Obergefell and Resistance

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The movement for LGBT equality achieved a seminal victory in June 2015—the Supreme Court held in Obergefell v. Hodges that same-sex marriage bans violated the Fourteenth Amendment to the U.S. Constitution. In the face of this triumph, many people of faith continue to disapprove of same-sex marriage. They are now advocating for spaces of objection that will, among other things, allow them to disclaim the need to follow anti-discrimination norms that might result in even a tangential connection to the marriage ceremonies themselves. This Essay sketches some of the most recent controversies flowing from the rearguard effort, and briefly considers the possibility, or even the propriety, of compromise between pro-equality advocates and those whose objections are rooted in faith.

I. INTRODUCTION

In Obergefell v. Hodges,1 the United States Supreme Court held—after over forty years of litigants and movement actors pressing the case2—that prohibitions on same-sex marriage violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.3 Despite a decades-long onslaught of criticism and backlash, as well as counter-movement victories in the very recent past,4 the movement for marriage equality succeeded with a swiftness that surprised even its most ardent supporters.5

Counter-movement activists and grassroots opponents are fully engaged in strategies of resistance. Of course, opposition to both marriage equality, and to wider civil rights gains for the LGBT community, is not a new phenomenon. In the early 1990s, the Hawaii Supreme Court’s decision in Baehr v. Lewin6 led to the passage of the Defense of Marriage Act (DOMA), which defined marriage as

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2 See Baker v. Nelson, 191 N.W.2d 185, 186 (1971) (issuing the first holding in a U.S. jurisdiction that marriage between people of the same sex was not authorized under law). While the petitioners in Baker were the first to litigate the question, the final stage of the movement for marriage equality did not begin in earnest until the Hawaii Supreme Court issued its decision in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

3 Obergefell, 135 S. Ct. at 2602-03.

4 See, e.g., Michael C. Dorf & Sidney Tarrow, Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage Into the Public Arena, 39 L. & Soc. INQUIRY 449, 454-56 (2014) (describing opponents’ successes in passing the federal Defense of Marriage Act (DOMA), over thirty state-level versions of DOMA, popular initiatives designed to limit marriage to male-female relationships, and other efforts to defeat the push for marriage equality).


6 852 P.2d 44 (Haw. 1993).
the union between a man and a woman, and ensured that no legally married gay or lesbian couple could insist on recognition by either the federal government or a state that objected on public policy grounds. Similarly, when Massachusetts became the first U.S. jurisdiction to legalize same-sex marriage, opponents passed dozens of "baby DOMAs" in response. Ranging in their severity, these laws banned same-sex marriage, in selected cases, prohibited the creation of alternatives, and often proscribed the recognition of same-sex marriages contracted in other jurisdictions.

The tenor of the resistance changed when two trends began to emerge: first, beginning in 2009, twelve states and the District of Columbia legalized same-sex marriage through the political process. Second, the Supreme Court signaled, in United States v. Windsor, a willingness to find that same-sex couples had a constitutional right to marry. Even though opponents continued to battle fiercely in the courts, strategists looked for spaces in which they could shield traditionalists under the mantle of religious freedom.

Thus, while progressives were celebrating their victories in the state houses and at the Supreme Court, conservatives were defending narrow spaces of objection. The statutes reflected a careful accommodation: in exchange for marriage equality rights, religious organizations, including religious nonprofits, received statutory protections allowing them to maintain their objections to same-sex marriage. The carve-outs created safe harbors: with minimal variation


10 133 S. Ct. 2675 (2013). Windsor held that DOMA’s definition of marriage violated the Fifth Amendment. Windsor was premised on the notion that DOMA violated the equal protection and due process rights of same-sex married couples. In the following year and a half, forty-one federal district courts, five federal courts of appeal, and eighteen state courts held that prohibitions on same-sex marriage violate the U.S. Constitution. See Marriage Rulings in the Courts, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last visited Dec. 16, 2015).

11 The states in the table below passed legislation prior to Windsor that legalized same-sex marriage and also established carve-outs for religious entities:

<table>
<thead>
<tr>
<th>State</th>
<th>Legalization Statute</th>
<th>Effective Date</th>
<th>Common Religious Carve-Out Provisions</th>
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among the states, formal religious actors and organizations would not be required to participate in, facilitate, endorse, or otherwise engage with individuals for the purpose of celebrating a same-sex marriage. These compromises reflected the political strength of religious and cultural conservatives, but they also laid out the normative framework of preservation and retreat that other conservatives would view as a model, as the movement for marriage equality moved toward national victory.

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12 The states differed in the amount of protection that they offered to religious actors, but with the exception of Delaware, each one offered, at a minimum, the following protections: no clergy were obliged to solemnize same-sex marriages; religious organizations, including non-profit organizations, were exempt from meeting any service and accommodation obligations related to same-sex marriage; and objectors were shielded from both private suits and government penalties. Delaware, by contrast, simply protected clergy from any solemnization obligations, and shielded objectors from penalty. See id.

