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# Marriage Equality Comes to the Fourth Circuit

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Carl Tobias\*

## *Table of Contents*

I. Introduction.....	2006
II. A Brief History of Marriage Equality .....	2006
III. Marriage Equality Litigation and Marriage Equality's Implementation.....	2013
A. The Fourth Circuit.....	2013
1. Virginia Litigation .....	2014
a. Eastern District Opinion.....	2014
b. Fourth Circuit Majority Opinion .....	2019
c. Fourth Circuit Dissenting Opinion.....	2024
2. North Carolina Litigation.....	2027
3. South Carolina Litigation.....	2028
4. West Virginia Litigation.....	2032
B. Supreme Court.....	2034
C. Marriage Equality's Implementation .....	2040
IV. Lessons from Marriage Equality Initiatives.....	2046
V. Suggestions for the Future .....	2053
A. Fourth Circuit States.....	2053
B. United States .....	2061
VI. Conclusion .....	2063

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### *I. Introduction*

Marriage equality has come to America. Throughout 2014, several federal appellate courts and numerous district court judges across the United States invalidated state constitutional or statutory proscriptions on same-sex marriage. Therefore, it was not surprising that Eastern District of Virginia Judge Arenda Wright Allen held that Virginia's bans were unconstitutional in February. The United States Court of Appeals for the Fourth Circuit affirmed her opinion that July. North Carolina, South Carolina, and West Virginia District Judges rejected these jurisdictions' prohibitions during autumn, and the Supreme Court approved marriage equality the next year. Because marriage equality in the Fourth Circuit presents significant legal questions which profoundly affect numbers of individuals, the road to equality in the Circuit's states deserves analysis, which this piece conducts.

Part I traces marriage equality's national rise and growth. It finds that litigants pursued marriage equality in every state, including those of the Fourth Circuit, which lacked equality, and provoked some controversy. Part II assesses disposition of the Virginia, North Carolina, South Carolina, and West Virginia litigation; the Fourth Circuit opinion, which promptly affirmed the Virginia ruling and mandated the other jurists' decisions; and Supreme Court resolution. It ascertains that North Carolina, South Carolina, and West Virginia District Judges correctly applied this binding Fourth Circuit precedent. Part III extracts lessons from the tale recounted, determining that marriage equality over the Fourth Circuit has generally clarified, although numerous pertinent questions remain unclear in certain areas of the Fourth Circuit and the country. Part IV, thus, proffers future suggestions for ensuring that the Fourth Circuit jurisdictions attain comprehensive marriage equality.

### *II. A Brief History of Marriage Equality*

Marriage equality's history, which preceded federal challenges to state laws, merits brief analysis here. The Justices' 2013 opinion

in *United States v. Windsor*<sup>1</sup> prompted the new marriage equality suits and was important to numerous circuit and district court opinions which rejected bans.<sup>2</sup> The plaintiffs filed cases in each jurisdiction that barred same-sex marriage.<sup>3</sup>

Justice Anthony Kennedy, writing for the *Windsor* majority, held that section three in the Defense of Marriage Act (DOMA)<sup>4</sup> contravened the Fourteenth Amendment.<sup>5</sup> The Court did not enunciate the proper level of review, but it seemed to use elevated, albeit less than strict, scrutiny.<sup>6</sup> Kennedy detected little reason for DOMA's incursions on dignity and personhood as well as the problematic damage that the statute inflicted upon same-sex couples and their children, while he did not address state bans.<sup>7</sup>

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1. 570 U.S. 744 (2013); see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 870–74 (2014) (discussing shifting constitutional views and the likelihood of further invalidation of laws restricting same-sex marriage).

2. See, e.g., *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014) (affirming an Eastern District of Virginia ruling that enjoined enforcement of laws banning same-sex marriage that were deemed to be unconstitutional); *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014) (affirming rulings from Indiana and Wisconsin district courts that invalidated laws prohibiting same-sex marriages in those states); see also *DeLeon v. Perry*, 975 F. Supp. 2d 632, 639–40 (W.D. Tex. 2014) (deciding that Texas's refusal to recognize same-sex marriages from other jurisdictions was unconstitutional).

3. See *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (representing one of the many cases that the ACLU pursued, this one was pursued in the Fourth Circuit); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2014) (showing that ACLU also participated in cases at the district court level, but local parties also filed a number of cases).

4. Defense of Marriage (DOMA) Act, 1 U.S.C. § 7, *invalidated by United States v. Windsor*, 570 U.S. 744 (2013).

5. See *Windsor*, 570 U.S. at 775 (finding a section of DOMA to be an unconstitutional denial of equal marriage rights); Michael Klarman, *Windsor and Brown*, 127 HARV. L. REV. 127, 140 (2013) (comparing the doctrinally questionable opinion in *Brown v. Board of Education* to the Fourteenth Amendment justification used in *Windsor*).

6. See *Windsor*, 570 U.S. at 769–75 (discussing the manner in which the Court examined the statute before deciding “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”); Franklin, *supra* note 1, at 872 (explaining that the standard of review applied by courts includes heightened scrutiny, intermediate scrutiny, rational basis, and “rational basis with bite”).

7. See *Windsor*, 570 U.S. at 771–73 (strongly praising federalism's value);

This made *Windsor*'s impact on the bars ambiguous, yet equality proponents capitalized upon the ruling when disputing them and lower courts invoked *Windsor* to eliminate bans.<sup>8</sup> Chief Justice John Roberts in a dissent explicitly remarked that the Court did not review state laws' validity.<sup>9</sup>

Thirty district court jurists rejected bans.<sup>10</sup> The U.S. Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits affirmed district invalidations, even as the Sixth Circuit reversed determinations overturning four states' laws in a case which the Justices resolved during June 2015.<sup>11</sup> Litigants pursued appeals in

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*infra* notes 47–50 (discussing the evolving doctrinal treatment related to same-sex marriage and the effect on Virginia law).

8. See, e.g., *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1277–80 (N.D. Okla. 2014) (concluding that *Windsor* should be applied to same-sex marriage at the state level); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1193–94 (D. Utah 2014) (following the reasoning in *Windsor*, the plaintiffs argued that Utah law violated their rights to equal protection and due process).

9. See *Windsor*, 570 U.S. at 776 (Roberts, C.J., dissenting) (“The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their ‘historic and essential authority to define the marital relation,’ may continue to utilize the traditional definition of marriage.”); Klarman, *supra* note 5, at 158 (agreeing, Justice Scalia said that ideas employed to invalidate DOMA could analogously govern state bans); Franklin, *supra* note 1, at 870 (predicting that the *Windsor* decision’s approach to same-sex marriage would have ramifications for state laws).

10. See *infra* note 29 (citing cases in which bans were partially invalidated); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014) (finding that Louisiana’s definition of marriage does not infringe upon due process and equal protection rights), *rev’d*, 791 F.3d 616 (5th Cir. 2015); *Conde-Vidal v. Garcia-Padilla*, 54 F. Supp. 3d 157, 167–168 (D.P.R. 2014), *vacated, sub nom. Conde-Vidal v. Rius-Armendariz*, No. 14-2184, 2015 WL 10574261 (1st Cir. July 8, 2015) (upholding the same-sex marriage ban in Puerto Rico); ALLIANCE FOR JUSTICE, LOVE AND THE LAW: FEDERAL CASES CHALLENGING STATE BANS ON SAME-SEX MARRIAGE (2015), <https://www.afj.org/wp-content/uploads/2015/06/Federal-Marriage-Equality-Report-6.23.15-POSITIVE.pdf> [hereinafter AFJ].

11. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (finding laws preventing same-sex marriage in Michigan, Kentucky, Ohio, and Tennessee invalid and overturning the Sixth Circuit); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014) (affirming an injunction granted in the Eastern District of Virginia to prevent enforcement of Virginia marriage laws that were found to violate the Fourteenth Amendment); *DeBoer v. Snyder*, 772 F.3d 388, 413, 421 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015) (finding that the Fourteenth Amendment was not violated by same-sex marriage prohibitions or the states’ definition of marriage under rational basis review and granting certiorari);

the First, Fifth, Eighth, and Eleventh Circuits.<sup>12</sup> The judges who overruled bars found that they violated the Due Process or the Equal Protection Clauses.<sup>13</sup>

In December 2013, a Utah federal trial level jurist was the first to eliminate a ban.<sup>14</sup> The next month, an Oklahoma district court rejected a bar.<sup>15</sup> In February 2014, Texas and Virginia district court judges nullified the states' bans.<sup>16</sup> That March, a Michigan district ruled that its laws were not constitutional.<sup>17</sup> In May, Idaho, Oregon and Pennsylvania district court jurists invalidated the states' bars.<sup>18</sup> During June, Wisconsin and Indiana

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Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (affirming judgments from Indiana and Wisconsin invalidating laws prohibiting same-sex marriages); Latta v. Otter, 771 F.3d 456, 495–96 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015) (affirming invalidation of an Idaho law banning same-sex marriage for its violation of the Equal Protection Clause); Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014), *cert. denied*, 190 L. Ed. 2d 138 (2014) (finding that Utah laws prohibiting same-sex marriage were unconstitutional); Bishop v. Smith, 760 F.3d 1070, 1074 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014) (affirming a decision that a provision of the Oklahoma Constitution preventing the issuing of marriage licenses to same-sex couples was unconstitutional).

12. See AFJ, *supra* note 10 (discussing that appellants in these circuits did not receive rulings before the Justices decided).

13. See *infra* note 32 (citing cases in which some type of elevated scrutiny was applied).

14. See *Kitchen*, 916 F. Supp. 2d at 1216 (“[T]he Constitution protects the Plaintiffs’ fundamental rights, which include the right to marry and the right to have that marriage recognized by their government.”).

15. See *Bishop*, 962 F. Supp. 2d at 1296 (“The Court declares that Part A of the Oklahoma Constitutional Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by precluding same-sex couples from receiving an Oklahoma marriage license.”).

16. See *DeLeon v. Perry*, 975 F. Supp. 2d 632, 639–40 (W.D. Tex. 2014), *aff’d sub nom.* *DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (finding that Texas’s failure to recognize same-sex marriages from other states lacked a rational basis and was therefore unconstitutional); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483–84 (E.D. Va. 2014), *aff’d sub nom.* *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (concluding that the provision of the Virginia Constitution and the specific statute at issue were unconstitutional due to the Fourteenth Amendment).

17. See *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev’d*, 772 F.3d 338 (6th Cir. 2014) (using rational basis review, decided that a provision of the Michigan Constitution precluding adoption by same-sex couples was unconstitutional).

18. See *Latta v. Otter*, 19 F. Supp. 3d 1054, 1086–87 (D. Idaho 2014), *aff’d*, 771 F.3d 456 (9th Cir. 2014) (finding by a Magistrate Judge that Idaho laws that

district courts rejected their bans.<sup>19</sup> That July, Colorado and Kentucky district judges struck down their jurisdictions' laws.<sup>20</sup> In August, a Florida district court found its bar unconstitutional.<sup>21</sup> During October, Alaska, Arizona, North Carolina and Wyoming district court jurists held that the states' bans lacked constitutionality.<sup>22</sup> Throughout November, Missouri, Kansas, South Carolina, West Virginia, Montana, Mississippi and Arkansas district judges invalidated bars.<sup>23</sup> In January 2015,

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limited same-sex marriage were invalid); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1146–47 (D. Or. 2014) (declaring statutes and constitutional provisions limiting marriage to opposite sex couples unconstitutional); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431–32 (M.D. Pa. 2014) (deciding that Pennsylvania's opposite-sex only definition of marriage and failure to recognize same-sex marriages performed elsewhere are unconstitutional).

19. See *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014), *aff'd sub nom.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (finding that statutory and constitutional provisions defining marriage as between a husband and wife were unconstitutional); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1164–65 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014) (ruling Indiana's same-sex marriage ban unconstitutional).

20. See *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at \*5 (D. Colo. July 23, 2014) (granting temporary injunction for six same-sex couples married elsewhere whose marriages were not recognized by the state of Colorado); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 556–57 (W.D. Ky. 2014), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (using even a deferential standard of review, Kentucky's laws preventing recognition of valid same-sex marriages were found to be unconstitutional).

21. See *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014) (using reasoning similar to *Windsor*, the court found that Florida's statutory provisions preventing recognition of same-sex marriages were unconstitutional).

22. See *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1073 (D. Alaska 2014) (declaring Alaska same-sex marriage laws unconstitutional for their failure to comply with the Fourteenth Amendment); *Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014) (deciding that Arizona statutory and constitutional provisions fail to provide equal protection to same-sex couples and are therefore unconstitutional); *Gen. Synod of United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 792 (W.D.N.C. 2014) (ordering a permanent injunction against enforcement of any North Carolina laws that deny equal rights to same-sex couples); *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014) (declaring unconstitutional North Carolina laws that fail to recognize legal marriages performed out of state and prohibitions against same-sex marriage); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797, at \*8–9 (D. Wyo. Oct. 17, 2014) (granting a preliminary injunction to prevent enforcement of any Wyoming laws that deny marriage or legal recognition to same-sex couples).

23. See *Marie v. Moser*, 65 F. Supp. 3d 1175, 1206 (D. Kan. 2014) (authorizing preliminary injunction against Kansas laws prohibiting the state

South Dakota and Alabama district courts rejected bans, while that March, a Nebraska district jurist did so.<sup>24</sup>

Many states appealed.<sup>25</sup> The Fifth Circuit heard January 2015 oral arguments from its three jurisdictions<sup>26</sup> while Alabama and Florida appealed to the Eleventh Circuit, but neither of the

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from issuing marriage licenses to same-sex couples); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 935–36 (W.D. Mo. 2014) (finding Missouri laws denying same-sex marriage rights fail rational basis review and contravene the Constitution); *Condon v. Haley*, 21 F. Supp. 3d 572, 589 (D.S.C. 2014) (granting permanent injunctive relief against South Carolina laws denying same-sex couples the same marriage rights as opposite-sex couples); *Bradacs v. Haley*, 58 F. Supp. 3d 514, 532–33 (D.S.C. 2014) (declaring South Carolina laws that failed to recognize a valid same-sex marriage from a state where it was legally performed violated the Fourteenth Amendment); *McGee v. Cole*, 66 F. Supp. 3d 747, 760–61 (S.D.W. Va. 2014) (deciding portions of the West Virginia Code prohibiting same-sex marriage were not narrow enough to achieve the stated goal and accordingly unconstitutional); *Rolando v. Fox*, 23 F. Supp. 3d 1227, 1235–36 (D. Mont. 2014) (declaring any Montana laws that ban same-sex marriage unconstitutional due to the Fourteenth Amendment); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 954 (S.D. Miss. 2014) (stating that the Mississippi ban on same-sex marriage was invalid for violation of due process and equal protection); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1287–89 (E.D. Ark. 2014), *aff'd*, 796 F.3d 976 (8th Cir. 2015) (deciding that laws preventing recognition of valid same-sex marriages performed outside Arkansas and preventing same-sex marriage within the state were unconstitutional).

24. See *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 862, 877 (D.S.D. 2015) (deciding that the statutory and constitutional provisions in South Dakota banning same-sex marriage violated the Constitution); *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1290–91 (S.D. Ala. 2015) (finding Alabama laws prohibiting same-sex marriage unconstitutional); *Waters v. Ricketts*, 48 F. Supp. 3d 1271, 1291 (D. Neb. 2015), *aff'd*, 798 F.3d 682 (8th Cir. 2015) (seeking invalidation of a Nebraska law prohibiting same-sex marriage and the recognition of legal marriages from other jurisdictions).

25. See, e.g., *Robicheaux v. Caldwell*, 791 F.3d 616, 617–18 (5th Cir. 2015) (appealing a district court ruling, the state of Louisiana sought from the Fifth Circuit reinstatement of a same-sex marriage ban).

26. See Andy Grimm, *Listen Here for the 5th Circuit's Hearing on Louisiana's Gay Marriage Case*, TIMES-PICAYUNE (Jan. 9, 2015, 3:10 PM), [https://www.nola.com/politics/index.ssf/2015/01/listen\\_online\\_to\\_audio\\_louisia.html](https://www.nola.com/politics/index.ssf/2015/01/listen_online_to_audio_louisia.html) (last visited Dec. 5, 2018) (describing oral arguments made by Louisiana, Mississippi, and Texas before the Fifth Circuit) (on file with the Washington and Lee Law Review); Lauren McGaughey, *Judges Question Texas' Interest in Banning Gay Marriage*, HOUS. CHRON. (Jan. 9, 2015, 3:19 PM), <https://www.houstonchronicle.com/news/houston-texas/texas/article/Appeals-court-judges-6004718.php> (last visited Dec. 5, 2018) (discussing oral arguments before the Fifth Circuit questioning Texas's ban on same-sex marriage) (on file with the Washington and Lee Law Review); see *supra* notes 10, 16.



tribunals ruled before the Supreme Court decided.<sup>27</sup> Idaho and Alaska pursued Ninth Circuit en banc review and certiorari, but the court denied the requests.<sup>28</sup> Some district courts partially invalidated bans.<sup>29</sup>

Most judges depended on analogous reasoning while citing prior circuit and district court opinions.<sup>30</sup> The jurists found that the bans contravened the Fourteenth Amendment's Due Process or Equal Protection Clause.<sup>31</sup> They differed more over the rigor of

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27. See Lyle Denniston, *Eleventh Circuit Puts Off Same-Sex Marriage Cases*, SCOTUSBLOG, (Feb. 5, 2015, 7:31 AM), <http://www.scotusblog.com/2015/02/eleventh-circuit-puts-off-same-sex-marriage-cases/> (last visited Dec. 5, 2018) (stating that the Eleventh Circuit placed any same-sex marriage cases on hold while waiting for a Supreme Court ruling on the issue) (on file with the Washington and Lee Law Review); Steve Rothaus, *Same-Sex Marriage Could Begin in Florida Jan. 6 After Appeals Court Decision*, TAMPA BAY TIMES, <https://www.tampabay.com/news/courts/civil/11th-circuit-court-of-appeals-refuses-to-extend-ban-on-same-sex-marriage/2208838> (last updated Dec. 5, 2014) (last visited Dec. 5, 2018) (detailing the Eleventh Circuit's decision not to extend a stay after previously finding Florida's same-sex marriage ban unconstitutional) (on file with the Washington and Lee Law Review).

