S3FX].

52. These states include West Virginia, Wisconsin, Colorado, Oklahoma and Wyoming. *See infra* notes 55, 58, 61 and accompanying text.

53. VA. CONST. art. XII, § 1 (2015). The Assembly would twice have to approve and send the people a measure to repeal the ban and substitute a marriage-equality amendment, which could consume at least two years. *Id.*

equality bans could make insistence on revision seem technical, but strong arguments justify removal. For instance, not deleting prohibitions might require spending resources to litigate the question. The continued existence of limitations may also be a painful reminder of discrimination declared unconstitutional only recently. This harms same-sex couples' dignity and personhood, concerns which the *Obergefell* majority repeatedly expressed.[54] Failing to remove the strictures as well might undermine the Court and *Obergefell*'s legitimacy.

C. *States' Grants of Same-Sex Marriage Licenses*

Most states apparently undertook efforts to implement complete marriage equality promptly after *Obergefell* issued, but the initiatives proceeded even faster in jurisdictions covered by the Supreme Court's October 2014 rejection of appeals from the Fourth, Seventh, and Tenth Circuits.[55] For example, a day after the Court denied certiorari, Virginia's Governor rapidly initiated actions to fully effectuate the Fourth Circuit opinion, *Bostic v. Schaefer*,[56] by promulgating an executive order that commanded agencies and employees to grant same-sex couples all benefits which opposite-sex couples enjoy.[57] Only two days later, the West Virginia Governor

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54. *E.g.*, *supra* notes 26, 33–34 and accompanying text.

55. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); Andrew Cain, *In First Year, Virginia Issued 2,670 Marriage Licenses to Same-Sex Couples*, RICHMOND TIMES-DISPATCH (Oct. 6, 2015, 11:00 AM), http://www.richmond.com/news/virginia/government-politics/article_8126b713-3f71-5883-acc6-325fb269442f.html?mode=jqm [perma.cc/6RLU-TSXA]; Ginnie Graham, *More Than 3,200 Same-Sex Couples Marry in Oklahoma in Less Than Three Months*, TULSA WORLD (Jan. 18, 2015, 12:00 AM), http://www.tulsaworld.com/news/ginniegraham/more-than-same-sex-couples-marry-in-oklahoma-in-less/article_dd39267c-093f-5d13-a675-734b11637659.html [http://perma.cc/3N3Q-GEF7]; Ryan Haarer, *Same-Sex Marriage Now Legal in Colorado*, 9 NEWS (Oct. 7, 2014, 8:21 PM), http://www.9news.com/story/news/local/politics/2014/10/07/same-sex-marriage-dougco/16849081 [https://perma.cc/JN4F-BFSV]; Michele Richinick, *Wyoming Becomes 32nd State to Legalize Gay Marriage*, MSNBC (Oct. 21, 2014, 2:48 PM), http://www.msnbc.com/msnbc/wyoming-becomes-32nd-state-legalize-gay-marriage [https://perma.cc/MTB9-G3SH].

56. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

57. The benefits cover taxation, health care, and adoption. VA. GOV. EXEC. ORDER NO. 30, Marriage Equality in the Commonwealth of Virginia (2014); Bulletin from Margaret Ross Schultze, Comm'r, Va. Dep't of Soc. Servs., to Local Soc. Servs. Dep'ts on Impact of Same-Sex Court Ruling on Adoption and Foster Care (Oct. 10, 2014), https://governor.virginia.gov/

similarly ordered that agencies implement *Bostic*'s mandate and that clerk offices issue marriage certificates.[58] North Carolina and South Carolina, two other Fourth Circuit jurisdictions, instituted similar endeavors involving taxation.[59] Wisconsin also thoroughly effectuated marriage equality after the Seventh Circuit affirmed invalidation of the state's ban and certiorari was denied,[60] even though its Governor and Attorney General vigorously pursued both appeals.[61] Colorado, Oklahoma, and Wyoming, half of the Tenth Circuit states, rather quickly and easily implemented marriage equality once that appeals court ruled and certiorari was refused.[62] Most others appeared to institute equality relatively quickly and smoothly.[63]

In certain jurisdictions, however, marriage equality's implementation proceeded slowly. For example, in February 2015, after a federal district court in Alabama ruled that Alabama's

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newsroom/newsarticle?articleId=6827 [http://perma.cc/E3YR-GJG8]; Va. Dep't of Taxation, Tax Bulletin 14-7, Virginia Income Tax Treatment of Same-Sex Marriage (Oct. 7, 2014).

58. Press Release, Office of the Governor, Governor Tomblin Issues Statement Regarding Same-Sex Marriage in West Virginia (Oct. 9, 2014), http://www.governor.wv.gov/media/pressreleases/2014/Pages/GOVERNOR-TOMBLIN-ISSUES-STATEMENT-REGARDING-SAME-SEX-MARRIAGE-IN-WEST-VIRGINIA.aspx [http://perma.cc/5X5H-PMEB]; Hunter Schwarz, *West Virginia Will Stop Defending Bans on Same-Sex Marriage, Governor and Attorney General Say*, WASH. POST: GOVBEAT (Oct. 9, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/09/west-virginia-will-stop-defending-bans-on-same-sex-marriage-governor-and-attorney-general-say/ [http://perma.cc/Q5BB-TCY2]; *see* W. Va. Tax Dep't, W. Va. Tax-Same Sex Marriage, Admin. Notice 2014-20 (Oct. 20, 2014), http://www.state.wv.us/taxrev/publications/administrativeNotices/2014/AdministrativeNotice.2014-20.pdf [http://perma.cc/3UC9-FLRA].

59. S.C. Dep't of Revenue, South Carolina Tax Treatment of Same-Sex Marriages (Property Taxes and Deed Recording Fees), S.C. Revenue Ruling #14-9 (2014); S.C. Dep't of Revenue, South Carolina Income Tax Treatment of Same-Sex Marriages (Income Tax), S.C. Revenue Ruling #14-8 (2014).

60. *Baskin*, 766 F.3d 648, *cert. denied*, 135 S. Ct. 316.

