

## Going to the Clerk's Office and We're Not Going to Get Married

Alicia F. Blanchard

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### Recommended Citation

Blanchard, Alicia F. () "Going to the Clerk's Office and We're Not Going to Get Married," *University of Massachusetts Law Review*: Vol. 13 : Iss. 1 , Article 3.

Available at: <https://scholarship.law.umassd.edu/umlr/vol13/iss1/3>

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# Going to the Clerk's Office and We're Not Going to Get Married

Alicia F. Blanchard

13 U. MASS. L. REV. 100

## ABSTRACT

Same-sex marriage is a controversial topic subject to great debate. The Supreme Court in 2015 federally recognized the legality of same-sex marriages in *Obergefell v. Hodges*. Despite this ruling, some people looked for any reason to denounce the holding. Perhaps none were more vocal than those who rejected same-sex marriage on the basis of their religious tenets. *Miller v. Davis* provided people who were morally opposed to same-sex marriage a platform to support their concerns grounded in a First Amendment right to freedom of religion. The question is how far does one's freedom of religion extend? Does freedom of religion give one the right to deny to others their federally recognized rights? Many have sought to define the boundaries separating church and state; however, those boundaries remain malleable and oftentimes hard to enforce, presenting a challenge to those seeking to define them. This comment explores the bounds of freedom of religion and analyzes the rights and protections associated with marriage. Specifically, this comment suggests a balancing test for determining when a government official may exempt themselves from issuing marriage licenses based on their religious tenets. Broadly, the test determines when religious exemptions are appropriate.

## AUTHOR NOTE

J.D. Candidate 2018, University of Massachusetts School of Law; B.A. Saint Anselm College. The author would like to thank Professors Jeremiah Ho and Margaret Drew for their guidance and patience throughout the researching and writing process. Furthermore, the author thanks the University of Massachusetts Law Review for their extensive work on this and all articles. The author would also like to thank her friends and family for their continued encouragement and support throughout the article writing process and law school.

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## I. INTRODUCTION

*Denied . . .*

*Because they wanted to get married.<sup>1</sup>*

*Denied . . .*

*Because someone felt what they were doing was wrong.<sup>2</sup>*

*Denied . . .*

*Because two civil liberties are in conflict . . .<sup>3</sup>*

*And no one knows which will win or if both will lose.<sup>4</sup>*

On June 26, 2015, April Miller and Karen Roberts traveled to 600 Main Street in Morehead, Kentucky on a day they hoped to remember forever.<sup>5</sup> They soon discovered they would remember the day forever, but for an entirely different reason than they hoped.<sup>6</sup> In addition to Ms. Miller and Ms. Roberts, three other couples — Kevin Holloway and Jody Fernandez, Barry Spartman and Aaron Skaags, and Shantel Burke and Stephen Napier — traveled to or called the Rowan County Clerk’s office in hopes of getting marriage licenses to solemnize their relationships.<sup>7</sup> All four couples were denied this right.<sup>8</sup> They had gone to the County Clerk’s office after the Supreme Court came out of the judicial closet with its decision *Obergefell v. Hodges*, which federally recognized the right for same-sex couples to marry.<sup>9</sup> These couples were denied their right to a marriage license because the county clerk, Kim Davis, could not find it in her conscience to grant same-sex couples marriage licenses.<sup>10</sup> Further, she instated a policy where no marriage

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<sup>1</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 930 (E.D. Ky. 2015).

<sup>2</sup> See *id.* at 929.

<sup>3</sup> See *id.* at 930.

<sup>4</sup> See *id.*

<sup>5</sup> Kim Davis, KIM DAVIS COUNTY CLERK ROWAN COUNTY, KENTUCKY, <http://rowancountyclerk.com> (last visited Nov. 27, 2016) [<https://perma.cc/JU9M-MM7V>]; see also *Miller*, 123 F. Supp. 3d at 929.

<sup>6</sup> See *Miller*, 123 F. Supp. 3d at 929.

<sup>7</sup> See *id.* Two couples were same-sex, and two couples were heterosexual.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *id.*

licenses would be issued out of her office.<sup>11</sup> Davis claimed she could not abide by the ruling in *Obergefell* as it violated her Apostolic Christian beliefs.<sup>12</sup>

The four couples argued that Davis violated their Fourteenth Amendment Due Process right as established in *Loving v. Virginia*, and extended by *Obergefell* to include same-sex couples under its protection.<sup>13</sup> The *Obergefell* ruling caused a stampede of opinions on same-sex marriage to come to an already turbulent forefront by providing a soapbox for many officials and individuals to profess their own judgments on how the case should have been decided.<sup>14</sup>

For many years, same-sex rights and equality questions were within the specific domain of the states, but with reactions to the Defense of Marriage Act,<sup>15</sup> and popular opinion in favor of more liberal policies, the federal government began testing the waters of regulating LGBTQ rights.<sup>16</sup> While the federal government began the whirlwind process toward LGBTQ equality, fierce advocates protested against same-sex marriage for religious reasons.<sup>17</sup> Governors, attorneys general, mayors, and clerks were appalled as their morals and religious beliefs were tested by the *Obergefell* decision.<sup>18</sup> Many sought ways to avoid its enforcement, thus frustrating the balance between those enforcing the law and the actual law.<sup>19</sup>

Citizens are guaranteed the right to freedom of religion under the First Amendment, which affirms that the government shall not involve itself in matters of or inhibit the free exercise of religion.<sup>20</sup> Opponents claim the *Obergefell* decision does exactly that.<sup>21</sup> Kim Davis used this

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<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 932.

<sup>13</sup> *See id.* at 934; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>14</sup> *See, e.g.,* *Obergefell*, 135 S. Ct. at 2604.

<sup>15</sup> *See generally* 1 MASS. PRAC., FAMILY LAW AND PRACTICE § 19:16 (4th ed.).

<sup>16</sup> *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH AND THE STRUGGLE FOR SAME-SEX MARRIAGE 9 (2013).

<sup>17</sup> *See* Elliott C. McLaughlin, *Most States to Abide By Supreme Court's Same-Sex Marriage Ruling, but . . .*, CNN (June 30, 2015, 8:20 AM), <http://www.cnn.com/2015/06/29/us/same-sex-marriage-state-by-state/> [<https://perma.cc/6HPQ-9RLG>]; *see also* *Miller*, 123 F. Supp. 3d at 930.

<sup>18</sup> *See* McLaughlin, *supra* note 17; *see also* *Miller*, 123 F. Supp. 3d at 932.

<sup>19</sup> *See* McLaughlin, *supra* note 17; *see also* *Miller*, 123 F. Supp. 3d at 932.

<sup>20</sup> *See* U.S. CONST. amend. I.

<sup>21</sup> *See* *Miller*, 123 F. Supp. 3d at 932.

as her excuse for not issuing any marriage licenses in her county.<sup>22</sup> *Miller v. Davis* gave people who were morally opposed to same-sex marriage a platform to bring forth their concerns.<sup>23</sup> Many challenged the *Obergefell* decision, and supported Kim Davis by alleging that federalizing same-sex marriage violates the First Amendment.<sup>24</sup> Specifically, challengers claimed the *Obergefell* decision resulted in a violation of their freedom of religion.<sup>25</sup>

Freedom of religion is a fundamental tenet of the Bill of Rights.<sup>26</sup> However, multiple times throughout history laws have come into conflict with religious beliefs, and thus posed a challenge to one's freedom of religion.<sup>27</sup> The critical question remains: How far does a person's freedom of religion extend?<sup>28</sup> Are citizens excused from following a law they believe conflicts with their religious beliefs?<sup>29</sup> Or are they forced to follow a law despite their religious beliefs?<sup>30</sup> Thomas Jefferson and others sought to define the boundaries separating church and state; however, those boundaries remain malleable and oftentimes hard to enforce.<sup>31</sup>

Section I of this comment will give a brief history of the separation of church and state, and how the courts and leading figures have attempted to define its boundaries throughout history. Section II will give a synopsis of the evolution of same-sex marriage law in the United

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<sup>22</sup> *See id.*

<sup>23</sup> *See* McLaughlin, *supra* note 17; *see generally* Miller, 123 F. Supp. 3d at 932.

<sup>24</sup> *See* Miller, 123 F. Supp. 3d at 938-39. Kim Davis argued that the directive to issue marriage licenses to same-sex couples was a violation of her First Amendment right; specifically, it burdened her right to freedom of religion by forcing her to act in contradiction to her closely-held religious beliefs. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> U.S. CONST. amend. I.

<sup>27</sup> Anthony M. Lise, *Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality*, 12 N.Y. CITY L. REV. 129, 131 (2008). There has been a departure from Thomas Jefferson's notion of a strict separation of church and state. In recent times, the government has involved itself in some ways in various religious practices and organizations. Instead of the strict separation touted by the founders, there are now a series of tests to determine when the government has gone too far in its involvement in religion. *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

States. Section III will discuss the aftermath of the *Obergefell* decision and provide a case study of *Miller v. Davis* to highlight the issue of government officials who claim faith-based rationales for opposing same-sex marriage in their official capacity. Section IV will use *Miller v. Davis* and other historical and current cases to outline a balancing test courts should use to determine whether government officials have the right to claim an exemption from enforcing the law based on their right to freedom of religion. Section V will conclude with an analysis of the potential future effects of this test.

## II. SEPARATION OF CHURCH AND STATE IN THE UNITED STATES

Religion and governmental functions have been inextricably linked for the entirety of U.S. history.<sup>32</sup> In the early sessions of the Continental Congress, convened to discuss aspects of the Revolutionary War and the burgeoning government, religion was embraced as part of the delegates' daily activities.<sup>33</sup> Despite these initial religious undertones in government, tensions rose when religion was incorporated into government processes.<sup>34</sup> For instance, in 1785, Virginia proposed the adoption of a state religion.<sup>35</sup> James Madison and Thomas Jefferson vehemently opposed this idea as it interfered with the citizenry's freedoms.<sup>36</sup> James Madison believed, "[r]eligion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."<sup>37</sup> Thomas Jefferson, too, wrote on the establishment of religion in Virginia:

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<sup>32</sup> JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 57-60 (2000).

<sup>33</sup> *See id.* The First Continental Congress began each session with a prayer. The Second Continental Congress used government funds to pay chaplains to offer prayers at the beginning of each session and to serve in the military. Further, the Continental Congress endorsed days of fasting and prayer.

<sup>34</sup> *See Lise, supra* note 27, at 141.

<sup>35</sup> *See id.*

<sup>36</sup> *Id.* at 141-42.