13 See Robin Fretwell Wilson, *Marriage of Necessity*, 64 CASE W. RES. L. REV. 1161, 1161-62 (2014) (observing, prior to *Obergefell*, that parties on both sides of the marriage debate were in the process of hardening their respective positions, and arguing that compromise positions were ultimately wiser because neither side could clearly predict the outcome).
Interest in such a negotiated retreat began to intensify as lower courts, post-\textit{Windsor}, began to invalidate bans on same-sex marriage.\textsuperscript{14} Prior to the imposition of the subsequent stays that halted litigation in many of these cases, same-sex couples took advantage of the decisions and married.\textsuperscript{15} The Supreme Court later sent an unmistakable signal when it denied review of the cases which legalized those unions: by doing so, it allowed those marriages to remain intact and sanctioned the entry of thousands of new participants into the marital category.\textsuperscript{16} Moreover, granting marriage rights to gay men and lesbians heralded the expansion of rights in other arenas: both sides understood that the movement for LGBT equality would not be satisfied with a marriage victory alone. Issues ranging from the passage of anti-discrimination laws covering employment, housing, and public accommodations, to establishing family formation rights, to the plethora of issues that continue to impact the transgender community, still needed to be addressed in many jurisdictions. Given the legal and political realities they were facing, religious freedom advocates pressed harder for new legal frameworks that would sanction the preferences of opponents to avoid many of the consequences that would flow from extending greater civil rights protection for the LGBT community.\textsuperscript{17}

\textsuperscript{14} By way of example, cultural critic Rod Dreher has been developing the idea of a “Benedict Option,” in which social conservatives “strengthen[\textsuperscript{a}] our institutions as places of effective cultural resistance.” Rod Dreher, \textit{The Political Benedict Option}, AM. CONSERVATIVE (Mar. 9, 2014), http://www.theamericanconservative.com/dreher/benedict-option-social-conservatives-cpac/. The purpose of the Benedict Option is to create cohesive communities whose members remain engaged in modern life, but who also commit themselves to orthodox Christian living in ways that secular society often will not permit. Rod Dreher, \textit{The Cost of ‘Narrative Collapse’}, AMERICAN CONSERVATIVE (Feb. 17, 2014), http://www.theamericanconservative.com/dreher/the-cost-of-narrative-collapse/.

\textsuperscript{15} See, e.g., Jim Urquhart, \textit{Gay Couples Marry in Utah After Judge Overturns Ban}, CBSNEWS (Dec. 20, 2013), http://www.cbsnews.com/news/federal-judge-strikes-down-utahs-same-sex-marriage-ban/ (“The [federal district court decision invalidating the ban on same-sex marriage] set off an immediate frenzy as the clerk in the state’s most populous county began issuing marriage licenses to gay couples while state officials took steps to appeal the ruling and halt the process.”).


These pressures shaped the periods immediately preceding and following \textit{Obergefell}. As expected, most of the resistance efforts have been legal failures and public relations nightmares. All of this notwithstanding, the debates that structured the opponents’ efforts may have an impact on the conversation over future accommodations, especially regarding putative beneficiaries who do not currently benefit under traditional exemption regimes. In order to explore some of these issues, this essay will sketch the contours of the resistance engaged in by public actors before and after \textit{Obergefell}. Those actors—with specific attention to judges, magistrates, and clerks—are the most accessible entry point into this discussion because they are the gatekeepers: marriage in its initial stage is a quintessentially public act, facilitated in multiple ways by representatives from the state. Analysis of the judges, magistrates, and clerks, then, may reveal possibilities for future accommodations: they highlight the intensity of opponents’ continued objections in a full marriage equality world, as well as the prospects for negotiation and compromise between LGBT movement and counter-movement activists. Progressive activists have won this fight so far, fair and square. The key question, then, is for them: which compromises, if any, are appropriate, in which areas, and ultimately, along what grounds?

\section*{II. RESISTANCE: DIRECT AND INDIRECT}

\subsection*{A. MASSIVE RESISTANCE REDUX?}

Multiple state actors resisted same-sex marriage, both before and after \textit{Obergefell}, and one of the most useful frames for contextualizing the resistance is the campaign of massive resistance that followed \textit{Brown v. Board of Education}.$^{18}$ Numerous scholars have examined it closely. Michael Klarman, for instance, has evaluated the strategies that Southerners employed in the wake of \textit{Brown}:

[Southern legislatures] passed dozens of laws designed to avoid desegregation—measures that authorized school closures, repealed compulsory attendance requirements, cut off public funding for integrated schools, provided public money for private schools, and attacked the NAACP. In March 1956, most southern congressmen signed the Southern Manifesto, which assailed the court’s “clear abuse of judicial power” and pledged all “lawful means” of resistance.$^{19}$


Intransigence and evasion were widespread. During the mid-1950s, violence occurred in several Southern cities; state legislatures adopted interposition resolutions that asserted the nullification of *Brown*; Citizen Council members devised and implemented tactics for maintaining white supremacy in Southern life, and ultimately, those whose opposition was strongest pushed the region to organize itself around the long-term goal of obstructing integration. Many of these forms of opposition were directly adversarial in nature, as typified by the image of George Wallace standing in front of the famous schoolhouse door.