61. *Same-Sex Couples Common Questions*, WIS. DEP'T OF REVENUE (Oct. 21, 2014), https://www.revenue.wi.gov/faqs/ise/samesex.html [http://perma.cc/33NR-9KDA]; *see* Patrick Marley, *Judge Makes Clear Wisconsin Gay Marriages Can Proceed*, JOURNAL SENTINEL (Oct. 8, 2014), http://www.jsonline.com/news/statepolitics/judge-makes-clear-wisconsin-gay-marriages-can-proceed-b99367384z1-278526781.html [http://perma.cc/5KMH-KBQG]; *infra* notes 80–82 and accompanying text (recounting the legislative response by Indiana, another state in the Seventh Circuit, to the *Baskin* opinion).

62. *See supra* note 55 and accompanying text; *see also infra* note 78 (showing the legislative response by Utah, another state in the Tenth Circuit, to the *Kitchen* opinion).

63. Erik Eckholm & Manny Fernandez, *After Same-Sex Marriage Ruling, Southern States Fall in Line*, N.Y. TIMES (June 29, 2015), http://www.nytimes.com/2015/06/30/us/after-same-sex-marriage-ruling-southern-states-fall-in-line.html [http://perma.cc/PS2D-ETB7]; Eliott C. McLaughlin, *Most States to Abide by Supreme Court's Same-Sex Marriage Ruling, But…*, CNN (June 30, 2015, 8:20 AM), http://www.cnn.com/2015/06/29/us/same-sex-marriage-state-by-state/ [http://perma.cc/4AP3-5ECL].

"Sanctity of Marriage Amendment" was unconstitutional, Alabama Supreme Court Chief Justice Roy Moore issued an order that authorized probate judges not to furnish same-sex couples marriage licenses.[64] The next month, the Alabama High Court granted a writ of mandamus, which barred probate judges from granting licenses and was construed to assert that only a U.S. Supreme Court marriage-equality opinion, not an Alabama federal district judge ruling, could override its decision.[65] The Alabama Justices then upheld the ban and enforcement, which prevented couples from securing licenses without a new federal court order.[66] After *Obergefell* issued, the state High Court reminded probate judges that the litigants had twenty-five days to pursue U.S. Supreme Court reconsideration, which led several counties to deny licenses and some to cease providing them or await the Justices' mandate.[67] This behavior of the counties could have directly injured same-sex couples' dignity and personhood, which the *Obergefell* majority deemed worthy of constitutional protection, and the conduct of the Alabama Supreme Court may have indirectly done so.[68]

In February 2015, when one Texas state-court judge invalidated its ban and permitted a clerk to grant one same-sex couple's marriage license, Texas's Attorney General claimed that the marriage was

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64. ROY S. MOORE, ALA. SUPREME CT., ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF THE SUPREME COURT (Feb. 8, 2015), http://media.al.com/news_impact/other/CJ%20Moore%20Order%20to%20Ala.%20Probate%20Judges.pdf [http://perma.cc/8Q76-N3GH]; *see* Sandhya Somashekhar & Robert Barnes, *Alabama Chief Justice Asks Officials to Defy Gay Marriage Ruling*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/02/09/alabama-chief-justice-asks-officials-to-defy-gay-marriage-ruling/ [http://perma.cc/3X3Q-RCRU].

65. *Ex parte* State *ex rel.* Ala. Policy Inst., No. 1140460, 2015 WL 892752, at *43 (Ala. Mar. 3, 2015); *see* Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 201, 210–11 (2015); Campbell Robertson, *Alabama Court Orders a Halt to Same-Sex Marriage Licenses*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/alabama-court-orders-halt-to-same-sex-marriage-licenses.html [http://perma.cc/L4YN-A3ML].

66. *Ex parte State*, 2015 WL 892752, at *43; *see* Wasserman, *supra* note 65, at 211.

67. *Ex parte* State *ex rel.* Ala. Policy Inst., No. 1140460 (Ala. June 29, 2015) (corrected order); Wasserman, *supra* note 65, at 216; *see* Alan Blinder, *In Alabama, One County Exits the Marriage Business*, N.Y. TIMES (June 26, 2015, 12:16 PM), http://www.nytimes.com/live/supreme-court-rulings/in-alabama-one-county-exits-the-marriage-business/ [http://perma.cc/4SHY-JUSB] ("In a signal of the type of resistance that could emerge in the aftermath of the Supreme Court's decision on Friday, an Alabama probate judge said that his office would no longer issue marriage licenses to anyone."); Arian Campo-Flores, *Other State Officials Say No to Same-Sex Marriage*, WALL ST. J. (Sept. 13, 2015, 12:25 PM), http://www.wsj.com/articles/other-state-officials-say-no-to-same-sex-marriage-1442161531 [http://perma.cc/925Q-TDFL].

68. *E.g.*, *supra* notes 26, 33–34 and accompanying text.

invalid and persuaded the Texas Supreme Court to enjoin issuance of more licenses.[69] When the U.S. Supreme Court Justices released *Obergefell*, he castigated it and posited an opinion that (1) county clerks enjoy freedoms that may permit "accommodation of their religious objections to issuing same-sex marriage licenses" and (2) judges analogously might claim the government cannot force them to perform "same-sex wedding ceremonies over their religious objections."[70] This may have led several clerks to refuse licenses upon *Obergefell*'s publication. After a couple sued the Hood County Clerk, however, the remaining clerks decided to grant licenses.[71] Texas's Governor and legislature also seemed not to anticipate, or smoothly facilitate, equality's implementation, which enabled certain local officials to stall license issuance; however, the legislature did reject bills that would have defied *Obergefell*'s mandate.[72] The clerks' refusal to issue licenses may have directly harmed same-sex couples' dignity and personhood, which the *Obergefell* majority found warranted constitutional protection, and the conduct of the Attorney General, Governor and legislature likely did so indirectly.[73] A subsequent decision by the Fifth Circuit apparently further dampened enthusiasm for resistance to *Obergefell*'s mandate, stating that

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69. Stay Orders, *In re* State of Texas, Nos. 15-0135, 15-0139 (Tex. Feb. 19, 2015); Ray Sanchez & Carma Hassan, *Texas Supreme Court Blocks Same-Sex Marriage Licenses*, CNN (Feb. 19, 2015, 9:57 PM), http://www.cnn.com/2015/02/19/us/texas-same-sex-marriage/ [http://perma.cc/862A-QJPS].

