

# The Politics of Accommodation

## *The American Experience with Same-Sex Marriage and Religious Freedom*

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### Introduction

In war, litigation, and even the legislative process, parties go to battle when they fundamentally underestimate the other side's strength. Armed with a more realistic view of a rival's strengths, the same parties will sometimes come to the bargaining table, with a renewed appreciation for the advantages of negotiation and compromise.

\* This chapter draws on two articles: Robin Fretwell Wilson, "A Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections," *Case Western Reserve Law Review* 64, no. 3 (2014): 1161–1268, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448344](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448344) [hereinafter "Marriage of Necessity"] and Wilson, "The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes between Religion and the State," *Boston College Law Review* 53, no. 4 (2012): 1417–1513, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2155867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155867) [hereinafter "Calculus of Accommodation"].

It grows out of my work assisting the Utah Legislature to enact the Utah Compromise, as well as law reform work with two groups of scholars urging the inclusion of meaningful religious liberty protections in same-sex marriage laws.

This chapter takes into account same-sex marriage laws and judicial decisions as of November 11, 2014, but uses a snapshot of the sexual orientation non-discrimination protections and state constitutional amendments banning same-sex marriage as of October 22, 2013. Appendix 6.A was proposed explicitly to be included in voluntary same-sex marriage laws. Since that early proposal, more nuanced accommodations that bypass collisions entirely have developed and become part of balanced legislation, like the Utah Compromise. See Part I.A.

In many ways, those who oppose same-sex marriage and those who support it are both wrong about the strengths of the other side's position. Some same-sex marriage supporters push for rights surrounding marriage without qualification—even if it means forcing others to facilitate weddings by hosting the reception or providing other wedding-related services in violation of deeply held religious beliefs.<sup>1</sup> Some same-sex marriage opponents take an equally rigid approach. Even before the US Supreme Court's decision in *Obergefell v. Hodges*, these opponents resisted same-sex marriage on the grounds that it would destroy the moral foundation of society—whether or not the recognition came from a judicial decision or voluntary legislation that balances respect for gay couples with consideration for those who adhere to a traditional view of marriage.<sup>2</sup>

Until the recent juggernaut of federal judicial decisions mandating same-sex marriage that began with *United States v. Windsor*<sup>3</sup> and culminated in *Obergefell*,<sup>4</sup> a significant generator of marriage equality in the United States was the voluntary adoption of same-sex marriage laws by state legislatures and voters, as the timeline in Figure 6.1 shows. The voluntary embrace of marriage equality hinged on compromise. Same-sex marriage supporters traded meaningful, if imperfect, religious liberty protections for objectors for the right to marry.<sup>5</sup>

In June 2015, writing against the background of hundreds of thousands of same-sex marriages across the country,<sup>6</sup> the Court found a constitutional right to same-sex marriage in *Obergefell*, as many had expected.<sup>7</sup> Some naturally assume now that the Supreme Court has wiped away all remaining state constitutional bans on same-sex marriage, this victory erases all need to bargain. This supposition is short-sighted. Americans favor same-sex marriage but on the cusp of the Court's 2015 decision, were "evenly divided" on whether it "must be legal nationwide."<sup>8</sup> But more importantly, same-sex marriage is not the only legal protection in play. Throughout most of the country, the lesbian, gay, bisexual, and transgender ("LGBT") community lacks sorely needed statewide protections against discrimination in housing, hiring, and public accommodations.<sup>9</sup> Even after achieving the long sought-after goal of marriage equality, gay rights advocates almost certainly require the help of state legislators to enact LGBT non-discrimination protections—and that will be the moment when religious liberty protections for those who adhere to a traditional view of marriage will be balanced with LGBT rights.<sup>10</sup>

The public favors such live-and-let-live deals. Approximately half of the country says that "local officials and judges with religious objections ought to be exempt from any requirement that they issue marriage licenses to gay and lesbian couples," while 57% believes that "wedding-related businesses with religious objections should be allowed to refuse service to same-sex couples."<sup>11</sup>

History shows that compromise facilitates social progress. For proponents, legislative compromise delivered marriage equality years before it otherwise

### Same-Sex Marriage Timeline

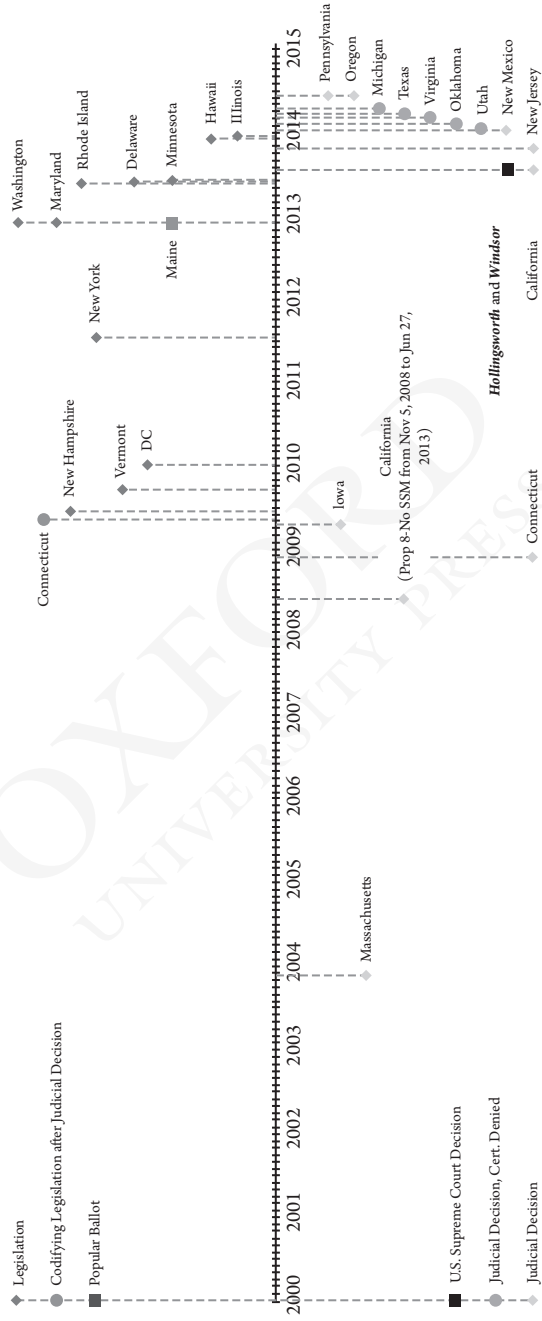


Figure 6.1. Same-Sex Marriage Timeline (until Oct. 6, 2014).

would have been adopted.<sup>12</sup> Over the last decade, efforts to enact same-sex marriage without qualification were self-defeating—bills that adopted a winner-takes-all, maximalist approach did not yield enduring legislative victories. Rather, only those bills that contained meaningful religious liberty accommodations garnered sufficient support to become, and remain, law.

For opponents, compromise delivered modest, but important, protections for religious organizations and individuals. Ironically, until 2012, there was no urgent need for opponents to trade recognition of same-sex marriage for meaningful religious liberty concessions. Until then, opponents had amassed 29 consecutive victories at the ballot box, resulting in constitutional amendments barring same-sex marriage in 29 states. However, as this chapter illustrates, long before federal courts began striking down state constitutional bans, the tide had shifted against opponents.<sup>13</sup> In 2012, the first constitutional amendment to ban same-sex marriage failed in Minnesota; same-sex marriage was adopted for the first time by popular vote in Maine<sup>14</sup>; and state laws recognizing same-sex marriage in Maryland and Washington both survived referendum challenges.

Even after *Obergefell* has enshrined a constitutional right to same-sex marriage, there are concrete gains to supporters and opponents alike from remaining at the bargaining table. For opponents of same-sex marriage, bargaining offers protections to religious objectors that are wholly absent from judicial decisions requiring the recognition of same-sex marriage. Further, the majority of now-struck state constitutional bans simply did not provide the bulwark against change that some assumed. Many constitutional amendments can be repealed almost as easily as enacting ordinary legislation. Further, given the steady shift toward wider public acceptance of same-sex relationships, opponents were running a race against time. That same public acceptance of same-sex marriage and LGBT rights more broadly means that opponents still face a closing window for securing religious liberty protections. With sufficient time, it will be possible, through legislation or ballot initiative, to enact non-discrimination protections *without* concomitant safeguards for faith communities. Not only is it right and just to provide basic protections against discrimination to the LGBT community, those basic protections are the key to securing the autonomy of faith communities to abide by their own beliefs about marriage.

For supporters, securing marriage equality was never the only pressing needs for the LGBT community. Until Utah's landmark legislation in 2015, only 21 states banned discrimination based on sexual orientation in housing, employment, or public accommodations in statewide law, as Part I.A documents.<sup>15</sup> Thus, the deep irony is that marriage equality has now come to parts of the country where the LGBT community lacks even the most basic protections. As Tim Gill of the Gill Foundation recently explained, many civil rights

movements have “won something and then sat back and relaxed,” leaving other pressing needs for another day<sup>16</sup>—a mistake that the LGBT rights community is committed not to repeat.

Even before *Obergefell*, bargaining over religious liberty had shifted from trading marriage equality for religious liberty protections like those found in voluntary same-sex marriage laws<sup>17</sup> to trading LGBT non-discrimination protections for religious accommodations. In March 2015, Utah passed “landmark” LGBT non-discrimination legislation that “balance[d] gay rights and religious freedoms.”<sup>18</sup> Legislators elsewhere also introduced proposed legislation combining LGBT non-discrimination protections with religious liberty exemptions.<sup>19</sup>

In this climate of mutual need and gain, negotiating—although less gratifying for many—continues to serve both sides. Only compromise will yield significant protections for religious objectors *and* significant protections for the LGBT community against discrimination.

Legislators who have the power to craft such compromises are caught in the crossfire between warring sides. For some legislators, such compromises hold no appeal—they simply do not want to be seen as “selling out” their constituents, whether gay, religious, or otherwise.<sup>20</sup> But for other legislators in the middle, their resistance to doing more for gay couples or religious objectors involves an express set of reservations or “sticking points” about whether certain religious liberty exemptions are workable.<sup>21</sup> These concerns range from why legislators should ever accommodate religious objectors to whether accommodations should protect only those who directly perform a morally freighted service, like clergy who actually “tie the knot” for the same-sex couple. These concerns seem compelling at first blush. Yet, religious liberty accommodations that bypass collisions entirely, or that are qualified by hardship to same-sex couples—that is, accommodations that allow religious objectors to avoid facilitating a same-sex marriage *only* when a hardship will not result—transform what would otherwise be a zero-sum “I win, you lose” proposition into one in which marriage equality and religious freedom can *both* be affirmed.

This chapter makes two claims. First, quite simply, compromise is the optimal way forward for both sides—the constitutional entitlement to same-sex marriage in *Obergefell* leaves the LGBT community without much needed protections in other realms. Moreover, *Obergefell* itself provides “people of faith” with “no comfort.”<sup>22</sup> This is not surprising: Legislatures had no opportunity to consciously balance the interests of religious believers with the equally important interests of the LGBT community. Second, this chapter contends that, nuanced legislation recognizing new civil rights while providing robust religious liberty accommodations allows legislators to advance *two compelling values*—LGBT rights and religious liberty. Part I begins with the political calculus impeding compromise. It shows that on the question of same-sex marriage and LGBT protections, the United States has

become a classic constitutional and statutory “checkerboard”—with both sides racking up victories in state legislatures and at the ballot box. It then demonstrates empirically that in the same-sex marriage context, compromise led to legislative victories for marriage supporters, while a winner-takes-all approach failed. Although *Obergefell* now guarantees same-sex couples the right to marry, LGBT rights advocates can, through compromise, lock in other much-needed protections against discrimination which may not be forthcoming judicially as they recently did in Utah.<sup>23</sup>

On the other side, Part I acknowledges that opponents had won absolute victories at the ballot box in 29 consecutive ballot initiatives until 2012, when opponents experienced four stinging defeats.<sup>24</sup> Opponents now face the looming reality that future generations of voters increasingly—and in some states overwhelmingly—support not only same-sex marriage but LGBT rights more generally. Receding opposition means that same-sex marriage would have been possible politically across the country *without any protections for religious objectors* in a matter of years, just as LGBT non-discrimination protections are likely to be in the near term. Thus, the time to lock in common sense religious liberty protections is now. During this rapidly closing window, opponents should embrace compromise.

Now, some will assume that LGBT supporters, after winning on same-sex marriage, will simply pivot their momentum toward enacting sexual orientation non-discrimination bans. Yet, when same-sex marriage became a reality overnight in “red” states after the Supreme Court’s 2014 refusal to accept a case for review (known as denial of certiorari),<sup>25</sup> collision points over same-sex marriage rapidly multiplied. Witness the steady drumbeat of headlines about lawsuits brought against bakers, florists, and bed-and-breakfast owners, together with the wave of resignations by magistrates and government employees who say they cannot, consistent with their faith, preside over or facilitate a same-sex marriage.<sup>26</sup> Pollsters are now asking Americans more nuanced questions about their “support” for same-sex marriage, revealing a live-and-let-live approach. People more readily support same-sex marriage if it comes packaged with religious liberty protections.<sup>27</sup> In a 2015 Associated Press-GfK poll, approximately half of the country said that, in states that allow same-sex marriage, “local officials and judges with religious objections ought to be exempt from any requirement that they issue marriage licenses to gay and lesbian couples,” while 57% believed that “wedding-related businesses . . . should be allowed to refuse service to same-sex couples.”<sup>28</sup> Importantly, every state that has voluntarily enacted LGBT non-discrimination protections to date has included religious liberty accommodations.<sup>29</sup> The polls and enacted laws suggest that going forward, limited opt-outs related to marriage solemnization will be part and parcel of legislative bargains.

Part II turns to substantive points of resistance to compromise. Part II.A first describes moral clashes over same-sex marriage that have unfolded in the past decade, clashes that religious liberty protections are designed to allay. Part II.A then turns to the first “sticking point” for legislators seeking to balance competing rights: that accommodations will be used to disguise bigotry. This part shows that courts have proven able to separate sincere from insincere objections in a range of contexts, from military conscientious objections to employment disputes.

Part II.B examines the notion that accommodations exempt people remotely associated with objectionable activity. In other contexts, exemptions have routinely encompassed not only those who directly perform a contested activity, but those who facilitate it, too. Part II.C grapples with the claim that same-sex marriage legislation establishes marriage equality but requires nothing in particular of the public and therefore no exemption is needed. This Part examines the scope of non-discrimination statutes enacted long before same-sex marriage. Without explicit protection, many objectors will face a cruel choice between their conscience and their livelihood.