Echoes of this time mirror the immediate period preceding *Obergefell*, as well as its direct aftermath, though the resistance has been neither as widespread, nor as deeply felt. Prior to *Obergefell*, for instance, the Alabama courts embraced the spirit, if not the substance, of a federal-state confrontation when it halted same-sex marriages after a federal district court struck down the state prohibition. Alabama’s response, however, was not replicated. After *Obergefell*, various state officials across the country engaged in multiple forms of resistance, including technical delays, refusals to issue licenses, and in some cases, resignations. The overwhelming majority, however, implemented the decision

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with no undue delay. Obergefell is much more a product of its time than was Brown, which is reflected in the comparatively muted response to the decision. Nonetheless, it is worth examining the resistance that did occur: these eruptions reveal an intensity in the opposition that may fuel more effective political efforts at retreat on a going-forward basis.

B. PRE-OBERGELL RESISTANCE: FEDERAL-STATE TENSION IN THE DISTRICT OF ALABAMA

The story of Alabama’s resistance began in January 2015. The federal court in the Southern District of Alabama found in Searcy v. Strange and Strawser v. Strange that the prohibition on same-sex marriage violated the Fourteenth Amendment. The court enjoined the State Attorney General from enforcing the law, but subsequently stayed the injunction. After the United States Court of Appeals for the Eleventh Circuit and the United States Supreme Court declined to extend the stays, the orders went into effect in early February 2015.

In reliance on the lower court rulings, gay and lesbian couples sought marriage licenses from county probate judges around the state, including in the Mobile County Probate office. They found that Judge John Davis, who was in charge of the Mobile office, was not issuing licenses. Judge Davis was not a party in Searcy or Strawser, nor did the Attorney General have supervisory authority over him. Therefore, he filed a request for clarification from the federal district court and the Alabama Supreme Court regarding his legal obligations.

The State Government shall not take any discriminatory action against a religious organization, including those providing social services, wholly or partially on the basis that such organization declines or will decline to solemnize any marriage or to provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage, based upon or consistent with a sincerely held religious belief or moral conviction.

23 81 F. Supp. 3d 1285, 1286 (S.D. Ala. 2015) (holding that the Alabama prohibition of same-sex marriage violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment where plaintiff—who had legally married a person of the same gender in California—was denied the right to adopt her spouse’s child, which was permitted under Alabama law, because the state refused to recognize the marriage).


25 Strawser v. Strange, 44 F. Supp. 3d 1206, 1207-08 (S.D. Ala. 2015) (enjoining a probate judge from continuing to refuse the issuance of marriage licenses to same-sex couples in light of the court’s earlier decision invalidating Alabama’s prohibition on same-sex marriage).

26 Id. at 1208.

27 Howard M. Wasserman, Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace, 110 NW. U. L. REV. ONLINE 1, 4-5 (2015). Judge Strawser was not the only probate judge in Alabama who declined to issue licenses, though some were willing to do so. See Case Summary and History: Strawser v. Strange, NAT’L CTR. FOR
Both the Alabama Probate Judges Association and Chief Justice Roy Moore of the Alabama Supreme Court instructed him not to comply—the district court order was procedurally flawed, and the ruling had only limited precedential authority. The petitioners in Strawser—who were seeking licenses, rather than the recognition of a preexisting union—filed a motion to amend the complaint, naming Judge Davis as a defendant. The federal court then extended the original injunction to cover him.

At this point, all of the parties had behaved consistently with their proper roles. Judge Davis was not bound by the district court order until the injunction was extended to cover him. Even if he was engaged in a technical form of resistance, he was also correct as a matter of federal court procedure. Several weeks later, however, the Alabama Supreme Court created a near-federal-state conflict by issuing a writ of mandamus ordering all probate judges to stop providing marriage licenses to same-sex couples.

Alabama had the clear authority to issue this ruling. The request for mandamus was within the court’s original jurisdiction. The court was not, however, obliged to hear the matter. Alabama justified its decision to take up the case by asserting that it needed to create order out of chaos; some judges were issuing marriage licenses, while others were not. Furthermore, these new entrants into the marriage category had access to a bevy of rights, though it was unclear whether or not they should. As only one probate judge in the state was subject to the federal ruling, the state of the law was unclear. While these points had some force to them, they may have been overstated. First, the lack of uniformity among issuing judges was an inconvenience that affected approximately 3.5 percent of the population. This was not a recipe for chaos.