70. Ken Paxton, Att'y Gen. of Tex., Re: Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Same-Sex Wedding Ceremonies (RQ-0031-KP), Op. No. KP-0025, at 2 (June 28, 2015); *see* David A. Fahrenthold, Kevin Sullivan & Niraj Chokshi, *Opponents Divided on How—or Whether—to Resist Justices' Ruling*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/opponents-divided-how-or-whether-to-resist-supreme-court-ruling/2015/06/26/3219f626-1c12-11e5-ab92-c75ae6ab94b5_story.html [http://perma.cc/A7WW-4RQS]; McLaughlin, *supra* note 63.

71. Dylan Baddour, *West Texas County Clerk Refuses to Issue Same Sex Marriage Licenses*, HOUS. CHRON. (July 7, 2015, 5:11 PM), http://www.chron.com/news/houston-texas/article/West-Texas-county-clerk-refuses-to-issue-same-sex-6371264.php [http://perma.cc/T7UA-QRPP]; Sandhya Somashekhar, *Same-Sex Marriage License Ban Bill Dies in Texas Legislature*, WASH. POST (May 15, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/15/bill-opposing-same-sex-marriage-dies-in-texas/ [http://perma.cc/JK54-UAXR]; Alexa Ura, *Holdouts on Gay Marriage Could Face Lawsuits*, TEXAS TRIB. (July 10, 2015), https://www.texastribune.org/2015/07/10/lawsuits-needed-holdout-counties-gay-marriage/ [http://perma.cc/9UAP-MUMA].

72. Memorandum from Governor Greg Abbott to All State Agency Heads on Preserving Religious Liberty for All Texans (June 26, 2015), http://gov.texas.gov/files/press-office/State_AgencyHeads_SCOTUS_Rulin_06262015.pdf [http://perma.cc/S9YF-Z7CC]; Fahrenthold et al., *supra* note 70; Somashekhar, *supra* note 71.

73. *E.g.*, *supra* notes 26, 33–34 and accompanying text.

Obergefell "is the law of the land and, consequently, the law of this circuit."[74]

Related actions occurred in Kentucky, but the developments may have reflected partisan division between Steve Beshear, the Democratic Governor, and GOP lawmakers; the parties seemingly failed to predict *Obergefell* and speedily effectuate equality, which permitted a few clerks to refuse to provide licenses.[75] This erupted into a national spectacle when Kim Davis defied a federal court order to issue licenses and a district judge incarcerated her for contempt.[76]

D. *Opposition Based on Religious Liberty*

Observers have voiced concern that the implementation of marriage equality could prompt activities that violate the religious liberty of same-sex marriage opponents—including judges, clerk of court employees responsible for license issuance, florists, and bakers—whom states allegedly will require to facilitate same-sex weddings.[77] North Carolina adopted a statute that exempts local officers from conducting weddings or issuing licenses premised on a "sincerely held religious objection."[78] The act seemingly

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74. De Leon v. Abbott, 791 F.3d 619, 625 (5th Cir. 2015).

75. *See* Heather Clark, *Kentucky Governor Refuses to Intervene to Protect Religious Liberty of Clerk Facing Contempt Charge*, CHRISTIAN NEWS (Sept. 2, 2015), http://christiannews.net/2015/09/02/kentucky-governor-refuses-to-intervene-to-protect-religious-liberty-of-clerk-facing-contempt-charge/ [http://perma.cc/2SET-3E25]; Lynn Sweet, *Gay Marriage Ruling Spotlights Democrat-Republican Divide*, CHICAGO SUN-TIMES (June 26, 2015, 5:36 PM), http://chicago.suntimes.com/lynn-sweet-politics/7/71/724785/gay-marriage-ruling-spotlights-democrat-republican-divide [http://perma.cc/V7MJ-LY4Y].

76. *See infra* notes 92–104 and accompanying text.

77. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1193–94 (2014); Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html [http://perma.cc/26G8-MXS8]; *see infra* note 130 (providing examples of litigations involving religious freedom).

78. N.C. GEN. STAT. § 51-5.5 (2015); *see* Sheryl Gay Stolberg, *Uneasy Truce on Gay Marriage is Shaken by Kentucky Clerk's Defiance*, N.Y. TIMES (Sept. 5, 2015), http://www.nytimes.com/2015/09/06/us/uneasy-truce-on-gay-marriage-is-shaken-by-kentucky-clerks-defiance.html?smtyp=cur [http://perma.cc/B9AC-K6N4] (claiming North Carolina is the only state with a specific exemption for public officials); *see also* S.B. 297, 2015 Gen. Sess. (Utah 2015) (protecting religious freedom primarily of officiants and private persons); Jack Healy, *Mormons Say Duty to Law on Same-Sex Marriage Trumps Faith*, N.Y. TIMES (Oct. 22, 2015), http://www.nytimes.com/2015/10/23/us/mormons-still-against-same-sex-unions-take-a-stand-against-kim-davis.html [http://perma.cc/D8FJ-A89F] ("Mormon leaders supported a law . . . that outlawed housing and employment discrimination against gay, lesbian, bisexual and transgender

accommodates the officials' religious freedom; however, Judge Bunning's reasoning in the Kim Davis litigation suggests that the law erodes the fundamental right to marry of same-sex couples.[79] Religious liberty concerns also underlay the Indiana legislature's passage of a similar statute.[80] This sparked much opposition, particularly from industry and employers, who claimed that the statute could tarnish Indiana's business-friendly reputation, and from marriage equality proponents, who claimed that it would undercut advances.[81] These protests concomitantly spurred the Governor and lawmakers to change the bill.[82] Strikingly analogous developments unfolded in Arkansas.[83] One possibility why only a few jurisdictions adopted similar measures is that a number had already passed a Religious Freedom Restoration Act (RFRA), modeled on the federal statute, and thus may believe that these statutes suffice.[84]

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people. Called the 'Utah compromise,' it exempted religious groups that object to homosexuality.").