28. See *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1073 (D. Alaska 2014), *stay denied*, 135 S. Ct. 399 (2014) (following an injunction in Alaska, a stay was requested and denied by the Court); *Latta v. Otter*, 771 F.3d 456, 495–96 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2931 (2015) (describing the invalidation of the same-sex marriage ban in Idaho); Chris Johnson, *Idaho, Alaska Seek Full Ninth Circuit Review of Marriage Rulings*, WASH. BLADE (Oct. 23, 2014, 1:17 AM), <http://www.washingtonblade.com/2014/10/23/idaho-alaska-seek-full-ninth-circuit-review-marriage-rulings/> (last visited Dec. 5, 2018) (describing Alaska and Idaho pursuit of en banc review from the Ninth Circuit) (on file with the Washington and Lee Law Review).

29. See *Henry v. Himes*, 14 F. Supp. 3d 1036, 1061–62 (S.D. Ohio 2014) (ruling required Ohio to recognize same-sex marriages that were valid where entered); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014) (granting a preliminary injunction preventing Tennessee from enforcing Anti-Recognition Laws against the six plaintiffs); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1029 (S.D. Ind. 2014) (authorizing a preliminary injunction in Indiana that would later become permanent); *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014) (declaring Kentucky laws that deny same-sex marriage rights unenforceable).

30. See, e.g., *Latta v. Otter*, 19 F. Supp. 3d 1054, 1067–68 (D. Idaho 2014) (concluding that Idaho laws banning same-sex marriage were unconstitutional while citing cases like *Bostic v. Rainey* from Virginia, *Kitchen v. Herbert* from Utah, and *Bishop v. U.S.* from Oklahoma).

31. See *supra* note 11 (citing cases from the Fourth and Tenth Circuits that premised their decisions on due process as well as the Seventh and Ninth Circuits which relied on equal protection).

scrutiny to apply. A number invoked diverse types of elevated review, while a few deployed strict scrutiny and many used the rational basis test.<sup>32</sup>

In October, the Supreme Court denied certiorari of Fourth, Seventh and Tenth Circuit determinations.<sup>33</sup> In short, the vast majority of judges rejected bars, and numerous jurists depended on heightened scrutiny.<sup>34</sup>

### *III. Marriage Equality Litigation and Marriage Equality's Implementation*

#### *A. The Fourth Circuit*

This Part evaluates Judge Wright Allen's opinion which struck down Virginia marriage laws,<sup>35</sup> the Fourth Circuit ruling that affirmed her determination<sup>36</sup> and how the other Fourth Circuit states, district jurists and the Justices treated the marriage equality question.

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32. See *Baskin v. Bogan*, 766 F.3d 648, 655–56 (7th Cir. 2014) (adopting an elevated scrutiny test in the Seventh Circuit to examine the constitutionality of a same-sex marriage ban); *Latta*, 771 F.3d at 468 (employing elevated scrutiny as the standard for the Ninth Circuit); *Bostic v. Schaefer*, 760 F.3d 352, 374–77 (4th Cir. 2014) (establishing a strict scrutiny standard to evaluate same-sex marriage prohibitions in the Fourth Circuit); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994–98 (N.D. Cal. 2010) (using rational basis as the standard of review in California for Proposition Eight); *infra* notes 81–117 (discussing *Bostic v. Schaefer* in greater depth).

33. *Salgado-Silver v. U.S.*, 135 S. Ct. 134 (2014) (mem.); see AFJ, *supra* note 10, at 5, 13, 22 (discussing the denial of certiorari in the Fourth, Seventh, and Tenth Circuits resulting in legalized same-sex marriage in those circuits as well as Arizona, Colorado, Montana, Nevada, West Virginia and Wyoming, even as Alaska, Kansas and North and South Carolina did not legalize same-sex marriage until courts ruled).

34. See *Franklin*, *supra* note 1, at 872 (discussing cases which applied heightened scrutiny as the standard).

35. See *Bostic v. Rainey*, 970 F. Supp. 2d 456, 483–84 (E.D. Va. 2014) (writing the opinion in this case, Judge Wright Allen declared Virginia statutes and a constitutional provision banning same-sex marriage unconstitutional).

36. See *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (affirming Judge Wright Allen's ruling, the Fourth Circuit similarly held that Virginia's ban on same-sex marriage violated the Fourteenth Amendment).

## 1. Virginia Litigation

### a. Eastern District Opinion

In July 2013, plaintiffs contested Virginia's bans; in February 2014, she rejected the bars.<sup>37</sup> The district judge invoked *Loving v. Virginia*,<sup>38</sup> proclaiming that the United States has followed a difficult, sometimes "painful and poignant," sojourn to make and keep its people free<sup>39</sup> and that barring citizens from marrying someone whom they love violates due process and equal protection.<sup>40</sup>

She found that the General Assembly had revised the code in 1997 to ban same-sex marriage,<sup>41</sup> and during 2004, after a few states rejected bars, it proposed a constitutional amendment to ban same-sex marriage that the voters duly ratified over 2006.<sup>42</sup> During January 2014, State Registrar of Vital Records Janet Rainey and Democratic Attorney General Mark Herring tendered a change in position.<sup>43</sup> The jurist easily determined that plaintiffs possessed standing<sup>44</sup> and ruled that the Justices' summary

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37. See *Bostic*, 970 F. Supp. 2d at 483–84 (explaining Judge Wright Allen's finding that the Virginia laws were unconstitutional resulting in an order enjoining the Commonwealth from enforcing laws prohibiting same-sex marriage).

38. See *id.* at 460 ("[A]ll Americans, no matter their race, . . . sex, [or] . . . sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others . . . I support the freedom to marry for all." (citing Mildred Loving, Public Statement on Loving's 40th Anniversary (June 12, 2007))).

39. See *id.* (explaining that the U.S. was having a spirited debate about who enjoys the right to marry).

40. See *id.* at 460–61 (asserting the ultimate exercise of freedom is choice, applying strict scrutiny and declaring one of a court's noblest endeavors is analyzing laws "rooted in unlawful prejudice").

41. See *id.* at 464 (including voiding out-of-state marriages (citing VA. CODE ANN. § 20–45.2)).

42. See *id.* at 465 (describing the ratification of VA. CONST. art. I. § 15-A known as the "Marshall/Newman Amendment").

43. See *id.* at 461 (relinquishing a prior defense, the Prince William Clerk, who intervened, adopted a prior motion and supporting briefs of Rainey).

44. See *id.* at 466–68 (finding the required elements of standing existed including: injury in fact from stigmatic injuries, casual connection between the state official denying marriage licenses and the injury, and redressability if an

disposition—“for want of a substantial federal question”—in *Baker v. Nelson*<sup>45</sup> did not preclude her exercising jurisdiction.<sup>46</sup>

She observed that the Constitution protects all fundamental rights within “liberty” from state invasion,<sup>47</sup> declaring that the right to marry was clearly “a rigorously protected fundamental right,” because the Court had long recognized that due process and equal protection safeguard the marriage right.<sup>48</sup> She then rejected the allegation that plaintiffs sought to “create and exercise a new” right, as they were pursuing the same one that heterosexuals enjoy.<sup>49</sup> Because marriage is a personal, sacred decision, judges must carefully ensure that bans are not an “unwarranted government interference” with this choice.<sup>50</sup>

She found that marriage regulation was generally presumed valid and upheld when “rationally related to a legitimate state interest[.]” but that strict scrutiny applied to a fundamental right,<sup>51</sup> which demanded that regulation be “narrowly tailored to serve a compelling state interest.”<sup>52</sup> Because marriage was a fundamental right, the court assessed the laws to discern whether they met this test.<sup>53</sup> The judge first reviewed traditions and the defendant’s claim that the bans discourage people from abusing

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injunction were issued).

45. 405 U.S. 810 (1972) (mem.)

46. See *Bostic v. Rainey*, 970 F. Supp. 2d 456, 466–70 (E.D. Va. 2014) (joining many others deciding marriage equality cases who held “doctrinal developments since 1971 compel the conclusion” that *Baker* is no longer binding (citing *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.))).

47. See *id.* at 470 (citation omitted).

48. *Id.* at 470–71 (elaborating that this cannot be divorced from the right to privacy and intimate association and reciting *Griswold v. Connecticut*’s paean to “marriage’s noble purposes” (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965))).

49. *Id.* at 472 (explaining that each publicly commits to join an exclusive relationship and create a family with a partner who shares an intimate, sustaining emotional bond).

50. *Bostic*, 970 F. Supp. 2d at 472–73 (citations omitted).

51. *Id.* at 473 (explaining that it is deeply rooted in U.S. history and implicit in ordered liberty, so “neither liberty, nor justice” exists without it, and protects making “deeply personal choices about love and family free from government interference” (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997))).

52. *Id.* (citations omitted); see *supra* note 32 and accompanying text.

53. See *id.* at 473 (citations omitted).

marriage rights by wedding to secure benefits and determined that it lacked “any rational basis.”<sup>54</sup> She stressed the laws’ history, prompting the “inescapable” conclusion that the state interest was to “avoid ‘radical changes’ that would [diminish a] long-held view” of marriage, even though the Justices have rejected the notion that a prevalent moral conviction alone supports a “constitutionally infirm law.”<sup>55</sup>

The jurist then explored the second interest, federalism,<sup>56</sup> but said that courts must intervene when states violate the fundamental right to marry and *Windsor’s Loving* citation was a “disclaimer of enormous proportion.”<sup>57</sup> She found that *Windsor* invoked the Constitution to safeguard LGBT individuals’ rights and the propriety of applying this protection remained crucial when analyzing state laws’ validity.<sup>58</sup> The judge deemed meritless the assertion that she must postpone review in deference to supposed legislative or citizen action, as this ignored the continuing harm which LGBT persons suffer and the prejudice and stigma that are visited upon their children while awaiting change.<sup>59</sup>

The jurist addressed a third rationale, “for-the-children,” which urged that “responsible procreation and ‘optimal child rearing’ are legitimate interests that support” the bans, yet this

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54. *Id.* at 474 (stating that a legal idea’s ancient lineage does not immunize it “from attack for lacking a rational basis” (citing *Heller v. Doe*, 509 U.S. 312, 326 (1993))).

55. *Id.* at 474–75 (explaining that this was not advanced by excluding people from marriage based on sexual orientation, and stating *Loving* treated similar concerns but rejected Virginia’s interracial marriage ban, despite its lengthy existence).

56. *See id.* at 475–76 (intoning *Windsor’s* exposition on federal deference to state law policymaking regarding domestic relations, she said that states properly enjoy this power and federal intervention was best used rarely).

57. *See id.* at 476 (signaling that “due process and equal protection guarantees must trump objections to federal intervention”).

58. *See id.* (invoking Justice Scalia’s *Windsor* dissent, like the Utah district judge); *supra* notes 9, 14 and accompanying text.

59. *See id.* at 476–77 (stating that the long amendment process and despite the wisdom in usually deferring to states on domestic relations, courts must act “when core civil rights are at stake”); *id.* at 477 n.11 (explaining that the Virginia constitution creates a barrier by requiring majorities in both chambers in more than one legislative year, both before and after elections for House Delegates).

failed two chief tests.<sup>60</sup> Preventing same-sex marriage did not advance these, as the bars needlessly deprived the thousands of children whom same-sex partners rear of marriage's stability, protection, recognition and legitimacy.<sup>61</sup> She found research demonstrates that LGBT couples are equally capable of having well-adjusted children.<sup>62</sup> Wright Allen declared that the rationale was based on an unfounded, hurtful presumption, and legislating a state-sanctioned preference for one parenting model is unconstitutional.<sup>63</sup> That interest also nominally justified the bans, because directly recognizing LGBT peoples' fundamental right to marry cannot affect whether other individuals decide to marry or how they would rear families.<sup>64</sup> The judge also observed that this misconstrues the values and dignity intrinsic to the marriage right as essentially a "vehicle for 'responsibly' breeding 'natural' offspring" by ignoring marriage's profound non-procreative facets.<sup>65</sup>

She determined that the bans distinctly violated equal protection for the same reasons—the laws "significantly interfere with a fundamental right" and lack narrow tailoring to effectuate

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60. *Id.* at 477–78 (explaining that the for-the-children rationale failed both strict scrutiny and rational basis testing); *see supra* note 32 and accompanying text (citing cases in which strict scrutiny or rational basis were used as the standard of review).

61. *See id.* at 478 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010))).

62. *See id.*

63. *See id.* (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010)) ("[S]ame-sex couples have happy, satisfying relationships and form deep emotional bonds and strong commitments to their partners."). Thus, the rationale was based on an unfounded, hurtful presumption, and legislating a state-sanctioned preference for one parenting model is unconstitutional. *Id.* at 479.

64. *See id.* at 478 (stating that the Defendant's argument is a "profound distortion" of what the Plaintiff seeks). The argument also failed, as it would jeopardize the legitimacy of persons who do not procreate. *Id.* at 478–79.

65. *Id.* at 479. These included "expressions of emotional support," personal dedication, public commitment and "spiritual significance." *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)). In short, the ban did not advance the compelling state interests in supporting and protecting children by denying marriage's benefits, dignity and worth simply due to gender. *Id.* at 480.

only sufficiently critical state interests.<sup>66</sup> Even absent a determination that plaintiffs could invoke a fundamental right, the jurist said that the measures violated equal protection because the strictures treated differently persons “standing in the same relation to” them.<sup>67</sup>

The judge examined what level of scrutiny to apply, proclaiming that deference was clearly unwarranted, as she discerned reasonable bases to suspect “prejudice against discrete and insular minorities” which severely curtail operation of political processes normally depended on to safeguard them.<sup>68</sup> The jurist cited *Lawrence v. Texas*<sup>69</sup> for the idea that powerful voices have long disparaged “homosexual conduct as immoral,” condemnation manifested in state-sanctioned actions.<sup>70</sup> She canvassed scrutiny levels and tests, considered the reasons that advocates provided for the marriage laws, found that the bans exhibited no rational relation to a legitimate purpose and, thus, were invalid under even the least rigorous scrutiny.<sup>71</sup> The measures’ goal and result deprived LGBT people of the right to “celebrate, *in marriage*, a loving, rewarding, monogamous relationship with a partner to whom they are committed for life.”<sup>72</sup>

The judge urged that legislation ensuring marriage affords “profound legal, financial, and social benefits, and exacts serious” identical duties, but government participation in granting marriage advantages needs to withstand scrutiny.<sup>73</sup> Laws failing constitutional scrutiny must fall, despite their religious heritage’s depth and legitimacy.<sup>74</sup> She was compelled to rule that the bans

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66. *Id.*; *supra* notes 31–32 and accompanying text.

67. *Bostic*, 970 F. Supp. 2d at 480.

68. *Id.* at 481 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

69. 539 U.S. 558 (2003).

70. *Bostic*, 970 F. Supp. 2d at 481 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)).

71. *See id.* at 481–82 (“Virginia’s Marriage Laws fail to display a rational relationship to a legitimate purpose . . .”). Thus, she “need not address Plaintiffs’ compelling arguments” for elevated scrutiny. *Id.* at 482.

72. *Id.* They advance no legitimate state purpose. *Id.*

73. *Id.* at 483.

74. *See id.* (stating that the government’s involvement in marriage must withstand constitutional scrutiny).

unconstitutionally deny LGBT persons the fundamental marriage right, as the state's proffered interests must yield to cherished safeguards which assure that citizens may exercise private choices "regarding love and family."<sup>75</sup>

This disposition respected the country's tradition of freedom, while America's checkered "but dogged journey toward" truer freedoms has continually given the United States deeper appreciation of the Constitution's first three words: "*we the people*."<sup>76</sup> The jurist said that "[j]ustice has often been forged from fires of indignities and prejudices suffered," and that the nation's triumphs which celebrate "freedom of choice are hallowed."<sup>77</sup> She declared, we have reached another moment "when *We the People* becomes more inclusive, and our freedom more perfect."<sup>78</sup>

*b. Fourth Circuit Majority Opinion*

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75. *Id.*

76. *Id.* (citing U.S. CONST. pmb.). "We the People' have become a broader, more diverse family than once imagined." *Id.* (citation omitted).

77. *Id.* at 483–84.

78. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014). She invoked Abraham Lincoln's 1860s statement: people "whose voices join in noble harmony with Plaintiffs today, [seek] fairness only [that] so far as it is in this Court's power . . . [they shall] have." *Id.* She invalidated and enjoined laws barring same-sex marriages. *Id.*

Judge Wright recently ruled on an important transgender rights issue in *Grimm v. Gloucester County School Board*, 302 F. Supp. 3d 730 (E.D. Va. 2018). A transgender high school student had sued the school board, alleging that its policy of assigning students to restrooms based on their biological sex violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 738. Judge Robert Doumar dismissed the Title IX claim and denied the student's request for a preliminary injunction. *Id.* The Court of Appeals reversed in part and vacated in part, and the Supreme Court granted certiorari and vacated and remanded for consideration of the Title IX claim. *Id.* Judge Wright Allen found that the student's allegations were sufficient to show that the school board's policy subjected him to sex discrimination under a gender stereotyping theory in violation of Title IX, applying intermediate scrutiny, and that the policy caused the student harm. *Id.* at 748. She thus denied the school board's motion to dismiss. *Id.* Judge Wright also denied the motion to dismiss the equal protection claim. *Id.* at 750.