Wasserman, supra note 27, at 5.

Id. at 6.

Id. at 6-7.


See id. at *13-14.

The court stated in its analysis that “a court will exercise its superintending control over tribunals only in extreme cases and under unusual circumstances.” Id. at *13 (quoting P.V. Smith, Superintending Control over Inferior Tribunals, 112 A.L.R. 1351, 1373 (2015)). Without question, the case before the Court presented an unusual circumstance of extraordinary magnitude—it pertained to litigation that would resolve a major, once-in-a-generation civil rights claim. Nonetheless, given the ability of the federal plaintiffs to re-file their complaint as a class action suit naming as defendants every probate judge in the state—a move which did, in fact, occur after this ruling was issued, and which resulted in the extension of the injunction—the decision to take up this case was a predictable exercise in futility. See Wasserman, supra note 27, at 8. As such, it still stands to reason that the Court heard the case for reasons other than a desire to provide guidance for the lower courts.

Similarly, the fact that married same-sex couples could access new rights under state law would certainly have posed the occasional challenge, but it was one to which the state had to adjust anyway because over five-hundred couples had married during the period when licenses were being issued. It is not clear that the burden of resolving new legal questions would have been meaningfully greater if the class of new entrants continued to grow—courts and policymakers would have had to resolve the questions in any case.

Other facts support the notion that Alabama was engaged in a last-gasp form of resistance. The request for mandamus was filed in February 2015. When the court issued its ruling in March, at least sixty-five federal courts around the country had ruled that same-sex marriage bans violated the federal constitution. Moreover, the United States Supreme Court consistently refused to stay litigation in federal circuits where the question was pending. As such, thousands of couples across the country who were newly-eligible to marry had taken advantage of the chance to do so. The plausibility of the Court rendering a decision in Obergefell that would throw the nation into chaos, when it would have been entirely responsible for that chaos, suggested it was likely to find that gay and lesbian couples had a right to marry. Alabama, of course, was not obliged to adopt the reasoning of the other courts, or read the tea leaves in this particular way; nonetheless, the overwhelming weight of authority argued in favor of concluding that same-sex marriage would soon be the law of the land.

35 During the three-week span prior to Obergefell when licenses were being issued to gay and lesbian couples, 545 same-sex marriages were performed. See Ryan Phillips, Over 500 Same-Sex Couples Married in Alabama During Three Week Time Span, BIRMINGHAM BUS. J. (Apr. 9, 2015), http://www.bizjournals.com/birmingham/morning_call/2015/04/over500-same-sex-couples-married-in-alabama-during.html.


37 Marriage Rulings in the Courts, FREEDOM TO MARRY (Mar. 2, 2015), http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (noting that those sixty-five rulings were issued in the wake of the U.S. Supreme Court decision in Windsor).

38 By way of example, when the U.S. Supreme Court denied the petition for a writ of certiorari in Herbert v. Kitchen, 134 S. Ct. 893 (2014), same-sex couples in Utah, in particular, and ultimately throughout the Tenth Circuit, in general, became eligible to marry. When Obergefell went to the Supreme Court, the status of marriage was unclear only in the First, Fifth, Eighth, and Eleventh Circuits. Lyle Denniston, Constitution Check: Why the Delay in Allowing Same-Sex Marriages?, YAHOO NEWS (July 2, 2015), http://news.yahoo.com/constitution-check-why-delay-allowing-same-sex-marriages-102211073--politics.html. The refusal both to stay litigation and to deny certiorari in Kitchen were extraordinary signals of the Court’s likely position. As such, Alabama’s willingness to ignore these signs, as well as its analysis in the opinion, reveal a preference for maintaining the traditional order until forced to abandon it.

39 In early October 2014, when the Supreme Court denied the petition for the writ of certiorari in Kitchen, same-sex couples could marry in nineteen states plus the District of Columbia; less than six weeks later, they could marry in nearly thirty-five states. Lyle Denniston, Same-Sex Marriage Nears Thirty-Five State Total, SCOTUSBLOG (Nov. 19, 2014, 5:19 PM), http://www.scotusblog.com/2014/11/same-sex-marriage-nears-thirty-five-state-total/.
These considerations notwithstanding, the Alabama Supreme Court issued the writ. The court found that it was not bound by the lower federal court ruling, and further, that the district court’s constitutional interpretation was flawed. Since sexual orientation was not a suspect designation, rational basis review applied to the equal protection claim, and because the plaintiffs sought entrance to, and recognition of, a non-traditional marital pairing, they could not establish a violation of the fundamental right to marry. In light of this analysis, the court found that the state prohibition on same-sex marriage was constitutional. As such, all probate judges were prohibited from issuing licenses to same-sex couples, including Judge Davis. He had already issued licenses to the four named plaintiffs in the complaint; therefore, he had completed his specific obligation under federal law. The stalemate between the state and federal courts continued until the district court judge allowed the plaintiffs to amend their complaints, this time naming all county probate judges as defendants in a class action suit. She then granted a class-wide preliminary injunction against the defendants, but stayed the ruling pending a resolution in Obergefell.