79. *See infra* notes 92–104 and accompanying text. The law may also undercut the *Obergefell* majority's rationales by, for instance, stigmatizing gays and lesbians or disparaging their choices. *E.g.*, *supra* notes 26, 33–34 and accompanying text. Media found little evidence of problems. For potential problems and possible remedies, see Wilson, *supra* note 77, at 1175–76. *See generally* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello Jr. & Robin Fretwell Wilson, eds. 2008) (discussing marriage equality's implications for religious freedom).

80. IND. CODE § 34-13-9 (2015); Mike Pence, *Ensuring Religious Freedom in Indiana*, WALL ST. J. (Mar. 31, 2015, 10:28 AM), http://www.wsj.com/articles/mike-pence-ensuring-religious-freedom-in-indiana-1427757799 [http://perma.cc/272Y-UACJ]; Sandhya Somashekhar, *Christian Activists: Indiana Law Tried to Shield Companies Against Gay Marriage*, WASH. POST (Apr. 3, 2015), https://www.washingtonpost.com/politics/christian-activists-indiana-law-sought-to-protect-businesses-that-oppose-gay-marriage/2015/04/03/d6826f9c-d944-11e4-ba28-f2a685dc7f89_story.html [http://perma.cc/7UYV-3VL2].

81. *See, e.g.*, Garrett Epps, *What Makes Indiana's Religious-Freedom Law Different?*, THE ATLANTIC (Mar. 30, 2015), http://www.theatlantic.com/politics/archive/2015/03/what-makes-indianas-religious-freedom-law-different/388997 [http://perma.cc/6FUE-CNKF]; David G. Savage, *Backlash Against Religious Freedom Laws Helps Gay Rights in Indiana*, *Arkansas*, L.A. TIMES (Apr. 4, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-religious-rights-analysis-20150404-story.html [http://perma.cc/2DXT-K2KQ].

82. *See* 2015 Ind. Acts 9; Stephanie Wang, *What the 'Religious Freedom' Law Really Means for Indiana*, INDIANAPOLIS STAR (Apr. 3, 2015, 11:13 AM), http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/ [http://perma.cc/NTD6-S2T2].

83. ARK. CODE ANN. § 16-123-401-07 (2015); *see* Garrett Epps, *The Next Steps in the Battle Over Religious-Freedom Laws*, THE ATLANTIC (Apr. 2, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-next-steps-in-the-battle-over-religious-freedom-laws/389369 [http://perma.cc/MPK2-CZVP]; Savage, *supra* note 81.

84. 42 U.S.C. §§ 2000bb–1 to –4 (2006); KY. REV. STAT. ANN. § 446.350 (West 2013); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2015); *see* Stolberg, *supra* note 78 (finding that

States have variously addressed concerns that marriage equality's implementation can threaten the religious liberty of *private* individuals and entities. Some states, particularly Utah, Indiana and those with RFRAs, ostensibly protect religious freedom by commanding that government accommodate sincerely-held religious beliefs.[85] However, certain jurisdictions require those holding themselves out as open for business to provide same-sex couples service under antidiscrimination or public-accommodation laws.[86] Most of the few judges who resolved this question have deemed service mandated by the statutes or by analogy to them.[87]

E. *Local Governments*

Many local government employees, particularly those responsible for performing weddings or issuing marriage licenses, who are situated in jurisdictions that prohibited same-sex marriage appear to have implemented marriage equality rather quickly and smoothly. However, a comparatively small number have not.

Personnel in many locales have facilitated provision of weddings and licenses. For example, Virginia license issuance seemingly operated well because all clerks mounted strong efforts to comply with *Bostic*, and the seven months needed for completing the Fourth

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twenty-one states have a form of religious exemption law); *infra* note 85 (explaining why provisos could suffice).

85. *See supra* notes 78, 80, 82 and accompanying text; *see also supra* notes 83–84. In states without antidiscrimination laws, those refusing service will not be civilly liable, as there is no statutory cause of action and they can avoid common law breach of implied contract suits by posting notice that they will not provide service. *See* Yoshino, *supra* note 8, at 176 (affording an example). In this context, state RFRAs provide a defense to nonexistent liability. In states with antidiscrimination laws, state RFRAs would provide a defense. This prospect shows the need for a federal law that honors marriage equality. *See infra* notes 134, 136.

86. *See* State Assemb. A8070, 2013-14 Assemb., Reg. Sess. (N.Y. 2013); *Non-Discrimination Laws: State by State Information – Map*, ACLU, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map [http://perma.cc/97A8-8P6G]; *SEI 2014: View Your State's Scorecard*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/sei-2014-view-your-states-scorecard [http://perma.cc/MTH3-DTX9]; Map of Employment and Public Accommodation by State, LAMBDA LEGAL, http://www.lambdalegal.org/states-regions [http://perma.cc/THJ3-8ELX]; *see* Yoshino, *supra* note 8, at 176 (analyzing the laws' effects).

87. Craig v. Masterpiece Cakeshop, Inc., No. 14-CA-1351, 2015 WL 4760453, at *8 (Colo. App. Aug. 13, 2015); Elane Photography, LLC v. Willock, 309 P.3d 53, 79 (N.M. 2013); *see* Yoshino, *supra* note 8, at 176 (analyzing *Elane* and finding that "[i]ndividuals who object to the simple existence of same-sex marriage on religious grounds not only have an extremely attenuated claim of harm, but also run up against the prohibition on creating civil law based on religious viewpoints"). Cases are rare, as the issue is new, and same-sex couples and other marriage equality proponents may prefer to simply eschew patronizing those who refuse service or devoting scarce resources to litigation.