<sup>37</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments in Virginia* (June 20, 1785), [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (last visited Dec. 2, 2016) [<https://perma.cc/KA7Q-ER49>]; *see also* Lise, *supra* note 27, at 141; DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGIOUS CLAUSES 8 (2003).

*No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.*<sup>38</sup>

Despite Madison and Jefferson's opposition to religious entanglement with government proceedings, the Framers of the Constitution viewed religious liberties as beyond the purview of the federal government, and within the states' authority.<sup>39</sup>

Following the Revolutionary War, from May 25, 1787, to September 17, 1787, state delegates convened to develop a Constitution for the newly liberated states.<sup>40</sup> There were a few general references to religion in the Constitution, but no explicit statement of the separation of church and state.<sup>41</sup> The Constitution was, in effect, "Godless."<sup>42</sup> Religious matters were left for the states to decide.<sup>43</sup> On September 28, 1787, the Continental Congress unanimously voted to approve the Constitution.<sup>44</sup> It was then sent to the states to garner the minimum nine-

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<sup>38</sup> Thomas Jefferson, *The Virginia Act for Establishing Religious Freedom* (Jan. 16, 1786), <http://www.heritage.org/initiatives/first-principles/primary-sources/virginia-act-establishing-religious-freedom> (last visited Dec. 2, 2016) [https://perma.cc/B9DK-7TG5]; see also Lise, *supra* note 27, at 141; CONKLE, *supra* note 37, at 9-10.

<sup>39</sup> See WITTE, *supra* note 32, at 61. Eleven of the thirteen states had already incorporated religious liberty clauses into their state constitutions. Rhode Island and Connecticut did not write a new constitution after the Revolutionary War, but retained their colonial charters which included religious liberty clauses. The United States Constitution did not initially include a religious liberty clause, and in the absence of a federal law the state had sovereign authority.

<sup>40</sup> *Id.* at 60.

<sup>41</sup> *Id.* at 60-1. The Constitution made several references to religion, all of which were generic in nature. The Preamble speaks of "Blessings of Liberty." Article VI states, "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The date at the conclusions also makes reference to "the Year of our Lord."

<sup>42</sup> *Id.* at 61.

<sup>43</sup> See *id.* Before the Constitution was even written most of the states already had detailed policies concerning religious liberty.

<sup>44</sup> See *id.* at 63.

state approval required to ensure its ratification.<sup>45</sup> Tension existed after the Constitution was ratified because it did not include a bill of rights enumerating an individual's rights and liberties.<sup>46</sup> Many of the initial framers thought a bill of rights was unnecessary to ensure individual liberties for it was thought to be impossible to create a comprehensive list of those liberties.<sup>47</sup> Ultimately, the states ratified the Constitution, but only on the condition that there would be a Bill of Rights.<sup>48</sup>

Seven states proposed content to be included in the Bill of Rights, six of which submitted content concerning religious liberty.<sup>49</sup> The Bill of Rights was ratified on December 15, 1791.<sup>50</sup> Within the newly ratified Bill of Rights, the Framers incorporated a religious liberty clause into the First Amendment.<sup>51</sup> The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>52</sup> The First Amendment religious clause can be broken down into two sub-clauses: a Free Exercise Clause and an Establishment Clause.<sup>53</sup>

#### **A. The Establishment Clause of the First Amendment**

The Establishment Clause of the First Amendment states, "Congress shall make no law respecting an establishment of religion . . . ."<sup>54</sup> This clause serves three distinct purposes: to prevent state or government sponsorship of religion; to prevent sending government funds to

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<sup>45</sup> *See id.*

<sup>46</sup> *Id.* at 61-3.

<sup>47</sup> *See id.* As James Wilson noted at the Pennsylvania Ratification Convention, "[A] bill of rights is neither an essential nor a necessary instrument in framing a system of government, since liberty may not exist and be as well secured without it. But it was not only unnecessary, but on this occasion it was found impracticable – for who will be bold enough to undertake to enumerate all the rights of the people? – and when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted." *Id.* at 63.

<sup>48</sup> *See id.* New Hampshire, Virginia, New York, and North Carolina's proposed language would eventually be combined into the modern language of the First Amendment.

<sup>49</sup> *Id.* at 63-4.

<sup>50</sup> *Id.* at 72.

<sup>51</sup> *See id.* There were twenty drafts of the First Amendment before the final text was adopted.

<sup>52</sup> U.S. CONST. amend. I.

<sup>53</sup> *See* CONKLE, *supra* note 37, at 9-10.

<sup>54</sup> U.S. CONST. amend. I.

religious institutions; and to protect involvement of governmental bodies in religious activity.<sup>55</sup> The clause impliedly creates a “wall of separation between church and state.”<sup>56</sup> Courts recognize that while there cannot be a complete separation of church and state, there need to be some demarcated boundaries.<sup>57</sup> Three tests are used to determine those boundaries.<sup>58</sup> These tests are the Lemon Test, the Endorsement Test, and the Coercion Test.<sup>59</sup>

The Lemon Test, derived from *Lemon v. Kurtzman*, uses a three-prong approach to determine whether a statute infringes on religious liberty.<sup>60</sup> The first prong is that the statute must have a “secular, legislative purpose.”<sup>61</sup> The second prong is that the primary effect of the statute must not further or limit religion.<sup>62</sup> The third prong is that the statute must not “foster an excessive government entanglement with

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<sup>55</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

<sup>56</sup> *Id.* The Establishment Clause refers to the First Amendment text, “Congress shall make no law respecting an establishment of religion . . . .” (citing U.S. CONST. amend. I).

<sup>57</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984); *Lemon*, 403 U.S. at 614 (1973) (finding that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”). *Id.*

<sup>58</sup> See *Lynch*, 465 U.S. at 672; *Lemon*, 403 U.S. at 603.

<sup>59</sup> See *Lemon*, 403 U.S. at 602; *Lynch*, 465 U.S. at 672; *Lee v. Weisman*, 505 U.S. 577, 577 (1992).

<sup>60</sup> See *Lemon*, 403 U.S. at 613; David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11 TEX. WESLEYAN L. REV. 71, 79-80 (2004) (citing *Waltz v. Tax Comm’n of New York*, 397 U.S. 664, 668 (1970); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)). The court extrapolated the first two prongs of the Lemon Test from *Board of Education v. Allen*, and the third prong from *Waltz v. Tax Common of New York*. See *Lemon*, 403 U.S. at 613.

<sup>61</sup> See *Lemon*, 403 U.S. at 613. *Lemon v. Kurtzman* dealt with the Rhode Island 1969 Salary Supplement Act, which allowed for a 15% salary supplement to teachers in non-public schools provided they refrain from teaching religious courses. Additionally, it dealt with the 1968 Pennsylvania Nonpublic Elementary and Secondary Education Act, which allowed the superintendent to propose secular classes. Citizens brought these suits claiming that the classes were a violation of the First Amendment Establishment Clause. The Supreme Court found that the Rhode Island and the Pennsylvania Acts violated the third prong of the Lemon Test by encouraging too much entanglement between religion and state, and thus were violations of the Establishment Clause. See generally *id.*

<sup>62</sup> See *id.*

religion.”<sup>63</sup> The Lemon Test is the most widely-used Establishment Clause test.<sup>64</sup>

The lesser-used Establishment Clause tests are the Endorsement Test and the Coercion Test.<sup>65</sup> The Endorsement Test comes from Sandra Day O’Conner’s concurrence in *Lynch v. Donnelly*.<sup>66</sup> Endorsement exists when a reasonable person observing a public display would perceive it as conveying governmental support for a certain religion.<sup>67</sup> Additionally, the Coercion Test, stemming from *Lee v. Weisman*, determines whether the state used coercive measures to enforce a religion.<sup>68</sup>

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<sup>63</sup> *See id.*

<sup>64</sup> *See Dean v. D.C.*, No. 90-13892, 1992 WL 685364, at \*4 (D.C. Super. Ct. June 2, 1992); *see also* Matthew E. Feinberg, Esq., *And the Ban Plays on . . . for Now: Why Courts Must Consider Religion in Marriage Equality Cases*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 221, 235 (2010). The Supreme Court heavily relies on the Lemon test in Establishment cases; however, it may expand, limit, or abandon a prong of the test depending on the circumstances. Ultimately though, the Lemon Test is the “law of the land.” *Id.*

<sup>65</sup> *See* Feinberg, *supra* note 64, at 234.

<sup>66</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 668 (1984); Cook, *supra* note 60, at 82-83. In *Lynch v. Donnelly*, the city of Pawtucket, Rhode Island included a nativity scene in its annual public Christmas display. The District Court of Rhode Island enjoined the city from using the display. Pawtucket residents and members of the Rhode Island branch of the American Civil Liberties Union brought suit claiming that the display violated the Establishment Clause. On appeal, the judgment of the District Court was affirmed, and certiorari was granted. The Supreme Court found Pawtucket did not violate the First Amendment Establishment Clause because the display did not imply government support of a particular religion. *Lynch*, 465 U.S. at 671-726.

<sup>67</sup> *See Lynch*, 465 U.S. at 668.

<sup>68</sup> *See Lee v. Weisman*, 505 U.S. 577, 592 (1992). This case was brought by a public school student and her father to discontinue benedictions at graduation. The principal of a middle school invited a rabbi to recite a nonsectarian prayer at the graduation. The District Court of Rhode Island granted the injunction, and the Court of Appeals affirmed. The Supreme Court held in favor of the student and her father. The Court reasoned that the principal’s choice to include a prayer and choice of religious figure was attributable to the state as he was the principal of a public school. Prayer in public schools is subtly coercive because it creates pressure for students who may not understand the difference between respecting a religious practice and participating in conduct that may result in the endorsement of a particular religion. The Court ultimately determined that the Constitution prohibits the government from coercing others to participate in religion. *Id.* at 577-603.

The Establishment Clause tests are difficult to apply to same-sex marriage cases.<sup>69</sup> Parties who brought same-sex marriage cases under the Establishment Clause have been few and unsuccessful;<sup>70</sup> however, there is a growing trend that supports the application of Establishment Clause Tests to marriage ban laws and policies.<sup>71</sup> In the future, the questions to be asked are whether same-sex marriage bans act to promote a religious preference or whether there are any secular purposes for them.<sup>72</sup>

## B. Free Exercise Clause of the First Amendment

The First Amendment includes a Free Exercise Clause, which states that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>73</sup> This removed from Congress power over an individual’s opinion, but gave Congress authority over “actions which were in violation of social duties or subversive of good order.”<sup>74</sup> To bring a cause of action under the Free Exercise Clause, a person must demonstrate that a law “improperly burdened” a religious belief.<sup>75</sup>

There are three different standards of review for Free Exercise cases.<sup>76</sup> The first level of review is the lowest level of scrutiny or the

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<sup>69</sup> See Feinberg, *supra* note 64, at 232-36.