The state and federal courts dueled to a draw in Alabama, and the Supreme Court’s decision has only inflamed the opposition in the state. While the majority of its citizens support enforcement, Alabama has still distinguished itself as a locus of resistance. By way of example, 99.9 percent of Americans either live in a county where marriage licenses are being issued, or where the status is unknown to researchers; Alabama, however, has the highest known percentage of citizens—5.78 percent—who are living in counties where licenses are not being issued. More than that, ten percent of Alabama magistrates—who may issue marriage licenses, but are not obliged to do so under state law—have chosen to stop issuing licenses altogether because of their opposition to same-sex marriage. A state legislator has even gone so far as to propose the dismantling

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40 See Alabama Policy Inst., 2015 WL 892752, at *43.
41 See id. at *37.
42 See Wasserman, supra note 27, at 12-13.
44 See Local Government Responses to Obergefell v. Hodges, BALLOTPEDEA (Oct. 29, 2015), http://ballotpedia.org/Local_government_responses_to_Obergefell_v._Hodges#cite_note-census-1. In fact, three of the counties where magistrates have stopped issuing licenses adjoin each other in southwestern Alabama, and as a result, there now exists a region of 78,000 Alabamans who do not have ready access to marriage licenses. See Jay Reeves, Alabama Judges Use Segregation-Era Law to Avoid Gay Marriage, BOSTON GLOBE (Oct. 3, 2015), https://www.bostonglobe.com/news/nation/2015/10/03/alabama-judges-use-segregation-era-law-avoid-gay-marriage/HQf8HRywdWXjOhePT7BGpO/story.html.
of marriage by restructuring it as a legal status based explicitly in contract.\textsuperscript{47} Opposition to same-sex marriage runs deep in this state, where only 35 percent of residents support it, and 63 percent of Evangelical Protestants, 14 percent of Historically Black Protestants, and 10 percent of Mainline Protestants strongly oppose it.\textsuperscript{48}

The behavior of the Alabama Supreme Court, the repudiation by the magistrates, the radical nature of the legislative proposal, and the overall degree of opposition in the state, reveal a depth and sincerity of feeling that is important to comprehend. The Alabama experience, again, is not reflective of the nation—the amount of resistance is unusual, and the machinery of the state has played an outsize role in framing objections—but it \textit{does} reflect the intensity of the opposition. Understanding this desire will help progressives determine which battles are worth pursuing, and which ground, if any, is worth ceding to the other side.

\textbf{C. POST-OBERGEFELL RESISTANCE: PUBLIC OFFICIALS ON THE FRONT LINES}

Alabama, of course, was not the only state whose public officials resisted the marriage equality tide. Once the decision in \textit{Obergefell} was issued, clerks and judges who were responsible for issuing licenses or had the power to marry couples declined to do so in multiple states, invariably citing objections based on the tenets of their faith. Ultimately, two forms of resistance became apparent: (1) a position of no compromise, and (2) state-brokered compromises that allowed objectors a limited option of refusal while granting same-sex couples the licenses they deserved.

By and large, the individuals who would not compromise followed one of two paths. The first non-compromise path embraced disengagement. In the case of the clerks, they resigned their positions, and in the case of judges—who were generally not obliged to conduct marriage ceremonies at all\textsuperscript{49}—they declined to marry anyone in light of their refusal to marry same-sex couples.\textsuperscript{50}


\textsuperscript{49} But see \textit{Judicial Performance of Civil Marriages of Same-Sex Couples}, \textit{BD. OF PROF'L CONDUCT, SUPREME COURT OF OHIO} (Aug. 7, 2015),
The second non-compromise path embraced direct engagement. The person who best exemplified this stance was Kim Davis: the elected Rowan County Clerk from Kentucky who refused to issue marriage licenses, refused to resign her position, and refused to allow her deputy clerks to issue licenses to same-sex couples because her name and title appeared on the licenses, which she construed as a message of endorsement. Davis' initial position was a legal challenge in federal court—she sought relief from the governor's order that she enforce Obergefell, an order that was later accompanied by a federal court injunction to issue the licenses. When she lost her appeals, she continued to defy the injunction and was subsequently jailed for contempt. During her brief period of incarceration, the deputy clerks in her office issued licenses. Upon returning to the office, Davis materially altered the licenses: they no longer

http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf (finding that a judge who refuses to marry all couples in order to avoid marrying same-sex couples may be perceived as holding an improper bias toward gay and lesbian individuals).