Finally, Part II.D explores whether religious liberty accommodations will impose hardships on same-sex couples or undermine their dignity. This part argues that exemptions qualified by hardship to same-sex couples can avoid the real concern driving efforts to cabin the scope of accommodations—namely, avoiding hardship and embarrassment to same-sex couples. Creative approaches can make accommodations invisible to the public, avoiding dignitary harms to same-sex couples.

## I. The Political Calculus of Compromise

In the same week in 2012 that President Obama became the first sitting president of the United States to endorse same-sex marriage—saying in an ABC News interview that same-sex couples should “be able to get married”<sup>30</sup>—North Carolina became the 29th state to enshrine in its Constitution a ban on such marriages.<sup>31</sup> In his endorsement, President Obama affirmed the value of being “respectful of religious liberty” when recognizing same-sex marriage, saying “it’s important to recognize that folks who feel very strongly that marriage should be defined narrowly as between a man and a woman, many of them are not coming at it from a mean-spirited perspective. They’re coming at it because they care about families . . .”<sup>32</sup> Only weeks before, North Carolina’s then-Speaker of the House, Thom Tillis, who voted to put the constitutional amendment on the ballot, was asked by a student at NC State to weigh in on the amendment. Far

from confidently predicting victory, Tillis said that “If it passes, I think it will be repealed within 20 years.”<sup>33</sup>

Although these two events could not stand in sharper contrast, they capture both the depth of the rift over same-sex marriage in America,<sup>34</sup> as well as the fluidity of views. As the remainder of this part illustrates, there is a premium on compromise for both sides in such a climate.

### A. Checkerboard of Same-Sex Marriage Laws and Bans

The year 2014 stood as “the biggest year for gay-marriage legalization ever . . . bringing the total number of states that allow gay couples to wed to 35, plus the District of Columbia.”<sup>35</sup> For the first time, the US map looked more “blue,” shown in Figure 6.2 as light gray, than “red,” which Figure 6.2 shows as dark gray.

This shift occurred in the wake of the Supreme Court’s 2014 denial of certiorari, which put off the Court’s ultimate decision in *Obergefell* until 2015 but green-lighted same-sex marriage for couples in Wyoming, Utah, Oklahoma, Wisconsin, Indiana, Virginia, West Virginia, North Carolina, South Carolina, Colorado, and Kansas.<sup>36</sup>

Only days before, the country was overwhelmingly red, as Figure 6.3 shows in dark gray.

Judicial decisions wiping away democratically adopted constitutional and statutory bans remind us that droves of voters across the United States have endorsed bans. Indeed, the string of legislative victories by same-sex marriage supporters in statehouses across the country paled alongside the wins racked up by opponents, both at the ballot box and in statehouses. At the end of 2014, 12 states and the District of Columbia had voluntarily recognized same-sex marriage—one by popular ballot, the rest by legislation.<sup>37</sup> Yet, before federal courts began striking constitutional bans in earnest, states had banned same-sex marriage by constitutional amendment in 29 states<sup>38</sup> and by statute in 8 others.<sup>39</sup> By November 11, 2014, constitutional bans in only 16 states survived,<sup>40</sup> while every statutory ban had succumbed to the voluntary enactment of marriage equality (Delaware, Hawaii, Illinois, Maine, and Minnesota)<sup>41</sup> or been struck down (Indiana, Pennsylvania, West Virginia, and Wyoming).<sup>42</sup> Rounding out the pathway to same-sex marriage recognition, state courts in four states interpreted their own constitutions to require same-sex marriage.<sup>43</sup>

Even this snapshot masks deep flux. In spring 2012, Washington and Maryland became the 8th and 9th jurisdictions to recognize same-sex marriage.<sup>44</sup> The same day that Maryland’s bill became law, opponents began efforts to overturn it by referendum in the fall 2012 election.<sup>45</sup> By summer 2012, opponents in both states had gathered enough signatures to put the two measures before voters in November.<sup>46</sup> Both ultimately survived challenge by exceedingly



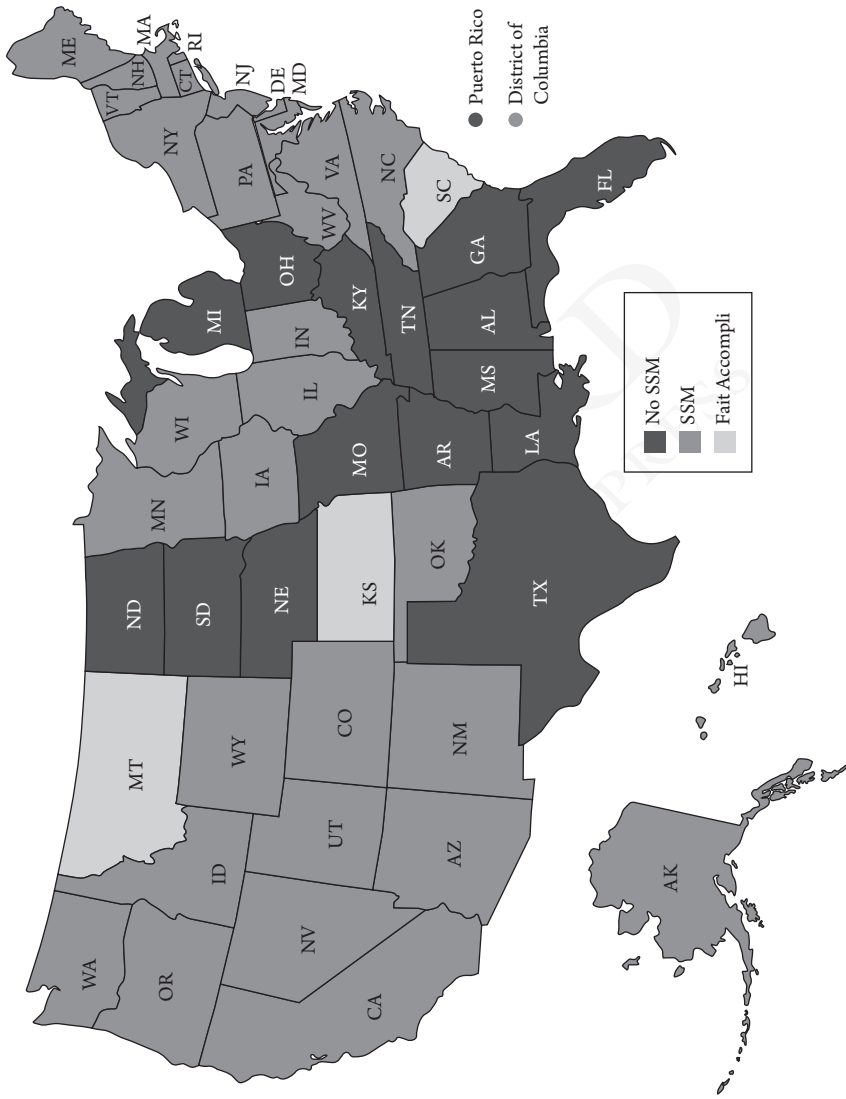


Figure 6.2. Same-Sex Marriage after Supreme Court's Certiorari Denial' (until Nov. 1, 2014). \* See Wilson, "Human Costs," supra note 6.

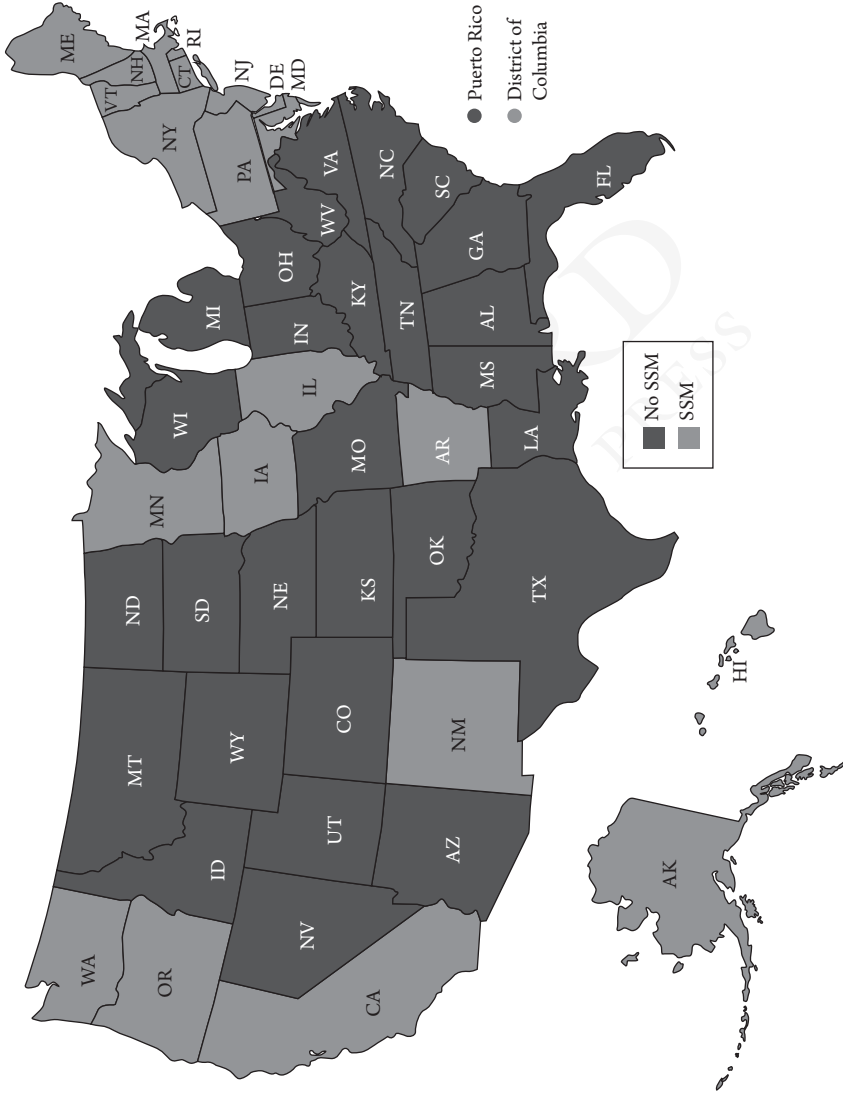


Figure 6.3. Same-Sex Marriage before the Supreme Court's Denial of Certiorari (until Nov. 11, 2014). \* Arkansas temporarily allowed same-sex marriages in the window between a favorable state trial court ruling and the Arkansas Supreme Court's stay of that decision. Parsh Dave, "Arkansas Supreme Court Halts Same-Sex Marriages," Los Angeles Times, May 16, 2014, <http://www.latimes.com/nation/nationnow/la-na-nn-arkansas-gay-marriage-stay-20140516-story.html>.

narrow margins,<sup>47</sup> helped in significant measure by religious liberty protections embedded in the legislation. The incremental policymaking that took place in statehouses to balance religious liberty and marriage equality, described in Part I.B.1, permitted both sides to benefit from compromising.

Some naturally assume that the political calculus has shifted dramatically now that the Supreme Court has recognized a federal constitutional right to same-sex marriage. True, there is no incentive to trade religious liberty for marriage recognition after *Obergefell*. But the need to compromise—and benefits of compromise—have not abruptly disappeared. This is so because, until Utah's landmark legislation in 2015,<sup>48</sup> only 20 states and the District of Columbia barred discrimination based on sexual orientation in housing, employment, or public accommodations in state law, as Figure 6.4 shows.<sup>49</sup>

Only in the states shown in white in Figure 6.4 is there both a present right for same-sex couples to marry *and* state laws protecting LGBT individuals from discrimination. To be sure, Americans strongly support LGBT non-discrimination laws, seeing them as necessary to combat discrimination against LGBT individuals.<sup>50</sup> In 2014, 68% of Americans thought lesbians and gays faced “a lot of discrimination”—more perceived discrimination than that faced by every other minority group except Muslims.<sup>51</sup>

When asked, Americans overwhelmingly say lesbians and gays deserve protection from discrimination in public accommodations, housing, or employment.<sup>52</sup> In 2014, nearly 3 out of 4 Americans (72%) favored protections for LGBT individuals from employment discrimination.<sup>53</sup> Notwithstanding support for these protections, enacting non-discrimination laws is complex, involving more than just public support.<sup>54</sup>

Indeed, as same-sex marriage rapidly spread to formerly red states after the Court's denial of certiorari at the end of 2014, states witnessed the bargaining over religious liberty shift from trading marriage equality for religious liberty protection to trading non-discrimination protections for religious liberty protections like those found in the voluntary same-sex marriage laws.<sup>55</sup> Utah represents a striking bellwether of this shift. In January 2015, the Mormon Church called for legislation to “protect[] vital religious freedoms for individuals, families, churches and other faith groups while also protecting the rights of our LGBT citizens in . . . housing, employment and public accommodation.”<sup>56</sup> Utah Senate Majority Leader Ralph Okerlund and others supported comprehensive measures to effect such a balance, believing “[i]t would polarize those two issues if we tried to move forward with one without the other.”<sup>57</sup>

The Utah legislature successfully passed by overwhelming majorities a pair of bills that were signed into law by Governor Gary Herbert.<sup>58</sup> The first bill, SB 296, protects LGBT individuals from discrimination in employment or housing based on their gender identity or sexual orientation, but it exempts “[r]eligious

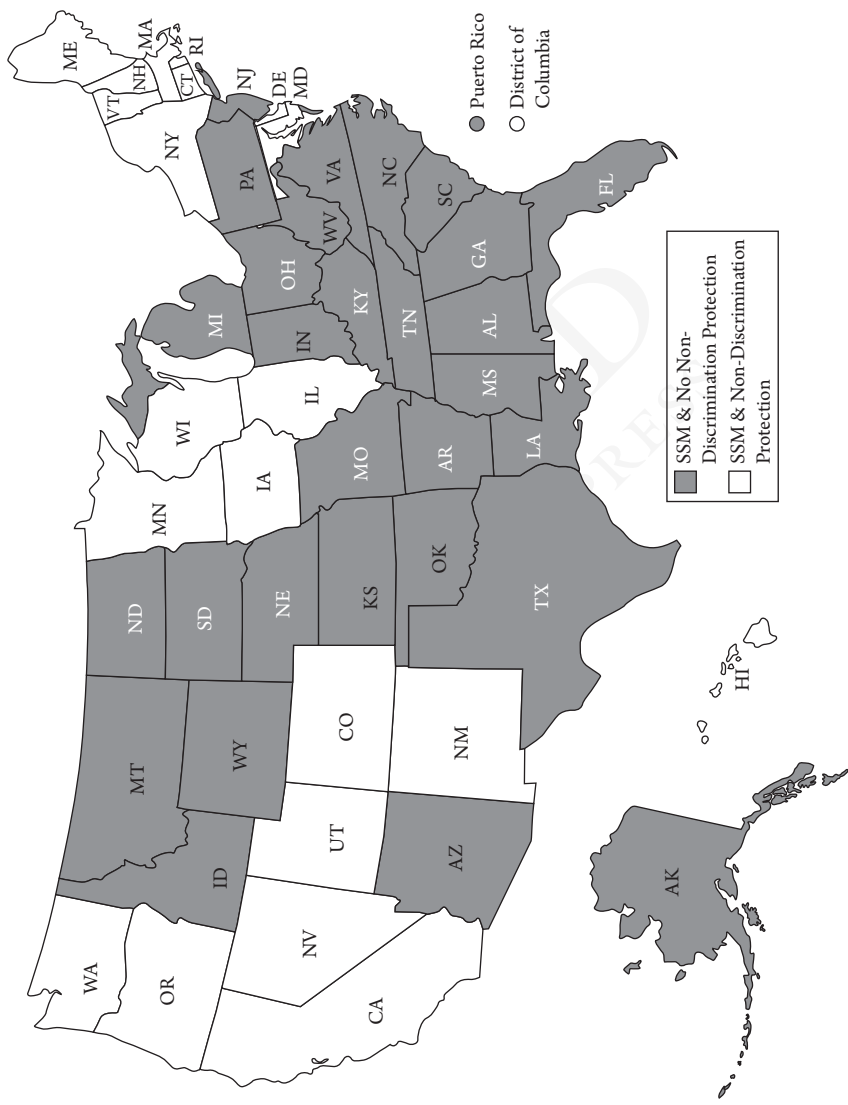


Figure 6.4. A Right to Marry without Basic Non-Discrimination Protections.

organizations and their affiliates . . . from the bill's requirements."<sup>59</sup> The second bill, SB 297, permits faith groups to solemnize and host only those weddings and receptions consistent with their faith and to limit religious counseling to those in traditional marriages—without threat of civil suit or government penalty; it also requires county clerk offices to establish a process for solemnizing all legal marriages—not required by Utah law before the Utah Compromise—but the office may outsource the duty to any willing celebrant in the community, avoiding the need to fire “[i]ndividual local officials who object to same-sex marriage” or force them to quit their jobs.<sup>60</sup> In bypassing religious objectors entirely, the Utah Compromise ensures the dignity of same-sex couples seeking licenses, who receive access to marriage on exactly the same basis as straight couples, and never even know whether someone in the office had a religious objection.