The case was swiftly appealed.<sup>79</sup> The panel, comprising Judges Paul Niemeyer, Roger Gregory and Henry Floyd, conducted May oral arguments.<sup>80</sup> The court issued a July opinion that Floyd wrote, which affirmed the lower court's ruling.<sup>81</sup> Floyd deemed standing easily met<sup>82</sup> and posited that *Windsor's* Supreme Court resolution "without mentioning *Baker* [spoke] volumes" about the case's relevance, while its due process and equal protection opinions since *Baker* were even more instructive.<sup>83</sup>

The panel stated that Fourteenth Amendment claims' review includes two elements.<sup>84</sup> The court must determine the level of analysis to use—either rational basis, or certain heightened evaluation, namely strict scrutiny—and apply this to marriage laws.<sup>85</sup> Floyd said that putative interference with a fundamental right merits strict scrutiny under the Due Process and Equal Protection Clauses, stating that bans violate a right derived from the amendment's "protection of individual liberty . . . includ[ing] the fundamental right to marry."<sup>86</sup> Because this encompasses

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79. See Markus Schmidt, *In Procedural Step, Va. Appeals Marriage Case*, RICH. TIMES-DISPATCH (Feb. 24, 2014), [https://www.richmond.com/news/virginia/in-procedural-step-va-appeals-marriage-case/article\\_af81dd88-9da4-11e3-86ef-0017a43b2370.html](https://www.richmond.com/news/virginia/in-procedural-step-va-appeals-marriage-case/article_af81dd88-9da4-11e3-86ef-0017a43b2370.html) (last visited Dec. 5, 2018) (stating that the appeal was expedited) (on file with the Washington and Lee Law Review).

80. Robert Barnes, *Appeals Court Judges Seem Sharply Divided Over Virginia Ban on Same-Sex Marriage*, WASH. POST (May 13, 2014), [https://www.washingtonpost.com/politics/appeals-court-to-hear-arguments-on-virginia-ban-on-gay-marriage/2014/05/12/38b64ada-da13-11e3-8009-71de85b9c527\\_story.html?utm\\_term=.c1bfd4464e10](https://www.washingtonpost.com/politics/appeals-court-to-hear-arguments-on-virginia-ban-on-gay-marriage/2014/05/12/38b64ada-da13-11e3-8009-71de85b9c527_story.html?utm_term=.c1bfd4464e10) (last visited Dec. 5, 2018) (on file with the Washington and Lee Law Review).

81. See *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014) ("Virginia's same-sex marriage bans impermissibly infringe on its citizens' fundamental right to marry . . ."). Gregory joined Floyd, while Niemeyer dissented. *Id.*

82. See *id.* at 370–72 (finding that "each of the Plaintiffs has standing as to at least one defendant").

83. *Id.* at 374. Judge Floyd viewed the case like many other judges, saying that *Baker's* abandonment and later doctrinal developments meant that *Baker* was not binding. *Id.* at 373–75; *supra* note 45.

84. See *id.* at 375 (stating that the court must determine what level of scrutiny to apply, and whether the Virginia Marriage Laws satisfy the scrutiny test applied).

85. See *id.* ("We therefore begin by assessing whether the Virginia Marriage Laws infringe on a fundamental right.").

86. *Id.* (citations omitted).

same-sex marriage, the panel found that *Washington v. Glucksberg*<sup>87</sup> was inapt, as that decision only governs recognition of *new* fundamental rights.<sup>88</sup>

He claimed that *Loving v. Virginia*<sup>89</sup> and other cases “speak of a broad right to marry,” which stretches to “accommodate changing societal norms,” reflecting the Justices’ view that it applies to individuals’ freedom of choice.<sup>90</sup> When proponents asserted that the cases involved heterosexuals, so same-sex couples have less constitutional protection, Floyd said that *Lawrence* and *Windsor* indicated same-sex couples enjoy similar protection.<sup>91</sup> Thus, strict scrutiny pertains “only when laws ‘significantly interfere’ with a fundamental right,”<sup>92</sup> and they must be justified by narrowly-drawn compelling state interests.<sup>93</sup> Advocates offered five putatively compelling interests.<sup>94</sup> First, the federalism-based interest in defining and regulating marriage ostensibly justified the statutes,<sup>95</sup> yet the panel ascertained that *Windsor* undercut this by providing laws which do so must respect the constitutional rights of persons.<sup>96</sup>

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87. 521 U.S. 702 (1997).

88. See *Bostic*, 760 F.3d at 376 (finding that the fundamental right to marriage includes same-sex marriage) (emphasis added).

89. 388 U.S. 1 (1967).

90. *Bostic*, 760 F.3d at 376 (citations omitted).

91. See *id.* at 377 (stating that same-sex marriages demand the same respect as opposite-sex marriages). Floyd rejected describing the right urged as one to same-sex marriage, citing both *Lawrence* and *Windsor*. *Id.*

92. *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014). The Virginia Marriage Laws impede a fundamental right by denying same-sex couples marriage and voiding out-of-state marriages. *Id.*

93. See *id.* (“The Proponents bear the burden of demonstrating that the Virginia Marriage Laws satisfy this standard.”) (citation omitted). Proponents must show that Virginia Marriage Laws meet this test and depend on the laws’ actual purposes. *Id.*

94. See *id.* at 377–78 (analyzing the Proponents’ counter-argument).

95. See *id.* at 378 (“The Constitution does not grant the federal government any authority over domestic relations matters, such as marriage.”). Floyd cited *Windsor* for the idea that states have long enjoyed “freedom to define and regulate marriage.” *Id.*

96. See *id.* at 379 (stating that *Windsor* emphasized that States may not impinge constitutional rights). Thus, states cannot encroach on the fundamental right to marry. *Id.* (citing *Loving*, 388 U.S. at 12).

Floyd found that *Schuette v. Coalition to Defend Affirmative Action*<sup>97</sup> did not alter the result that *Windsor* dictated.<sup>98</sup> *Schuette* emphasized the need to honor the voters' policy choice when amending the state constitution, and proponents argued that the opinion governed Virginia's revision.<sup>99</sup> However, the people's will did not comprise "an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry."<sup>100</sup> Thus, the federalism-based interest when defining marriage and respect for the democratic process that codified this failed to excuse infringing marriage rights.<sup>101</sup> History and tradition were also lacking,<sup>102</sup> as the Court advised that a legal construct's ancient lineage did not immunize the concept.<sup>103</sup>

Advocates claimed that deviation from opposite-sex marriage would destabilize the institution by severing the marriage-procreation link.<sup>104</sup> The notions were unfounded for two reasons.<sup>105</sup> First, *Griswold v. Connecticut*<sup>106</sup> rejected the theory that marriage only involves procreation by upholding wedded couples' right to not do so and treating a view of marriage that lacked a relationship to children.<sup>107</sup> Second, this idea primarily

97. 572 U.S. 291 (2014).

98. See *Bostic*, 760 F.3d at 379 (comparing *Schuette* to *Windsor*) (citing *Schuette*, 134 S. Ct. 1623, 1629 (2014)).

99. See *id.* (stating that votes are "essential to our democracy").

100. *Id.* (citation omitted); see *infra* notes 214–217 and accompanying text.

101. See *Bostic*, 760 F.3d at 379–80 ("[T]he people's will is not an independent compelling interest . . .").

102. See *id.* at 380 (stating that preserving history and tradition is not a compelling interest).

103. See *Bostic v. Schaefer*, 760 F.3d 352, 380 (4th Cir. 2014) (rejecting the Proponents' argument) citing *Heller v. Doe*, 509 U.S. 312 (1993)). This obtains, even under rational basis review. *Id.* Thus, conserving the "historical and traditional status quo" was not compelling. *Id.* *Lawrence* similarly disparaged the related idea of fostering moral principles. *Id.*

104. See *id.* (arguing that same-sex marriage will establish the idea that marriage is for emotional fulfillment).

105. See *id.* at 380–81 ("[I]f adults are the focal point of marriage, 'then no logical grounds reinforce stabilizing norms like sexual exclusivity . . ."). Floyd so found, even if he viewed the ideas "through rose-colored glasses." *Id.*

106. 381 U.S. 479 (2001).

107. See *Bostic*, 760 F.3d at 380 (stating that marriage is more than just procreation). Floyd, like Wright Allen, cited *Griswold's* classic description. *Id.*

rested on no-fault divorce's legacy, an "unrelated legal change to marriage,"<sup>108</sup> yet Floyd saw no reason why legalizing same-sex marriage would be similarly destabilizing.<sup>109</sup>

Proponents also contended that the laws, by allowing only heterosexual marriages, provide stability for the kinds of relationships which lead to unplanned pregnancies, thus avoiding or curbing the negative effects often associated with unintended children.<sup>110</sup> However, the measures were not properly tailored, as they were "woefully underinclusive"<sup>111</sup> and failed because strict scrutiny demanded that a state's means advance a compelling interest.<sup>112</sup>

Advocates urged that children develop best when married biological parents rear them in a stable family unit with "gender-differentiated parenting."<sup>113</sup> Floyd deemed "extremely persuasive" the fact that no scientific evidence found that parenting efficacy was related to couples' sexual orientation, and the laws actually harm offspring by stigmatizing their families and depriving children of marriage's benefits.<sup>114</sup> Floyd saw little need

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(citing *Griswold*, 381 U.S. at 485–86); *supra* note 47.

108. *Bostic*, 760 F.3d at 381. No-fault divorce altered marriage by facilitating couples' ability to end relationships. *Id.*

109. *See id.* (stating that no-fault divorce made it easier for couples to separate). Floyd found more logical that same-sex couples want access to marriage to capitalize on marriage's hallmarks, namely faithfulness and permanence. *Id.* Thus, marriages would strengthen the institution. *Id.*

110. *See id.* ("[C]hildren born to unwed parents face a 'significant risk' of being raised in unstable families . . .").

111. *Id.* "Same-sex couples are not the only [couples] who cannot reproduce accidentally." *Id.* He analogized this to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which permit denial that was so underinclusive it must have derived from "irrational prejudice," rendering the law unconstitutional," and leading him "to draw the same conclusion." *Id.* at 382.

112. *See id.* ("Prohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births.") (citation omitted). Thus, barring same-sex marriage or voiding out-of-state same-sex marriages does not prevent out-of-wedlock births. *Id.*

113. *Id.* at 383. They are protected by "preventing same-sex couples from marrying and starting inferior families." *Id.*

114. *Bostic v. Schaefer*, 760 F.3d 352, 383–84 (4th Cir. 2014). They include stability, togetherness and economic security. *Id.* at 384; *see* Lisa Pryor, *Heterosexuals Deserve Our Support*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/opinion/heterosexuals-deserve-our->

to resolve this dispute, as elevated scrutiny: (1) rejected laws with overbroad generalizations about groups' differing "talents, capacities or preferences"<sup>115</sup> and (2) required congruity between a statute's means and end, that was lacking.<sup>116</sup>

In the end, the panel held Virginia bans unconstitutional, thus affirming the district court.<sup>117</sup> The appeals court recognized that "same-sex marriage makes some people deeply uncomfortable," but this was not a legitimate reason for denying same-sex couples the intensely personal choice to marry, which can alter the "course of an individual's life," because that prevented full societal participation.<sup>118</sup>

### *c. Fourth Circuit Dissenting Opinion*

Judge Niemeyer said that the case involved whether a state decision to not recognize same-sex marriage violated the Fourteenth Amendment, so the court must only apply established constitutional tenets.<sup>119</sup> He criticized the majority for proclaiming, "*ipse dixit*, that the fundamental right to marry" included same-sex marriage and, thus, enjoyed due process protection, because the jurists "bypassed the relevant constitutional analysis," which *Glucksberg* mandated, by finding it unnecessary, as they were recognizing "no new fundamental right."<sup>120</sup>

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support.html (last visited Dec. 5, 2018) (studying the effects that same-sex marriages have on childrearing) (on file with the Washington and Lee Law Review).

115. *Bostic*, 760 F.3d at 384 (citing *U.S. v. Virginia*, 518 U.S. 515, 533–34 (1996)).

116. *See id.* ("There is absolutely no reason to suspect that prohibiting same-sex couples from marrying . . . will cause same-sex couples to raise fewer children . . ."). Because all justifications failed, the laws could not satisfy this scrutiny. *Id.*

117. *Id.*

118. *Id.* This was exactly the kind of segregation that the Fourteenth Amendment proscribes. *Id.*

119. It was not about whether judges "favor or disfavor same-sex marriage" or whether state choices are "good policy." *Id.* at 385 (Niemeyer, J., dissenting).

120. *See supra* note 84 and accompanying text (evaluating the proper level of judicial scrutiny). *Bostic*, 760 F.3d at 385–86 (Niemeyer, J., dissenting) (citing *Glucksberg*, 521 U.S. at 721).

Because the right to marry excluded same-sex marriage and a *Glucksberg* analysis failed to yield any new fundamental right, the laws must be upheld if they have a rational basis.<sup>121</sup> This test grants legislatures “heavy deference” and only explores whether the classification is “*rationaly related to legitimate governmental goals*”<sup>122</sup> while holding that measures possess a “strong presumption of validity and those attacking” the classification’s rationality “have the burden ‘*to negative every conceivable basis which might support [it].*’”<sup>123</sup> This approach allows lawmakers’ choices to be premised on reasonable speculation, rather than evidentiary or empirical support, recognizing that legislators are better equipped than judges to make these assessments.<sup>124</sup> Niemeyer cited Virginia’s reasons for enacting the bans, which included the contention that opposite sex marriages “provide a family structure by which to nourish and raise those children” and that “a biological family is a more stable environment.”<sup>125</sup> Niemeyer concluded that the laws satisfied due process because the laws had rational relationships to valid purposes.<sup>126</sup>

The jurist then addressed equal protection.<sup>127</sup> He treated the scrutiny levels but contended that “when a regulation adversely affects members of a class that is not suspect or quasi-suspect, the regulation is presumed to be valid and will be sustained if the

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121. *Bostic*, 760 F.3d at 363.

122. *Id.* (citation omitted).

123. *Id.* (citation omitted).

124. *See Bostic v. Schaefer*, 760 F.3d 352, 395 (4th Cir. 2014) (Niemeyer, J., dissenting) (observing that legislators can formulate courses of action based on predictions).

125. *Id.* at 393 (Niemeyer, J., dissenting). Virginia also asserted that its laws were rational based “on the biological connection of men and women; the potential for their having children; the family order needed in raising children; and, on a larger scale, the political order resulting from stable family units.” *Id.* at 395 (Niemeyer, J., dissenting).

126. *See id.* at 395 (Niemeyer, J., dissenting) (“Because Virginia’s marriage laws are rationally related to its legitimate purposes, they withstand rational-basis scrutiny under the Due Process Clause.”).

127. *See id.* at 396 (Niemeyer, J., dissenting) (“[B]ecause I find no fundamental right is infringed by the laws, I also address discrimination under the Equal Protection Clause.”). The majority “did not substantively address the plaintiff’s second argument” regarding equal protection, as it found that the laws infringed on a due process right. *Id.*

classification drawn by the statute is rationally related to a legitimate state interest.”<sup>128</sup> Plaintiffs argued that Virginia bans warranted elevated scrutiny, as the prohibitions “discriminate on the basis of *sexual orientation*,” yet recognized that the Supreme Court and the Fourth Circuit had not applied this level to classifications premised on sexual orientation.<sup>129</sup> Niemeyer evaluated *Romer*, *Windsor* and Fourth Circuit opinions, determining that they and most other appellate courts had applied rational basis review.<sup>130</sup> This precedent prompted Niemeyer to consider Virginia measures under that standard and to find that it was met.<sup>131</sup>

Niemeyer summarized his dissent by powerfully disagreeing with the idea that same-sex marriage enjoyed the “same constitutional protections as the traditional right to marry.”<sup>132</sup> Because Niemeyer detected no fundamental right to same-sex marriage and rational reasons disfavoring recognition, he declared that courts must permit states to enact laws in accordance with their political views.<sup>133</sup>

The majority denied a request to stay the ruling, but the Justices granted it while the defendants and the Attorney General swiftly appealed.<sup>134</sup> The Court rejected each *Bostic* petition in early

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128. *Id.* (Niemeyer, J., dissenting) (citation and emphasis omitted).

129. *Id.* (Niemeyer, J., dissenting)

130. *See id.* at 396–97 (Niemeyer, J., dissenting) (“[T]he [*Romer*] Court applied rational-basis review. . . . [In *Windsor*,] [t]he Court was presented an opportunity to alter the *Romer* standard but did not do so. . . . The vast majority of other courts of appeals have reached the same conclusion.”).

131. *See id.* at 398 (Niemeyer, J., dissenting) (“I would hold that Virginia’s marriage laws are subject to rational basis review. Applying that standard, I conclude that there is a rational basis for the laws.”).

132. *Id.* (Niemeyer, J., dissenting)

133. *See id.* (Niemeyer, J., dissenting) (“[W]e, in the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes.”). Despite Niemeyer’s strong defense of Virginia’s marriage laws, the Court eventually invalidated them. *See infra* notes 199–239 (discussing the Supreme Court’s ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

134. *See* *McQuigg v. Bostic*, 135 S. Ct. 32, 32 (2014) (mem.) (granting a stay pending the filing of a writ of certiorari); Alan Rappeport, *Supreme Court Delays Gay Marriage in Virginia, A Day Before It Was Set to Begin*, N.Y. TIMES, Aug. 21, 2014, at A12 (explaining the sequence of events leading up to the Supreme Court’s last minute order to delay same-sex marriages in Virginia).

October, and marriages speedily commenced throughout Virginia.<sup>135</sup> Plaintiffs also challenged similar North Carolina, South Carolina and West Virginia bans, which district judges then invalidated.<sup>136</sup>

## 2. North Carolina Litigation

In April 2014, plaintiffs attacked North Carolina bars on same-sex marriage.<sup>137</sup> Judge William Osteen said that the pleadings showed that plaintiffs had standing and that the court had jurisdiction, while the defendant's answer conceded that plaintiffs were "entitled to certain relief."<sup>138</sup> Based on the litigants' briefs and representations, the state's admissions, and *Bostic*, Osteen found the matter ripe for review.<sup>139</sup> Osteen recognized that *Bostic* had explicitly declared Virginia bans on same-sex marriage unconstitutional.<sup>140</sup> He cited opinions holding that a Fourth Circuit ruling on a legal issue bound all circuit districts,<sup>141</sup> then assessed both states' constitutional provisos and marriage laws and held them indistinguishable.<sup>142</sup> The jurist allowed intervention by Phil

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135. *Schaefer v. Bostic*, 760 F.3d 352 (4th Cir. 2014) *cert. denied* 135 S. Ct. 308 (2014) (mem.); *Rainey v. Bostic*, 760 F.3d 352 (4th Cir. 2014) *cert. denied* 135 S. Ct. 286 (2014) (mem.); *McQuigg v. Bostic*, 760 F.3d 352 (4th Cir. 2014) *cert. denied* 135 S. Ct. 31 (2014) (mem.). *See supra* notes 35–36 and accompanying text.