<sup>70</sup> See *Dean v. D.C.*, No. 90-13892, 1992 WL 685364, at \*4 (D.C. Super. Ct. June 2, 1992). The plaintiffs were a same-sex couple who claimed that the court’s interpretation of same-sex marriages violated their Due Process rights. They also claimed that the court violated the Establishment Clause by relying on the Bible in their interpretation of marriage. The court applied the Lemon Test and found the law did not advance religion simply because it happened to coincide with religious ideals. The court dismissed this charge as being frivolous. *Id.* at \*1-8.

<sup>71</sup> See Feinberg, *supra* note 64, at 237.

<sup>72</sup> See *id.* The argument against laws and policies that ban same-sex marriage for violating the Establishment Clause is that preventing same-sex marriages advances or inhibits religion, which in turn violates the Lemon Test. See *id.* at 242.

<sup>73</sup> U.S. CONST. amend. I.

<sup>74</sup> See CONKLE, *supra* note 37, at 9-10. This refers to the First Amendment Free Exercise Clause, “Congress shall make no law . . . prohibiting the free exercise thereof . . .” (citing U.S. CONST. amend. I).

<sup>75</sup> See WITTE, *supra* note 32, at 119. A party bringing a claim under the Free Exercise Clause must have proper standing and cannot bring a political question.

<sup>76</sup> See *id.*

rational basis review.<sup>77</sup> A challenged law will be upheld if the government can prove that the law is in “pursuit of a legitimate governmental interest,” and the law is “reasonably related to the interest.”<sup>78</sup> The intermediate scrutiny test requires heightened scrutiny.<sup>79</sup> Under this test, a court will generally uphold a law if it pursues an “important or significant governmental interest,” and is “substantially related to that interest.”<sup>80</sup> The last test is the highest level of scrutiny, known as strict scrutiny.<sup>81</sup> Under this test, the court will uphold a law if it is in “pursuit of a compelling or overriding governmental interest,” and is “narrowly tailored to achieve that interest.”<sup>82</sup>

The Supreme Court used a rational basis level of scrutiny when it heard its first Free Exercise case in 1879 in *Reynolds v. United States*.<sup>83</sup> In *Reynolds*, the Court faced a conflict derived from the intersection of freedom of religion and the law.<sup>84</sup> A man who was tried for polygamy in violation of a Utah statute claimed that the practice was part of his Mormon religion.<sup>85</sup> The Court reasoned that Utah had constitutional authority to enact a law banning polygamy; therefore, the court held Mormons were not exempted from the statute.<sup>86</sup>

The Free Speech portion of the First Amendment adds an extra layer of protection to the Free Exercise Clause.<sup>87</sup> In addition to the religious clauses, the First Amendment gives people the right to speak without

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<sup>77</sup> See *id.* at 121-24; see also *Reynolds v. United States*, 98 U.S. 145, 145 (1878); *Arver v. United States*, 245 U.S. 366, 389-90 (1918); *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 512-13 (1997) (These cases all utilized the rational basis test for causes of action brought under the Free Exercise Clause.).

<sup>78</sup> See WITTE, *supra* note 37, at 121-24.

<sup>79</sup> See *id.* at 121-23. In *Cantwell v. Connecticut* the Supreme Court raised the heightened level of scrutiny and ruled that there were certain areas of religion the government could not regulate unless they involved criminal actions including religious beliefs, worship, and assembly.

<sup>80</sup> See *id.* at 122.

<sup>81</sup> See *id.* at 122-24; see also *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>82</sup> See WITTE, *supra* note 37, at 122.

<sup>83</sup> See *Reynolds v. United States*, 98 U.S. 145, 145 (1878). See, e.g., CONKLE, *supra* note 37, at 7; WITTE, *supra* note 32, at 121-24.

<sup>84</sup> See CONKLE, *supra* note 37, at 7.

<sup>85</sup> See *Reynolds*, 98 U.S. at 145-47.

<sup>86</sup> *Id.* at 165-66.

<sup>87</sup> See CONKLE, *supra* note 37, at 106.

fear of government retribution.<sup>88</sup> The Free Speech Clause protects an individual's own religious speech from discrimination.<sup>89</sup>

### C. Modern Separation of Church and State:

The modern view of the First Amendment Free Exercise Clause is grounded in the pursuit of religious equality and non-discrimination.<sup>90</sup> Further, many statutes and policies apart from the Free Exercise Clause are imbued with the value of non-discrimination.<sup>91</sup> With regards to Establishment Clause cases, the Lemon Test is the primary mode in which laws are tested to determine if they violate the First Amendment.<sup>92</sup> In an increasingly homogenized world, the challenges surrounding freedom of religion become more complex.<sup>93</sup>

In a 2006 speech, "On Faith and Politics," Barack Obama spoke on the issue of evolving demographics in the United States and how that phenomena affects the separation of church and state.<sup>94</sup> The United States is comprised of people of many different faiths, and a certain degree of separation of church and state is necessary to prevent sectarianism.<sup>95</sup> Obama offered a hypothetical on the dangers of sectarianism, by imagining a United States with only Christians. Amongst Christians there are numerous divisions of belief, and he used the following words to emphasize the dangers of those divisions:

*Which passages of Scripture should guide our public policy? Should we go with Leviticus, which suggests slavery is ok and that eating shellfish is an abomination?*

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<sup>88</sup> U.S. CONST. amend. I.

<sup>89</sup> See CONKLE, *supra* note 37, at 106.

<sup>90</sup> *Id.* at 105-06.

<sup>91</sup> See *id.* at 106. The Free Speech doctrine contains protections for the free exercise of religion. Its purpose with regards to religious freedom is to provide discrimination protections for religious speech. Moreover, legislatures have made a recent move towards including protections against religious conduct from discrimination.

<sup>92</sup> See *id.* at 203.

<sup>93</sup> President Barack Obama, Remarks by the President at National Prayer Breakfast (Feb. 5, 2015, 9:13 AM), <https://www.whitehouse.gov/the-press-office/2015/02/05/remarks-president-national-prayer-breakfast> [<https://perma.cc/H2L2-JTE4>].

<sup>94</sup> Senator Barack Obama, Obama's 2006 Speech on Faith and Politics (June 28, 2006), <http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html> [<https://perma.cc/GKW9-C8LJ>].

<sup>95</sup> See *id.*

*How about Deuteronomy, which suggests stoning your child if he strays from the faith? Or should we just stick to the Sermon on the Mount - a passage that is so radical that it's doubtful that our own Defense Department would survive its application?*<sup>96</sup>

Sectarian principles cannot govern because democracy prefers compromise amongst all religious beliefs via the promotion of certain universal principles from dominant religions.<sup>97</sup> The roots of the majority of dominant religions do not allow for compromise when it comes to their core tenets and beliefs.<sup>98</sup> Many religions offer “edicts” that must be followed, but public policy cannot be governed in the same way.<sup>99</sup> Obama offered the biblical story of Abraham and Isaac to illustrate this principle.<sup>100</sup> Abraham was ordered by God to sacrifice his son, but at the last moment an angel appeared telling Abraham he passed God’s test of devotion.<sup>101</sup> Obama then told the story as if it were happening in today’s world, for if a person saw a man raising a knife to a child, one would hope that they would call the police.<sup>102</sup> Not everyone will recognize their God or gods within such limited and biblically-based frames of reference. That is because not everyone will have the same edicts stemming from their religious beliefs.<sup>103</sup> Public policy must be constructed based on what is evident to all, not just what is evident to those few who fall in line with a certain system of beliefs.<sup>104</sup>

Obama returned to the theme of the dangers of sectarianism in his remarks at the National Prayer Breakfast:

*The United States is one of the most religious countries in the world – far more religious than most Western developed countries. And one of the reasons is that our founders wisely embraced the separation of church and state. Our government does not sponsor a religion, nor does it pressure anyone to practice a particular faith, or*

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<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

*any faith at all. And the result is a culture where people of all backgrounds and beliefs can freely and proudly worship, without fear, or coercion. . . .*<sup>105</sup>

In an increasingly multicultural nation, Obama saw value in the freedom of religion and found that it is best upheld through the separation of church and state because it allows for people of all religions to practice however they wish, free from duress.<sup>106</sup>

### III. HISTORY OF SAME-SEX MARRIAGE LAWS IN THE UNITED STATES

Homosexuality has a long and discordant history of discrimination under the American legal system.<sup>107</sup> After the Civil War, sub-cultures began to grow that included homosexuality and gender-bending ideals, leading many states to enact sodomy laws to counter these sub-cultures.<sup>108</sup> Conversely, there were no federal laws explicitly prohibiting these sub-cultures, but there were laws whose side effects limited the rights of individuals within certain homosexual sub-cultures.<sup>109</sup> These laws included the Comstock Act, prohibiting the mailing of all obscene materials, and the Tariff Acts of 1922 and 1930, prohibiting customs from allowing obscene materials to enter the country.<sup>110</sup> Immigration laws also prevented those with homosexual tendencies from entering the country in its prohibition of “sexual degenerates.”<sup>111</sup>

By 1960, all states had enacted sodomy laws prohibiting sex between male same-sex partners.<sup>112</sup> These laws were used as a justification for a blanket discrimination policy against homosexuals.<sup>113</sup> However, popular media increasingly publicized homosexuality

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<sup>105</sup> See President Obama, *supra* note 93.

<sup>106</sup> See *id.*

<sup>107</sup> See KLARMAN, *supra* note 16, at 3; see also WILLIAM N. ESKRIDGE, JR., GAY LAW: CHALLENGING THE APARTHEID OF THE CLOSET 19-26 (1999).

<sup>108</sup> See ESKRIDGE, *supra* note 107, at 19-26.

<sup>109</sup> *Id.* at 34.

<sup>110</sup> See *id.* For instance, the publications *MANual*, *Trim*, and *Grecian Guild Pictorial*, were deemed by the Judicial Officer of the Post Office as “not mailable” pursuant to the Comstock Act due to their photos of semi-nude males posing suggestively. Further, pen pal clubs catering to homosexuals were also deemed obscene. *Id.*

<sup>111</sup> *Id.* at 35.

<sup>112</sup> See KLARMAN, *supra* note 16, at 3.