The Utah Compromise contains other novel protections for religious liberty, too. No one can be stripped of a professional license for speaking about marriage, family, or sexuality in a nonprofessional setting.<sup>61</sup> No covered employee can be fired for political or religious expression outside the workplace, whether giving to Proposition 8 or marching in a gay rights parade.<sup>62</sup> Political and religious speech receive equal treatment in the workplace, too, although employers retain the latitude to bar all such talk.<sup>63</sup> Together, the measures marked “a major step forward” because neither LGBT nor religious freedom advocates “allowed the best to become the enemy of the good.”<sup>64</sup>

As Yale University Professor William Eskridge notes, the “Utah statute . . . never would have gotten anywhere if there had not been a lot of appreciation, particularly by the Mormons and conservative Republicans, that LGBT people are part of the community.”<sup>65</sup> The Utah legislature responded to the tension over forced recognition by the federal courts of same-sex marriage by “call[ing] a truce in the culture war pitting gay rights against religious liberty.”<sup>66</sup> Indeed, “the Utah legislature . . . reminded politicians across the country that, in fact, half a loaf is often better than no loaf at all.”<sup>67</sup>

In 2015, other state legislatures signaled a willingness to bargain around LGBT non-discrimination and religious freedom. For example, Michigan and Wyoming made halting attempts to pass LGBT non-discrimination bills with broad religious exemptions.<sup>68</sup> Nebraska legislators amended a LGBT non-discrimination bill to “make it clear that religious corporations, associations and societies are exempt from the non-discrimination requirements based on religious belief.”<sup>69</sup> And in Indiana, Senate Republicans introduced a bill to ban discrimination statewide based on sexual orientation and gender identity in housing, hiring, and public accommodations, “while carving out several exemptions for those with strong religious objections,” a bill seen as the “opening salvo of what is likely to be a long and arduous debate.”<sup>70</sup>

As the next sub-part shows, the story of legislative recognition of same-sex marriage in the United States has been one of compromise—going forward, compromise is the key to securing much-needed protections for both sides.

## B. The Political Realities on Each Side

### 1. *Supporters Need to Compromise*

When same-sex marriage advocates have negotiated, they have won legislative victories; conversely, when they have pursued a winner-takes-all approach without meaningful religious liberty accommodations that extend beyond the clergy and church sanctuary, they have lost. In the decade before *Obergefell*, legislators in nine states and the District of Columbia proposed same-sex marriage legislation shorn of protections for anyone other than the clergy and churches.<sup>71</sup> Those provisions offered faux “protection” because “[n]o one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them.”<sup>72</sup> Such legislative proposals ultimately failed in every jurisdiction.<sup>73</sup>

In the single instance that a same-sex marriage bill with clergy-only protections managed to become law, it was later repealed by voters. In 2009, Maine legislators stubbornly refused to include robust religious liberty protections in Maine’s same-sex marriage law. Instead, the legislature elected to provide only those protections already guaranteed by the Constitution<sup>74</sup>—and turned down more meaningful religious liberty protections like those advocated for in this chapter. Maine voters turned back the law in a “people’s veto” by a relatively narrow margin: 52.9% to 47.1%. The inflexible, absolute character of the Maine statute naturally elicited the question raised by Professor Dale Carpenter after the loss: Would “includ[ing] broader protection for religious liberty in the legislature’s [same-sex marriage] bill” have made a difference?<sup>75</sup> Arguably, it would have. After all, if a mere 3% of voters could have been swayed to change their votes by live-and-let-live religious liberty protections, Maine would likely have realized same-sex marriage in 2009.<sup>76</sup>

A scant three years later, in 2012, Maine voters enacted same-sex marriage by popular referendum. Voters responded “yes” to the question “Do you want to allow the State of Maine to issue marriage licenses to same-sex couples?” by a margin of 52.65% to 47.35%.<sup>77</sup> Notably, the ballot measure itself authorized specific legislation to “allow marriage licenses for same-sex couples and protect religious freedom,” while exempting not only clergy but “any church, religious denomination or other religious institution.”<sup>78</sup> These institutions may not be required to “host any marriage in violation of the religious beliefs of that member of the clergy, church, religious denomination or other religious institution.”<sup>79</sup> Any refusal would not subject the group to “a lawsuit or liability and does not

affect the tax-exempt status of the church, religious denomination or other religious institution.<sup>80</sup> One cannot, however, be completely confident that voters understood or gave weight to these religious protections in the run-up to the ballot question.<sup>81</sup> Certainly, ballot supporters emphasized it.<sup>82</sup> Yet Maine's rapid turn-about on same-sex marriage points to the value of compromise.

Like Maine's voter-driven enactment, every marriage equality bill that garnered sufficient support to become law—and endure—acknowledged the impact of same-sex marriage laws on believers who adhere to a traditional view of marriage.<sup>83</sup> Twelve jurisdictions voluntarily embraced same-sex marriage through the legislative process (Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington).<sup>84</sup> Each law provided religious liberty protections to the clergy, but then reached beyond guarantees given by the First Amendment.<sup>85</sup>

A core of protections emerged for religious organizations<sup>86</sup> and individuals<sup>87</sup> who cannot celebrate or facilitate *any* marriage—including a same-sex marriage, interfaith marriage,<sup>88</sup> or second marriage—when doing so would violate their religious convictions.<sup>89</sup> Although each law describes the exempt activities in slightly different terms, generally they encompass the provision of “services, accommodations, advantages, facilities, goods, or privileges to an individual if . . . related to the solemnization of a marriage [or] the celebration of a marriage.”<sup>90</sup> All but one jurisdiction insulates religious organizations from civil suits for refusing to celebrate marriages, while all but two explicitly protect such organizations from punishment at the hands of the government.<sup>91</sup>

Every state but Delaware extends the protection from lawsuits to religious nonprofits, like Catholic Charities or the Salvation Army.<sup>92</sup> Eight jurisdictions extend protections to benevolent religious organizations, like the Knights of Columbus, or to religious groups that sponsor marriage retreats or provide housing for married individuals.<sup>93</sup> Six states (Maryland, Minnesota, New Hampshire, New York, Rhode Island, and Washington) expressly exempt individual employees “managed, directed, or supervised by” a covered entity from celebrating same-sex marriages if doing so would violate their “religious beliefs and faith.”<sup>94</sup> While it is not readily apparent how this protection adds to that for the individual's employer, one can imagine a lawsuit being filed against a church employee instead of the church. A single state, Delaware, permits justices of the peace and judges to solemnize only those marriages they choose to<sup>95</sup>—because this blanket protection permits objectors to “erect a roadblock to marriage,” it should be conditioned on *not* creating hardship to same-sex couples.<sup>96</sup> In all, such robust religious liberty protections sweep far beyond the church sanctuary, providing accommodations that exceed what most scholars believe would be constitutionally demanded.<sup>97</sup>

As in Maine, legislation in Maryland and Washington faced referendum challenges. But unlike Maine's 2009 legislation protecting only the clergy, Maryland's and Washington's more robust laws survived challenge, albeit by narrow margins.<sup>98</sup> In each jurisdiction, the religious liberty protections in the law were featured on the face of the ballot.

Religious liberty protections are important not only to a law's success, but to its reality. Without such protections, religious groups and individuals that hew to their religious beliefs about marriage would be at risk of punishment by the government and would also be subject to lawsuits from private citizens. These risks are not speculative. The City of San Francisco withdrew \$3.5 million in social services contracts from the Salvation Army when it refused, for religious reasons, to provide benefits to its employees' same-sex partners.<sup>99</sup> In New Jersey, the state's Division of Civil Rights found that a Methodist nonprofit association violated New Jersey's Law Against Discrimination when it denied the requests of two same-sex couples to use the group's boardwalk pavilion for their commitment ceremonies.<sup>100</sup> Separately, local tax authorities stripped the group of its exemption from ad valorem property taxes on the boardwalk pavilion, billing the group close to \$20,000 in "rollback" taxes, although that loss was hastened by the group's own decision to tie its property tax exemption to a public lands program and the group ultimately paid less.<sup>101</sup> Some may see coercion by the government—through the denial of grants or other benefits extended to the public—as a perfectly appropriate way to make same-sex marriage opponents conform no matter what their faith asks of them. As this chapter shows, however, protecting equality need not come at the expense of religious liberty. But more fundamentally, it breaches the American social contract<sup>102</sup> to force religious objectors to heel just because the government has the power to do so.<sup>103</sup>

We have also seen clashes in the commercial arena where individuals have felt pressured to choose between their livelihoods and their religious convictions. In 2008, the New Mexico Human Rights Commission fined a small photography shop, Elane Photography, over \$6,000 for refusing on religious grounds to photograph a same-sex commitment ceremony.<sup>104</sup> New Mexico did not recognize same-sex marriage until 2013.<sup>105</sup> The Supreme Court of New Mexico upheld the fine.<sup>106</sup> In Oregon, which bans LGBT discrimination, an administrative law judge ordered the owners of Sweet Cakes by Melissa in Portland to pay \$135,000 to a same-sex couple after refusing to provide the couple a wedding cake.<sup>107</sup> In July 2015, an Oregon appeals court upheld the fine.<sup>108</sup>

Beginning with the first marriage equality decision, clashes have also erupted over the appropriate role of judges, magistrates, and marriage registrars. On the heels of Massachusetts' same-sex marriage decision,<sup>109</sup> state justices of the peace were told by counsel to then-Governor Mitt Romney that they must "follow the law, whether you agree with it or not."<sup>110</sup> Anyone who turned away same-sex



couples could be held personally liable for up to \$50,000.<sup>111</sup> Iowa and New York gave all government officials similar directives, which precipitated a host of resignations.<sup>112</sup> In one controversial case in New York, the town clerk instituted a new process to delegate the marriage license task to a deputy clerk who did not share the town clerk's religious objection to same-sex marriage—provoking charges that a “public official simply decide[d] to shirk the obligations of her office.”<sup>113</sup>

In state after state, religious liberty accommodations helped same-sex marriage advocates secure long-sought legislative victories. In all but two states, proposed legislation offering “clergy-only protection” failed to garner enough support to become law only months before enactment of legislation with more meaningful protections, suggesting that robust exemptions made marriage equality laws politically feasible.<sup>114</sup>

For example, in 2007 and 2009, proposed legislation containing a clergy-only exemption passed the New York Assembly, only to die in the New York Senate.<sup>115</sup> Two years later, in 2011, Governor Andrew M. Cuomo proposed The Marriage Equality Act, a revised bill with more robust religious liberty protections described below. The New York Assembly approved the bill on June 15, 2011, by a vote of 80 to 63.<sup>116</sup> Although Governor Cuomo's bill improved on the non-protections in the 2007 and 2009 bills, it notably did *not* insulate religious objectors from government penalty.<sup>117</sup> The New York Senate then enlarged the protections and that measure passed on June 24, 2011, by a vote of 33 to 29.<sup>118</sup>

After Governor Andrew Cuomo signed New York's same-sex marriage law, the *New York Times* observed that the religious exemptions were

just a few paragraphs, but they proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage. . . . Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive protections for religious organizations and helped pull the legislation over the finish line Friday night.<sup>119</sup>

Efforts to pass same-sex marriage legislation in Washington and Maryland followed similar trajectories.<sup>120</sup> In both states, religious liberty protections shifted the question for some legislators from *whether* to embrace marriage equality to *how* to balance that good with religious liberty.<sup>121</sup> As Speaker Michael Busch of the Maryland House of Delegates explained, more expansive religious liberty protections facilitated passage:

We didn't want to inhibit any religious organization from practicing their beliefs. One of the issues was the adoption issue. We wanted to make sure

we didn't impede on the Catholic Church for adoption services. . . . I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision to vote for it.<sup>122</sup>

Washington Governor Christine Gregoire explained how thicker protection for religious liberty figured in her own decision to back marriage equality legislation:

I looked at what New York had done. I worked with our gay community. I told them that that was the only way I would introduce the bill. There were some people who wanted to compromise on [the religious liberty protections] in the future. But I said, "No," that this was in part a reflection of my evolution on the issue, and it wasn't compromisable.<sup>123</sup>

As noted above, Maryland's and Washington's laws both survived pitched and expensive referendum challenges. Together, these experiences suggest that exemptions took a powerful argument against same-sex marriage away from opponents.<sup>124</sup> Although counter-intuitive to some, as prominent gay rights leader Jonathan Rauch has pointed out, the smart move for LGBT rights supporters is to "bend toward accommodation," not away from it.<sup>125</sup>

With marriage equality now guaranteed, the temptation for many LGBT rights supporters may be to harden against compromise. This would be a mistake.