51 Michael C. Dorf, Must County Clerks Issue Marriage Licenses?, VERDICT (Sept. 3, 2015), https://verdict.justia.com/2015/09/03/must-county-clerks-issue-marriage-licenses (analyzing the validity of the claim that a state law which did not allow the removal of her name from a license violated the state religious freedom act).


reflected the office from which they were issued, the name of the county, her name, her title, or any other employee’s title as deputy clerk.\textsuperscript{55} The plaintiffs who originally sued her, on behalf of themselves and the class, then filed a motion asking the district court to direct the deputy clerks to issue licenses that removed her name, but were otherwise unadulterated.\textsuperscript{56}

These two non-compromise paths—disengagement and direct engagement—highlighted many important matters: the power of low-level bureaucrats to stymie the orderly functioning of the law (by way of example, when the clerks in Decatur County, Tennessee resigned, they comprised the entire office, which shut down all functions for a brief period of time);\textsuperscript{57} the power of managers to direct the actions of subordinates so they cannot meaningfully comply with even constitutional obligations; and most importantly, an impending clash between (broadly speaking) secularists and traditionalists as they seek exemptions from generally applicable practices, imposing costs that are not broadly shared, but instead, would be borne by narrowly-defined groups.\textsuperscript{58}

The latter issue is especially concerning in a case like Davis’, when the person seeking the accommodation is an elected official. There is an important question regarding her right to assert a religious claim—to what extent can we accommodate elected officials who are meant to serve as the neutral face of the state?\textsuperscript{59}

North Carolina and Utah have provided an answer to the accommodation question, reaching state-brokered compromises that have settled the matter for now. In North Carolina, magistrates and registers of deeds who assert a sincere

\textsuperscript{55} Marty Lederman, \textit{Don’t Be Surprised if Kim Davis is Remanded to the Custody of the Federal Marshal... Again}, BALKINIZATION (Sept. 19, 2015, 9:39 AM), http://balkin.blogspot.com/2015/09/dont-be-surprised-if-kim-davis-is.html. Despite the alteration, Kentucky Governor Beshear indicated that they would be recognized as valid. \textit{id.}

\textsuperscript{56} Motion to Enforce September 3 and September 8 Orders, Miller v. Davis, Case No. 0:15-cv-00044-DLB (E.D.KY Sept. 21, 2015), available at https://www.justsecurity.org/wp-content/uploads/2015/09/millerplaintiffs.motion.enforce.orders.pdf At the time of this writing, the motion was still pending.

\textsuperscript{57} Whetstone, \textit{supra} note 50.

\textsuperscript{58} See, e.g., Douglas Nejaime & Reva B. Siegel, \textit{Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics}, 124 YALE L.J. 2516, 2520 (2015) (discussing claims in which a growing number of traditionalists who have lost democratic contests—often those related to sex, reproduction, or marriage—seek exemptions from generally-imposed obligations based on the argument that compliance will make them complicit in sin, despite the fact that an exemption inflicts harm on third parties).

\textsuperscript{59} Kentucky’s Religious Freedom Act, by its terms, likely would have applied to Davis, but it was unclear at the time whether it applied to elected officials. KY. REV. STAT. ANN. § 446.350 (2013): Government shall not substantially burden a person’s freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest.
religious objection to performing any lawful marriage or issuing any licenses may be excused from doing so.\textsuperscript{60} If a magistrate or register recuses him or herself, the chief district judge must ensure that a replacement is available to perform a properly-licensed marriage or issue licenses to eligible individuals.\textsuperscript{61} If every official in a jurisdiction recuses, then other officials will be appointed to carry out the relevant duties.\textsuperscript{62} Similarly, in Utah, the county clerk must establish policies regarding licensing, and either the clerk or a designee—\textit{whether or not that person is an office employee}—must be available during business hours to solemnize a marriage.\textsuperscript{63} In both North Carolina and Utah, then, even an elected official has the right to avoid any form of participation in a same-sex marriage, as long as someone in the office is prepared to uphold a same-sex couple's constitutional rights. The objector remains employed, but is tasked with other duties.

Both statutory regimes are subject to critique. As Michael Dorf points out, each structure risks dignitary harm:

> When the states of North Carolina and Utah chose just this one government function—providing government services for marriage—as specially eligible for opt-outs based on religion, they effectively communicated that of all the religious objections that a government official might have to any of his or her duties, this one is especially weighty.\textsuperscript{64}

Robin Fretwell Wilson would agree that North Carolina presents this concern, but the harm she sees is more precise: the objection need not be raised until the individual makes contact with the first gay or lesbian couple. This increases the likelihood of a dignitary injury.\textsuperscript{65} She would praise the Utah statute, however, as a model of compromise.\textsuperscript{66} It forces clerks to develop licensing