<sup>113</sup> See *id.*

throughout the 1960s,<sup>114</sup> resulting in a growth of pro-LGBTQ activism.<sup>115</sup> In 1962, the American Law Institute condemned sodomy laws in its Model Penal Code.<sup>116</sup> Despite same-sex activism growing in popularity, public opinion still weighed heavily against homosexuality.<sup>117</sup>

The 1970s saw a rise in gay rights organizations.<sup>118</sup> As gay rights and activism gained esteem, homosexual couples sought to gain legal recognition for the first time.<sup>119</sup> Many same-sex couples seeking marriage licenses used the precedent set in *Loving v. Virginia* to their advantage.<sup>120</sup> The *Loving* court found unconstitutional a ban on interracial marriage when it determined that marriage is a fundamental right subject to the Fourteenth Amendment Equal Protection and Due Process Clauses.<sup>121</sup> However, the lower courts were not persuaded by the argument that *Loving* should be extended to same-sex marriage.<sup>122</sup> They reasoned that miscegenation was distinguishable from same-sex marriage as it applied to racial discrimination, which was based on an immutable characteristic, and not discrimination based on sexual orientation, which many deemed a lifestyle choice.<sup>123</sup>

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<sup>114</sup> *See id.*

<sup>115</sup> *Id.* at 9. An instance of activism occurred on June 28, 1969 when police in New York raided the Stonewall Inn, which was known for having go-go boys under the guise of not having a liquor license. The police forced the 200 male patrons to leave that bar; however, patrons and bystanders resisted police attempts to maintain order. The crowd began throwing trash and parking meters at police. They also started mini demonstrations supporting homosexuality in the streets. The crowd became so unruly that the police locked themselves inside to protect themselves until reinforcements arrived. A fire bomb went off and injured several police officers. After the events at the Stonewall Inn, people gathered at Sheridan Square to demonstrate against the mistreatment of homosexual people. *Id.* at 16-17.

<sup>116</sup> *Id.* at 10.

<sup>117</sup> *Id.* at 9-11.

<sup>118</sup> *See id.* at 18. Organizations such as Lambda Legal, that National Gay Task Force, Gay Rights Advocates, the Lesbian Rights Project and the Gay and Lesbian Alliance Against Defamation gained popularity. *Id.*

<sup>119</sup> *See id.* at 18-19. In Minnesota, James Michael McConnell and Jack Baker sought a marriage license in 1971. They were married in a Methodist church, but the state refused to recognize their marriage as valid. *Id.*

<sup>120</sup> *Id.* at 19.

<sup>121</sup> *See id.*

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

In the decades following, increased access to information about Acquired Immunodeficiency Syndrome (“AIDS”) led to an ardent push for legal recognition of same-sex marriage.<sup>124</sup> By 1988, approximately 46,000 people had died from AIDS, two-thirds of whom were homosexual men.<sup>125</sup> The median age of death was thirty-six.<sup>126</sup> Many of these individuals were not prepared for death, and had not even considered end-of-life decisions, such as estate planning or medical decision-making surrogates.<sup>127</sup> Further, many benefits did not pass on to same-sex partners such as health insurance or deeds to property.<sup>128</sup> It became increasingly apparent that the benefits associated with marriage would be beneficial to those individuals whose partners were suffering from HIV/AIDs, thus adding fervor to the fight for recognition of same-sex marriage.<sup>129</sup>

There are two arguments for same-sex marriage springing from the Fourteenth Amendment.<sup>130</sup> The first argument uses the Due Process Clause of the Fourteenth Amendment, which deems marriage a fundamental right of an individual.<sup>131</sup> Proponents of same-sex marriage argue that because the Supreme Court does not allow the government to institute bans on marriage based on race, imprisonment or delinquency in paying child support, it cannot ban same-sex couples from marriage.<sup>132</sup> The second argument is that same-sex marriage bans violate the Equal Protection Clause of the Fourteenth Amendment.<sup>133</sup> Proponents asserted that banning same-sex marriage is sex

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<sup>124</sup> *Id.* at 49.

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 49-50.

<sup>129</sup> *See Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/how-it-happened> (last visited Dec. 2, 2016) [<https://perma.cc/QV4K-GQUK>].

<sup>130</sup> *See KLARMAN, supra* note 16, at 53-4.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.*; *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring marriage bans based on race unconstitutional); *Zablocki v. Redhail*, 434 U.S. 374, 395-96 (1978) (finding marriage bans based on fulfilling child support obligations for a minor child not in his or her custody unconstitutional); *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (finding marriage bans between inmates or inmates and civilians, unless there was a compelling reason for marriage, unconstitutional).

<sup>133</sup> *See KLARMAN, supra* note 16, at 54.

discrimination on its face, and thus violates the Fourteenth Amendment requiring a strict scrutiny analysis that had not yet been applied to same-sex marriage cases.<sup>134</sup>

Nineteen ninety-six marked one of the first successes for proponents of legalizing same-sex marriage.<sup>135</sup> Three same-sex couples in Hawaii were denied marriage licenses in 1990.<sup>136</sup> They sought injunctive relief from a Hawaiian statute preventing legal recognition of same-sex marriage.<sup>137</sup> In 1993, the Hawaii Supreme Court applied a strict scrutiny standard and ruled it presumptively unconstitutional to discriminate against same-sex marriage.<sup>138</sup> In 1996, on remand, the court found that same-sex couples should have the right to marry.<sup>139</sup> Unfortunately, in 1999 the decision was reversed in light of an amendment to the Hawaiian Constitution banning same-sex marriage.<sup>140</sup>

President Bill Clinton signed into law the Defense Against Marriage Act (“DOMA”) in 1996, which severely hindered actions to legalize same-sex marriage.<sup>141</sup> DOMA interprets the word “marriage” to mean only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife in all federal rulings and statements.<sup>142</sup> DOMA was aimed at depriving same-sex couples of the federally guaranteed rights allotted to heterosexual couples.<sup>143</sup> Eventually, DOMA was found unconstitutional in *United States v. Windsor* as violating the Fifth and the Fourteenth Amendments.<sup>144</sup>

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<sup>134</sup> *See id.*

<sup>135</sup> *Id.* at 56.

<sup>136</sup> *See Baehr v. Lewin*, 74 Haw. 530, 538 (1993).

<sup>137</sup> *See id.*

<sup>138</sup> *See Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at \*2 (Haw. Cir. Ct. Dec. 3, 1996); *see also Lewin*, 74 Haw. at 582.

<sup>139</sup> *See Baehr*, 1996 WL 694235, at \*22.

<sup>140</sup> *See Baehr v. Miike*, No. 20371, 1999 WL 35643448, at \*1 (Haw. Dec. 9, 1999).

<sup>141</sup> *See* 1 MASS. PRAC., FAMILY LAW AND PRACTICE § 19:16 (4th ed.). DOMA was overwhelmingly passed in both houses: the House of Representatives: 342-67, the Senate: 85-14. *See Winning the Freedom to Marry Nationwide: The Inside Story of a Transformative Campaign - Chapter 2: Launching the Movement*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/how-it-happened> (last visited Dec. 2, 2016) [<https://perma.cc/GYC7-82GG>].

<sup>142</sup> *See* 1 U.S.C.A. § 7 (West 1996).

<sup>143</sup> *See KLARMAN*, *supra* note 16, at 9.

<sup>144</sup> *See United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013); *see, e.g.*, 36 AM. JUR. 2d *Proof of Facts* 441 §1.51 (2017).

In 2003, Massachusetts became the first state to legalize same-sex marriage in *Goodridge v. Department of Public Health*.<sup>145</sup> The decision led to microbursts of support around the country.<sup>146</sup> For the first time, governors and mayors of cities were directing their clerks to issue marriage licenses to same-sex couples.<sup>147</sup> While the *Windsor* case said nothing about state regulation over same-sex marriage, it opened the floodgates for plaintiffs to bring litigation claiming that a given state lacked authority to regulate their right to marry a person of the same sex.<sup>148</sup> In the six months directly following the *Windsor* decision, courts were flooded with litigation over the newly unconstitutional DOMA.<sup>149</sup> *Bassett v. Snyder* was the first case to cite *Windsor*.<sup>150</sup> In *Bassett*, the court found a Michigan law banning public employers from providing benefits to non-spouse partners was worthy of a preliminary injunction.<sup>151</sup> In Ohio, Jim Obergefell filed suit for state recognition of his marriage.<sup>152</sup> In New Jersey and New Mexico, courts struck down same-sex marriage bans,<sup>153</sup> and many district courts followed.<sup>154</sup>

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<sup>145</sup> See *Winning the Freedom to Marry*, *supra* note 141, at Chapter 4: *Winning the First State*.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* San Francisco, California, Sandoval County, New Mexico, New Paltz, New York, and Multnomah County, Oregon followed Massachusetts's example.

<sup>148</sup> See Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. 552 (2015).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> *Id.* at S59-60.

<sup>152</sup> *Id.* at S60-61.

<sup>153</sup> *Id.* at S61.

<sup>154</sup> *Id.* at S61-5. The following states allowed same-sex marriage before *Obergefell*: Alaska (October 12, 2014), Arizona (October 17, 2014), California (June 26, 2013), Colorado (October 6, 2014), Connecticut (November 12, 2008), Delaware (July 1, 2013), Washington D.C. (March 3, 2010), Florida (January 6, 2015), Hawaii (December 2, 2013), Idaho (October 15, 2014), Illinois (June 1, 2014), Indiana (October 6, 2014), Iowa (April 27, 2009), Maine (December 29, 2012), Maryland (January 1, 2013), Massachusetts (May 17, 2004), Minnesota (August 1, 2013), Montana (November 19, 2015), Nevada (October 9, 2014), New Hampshire (January 1, 2010), New Jersey (October 21, 2013), New Mexico (December 19, 2013), New York (July 24, 2011), North Carolina (October 13, 2014), Oklahoma (October 6, 2014), Oregon (May 19, 2014), Pennsylvania (May 20, 2014), Rhode Island (August 1, 2013), South Carolina (November 20, 2014), Utah (October 6, 2014), Vermont (September 1, 2009), Virginia (October 6, 2014), Washington (December 6, 2012), West Virginia (October 9, 2014), Wisconsin (October 6, 2014) and Wyoming (October 21, 2014). The following

Circuit courts began to issue decisions on same-sex marriage recognition.<sup>155</sup> The Tenth Circuit ruled same-sex marriage bans were unconstitutional in *Kitchen v. Hebert*.<sup>156</sup> The Fourth Circuit followed suit.<sup>157</sup> In September 2014, the rush of legal recognition for same-sex marriage hit a road bump in the Louisiana case *Robicheaux v. Caldwell* as the court found a same-sex marriage ban constitutional.<sup>158</sup> On several occasions, LGBTQ activist groups appealed to the Supreme Court to consider their cases, but the Supreme Court remained removed from the discussion, claiming it would not hear any cases regarding the issue unless there was a circuit split.<sup>159</sup> The Sixth Circuit created the long-awaited circuit split when it ruled that same-sex marriage bans were constitutional in what would come to be known as the seminal case *Obergefell v. Hodges*.<sup>160</sup>

#### IV. *OBERGEFELL V. HODGES* AND ITS AFTERMATH

##### A. *Obergefell v. Hodges* and State Reactions

In *Obergefell*, the Supreme Court ruled that the Fourteenth Amendment required states to issue marriage licenses to same-sex couples.<sup>161</sup> It found so because the fundamental liberties outlined within the Constitution help citizens “define and express their identity,” and the Fourteenth Amendment ensures all citizens enjoy those liberties.<sup>162</sup> Fourteen same-sex couples and two men with deceased partners brought

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states recognized same-sex marriage only after *Obergefell*: Alabama, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. See *Winning in the States, FREEDOM TO MARRY*, <http://www.freedomtomarry.org/pages/winning-in-the-states> (last visited Dec. 2, 2016) [<https://perma.cc/88HP-GQTD>].