There is far more work to be done for the LGBT community even after securing marriage equality. Only 21 states and the District of Columbia ban discrimination based on sexual orientation in housing, employment, or public accommodations in state law,<sup>126</sup> leaving great swaths of the country where same-sex couples can marry but lack protection from discrimination in housing, hiring, and public accommodations. Only in the states shown in white in Figure 6.4 is there both the right for same-sex couples to marry *and* protection from discrimination based on sexual orientation.

Thus, although what would be traded necessarily changes now that the right to marry is assured, the motivation to bargain remains for LGBT rights supporters. The recent repeal of the Houston Equal Rights Ordinance or "HERO," which would have extended protections in housing, employment, and public accommodations to the LGBT community, is instructive. Going into the referendum, "[i]n 2015, in America's fourth-largest city and one of its most diverse, backing [HERO] might have seemed an obvious choice."<sup>127</sup> What should have been an easy electoral victory stalled for complex reasons, including the ordinance's "vagueness" and what many people of good will saw as scare mongering over public access to restroom facilities.<sup>128</sup> The *Christian Science Monitor* read HERO's repeal by a "resounding margin" as laying bare again "America's bitter and ongoing divisions over same-sex marriage and religious freedom."<sup>129</sup> Eskridge speculates

that the Utah Compromise may have succeeded where HERO failed precisely because Utah Compromise “permitted those with religious objections to find a space to opt out.”<sup>130</sup>

## 2. *Opponents Need to Compromise*

Before the judicial juggernaut shown in Figure 6.1, it was far easier to see why supporters of same-sex marriage should compromise than why opponents should. After all, opponents had amassed 29 consecutive victories at the ballot box before the stinging defeats delivered by the 2012 election.

Pre-*Obergefell*, legislative compromise over same-sex marriage averted an absolute defeat for opponents at the hands of a state or federal court.<sup>131</sup> Same-sex marriage by judicial decision alone was the real “nightmare for religious liberty” that opponents feared.<sup>132</sup> As Figure 6.5 and Appendix 6.B both underscore, judicial decisions leave religious objectors the most exposed. States shown in black in Figure 6.5 received no religious liberty protections tailored to marriage at the time same-sex marriage was recognized, because the right to marry arose by judicial decision.

The failure of the judiciary to protect religious objectors is hardly its fault. Courts lack the inherent ability of legislatures to balance competing goods in a plural society. Moreover, protecting religious objectors is not the issue before the court when it considers a constitutional entitlement, such as the right to same-sex marriage.

Even after *Obergefell*'s mandate of same-sex marriage, compromising is still the path forward to religious liberty protections, protections that are likely to elude opponents later. Why?

If support for same-sex marriage is any indicator, support for LGBT rights will mushroom over time, making the denial of statewide non-discrimination protections for sexual orientation and gender identity increasingly untenable. Although most states lack these fundamental protections for the LGBT community, popular support for LGBT rights will likely hasten state legislation, without the need for judicial interference. But that shift can occur sooner, in a more positive way, if both parties compromise. Just consider how support for same-sex marriage grew over a decade into a force to be reckoned with. For several years running, a slim majority of Americans has believed that “marriages between same-sex couples should . . . be recognize[d] by the law.”<sup>133</sup> In 2014, same-sex marriage support reached a “new high at 55%.”<sup>134</sup> The public’s embrace of same-sex marriage and LGBT rights more generally will only accelerate. For example, a string of polls reveal a deep generational fracture. In every state in the United States, opposition to same-sex marriage recedes with age, as Figure 6.6 illustrates.<sup>135</sup>

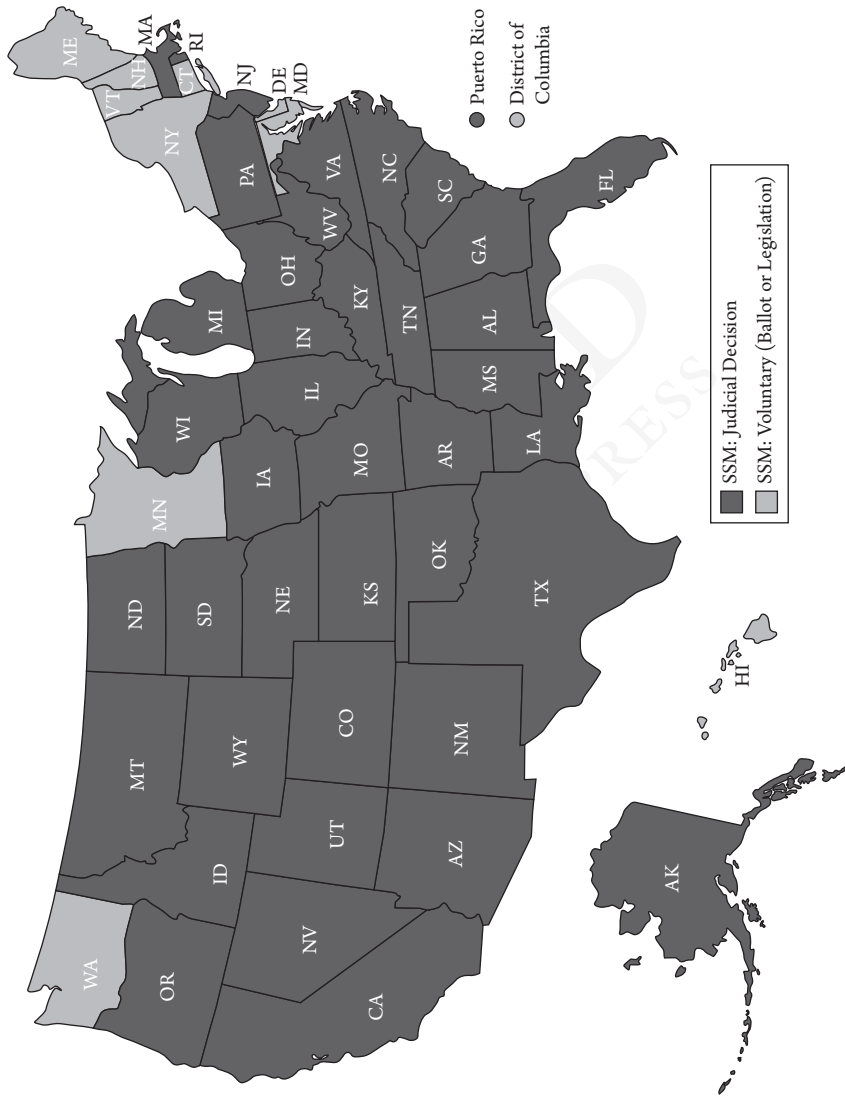
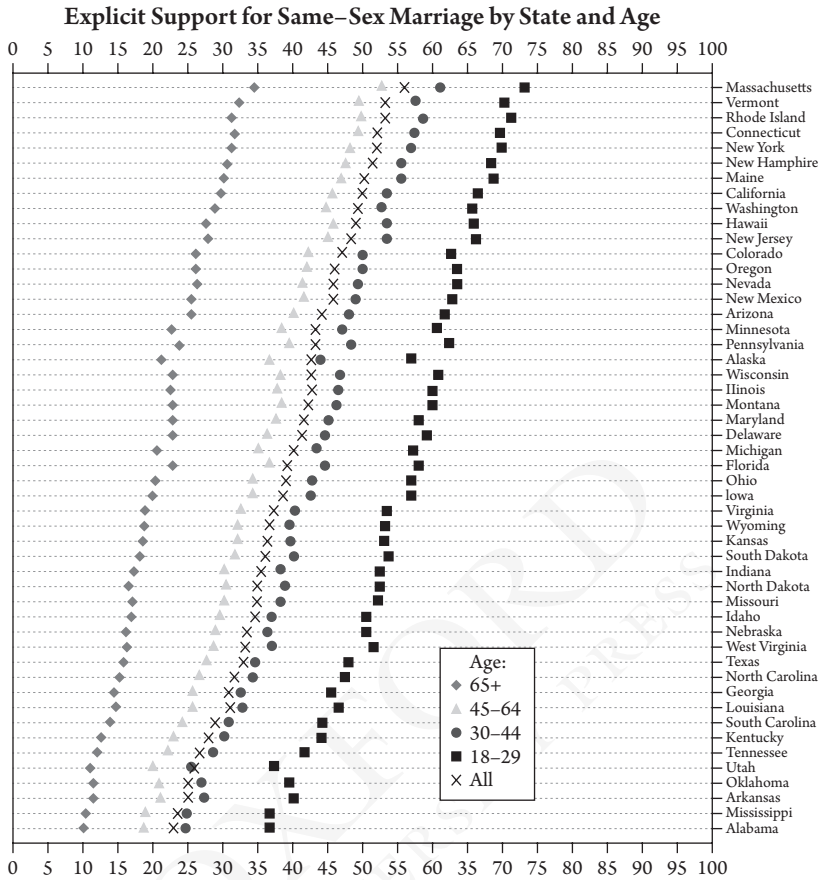


Figure 6.5. Degrees of Protection with Judicial Decisions and Voluntary Marriage Laws.



Lax and Phillips (2009): data from 1994 to 2008, estimates weighted for 2008

Figure 6.6. Generational Support (and Opposition) to Same-Sex Marriage.\*

\* Jeffrey R. Lax and Justin H. Phillips, “Gay Rights in the States: Public Opinion and Policy Responsiveness,” *American Political Science Review* 103 (2009): 367–386, Fig. 8 (online appendix only), [http://www.columbia.edu/~jrl2124/Lax\\_Phillips\\_Gay\\_Policy\\_Responsiveness\\_2009.pdf](http://www.columbia.edu/~jrl2124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf) (reproduced with permission of authors).

More recent polls confirm that younger people support same-sex marriage at considerably higher rates than their older counterparts.<sup>136</sup> According to a 2014 poll by the Pew Research Center Forum on Religion and Public Life, 67% of Millennials—those born after 1981—“favor allowing gays and lesbians to marry legally,” while a slim majority, 53%, of Generation X—those born between 1965 and 1980—support same-sex marriage.<sup>137</sup> Opposition to same-sex marriage largely concentrates in America’s oldest generations, the Baby Boomers and the Silent Generation, those born between 1946 and 1964 and 1925 and 1945, respectively. Only 46% of Baby Boomers and 35% of the Silent Generation support same-sex marriage.<sup>138</sup> After the staunchest opponents pass from the scene,

the landslide of support for same-sex marriage will only accelerate.<sup>139</sup> The contrast between America's oldest and youngest citizens portends a wellspring of support for gay marriage, which would have shown up at the ballot box even if *Obergefell* had not required states to recognize same-sex marriage. As Andrew Kohut, President of the Pew Research Center, astutely noted, "the electorate changes, and politics follow. . . ."<sup>140</sup>

This generational shift would have meant very little if existing state constitutional amendments banning same-sex marriage were unassailable. Ultimately, they did not prove immune from abrogation by the courts. But the bans would have crumbled in a matter of years without *Obergefell*.

One might think that amending state constitutions is as difficult as amending the federal Constitution, which requires "two-thirds of both houses of Congress and approval from three-fourths of the states."<sup>141</sup> In reality, however, "most state constitutions can be amended by majority vote on a ballot referendum. This ease of amendment led to 946 state constitutional amendments in the 1970s alone."<sup>142</sup>

A careful review of the process for amending the state constitution in the 29 states that until recently had constitutional amendments banning same-sex marriage<sup>143</sup> shows their vulnerability. Eight states (Georgia, Idaho, Kansas, Louisiana, North Carolina, South Carolina, Texas, and Utah) erected significant barriers to amendment, and therefore significant barriers to repeal.<sup>144</sup> Consider, for example, Utah, where the state's ban was struck by a lower court even before *Obergefell*.<sup>145</sup> Utah requires two-thirds of state legislators in both houses to amend the state constitution, after which a simple majority of the electorate must also approve the amendment.<sup>146</sup> Because this process is so onerous, once an amendment is adopted, it is highly unlikely to be repealed in the near future. Only a court's decision is likely to shatter it until a significant portion of the public believes it should fall.

But in the remaining states, constitutional bans enjoy only a mild or negligible lock-in effect. Eight states (Alabama, Alaska, Kentucky, Nevada, Oregon, Tennessee, Virginia, and Wisconsin) erected some barriers to repeal, but not ones as daunting as Utah's.<sup>147</sup> Generally, these states provide a legislative method for amendment, requiring only a majority of legislators and voters to amend the state's constitution. Some of these states also allow amendments by a periodic convention that either (a) requires approval by a simple majority of voters, but the convention may be called only after long periods of time (e.g., ten years), or (b) permits a convention to take place after two steps—approval by a majority of legislators and approval by majority of the electorate. Consider, for example, Virginia, which provides two paths to adoption or repeal: the legislative method—requiring approval by a simple majority of legislators in both houses and a simple majority of the electorate—and periodic constitutional conventions called by the legislature, where voters can approve amendments by a simple majority.<sup>148</sup> Because amendments can pass without supermajority support in the legislature, this process creates a milder lock-in effect.

Thirteen states (Arizona, Arkansas, Colorado, Florida, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, and South Dakota) fall in the final category, where constitutional bans can be adopted or repealed with relative ease.<sup>149</sup> A negligible lock-in state permits change with only a small fraction of voters petitioning for it, followed by a simple majority of voters voting for amendment. Typically, states require 10% of the electorate to initiate the process, but this percentage may range as low as 2% and as high as 15%.<sup>150</sup> Arizona is emblematic of this approach. It requires a petition to be signed by 15% of the total number of voters who cast votes for governor in the preceding election. At that point, the proposed amendment appears on the ballot to be decided by a majority of voters in a general election.<sup>151</sup>

In short, state constitutional amendments were surmountable in all 29 states to ban same-sex marriage in the state's constitution. In all but 8 states, constitutional bans could have been undone without "supermajority" votes by the legislature or the electorate, meaning that they were at risk long before *Obergefell* swept them away.