136. *See supra* notes 35–36 and accompanying text. Assembly and citizen adoption of equality measures obviated the need for a Maryland case. *See infra* note 239 (discussing the implementation of marriage equality in Maryland).

137. *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 696 (M.D.N.C. 2014) (addressing challenges to the constitutionality of North Carolina's laws preventing same-sex marriages). Plaintiffs also urged the courts to recognize "same-sex couples' lawful out-of-state marriages." *Id.*

138. *Id.* at 697.

139. *See id.* ("[M]atters [are] now ripe for ruling.").

140. *See id.* (observing that the Virginia laws had also prevented the state from recognizing out of state marriages).

141. *See id.* at 697–98 (citations omitted) (citing five district court cases that invoke the doctrine of stare decisis).

142. *See id.* at 698 (citation omitted) (observing that the phrasing was similar, which "*Bostic* also recognized," that the parties agreed that *Bostic* controlled, and invalidating and enjoining the laws).



Berger and Thom Tillis<sup>143</sup> for the purpose of preserving an objection to his application of *Bostic*.<sup>144</sup>

In April 2014, plaintiffs similarly challenged the same bars, and Western District Judge Max Cogburn ruled like Osteen.<sup>145</sup> Given *Bostic*, he upheld same-sex marriage.<sup>146</sup> Cogburn found any law denying “same-sex couples the right to marry . . . or threaten[ing] clergy or other[s] who solemnize the union of same-sex couples” violated due process and equal protection under *Bostic*.<sup>147</sup> He said that the question was not a political or moral issue, but a clearly settled legal one.<sup>148</sup>

### 3. South Carolina Litigation

In October 2014, a couple challenged South Carolina bans for contravening the fundamental right to marry, a liberty interest which due process and equal protection safeguard.<sup>149</sup> Judge Richard Gergel rejected justiciability challenges<sup>150</sup> and some,

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143. See *id.* at 697 (stating that Berger was House of Representatives Speaker and Tillis was Senate President Pro Tempore).

144. See *id.* at 710 (stating that the intervention decision was “very close”).

145. See *Gen. Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014) (holding that North Carolina’s marriage laws were unconstitutional under the Due Process and Equal Protection Clauses); Michael Paulson, *State’s Gay-Marriage Ban is Challenged by Church*, N.Y. TIMES, Apr. 29, 2014, at A13 (describing the lawsuit filed by a national religious group in a challenge to the state’s marriage laws).

146. See *Resinger*, 12 F. Supp. 3d at 791 (invalidating and enjoining the bans).

147. *Id.* at 791. He also found laws barring the recognition of same sex marriages that were lawful in other states to be violative. See *id.* (finding all challenged aspects of the marriage laws to be unconstitutional).

148. See *id.* (“[I]t is clear as a matter of what is now settled law in the Fourth Circuit that North Carolina laws prohibiting same sex marriage . . . are unconstitutional.”). Berger and Tillis appealed both rulings, but after *Obergefell* issued, they filed dismissal motions that were granted in August 2015. See *Fisher-Borne v. Moore*, No. 14-2228 (4th Cir. dismissed Aug. 11, 2015) (granting dismissal motion); *Gen. Synod of the United Church of Christ v. Moore*, No. 14-2225 (4th Cir. dismissed Aug. 11, 2015) (same).

149. See *Condon v. Haley*, 21 F. Supp. 3d 572, 575 (D.S.C. 2014) (arguing that *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), controlled).

150. See *id.* at 577–78 (rejecting a challenge to standing); *supra* note 44 and accompanying text.

although not all, of the defendants' immunity claims.<sup>151</sup> When assessing a right to marry, he invoked *Windsor's* personhood and dignity notions and Justice Scalia's dissent.<sup>152</sup> Gergel remarked that a few appeals courts, and "most importantly for our purposes, the Fourth," held bans violative<sup>153</sup> and the vast majority of district courts had rejected bans since *Windsor's* issuance.<sup>154</sup>

Gergel reasoned that *Bostic*, as a circuit opinion which the Justices did not alter, bound the circuit districts.<sup>155</sup> He said that *Bostic* perceived the Virginia bars like South Carolina's,<sup>156</sup> found that *Baker* was not controlling,<sup>157</sup> and held that plaintiffs enjoyed a fundamental right to marry,<sup>158</sup> which meant that Virginia's bans received strict scrutiny and thus could only be justified by a compelling state interest.<sup>159</sup> He deftly rejected defendant's

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151. See *Condon*, 21 F. Supp. 3d at 578–79 (rejecting a defense of immunity by the state's chief prosecutor, but dismissing claims against the state's governor as barred by the Eleventh Amendment). The judge also rejected: (1) the Rooker-Feldman Doctrine's use; (2) *Younger* abstention; and (3) the "domestic relations exception" to federal jurisdiction. See *id.* at 579–81, 584 (identifying and dismissing each of these arguments as presented).

152. See *id.* at 582 (stating that Justice Scalia urged that the *Windsor* decision would permit an assault on state bans); *supra* note 9 and accompanying text.

153. See *Condon*, 21 F. Supp. 3d at 582 (citations omitted) (stating that the "Supreme Court . . . declined to grant review of the decisions of the Fourth, Seventh, and Tenth Circuits, leaving their judgments in place.").

154. See *id.* (citations omitted) ("[A] clear majority of federal district courts that have addressed this issue have found state same-sex marriage bans unconstitutional."); *supra* note 8 and accompanying text. The Sixth Circuit did reverse district opinions invalidating bans. See *Condon*, 21 F. Supp. 3d at 582 (citations omitted) (listing lower court decisions overruled in Kentucky, Michigan, Ohio, and Tennessee).

155. See *Condon*, 21 F. Supp. 3d at 583 (citations omitted) ("[T]his Court finds most persuasive the clearly stated authority of the Fourth Circuit's seminal decision in *Bostic*."); *supra* notes 141, 146 and accompanying text.

156. See *Condon*, 21 F. Supp. 3d at 583 (stating that many parties and amici "exhaustively briefed" *Bostic's* issues).

157. See *id.* (citation omitted) (arguing that later doctrinal developments eroded it); *supra* note 73 and accompanying text.

158. See *Condon*, 21 F. Supp. 3d at 583–84 (stating that *Bostic* cited *Loving*, *Zablocki*, and *Turner* for establishing a "liberty interest in a broad right to marry" and *Windsor* and *Lawrence* for giving same-sex relationships due process protection).

159. See *id.* at 584 (stating that *Bostic's* scrutiny of Virginia interests found none compelling).

contention that federalism and respect for voter and state prerogatives must trump plaintiffs' liberty rights, as *Bostic* declared that the Fourteenth Amendment withdrew certain subjects from politics.<sup>160</sup>

Gergel said that the Fourth, Seventh and Tenth Circuit appellants petitioned the Supreme Court, asserting most claims alleged below and in his case,<sup>161</sup> but all were denied certiorari.<sup>162</sup> The judge reviewed developments in Fourth Circuit states with bars ascertaining that South Carolina alone banned same-sex marriage.<sup>163</sup> He therefore carefully compared its laws' wording and Virginia's, finding "no meaningful distinction" from that which *Bostic* had rejected.<sup>164</sup> Gergel addressed the state's claim that he should not follow *Bostic*<sup>165</sup> by saying that the Fourth Circuit had exhaustively treated the issues raised.<sup>166</sup> Gergel urged that judicial decision-making's predictability and stability required districts to enforce a circuit opinion which the Justices left undisturbed.<sup>167</sup> "This principle, along with the foundational rule that the United States Constitution is the supreme law of the land and state laws that run contrary to constitutionally protected rights of individuals" must fall, comprise the rule of law.<sup>168</sup> The jurist

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160. See *Condon v. Haley*, 21 F. Supp. 3d 572, 585 (D.S.C. 2014) (arguing that *Bostic* placed the subjects beyond majorities' reach, as the "right to . . . liberty . . . may not be submitted to a vote." (citing *Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir. 2014)); see also *infra* note 220 and accompanying text (discussing why the judicial rulings were accepted and implemented relatively smoothly).

161. See *Condon*, 21 F. Supp. 3d at 585 (stating that one claim was *Baker* controlled); *supra* note 73 and accompanying text.

162. See *id.* (adding that the Court lifted the stays); *supra* note 29 and accompanying text.

163. See *id.* at 586 ("[A]t the time Plaintiffs filed this action, South Carolina was the only state within the Fourth Circuit that continued to prohibit same sex marriage.").

164. *Id.*

165. See *id.* (observing that the state argued that *Baker* should have bound the circuit, but that *Windsor* did not cite *Baker* when invalidating DOMA).

166. See *id.* (adding that *Windsor* also recognized a fundamental right to marry and court power to vindicate it).

167. See *id.* at 587 ("Coherent and consistent adjudication requires respect for the principle of stare decisis.").

168. *Id.*

therefore held that *Bostic* governed and clearly established plaintiffs' right to marry.<sup>169</sup>

In August 2013, a same-sex couple who lawfully wed elsewhere had also challenged the bans, and Judge Michelle Childs heard the suit.<sup>170</sup> In April 2014, the jurist stayed the case until the July *Bostic* circuit ruling.<sup>171</sup> With the Supreme Court denial of *Bostic* appeals, Childs promptly lifted the stay.<sup>172</sup> On November 10, the judge found that plaintiffs had standing to pursue legal recognition of their marriage and that the suit could proceed.<sup>173</sup> Childs rejected defendant's arguments that she must defer to state courts on marital relations questions<sup>174</sup> and that *Baker* was binding.<sup>175</sup>

Childs said that plaintiffs had a fundamental liberty interest in the right to marry; therefore, state bars to same-sex marriage required strict scrutiny and must be "narrowly tailored to a compelling government interest," while the bans were not so defined and they clearly infringed this right.<sup>176</sup> She found that the

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169. *See id.* at 587–89 (finding that the state's bans infringed on this right, enjoining them and denying the stay, but granting a temporary stay to allow orderly review, while also criticizing the Attorney General's attempt to relitigate issues that *Bostic* had resolved).

170. *See Bradacs v. Haley*, 58 F. Supp. 3d 514, 518 (D.S.C. 2014) (asserting claims by a same-sex couple challenging the constitutionality of South Carolina's laws denying legal protection to the marriages of same-sex couples who wed out of state).

171. *See id.* at 519 (recounting the procedural history of the suit); *Condon v. Haley*, No. 14-2241 (4th Cir. Nov. 18, 2014) (denying stay).

172. *See Bradacs*, 58 F. Supp. 3d at 520 (setting a two-week date for filing dispositive motions and later responses).

173. *See id.* at 520–25 (rejecting standing to oppose marriage license denial, a motion for judgment on the pleadings and a state immunity claim under an exception to *Ex parte Young*, 209 U.S. 123 (1908)).

174. *See Bradacs*, 58 F. Supp. 3d at 525–36 (stating that the South Carolina Supreme Court in South Carolina *ex rel. Wilson v. Condon*, 764 S.E.2d 247 (S.C. 2014) made state judges defer to federal judges, while *Loving* found state power to regulate marriage limited).

175. *See Bradacs*, 58 F. Supp. 3d at 528 (reasoning that *Bostic* deemed *Baker* no longer binding and that *Bostic*, rather than *Baker*, bound her); *supra* note 45 and accompanying text.

176. *Bradacs*, 58 F. Supp. 3d at 529, 530 (citation omitted). The bans also deserved strict scrutiny under equal protection claims, as they burden the fundamental right to marry. *See id.* (discussing the strict scrutiny standard and

interests asserted were like those that Virginia proffered in *Bostic*, which the opinion rejected.<sup>177</sup>

#### 4. West Virginia Litigation

In 2014, same-sex couples disputed bars by suing clerks whom West Virginia laws prohibited from issuing licenses.<sup>178</sup> Judge Robert Chambers said that the case was among many filed after *Windsor*<sup>179</sup> and their pace had recently accelerated, culminating in the Supreme Court's denials of appeals.<sup>180</sup> Thus, he considered that this binding precedent and state and county officials' acceptance of its effects provided a "clear blueprint."<sup>181</sup> The jurist urged that the government could not interfere with the fundamental right to marry, unless it had compelling interests and narrowly tailored bans to safeguard them.<sup>182</sup>

Chambers first rejected: (1) the defendant's motions to dismiss, easily finding that plaintiffs had standing by suing the clerks, who asserted *Burford* abstention, which he deemed lacking,<sup>183</sup> and (2) *Baker* as a grounds for abstention, because he had previously ruled that it was not binding.<sup>184</sup> Chambers assessed

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applying it to South Carolina's laws).

177. *See id.* at 526–28, 531 (enjoining the laws as due process and equal protection violations and denying plaintiffs' Full Faith and Credit Clause claim).

178. *See McGee v. Cole*, 66 F. Supp. 3d 747, 750–51 (S.D.W. Va. 2014) (stating that the State of West Virginia intervened as a defendant to defend the constitutionality of the West Virginia law that excluded same-sex couples from marriage).

179. *See id.* at 749 (summarizing challenges to same-sex marriage bans following *Windsor*); *supra* notes 8–9 and accompanying text.

180. *See McGee*, 66 F. Supp. 3d at 749 (discussing the pace of related litigation and the court's decision to stay proceedings).

181. *Id.*

182. *See id.* at 749–50 (concluding that the government did not satisfy the test as "governmental restrictions on individual rights must be justified by more than simply strongly, or even widely, held opinions or traditions").

183. *See id.* at 751–56 (rejecting West Virginia's sovereign immunity defense and defendants' three summary judgment claims).

184. *See id.* at 755 ("In light of the Supreme Court's apparent abandonment of *Baker* and the significant doctrinal developments that occurred after the Court issued its summary dismissal in that case, we decline to view *Baker* as binding precedent." (quoting *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014))); *supra*

more closely federalism, invoking the *Bostic* dependence on *Loving*'s admonition that states must exercise authority to regulate marriage "without trampling constitutional guarantees."<sup>185</sup>

The judge found unavailing the claim that the bars did not violate due process or equal protection, given *Bostic*.<sup>186</sup> He reviewed the case that held the fundamental right to marry demanded strict scrutiny,<sup>187</sup> and canvassed the five interests that Virginia asserted, which the panel ruled were not compelling or narrowly tailored, and its conclusion that state laws violated both clauses.<sup>188</sup> The jurist said that *Bostic* controlled and the bans and plaintiffs' claims were the same as in *Bostic*;<sup>189</sup> thus, strict scrutiny applied.<sup>190</sup> He found that defendant asserted two interests which failed: (1) incrementally expanding gay rights to deflect abrupt change's unforeseen results and (2) treating a unique consequence of heterosexual intercourse—children's conception.<sup>191</sup> The judge said *Bostic* held that preserving the traditional status quo was not compelling and explained that legalizing same-sex marriage would not destabilize the institution.<sup>192</sup> Potentially working abrupt

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note 45 and accompanying text.

185. See *McGee*, 66 F. Supp. 3d at 757 (finding that the principles of federalism did not outweigh the court's duty to determine if the ban violated a plaintiff's constitutional rights (citing *Bostic*, 760 F.3d at 379)).

186. See *McGee*, 66 F. Supp. 3d at 757–60 (stating that the ban was not tailored to achieve the state's interest).

187. See *id.* at 757–58 (discussing the standard of scrutiny analysis in *Bostic* (citations omitted)).

188. See *McGee v. Cole*, 66 F. Supp. 3d 747, 758 (S.D.W. Va. 2014) (stating that the Virginia marriage ban violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment (citing *Bostic*, 760 F.3d at 384)); *supra* notes 81–100 and accompanying text.

189. See *McGee*, 66 F. Supp. 3d at 758 ("The holding in *Bostic* controls this case.").

190. See *id.* at 759 (acknowledging that the court must assess West Virginia's actual purposes for adopting the marriage ban) (citations omitted).

191. See *id.* at 758 n.5 (rejecting the Sixth Circuit's reason for favoring bans because "wait and see" ignored the courts' role in the democratic process to protect rights and the Sixth Circuit conceded the responsible procreation perspective could not be sustained (citing *DeBoer v. Snyder*, 772 F.3d 388, 405–06 (6th Cir. 2014))).

192. See *McGee*, 66 F. Supp. 3d at 759 (concluding that if West Virginia's interest went further, there was not a compelling reason to preserve the laws, as

change was irrelevant, because landmark decisions often brought this change, and *Loving*, for example, could have quickly altered marriage regulation but the Court invalidated that ban as a violation of equal protection.<sup>193</sup> Chambers held that limiting the “freedom to marry based on sexual orientation violates the Equal Protection and Due Process Clauses”<sup>194</sup> and the state experiencing change more swiftly than lawmakers anticipated did not compel permitting an unconstitutional law to stand.<sup>195</sup>

He admitted that defendant might possess a compelling interest in fostering heterosexual marriage and stopping “parents from abandoning their responsibilities,” yet the ban lacked narrow tailoring.<sup>196</sup> Virginia claimed a similar interest in *Bostic* that it rejected as “woefully underinclusive”<sup>197</sup> and West Virginia bans were “equally underinclusive.”<sup>198</sup>

### B. Supreme Court

In 2015, the Justices decided the Sixth Circuit appeals in *Obergefell v. Hodges*.<sup>199</sup> Kennedy, writing for the majority, first

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they violate both due process and equal protection rights).