<sup>155</sup> See Watts, *supra* note 148, at S65-66.

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at S66. Louisiana, unlike all other states, is a civil law jurisdiction; see also Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 792 (2005).

<sup>158</sup> See Watts, *supra* note 148, at S66.

<sup>159</sup> *Id.* at S68.

<sup>160</sup> *Id.* at S68-9; see also *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>161</sup> See *Obergefell*, 135 S. Ct. at 2588.

<sup>162</sup> *Id.* at 2593.

suit against government officials refusing to recognize the validity of their choice to marry a person of the same sex.<sup>163</sup> They claimed this was a violation of both their Fourteenth Amendment Equal Protection and Due Process rights.<sup>164</sup> The couples initially filed suit in their home district courts and were successful.<sup>165</sup> However, the Sixth Circuit Court of Appeals in *DeBoer v. Snyder* reversed all of the previous decisions by finding the Constitution does not require states to issue marriage licenses to same-sex couples or even recognize same-sex marriages from other states.<sup>166</sup> Certiorari was granted by the Supreme Court to review these decisions.<sup>167</sup> The Supreme Court effectively expanded the application of the Fourteenth Amendment, which provides that a person cannot be deprived of “life, liberty, or property, without due process of law.”<sup>168</sup> As a result, the Court found that people have the right to choose whom they marry, regardless of sex, as a part of their individual autonomy, thus reversing the Sixth Circuit’s decision.<sup>169</sup>

*Obergefell* set off a firestorm of political opinion as leaders around the country praised or lamented the decision.<sup>170</sup> Attorney General Ken Paxton of Texas was amongst those allegedly aggrieved by the ruling.<sup>171</sup> He stated, “the United States Supreme Court again ignored the text and spirit of the Constitution to manufacture a right that simply does not exist.”<sup>172</sup> He claimed the Justices acted detrimentally to the Constitution.<sup>173</sup> He further argued that the Supreme Court weakened the words of the Constitution, and thus weakened the law.<sup>174</sup> Paxton

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<sup>163</sup> *See id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at 2597.

<sup>169</sup> *Id.* at 2599, 2608.

<sup>170</sup> *See* McLaughlin, *supra* note 17.

<sup>171</sup> *Attorney General Paxton: Religious Liberties of Texas Public Officials Remain Constitutionally Protected After Obergefell v. Hodges*, THE ATT’Y GEN. OF TEX.: KEN PAXTON (June 28, 2105), <https://www.texasattorneygeneral.gov/static/5144.html> [https://perma.cc/RC9K-PBTQ].

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

lamented this fact, but also used the ruling as a battle cry for religious liberty.<sup>175</sup>

Ken Paxton proclaimed the essential problem of *Obergefell* is that public officials need guidance on how to implement the ruling while remaining loyal to the core tenets of their faith.<sup>176</sup> He claimed public officials' dual duties to their faith and the principles of the Constitution were now in conflict, and many were lost as to what to do regarding its implementation.<sup>177</sup> Texas officials came to the solution that clerks and other public officials had the ability to seek accommodations for their religious beliefs regarding same-sex marriages.<sup>178</sup> Further, Paxton determined that justices of the peace and judges were under no obligation to conduct same-sex wedding ceremonies when they felt that their religious beliefs prevented them from so doing.<sup>179</sup>

Moreover, Alabama Supreme Court Chief Justice Roy Moore told the probate judges not to issue any marriage licenses.<sup>180</sup> The Alabama Supreme Court supported this notion by issuing a writ of mandamus suspending the issuance of marriage licenses to same-sex couples for twenty-five days.<sup>181</sup> The Court of the Judiciary ultimately suspended Chief Justice Roy Moore for the remainder of his term ending in 2019.<sup>182</sup> Additionally, Louisiana refused to issue marriage licenses to same-sex couples for either twenty-five days or until the Supreme Court issued a mandate requiring them to do so.<sup>183</sup> Louisiana officials believed the *Obergefell* ruling took away a right that should have been left for the states to resolve.<sup>184</sup>

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<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See McLaughlin, *supra* note 17.

<sup>181</sup> See *id.* For a copy of the writ of mandamus see <http://i2.cdn.turner.com/cnn/2015/images/06/29/al.pdf> (Dec. 2, 2016) [<https://perma.cc/6YDZ-22JE>].

<sup>182</sup> Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES, Sept. 30, 2016, [http://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html?\\_r=0](http://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html?_r=0) [<https://perma.cc/VU43-H8WK>].

<sup>183</sup> See McLaughlin, *supra* note 17.

<sup>184</sup> Press Release, Attorney General Buddy Caldwell of Louisiana, Statement on Today's Supreme Court Ruling (June 26, 2015)

## B. The Case Analysis of *Miller v. Davis*

April Miller and Karen Roberts wanted to celebrate their eleven-year relationship by getting married, and after the *Obergefell* decision they could do so in their home state of Kentucky.<sup>185</sup> The couple tried marrying twice before but was denied a marriage license on both occasions.<sup>186</sup> On their third visit to the Rowan County Clerk's office following the *Obergefell* decision, they were denied again.<sup>187</sup> Additionally, another same-sex and two heterosexual couples were denied marriage licenses.<sup>188</sup> Following *Obergefell*, Kim Davis, head clerk of Rowan County Clerk's office announced that Rowan County would not issue marriage licenses to any couples.<sup>189</sup> Together, the four couples filed an injunction in the District Court of Kentucky to enjoin Davis from enforcing her personal marriage license policy as it was in violation of the law.<sup>190</sup>

In implementing this policy, Davis claimed she was protecting her right of freely exercising her religion as an Apostolic Christian.<sup>191</sup> In furtherance of her policy, Davis did not allow any clerks to authorize marriage licenses because her name was on the document.<sup>192</sup> Same-sex marriage was contrary to her Apostolic Christian beliefs, and she feared that having her name on marriage licenses for same-sex couples would be viewed as her endorsement of the practice.<sup>193</sup> She argued there was an available alternative for couples because they could obtain marriage licenses from Rowan County Judge Executive Blevins.<sup>194</sup> However, when couples attempted to get marriage licenses from Blevins, he was unable to do so as the law only permits him to issue marriage licenses

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<https://www.ag.state.la.us/Article.aspx?articleID=1037&catID=5>  
[<https://perma.cc/63KD-ZAB4>].

<sup>185</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 930 (E.D. Ky. 2015).

<sup>186</sup> See Gabe Gutierrez & Daniella Silva, *Couple Suing Kentucky Clerk Kim Davis Over Marriage License Plan to Wed Friday*, NBC NEWS (Sept. 3, 2015, 8:28 PM) <http://www.nbcnews.com/news/us-news/couple-suing-kentucky-clerk-kim-davis-over-marriage-licenses-plans-n421402> [<https://perma.cc/TL24-447X>].

<sup>187</sup> See *Miller* 123 F. Supp. 3d at 930.

<sup>188</sup> See *id.*

<sup>189</sup> *Id.* at 929.

<sup>190</sup> See *id.*

<sup>191</sup> *Id.* at 932.

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

<sup>194</sup> *Id.* at 930.

when the elected county clerk is absent.<sup>195</sup> Since Davis was still performing other aspects of her position, she could not be deemed absent, thus Blevins could not issue marriage licenses.<sup>196</sup>

Governor Beshear of Kentucky foresaw religion being a concern with regards to the *Obergefell* decision.<sup>197</sup> In acknowledgment of this he stated:

*You can continue to have your own personal beliefs but, you're also taking an oath to fulfill the duties prescribed by law, and if you are at that point to where your personal convictions tell you that you simply cannot fulfill your duties that you were elected to do, th[e]n obviously an honorable course to take is to resign and let someone else step in who feels that they can fulfill those duties.*<sup>198</sup>

According to Governor Beshear, Kim Davis did not take the honorable course because she did not resign.<sup>199</sup> She remained in her position and continued to refuse to fulfill all the duties of her position.<sup>200</sup>

The *Obergefell* decision and the reaction of Kim Davis formed the basis of a widespread concern.<sup>201</sup> For instance, 57 out of the 120 clerks in Kentucky were of the same religion as Davis.<sup>202</sup> The court needed to consider the possible ramifications that might occur if it granted Davis the right to excuse herself from executing marriage licenses.<sup>203</sup> There was a potential for a snowball effect — the fifty-seven clerks who were of the same religious belief as Davis may follow her in asking for a religious exemption if the court granted her plea for an exemption from issuing marriage licenses to same-sex couples.<sup>204</sup> The court had to make a decision as the potential for damage to same-sex couples was exponential.<sup>205</sup>

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<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> *Id.* at 932.

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

<sup>201</sup> *Id.* at 935-36.

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See id.*

District Court Judge David Bunning found Davis in contempt of court, and as a result she was jailed for five days.<sup>206</sup> In April 2016, Governor Matt Blevin signed into law a statute that allowed clerks to remove their names from marriage licenses, and as such Davis asked the Sixth Circuit to dismiss her appeal.<sup>207</sup>

### C. Exemption for Reasons of Religious Belief

A law in and of itself may not be a violation of the Establishment or the Free Exercise Clauses, but a law may still be offensive to an individual's religious beliefs.<sup>208</sup> Exemptions allow an individual to be excluded from the enforcement of or obligations imposed by the law if they successfully present a need for one based on religious beliefs.<sup>209</sup> In *Sherbert v. Verner*, a seven-day Adventist was denied unemployment benefits because she refused to work on Saturdays, citing religious beliefs as the reason for her absence.<sup>210</sup> The Court held she was exempted from the law.<sup>211</sup> Exemptions can only occur when two circumstances are present.<sup>212</sup> The first circumstance is the law is burdensome on a person's free exercise of religion.<sup>213</sup> The second circumstance is there is a substantial state interest served by the infringement on a person's religious beliefs.<sup>214</sup> To override a person's religious belief the state interest must be of the upmost importance.<sup>215</sup>

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<sup>206</sup> See Corky Siemaszko, *Kentucky Clerk Kim Davis, Who Refused to Issue Marriage Licenses to Gays, Seeks to End Case*, NBC NEWS (June 21, 2016, 2:28 PM), <http://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-who-refused-issue-marriage-licenses-gays-n596476> [https://perma.cc/S4CZ-JX2C]; see also Gabe Gutierrez & Erik Ortiz, *Same-Sex Couples Receive Marriage Licenses in Kentucky as Clerk Kim Davis Remains in Jail*, NBC NEWS (Sep. 4, 2015), <http://www.nbcnews.com/news/us-news/kim-davis-kentucky-clerk-will-stay-jail-long-it-takes-n421676> [https://perma.cc/5Q7J-JQSP].