The speed at which opposition to same-sex marriage has receded in nearly all these states—including those states where the ban enjoyed a strong lock-in effect, a mild lock-in effect, or nearly none at all—is as important as the ease with which constitutional bans could be repealed. Figures 6.7 through 6.9 show actual support in 1994–1996, actual support at the time of the constitutional amendment, and projected support for 2012 and 2016.<sup>152</sup>

As Figure 6.7 shows, the eight strong lock-in states were not likely to enact same-sex marriage legislation of their own accord in the near future, based on either public support or the strength of the constitutional amendment.<sup>153</sup> But, by November 11, 2014, judicial decisions had wiped away bans in Idaho, Kansas, Utah, North Carolina, and South Carolina, and the remaining bans fell with *Obergefell*.<sup>154</sup>

Figure 6.8 highlights the flimsiness of state constitutional amendments. Of the eight mild lock-in states, a majority of the populations in three states (Nevada, Oregon, and Wisconsin) already supported same-sex marriage by 2012, putting those bans at risk without judicial challenges. By 2016, in five of the eight states a majority of the population was projected to support same-sex marriage (Alaska, Nevada, Oregon, Virginia, and Wisconsin).<sup>155</sup> Of course, bans in Virginia, Wisconsin, Oregon, Nevada, and Alaska had already been swept aside before *Obergefell*, permitting same-sex couples to marry in those states.<sup>156</sup>

Figure 6.9 tells an even starker story. Of the states with negligible lock-in effects, by 2012, a majority of the population in ten of the twelve supported same-sex marriage or were within striking distance of majority support (Arizona, Colorado, Florida, Missouri, Montana, Michigan, Nebraska, Ohio, North Dakota, and South Dakota).<sup>157</sup> By 2016, only four of the negligible lock-in effect states were not projected to have majority support for same-sex marriage (Arkansas, Mississippi, Missouri, and South Dakota).<sup>158</sup> Because the constitutions in these

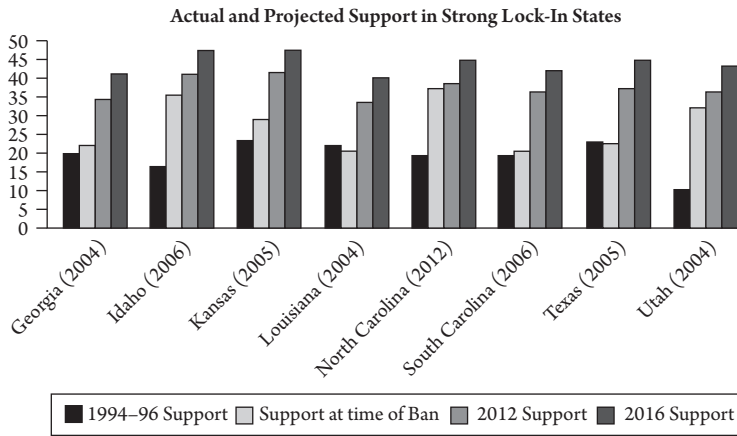


Figure 6.7. Strong Lock-in States: Actual and Projected Support.

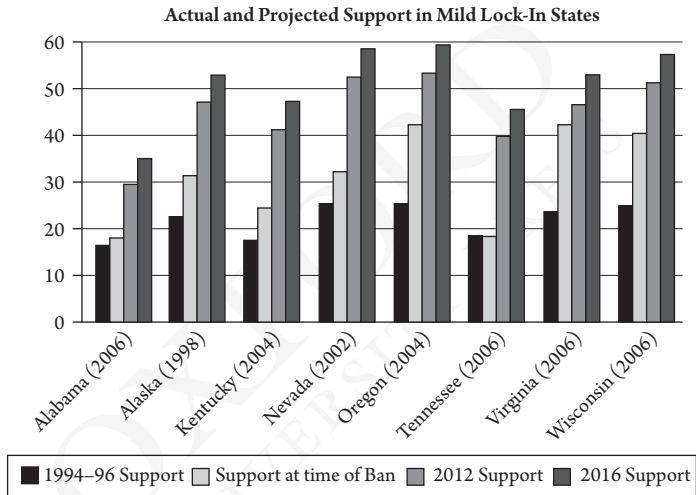


Figure 6.8. Mild Lock-in States: Actual and Projected Support.

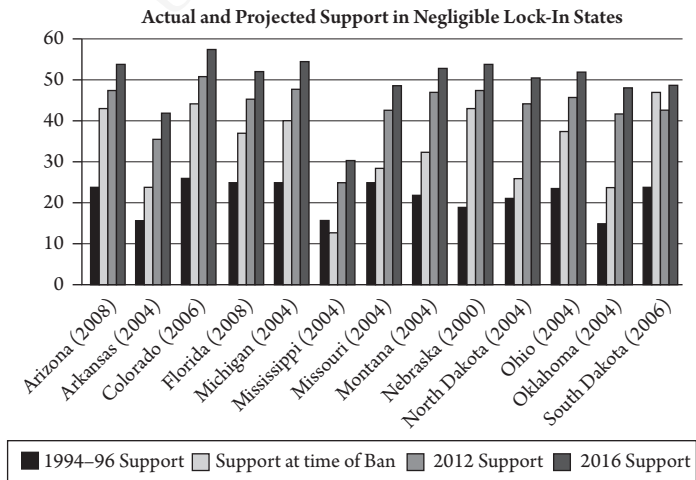


Figure 6.9. Negligible Lock-in States: Actual and Projected Support.



states are almost as easy to amend as enacting ordinary legislation, the need to bargain was at a zenith, however the Supreme Court decided *Obergefell*. The fact that, by November 11, 2014, bans in Oklahoma, Arizona, Colorado, Missouri, and Montana had already fallen, while decisions striking the bans in Florida and Arkansas were stayed, only underscored the necessity of bargaining.<sup>159</sup>

In short, if projected support approximates reality, legislation to recognize same-sex marriage would have been possible in the majority of the constitutional amendment states by the middle of the decade, whatever happened with *Obergefell*. And by 2020, putting aside the lock-in effect, virtually every state was likely to have sufficient support to voluntarily embrace same-sex marriage.<sup>160</sup> Only six states were projected to then show support below 50%, and all but two were projected to be within a few percentage points of majority support.<sup>161</sup>

Now that *Obergefell* dispositively decides the question of same-sex marriage, religious objectors who are bitterly disappointed may see no point in compromising now or no opportunity to do so.<sup>162</sup> Yet the same political flimsiness of constitutional amendments banning marriage reveals the folly of hardening in opposition to gay rights.

Gay rights advocates, eager to avoid the mistakes of past civil rights movements, have announced campaigns to capitalize on their momentum to wrest LGBT non-discrimination protections from the political process, whether in state houses or by popular vote. Utah shows that in the legislative process, the interests of religious communities and individuals of faith mattered greatly and received unprecedented protections. If forced to pursue ballot measures, gay rights advocates surely will not build religious protections into the text of the ballot measure. Partnering with the LGBT community on compromise legislation offers another distinct advantage over gambling on an initiative: in some states, ballot measures may not be amended by the legislature except to “further the purposes of the ballot measure.”<sup>163</sup> The spectre of losing all control over the extent of nondiscrimination protections and their impact on faith communities creates an urgency to reach reasonable compromises over gay rights now. But for compromise to succeed, proponents must be prepared to answer whether and how to balance competing interests in a single piece of legislation, a topic to which we now turn.

## II. Overcoming Substantive Points of Resistance to Religious Liberty Protections

The LGBT community and religious traditionalists both benefit from compromise. Nonetheless, legislators and staffers charged with arriving at political consensus have expressed a number of substantive points of resistance to the religious liberty protections like the model provisions contained in Appendix 6.A.

A word about the proposals in Appendix 6.A is in order. Those protections were proposed in 2009 as part of any legislative package enacting marriage equality. I believe they can and should be part of a host of protections for faith communities in LGBT nondiscrimination legislation, as they were in the Utah Compromise. But I also believe that enacting them as stand-alone protections for religious objectors after *Obergefell*—even if qualified by hardship—extracts concessions for religious objectors while offering nothing for the gay community. Such one-sided deals are not only wrong, but have drawn the ire of the public and precipitated boycotts.<sup>164</sup>

If “hardship” exemptions protect the interests of both sides, as many believe they do,<sup>165</sup> why are the exemptions difficult for some legislators to embrace? Skepticism may stem from naked political assessments. But in my conversations with legislators, I have sensed a real struggle to vindicate two competing values—religious liberty and LGBT equality—with tensions along a number of specific lines. These substantive points of resistance range from whether accommodations disguise bigotry<sup>166</sup> to the idea that accommodations would impose hardships on a gay couple seeking services or undermine their dignity.<sup>167</sup> As shown below, religious liberty accommodations qualified by hardships—or that bypass collisions altogether—can transform a zero-sum proposition into one in which LGBT equality and religious freedom can both be affirmed.

### A. Point of Resistance: “Exemptions Condone Bigotry in Disguise”

One point of resistance maintains that “exemptions condone bigotry in disguise.” In other words, how can anyone tell the sincere from the feigned objection?

Whether a claimed belief is sincere or a convenient screen for ignoble acts is an issue common to many, but not all, religious freedom protections. Unlike freedom of speech, freedom of conscience does not protect the insincere.

True, some individuals may be motivated to make religious freedom arguments in order to receive better work hours, get away with using illegal drugs, or avoid criminal charges.<sup>168</sup> Many claims for protection, however, seek the ability to perform an act that is not only personally burdensome, but wholly meaningless apart from the religious faith that gives the act meaning. So, for example, claims to adhere to kosher dietary laws<sup>169</sup> or to go without medical care<sup>170</sup> burden the claimant significantly, but impose very little cost on others, making it very unlikely that someone would make an insincere claim.<sup>171</sup>

Even when an individual requests religious protection for an act that may impose a cost on others, that request may nonetheless carry significant personal costs for the individual. Consider nurses who allege that they have been coerced into assisting with abortions, despite federal and state statutes giving an

unqualified right to refuse.<sup>172</sup> Some have been threatened not only with termination, but also with losing their nursing licenses for “patient abandonment.”<sup>173</sup>

Individuals who object on religious grounds to facilitating same-sex marriages have also incurred significant wrath in the marketplace, suggesting that an objector would not lightly feign an objection. When a New Jersey bridal salon refused to assist a woman with a bridal gown for her same-sex marriage, the story went “viral,” soon gracing not just the pages of a local newspaper, but national media outlets as well, like the *Los Angeles Times*.<sup>174</sup>

As others have noted:

If an exemption, say from participating in the sale of morning after pills, confers no ordinary advantage on the person who claims that participation would violate his conscience, and if the seeking of an exemption is likely to cause irritation of superiors or colleagues that could down the road hurt one’s chances for a promotion or informal benefits, a person has no incentive to make an insincere claim.<sup>175</sup>

Even though many individuals will not be motivated to feign a religious objection, sincerity questions can and do arise in some cases—from military conscientious objectors to prisoners requesting religious liberty accommodations. In each context, courts have generally proven competent to separate the sincere from the insincere plaintiff. In the prison context, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) directs prison officials not to “impose a substantial burden on the religious exercise of a person residing in or confined to an institution. . . .”<sup>176</sup> Some prisoners bring lawsuits based on religious claims to harass prison administrators or to gain perks they cannot otherwise secure. For instance, in 2010, an Orange County, California inmate claimed to follow the Seinfeld holiday religion, Festivus, to get double portions of food.<sup>177</sup> There, prison officials determined that the inmate’s religious claim was not sincere. Obviously, prisoners also bring claims with merit.<sup>178</sup>

Because both sincere and insincere claims can arise, in *Cutter v. Wilkinson*, the Supreme Court gave prison officials considerable leeway to test the sincerity of a prisoner’s stated need for accommodation before a prisoner plaintiff could take advantage of RLUIPA’s accommodations for religion:

[P]rison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner’s religion, the Act does not preclude inquiry into the sincerity of a prisoner’s professed religiosity. The truth

of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held.<sup>179</sup>

The Court reaffirmed this approach in *Burwell v. Hobby Lobby Stores, Inc.*<sup>180</sup> Interpreting the federal Religious Freedom Restoration Act ("RFRA")<sup>181</sup> to prohibit the government from forcing closely held, family-owned corporations to cover drugs and devices they religiously oppose, so long as less restrictive means were available,<sup>182</sup> the Court necessarily grappled with whether mandated coverage substantially burdened the plaintiffs' religious beliefs. Writing for the Court, Justice Alito explained that "it is not for us to say that [plaintiffs'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'"<sup>183</sup>

The military has long had a detailed system in place for evaluating the sincerity of conscientious objections to military service.<sup>184</sup> Sincerity tests parallel the examination of "pretext," which is common to most employment discrimination litigation in federal court. Under the framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*,<sup>185</sup> courts must evaluate whether an employer's proffered non-discriminatory reason for an adverse employment action is a pretext for invidious discrimination.

Although these contexts differ in important ways, together they demonstrate that courts have the institutional competence to decide whether a claimed religious objection to same-sex marriage is sincere or merely pretext for animus.

This is not to say that deciding the sincerity of a religious belief is an easy task. Sincerity must be determined "without a view as to [the] truth or falsity" of the religious belief being claimed, a point that the Supreme Court established in *United States v. Ballard*.<sup>186</sup> There, the government indicted leaders of a religion called "I Am" for mail fraud after they solicited donations from individuals they promised to cure of diseases. The Court held that the jury could properly decide whether the leaders sincerely believed that they had the ability to heal but could not evaluate the religious belief itself. Further, as Professor Chemerinsky points out, "[t]here is no measure for sincerity,"<sup>187</sup> although a number of commentators have suggested guides for evaluating it. For example, Professor Greenawalt notes that when someone "loses her job or is demoted because she actually refuses to perform an act," this helps to "demonstrate a true claim of conscience."<sup>188</sup> But he observes that "those whose claim for an exemption is granted usually are not put to such a test, . . . opening an exemption . . . to those with lukewarm reservations."<sup>189</sup>

While it is true that legislative protections proposed in Appendix 6.A as part of a legislative package enacting marriage equality would have shielded most religious objectors from lawsuits, this does not mean that objecting is cost-free. As noted above, many refusals are met with social opprobrium or stigma

from one's employer, coworkers, or community, even when there are existing protections.<sup>190</sup>

Neither does it mean that religious objectors get a free pass. Lawsuits may follow, and, if an exemption is structured like that in Appendix 6.A,<sup>191</sup> objectors who are sued may find that their beliefs are, in fact, subjected to a searching examination for sincerity. In the end, the difficulty of assessing sincerity remains "one reason for the law to avoid exemptions," but that reason "must be measured against the positive reasons to grant such exemptions."<sup>192</sup>

### B. Point of Resistance: "Objectors Are Protected from Doing the Deed (Solemnizing a Relationship), and That Is Sufficient"—or "Society Should Protect the Clergy, and Only Them"

Every draft same-sex marriage bill has unambiguously protected the refusal to solemnize a marriage,<sup>193</sup> a wholly unnecessary protection given the shared intuition that churches and clergy cannot be forced to solemnize marriages in violation of their religious tenets.<sup>194</sup> But legislators responsible for the text of marriage equality bills have been much more skeptical when it comes to crafting a "compromise that permits continued discrimination outside of solemnizing a marriage in a church sanctuary."<sup>195</sup> Professor John Corvino captures nicely the tension over protecting more than solemnization when he observes that the fight about religious liberty protections is not about the clergy, but about "the not-strictly-religious things that religious organizations often do: renting out banquet space, for example. And it's about religious individuals who for reasons of conscience wish to discriminate in secular settings."<sup>196</sup>

Although unstated, Corvino's comments encompass three related claims: first, that facilitating a ceremony is not a religious act in the way that performing the ceremony itself is; second, that an objector's claim weakens when it extends to services routinely provided by commercial entities, such as renting a banquet hall; and finally, that a religious objector may legally or morally object when asked directly to "do the deed"—to solemnize a relationship—but that an objector's moral or legal claim weakens when less direct actions are at stake.<sup>197</sup>

Let's begin with whether facilitating a same-sex marriage should be entitled to protection. Religious objectors, from wedding planners to caterers, all may seek to step aside from providing certain services because they "feel that they are being asked to promote or facilitate sin in a way that makes them personally responsible for the sin that ensues."<sup>198</sup> Professor Douglas Laycock believes there is a tendency "to dismiss these feelings of moral responsibility" because "the person providing services to a same-sex couple is not participating in the . . .

conduct she considers immoral and cannot reasonably think of herself as responsible for it.”<sup>199</sup> Yet, he contends, this is a mistake: “[m]any religious traditions have a long history of theological teaching attempting to identify the point at which one who cooperates with another’s wrongdoing, or even one who fails to sufficiently resist, becomes personally responsible for that wrongdoing.”<sup>200</sup> Certainly, with other actions, ideas of complicity and vicarious moral responsibility have not seemed so far-fetched—they underpinned, for example, boycotts of companies doing business in South Africa during apartheid.<sup>201</sup>

The religious liberty exemptions folded into existing same-sex marriage laws, described in Appendix 6.B, have treated claims of facilitation as worthy of respect: all exempted religious institutions from facilitating or celebrating a marriage through such actions as providing the space for a reception.<sup>202</sup> And six states exempted individual employees of religious organizations from the duty to “celebrate or promote” same-sex marriage if doing so would violate their “religious beliefs and faith.”<sup>203</sup>

But those same laws offer no protection to businesses or individuals in the marketplace who provide catering, flowers, reception halls, or gowns.<sup>204</sup> This brings us to the question of whether the law should distinguish between religious organizations and for-profit commercial vendors, even when they provide identical services.