193. *See id.* (discussing the Supreme Court’s decision to strike down Virginia’s anti-miscegenation statute (citing *Loving v. Virginia*, 388 U.S. 1, 6, 12 (1967))).

194. *McGee*, 66 F. Supp. 3d at 759 (citing *Bostic v. Schafer*, 760 F.3d 352, 384 (4th Cir. 2014)).

195. *See id.* at 759–60 (explaining that the state had earlier altered its marriage policy, so his opinion might not abruptly change present state policy, and the asserted interest could not survive strict scrutiny).

196. *Id.* at 760 (rejecting the argument that opposite-sex and same-sex couples are not similarly situated because only opposite-sex couples can have an unplanned child, resulting in the state’s decision to incentivize marriage for only opposite-sex couples).

197. *See id.* (emphasizing that precluding same-sex marriage fails to prevent out-of-wedlock births) (citing *Bostic*, 760 F.3d at 381); *supra* note 110 and accompanying text.

198. *McGee v. Cole*, 66 F. Supp. 3d 747, 760 (S.D.W. Va. 2014) (invalidating and enjoining the ban because the laws lack narrow tailoring and fail strict scrutiny as they fail to prevent heterosexual “couples from having unwanted children” and rearing them poorly).

199. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (“The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as

said that the Constitution promises liberty for all to express and define their identity, which plaintiffs sought by “marrying someone of the same-sex and having their marriages deemed lawful.”<sup>200</sup> The annals of history show that marriage has transcendent significance, and the institution’s centrality to the human condition demonstrates that it has existed for millennia across civilizations.<sup>201</sup> Marriage’s history reveals continuity and change over time,<sup>202</sup> while evolving appreciation defines a nation in which freedom’s new dimensions become clear to each generation, a dynamic that LGBT rights witness.<sup>203</sup> Kennedy analyzed the United States Supreme Court’s LGBT decisions,<sup>204</sup> the 1993 Hawaii and 2003 Massachusetts Supreme Court marriage equality opinions,<sup>205</sup> the 1996 DOMA law,<sup>206</sup> and its 2013 partial invalidation in *Windsor*.<sup>207</sup> He observed that several appellate courts had treated marriage equality, district courts

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marriages between persons of the opposite sex.”).

200. *Id.* at 2593–95 (showing how the petitioners’ situations illuminated their cases’ urgency).

201. *See id.* at 2593–94 (presenting references to the importance of marriage in the teachings of Confucius and the writings of Cicero) (citations omitted).

202. *See id.* at 2595–96 (observing that developments in the structure of marriage have strengthened the institution).

203. *See id.* at 2596 (discussing how LGBT persons recently began leading more open lives, provoking discussion and enhanced tolerance, which were manifested in litigation over LGBT rights).

204. *See id.* (stating how the Court’s position evolved from upholding laws that criminalized certain homosexual acts to holding laws that make same-sex intimacy a crime unconstitutional) (first citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003), then citing *Romer v. Evans*, 517 U.S. 620 (1996), then citing *Lawrence*, 539 U.S. at 575).

205. *See Obergefell*, 135 S. Ct. at 2596 (analyzing prior Hawaii and Massachusetts state court opinions regarding same sex marriage) (first citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *abrogated by Obergefell*, 135 S. Ct. at 2584, then citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

206. *See Obergefell*, 135 S. Ct. at 2596 (recognizing the definition of marriage contained in DOMA); *see also* 1 U.S.C. § 7 (2012) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife . . .”).

207. *See Obergefell*, 135 S. Ct. at 2596–97 (referencing the partial invalidation of DOMA in *Windsor*); *supra* note 3 and accompanying text; *see also* *United States v. Windsor*, 570 U.S. 744, 770 (2013) (“DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”).



published “many thoughtful” opinions,<sup>208</sup> and the states remained divided after “years of litigation, legislation, referenda and discussions.”<sup>209</sup>

The Justice mainly relied on due process that safeguards fundamental liberties, encompassing most in the Bill of Rights and personal choices which are central to individual dignity and autonomy.<sup>210</sup> He believed that identifying and protecting those rights was an enduring aspect of the judicial duty to interpret the Constitution<sup>211</sup> while detecting that history and tradition guide this endeavor but leave undefined the outer limits of that inquiry.<sup>212</sup>

Applying these established tenets, Kennedy stated that the Justices have perennially held that the Constitution safeguards the right to marry.<sup>213</sup> He found informative opinions which expressed broad constitutional precepts, as they identified the marriage right’s critical attributes premised on history and tradition and related constitutional liberties inherent in this intimate bond.<sup>214</sup> The jurist asserted that the Court must honor the

208. *Obergefell*, 135 S. Ct. at 2597 (observing that most district court decisions allowed same-sex marriage); *see supra* notes 8–9 and accompanying text.

209. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

210. *See id.* at 2597–98 (recognizing personal decisions that “define personal identity and beliefs” (citations omitted)).

211. *See id.* at 2598 (providing that courts must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect”).

212. *See id.* (stating that judges can learn from history without allowing it to “rule the present”)

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

*Id.*

213. *See Obergefell*, 135 S. Ct. at 2598 (“[T]he Court has long held the right to marry is protected by the Constitution.”).

214. *See id.* (discussing three modern cases that recognized a fundamental right, yet assumed that the parties were opposite-sex partners) (first citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967), then citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), then citing *Turner v. Safley*, 482 U.S. 78, 95 (1987)); *supra* notes 88, 157 and accompanying text. Justice Kennedy recognized that the assumption of opposite-sex partners is evident in *Baker*. *See id.* (“[*Baker* held] the exclusion of

basic reasons why the right has long enjoyed protection when assessing whether its decisions' rationales and force apply to same-sex couples.<sup>215</sup>

This analysis drove his conclusion that these "couples may exercise the right to marry," because four principles and traditions that show why marriage is deemed fundamental equally apply to them.<sup>216</sup> First, Kennedy found that the right of personal choice regarding marriage is intrinsic to individual autonomy, because the decisions were among the most intimate people make.<sup>217</sup> He said marriage's nature is that, "through its enduring bond," two persons can discover other freedoms, including spirituality and intimacy, which is true for people of any sexual orientation.<sup>218</sup> Second, the marriage right is fundamental, supporting a two-person union different from any other in importance to the committed people.<sup>219</sup> Third, the right affords children and families benefits.<sup>220</sup> Some are material, yet it offers more profound advantages,<sup>221</sup> but exclusion violates the right's integral premise by stigmatizing children who deem their families less worthy.<sup>222</sup> Court decisions and traditions identify another precept: "marriage

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same-sex couples from marriage did not present a substantial federal question.").

215. *See Obergefell*, 135 S. Ct. at 2599 (considering how to evaluate precedential cases).

216. *Id.*

217. *See id.* (comparing decisions regarding marriage to decisions on "contraception, family relationships, procreation and childrearing").

218. *Id.*

219. *See id.* at 2600 (explaining that "[t]he right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other'" and "same-sex couples have the same right as opposite-sex couples to enjoy intimate association") (first quoting *United States v. Windsor*, 570 U.S. 744, 763 (2013), then citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

220. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (recognizing that the right to marry derives meaning from related rights, including childrearing, procreation and education, which the Justices characterize as a unified whole) (citations omitted).

221. *See id.* (finding that marriage lends parental relationships recognition and legal structure, enabling children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives") (quoting *Windsor*, 570 U.S. at 772).

222. *See id.* at 2600 (noting that without marriage, families with same-sex parents lack the stability, recognition, and predictability that marriage affords).

is a keystone” of social order.<sup>223</sup> Kennedy perceived no difference, yet same-sex couples’ exclusion makes them forfeit the “constellation of benefits” which states ascribe to marriage.<sup>224</sup>

He said that *Glucksberg* mandated a narrow definition of liberty in the Due Process Clause with “reference to specific historical practices,” but that this conflicted with the fundamental rights to marry and intimacy.<sup>225</sup> The marriage cases employ the right “in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”<sup>226</sup> Kennedy deemed the right to marry fundamental as a matter of tradition yet found that rights emanate from a better informed understanding of “how constitutional imperatives define a liberty.”<sup>227</sup>

He recognized that many who find same-sex marriage wrong premise that on “decent and honorable religious or philosophical” bases;<sup>228</sup> however, if “sincere, personal opposition becomes enacted law and public policy,” this stamps the government imprimatur on exclusion which demeans or stigmatizes people whose liberty is denied.<sup>229</sup> When same-sex couples pursue in marriage the same legal treatment as heterosexuals under the Constitution, denial of that right “disparage[s] their choices and diminish[es] their personhood.”<sup>230</sup>

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223. *See id.* at 2601 (examining the growing benefits, rights, and duties that states bestow on married couples).

224. *See id.* at 2601–02 (concluding that same-sex couples’ exclusion from marriage creates material hurdles and instability, teaches that LGBT people are unequal in major respects, and violates the fundamental right to marry while inflicting stigma and injury that the Constitution prohibits).

225. *Id.* at 2602 (recognizing that the approach may have been proper for the right to physician-assisted suicide asserted in *Glucksberg*).

226. *Id.* (stating that the Court previously rejected the notion that historical practice should be ongoing justification precluding new groups from pursuing rights earlier denied, exemplified in the Court’s recognition of new marriage and LGBT rights).

227. *Id.* (acknowledging the urgency of recognizing same-sex marriage).

228. *Id.*

229. *Id.* at 2602; *see also id.* at 2607 (stressing that the First Amendment protects religion, and adherents to religious doctrines, that continue opposing marriage equality).

230. *Id.* at 2602.

The jurist argued that equal protection also safeguards the right to marry, because this and due process are intimately connected, despite being separate tenets.<sup>231</sup> In particular situations, each clause may rest on different concepts and identify the right's essence more accurately, even while both converge to pinpoint and define the right.<sup>232</sup> That dynamic applies to same-sex marriage, as the laws burden the liberty of couples while infringing on equality's core precepts, deny them all benefits that opposite-sex couples have, and preclude the exercise of a fundamental right.<sup>233</sup>

These factors prompted the conclusions that the "right to marry is a fundamental right inherent in" liberty, and under due process and equal protection same-sex couples "may not be deprived of that right and that liberty."<sup>234</sup> The Court held that couples possess this right, overruled *Baker* and invalidated state laws which excluded same-sex couples from marriage.<sup>235</sup>

Kennedy responded to the concern that judges should proceed cautiously and wait on more "legislation, litigation, and debate."<sup>236</sup> He said that the Constitution envisions democracy as the appropriate process for change when it does not violate fundamental rights, conceding that the *Schuette* plurality affirmed

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231. *See id.* at 2602–03 ("Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.").

232. *See id.* at 2603 (recognizing that the "interrelation of the two principles furthers our understanding of what freedom is and must become"). Court opinions on the right to marry, invidious sex-based marriage classifications, and LGBT rights reflect this dynamic. *See id.* at 2603–04 (analyzing the confluence of the Equal Protection Clause and the Due Process Clause in prior case law) (citations omitted).

233. *See id.* at 2604 (concluding that equal protection and due process bar the unwarranted abridgment of the fundamental right to marry, which disrespects and subordinates LGBT people).

234. *Id.*

235. *See id.* at 2605 (holding the state laws invalid "to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples").

236. *Id.* at 2065. Kennedy disagreed with the Sixth Circuit's concern that "respondents' States [should] await further public discussion and political measures before licensing same-sex marriages," stating that "substantial attention" had already been devoted to the question. *Id.*

the significance of this concept *and* constitutional freedom, which secures a person's right to suffer no injury from unlawful governmental action.<sup>237</sup> Notwithstanding democracy's more general value, the Constitution demands judicial redress when the government contravenes individual rights.<sup>238</sup> Thus, people who allegedly suffer harm can vindicate in court a personal stake in the Constitution, even if the broader citizenry differs and the legislature rejects action, because the document withdrew certain matters from politics.<sup>239</sup>

### C. Marriage Equality's Implementation

Marriage equality's implementation proceeded smoothly. Maryland felicitously initiated equality because its Assembly passed a statute which the people approved in a referendum.<sup>240</sup>

237. *Id.*

238. *See id.* ("This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.")

239. *See id.* at 2605–06 (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638, (1943)); *supra* note 159. The Constitution places "fundamental rights [which] may not be submitted to a vote" beyond majorities' reach, which makes them legal tenets that courts apply. *Id.*

240. *See* Civil Marriage Protection Act, H.B. 438, 2012 Sess. (Md. 2012) (allowing gay and lesbian couples to obtain civil marriage licenses); *Statewide Ballot Question Language*, MD. ST. BD. OF ELECTIONS (Aug. 20, 2012), [https://elections.maryland.gov/elections/2012/ballot\\_question\\_language.html#state6](https://elections.maryland.gov/elections/2012/ballot_question_language.html#state6) (last visited Dec. 5, 2018) (including the ballot language of the "Maryland same-sex marriage referendum" on House Bill 438, also known as "Question 6") (on file with the Washington and Lee Law Review); *see also supra* notes 178–79 (describing why the nationwide implementation of marriage equality after *Windsor* was relatively smooth); *Md. Approves Gay Marriage In Historic 'Question 6' Vote*, HUFFINGTON POST, [https://www.huffingtonpost.com/2012/11/07/maryland-question-6-results-2012\\_n\\_2050830.html](https://www.huffingtonpost.com/2012/11/07/maryland-question-6-results-2012_n_2050830.html) (last updated Feb. 2, 2016) (last visited Dec. 5, 2018) (reporting that "Question 6" was approved by 52% of Maryland voters) (on file with the Washington and Lee Law Review); Kevin Rector, *Md. Attorney General Says Supreme Court Must Overturn Same-Sex Marriage Bans Nationwide*, BALTIMORE SUN (Mar. 9, 2015, 4:00 PM), <http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-attorney-general-issues-report-calling-samesex-marriage-bans-20150309-story.html> (last visited Dec. 5, 2018) (describing the Maryland Attorney General's favorable opinion on marriage equality and detailing the prior efforts of Maryland and other states to enact marriage equality legislation) (on file with the Washington and Lee Law Review).

Thus, equality had widespread popular support; state and local officers ensured efficacious institution and had considerable time to plan.<sup>241</sup> For example, Democratic Attorney General Brian Frosh crafted a thorough substantive opinion which foresaw potential difficulties, carefully answered numbers of questions that could arise, and tendered helpful recommendations for swift implementation.<sup>242</sup> The other jurisdictions commenced institution expeditiously following the *Bostic* appeal's denial<sup>243</sup> and implemented equality rather well.

Democratic Governor Terry McAuliffe, Attorney General Herring, and numerous other Virginia state and local officials quickly acted to fully effectuate *Bostic*'s mandate. The Governor issued an executive order instructing state workers to accord same-sex married couples each benefit across a number of critical areas—including health care, taxation and adoption—that heterosexuals possess.<sup>244</sup> Clerk offices also seemed to issue licenses well, because quite a few made concerted efforts to comply.<sup>245</sup>

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241. Maryland's Civil Marriage Protection Act was passed in February 2012, signed in March, approved by voters in a November referendum, and became effective January 1, 2013. *See supra* note 239.

242. *See* Issuance of Marriage Licenses to Same-Sex Couples After Approval of the Civil Marriage Protection Act, 97 Md. Att'y Gen. Op. 72 (2012) (answering questions from clerks regarding the issuance of marriage licenses to same-sex couples).

243. *See supra* note 135 and accompanying text; *see also infra* notes 248–258 and accompanying text.

244. *See* Va. Exec. Order No. 30 (2014) (ordering state agencies to “take all necessary and appropriate legal measures to comply with” *Bostic*). “On issues ranging from recognizing same-sex marriages to extending health care benefits to same-sex spouses of state employees, state government is already well-prepared to implement this landmark decision.” *Id.*; *see also* Va. Exec. Order No. 61 (2017) (“Virginia will not do business with entities that discriminate based on sexual orientation or gender identity.”); Statement of Att’y Gen. Herring on Marriage Equality in Va. (Oct. 6, 2014) (reporting that local clerks would begin issuing marriage licenses to same-sex couples); Va. Dep’t of Tax’n, Tax Bull. 14-7 (Oct. 7, 2014) (declaring that same-sex marriages recognized for federal income tax purposes would also be recognized for Virginia income tax purposes); Bull. from Margaret Schultze, Comm’r Va. Soc. Servs. Dep’t, to Local Soc. Servs. Dep’ts on *Bostic*'s Impact (Oct. 10, 2014) (announcing that married same-sex couples could now adopt children and serve as foster parents).

245. The seven-month window between *Bostic*'s appeal and Supreme Court denial of certiorari provided government agencies and clerk offices much time to plan for the influx of Virginians seeking marriage licenses. *See* John Woodrow

However, numerous GOP legislators preferred to wait on *Obergefell*'s final disposition before revising marriage laws.<sup>246</sup> Virginia senators and delegates have introduced bills that would repeal the same-sex marriage ban, but the Assembly has not acted.<sup>247</sup>

North Carolina instituted marriage equality relatively smoothly after the Fourth Circuit denied the *Bostic* appeal. Numbers of state magistrates expressed religious objections to conducting same-sex marriages, and plentiful deeds registers voiced similar concerns about issuing licenses.<sup>248</sup> The Assembly

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Cox, Jenna Portnoy & Justin Jouvenal, *Same-Sex Couples Begin to Marry in Virginia*, WASH. POST (Oct. 6, 2016), [https://www.washingtonpost.com/local/virginia-politics/same-sex-marriages-in-virginia-can-begin-almost-immediately/2014/10/06/97ceab2e-4d69-11e4-aa5e-7153e466a02d\\_story.html?utm\\_term=.9e25cc7e57b3](https://www.washingtonpost.com/local/virginia-politics/same-sex-marriages-in-virginia-can-begin-almost-immediately/2014/10/06/97ceab2e-4d69-11e4-aa5e-7153e466a02d_story.html?utm_term=.9e25cc7e57b3) (last visited Dec. 5, 2018) (describing same-sex couples who sought marriage licenses the day that the Justices denied the *Bostic* appeal) (on file with the Washington and Lee Law Review); Jim Nolan, *McAuliffe Orders Agencies to Comply with Same-Sex Marriage*, RICHMOND TIMES-DISPATCH (Oct. 7, 2014), [https://www.richmond.com/news/virginia/mcauliffe-orders-agencies-to-comply-with-same-sex-marriage/article\\_aad77b10-8b14-5d14-807b-0b36344c6791.html](https://www.richmond.com/news/virginia/mcauliffe-orders-agencies-to-comply-with-same-sex-marriage/article_aad77b10-8b14-5d14-807b-0b36344c6791.html) (last visited Dec. 5, 2018) (describing the reaction to Executive Order 30) (on file with the Washington and Lee Law Review). Governor McAuliffe vetoed a “religious freedom” bill exempting religious organizations and ministers from performing same-sex marriages, which passed the Virginia House and Senate. S.B. 41, 2016 Sess. (Va. 2016).