<sup>207</sup> See Siemaszko, *supra* note 206. ("A marriage license which provides for the entering of: (a) An authorization statement ~~of the county clerk issuing the license~~ [sic] for any person or religious society authorized to perform marriage ceremonies to unite in marriage the persons [sic] name. . ."). See KY. REV. STAT. ANN § 402.100 (West 2017).

<sup>208</sup> See Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 858 (2004).

<sup>209</sup> See *id.*; see also *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

<sup>210</sup> See Hamburger, *supra* note 208, at 858.

<sup>211</sup> See *Sherbert*, 374 U.S. at 410.

<sup>212</sup> *Id.* at 403-06.

<sup>213</sup> *Id.* at 403-05

<sup>214</sup> See *id.* at 405-06

<sup>215</sup> See *id.* at 406.

The flaw with this test is that there is no defined limit on what qualifies as a person's religious belief and what they can claim as such in order to be exempted from a particular law.<sup>216</sup> The potential for abusing exemptions is great if one uses the exemption test as a tool to escape the provisions or effects of all laws.<sup>217</sup>

Further, the exemption test does not directly address government officials and whether they can be exempted from performing official duties they believe are contrary to their religious beliefs.<sup>218</sup> Government officials, whether elected or appointed, are to serve the general public.<sup>219</sup> If they were to claim an exemption from performing a portion of their job, it would create a hazardous precedent because they are failing to serve a portion of the public for whom they were elected or appointed to serve.<sup>220</sup> Moreover, there is the problem with a potential snowball effect.<sup>221</sup> If one clerk is allowed to refrain from issuing marriage licenses, then how many others will follow suit?<sup>222</sup> How would a potential snowball effect influence other areas of law in which there may be conflicts between law and religion?<sup>223</sup> How would this affect other public officials and service providers such as hospitals or shelters?<sup>224</sup>

## V. PRESCRIPTIVE BALANCING TEST

The complexity of *Miller v. Davis* demonstrates the need for a clear test to determine when government officials can be exempted from performing their public duties citing religious reasons.<sup>225</sup> Below are several factors to be included in a balancing test concerning occasions where government officials could be exempted from issuing marriage

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<sup>216</sup> See Hamburger, *supra* note 208, at 869.

<sup>217</sup> See *id.*

<sup>218</sup> See Frank S. Ravitch, *Complementary or Competing Freedoms: Government Officials, Religious Freedom, and Lgbtq Rights*, 11 FLA. INT'L U. L. REV. 163, 164-65 (2015).

<sup>219</sup> *Id.* at 167.

<sup>220</sup> See *id.*

<sup>221</sup> See Robin Fretwell Wilson, "Getting the Government Out of Marriage" *Post Obergefell: The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. 1445, 1500 (2016).

<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 935-36 (E.D. Ky. 2015).

licenses to same-sex couples based on religious objections.<sup>226</sup> These factors include: the accessibility of alternatives; denial of the benefits of marriage; irreparable harm to the plaintiffs; whether the official is elected or appointed; harm to government officials; and the feasibility of exemption.

### A. Accessibility of Alternatives

When there are reasonable alternatives available to a party seeking a service that a government official is unwilling to provide based on personal religious beliefs, this may be an argument for the government official's exemption from providing the service they find offensive.<sup>227</sup> Kim Davis argued there were multiple reasonable alternatives to getting a marriage license issued from the Rowan County Clerk's office.<sup>228</sup> These options included obtaining a marriage license from one of the other seven local county clerks offices, going to the Rowan County Judge Executive or other alternative methods that may be determined.<sup>229</sup>

There are numerous apparent issues with these suggested alternative options for same-sex couples. For example, there are several challenges with finding alternative locations to get a marriage license.<sup>230</sup> The first challenge is transportation.<sup>231</sup> Transportation to an alternate location may not be convenient or feasible for some couples.<sup>232</sup> Furthermore, there are additional financial costs associated with finding an alternative location such as public transportation costs or gas.<sup>233</sup> While there are available alternatives in the form of other counties, these counties are not the county in which the couple lives.<sup>234</sup> The couple may have strong social ties to a particular community, and it may hold greater sentimental value to be married in that community.<sup>235</sup> Moreover, same-sex couples argue that they pay taxes in a particular community and,

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<sup>226</sup> *See id.*

<sup>227</sup> *Id.* at 935.

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See id.*

therefore, they have the right to exercise their federally endowed rights in the same community.<sup>236</sup>

In addition to alternative locations, there also must be alternative public officials available to perform civil unions and issue marriage licenses when a government official claims they should be exempted from issuing marriage licenses.<sup>237</sup> The test must account for the possibility that clerks in surrounding counties may also express religious condemnation of the law, and refuse to issue marriage licenses.<sup>238</sup> If this were the case, the available alternatives would be severely limited if available at all.<sup>239</sup> For instance, there are 120 clerks in Kentucky, and 57 clerks who expressed religious condemnation of the *Obergefell* decision, calling for Governor Beshear to hold a special session of the legislature to discuss the religious implications of the decision.<sup>240</sup> The fact that so many clerks expressed religious beliefs in conflict with the *Obergefell* decision presents the potential for a disastrous domino effect of prohibiting same-sex couples from exercising their newly guaranteed right to marry.<sup>241</sup> If Davis were exempted from issuing marriage licenses, then the fifty-seven other clerks who expressed religious opposition of same-sex marriage might also claim that they should be exempted, which means nearly half of the officials elected or appointed to issue marriage licenses would refuse to issue them to an entire class of people.<sup>242</sup> This exponentially decreases the number of potential alternative clerks available to issue marriage licenses to same-sex couples.<sup>243</sup>

Moreover, the District Court of Eastern Kentucky dismissed as infeasible Davis's claim that the Rowan County Judge Executive could issue marriage licenses instead.<sup>244</sup> The local statute allows the Judge Executive to issue marriage licenses only in the absence of the county clerk which, as previously stated, was inapplicable since Davis was continuing in her other public duties.<sup>245</sup> Additionally, if the Judge

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<sup>236</sup> *See id.*

<sup>237</sup> *See Ravitch, supra* note 218, at 168.

<sup>238</sup> *See Miller*, 123 F. Supp. 3d at 935.

<sup>239</sup> *See id.*

<sup>240</sup> *See id.*

<sup>241</sup> *See id.*

<sup>242</sup> *Id.* at 935-36.

<sup>243</sup> *See id.*

<sup>244</sup> *Id.* at 936.

<sup>245</sup> *See id.*

Executive were to assume this as part of his or her duties, he or she would be excessively burdened, and it would exceed the scope of his or her employment.<sup>246</sup>

## B. Denial of Benefits of Marriage

Courts must incorporate into their analysis all the state and federal benefits denied to same-sex couples when they are not permitted to obtain a marriage license.<sup>247</sup> The denial of marriage licenses is not just a denial of a document; it is a denial of many rights entitled to married couples.<sup>248</sup> Further, the denial of marriage licenses prevents same-sex partners from making medical decisions for each other in cases where one partner is incapacitated.<sup>249</sup> As of December 31, 2003, following the *Windsor* decision declaring DOMA unconstitutional, the United States Government Accountability Office (“GAO”) identified 1,138 benefits within federal statutes where marriage is a factor in determining eligibility for those benefits.<sup>250</sup>

The GAO extrapolated thirteen areas in which marital status is a factor in determining eligibility for benefits and privileges.<sup>251</sup> These areas include: (1) Social Security and Related Programs, Housing and Food Stamps; (2) Veteran’s Benefits; (3) Taxation; (4) Federal Civilian and Military Service Benefits; (5) Employment Benefits and Related Statutory Benefits; (6) Immigration, Naturalization, and Aliens; (7) Indians; (8) Trade, Commerce, and Intellectual Property; (9) Financial Disclosure and Conflict of Interest; (10) Crimes and Family Violence; (11) Loans, Guarantees, and Payments in Agriculture; (12) Federal Natural Resources and Related Statutory Provisions; and (13) Miscellaneous Statutory Provisions.<sup>252</sup> These designated areas clearly cover a broad range of benefits that impact almost every aspect of one’s

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<sup>246</sup> *See id.*

<sup>247</sup> *See generally* 36 AM. JUR. 2d *Proof of Facts* 441 (1983). The denial of marriage licenses to same-sex couples hinders custody and adoption proceedings. *Id.*

<sup>248</sup> Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate, (Jan. 23, 2004), <http://www.gao.gov/assets/100/92441.pdf> [<https://perma.cc/B6CT-9383>].

<sup>249</sup> *See id.* The ability to make medical decisions for one’s partner became increasingly important as more information came to light regarding HIV/AIDS; *see* KLARMAN, *supra* note 16, at 18.

<sup>250</sup> *See* Letter from Dayna K. Shah to Bill Frist, *supra* note 248.

<sup>251</sup> *See id.*

<sup>252</sup> *See id.*

life, and have the potential to significantly improve the quality of life for one and one's spouse.