Circuit and Supreme Court appeals offered a lengthy period to anticipate difficulties and institute responsive regimes.[88] Virginia officers appreciated that the Court had clearly invalidated the bans and declared marriage equality the law of the land and recognized that they had a duty to implement the Court's decision.[89]

Nevertheless, public employees in some localities have apparently not implemented full equality. The officers responded to equality cases by not furnishing either same-sex *or* heterosexual couples with weddings or licenses.[90] A minuscule number apparently failed to provide same-sex couples marriages or licenses, primarily based on religious objections and in response to *Obergefell*, especially soon after that decision's issuance. However, this resistance dissipated over time.[91]

The most notorious example, which advanced farthest in the courts and received the greatest publicity, involved Kim Davis's refusal to grant licenses premised on her religious beliefs.[92] Plaintiffs sued the clerk in the Eastern District of Kentucky where Judge David Bunning preliminarily enjoined Davis and ordered her to issue licenses, as Davis's inaction violated *Obergefell*.[93] Judge Bunning determined that the marriage statutes are facially neutral laws of

88. John Woodrow Cox, Jenna Portnoy & Justin Jouvenal, *Same-Sex Couples Begin to Marry in Virginia*, WASH. POST (Oct. 6, 2014), https://www.washingtonpost.com/local/virginia-politics/same-sex-marriages-in-virginia-can-begin-almost-immediately/2014/10/06/97ceab2e-4d69-11e4-aa5e-7153e466a02d_story.html [http://perma.cc/9NPV-TXML]; Jim Nolan, *McAuliffe Orders Agencies to Comply with Same-Sex Marriage*, RICHMOND TIMES-DISPATCH (Oct. 7, 2014, 1:06 PM), http://www.richmond.com/news/virginia/article_aad77b10-8b14-5d14-807b-0b36344c6791.html [http://perma.cc/4M95-FTSS].

89. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958); *supra* note 74 and accompanying text; *see generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (discussing the resistance to and eventual implementation of school desegregation).

90. *See* Fahrenthold et al., *supra* note 70; Stolberg, *supra* note 78; Yoshino, *supra* note 8, at 173 ("Those actors violate [*Obergefell*'s] due process ruling in a way that would not violate an equal protection ruling.").

91. *See supra* notes 66, 69, 71 and accompanying text (discussing the refusal of licenses in Alabama and Texas).

92. Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html [http://perma.cc/5LEN-9X7Q]; Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html [http://perma.cc/2KR2-KUPZ].

93. Miller v. Davis, Civ. Act. No. 15-44-DLB, 2015 WL 4866729, at *15 (E.D. Ky. Aug. 12, 2015).

general applicability, so even if they burden religious conduct, the laws need only be rationally related to a legitimate governmental purpose.[94] Bunning found that affording equal access to marriage easily satisfied this test, as the Governor's directive to implement *Obergefell* "certainly serves the State's interest in upholding the rule of law," but the command is also rationally related to several narrower interests which *Obergefell* identifies.[95] "By issuing licenses to same-sex couples, the State allows them to enjoy 'the right to personal choice regarding marriage [that] is inherent in the concept of individual autonomy' and enter into 'a two-person union unlike any other in its importance to the committed individuals,'"[96] and permits the couples to realize "many societal benefits and fosters stability for their children."[97] Thus, Judge Bunning concluded that the Governor's directive protected same-sex couples from the harms about which the *Obergefell* majority evinced concern and that *Obergefell*'s implementation "likely does not infringe upon [Davis's] free exercise rights."[98]

Davis pursued stays of Bunning's orders from the Sixth Circuit, which denied her requests because it found minimal likelihood of success on the merits,[99] and from the Supreme Court, which quickly rejected her petition without comment.[100] Davis asked that Judge Bunning order Governor Beshear to relieve her of her licensing duty, but the Governor contended that only the legislature possessed this authority and Bunning denied the request.[101] When she continued disobeying the judge's orders, he sentenced Davis to jail for

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94. *Id.* at *11.

95. *Id.*

96. *Id.* (alterations in original) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2599–2600 (2015)); *see supra* notes 19–20 and accompanying text.

97. *Miller*, 2015 WL 4866729, at *11 (citing *Obergefell*, 135 S. Ct. at 2599–2600); *see supra* notes 24–26 and accompanying text.

98. *Miller*, 2015 WL 4866729, at *11; *see supra* notes 26, 33–34 and accompanying text.

99. *See* Order, Miller v. Davis, No. 15-5880, at 2 (6th Cir. Aug. 26, 2015).

100. Davis v. Miller, No. 15A250, 2015 WL 5097125, at *1 (Aug. 31, 2015) (Kagan, J.) (denying certiorari); *see* Sandhya Somashekhar & Robert Barnes, *Supreme Court Rejects County Official's Request in Gay-Marriage Case*, WASH. POST (Aug. 31, 2015), https://www.washingtonpost.com/national/supreme-court-rejects-county-clerks-request-in-gay-marriage-case/2015/08/31/6ec094bc-4ffd-11e5-9812-92d5948a40f8_story.html [http://perma.cc/HS54-Q2Y8].

101. *See* Order, Miller v. Davis, Civ. Act. No. 15-44-DLB, at 5 (E.D. Ky. Sept. 11, 2015); Jacob Gershman, *Is Kim Davis Fighting Her Battle in the Wrong Court?*, WALL ST. J.: L. BLOG (Sept. 4, 2015, 6:35 PM), http://blogs.wsj.com/law/2015/09/04/is-kim-davis-fighting-her-battle-in-the-wrong-court/ [http://perma.cc/EP64-QVAL].

contempt.[102] Bunning released her five days later after she pledged not to interfere with license issuance.[103] This dispute proved extremely contentious, because equality champions asserted that Davis was denying same-sex couples the constitutional right to marry and the corresponding benefits that the *Obergefell* majority addressed, and her supporters argued that she was being deprived of religious freedom.[104]

In sum, concerted endeavors of myriad citizens, national, state and local entities, and government officers brought formal marriage equality to America when *Obergefell* held that same-sex couples possessed a fundamental right to marry. Most states and localities have appeared receptive to marriage equality, but a few have been less responsive. Accordingly, the concluding Part first compares these developments with related historical antecedents; it then proffers future suggestions.