246. See Markus Schmidt, *After Gay Marriage Ruling, State Law Requires Update*, RICHMOND TIMES-DISPATCH (June 28, 2015), [https://www.richmond.com/news/virginia/government-politics/after-gay-marriageruling-state-law-requires-update/article\\_60990341-dfa6-5119-a267-089305ab6348.html](https://www.richmond.com/news/virginia/government-politics/after-gay-marriageruling-state-law-requires-update/article_60990341-dfa6-5119-a267-089305ab6348.html) (last visited Dec. 5, 2018) (“Republican state legislators remained wary of adopting regulatory changes ahead of a final Supreme Court ruling on gay marriage, blocking attempts by Democrats to update the code.”) (on file with the Washington and Lee Law Review).

247. See H.B. 414, 2018 Sess. (Va. 2018) (proposing the repeal of statutory prohibitions on same-sex marriage in light of *Obergefell*); S.B. 603, 2018 Sess. (Va. 2018) (proposing the implementation of gender-neutral terms in Virginia marriage statutes, e.g. “widow” becomes “surviving spouse”).

248. See Beth Walton, *W.N.C. Magistrate Resigns, Objects to Same-Sex Marriage*, CITIZEN TIMES, <https://www.citizen-times.com/story/news/local/2014/10/21/wnc-magistrate-resigns-objects-sex-marriage/17658901/> (last updated Sept. 21, 2015, 10:22 PM) (last visited Dec. 5, 2018) (reporting the resignation of several North Carolina magistrates) (on file with the Washington and Lee Law Review); see also Colin Campbell, *N.C. Senate’s Move to Exempt Magistrates Rekindles Gay Marriage Debate*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/state-politics/article11>

passed a 2015 bill giving the officers the “right to recuse from performing all lawful marriages” and issuing every lawful license based on “any sincerely held religious objection.”<sup>249</sup> Republican Governor Pat McCrory vetoed the measure, because “no public official who voluntarily swears to support and defend the Constitution . . . should be exempt from upholding that oath,”<sup>250</sup> yet the bill became law.<sup>251</sup> Equality proponents contested this, but

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312021.html (last updated Feb. 25, 2015, 9:07 PM) (last visited Dec. 5, 2018) (emphasizing the political turmoil over the religious exemption for magistrates and deeds employees) (on file with the Washington and Lee Law Review). *But see* Beth Walton, *Officials to Issue Marriage Licenses Regardless of Beliefs*, CITIZEN TIMES, <https://www.citizen-times.com/story/news/local/2014/10/20/officials-issue-licenses-regardless-beliefs/17635563/> (last updated Oct. 21, 2014, 11:49 AM) (last visited Dec. 5, 2018) (maintaining that clerks in the Asheville deeds office upheld the law in spite of their religious objection to same-sex marriage) (on file with the Washington and Lee Law Review).

249. S.B. 2, Sess. L. 2015-75 (N.C. 2015). *See* Garrett Epps, *N.C.’s Rightward Turn*, ATLANTIC (June 9, 2015), <https://www.theatlantic.com/politics/archive/2015/06/north-carolina-same-sex-marriage/395171/> (last visited Dec. 5, 2018) (citing the recusal law as an indication of a broader trend towards conservatism in North Carolina) (on file with the Washington and Lee Law Review); Jonathan Katz, *N.C. Officials Can Now Cite Religion as Basis to Refuse Marriage Duties*, N.Y. TIMES, June 12, 2015, at A14 (observing that the bill “allows magistrates, along with assistant and deputy registers of deeds, to refuse to perform a marriage without facing punishment or charges of willfully failing to discharge their duties”).

250. Gov. Pat McCrory S.B. 2 Veto Statement, May 28, 2015.

251. N.C. CODE §§ 7A-292(b), 51-5.5, 114-230(b), 161-27(b) (2015); *see* Colin Campbell, *McCrory Will Veto Bill Letting Magistrates Opt Out of Performing Gay Marriages*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article22513470.html> (last updated May 29, 2015, 11:02 AM) (last visited Dec. 5, 2018) (describing the governor’s plan to veto S.B. 2) (on file with the Washington and Lee Law Review); Craig Jarvis & Colin Campbell, *N.C. House Overrides Governor’s Veto on Marriage Bill, Making it Law*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/article23746558.html> (last visited June 11, 2015 7:21 PM) (last visited Dec. 5, 2018) (“The Senate overrode the veto by a wide margin[, but] the votes in the House were much closer.”) (on file with the Washington and Lee Law Review); *see also* Noah Feldman, *What the Oath of Office Means to a Kentucky Clerk*, BLOOMBERGVIEW (Sept. 3, 2015, 10:43 AM), <https://www.bloomberg.com/view/articles/2015-09-03/what-oath-of-office-means-to-county-clerk-kim-davis> (last visited Dec. 5, 2018) (describing a Kentucky clerk who refused to administer marriage licenses because “obedience to the moral law of God” is part of upholding “one’s constitutional duties and obligations” as a government employee) (on file with the Washington and Lee Law Review).



Judge Cogburn ruled that they lacked standing.<sup>252</sup> Same-sex couples have apparently experienced little difficulty securing licenses or weddings, because few officers seemed to recuse; and when all in a locality have, the measure provided for that contingency.<sup>253</sup>

South Carolina appeared to implement marriage equality comparatively smoothly after Judges Gergel and Childs held its bans unconstitutional.<sup>254</sup> However, Republican Attorney General Alan Wilson appealed speedily (albeit fruitlessly) once the cases were decided, but after the U.S. Supreme Court Justices resolved

252. *Ansley v. Warren*, No. 116CV00054MOCDLH, 2016 WL5213937, at \*9–16 (W.D.N.C. Sept. 20, 2016), *aff'd*, 861 F.3d 512 (4th Cir. 2017).

253. See N.C. CODE § 51-5.5(b)–(c) (2015) (providing a contingent plan to bring in officers from other areas if all officers in one district refuse to perform their duties); Colin Campbell, *32 N.C. Magistrates Opt Out of Marriages, Won't Face Penalties*, NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/state-politics/article33815355.html> (last visited Sept. 4, 2015, 3:59 PM) (last visited Dec. 5, 2018) (reporting less than 5% of the state's magistrates—only 32 of 670—recused themselves after the law passed in 2015) (on file with the Washington and Lee Law Review); *infra* notes 280–282. A special 2016 session passed H.B. 2, a law eliminating local anti-discrimination protections for LGBT people and requiring individuals to use restrooms and facilities that corresponded to the sex on their birth certificates. The portion of H.B. 2 regarding bathroom use was challenged and repealed, causing more controversy by halting local action through 2020. H.B. 2, Sess. L. 2016-3 (N.C. 2016) (bathroom ban); *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (challenging H.B. 2 and seeking a preliminary injunction, which the court granted for individual transgender plaintiffs under Title IX but denied for their equal protection claim and reserved on their due process claims); H.B. 142, Sess. L. 2017-4 (N.C. 2017) (repealing and replacing H.B. 2); see Richard Fausset, *Bathroom Law Repeal Leaves Few Pleased in N.C.*, N.Y. TIMES, Mar. 31, 2017, at A1; Motoko Rich, *N.C. Law Barring Anti-Discrimination Measures Draws Sharp Backlash*, N.Y. TIMES, Mar. 25, 2016, at A13.

254. See *supra* notes 149–177 and accompanying text; see, e.g., S.C. Dep't of Revenue, *South Carolina Tax Treatment of Same-Sex Marriages (Property Taxes and Deed Recording Fees)*, S.C. Rev. Rul. #14-9 (2014) (modifying the tax code to recognize same-sex marriages for income tax purposes); S.C. Dep't of Revenue, *South Carolina Income Tax Treatment of Same-Sex Marriages (Income Tax)*, S.C. Rev. Rul. #14-8 (2014) (same); see also Kurtis Lee, *Same-Sex Marriage Licenses Doled Out in S.C.*, L.A. TIMES (Nov. 20, 2014, 2:04 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-supreme-court-deny-stay-same-sex-marriage-south-carolina-20141120-story.html#> (last visited Dec. 5, 2018) (“From Columbia to Charleston, couples lined up at probate courts to obtain the licenses, sharing photos on social media and calling for marriage equality in all 50 states.”) (on file with the Washington and Lee Law Review).

*Obergefell* Wilson filed motions to voluntarily dismiss them, which the circuit granted.<sup>255</sup>

West Virginia initiated equality rapidly following the *Bostic* appeal's denial.<sup>256</sup> Republican Attorney General Patrick Morrissey ended its case, as *Bostic* was binding; Democratic Governor Earl Ray Tomblin carefully ordered state agencies to obey *Bostic* and county clerks to quickly provide same-sex couples marriage licenses.<sup>257</sup> Clerks' first responses were unclear, yet a number gradually issued licenses, particularly after Judge Chambers issued his ruling.<sup>258</sup> One blatant 2016 exception was a staffer who

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255. See *Condon v. Haley*, 21 F. Supp. 3d 572 (D.S.C. Nov. 12, 2014), *stay pending appeal denied* 14-2241 (4th Cir. Nov. 18, 2014), *appeal dismissed* 14-2241 (4th Cir. Jul 20, 2015); *Bradacs v. Haley*, 58 F. Supp. 3d 514 (D.S.C. Nov. 18, 2014), *appeal dismissed* 14-2337 (4th Cir. July 20, 2015). The Senate considered an exemption bill like North Carolina's law. S.B. 116, 121st Sess. (S.C. 2016).

256. It did not await *McGee's* November issuance. See *supra* notes 177–197 and accompanying text.

257. See James Queally, *West Virginia to Stop Challenging Same-Sex Marriage*, L.A. TIMES (Oct. 9, 2014, 12:36 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-west-virginia-same-sex-marriage-20141009-story.html> (last visited Dec. 5, 2018) (quoting Morrissey as stating “[w]hile we disagree with the Supreme Court’s decision to allow the 4th Circuit’s opinion to stand and believe it improperly displaces state and local decision-making, we will respect it”) (on file with the Washington and Lee Law Review); Press Release, *Governor Tomblin Issues Statement on Same-Sex Marriage* (Oct. 14, 2014), <http://www.governor.wv.gov/media/pressreleases/2014/pages/governor-tomblin-issues-statement-regardingsame-sex-marriage-in-west-virginia.aspx> [<https://perma.cc/5X5H-PMEB>] (last visited Dec. 5, 2018) (“West Virginia will uphold the law according to these rulings, and I have directed state agencies to take appropriate action to make that possible.”) (on file with the Washington and Lee Law Review).

258. See Erin Beck, *W. Va. Drops Gay Marriage Ban*, W. VA. GAZETTE (Oct. 9, 2014), [https://www.wvgazette.com/news/west-virginia-drops-gay-marriage-ban/article\\_411169b0-17ae-58b8-b0de-5294daddf552.html](https://www.wvgazette.com/news/west-virginia-drops-gay-marriage-ban/article_411169b0-17ae-58b8-b0de-5294daddf552.html) (last visited Dec. 5, 2018) (“While Kanawha and Cabell counties . . . issued same-sex marriage licenses without a hitch, Putnam County Clerk Brian Wood said he would not issue any licenses until Friday, after he’d talked with county Prosecuting Attorney Mark Sorsaia.”) (on file with the Washington and Lee Law Review). See also W. Va. Tax Dep’t, *W. Va. Tax-Same-Sex Marriage*, Admin. Notice 2014-20 (Oct. 20, 2014), <http://www.state.wv.us/taxrev/publications/administrativeNotices/2014/AdministrativeNotice.2014-20.pdf> (notifying taxpayers that taxes “filed by lawfully married individuals will be processed without regard to the gender . . . of the married partners”). The House passed a RFRA that the Senate rejected in 2016. H.B. 4012 (W. Va. 2016). In 2017, the Senate assessed a similar bill. S.B. 19 (W.

mistreated one couple seeking a license, which prompted their victorious federal litigation.<sup>259</sup>

In sum, the Fourth Circuit upheld Judge Wright Allen's opinion regarding marriage equality. Denial of *Bostic's* review ushered in equality throughout the Fourth Circuit.<sup>260</sup>

#### IV. Lessons from Marriage Equality Initiatives

Only Maryland lawmakers and voters implemented marriage equality. In the other states, equality advocates convinced jurists that the Fourteenth Amendment granted: (1) same-sex couples a fundamental right to marry, and (2) courts power to invalidate violative laws.<sup>261</sup> This suggests that the public supported equality less there, which might impede effectuation.<sup>262</sup> Legislation, such as the North Carolina bathroom ban, which mandated that individuals use the restroom that corresponded with the gender

Va. 2017).

259. See *Brookover v. Gilmer Cty.*, No. 1:2017-CV-00057 (N.D. W. Va. 2017) (ruling in favor of the lesbian couple); Rachel Chason, *Lesbians Win \$10,000 Judgment Against County Clerk for Calling Them an 'Abomination'*, WASH. POST (Aug. 31, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/08/31/lesbians-win-10000-judgment-against-county-clerk-for-calling-them-an-abomination/?utm\\_term=.a28a491dc93c](https://www.washingtonpost.com/news/morning-mix/wp/2017/08/31/lesbians-win-10000-judgment-against-county-clerk-for-calling-them-an-abomination/?utm_term=.a28a491dc93c) (last visited Dec. 5, 2018) (“[The] Deputy Clerk . . . slammed the paperwork on the desk, . . . called the couple an ‘abomination’ in a rant that continued for several minutes[,] . . . [and] shout[ed] that it was [her] ‘religious right’ to harass the couple.”) (on file with the Washington and Lee Law Review).

260. Marriage equality effectively came because district judges of three states ruled that *Bostic* bound them. See *supra* notes 136–197 and accompanying text (district judges, ruling in three states that *Bostic* bound them).

261. These advocates contended that the Fourteenth Amendment trumped the powerful state interests reflected in marriage bans. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); *supra* notes 82–86, 144 and accompanying text.

262. But see Andrew Flores, *Trends in Public Support for Same-Sex Marriage*, WILLIAMS INST. (Apr. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trends-in-Public-Support-for-Same-Sex-Marriage-2004-2014.pdf> (demonstrating though a comprehensive statistical study that “support for same-sex marriage has increased at a rapid pace in every state in the past decade”).

listed on their birth certificate, may suggest potential lack of public support for LGBT people generally.<sup>263</sup> Numerous Trump Administration initiatives might concomitantly have undermined this public support. For example, the Trump Justice Department refused to continue pursuing federal litigation which the Obama Justice Department originally filed challenging the state's bathroom law.<sup>264</sup> Officials claimed that they were dropping the suit because the legislature had repealed the bathroom law, but LGBT individuals and groups strongly criticized this idea because they believed the repeal was worse than the original law.<sup>265</sup>

The DOJ and the Department of Education have similarly rescinded Obama Administration guidance on bathroom use in public secondary schools which prescribed current gender identity as the touchstone, because the departments claimed that it lacked legal justification.<sup>266</sup> This aligned with the plaintiffs who

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263. See H.B. 2, 2d Extra Sess. 2016 (N.C. 2016) (nullifying all local LGBT nondiscrimination ordinances). *But see* H.B. 142, 2017 Sess. (N.C. 2017) (repealing and replacing the "bathroom ban"); Mark Joseph Stern, *The HB2 "Repeal" Bill is an Unmitigated Disaster for LGBTQ Rights and North Carolina*, SLATE (Mar. 30, 2017, 12:25 PM), <https://slate.com/human-interest/2017/03/hb2-repeal-bill-is-a-disaster-for-north-carolina-and-lgbtq-rights.html> (last visited Dec. 5, 2018) (criticizing the repeal as "an unmitigated disaster for LGBTQ rights" because it "forbids 'state agencies, boards, offices, departments, institutions,' and 'branches of government,' including public universities, from regulating 'access to multiple occupancy restrooms, showers, or changing facilities'") (on file with the Washington and Lee Law Review).

264. Mark Berman, *Justice Dept. Drops Federal Lawsuit over North Carolina's 'Bathroom Bill'*, WASH. POST (Apr. 14, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/?utm\\_term=.1b43b194c4ea](https://www.washingtonpost.com/news/post-nation/wp/2017/04/14/justice-dept-drops-federal-lawsuit-over-north-carolinas-bathroom-bill/?utm_term=.1b43b194c4ea) (last visited Dec. 5, 2018) (contrasting the Obama and Trump Administrations' positions on the "bathroom ban" litigation) (on file with the Washington and Lee Law Review).