Some of the most critical benefits of married couples are those related to healthcare and medical surrogacy.<sup>253</sup> Marriage allows spousal access to each partner's health insurance plan.<sup>254</sup> Marriage also allows people to act as medical decision-makers in cases where one spouse is incapacitated.<sup>255</sup> In the case *In re Guardianship of Sharon Kowalski*, Karen Thompson, Sharon Kowalski's partner, challenged the trial court's decision to appoint Kowalski's father as her guardian after Kowalski was injured in a car accident that left her paralyzed and unable to speak.<sup>256</sup> Kowalski and Thompson had been cohabitating for four years.<sup>257</sup> Further, they were each other's insurance beneficiaries, and had exchanged rings.<sup>258</sup> Initially, Thompson set aside her petition for guardianship with the understanding that Kowalski's father would allow her to be part of the decision-making process.<sup>259</sup> Kowalski's father subsequently got a court order terminating Thompson's visitation rights.<sup>260</sup> After some time, the court ruled Kowalski competent enough to honor her request to visit with Thompson, her partner.<sup>261</sup> Kowalski's father relinquished his claim of guardianship, and Thompson petitioned for guardianship.<sup>262</sup> Thompson's petition was denied in favor of a Kowalski family friend.<sup>263</sup> On appeal, the court found Thompson suitable to act as guardian to Kowalski.<sup>264</sup> This case demonstrates how important medical surrogacy is to married couples as oftentimes one's spouse has the most information about the current physical condition of their spouse, and what is best for them.<sup>265</sup>

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<sup>253</sup> *Same-Sex Spousal Health Benefits*, HEALTH L. ADVOC. (Jan. 2015), <https://www.glad.org/wp-content/uploads/2017/01/hla-glad-health-benefits.pdf> [<https://perma.cc/M8LB-DS4B>].

<sup>254</sup> *See id.*

<sup>255</sup> *See* KLARMAN, *supra* note 16, at 50.

<sup>256</sup> *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991).

<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> *See id.*

<sup>260</sup> *See id.*

<sup>261</sup> *Id.* at 792.

<sup>262</sup> *See id.*

<sup>263</sup> *See id.*

<sup>264</sup> *Id.* at 797.

<sup>265</sup> *See id.*

Furthermore, social security is another benefit where marriage plays a factor in one's eligibility.<sup>266</sup> Following *Windsor's* finding that DOMA was unconstitutional, same-sex couples in states where same-sex marriages were recognized became eligible for spousal social security benefits.<sup>267</sup> Upon the ruling in *Obergefell* on June 26, 2015, the Social Security Administration recognized all same-sex marriages, and acknowledged their eligibility for spousal benefits.<sup>268</sup>

In denying same-sex couples marriage licenses, they are denied hundreds of rights.<sup>269</sup> It is important to balance all that is being denied to a same-sex couple when they are denied a marriage license with the hardship faced by a government official who has a religious objection to the *Obergefell* decision.<sup>270</sup> People get married because they love one another, and with that comes an intimate knowledge of one's spouse, which places them in the best position to make decisions for one another.<sup>271</sup> To deny same-sex couples the benefits of marriage is to deny the couple their most knowledgeable decision-maker if something should happen to the other.<sup>272</sup> It is to deny the spouse estate and tax benefits.<sup>273</sup> It is to deny the spouse over 1,138 federal benefits obtained through marriage.<sup>274</sup>

### **C. Irreparable Harm to the Plaintiffs - Fourteenth Amendment Right Denial**

A party will suffer irreparable harm when they are deprived of a constitutional right.<sup>275</sup> In cases where same-sex marriage licenses are denied, the Fourteenth Amendment may be implicated as it contains two

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<sup>266</sup> See Letter from Dayna K. Shah to Bill Frist, *supra* note 248.

<sup>267</sup> § 12:6. Spouse's benefits (retirement or disability), 23 KY. PRAC. KY. ELDER LAW § 12:6 (2d ed.).

<sup>268</sup> SOC. SEC. ADMIN., GN 00210.002, DETERMINING MARITAL STATUS (MARRIAGES AND NON-MARITAL LEGAL RELATIONSHIPS) FOR TITLE II AND MEDICARE BENEFITS (2016), <https://secure.ssa.gov/poms.nsf/lnx/0200210002> [<https://perma.cc/M4VF-HA8W>].

<sup>269</sup> See Letter from Dayna K. Shah to Bill Frist, *supra* note 248.

<sup>270</sup> See *id.*

<sup>271</sup> See *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991).

<sup>272</sup> See *id.*

<sup>273</sup> See Letter from Dayna K. Shah to Bill Frist, *supra* note 248.

<sup>274</sup> See *id.*

<sup>275</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 937 (E.D. Ky. 2015).

clauses applicable to marriage.<sup>276</sup> These are the Due Process and Equal Protection Clauses.<sup>277</sup> The Due Process and Equal Protection Clauses do not allow a state to make a law that, “deprive[s] any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>278</sup>

The petitioners in *Obergefell* claimed that the Fourteenth Amendment is implicated in cases where same-sex marriage is denied.<sup>279</sup> The petitioners asserted the argument made in *Loving* was analogous to their case, and thus the Fourteenth Amendment was applicable.<sup>280</sup> The couple at the heart of *Loving* had violated Virginia’s anti-miscegenation laws by marrying members of a different race.<sup>281</sup> Mildred Jeter, a black woman, and Richard Loving, a white man, legally married in Washington D.C.<sup>282</sup> They moved to Virginia, where they were charged with violating that state’s interracial marriage statute.<sup>283</sup> The Lovings were sentenced to one year in jail, but their sentence was postponed for twenty-five years on the condition that they leave Virginia and not return together while still married.<sup>284</sup> The couple moved to set aside the judgement claiming the interracial marriage ban was a violation of the Fourteenth Amendment Equal Protection and Due Process Clauses.<sup>285</sup> The court found the statute was a violation of the Equal Protection Clause because no government interest necessitates the facial discrimination that is evident in the Virginia statute.<sup>286</sup> Further, the Virginia statute implicated the Lovings’ Due Process rights under the Fourteenth Amendment because marriage is a fundamental personal right, and the Virginia statute was depriving the Lovings of that right.<sup>287</sup>

The petitioners in *Obergefell* echoed the Fourteenth Amendment argument in *Loving*, asserting the Due Process and Equal Protection

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<sup>276</sup> See *Loving v. Virginia*, 388 U.S. 1, 1 (1967); see also Ravitch, *supra* note 218, at 165-66.

<sup>277</sup> See U.S. CONST. amend. XIV.

<sup>278</sup> See *id.*

<sup>279</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

<sup>280</sup> See *id.*

<sup>281</sup> See *Loving*, 388 U.S. at 2.

<sup>282</sup> *Id.* at 2-3.

<sup>283</sup> See *id.*

<sup>284</sup> *Id.* at 3.

<sup>285</sup> See *id.* at 2-3.

<sup>286</sup> *Id.* at 10.

<sup>287</sup> See *id.*

Clauses applied to same-sex marriage.<sup>288</sup> They claimed that the Fourteenth Amendment “Due Process Clause extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.”<sup>289</sup> The Court in *Loving* found a nexus between a person’s liberty and marriage, and petitioners in *Obergefell* claimed this notion should be extended to same-sex couples.<sup>290</sup> Moreover, the petitioners in *Obergefell* argued that they were denied their Equal Protection rights under the Fourteenth Amendment because they were denied rights that are granted to heterosexual couples similarly situated regarding marriage.<sup>291</sup> The *Obergefell* decision made clear the Fourteenth Amendment applies to heterosexual marriages and same-sex marriages equally.<sup>292</sup> The couple is being denied their Fourteenth Amendment Right when they are not permitted to get a marriage license.<sup>293</sup> The Fourteenth Amendment right is inclusive of all people as evidenced by the language “any person.”<sup>294</sup> “Any person” includes homosexuals as well as heterosexuals.<sup>295</sup> By this logic, individuals in same-sex marriages should be afforded the same rights as individuals in heterosexual marriages.<sup>296</sup>

#### **D. Elected or Appointed Government Officials**

Government officials are elected or appointed for the specific purpose of serving the public and generally have a variety of duties that may affect the constitutionally guaranteed rights of others.<sup>297</sup> What happens when an official cannot perform one of his or her duties for religious reasons? Does the official’s refusal to issue marriage licenses in accordance with her religious beliefs prevent her from performing her other duties?<sup>298</sup> Generally, the answer to this question is no.<sup>299</sup> In the case of *Davis v. Miller*, Kim Davis performed her other public duties

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<sup>288</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

<sup>289</sup> See *id.*

<sup>290</sup> *Id.* at 2590.

<sup>291</sup> See *id.*

<sup>292</sup> *Id.* at 2591.

<sup>293</sup> See *id.*

<sup>294</sup> U.S. CONST. amend. XIV.

<sup>295</sup> See *id.*

<sup>296</sup> See *id.*

<sup>297</sup> See Ravitch, *supra* note 218, at 167-68.

<sup>298</sup> See *id.*

<sup>299</sup> See *id.*

during the time she was not issuing marriage licenses.<sup>300</sup> If officials are capable of continuing in their other duties, then an exemption from the specific duty of issuing marriage licenses to same-sex couples may be tolerable.<sup>301</sup>

Conversely, there is the concern that there must be someone else available to issue marriage licenses to same-sex couples if the official were exempted from this duty.<sup>302</sup> In cases where there are no officials available to perform the job, then an exemption would not be prudent.<sup>303</sup> North Carolina and Utah have developed models allowing for government officials who may harbor religious opposition to a certain duty to remain in their official capacity while not hindering the rights of a certain class of people.<sup>304</sup> These models ensure that there are alternate officials capable of issuing marriage licenses and performing civil ceremonies for same-sex couples, while also providing the opportunity for those with religious objections to excuse themselves from that duty.<sup>305</sup>

The North Carolina legislature passed §51-5.5, which deals with recusal of public officials.<sup>306</sup> This statute allows magistrates to recuse themselves from performing marriage ceremonies if they have a “sincerely held religious objection.”<sup>307</sup> Further, the statute allows for the assistant register of deeds and deputy registers of deeds to recuse themselves from issuing marriage licenses.<sup>308</sup> However, the office must provide an alternative public official to perform civil ceremonies and issue marriage licenses to same-sex couples.<sup>309</sup> Moreover, Utah’s model ensures there will be a “willing” clerk available during business hours to solemnize any marriage.<sup>310</sup>

The fact that all government officials take an oath to support the United States Constitution under Article VI must be taken into

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<sup>300</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 930 (E.D. Ky. 2015).

<sup>301</sup> See Ravitch, *supra* note 218, at 167-68.

<sup>302</sup> *Id.* at 168.

<sup>303</sup> See *id.* at 168-169.

<sup>304</sup> See Ravitch, *supra* note 218, at 169.

<sup>305</sup> See *id.*

<sup>306</sup> See N.C. GEN. STAT. ANN. § 51-5.5 (West 2015).

<sup>307</sup> See *id.*

<sup>308</sup> See *id.*

<sup>309</sup> See N.C. GEN. STAT. ANN. § 51-5.5(a) (West 2015); N.C. GEN. STAT. ANN. § 51-5.5(b) (West 2015).