III. A REVIEW OF THE PAST AND SUGGESTIONS FOR THE FUTURE

A. *Historical Echoes*

At first glance, the story regarding nascent implementation of marriage equality, particularly in Alabama, Kentucky and Texas, could resemble other critical moments in American history, notably resistance to public school desegregation which followed the Supreme Court's 1954 decision in *Brown v. Board of Education*.[105] Certain similarities may exist. For instance, public officials' refusal to marry same-sex couples or issue licenses might seem analogous to public

102. Order, Miller v. Davis, Civ. Act. No. 15-44-DLB, at 1 (E.D. Ky. Sept. 3, 2015); Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html [http://perma.cc/3YBU-8AT8].

103. *See* Order, Miller v. Davis, Civ. Act. No. 15-44-DLB, at 2 (E.D. Ky. Sept. 8, 2015); Order, Miller v. Davis, Civ. Act. No. 15-44-DLB, at 1–3 (E.D. Ky. Sept. 23, 2015); Steve Bittenbender, *Judge Rejects Latest Stay Request from Kentucky Clerk Davis*, REUTERS (Sept. 23, 2015, 5:31 PM), http://www.reuters.com/article/2015/09/23/us-usa-gaymarriage-kentucky-idUSKCN0RN2GG20150923 [http://perma.cc/FY74-FBTZ].

104. *See* Ryan T. Anderson, *We Don't Need Kim Davis To Be In Jail*, N.Y. TIMES (Sept. 7, 2015), http://www.nytimes.com/2015/09/07/opinion/we-dont-need-kim-davis-to-be-in-jail.html [http://perma.cc/REZ5-24JD]; *see* Healy, *supra* note 78; Stolberg, *supra* note 92; *supra* notes 17, 19, 23–24, 90–91 and accompanying text (marriage's benefits).

105. Brown v. Bd. of Educ., 347 U.S. 483 (1954). It may also resemble resistance to reproductive freedom in the wake of *Roe v. Wade*, 410 U.S. 113 (1973). *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992) (describing *Brown* and *Roe* as critical twentieth-century opinions).

officers' resistance to public school desegregation in that both denied equal treatment under the law. However, there are striking differences between resistance to marriage equality and public school desegregation, and the comparison risks trivializing the latter. The geographic and temporal scale and intensity of resistance to public school desegregation were orders of magnitude different from the resistance to marriage equality, at least that witnessed in the six months since *Obergefell*.

Rather soon after the Court released *Brown* and *Brown II*, with the infamous "all deliberate speed" phraseology[106] that numerous observers have contended granted public officials license to halt or stall desegregation,[107] many states and localities participated in a broad spectrum of actions, which prevented, evaded, or stymied *Brown*'s implementation across nearly all of the South over an extensive period. These practices included mandatory closure of public schools in localities that desegregated, establishment of private segregated schools, which taxpayer-supported vouchers partially funded, and onerous, complex processes that opponents administered in ways that prevented students from desegregating schools by transferring.[108]

These schemes prevailed in numerous states over the half decade following *Brown* and even longer in many locales. One especially pernicious illustration is Prince Edward County, Virginia, where public schools remained closed for five years.[109] Even after the Court's 1958 decision in *Cooper v. Aaron*,[110] which strongly reiterated that the *Brown* mandate was the law of the land,[111] and the 1959 publication of the Virginia Supreme Court and federal district-court opinions that

106. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

107. *See* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 124, 127 (unabr. ed. 1983); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*—THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 61–77 (1979).

108. Carl Tobias, *Public School Desegregation in Virginia During the Post-*Brown *Decade*, 37 WM. & MARY L. REV. 1261, 1270–71, 1283–84 (1996); *see* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 22–23 (2010); WILKINSON, *supra* note 107, at 80–87.

109. KRISTEN GREEN, SOMETHING MUST BE DONE ABOUT PRINCE EDWARD COUNTY 82–83 (2015); KLUGER, *supra* note 89, at 480–507; BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964, at 260–61 (1965).

110. Cooper v. Aaron, 358 U.S. 1 (1958).

111. *See id.* at 19–20; J.W. PELTASON, 58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 190–92 (1971).

invalidated school closure laws,[112] many Commonwealth school districts still only began token desegregation five years later.[113] Indeed, a number finally desegregated when the Civil Rights Act of 1964 empowered the Justice Department to achieve orderly desegregation through litigation and the Department of Health, Education and Welfare to eliminate federal funding in recalcitrant school districts.[114]

In sharp contrast, a half year after the Justices issued *Obergefell*, practically every state and most local governments have fully implemented the Court's mandate, even across much of the South, which initially appeared most resistant. Few localities have experienced resistance and for only a brief period. This compliance means that there has been little need for the kind of dramatic measures which resistance to desegregation necessitated.

Thus, it presently appears that formal marriage equality will soon be a comprehensive reality throughout virtually all the nation. This proposition concomitantly suggests that marriage equality's implementation more closely resembles developments which followed in the wake of *Loving v. Virginia*,[115] rather than *Brown*. Numerous states and many localities instituted marriage equality comparatively promptly and smoothly after *Loving* was decided, and interracial couples encountered relatively few difficulties securing weddings and licenses from public officials.[116]

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112. *See* James v. Almond, 170 F. Supp. 331, 337 (E.D. Va. 1959); Harrison v. Day, 106 S.E.2d 636, 645–46 (Va. 1959); RYAN, *supra* note 108, at 44–47; WILKINSON, *supra* note 107, at 88–95.

113. Tobias, *supra* note 108, at 1280–81; *see* WILKINSON, *supra* note 107, at 82–83, 98–100.

114. Tobias, *supra* note 108, at 1270, 1279–81; *see* WILKINSON, *supra* note 107, at 102–08.

115. Loving v. Virginia, 388 U.S. 1 (1967); *cf.* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 272–80 (2003) (discussing developments following *Loving*); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 231–41 (2002) (explaining how various states responded to *Loving*).