In other contexts, the law has not drawn the line for an exemption along a nonprofit versus for-profit divide. For example, with respect to abortion, many conscience clauses exempt nonprofit and for-profit providers alike. Thus, the Church Amendment provides that the receipt of certain federal funds cannot be used by courts or public officials to force any entity to “make its facilities available for the performance of any sterilization procedure or abortion if [it] is prohibited by the entity on the basis of religious beliefs or moral convictions” or to “provide any personnel for [such services].”<sup>205</sup> This protection is not limited to nonprofit organizations or denominational hospitals. Clearly, abortion services are provided in the commercial marketplace by non-objecting institutions.<sup>206</sup> So, at least in the abortion context, it is what objectors are being asked to do, not what kind of corporate form they take, that merits conscience protection.

Of course, it was precisely the refusal of the *Hobby Lobby* Court to draw the line for protection at religious nonprofits, and no further, that has so many up in arms now.<sup>207</sup> The deep and sustained blowback over *Hobby Lobby* is likely to make any compromise that encompasses for-profit entities harder to arrive at, whether that protection comes from new generalized protections like RFRA or from narrowly drawn, well-constructed specific exemptions.

Just as conscience protections have not historically been limited to nonprofit organizations, neither have they extended protection only for direct participation. Again, abortion conscience clauses are illustrative. Many insulate not just

the physician who performs the abortion, but any person being asked to assist in its performance. This is true of both state-level exemptions<sup>208</sup> and federal conscience protections.<sup>209</sup> Some reach services outside those that most would view as “core”—the abortion procedure itself—to encompass more peripheral activities, like training and referrals for abortion.<sup>210</sup> Some healthcare conscience clauses are so broad that they exempt objectors from performing any service they find objectionable if the facility receives certain program funding from the federal government.<sup>211</sup>

The accommodation of an employee’s religious beliefs in the employment context follows this pattern as well. Title VII of the Civil Rights Act of 1964 (“Title VII”) requires employers to provide reasonable accommodations for an employee’s religious practice or belief unless the employer will experience an undue hardship.<sup>212</sup> As thinned-out as Title VII’s protections now are,<sup>213</sup> Title VII imposes this duty even when the objector does not directly facilitate an activity to which she objects. Thus, Title VII’s protections have extended to nurses who do not want to assist with an abortion,<sup>214</sup> post office clerks processing clerks who processing draft registration forms<sup>215</sup> and IRS agents who process applications for tax exemptions.<sup>216</sup> Although employers may consider hardships to themselves and other employees in granting or refusing an accommodation, nothing suggests that only those directly involved in a challenged activity can or should be exempted. The expansive protections in the employment and healthcare contexts reflect the reality that many activities implicate one’s conscience.

It is, however, possible that a claim for exemption may be so remote that it is beyond cognizance and society’s willingness to protect it. For instance, an Iowa Attorney General Opinion concluded that the state’s abortion conscience clause would not extend to a pharmacist making up the saline solution used in abortions.<sup>217</sup>

By their very terms, the exemptions in Appendix 6.A assume a pre-existing duty to serve or law against sexual orientation discrimination, to which there would be a limited step-off for “provid[ing] goods or services that assist or promote the solemnization or celebration of any marriage.”<sup>218</sup> Some, like Professor Kent Greenawalt, have asked if this would cover the clerk signing the paperwork, the one who hands it to the customer, and the cashier, too. All these services arguably facilitate the same-sex marriage because they involve the license. It is difficult to pinpoint the precise degree of involvement warranting an exemption. But clearly, an exemption should not cover the security officer who unlocks the clerk’s office in the morning because unlocking the building is not particular to facilitating same-sex marriages—the office must be unlocked to facilitate all of the office’s other business throughout the day. Put another way, because the office must be open to the public for a number of services, there is no meaningful sense in which the guard’s service “celebrates” or “assists” the “solemnization” of any particular couple’s

marriage. Neither is there any reason for the security guard to know the occasion for any particular couple's visit to the clerk's office, which suggests that any refusal has nothing to do with sincere religious objections to the marriage. Importantly, society can afford to take a more expansive, not crabbed view of "assisting" with the promotion or celebration of same-sex marriage if the exemption is qualified by hardship to the same-sex couple<sup>219</sup>—hardship introduces a significant limiting principle, as does the sincerity test. Thus, at a time when the public remains deeply divided about same-sex marriage, legislators can soften the blow for people who cannot, consistent with their faith, facilitate same-sex marriages. Ideally, legislators will craft creative solutions to bypass objectors entirely, while guaranteeing seamless access to marriage for all couples as the Utah Compromise did. Barring that, legislators should allow religious objectors to step aside when doing so would not impose costs on same-sex couples, as Part II.D explains.

### C. Point of Resistance: "No One Is Being Asked to Do Anything So No One Needs Protection"

Legislators have expressed ambivalence and genuine confusion about how same-sex marriage can trigger a threat to religious liberty, asking for, in the words of D.C. Councilmember Jim Graham, "concrete examples . . . . Otherwise [people will worry that legislators are just] thinking in [a] kind of 'airy fairy way' about possible problems."<sup>220</sup> This chapter has outlined numerous concrete examples of individuals and organizations being asked to perform acts that they cannot, for reasons of faith, perform—judges being asked to solemnize marriages; religious organizations being approached to provide space for weddings or receptions; town clerks being asked to process the paperwork for marriages when other non-objecting personnel are immediately available to provide the needed service. This sub-part will focus on just one concrete example.

The idea that no government official or employee will be asked to do anything that would burden them overlooks a stream of threats to government employees and officials that they must serve everyone who walks through the door, even if another willing person can perform the needed service. For instance, Massachusetts justices of the peace,<sup>221</sup> Iowa country recorders, magistrates, and judges, and New York town clerks<sup>222</sup> have all been told that refusing to serve all couples will result in criminal misdemeanor prosecutions or other sanctions.<sup>223</sup>

Many government employees and officials believe they are at risk, prompting them to resign in advance of collisions.<sup>224</sup> Because every state to voluntarily embrace same-sex marriage had a preexisting statute banning discrimination



based on sexual orientation, government employees had little recourse if they could not do the service.<sup>225</sup> The clashes sketched above are all premised on violations of these non-discrimination statutes, with claims framed as sexual orientation or marital status discrimination.<sup>226</sup> The penalties for violating non-discrimination laws are sobering. For instance, in Massachusetts, violators may be fined more than \$50,000 and spend up to a year in jail.<sup>227</sup> In Connecticut, violators can spend 30 days in jail.<sup>228</sup>

Because non-discrimination statutes have provided a vehicle for challenges, some contend that objections to same-sex marriage are like other forms of discrimination against lesbians and gays.<sup>229</sup>

This is simply not true. Laws prohibiting discrimination on the basis of classifications such as race date back to the 1960s and 1970s, long before anyone envisioned same-sex marriage.<sup>230</sup> These laws address commercial services, like hailing taxis, serving burgers, and leasing apartments, where it is hard to imagine that a refusal to serve another individual can reflect anything other than animus toward that individual.

Refusals to assist with a same-sex marriage, however, are different—they can stem from something other than anti-gay animus.<sup>231</sup> For many people, marriage is a religious institution and wedding ceremonies are a religious sacrament.<sup>232</sup> For these individuals, assisting with marriage ceremonies has a religious significance that ordering burgers and driving taxis simply do not. Many have no objection generally to providing services to lesbians and gays, but they would object to directly facilitating a marriage—just as some religious believers would object to facilitating an interfaith or second marriage.

Without explicit protection in the non-discrimination or same-sex marriage law, many will be faced with a cruel choice: your conscience or your livelihood.

More to the point, if no one will seriously be asked to do anything, it costs nothing to allay the fears of people who are simply asking for a way to both honor their convictions *and* live together with same-sex couples in peace.

#### D. Point of Resistance: “Same-Sex Couples Should Not Have to Bear the Cost of Another’s Religious Objection”

Like the religious liberty protections in the Utah Compromise, the package of exemptions in Appendix 6.A was proposed as part of legislation effecting marriage equality. Both strive to balance the interests of same-sex couples with the religious concerns of others. Anytime one asks advocates on either side to balance interests, the natural response is “why should we do that?” Ask legislators, and they want to know not only *why* one should balance interests, but precisely

*how*. To answer either question, it is necessary to explain how a given religious liberty accommodation would work.

In a limited set of instances, collisions between religious objectors and same-sex couples can be bypassed entirely, as the Utah Compromise did with marriage solemnization. Where religious objections cannot be creatively bypassed, legislators face the daunting task of attempting to reconcile competing interests in two very different settings: government offices and the commercial marketplace. Because they raise distinct concerns, different restrictions must be placed on the ability of religious objectors to step aside. However structured, exemptions for religious believers will be better received when packaged with meaningful protections for the LGBT community.

### 1. *Bypassing Religious Objectors*

In the best of circumstances, accommodations for government workers strike many fair-minded Americans as wrong—they believe government employees should not be able to pick and choose what duties to perform, notwithstanding the norm established in Title VII that we should accommodate religious belief or practice when feasible.<sup>233</sup> Accommodations for magistrates and marriage registrars pose an additional challenge: once couples have the right to marry, the state cannot enact unqualified religious objections that could operate to bar access to marriage.<sup>234</sup> To shut down access to marriage is to deny the right just granted in *Obergefell*. Just as people of good will were appalled when Orval Faubus stood on the front steps of Arkansas's Central High School to block black children from entering, we should not tolerate government actors erecting a choke point on the path to marriage.<sup>235</sup>

Utah, the second most religious state in America, faced the very real possibility of widespread religious objections by government officials who otherwise may have been tasked with solemnizing marriages.<sup>236</sup> For the first time in Utah law, the Utah Compromise guaranteed access to marriage solemnization for all couples requesting it. But even as it placed this duty on state clerk's offices, it also permitted them to outsource that function to willing celebrants in the community.<sup>237</sup> In Utah, judges, religious authorities, and other elected officials may solemnize a marriage. Some thinly staffed state offices outsourced the new function for simple reasons of efficiency; others did so to respect the religious beliefs of co-workers.<sup>238</sup> By specifying that the duty to provide access to marriage may be fulfilled only with willing celebrants, Utah avoided the need to fire employees—*without* asking gay couples to bear the cost of another's religious objection. By instituting the same process for gay couples and straight couples alike, Utah ensured the dignity of gay couples. Utah also avoided the kind of ugliness and refusals by state employees that same-sex couples have experienced

after *Obergefell*<sup>239</sup>—a horrible experience for anyone during what should be one of the happiest times of their life.

## 2. *Conditioning the Right to Object on Causing No Hardship to Others*

Bypassing collisions is not always possible, however, necessitating more conscious attempts to reconcile competing interests. When balancing competing interests, great care must be given to how religious liberty protections are structured. The package of same-sex marriage exemptions in Appendix 6.A would have given state employees and officials—judges, justices of the peace, and marriage license clerks—as well as individuals in ordinary commerce—like bakers, photographers, caterers, and musicians—the ability to step aside from facilitating *any* marriage for religious reasons, but only when no hardship would result to same-sex couples. In the case of government employees, an employee could step aside only if another willing employee is promptly available to do the service without delay or inconvenience.

Under the exemptions in Appendix 6.A, commercial vendors could have stepped, too, when it would not substantially burden same-sex couples—in which case, religious liberty must yield.

To be clear, under both constructions, in a straight-up contest between religious liberty and marriage equality, religious liberty yields. Of course, as with any rule that seeks to balance two competing interests, hardship exemptions will involve some line drawing—specifically, what would count as “promptly” or as “inconvenience” or “delay.” Such line drawing should be accomplished through the legislative process, permitting states to make choices that reflect the facts on the ground in that state—for instance, how urban or rural the state is, the number of willing providers of a needed service in locales across the state, etc.<sup>240</sup> It is natural for states to make different policy decisions; as Jonathan Rauch has observed, “[t]here’s no reason that Massachusetts and Texas need to do the same thing[;] [n]ot everyone should agree on everything and not every state should look alike.”<sup>241</sup>

Many religious believers ask why their rights simply do not trump since, in the words of Chief Justice John Roberts, their “freedom to exercise religion is . . . actually spelled out in the Constitution.”<sup>242</sup> Neutral and generally applicable laws do not violate Free Exercise guarantees, no matter how much they burden an individual’s or organization’s exercise of religion.<sup>243</sup> And restricting the ability to object to situations when no hardship for same-sex couples would result is principled: unqualified religious objections cannot operate to bar access to marriage now that the Court has spoken dispositively.<sup>244</sup> Further, a qualified exemption has value for religious objectors; in the vast majority of cases involving government employees, the objector can be staffed around.<sup>245</sup>

On the other side of the ledger, some will ask why same-sex couples should ever have to experience any dislocation, however slight or remote. The case for a qualified exemption rests, in part, on two predictive judgments. First, public attitudes toward same-sex relationships are likely to become more divided, not less, in the absence of accommodations—this inflexibility will create lots of religious martyrs. And that will ensure that the issue “remains alive, bitter, and deeply divisive.”<sup>246</sup>

Second, it is unnecessary to use the coercive power of the law to force religious objectors to “go along” if the market provides an adequate corrective, as it has in some parts of the country. For example, in August 2011, a New Jersey bridal salon allegedly refused to assist a lesbian woman with her gown because the woman “came from a nice Jewish family, and it was a shame that [she] was gay.”<sup>247</sup> Although the owner denied the charges, outraged members of the public plastered the store’s Facebook profile with comments, and Yelp, the business review mobile application, reported it, too.<sup>248</sup> Presumably, the salon owner lost all the business of gay couples in her community—in itself a sufficient penalty to limit refusals to those who feel quite strongly about it.<sup>249</sup> The salon owner may also have lost business from friends of those gay couples and others who heard about her stance. This example illustrates that, often, objectors will pay a cost in the market for objecting. Although whether the market will offer a sufficient corrective is a difficult question and likely to be answered differently by legislators across the country, it matters to whether and how to grant religious liberty protections.