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\textsuperscript{60} N.C. GEN. STAT. § 51-5.5(a)-(b) (2015).
\textsuperscript{61} Id.
\textsuperscript{62} N.C. GEN. STAT. § 51-5.5(c) (2015).
\textsuperscript{63} UTAH CODE ANN. § 17-20-4(1)-(2) (2015).
\textsuperscript{64} Michael Dorf, \textit{The Social Meaning of Statutes Allowing Clerks to Opt Out of Marriage}, DORF ON LAW (Sept. 4, 2015, 7:00 AM), http://www.dorfonlaw.org/2015/09/the-social-meaning-of-statutes-allowing.html. He also notes an alternative meaning—that the state is not homophobic, but rather, is accommodating religion. Dorf, however, is skeptical of this argument because a generally-phrased religious freedom statute would achieve the same goal without implicitly singling out same-sex couples. \textit{Id.}
\textsuperscript{66} In fairness, it is worth noting that Wilson was a key advisor who assisted in the drafting of the Utah statute. Dennis Romboy, \textit{Utah Anti-Bias, Religious Rights Law Could Be Model for Other States}, DESERET NEWS (Mar. 14, 2015), http://www.deseretnews.com/article/865624241/Utah-anti-bias-religious-rights-law-could-be-model-for-other-states.html?pg=all.
\end{flushright}
policies in advance, and when feasible, allows task differentiation: offices that are large enough can assign objectors to non-licensing duties, and if necessary, can outsource marriage responsibilities to non-office employees who are willing to complete the tasks. This compromise upholds both traditional prerogatives and dignitary interests: staff members who prefer not to do so can avoid issuing licenses or conducting same-sex marriages, while same-sex couples never have to step into a "special" line or learn the identities of staff members who did not wish to serve them.67

Both authors raise important points. There is certainly dignitary harm at stake—in both instances—when the state establishes a vehicle for disapproving same-sex marriage. This is especially true when one considers the history of religious objections to interracial marriage, and the comparative lack of support for granting religious accommodations to the individuals who felt similarly.68 Even though there are strong reasons which explain why no one successfully pressed the claim during the civil rights era, the religious arguments were still available, adherents took them seriously, and government actors, by contrast, did not. The fact that we take religious liberty arguments in a comparable setting seriously today can be explained, but the justification may not be entirely satisfactory.

Beyond that, Wilson's vision of the Utah statute is slightly flawed: the virtue of the sorting mechanism depends on office size. If the staff of a clerk's office is too small to shift objectors to positions which ensure they will never have to issue licenses, there is a risk that dignitary harms will still be produced. For example, if only one person in the office agrees to issue licenses to same-sex couples, the office may designate him or her as the sole licensing clerk. Under normal circumstances, this might not be problematic—specialization of tasks is normal, and the community might not notice that only one person is willing to take on this role. When this individual is absent, however, the community will notice that the only party available to issue a license is a non-employee designee—this would be an unusual circumstance—and it will quickly discern why every other employee in the office objected to issuing the licenses to same-sex couples. The message would be clear: the remaining employees would perceive these unions as morally "unfit," and the state would have ratified their right to express this belief openly, if quietly. There is a dignitary harm here, even if it is minimal in theory; to the couples in question, it will be visible and felt.

At present, North Carolina and Utah provide the only formal carve-outs which establish a right of objection for public officials.69 These laws create both

67 Id.
69 The Texas Attorney General issued an Opinion after Obergefell that essentially modeled these statutes. See Ken Paxton, Attorney General of Texas, Rights of Government Officials Involved
a public entitlement and a quasi-private space of objection, and as a result, these states have facilitated both LGBT couples' rights of access to marriage licenses, as well as social conservatives' interests in a particular form of cultural withdrawal. Of course, many members of the LGBT community and their allies might characterize the laws differently: they might see the laws as mechanisms for reinforcing a narrative of second-class status, which stigmatizes their relationships and singles them out as worthy of negative treatment. The practical import of the accommodation might be negligible, but it carries a risk: much like unenforced sodomy laws marked gay men and lesbians as presumptive criminals, invisible licensing exemptions have the potential to mark them as moral pariahs.

Some would argue that the cost of accommodation is small, and social cohesion is worth the price. Ultimately, the right to marry exists, and LGBT couples have access to it. On the other hand, signals matter. If other states embrace this compromise solution, we will see how the debate plays out across the country.

III. CONCLUSION

The pushback against the success of the marriage equality movement will end up being one of its most critical moments: now that marriage has arrived, the stakes are enormously high for continuing objectors, and it will be the stage on which the discourse of religious liberty is most thoroughly aired. Resistance where sensible and productive will become key for them, and claims of liberty will be primary. In fact, other examples that typify this resistance have come from quasi-public actors; they have played an important role in building the narrative of compromise, negotiation, and limits, as well. Bakers in Oregon and Colorado, for instance, were cited for discriminatory practices when they refused to sell wedding cakes to gay couples. See George Rede, Sweet Cakes Final Order: Gresham Bakery Must Pay $135,000 for Denying Service to Same-Sex Couple, OREGON LIVE (July 2, 2015), http://www.oregonlive.com/business/index.ssf/2015/07/sweet_cakes_final_order_gresha.html; see also Craig v. Masterpiece Cakeshop, Inc., 2015 Co. Ct. App. No. 14CA1351, Aug. 13, 2015, available at https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2015/14CA1351-PD.pdf.