116. *See* KENNEDY, *supra* note 115, at 278–80; JULIE LAVONNE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865–1954, at 272 (2008); WALLENSTEIN, *supra* note 115, at 226–36; Lily Rothman, *A History Lesson for the Kentucky Clerk Refusing to Grant Marriage Licenses*, TIME (Sept. 1, 2015), http://time.com/4018494/kentucky-marriage-clerk-loving-virginia/ [http://perma.cc/MGY3-Y7YW]. In some states, more litigation was necessary to secure marriage equality. *E.g.*, United States v. Brittain, 319 F. Supp. 1058, 1061 (N.D. Ala. 1970); Davis v. Gately, 269 F. Supp. 996, 999–1000 (D. Del. 1967). The post-*Loving* experience in turn resembles the responses to the major homosexuality opinions that preceded *Obergefell*: *Lawrence v. Texas*, 539 U.S. 588 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

B. *Suggestions for the Future*

1. *State and Local Governments.* In all jurisdictions, state and local officials—legislators, Governors, Attorneys General, and personnel who conduct weddings and issue marriage licenses—must fully implement *Obergefell*'s mandate so that same-sex couples and their families, particularly these couples' children, receive the same treatment as opposite-sex couples and their families. The early initiatives that effectuated *Obergefell* appear constructive, but officers should redouble efforts to ensure that the promise of marriage equality becomes a reality.[117] This would allow same-sex couples and their families to experience less "stigma, humiliation and prejudice" and enjoy the many concrete and intangible benefits which marriage provides.[118]

State and local officials might also want to gather, evaluate, and synthesize empirical data on the issuance of licenses, the performance of marriages, and the infringement of religious liberty of government staff and private service providers. Little evidence now indicates the existence of many serious or widespread difficulties;[119] however, if review adduces problems, officials must devise solutions.

Implementation of equality allegedly could force opponents to engage in activities which violate their religious beliefs.[120] North Carolina's law grants public workers certain exemptions based on a "sincerely held religious objection."[121] The procedures seemingly accommodate public employees' religious freedom but may well undermine same-sex couples' fundamental right to marry; thus, state and local officers must effectuate this and related measures, namely

117. States like Maryland and New York that adopted marriage equality earlier and have been implementing it longer may serve as models for others.

118. *See supra* notes 5, 12, 22–26, 38 and accompanying text. Tangible ones are economic gains, notably marriage's effects on health care and taxation, and adoption of children. Less tangible ones include respect, legitimacy, companionship, emotional support, and recognition. Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 381, 384 (4th Cir. 2014).

119. *See supra* notes 55–63, 79. *But see supra* notes 64–72, 92–104. For potential complications and possible solutions, see Wilson, *supra* note 77, at 1193–94, and SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 79, at 97–102.

120. *See supra* note 77; *infra* note 130 (providing examples of litigations involving religious freedom).

121. N.C. GEN. STAT. § 51-5.5 (2015). States envisioning similar laws must scrutinize North Carolina's experience to ensure they protect rights of all. Campo-Flores, *supra* note 67; Stolberg, *supra* note 91.

RFRAs, in ways that safeguard the rights of all.[122] Jurisdictions and localities should also explore and institute constructive remedies that will prevent or ameliorate incidents similar to the contentious, unproductive dispute in Kentucky. Possible solutions include authorizing personnel other than employees with sincere religious objections in the same or adjacent locales to discharge relevant duties. If these controversies resist amicable disposition and erupt into litigation, courts should address them similarly to Judge Bunning's resolution.

When equality's implementation requires *private* individuals or entities to undertake actions that ostensibly violate their religious beliefs, different considerations apply. Legislation in certain states putatively safeguards religious liberty by making government accommodate sincerely-held religious objections, even while antidiscrimination or public-accommodations laws in others honor same-sex couples' right to marry by requiring those holding themselves out as open for business to provide the service requested.[123] The preferable solution is having all open-for-business individuals and entities serve every patron, as the latter statutes prescribe and most judges deciding these issues have concluded.[124] Nonetheless, the market could address that conundrum, because few same-sex couples or equality supporters may want to patronize those refusing service.

Legislative and executive branches should meticulously review constitutional, statutory, and regulatory provisos and change all strictures that they find preclude same-sex couples from achieving marriage equality.[125] Legislatures that chose to await final Supreme Court resolution must assiduously scrutinize laws and promptly

122. *See supra* note 77; *see also* Linda Greenhouse, *Drawing the Line Between Civil and Religious Rights*, N.Y. TIMES (Sept. 17, 2015), http://www.nytimes.com/2015/09/17/opinion/drawing-the-line-between-civil-and-religious-rights.html [http://perma.cc/L9FD-QD9W]. Same-sex couples' equality and dignity are critical, as Justice Kennedy says. *See supra* notes 12–21, 35 and accompanying text.

123. *See supra* notes 85–86 and accompanying text.

124. *See supra* notes 86–87 and accompanying text. Because RFRAs may trump the latter laws, Congress should pass the Equality Act to honor the right to marry. *See supra* note 85; *infra* notes 134, 136.

125. For example, Virginia agencies, with aid from the Attorney General, conducted full reviews of rules and modified any that limit marriage equality. *See supra* note 81 and accompanying text.

change any that deny same-sex couples marriage equality, because this practice has important symbolic and pragmatic value.[126]

All state-court judges should correspondingly be receptive to litigation filed by people in same-sex marriages or those who wish to enter or leave such marriages. For example, judicial officials in these jurisdictions could generally treat lesbian and gay persons and couples the same as opposite-sex individuals and partners when entertaining adoption, divorce, and custody disputes.[127]

Because certain states and numerous localities have instituted complete equality too slowly,[128] they must expeditiously implement equality by consulting efforts in Maryland, Wisconsin, and other jurisdictions that have promptly and easily implemented thorough equality.[129] If state or local officers proceed too slowly, individuals or groups who have filed previous cases might want to reopen them and even urge courts to hold resistant officials in contempt.[130] Should those parties forego lawsuits, others harmed by the failure to implement equality may contemplate litigation that would vindicate their rights. Jurisdictions and localities must also guarantee that initiatives to attain equality do not threaten religious liberty but that attempts to safeguard religious freedom do not undercut marriage equality.[131]

State and local governments in jurisdictions that have yet to extend lesbian and gay individuals full protection from discrimination must carefully consider enacting laws that prohibit employment, housing, and other discrimination.[132] State and local officers could

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126. *See supra* Part II.B. Some have moved slowly to review and repeal laws that deny marriage equality. *E.g.*, Eckholm & Fernandez, *supra* note 63; Blinder & Pérez-Peña, *supra* note 92; *see infra* notes 134, 136 and accompanying text.