<sup>310</sup> See UTAH CODE ANN. § 17-20-4 (West 2015).

consideration when determining whether an official should be exempted from a particular duty due to religious objections.<sup>311</sup> Article VI states, “all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”<sup>312</sup> Kim Davis’s actions violated her sworn oath to protect and defend the Constitution.<sup>313</sup> Davis argued that she did not violate this oath because her requirement to issue marriage licenses to same-sex couples was a religious test, which was a violation of the Oath Clause of the Constitution.<sup>314</sup> Article VI does include a provision stating, “[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”<sup>315</sup> The religious test provision is generally applied to candidates for official positions, and not people already in their official capacities.<sup>316</sup> If this principle were applied to *Miller v. Davis*, Kim Davis would not be able to claim a religious test violation.<sup>317</sup>

### E. Harm to Government Official

Another factor of the balancing test involves a consideration of the potential harm to a government official in not granting an exemption based on sincerely-held religious beliefs. In issuing marriage licenses to same-sex couples, Kim Davis claimed she was compromising her Apostolic Christian beliefs.<sup>318</sup> Further, she claimed that her name appearing on all marriage licenses equated to an endorsement of the institution of same-sex marriage, and thus issuing these marriage licenses would be a violation of her First Amendment right of free speech.<sup>319</sup>

Case precedent supports the idea that harm to the government official must be considered when determining if there was a free speech

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<sup>311</sup> See 2 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 18:20.60.

<sup>312</sup> U.S. CONST. art. VI, cl. 3.

<sup>313</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 943 (E.D. Ky. 2015).

<sup>314</sup> See *id.* at 943; 2 SMOLLA, *supra* note 311, § 18:20.60.

<sup>315</sup> U.S. CONST. art. VI, cl. 3.

<sup>316</sup> See generally Winston E. Calvert, *Judicial Selection and the Religious Test Clause*, 82 WASH. U. L.Q. 1129, 1130-46 (2004).

<sup>317</sup> See *Miller*, 123 F. Supp. 3d at 943.

<sup>318</sup> *Id.* at 941.

<sup>319</sup> See *id.*

violation.<sup>320</sup> *Connick v. Myers* involved an assistant district attorney whose employment was abruptly terminated for allegedly exercising her constitutional right to free speech.<sup>321</sup> The assistant district attorney was given a transfer with which she was unhappy, and in turn she distributed a questionnaire measuring her co-workers' support of supervisors and the transfer policy.<sup>322</sup> She was ultimately terminated for refusing her transfer.<sup>323</sup> She then brought suit claiming she was fired because she exercised her right of free speech in distributing her questionnaire.<sup>324</sup>

To determine whether an official's right to free speech has been violated, the court must balance the rights of the official as a citizen versus the state's need to promote efficiency of the public services its employees perform.<sup>325</sup> Further, the court must look at the official's speech with regards to "content, form and context."<sup>326</sup> The court found the assistant district attorney's First Amendment right of free speech had not been violated because she was not expressing an issue of public concern, but rather one of personal concern over her transfer.<sup>327</sup> A court would most likely dismiss Davis's Free Speech violation claim under the *Myers* standard.<sup>328</sup> Davis does have the right to free speech, and that right may be impeded by the fact that her name appears on all marriage licenses in her county.<sup>329</sup> However, this would most likely be outweighed by the state's need to promote efficiency of the public service its employees perform in issuing marriage licenses.<sup>330</sup>

Davis's policy of not issuing any marriage licenses was an inefficient response to *Obergefell* in that it deprived the public of the official duties of the clerk's office to which they were legally entitled.<sup>331</sup> Additionally, this efficiency consideration impacts many of the factors previously noted in this comment, such as availability of alternatives

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<sup>320</sup> See *Connick v. Myers*, 461 U.S. 138, 138 (1983).

<sup>321</sup> See *id.*

<sup>322</sup> See *id.*

<sup>323</sup> See *id.*

<sup>324</sup> See *id.*

<sup>325</sup> See *id.*

<sup>326</sup> *Id.* at 147.

<sup>327</sup> See *id.*

<sup>328</sup> *Id.* at 138.

<sup>329</sup> See *Miller v. Davis*, 123 F. Supp. 3d 924, 932 (E.D. Ky. 2015).

<sup>330</sup> See *Connick*, 461 U.S. at 138.

<sup>331</sup> See *Miller*, 123 F. Supp. 3d at 939.

and denial of benefits.<sup>332</sup> By refusing to issue marriage licenses out of the Rowan County Clerk's Office, she forced couples to travel to alternate locations, which may have been burdensome or infeasible. Further, her actions deprived people of the numerous tangible benefits attached to marriage.<sup>333</sup>

#### **F. Exemption: Compelling Interest Requirement**

For a government official to be exempted based on religious objections they must express a compelling interest.<sup>334</sup> In *Miller v. Davis*, Davis said her compelling interest was the protection of her own religious freedom.<sup>335</sup> While the state does have an interest in allowing the free exercise of religion, it also has an interest in preventing the imposition of religion on others.<sup>336</sup> Davis imposed her religion on others by refusing to issue marriage licenses to anyone, and by further forbidding any of her fellow clerks to issue licenses in her stead.<sup>337</sup> The court was unpersuaded by the personal interest Davis claimed.<sup>338</sup>

Furthermore, Davis's policy hindered the state interests of efficiency and applying the law evenly.<sup>339</sup> Her failure to abide by the *Obergefell* decision was neither efficient nor an even application of the law.<sup>340</sup> The court found that Davis's policy in the Rowan County Clerk's office served no compelling state interest.<sup>341</sup> Supreme Court decisions are due deference and respect.<sup>342</sup> By not abiding by the law set forth in *Obergefell*, Davis created a dangerous precedent with potentially disastrous consequences.<sup>343</sup>

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<sup>332</sup> See Letter from Dayna K. Shah to Bill Frist, *supra* note 248.; *Miller*, 123 F. Supp. 3d at 935.

<sup>333</sup> See Letter from Dayna K. Shah to Bill Frist, *supra* note 248.; *Miller*, 123 F. Supp. 3d at 935.

<sup>334</sup> See *Hamburger*, *supra* note 208, at 402.

<sup>335</sup> See *Miller*, 123 F. Supp. 3d at 937.

<sup>336</sup> See *id.*

<sup>337</sup> See *id.*

<sup>338</sup> See *id.*

<sup>339</sup> See *id.*

<sup>340</sup> See *id.*

<sup>341</sup> See *id.*

<sup>342</sup> See *id.*

<sup>343</sup> See *id.*

## VI. A LOOK TO THE FUTURE OF SAME-SEX MARRIAGE AND RELIGIOUS EXEMPTIONS FOR GOVERNMENT OFFICIALS

*Denied . . .*

*Because two civil liberties are in conflict . . .*<sup>344</sup>

*And no one knows which will win or if both will lose.*<sup>345</sup>

No one won in *Miller v. Davis*.<sup>346</sup> Yes, April Miller and Karen Roberts got married.<sup>347</sup> Yes, Kim Davis had her name removed from all marriage licenses issued out of the Rowan County Clerk's Office.<sup>348</sup> However, these small victories in the battle for same-sex marriage highlight an even bigger problem.<sup>349</sup> Kim Davis is one of many who expressed religious objections to the *Obergefell* decision.<sup>350</sup> What if all of those who expressed religious objections claimed they too could not issue marriage licenses?<sup>351</sup> All it would take is a slight change in the political climate or one charismatic believer to act as a martyr in the opposition to same-sex marriage to cause the tenuous walls created by the *Obergefell* decision to come crumbling down.<sup>352</sup> What occurred in *Miller v. Davis* was a bandage; it was not a solution.<sup>353</sup>

Government officials know what their duties are, and they should resign if they cannot perform those duties.<sup>354</sup> Religious exemption from enforcing or abiding by a law should come with a strict standard for

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<sup>344</sup> *Id.* at 924.

<sup>345</sup> *See id.*

<sup>346</sup> *See generally id.* at 944.

<sup>347</sup> *See* Gutierrez & Ortiz, *supra* note 206.

<sup>348</sup> *See Siemaszko, supra* note 206.

<sup>349</sup> *See Miller*, 123 F. Supp. 3d at 944; *see also Siemaszko, supra* note 206.

<sup>350</sup> *See Miller*, 123 F. Supp. 3d at 935-36.

<sup>351</sup> *See id.*

<sup>352</sup> *See id.* Kim Davis potentially could have caused others to follow her path of refusing to issue marriage licenses based on religious beliefs. At the time of Davis's refusal to issue marriage licenses, fifty-seven other clerks were asking for a special session of the state legislature to discuss their religious concerns with issuing same-sex marriage licenses. Davis could have very easily become a martyr in propelling their argument forward if the court did not make a decision concerning Davis's policy of refusing to issue marriage licenses out of the Rowan County Clerk's Office. *Id.*

<sup>353</sup> *See id.*

<sup>354</sup> *See id.*

government officials.<sup>355</sup> The balancing test described above provides a framework for this standard.<sup>356</sup> Additionally, sexual orientation should be a protected class. If sexual orientation were a protected class, there would be redress available against those who discriminate based on sexual orientation.<sup>357</sup> This would add teeth to the suggested balancing test above because it elevates sexual orientation to the same level as that of a protected class. The Supreme Court must decide this issue. On April 4, 2017, the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana* ruled that discrimination based on sexual orientation was against the Civil Rights Act of 1864 in an 8-3 decision.<sup>358</sup> This may be the very impetus the Supreme Court needs to weigh in on the issue of whether sexual orientation qualifies as a protected class.<sup>359</sup> When two civil liberties battle, “no one knows which will win or if both will lose.”<sup>360</sup> Until the court applies a stricter standard for religious exemptions to government officials, no one will win.<sup>361</sup>

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<sup>355</sup> *See id.*

<sup>356</sup> *See id.*

<sup>357</sup> *See, e.g., Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).

<sup>358</sup> *See Hively*, 853 F.3d at 339; *see also Hively v. Ivy Tech Community College*, LAMBDA LEGAL, [https://www.lambdalegal.org/in-court/cases/in\\_hively-v-ivy-tech](https://www.lambdalegal.org/in-court/cases/in_hively-v-ivy-tech) [<https://perma.cc/2FYR-W9GJ>].

<sup>359</sup> Johnathan Bible, *Hively v. Ivy Tech Community College of Indiana: Title VII Prohibits Sexual Orientation Discrimination*, BUS. L. TODAY AM. B. ASS’N, [https://www.americanbar.org/publications/blt/2017/04/keeping\\_current.html](https://www.americanbar.org/publications/blt/2017/04/keeping_current.html) [<https://perma.cc/CD6F-S4QJ>].

<sup>360</sup> *See Miller*, 123 F. Supp. 3d at 924.

<sup>361</sup> *See id.*