Insofar as the ruling was concerned, it mattered that they were clothed in the mantle of the
public—as places of public accommodation in states with gay-friendly anti-discrimination laws, this was not a battle they were likely to win.

All of these points of resistance are distinct in important ways, but they share an important aspect in common: opponents of same-sex marriage have lost this aspect of the culture war. They know this, and they are negotiating the terms of their surrender. The eruptions we have seen from public and quasi-public actors have been instructive. Not only have they confirmed the depth of the opposition, but they have also revealed useful information about the terms on which some compromises might be struck.

The tapestry that is forming, then, potentially suggests several things. First, the objection is so deeply felt, state and LGBT movement actors are going to have to engage opponents on these accommodation issues. These sentiments cannot be dismissed.

Second, entities with substantial obligations to the public may be limited in their ability to assert objections, but if they do, they should probably be maintained within confines that are mostly invisible. Visible objections (like refusals of service) will likely cross normative, and in some cases, legal lines. This is the lesson we can glean from the bakers, but it is also, potentially, the lesson from Kim Davis, as well as the North Carolina and Utah statutes. Regarding Davis, the plaintiffs who have returned to federal district court contend they will accept licenses that have removed her name; the other markers of official status—specifically, the name of the issuing county, and the title of the Deputy Clerk who signed the license—matter to them. It is irrelevant to the plaintiffs that the Kentucky Governor and Attorney General indicated a willingness to enforce the altered licenses. Davis’ unilateral changes were markers of humiliation, and forced them to accept a badge of her animus and disdain. Davis’ alterations are, indeed, problematic. She did not simply eliminate her name; she eliminated the visible, symbolic relationship between the couples and the state. Mere removal of her name was an acceptable compromise to the plaintiffs because it rendered her personal objection invisible, but removing the markers of the state raised questions (initially) about validity, but also communicated a message that she—and her perceived animus—were wholly identical with the state. This was a bridge too far for them.

The problem of visibility simply reproduces the dignity concerns that Dorf and Wilson highlighted in the discussion surrounding the North Carolina and Utah statutes. Despite their limitations, the laws afford practical opportunities for grace between neighbors. It is fair to ask whether public officials should ever be allowed to object in this manner—should the law facilitate traditionalist retreat in the taxpaying context? If, however, it is possible to find solutions that

73 Id. at *8.
reinforce—even imperfectly—respect for all claimants, they might be the ones that best preserve rights and dignity for all.

So what does this mean, then, for private actors? What changes, if any, will religious non-profit institutions have to employ in order to maintain their tax exempt status? Will evangelical colleges be forced to permit same-sex relationships? Will they have to extend benefits to the same-sex spouses of their employees, thereby recognizing such relationships? As a political matter, the likelihood of the federal government challenging the tax-exempt status of most religiously-affiliated groups is not high, but the questions are not entirely theoretical. What about adoption placement organizations that are religiously-affiliated—will they lose access to government funding if they decline to make same-sex placements?

The answers to these questions are not immediately clear. As we move in the direction of evaluating these and other more serious religious liberty claims, it will be key to bear in mind the intensity that drives the debate—on both ends. Beyond that, though, it will be worthwhile to note some of the limits that exist regarding the possibilities of compromise. These lessons from the pre- and post-Obergefell moment will help us frame our civic responses as we face the negotiation challenges of the future.

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74 It is worth noting, however, that a growing number of colleges and universities across the country have requested and received religious exemptions under Title IX that excuse their compliance under the statute. Nick Anderson, Religious Colleges Get Exemptions to Anti-Bias Law; Critics Denounce “Hidden Discrimination” Against LGBT Students, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/12/18/religious-colleges-get-exemptions-to-anti-bias-law-allowing-hidden-discrimination-against-lgbt-students/.

75 In fact, some religiously-affiliated adoption agencies have closed when forced to choose between adhering to their religious teachings regarding traditional marriage, which meant they would not place children with same-sex couples, or following non-discrimination requirements in government contracts. Alana Semuels, Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents, ATLANTIC (Sept. 23, 2015), http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/ (“Catholic agencies stopped providing adoptions in Boston, Illinois, and Washington, D.C., after those jurisdictions recognized same-sex marriages and civil unions. Should they be forced to provide services to same-sex couples, the agencies in Michigan would likewise shut down, [a representative of the Michigan Catholic Conference] said.”).