127. Cases from several state supreme courts may intimate this. *See* Boswell v. Boswell, 721 A.2d 662, 669, 679 (Md. 1998); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 337 (Va. Ct. App. 2006); Davenport v. Little-Bowser, 611 S.E.2d 366, 371–72 (Va. 2005). If litigants pursue the right to marry in state court, judges should remember that *Obergefell* is binding.

128. Most of these states and localities are in the South. *See* Editorial, *Illegal Defiance on Same-Sex Marriage*, N.Y. TIMES (July 10, 2015), http://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html [http://perma.cc/MN8B-2WD2]; *supra* notes 64–72, *infra* note 130. *But see* Eckholm & Fernandez, *supra* note 63.

129. *See supra* notes 55–63, 89.

130. Alabama and Kentucky are two examples. *See* Strawser v. Strange, Civ. Act. No. 14-0424-CG-C, at 1–2 (S.D. Ala. July 1, 2015); Blinder & Lewin, *supra* note 102; Blinder & Pérez-Peña, *supra* note 92; *supra* notes 64–67, 92–104.

131. *See supra* notes 120–22 and accompanying text.

132. *See supra* note 86; *see also* Hunter, *supra* note 39, at 112 (emphasizing the need for laws that prohibit discrimination on the basis of sexual orientation).

model regulations on measures adopted by other jurisdictions and localities to prohibit discrimination based on sexual orientation.[133] Another model is the recently-introduced Federal Equality Act (FEA) that would bar discrimination based on sexual orientation and gender identity nationwide.[134] Consideration by state and local governments assumes much significance because Congress will not seriously assess the FEA before the 2016 election.

2. *Federal Government*. The Obama Administration has rapidly and smoothly instituted broad marriage equality by, for instance, quickly and felicitously effectuating *Windsor* and *Obergefell*.[135] The current administration should continue and widen those endeavors, and the next President must initiate similar actions, although this will depend on who succeeds Obama.

Because certain states and numerous localities may not enact laws that ensure total equality, Congress must scrutinize relevant bills, including the FEA.[136] The Judiciary Committees ought to review pertinent safeguards in each jurisdiction and conduct hearings. Nonetheless, Congress is unlikely to evaluate this bill soon, despite the need for it. Lawmakers have also wisely eschewed thus far several inadvisable actions, which they should continue to reject. One is the First Amendment Defense Act that would in fact eviscerate the very amendment that the bill purports to defend.[137] The other is a constitutional amendment that would bar same-sex marriage nationwide.[138]

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133. *See Non-Discrimination Laws: State by State Information – Map*, *supra* note 86.

134. *See* Federal Equality Act, S. 1858, 114th Cong. (2015) (referred to the Subcommittee on the Constitution and Civil Justice); *supra* note 85.

135. *See supra* notes 49–51 and accompanying text.

136. S. 1858; *see* Dana Beyer, *The Equality Act, Part Two—What Now?*, HUFFINGTON POST (July 29, 2015, 12:58 PM), http://www.huffingtonpost.com/dana-beyer/the-equality-act-part-two_b_7896578.html [http://perma.cc/9PBT-H9TM]; Gabrielle Levy, *Forget SCOTUS: The Next Fight Over Gay Rights Will Be In Congress*, U.S. NEWS & WORLD REP. (July 23, 2015, 6:19 PM), http://www.usnews.com/news/articles/2015/07/23/equality-act-continues-push-for-lgbt-rights [http://perma.cc/R2PT-25WQ].

137. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015); *see* Editorial, *G.O.P. Anti-Gay Bigotry Threatens First Amendment*, N.Y. TIMES (Sept. 12, 2015), http://www.nytimes.com/2015/09/13/opinion/sunday/gop-anti-gay-bigotry-threatens-first-amendment.html [http://perma.cc/9RBY-JY3X].

138. Marriage Protection Amendment, H.R.J. Res. 32, 114th Cong. (2015); *see* State Marriage Defense Act, S. 435, 114th Cong. (2015); Jonathan Weisman, *Republicans Setting Sights on Same-Sex Marriage Law*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/us/politics/republicans-setting-sights-on-same-sex-marriage-law.html [http://perma.

If jurisdictions follow these suggestions, federal courts will probably address few situations that resemble the one that Judge Bunning confronted. When jurists do, they must respect same-sex couples' right to marry while accommodating officials' sincerely-held religious objections. For example, Bunning correctly honored marriage rights when he determined that the marriage equality mandate did not infringe "[Davis's] free exercise rights," required her to grant licenses, found Davis in contempt for violating court orders, and rejected the clerk's accommodation request, even as he partly left it to state elected officials.[139]

IV. CONCLUSION

The *Obergefell* decision, which continued and expanded the Supreme Court's jurisprudence articulated in earlier homosexuality opinions, declared that formal marriage equality is now the law of the land. This development has enabled same-sex couples and their families, notably the couples' children, to realize many important benefits which only heterosexual couples previously enjoyed. Thus, all states and localities that have promptly and smoothly implemented marriage equality must continue and redouble their valuable endeavors. Jurisdictions and local areas that have yet to attain full equality or have moved slowly ought to increase efforts, so the promise of equality becomes a reality. For instance, they should review existing laws and delete bans, respect marriage equality, accommodate those with sincerely-held religious objections to marriage equality insofar as possible, and seriously consider adopting antidiscrimination measures that resemble the Federal Equality Act.

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cc/T6WQ-RYLF]. This would be futile and divisive, given substantial, mounting support for marriage equality.

139. Miller v. Davis, No. 15-44-DLB, 2015 WL 4866729, at *11 (E.D. Ky. Aug. 12, 2015); *see supra* notes 92–104 and accompanying text.