265. *Id.*

266. See Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Just., Dear Colleague Letter on Transgender Students, Feb. 22, 2017, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (withdrawing an Obama-era guideline that Title IX requires access to sex-segregated facilities based on gender identity because the previous administration misinterpreted the civil rights law); see also Libby Bulinski, "Transgender Need Not Apply:" *How the Sessions Memo Threatens Essential Workplace Protections For Transgender Individuals*, 102 MINN. L. REV. DE NOVO (Nov. 12, 2017), <http://www.minnesotalawreview.org/2017/11/transgender-need>

challenged the earlier guidelines<sup>267</sup> and the defendant school board in *Grimm*.<sup>268</sup> The Trump Administration has analogously undermined Obama Administration efforts to support military service by transgender individuals, although numerous courts have rejected the government's efforts.<sup>269</sup>

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not-apply (last visited Dec. 5, 2018) (asserting that Sessions' reversal of workplace protections instituted by former Attorney General Eric Holder "limits Title VII's prohibition on sex discrimination by excluding discrimination based on gender identity") (on file with the Washington and Lee Law Review); Sari Horwitz & Spencer S. Hsu, *Sessions Ends Workplace Protections for Transgender People Under Civil Rights Act*, WASH. POST (Oct. 5, 2017), [http://wapo.st/2xY4yxt?tid=ss\\_tw&utm\\_term=.3611b3a71eae](http://wapo.st/2xY4yxt?tid=ss_tw&utm_term=.3611b3a71eae) (last visited Dec. 5, 2018) (reporting Sessions' revocation of policies that protected transgender workers from discrimination under federal law) (on file with the Washington and Lee Law Review).

267. See *Texas v. United States*, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016). Plaintiffs in *Texas* consisted of thirteen states and agencies who sued the Departments of Education, Justice, Labor, the Equal Employment Opportunity Commission, and various agency officials, challenging Defendants' assertions that "Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex." *Id.*; see also Liam Stack, *Trump Drops Defense of Obama Guidelines on Transgender Students*, N.Y. TIMES, Feb. 12, 2017, at A15 (describing the Trump administration as "ready to discard its obligation to protect all students").

268. *Grimm v. Gloucester Cty. Sch. Bd.*, 822 F. 3d 709 (4th Cir. 2016) (holding that the Obama-era regulation was entitled to deference), *dismissed as moot*, 137 S. Ct. 1239 (mem.) (2017). The transgender plaintiff in *Grimm* sued the board of his high school for violating the Obama-era Title IX regulation after it passed a policy banning him from the men's restroom. *Id.*; see also Stack, *supra* note 267 (discussing *Grimm*). DOJ also altered its position in the N.C. H.B. 2 case; *supra* note 264.

269. See *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017) (granting a preliminary injunction against the ban on transgender individuals in the military); *Stone v. Trump*, 280 F. Supp. 3d 747, 770 (D. Md. 2017) (granting a preliminary injunction *and* blocking the administration's prohibition on gender reassignment surgery for military service members), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018); see also Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. (Aug. 25, 2017) (preventing the accession of transgender individuals into military service and halting the use of DOD and DHS funds for sex-reassignment surgery); Helene Cooper, *Judge Lifts Transgender Restrictions In Military*, N.Y. TIMES, Dec. 11, 2017, at A16 (discussing the DOJ's reinstatement of Obama-era transgender military policies in response to the "barrage of lawsuits" following issuance of Trump's memorandum).

Fourth Circuit states' initiation of equality yielded pragmatic and symbolic impacts. A crucial practical effect is that thousands of same-sex couples and their families, notably the children whom the parents rear, experience less stigma, prejudice and humiliation and realize plentiful benefits which marriage offers.<sup>270</sup> Tangible advantages include economic gains and security, namely marriage's impacts on health care, taxation, and adoption of children. Less tangible are respect, legitimacy, emotional and psychological support, companionship, and recognition.<sup>271</sup>

Activities of legislative and executive branch officials and local government workers, notably clerks, influenced equality's positive reception once the Justices denied appeals. For instance, constructive efforts by Virginia and West Virginia Governors, Attorneys General and local officers to smoothly institute equality provided same-sex couples and their children many benefits, namely increased respect, decreased prejudice, and greater financial security.<sup>272</sup> The endeavors also promoted meaningful social change after the Court had recognized equality without the divisiveness, resistance and controversy attending implementation elsewhere.<sup>273</sup>

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270. *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014). Although marriage equality will not immediately change the negative views that many Americans hold of gay couples, the legitimization of same-sex marriage "may convert some of [its] opponents . . . by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples." *Id.*

271. See Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J. L. & SEXUALITY 1 (2016) (celebrating *Obergefell's* role in "relieving gay Americans and their families from the material costs, insecurity, and stigma of second class citizenship"); Suzanne Goldberg, *Reflections on Obergefell and the Family-Recognition Framework's Continuing Value*, 84 UMKC L. REV. 707, 709 (2016) ("[E]qual access to [marriage] for same-sex couples has propelled increased acceptance of gay people into the fabric of American society.").

272. See cases cited *supra* notes 245, 257 and accompanying text. As a result of these efforts, same-sex couples and their children were welcomed as fuller community participants.

273. Alabama, Kentucky, and Texas experienced notable controversy following the Court's recognition of marriage equality. See sources cited *infra* notes 312, 314. North and South Carolina officials continued resisting *Bostic's* mandate after certiorari's denial by pursuing fruitless appeals that wasted resources, perhaps fueling division. See discussion *supra* notes 136–176 and

The marriage equality initiatives also proffered critical symbolic effects. The Fourth Circuit jurisdictions have been defendants in many pathbreaking social policy cases since the 1940s. Illustrative was litigation pursued to end segregated public facilities,<sup>274</sup> voting strictures<sup>275</sup> and interracial marriage bans.<sup>276</sup> The precedents' citation by Judges Floyd and Wright Allen and other district courts showed their appreciation of equality's compelling symbolic value.<sup>277</sup>

Insofar as equality proponents relied on a national litigation strategy, the prior analysis suggests that the Fourth Circuit was important to this effort. A Pew Research Center study on attitudes of people on same-sex marriage across the country indicates that the South Central region (AL, AR, KY, LA, MS, OK, TN, TX) appears less hospitable to equality than other regions; perhaps that is why equality proponents may have viewed the Upper South (which includes the Fourth Circuit) as comparatively open to

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accompanying text.

274. South Carolina and Virginia suits served as companion cases to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Other cases addressed gender segregation in higher education and racial segregation in public accommodations. *See, e.g.*, *U.S. v. Virginia*, 518 U.S. 515 (1996) (requiring VMI, a Virginia military college, to admit women in accordance with the Constitution's Equal Protection Clause); *Maryland v. Bell*, 378 U.S. 226 (1964) (remanding without assessing the merits of whether private actions of segregation enforced by state courts constituted a state action which violated the Equal Protection Clause). *See generally* RICHARD KLUGER, *SIMPLE JUSTICE* (1976).

275. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (banning the discriminatory use of poll taxes in state elections under the Equal Protection Clause); *see also* David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375 (2011) (discussing the minimal impact of the Twenty-Fourth Amendment on American law, notably in comparison with Supreme Court precedents such as *Harper* that struck down poll taxes).

276. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that miscegenation statutes adopted by Virginia to prevent marriages between persons solely on the basis of racial classification violate Equal Protection and Due Process Clauses of Fourteenth Amendment); *see* Christopher Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077 (2014). “[F]ollowing the logic of *Loving*, same-sex marriage bans necessarily classify based on gender and, thus, gender-specific marriage laws should receive heightened scrutiny” and same-sex marriage bans should be held unconstitutional. *Id.* at 1077–78; *see also supra* notes 31, 77.

277. *See, e.g., supra* notes 31, 77, 142 and accompanying text.

equality's improvement.<sup>278</sup> For example, Virginia is the northernmost southern jurisdiction, rather centrist politically and within the moderate Fourth Circuit and was the defendant in numerous landmark suits.<sup>279</sup> The concepts explicate why *Bostic* was an initial post-*Windsor* marriage equality case, which ended before additional Fourth Circuit district litigation, and was integral to the national equality initiatives and why Virginia was the first southern state where a court recognized equality.

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278. The Northeast and West Coast appeared receptive. *Same-Sex Marriage Detailed Tables*, PEW RESEARCH CENTER (June 8, 2015), <http://www.people-press.org/2015/06/08/same-sex-marriage-detailed-tables/> (last visited Dec. 5, 2018) (showing South Central region as having a 54% net opposition to same-sex marriage, but Middle Atlantic (including MD) and the South Atlantic (including NC, SC, VA, and WV) having an average of 36.5% net opposition) (on file with the Washington and Lee Law Review).

279. See *supra* notes 274–275. Virginia is the only southern state that Hillary Clinton won. See also Micah Cohen, *In Virginia, It's Tradition Versus Change*, FIVETHIRTYEIGHT, N.Y. TIMES (Nov. 4, 2012), <https://fivethirtyeight.blogs.nytimes.com/2012/11/04/in-virginia-its-tradition-versus-change/> (last visited Dec. 5, 2018) (observing that Virginia has been considered a politically centrist battleground state since the 2008 election, when Obama became the first Democrat to carry Virginia since 1964 due to the state's shifting political climate, increasing urbanization, and changing demographics) (on file with the Washington and Lee Law Review); Reid Wilson et al., *How the New South Became a Swing Region*, HILL (Aug. 13, 2017, 7:31 AM), <http://thehill.com/homenews/state-watch/346270-how-the-new-south-became-a-swing-region> (last visited Dec. 5, 2018) (declaring that Virginia and North Carolina, both Fourth Circuit states, are now the “New South” where changing demographics in formerly conservative districts have resulted in more liberal election outcomes in recent years) (on file with the Washington and Lee Law Review); Ann Marinow, *There's a Word That No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), [https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08\\_story.html?utm\\_term=.11bde3992c8f](https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08_story.html?utm_term=.11bde3992c8f) (last visited Dec. 5, 2018) (“The U.S. Court of Appeals for the 4th Circuit, a Richmond-based venue the [Trump] administration might once have found reliably hospitable, now has a higher proportion of judges tapped by Democrats than most of the nation's 13 circuit courts.”) (on file with the Washington and Lee Law Review); Carl Tobias, *After Ruling on Trump's Travel Ban, All Eyes Are on 4th Circuit*, WASH. POST (June 2, 2017), [https://www.washingtonpost.com/opinions/after-a-ruling-on-trumps-travel-ban-all-eyes-are-on-the-4th-circuit/2017/06/02/b7a555f2-4545-11e7-bcde-624ad94170ab\\_story.html?utm\\_term=.3dc96339f013](https://www.washingtonpost.com/opinions/after-a-ruling-on-trumps-travel-ban-all-eyes-are-on-the-4th-circuit/2017/06/02/b7a555f2-4545-11e7-bcde-624ad94170ab_story.html?utm_term=.3dc96339f013) (last visited Dec. 5, 2018) (discussing the Fourth Circuit's transition from ideologically conservative to moderate) (on file with the Washington and Lee Law Review).



Observers ascribed marriage equality to certain “activist judges,”<sup>280</sup> but this lacks persuasiveness. Those invalidating bans nationally resemble Fourth Circuit appellate and district jurists, who ruled that bars lacked constitutionality.<sup>281</sup> Across the United States, more judges appointed by Democratic than Republican Presidents rejected bans, and President Barack Obama tapped some, especially in the Fourth Circuit.<sup>282</sup> However, notable GOP appointees who struck down bars were Circuit Judge Richard Posner and District Judges Bernard Friedman, John Heyburn and John Jones.<sup>283</sup> President George W. Bush confirmed Judges Floyd

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280. See Ryan Anderson, *Judicial Activism From the Court on Marriage: Here's How to Respond*, NAT'L REV. (June 26, 2015, 9:00 PM), <https://www.nationalreview.com/2015/06/gay-marriage-decision-conservative-response-ryan-t-anderson/> (last visited Dec. 5, 2018) (insisting that it was inappropriate for the Court to mandate marriage equality in all fifty states) (on file with the Washington and Lee Law Review); Greg Hitt & Jacob M. Schlesinger, *Bush Supports Constitutional Ban on Gay Marriage*, WALL STREET J., <https://www.wsj.com/articles/SB107763526982637731> (last updated Feb. 25, 2004, 1:21 PM) (last visited Dec. 5, 2018) (describing President George W. Bush's support for a constitutional amendment banning same-sex marriage in order to prevent the issue from reaching “activist judges”) (on file with the Washington and Lee Law Review).

281. Robert Barnes, *From a Diverse Group of Judges, a Unanimous Opinion on Same-Sex Marriage*, WASH. POST, May 26, 2014, at A1 (“[T]he federal judges who have supplied an unbroken wave of victories across the country to supporters of same-sex marriage are more diverse than their rulings would suggest: white and black, gay and straight, nominated by Democrats (most of them) and chosen by Republicans (a few of them).”); see also AFJ, *supra* note 10 (describing the demographics of the federal judges ruling on marriage equality).

282. See, e.g., *Bradacs v. Haley*, 58 F. Supp. 3d 514, 520 (D.S.C. 2014) (Judge Childs) (holding same-sex marriage bans violated due process and equal protection); *Gen. Synod of the United Church of Christ v. Resinger*, 12 F. Supp. 3d 790 (W.D.N.C. 2014) (Judge Cogburn) (same); *Condon v. Haley*, 21 F. Supp. 3d 572 (D.S.C. 2014) (Judge Gergel) (same).

283. See *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (Judge Friedman); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014) (Judge Heyburn); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (Judge Jones); *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014); see also Richard A. Posner, *Eighteen Years On: A Re-Review—The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, 125 YALE L.J. 533, 541 (2015) (explaining his reason for altering his opinion on same-sex marriage bans); Adam Liptak, *An Exit Interview with a Judicial Firebrawl*, N.Y. TIMES, Sept. 12, 2017, at A18 (describing Posner's shifting ideology).

and Osteen to districts and Judge Gregory to the court of appeals.<sup>284</sup>

In sum, concerted endeavors by many national, state, and local entities; government officials; and citizens individually and synergistically brought marriage equality to the Fourth Circuit. Most jurisdictions and localities within the court and the United States have appeared receptive to equality, yet others have not. Thus, the last Part tenders future suggestions.

## V. Suggestions for the Future

### A. Fourth Circuit States

The Fourth Circuit jurisdictions need to fully institute *Obergefell's* mandate by ensuring identical treatment between same-sex and heterosexual couples and their families. State and local officers—encompassing legislators, Governors, Attorneys General and those who furnish licenses and perform marriages—should initiate this. The early implementation efforts appeared constructive, but officials across the circuit must redouble their work to actually ensure that the promise of comprehensive marriage equality becomes a reality.<sup>285</sup>

State and local officers may want to collect, inspect, and synthesize empirical data on whether same-sex couples have experienced problems securing licenses or marriages and whether governments have infringed the religious freedom of employees,

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284. See *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 697 (M.D.N.C. 2014), *objections overruled*, 14 F. Supp. 3d 699 (M.D.N.C. 2014); Dale Carpenter, *Fourth Circuit Strikes Down Virginia Ban on Same-Sex Marriage*, WASH. POST (July 28, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/28/fourth-circuit-strikes-down-virginia-ban-on-same-sex-marriage/?utm\\_term=.ecd679f2fe34](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/28/fourth-circuit-strikes-down-virginia-ban-on-same-sex-marriage/?utm_term=.ecd679f2fe34) (last visited Dec. 5, 2018) (Judge Henry Floyd was an Obama Fourth Circuit appointee, but previously a George W. Bush choice for the district court; Judge Roger Gregory was initially a Clinton nominee, but was re-nominated and confirmed by George W. Bush) (on file with the Washington and Lee Law Review).

285. See *supra* note 240 and accompanying text. Because Maryland adopted marriage equality both earlier than other jurisdictions and by popular vote, its track record of positive steps towards implementation may serve as a model for other states.

who issue licenses or conduct marriages, and private wedding services providers. Should evaluation reveal difficulties, they must institute solutions which protect marriage equality *and* religious liberty.<sup>286</sup> Some in the private sector have litigated this issue,<sup>287</sup> as seen most recently in the *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>288</sup> opinion, which leaves unclear exactly how the Supreme Court will ultimately resolve the question.<sup>289</sup> In the case, the Justices ruled in favor of a baker who refused to make a same-sex couple's wedding cake, but they did so on narrow grounds, deciding that the Colorado Civil Rights Commission had shown anti-religious bias during its initial consideration of the case.<sup>290</sup>

The Court did not clearly resolve the issue that the parties were seeking to have decided, essentially avoiding the question

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286. The media find little evidence of problems. See Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014) (discussing concerns surrounding marriage equality implementation and offering solutions, while observing that protecting the religious liberties of those who oppose same-sex marriage has proved vital to successful implementation). However, the Supreme Court opinion in the *Masterpiece Cakeshop* case very publicly highlighted this issue. For discussion of that opinion, see *infra* notes 287–295 and accompanying text. Connecticut carves out an exemption for “religious organization[s],” which may “refuse to ‘provide services [or] accommodations . . . to an individual if the request for such is related to the solemnization or celebration’ of *any* marriage—for example, by hosting [a] wedding reception—when doing so would violate their religious tenets.” Wilson, *supra*, at 1187. See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY (Robin Fretwell Wilson et al., eds. 2008).

287. See *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (mem.) (granting judgment in favor of a gay couple who sued a Washington florist that refused to provide flowers for their wedding; vacated and remanded in light of *Masterpiece*); see also Lynn Thompson, *Richland Florist Discriminated Against Gay Couple by Refusing Service, State Supreme Court Rules*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/northwest/richland-florist-discriminated-against-gay-couple-for-refusing-service-states-highest-court-rules/> (last updated Feb. 16, 2017, 4:21 PM) (last visited Dec. 5, 2018) (describing *Arlene’s Flowers*) (on file with the Washington and Lee Law Review).

288. 138 S. Ct. 1719 (2018).

289. See *id.* at 1719 (leaving unresolved the question of whether private businesses can refuse to provide certain services to LGBT individuals based on a religious objection).

290. *Id.* at 1724.

whether the baker had engaged in LGBT discrimination.<sup>291</sup> The Court neither decided nor explicitly discussed the issue of whether the First Amendment could or would trump marriage equality that *Obergefell* recognized.<sup>292</sup> The majority opinion seemingly intimated that a service provider's sincere religious beliefs might have to yield to the state's interest in protecting same-sex couples' rights, but it left the question's definitive resolution for another day and another case.<sup>293</sup> This lack of definitiveness means that future litigants will seek to have the Supreme Court resolve the issue.<sup>294</sup> Litigants will now pursue cases that may require lower courts to decipher what *Masterpiece Cakeshop* means for marriage equality.<sup>295</sup> Lower court judges who confront this question should

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291. Garrett Epps, *Justice Kennedy's Masterpiece Ruling*, ATLANTIC (June 4, 2018), <https://www.theatlantic.com/politics/archive/2018/06/the-court-slices-a-narrow-ruling-out-of-masterpiece-cakeshop/561986/> (last visited Dec. 5, 2018) (“[A]fter prolonged labor, on Monday the Court brought forth what can only generously be called a mouse.”) (on file with the Washington and Lee Law Review).