As the next subparts explain, the contexts for government employee and commercial exemptions differ in important ways, warranting different protection.

### 3. *Government Employees*

As noted above, government employees’ objections implicate access to the status of marriage, potentially allowing objectors to act as a choke point on the path to marriage. Because the state has a monopoly on marriage—no one may statutorily marry without the necessary license from the state—the state should not undercut the right to marry by enacting broad, unqualified conscience protections.

How could an exemption cause this kind of dislocation? Imagine that a same-sex couple resides in Nowhere, New York, and that there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist the same-sex couple, that clerk could effectively bar them from the institution of marriage. Under the package of proposals in Appendix 6.A, the objector’s religious liberty would have had to yield to the same-sex couple’s right to marry “promptly.”

Of course, outside this rare case of a hardship, where there are other clerks who would gladly serve the couple promptly and no one would otherwise lose by honoring the religious convictions of the objector, objectors' convictions should be honored.

The notion of "promptness" is not infinitely malleable. It would not be prompt to ask same-sex couples to wait any significant amount of time for a license that heterosexual couples would receive immediately. Neither should same-sex couples be asked to wait in a separate line. Instead, any staffing around of religious objectors should happen before the public presents for a service, which can be accomplished by asking objectors to recuse themselves *ex ante* in writing. Once staffed around, the objector never needs to come into contact with the public when seeking the objected-to service. How would this work?

Imagine a couple, Steve and Adam, arrive at the marriage office, which has three officials, Faith, Hope, and Charity. Only Faith has a religious objection. If all the clerks randomly greet individuals and couples who present, disaster looms. Faith easily could pop up to assist Steve, only to find him later joined by his same-sex partner. If Faith then refuses to assist the couple, the couple surely will notice and be offended. Instead, Faith should be required to file a written objection and step aside from assisting with all marriages. Hope or Charity can then greet the public and farm out work, leaving Faith to perform other official duties, such as issuing subpoenas and taking affidavits.

Note what does *not* happen when so structured: Faith never encounters Steve and Adam but neither does she receive a pass; she performs other office functions. Steve and Adam never wait longer or step into another line. They never know any individual magistrate's views, including Faith's. By proactively addressing Faith's objection, Steve and Adam suffer no embarrassment. Dignitary harms evaporate when accommodations are invisible.

Far from overlooking dignitary harms, the risk of dignitary harm should guide policymakers in fashioning solutions that minimize the net harm of permitting religious objection.

A common refrain from accommodation skeptics is that religious objectors in government service should do every service available at the office or resign.<sup>250</sup> This stance conflates the work of the office with the work of any given employee. That is, a citizen's right to obtain a marriage license is against the state, not any particular employee. Moreover, as the discussion of Title VII above demonstrates, it is appropriate, and sometimes legally required, to allow employees to step aside from part of their jobs when they can reasonably be accommodated and there would be no undue hardship.<sup>251</sup> Although the US Court of Appeals for the Seventh Circuit has taken a very narrow view of such accommodations when sought by police officers and firefighters,<sup>252</sup> other circuits do not take such a narrow view—especially when sought by employees doing routine, predictable, and easily staffed-around work.<sup>253</sup>

Quite simply, magistrates and licensure clerks are not firefighters, and any objection is unlikely to cause great dislocation to staff around.

More fundamentally, this stance vilifies people who could not have known when they took their jobs that they would be asked to facilitate a same-sex marriage. Many government employees began working for the government long before the advent of same-sex marriage, and a large portion of them are already eligible to retire.

Dismissal or resignation would likely be very costly to these employees. A job in the state licensure office pays well and provides generous benefits; and many long-time employees have built up retirements that would be wiped out or significantly curtailed if they exit rather than violate a religious conviction.<sup>254</sup> Just as important as these very human costs is the fact that collisions will gradually become less and less significant. We know that resistance to recognition of same-sex relationships largely follows generational lines.<sup>255</sup> This suggests conflicts over same-sex marriage will recede over time until objection “gradually fade[s] away, and nearly all the rest [of those who oppose same-sex marriage] will go silent, succumbing to the live-and-let-live traditions of the American people.”<sup>256</sup>

#### 4. *Commercial Vendors*

The package of proposals in Appendix 6.A would have delivered marriage equality while giving more room for religious objectors in the stream of commerce to object unless the couple could not get the service without a substantial hardship. Now that marriage equality is recognized, that deal likely is not feasible, even with significant qualification, unless the state can proffer sexual orientation non-discrimination protections now absent in statewide law. Even then, balancing the rights of LGBT individuals and religious traditionalists will be a tough sell for reasons explained below.

Why might one build in greater leeway for small mom-and-pop wedding vendors to step aside from providing a service than for government employees? First, the service denied is not nearly as important as blocking a person’s access to a legal status and there are likely to be fewer hardships (the phone book of virtually every city or county contains dozens of photographers, for example). Second, a qualified exemption “lowers the stakes” in the debate about same-sex marriage and LGBT rights more generally, about which public opinion continues to be split. Houston’s 2015 repeal of the HERO ordinance provides an important caution that in winner-takes-all contests, gay rights sometimes lose out—to the detriment of important social progress. Third, qualified religious liberty protections preserve as much religious freedom as possible in a liberal society without significantly encroaching on others, which we should generally strive for, especially where the costs to the public are cabined. Finally, a qualified

exemption provides “elbow room” for citizens with widely divergent views to live together in a pluralistic society.

Weighed against all these positives is the insult from being denied a service. As Professor Laycock has pointed out, “the American commitment to freedom of speech ensures that same-sex couples will be reminded . . . from time to time” about how others feel, especially while opinion remains deeply divided.<sup>257</sup>

The government should be concerned about whether same-sex couples are subjected to insult. Indeed, the costs to gay couples today in being excluded from public accommodations are poignant. When a Tennessee hardware store can, without repercussion, openly post a sign that says “no gays allowed,” gay people are treated as “less than.”<sup>258</sup> All people of good faith—gay or straight—lose from that coarsening. True, the public often polices such discrimination, but it will not always do so.

Sometimes, the law can create a buffer zone between religious traditionalists and the rest of the world that satisfies the needs of both. The Utah Compromise broadened existing exemptions for religious groups and small businesses in its civil rights laws governing housing and hiring to give religious communities and individuals the autonomy to operate schools, offer counseling, and support marriage (through, say, married student housing) as they had before same-sex marriage was recognized and LGBT non-discrimination protections were enacted; to speak about marriage, family, and sexuality as they had before; and to remain in taxpayer-paid jobs without sacrificing access to a state service. For such concessions, the gay community cemented employment and housing protections in the nation’s most politically conservative state that exceed those provided in New York.<sup>259</sup> Carefully drawn exemptions allow people deeply divided over the common good to coexist in peace.

But to date, no public accommodations law at the federal or state level has combined religious exemptions with a right to be served. In Tennessee and much of the rest of the country, religious traditionalists can exclude gay people for religious reasons or no reason at all—when it comes to hardware stores and ordinary services without religious meaning, that should be wholly unacceptable. The failure of public accommodation laws to share the public square means that in states that do ban sexual-orientation discrimination, gay couples can demand access, whatever the consequences for small mom-and-pop wedding vendors. Some bakers, photographers, and bed-and-breakfast owners who adhere to a traditional view of marriage may be forced to a painful choice: serve everyone or be fined or hounded out of business.<sup>260</sup> As Part I noted, many see forcing the closure of someone’s business as harsh and pointless if other comparable services are readily available elsewhere.

After *Obergefell* common sense protections that permit religious traditionalists and gay couples to coexist may be possible *if the interests of both communities are advanced*, as the Utah Compromise shows. But in the public accommodations

context, such protections will require a wholly new approach that deliberately seeks to share the public square.

One way to divide the public square is to enact protections qualified by hardship to same-sex couples. In this scheme, small wedding vendors with less than five employees would be permitted to decline to facilitate any wedding when doing so would violate her religious convictions *so long as* the couple can secure the service without a substantial hardship. This approach has a lot of intuitive appeal. Wedding vendors cannot legally block access to the legal status of marriage, as objecting marriage registrars and clerks could do. The plethora of photographers and bakers in most locales suggests there are likely to be few hardships. In much of the country, there likely will be lots of businesses who want to serve same-sex couples and will actively seek them as clients.<sup>261</sup> As Professor Laycock explains, “same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin.”<sup>262</sup>

States that have existing non-discrimination bans pose the hardest challenge. Enacting stand-alone protections for religious objectors—even ones qualified by hardship—will be seen as a rollback of existing civil rights protections.<sup>263</sup> Such measures also extract concessions for religious objectors while offering up nothing for the gay community. Perhaps marriage-related protections can be offered alongside express protections for gender identity or tied to protections in spheres where LGBT individuals are not now protected, like access to credit or higher education.<sup>264</sup>

At the very least, any concessions for religious business owners should preserve the dignity of our gay neighbors. To do that would require the kind of seamless treatment the Utah Compromise arrived at when it outsourced the marriage function to willing celebrants in the community, bypassing any religious objectors. How religious wedding vendors can be permitted to step aside while preserving the dignity of gay couples is the thorny question facing legislatures across the country today.<sup>265</sup>

## Conclusion

Ultimately, religious objectors must make convincing claims for legislative accommodations because they are not shielded from generally applicable laws as a matter of constitutional right. In the end, no matter how thoughtful an exemption or claim for accommodation may be, individuals realistically seeking religious liberty protections must thoughtfully engage the points of resistance to giving such accommodations. The rapidly changing political calculus surrounding same-sex marriage and LGBT rights shows that, for now, both sides advance values important to them by shaping laws that affirm both LGBT rights *and* religious liberty.



*Appendix 6.A*PROPOSED SAME-SEX MARRIAGE  
PROTECTIONS

The Marriage Conscience Protection that I and others proposed, prior to *Obergefell* as a part of compromise marriage equality legislation would have read<sup>266</sup>:

**Section** \_\_\_\_

## (a) Religious organizations protected

Notwithstanding any other provision of law, no religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

- (1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
- (2) solemnize any marriage; or
- (3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs. This section shall not permit a religious organization engaged in the provision of healthcare, or its individual employees, to refuse to treat a state-recognized marriage as valid for purposes of a spouse's rights to visitation or to surrogate healthcare decision making.

## (b) Individuals and small businesses protected

- (1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to
  - (A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
  - (B) provide benefits to any spouse of an employee; or

(C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

- (2) Paragraph (b)(1) shall not apply if
  - (A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or
  - (B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.
- (3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person
  - (A) that provides services which are primarily performed by an owner of the business; or
  - (B) that has five or fewer employees; or
  - (C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

(c) No civil cause of action or other penalties

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

- (1) result in a civil claim or cause of action challenging such refusal; or
- (2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.<sup>267</sup>

Appendix 6.B

CORE LEGISLATIVE RELIGIOUS LIBERTY PROTECTIONS

State	Expressly exempt clergy from duty to solemnize any marriage <sup>a</sup>	Expressly exempts a religious organization (including nonprofits) from duty to "provide services, accommodations, advantages, facilities, goods, or privileges" (or similar) for solemnization <sup>b</sup>	Expressly protects covered objectors from private suit <sup>c</sup> and/or government "penalty" <sup>d</sup>	Expressly exempts "religious programs, counseling, courses, or retreats" (A) <sup>e</sup> ; housing for married individuals (B) <sup>f</sup> ; or insurance coverage by fraternal organizations (C) <sup>g</sup>	Expressly allows a religiously affiliated adoption or foster care agency to maintain its manner of services (e.g., place children only with opposite-sex couples) <sup>h</sup>	Expressly exempts non-clergy authorized celebrants (e.g., judges and justices of the peace) from duty to solemnize <sup>i</sup>
Conn. <sup>j</sup>	✓	✓	✓		✓ <sup>k</sup>	
Del.	✓		✓ <sup>l</sup>			✓
D.C.	✓	✓	✓	(A)		
Haw.	✓	✓	✓			
Ill.	✓	✓ <sup>m</sup>	✓			
Md.	✓	✓	✓	(A), (C)	✓ <sup>n</sup>	

Same-Sex Marriage by Legislation

Minn.	✓	✓	✓	✓	(B)	✓ <sup>o</sup>
N.H.	✓	✓	✓	✓	(A), (B), (C)	
N.Y.	✓	✓	✓	✓	(B)	
R.I.	✓	✓	✓	✓	(A), (C)	✓ <sup>p</sup>
Vt.	✓	✓	✓ <sup>q</sup>	✓	(C)	
Wash.	✓	✓	✓	✓	(A)	
<i>Same-Sex Marriage by Ballot Initiative</i>						
Me.	✓	✓ <sup>r</sup>	✓	✓		
<i>Same-Sex Marriage by Judicial Decision</i>						
Calif.	✓		✓ <sup>s</sup>			
Iowa						
Mass.						
N.J.						
N.M.	t					
Okla.						
Utah						

(Continued)

## Continued

<sup>a</sup> See Conn. Gen. Stat. § 46b-22b (West 2009); Del. Code Ann. tit. 13, § 106 (2013), <http://delcode.delaware.gov/title13/c001/index.shtml>; D.C. Code § 46-406(c) (LexisNexis 2012); S.B. No. 1 H.D.1 § 572-D, 27th Leg., 2nd Spec. Sess. (Haw. 2013); S.B. 10(a-5), 98th Gen. Assemb. Reg. Sess. (Ill. 2013); Md. Code Ann., Fam. Law § 2-201, 2-202, (LexisNexis 2012); Minn. Stat. Ann. § 517.09 (West Supp. 2013); N.H. Rev. Stat. Ann. § 457:37(II) (Supp. 2013); N.Y. Dom. Rel. Law § 11(1) (McKinney Supp. 2014); Vt. Stat. Ann. tit. 18, § 5144(b) (2012); R.I. Gen. Laws Ann. § 15-3-6.1(b) (LexisNexis 2013); Wash. Rev. Code § 26.04.010(4) (LexisNexis 2013). See also Me. Rev. Stat. Ann. tit. 19-A, § 655 (Supp. 2013); Cal. Fam. Code § 400 (West Supp. 2013).

<sup>b</sup> See Conn. Gen. Stat. § 46b-150d (2013); D.C. Code § 46-406(e) (2013); Md. Code Ann., Fam. Law § 2-201, 2-202 (West 2013); 2012 Md. Laws § 3; Minn. Stat. Ann. § 363A.26 (West 2013); N.H. Rev. Stat. Ann. § 457:37(III) (2013); N.Y. Dom. Rel. Law § 10-b(1) (McKinney 2013); R.I. Gen. Laws Ann. § 15-3-6.1 (West 2013); Vt. Stat. Ann. tit. 18, § 5144(b) (2013); Wash. Rev. Code Ann. § 26.04.010(S) (West 2013); S. 1, 27th Leg., 2nd Special Sess. 2 (Haw. 2013); S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); see also Me. Rev. Stat. tit. 19-A, § 655 (2013).

<sup>c</sup> See Conn. Gen. Stat. § 46b-150d; D.C. Code § 46-406(e); Md. Code Ann., Fam. Law § 2-201, 2-202; 2012 Md. Laws §§ 2-3; Minn. Stat. Ann. § 517.09 (West 2013); N.H. Rev. Stat. Ann. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); R.I. Gen. Laws Ann. § 15-3-6.1; Vt. Stat. Ann., tit. 18, § 5144(b); Wash. Rev. Code Ann. § 26.04.010(6); S. 1, 27th Leg., 2nd Special Sess. 2 (Haw. 2013); S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); see also Me. Rev. Stat. tit. 19-A, § 655.

<sup>d</sup> See Conn. Gen. Stat. § 46b-150d; Del. Code Ann. tit. 13 § 106 (West 2013); D.C. Code § 46-406(e)(2); Md. Code Ann., Fam. Law § 2-201, 2-202; 2012 Md. Laws §§ 2-3; Minn. Stat. Ann. § 517.09; N.H. Rev. Stat. Ann. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(1); R.I. Gen. Laws Ann. § 15-3-6.1; Wash. Rev. Code Ann. § 26.04.010(4); S.B. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013); S. 1, 27th Leg., 2nd Special Sess. 6 (Haw. 2013); see also Me. Rev. Stat. tit. 19-A, § 655.

<sup>e</sup> See D.C. Code § 46-406(e); Md. Code Ann., Fam. Law § 2-201, 2-202; 2012 Md. Laws §§ 2-3 (provided so long as the program receives no government funding); N.H. Rev. Stat. Ann. § 457:37(III) (exempting “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”); R.I. Gen. Laws Ann. § 15-3-6.1 (exempting the “promotion of marriage through any social or religious programs or services”); Wash. Rev. Code Ann. § 26.04.010(7) (a)(ii). New York may also protect this. See N.Y. Dom. Rel. Law § 10-b(2) (“[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

<sup>f</sup> See Minn. Stat. Ann. § 363A.26 (providing that religious organization are not prohibited from “in matters relating to sexual orientation, taking any action with respect to . . . housing and real property”); N.H. Rev. Stat. Ann. § 457:37(III); N.Y. Dom. Rel. Law § 10-b(2) (“[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization . . . to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination . . .”).

<sup>g</sup> See Md. Code Ann., Fam. Law § 2-201, 2-202; N.H. Rev. Stat. Ann. § 457:37(IV); R.I. Gen. Laws Ann. § 15-3-6.1(e) (West 2013); Vt. Stat. Ann. tit. 8 § 4501(b) (2013); see also Md. Code Ann., Ins. § 8-402 (2013) (defining “fraternal organization”); 2012 Md. Laws §§ 2-3.

<sup>h</sup> See 2009 Conn. Legis. Serv. § 19 (West); see also Md. Code Ann., Fam. Law § 2-201, 2-202; Minn. Stat. § 517.201; R.I. Gen. Laws Ann. § 15-3-6.1(e) (West 2013).

<sup>i</sup> Del. Code Ann. tit. 13, § 106 (“[N]othing in this section shall be construed to require any person (including any clergy person or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal.”).

<sup>j</sup> Connecticut passed legislation on the heels of a judicial decision requiring same-sex marriage. See Appendix 6.B.

<sup>k</sup> Conn. Gen. Stat. § 46b-35b (2013) (providing that the “manner” of services will be unaffected by the recognition of same-sex marriage, unless program publicly funded).

<sup>l</sup> Del. Code Ann. tit. 13 § 106 (providing that refusal shall not subject any person to “any fine or other penalty for such failure or refusal”).

<sup>m</sup> S. 10 § 209(a-10), 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (covering only the “facility” and extending only to organizations with “principal purpose” to advance religion).

<sup>n</sup> Md. Code Ann., Fam. Law § 2-202 (West 2013) (requiring no “promotion of marriage” through services unless program publicly funded).

<sup>o</sup> Minn. Stat. Ann. § 517.09 (West 2013).

<sup>p</sup> R.I. Gen. Laws Ann. § 15-3-6.1(e) (West 2013) (requiring no “promotion of marriage” through “any social or religious programs or services”).

<sup>q</sup> Vt. Stat. Ann. tit. 9 § 4502(1) (West 2013) (insulting against only a “civil claim or cause of action” and not against government penalty).

<sup>r</sup> Me. Rev. Stat. tit. 19-A, § 655 (2013) (providing that no “church, religious denomination or other religious institution” must “host” any marriage when doing so would violate its “religious beliefs”).

<sup>s</sup> Cal. Fam. Code § 400(a) (West 2013) (providing that “[a]ny refusal to solemnize a marriage under this subdivision, either by an individual or by a religious denomination, shall not affect the tax-exempt status of any entity”).

<sup>t</sup> *Griego v. Oliver*, 316 P.3d. 865, 871 (N.M. 2013) (“Our holding will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to change its policies to accommodate same gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs.”).

## Appendix 6.C

### STATES RECOGNIZING SAME-SEX MARRIAGE AND METHOD OF RECOGNITION (THROUGH NOVEMBER 11, 2014)

<i>Same-Sex Marriage Legal</i>	
<i>State</i>	<i>Legislation/Decision</i>
<b>Alaska</b>	<i>Hamby v. Parnell</i> , No. 3:14-CV-00089-TMB, 2014 WL 5089399 (D. Alaska Oct. 12, 2014).
<b>Arizona</b>	<i>Connolly v. Jeanes</i> , No. 2:14-CV-00024 JWS, 2014 WL 5320642 (D. Ariz. Oct. 17, 2014).
<b>California</b>	<i>Perry v. Schwarzenegger</i> , 704 F. Supp. 2d 921 (2010), <i>aff'd sub nom. Perry v. Brown</i> , 671 F. 3d 1052 (2012), <i>aff'd sub nom. Hollingsworth v. Perry</i> , 133 S. Ct. 2652 (2013).
<b>Colorado</b>	<i>Burns v. Hickenlooper</i> , No. 14-CV-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014).
<b>Connecticut</b>	<i>Kerrigan v. Comm'r of Pub. Health</i> , 289 Conn. 135 (2008), recognized same-sex marriage. The legislature then enacted same-sex marriage through legislation. Conn. Gen. Stat. § 46b-20 (2009).
<b>Delaware</b>	Del. Code Ann. tit. 13 § 101 (2013).
<b>Hawaii</b>	Haw. Rev. Stat. § 572-1 (West 2013).
<b>Idaho</b>	<i>Latta v. Otter</i> , No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014), <i>aff'd</i> , 771 F.3d 456 (9th Cir. 2014).
<b>Illinois</b>	750 Ill. Comp. Stat. 5/201 (2014).
<b>Indiana</b>	<i>Baskin v. Bogan</i> , No. 1:14-CV-00355-RLY, 2014 WL 2884868 (S.D. Ind. June 25, 2014), <i>aff'd</i> , 766 F.3d 648 (7th Cir.), <i>cert. denied</i> , 135 S. Ct. 316, <i>cert. denied sub nom. Walker v. Wolf</i> , 135 S. Ct. 316 (2014).
<b>Iowa</b>	<i>Varnum v. Brien</i> , 763 N.W.2d 862 (2009).
<b>Maine</b>	In 2009, the Maine legislature passed a same-sex marriage bill, Me. Rev. Stat. Ann. tit. 19-A, § 650-A (2013), that voters later repealed by referendum. Maine voters enacted same-sex marriage by ballot initiative in 2012.
<b>Maryland</b>	Md. Code Ann. Fam. Law §§ 2-201 (LexisNexis 2012).
<b>Massachusetts</b>	<i>Goodridge v. Dep't of Pub. Health</i> , 440 Mass. 309 (2003).

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<i>State</i>	<i>Legislation/Decision</i>
<b>Minnesota</b>	Minn. Stat. Ann. § 517.01 (West 2013).
<b>Missouri (STL)</b>	<i>Missouri v. Florida</i> , No. 1422-CC09027 (Mo. Cir. Ct. Nov. 5, 2014).
<b>Nevada</b>	<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014).
<b>New Hampshire</b>	N.H. Rev. Stat. § 457:1A (2010).
<b>New Jersey</b>	<i>Garden State Equal. v. Dow</i> , 82 A.2d 336 (N.J. Super. Ct. Law Div. 2013). Months before this decision, Governor Christie vetoed a 2012 same-sex marriage bill that contained modest religious liberty protection for organizations. See Kate Zernike, “Christie Keeps His Promise to Veto Gay Marriage Bill,” <i>New York Times</i> , February 18, 2012, at A19.
<b>New Mexico</b>	<i>Griego v. Oliver</i> , 316 P.3d 865 (2013).
<b>New York</b>	N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2014).
<b>North Carolina</b>	<i>Fisher-Borne v. Smith</i> , No. 1:12CV589, 2014 WL 5138914 (M.D.N.C. Oct. 14, 2014); <i>Gen. Synod of the United Church of Christ v. Resinger</i> , No. 3:14-CV-00213-MOC, 2014 WL 5092288 (W.D.N.C. Oct. 10, 2014).
<b>Oklahoma</b>	<i>Bishop v. United States ex rel. Holder</i> , No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014), <i>aff’d sub nom. Bishop v. Smith</i> , 760 F.3d 1070 (10th Cir.), <i>cert. denied</i> , 135 S. Ct. 271 (2014).
<b>Oregon</b>	<i>Geiger v. Kitzhaber</i> , 994 F. Supp. 2d 1128 (D. Or. 2014).
<b>Pennsylvania</b>	<i>Whitewood v. Wolf</i> , 992 F. Supp. 2d 410 (M.D. Pa. 2014).
<b>Rhode Island</b>	R.I. Gen. Laws § 15-1-1 (2013).
<b>District of Columbia</b>	D.C. Code § 46-401 (LexisNexis 2012).
<b>Utah</b>	<i>Kitchen v. Herbert</i> , No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), <i>aff’d</i> , 755 F.3d 1193 (10th Cir.), <i>cert. denied</i> , 135 S. Ct. 265 (2014)..
<b>Vermont</b>	Vt. Stat. Ann. Tit. 15, § 8 (2009).
<b>Virginia</b>	<i>Bostic v. Rainey</i> , 970 F. Supp. 2d 456, 461 (E.D. Va.), <i>aff’d sub nom. Bostic v. Schaefer</i> , 760 F.3d 352 (4th Cir.), <i>cert. denied sub nom. Rainey v. Bostic</i> , 135 S. Ct. 286, <i>cert. denied</i> , 135 S. Ct. 308, <i>cert. denied sub nom. McQuigg v. Bostic</i> , 135 S. Ct. 314 (2014).

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<i>State</i>	<i>Legislation/Decision</i>
<b>Washington</b>	In 2012, the Washington legislature passed a same-sex marriage bill. Wash. Rev. Code § 26.04.010(1) (West 2012). The bill was put to a state vote as Referendum 74; the referendum passed, thereby legalizing same-sex marriage. 2012 Wash. Sess. Laws S.S.B. 6239 (Referendum).
<b>West Virginia</b>	Almost a month after West Virginia stopped defending the State's same-sex marriage ban, <i>McGee v. Cole</i> , No. CIV.A. 3:13-24068, 2014 WL 5802665 (S.D.W. Va. Nov. 7, 2014), held that the State must allow same-sex marriage.
<b>Wisconsin</b>	<i>Wolf v. Walker</i> , 986 F. Supp. 2d 982 (W.D. Wis.), <i>aff'd sub nom. Baskin v. Bogan</i> , 766 F.3d 648 (7th Cir.), <i>cert. denied</i> , 135 S. Ct. 316, <i>cert. denied sub nom. Walker v. Wolf</i> , 135 S. Ct. 316 (2014).
<b>Wyoming</b>	<i>Guzzo v. Mead</i> , No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014).
<i>Favorable Same-Sex Marriage Decision Stayed</i>	
<i>State</i>	<i>Decision</i>
<b>Arkansas</b>	<i>Jernigan v. Crane</i> , No. 4:13-CV-00410 KGB, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014); <i>Wright v. State</i> , 2014 WL 1908815 (Ark. Cir. 2014).
<b>Florida</b>	<i>Brenner v. Scott</i> , 999 F. Supp. 2d 1278 (N.D. Fla. 2014). Many state judges have also held that same-sex couples must be allowed to marry. See, e.g., <i>Huntsman v. Heavilin</i> ; <i>Pareto v. Ruvin</i> ; <i>Brassner v. Lade</i> .
<b>Missouri</b>	<i>Lawson v. Kelly</i> , No. 14-0622-CV-W-ODS, 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014).
<b>Texas</b>	<i>De Leon v. Perry</i> , 975 F. Supp. 2d 632 (W.D. Tex. 2014).
<i>Circuit Court Rulings That Made Same-Sex Marriage Inevitable</i>	
<i>State</i>	<i>Decision</i>
<b>Kansas</b>	<i>Kitchen v. Herbert</i> , 755 F.3d 1193 (10th Cir.), <i>cert. denied</i> , 135 S. Ct. 265 (2014).
<b>Montana</b>	<i>Latta v. Otter</i> , 771 F.3d 456 (9th Cir. 2014).
<b>South Carolina</b>	<i>Bostic v. Schaefer</i> , 760 F.3d 352 (4th Cir.), <i>cert. denied sub nom. Rainey v. Bostic</i> , 135 S. Ct. 286, <i>cert. denied</i> , 135 S. Ct. 308, <i>cert. denied sub nom. McQuigg v. Bostic</i> , 135 S. Ct. 314 (2014).