292. See *Masterpiece Cakeshop*, 138 S. Ct. at 1740 (Thomas, J., concurring) (“The Court does not address this [free-speech] claim because it has some uncertainties about the record . . . . Specifically, the parties dispute whether [the baker] refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one).”) (emphases in original).

293. See *id.* at 1723–24 (“Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach.”); see also Amy Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-Sex-Wedding-Cake Case*, SCOTUSBLOG.COM (June 4, 2018, 12:04 PM), <http://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/> (last visited Dec. 5, 2018) (“But the critical question of when and how Phillips’ right to exercise his religion can be limited had to be determined, Kennedy emphasized, in a proceeding that was not tainted by hostility to religion.”) (on file with the Washington and Lee Law Review).

294. See, e.g., Eugene Volokh, *The Masterpiece Cakeshop Decision Leaves Almost All the Big Questions Unanswered*, REASON (June 4, 2018, 10:49 AM), <https://reason.com/volokh/2018/06/04/the-masterpiece-cakeshop-decision-leaves> (last visited Dec. 5, 2018) (observing that the decision answered none of the obviously raised questions in the case including whether bakers have a First Amendment right to refuse to bake cakes for same-sex weddings or cakes that include text or symbolism that the bakers disapprove) (on file with the Washington and Lee Law Review).

295. For example, on June 25, 2018, the Supreme Court vacated the Washington Supreme Court’s ruling that a flower shop owner discriminated on

apply *Obergefell* to safeguard the fundamental liberties of same-sex couples that the Fourteenth Amendment protects, perhaps eschewing a strict constitutional test, and perhaps leave *Masterpiece Cakeshop* to stand for the narrow, fact-specific proposition that it articulated.<sup>296</sup> Courts should attempt to reconcile the conflicting interests of the state in preventing discrimination based on sexual orientation and protecting the individual liberties embodied in the First Amendment.<sup>297</sup>

North Carolina exemplifies religious freedom concerns.<sup>298</sup> Its 2015 law permits registers of deeds and magistrates to seek exemptions from issuing licenses and performing marriages based

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the basis of sexual orientation by refusing to provide custom floral arrangements for same-sex wedding in violation of Washington's prohibition on discrimination in public accommodations and remanded it to the court for reexamination in light of *Masterpiece Cakeshop*. See *Arlene's Flowers Inc. v. Washington*, 389 P.3d 543 (Wash. 2017), *vacated by*, 138 S. Ct. 2671 (2018). The Washington Supreme Court has yet to decide, but its ruling may provide valuable insight into how courts will address the *Masterpiece Cakeshop* decision.

296. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) ("Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.'"); Lyle Denniston, *Opinion Analysis: Marriage Now Open to Same-Sex Couples*, SCOTUSBLOG (June 26, 2015, 3:01 PM), <http://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/> (last visited Dec. 5, 2018) ("Justice Kennedy did not spell out what constitutional test he was applying to a claim of gay equality. [He] simply discussed . . . precedents, and his own recitation of notions of liberty, without saying what burden those challenging the ban had to satisfy before winning the right to equality.") (on file with the Washington and Lee Law Review).

297. See David Bernstein, *Trends in First Amendment Jurisprudence: Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 85 (2001) ("The Supreme Court finally acknowledged in the 1980s that antidiscrimination laws could potentially impinge on First Amendment rights.").

298. See Wilson, *supra* note 286, at 1237 (discussing that North Carolina is a state where opponents to same-sex marriage are "reasonably assured of being able to push back same-sex marriage if the question is left to the political process"); Erik Eckholm, *Conservative Lawmakers and Religious Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seek-exemptions-after-same-sex-ruling.html> (last visited Dec. 5, 2018) ("In North Carolina, where several county magistrates resigned last fall rather than abet same-sex marriages, a law has been passed to allow such refusals.") (on file with the Washington and Lee Law Review); Campbell, *supra* note 253 (allowing state court officials to refuse to perform marriages for same-sex couples).

on “sincerely held religious objection.”<sup>299</sup> The measure seemingly accommodates religious liberty and the marriage right, but its effectuation needs to protect the rights of all.<sup>300</sup>

Legislators and Governors must fully review constitutional, statutory, and regulatory commands and change laws that preclude same-sex couples’ marriage equality.<sup>301</sup> For instance, Virginia departments with the Attorney General closely scrutinized rules, modifying all that denied equality.<sup>302</sup> However, GOP lawmakers had insisted on waiting for *Obergefell*’s resolution but have not moved since that time, and other Fourth Circuit jurisdictions directly evince analogous inactivity.<sup>303</sup> Thus, each

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299. See *supra* note 251 and accompanying text (describing North Carolina legislation as well as state court decisions that have made these exemptions possible). Other states which consider adopting similar laws must scrutinize North Carolina’s experience to ensure that they safeguard all persons’ rights.

300. Equality advocates contested it. See Linda Greenhouse, *Drawing the Line Between Civil and Religious Rights*, N.Y. TIMES (Sept. 17, 2015), <https://www.nytimes.com/2015/09/17/opinion/drawing-the-line-between-civil-and-religious-rights.html> (last visited Dec. 5, 2018) (“The Roberts court has tilted quite far in the direction of free exercise . . . . Inevitably, if history is any guide, a tipping point will come that causes society to push back and recalibrate the balance.”) (on file with the Washington and Lee Law Review).

301. See Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE L.J. ONLINE 25, 45 (2015) (“In all jurisdictions, state and local officials—legislators, Governors, Attorneys General, and personnel who conduct weddings and issue marriage licenses—must fully implement *Obergefell*’s mandate so that same-sex couples and their families, particularly these couples’ children, receive the same treatment as opposite-sex couples and their families.”).

302. See *supra* note 243 and accompanying text (articulating strong opposition to denial of equality to same-sex couples).

303. See Jenna Portnoy, *Same-Sex Marriage is Legal in Virginia, But Maneuvering Rages on in Richmond*, WASH. POST (Jan. 12, 2015), [https://www.washingtonpost.com/local/virginia-politics/same-sex-marriage-is-legal-in-virginia-but-maneuvering-rages-on-in-richmond/2015/01/12/61a3057c-9530-11e4-927a-4fa2638cd1b0\\_story.html?noredirect=on&utm\\_term=.1989b47c24b8](https://www.washingtonpost.com/local/virginia-politics/same-sex-marriage-is-legal-in-virginia-but-maneuvering-rages-on-in-richmond/2015/01/12/61a3057c-9530-11e4-927a-4fa2638cd1b0_story.html?noredirect=on&utm_term=.1989b47c24b8) (last visited Dec. 5, 2018) (“With gay marriage in particular, polls show that the overall electorate slightly favors it. Yet Republicans are unlikely to budge until the U.S. Supreme Court defines marriage once and for all.”) (on file with the Washington and Lee Law Review); see also Garrett Epps, *Marriage Equality Without Equivocation*, ATLANTIC (Jan. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/01/marriage-equality-without-equivocation/384999/> (last visited Dec. 5, 2018) (“If the Supreme Court, as seems likely, finds that same-sex couples have an equal right to marry, those who stand in the courthouse doors will certainly lose, and possibly pay.”) (on file with the

ought to meticulously consider legal provisos while altering ones that confine equality.<sup>304</sup>

All state courts should also be responsive to cases filed by people who are in or want to enter or leave same-sex marriages.<sup>305</sup> For example, judges could generally address LGBT persons and couples similarly to heterosexual individuals and partners when resolving adoption, divorce and custody litigation.<sup>306</sup> Maryland and

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Washington and Lee Law Review); Jenna Portnoy, *Va. GOP Leadership Calls for Studying Code Change After Gay Marriage Ruling*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/local/virginia-politics/va-republican-leadership-calls-for-code-change-after-gay-marriage-ruling/2015/06/26/65ca4e5a-1c15-11e5-bd7f-4611a60dd8e5\\_story.html?utm\\_term=.1999d52864c4](https://www.washingtonpost.com/local/virginia-politics/va-republican-leadership-calls-for-code-change-after-gay-marriage-ruling/2015/06/26/65ca4e5a-1c15-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.1999d52864c4) (last visited Dec. 5, 2018) (“During this year’s General Assembly session several lawmakers filed bills that would have removed from the state code references to ‘husband and wife’ in exchange for the gender-neutral term ‘spouse.’”) (on file with the Washington and Lee Law Review). Banning same-sex couple adoptions is another example. See VA. CODE ANN. § 63.2-1201 (2017) (making clear that adoption by couples should be made by a husband and wife).

304. Many states have acted slowly. See, e.g., Alan Blinder, *In Alabama, One County Exits the Marriage Business*, N.Y. TIMES (June 26, 2015, 12:16 PM), <https://www.nytimes.com/live/supreme-court-rulings/in-alabama-one-county-exits-the-marriage-business/> (last visited Dec. 5, 2018) (“[A]n Alabama probate judge said that his office would no longer issue marriage licenses to anyone.”) (on file with the Washington and Lee Law Review); Erik Eckholm & Manny Fernandez, *After Same-Sex Marriage Ruling, Southern States Fall in Line*, N.Y. TIMES (June 29, 2015), <https://www.nytimes.com/2015/06/30/us/after-same-sex-marriage-ruling-southern-states-fall-in-line.html> (last visited Dec. 5, 2018) (“Louisiana was the last holdout, the only state where no same-sex licenses were issued on Friday after the Supreme Court ruled that gay men and lesbians had a constitutional right to marry.”) (on file with the Washington and Lee Law Review); Michael Lavers, *Va. Senate Committee Tables Marriage Ban Repeal Bill*, WASH. BLADE (Jan. 16, 2017, 11:33 PM), <http://www.washingtonblade.com/2017/01/16/va-senate-committee-tables-sex-marriage-ban-repeal-bill/> (last visited Dec. 5, 2018) (“A Virginia Senate committee . . . tabled a bill that would have repealed state laws banning marriage and civil unions for same-sex couples.”) (on file with the Washington and Lee Law Review); Patricia Sullivan, *Va. Still Has Laws Banning Gay Marriage*, WASH. POST (July 29, 2016), [https://www.washingtonpost.com/local/virginia-politics/virginia-still-has-laws-banning-gay-marriage-should-that-matter/2016/07/28/44afec36-542a-11e6-b7de-dfe509430c39\\_story.html?utm\\_term=.914852664977](https://www.washingtonpost.com/local/virginia-politics/virginia-still-has-laws-banning-gay-marriage-should-that-matter/2016/07/28/44afec36-542a-11e6-b7de-dfe509430c39_story.html?utm_term=.914852664977) (last visited Dec. 5, 2018) (“[R]emoving marriage bans from the books is largely symbolic. But those who are trying to reverse the statutes say that the symbolism is deeply powerful.”) (on file with the Washington and Lee Law Review).

305. See *infra* note 307.

306. See *infra* note 307.

Virginia courts have analogously treated LGBT and heterosexual people and couples in addressing these kinds of questions.<sup>307</sup>

Certain states and many localities have not provided complete marriage equality or acted slowly.<sup>308</sup> They must ensure total equality by consulting efforts in Maryland, Wisconsin and other states that did so, as the Justices clearly ruled that equality is the law of the land.<sup>309</sup> The Fourth Circuit jurisdictions and localities which have yet to extend LGBT individuals full protection from orientation-based discrimination need to impose bans on that misbehavior in employment, housing, education and related critical fields, because the laws and marriage equality definitely reinforce one another.<sup>310</sup> State and local officials could base

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307. See, e.g., *Boswell v. Boswell*, 721 A.2d 662, 668 (Md. 1998) (treating the visitation of children by those in a non-marital relationship the same whether they are a same-sex couple or heterosexual); *Davenport v. Little-Bowser*, 611 S.E.2d 366, 371 (Va. 2005) (“[T]here is nothing in the statutory scheme that precludes recognition of same-sex couples as ‘adoptive parents.’”); see also *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1079 (S.D. Ind. 2016) (holding that *Obergefell* extended the same rights to same-sex married couples as opposite-sex married couples and those rights required the state to allow both female mothers to have their name on their child’s birth certificate); Dara Kam, *Fla. Settles Federal Birth Certificate Suit, Agrees to Recognize Same-Sex Married Parents*, MIAMI HERALD (Jan. 11, 2017, 4:05 PM), <https://www.miamiherald.com/news/local/community/gay-south-florida/article125929324.html> (last visited Dec. 5, 2018) (“Two years after gay marriage became legal in Florida, the state has agreed to settle a federal lawsuit over birth certificates issued to children born into same-sex marriages.”) (on file with the Washington and Lee Law Review).

308. Most are outside the Fourth Circuit. See sources cited *supra* note 304, *infra* note 316 (highlighting instances in Texas, Alabama, and Louisiana).

309. See *Cooper v. Aaron*, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring) (reaffirming “the decision that color alone cannot bar a child from a public school”); Kluger, *supra* note 273, at 754–55 (discussing the impact Warren Court decisions had on both racial and overall equality following the *Brown* decision). But see *supra* notes 262–268 and accompanying text (describing federal and state initiatives that could restrict LGBT individuals’ rights).

310. See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Dec. 5, 2018) (providing a comprehensive list of state legislation affecting LGBT rights) (on file with the Washington and Lee Law Review); *Map of Employment and Public Accommodations States*, LAMBDALEGAL, <http://www.lambdalegal.org/states-regions> (last visited Dec. 5, 2018) (displaying the legal protections available for LGBT people in each state concerning; workplace protection, public accommodations, and marriage and relationship protections) (on file with the Washington and Lee Law Review).



measures on practices of jurisdictions and subdivisions which proscribe this conduct or the Federal Equality Act that was introduced during 2015.<sup>311</sup> Those government-level endeavors are crucial, as the 114th Congress nominally analyzed this bill, which members reintroduced over 2017.<sup>312</sup>

If state or local officers do not prescribe equality or act slowly, litigants filing prior cases might reopen them and even urge federal judges to hold officials in contempt.<sup>313</sup> Most notorious was a Kentucky clerk whom a jurist found in contempt and sentenced to jail because she would not comply with his order to afford couples licenses.<sup>314</sup> If these parties eschew suit, others harmed by the failure to institute equality may consider litigation vindicating their rights.<sup>315</sup>

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311. See S.1858, 114th Cong. (2015) (prohibiting discrimination on the basis of sexual orientation); *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps> (last visited Dec. 5, 2018) (showing a state by state breakdown of laws and policies that affect the LGBT community) (on file with the Washington and Lee Law Review); William Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L. J. 91, 131 (2007) ("The nation's first legislation prohibiting discrimination on the basis of sexual orientation . . . was a major milestone in the history of lesbian and gay civil rights and deserves to be remembered as such."); N.Y. Women's Equality Act, A08070 (2017) (providing better protection of women's rights; including pay equality, and many other forms of discrimination).

312. See S.1006, 115th Cong. (2017) (reintroducing the bill prohibiting discrimination on the basis of sexual orientation).

313. See *infra* note 314 (providing an example of an official being held in contempt).

314. See *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015) (granting a preliminary injunction to keep the Rowan County Clerk from applying her "no marriage licenses" policy to same-sex couple marriage requests); Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html> (last visited Dec. 5, 2018) ("The clerk, Kim Davis of Rowan County, Ky., was ordered detained for contempt of court and later rejected a proposal to allow her deputies to process same-sex marriage licenses that could have prompted her release.") (on file with the Washington and Lee Law Review); Blinder, *supra* note 304 (discussing a local probate judge's resistance to issuing same-sex marriage licenses). Similar, but less notorious, is *Strawser v. Strange*, 190 F. Supp. 3d 1078, 1084 (S.D. Ala. 2016) (issuing a final judgment enjoining judges and other public officials in Alabama "from enforcing the Alabama laws that prohibit or fail to recognize same-sex marriage").

315. *Pending Marriage Equality Cases*, LAMBDALEGAL,

*B. United States*

Most jurisdictions and localities throughout the nation have appeared to implement full marriage equality, but others have not or moved slowly, phenomena evidenced in recent events.<sup>316</sup> The latter need to promptly ensure maximum equality by instituting actions like those found in states and localities that have expeditiously implemented total equality.<sup>317</sup> Fruitful insights can now be derived from Maryland and Virginia executive branch initiatives.<sup>318</sup> For example, the Maryland Attorney General issued a comprehensive opinion which afforded guidance regarding equality's institution, while his Virginia counterpart and state

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<https://www.lambdalegal.org/pending-marriage-equality-cases> (last visited Dec. 5, 2018) (providing data on pending marriage equality lawsuits across America) (on file with the Washington and Lee Law Review).

316. Texas's Supreme Court voided a local grant of spousal benefits to same-sex couples. *See* Pidgeon v. Turner, 538 S.W.3d 73 (Tex. 2017), *cert. denied*, 138 S. Ct. 505 (2017) (holding that on remand the trial court did not need to follow the Fifth Circuit Court of Appeals decision that found laws in Texas forbidding same-sex marriage unconstitutional); Mark Stern, *Texas May Hire Random Contractors to Issue Same-Sex Marriage Licenses Over the Phone*, SLATE (Apr. 17, 2017, 3:46 PM), [http://www.slate.com/blogs/outward/2017/04/17/texas\\_may\\_hire\\_contractors\\_to\\_perform\\_same\\_sex\\_marriages\\_over\\_the\\_phone.html](http://www.slate.com/blogs/outward/2017/04/17/texas_may_hire_contractors_to_perform_same_sex_marriages_over_the_phone.html) (last visited Dec. 5, 2018) ("[T]he Texas Senate approved a bill that would allow religious clerks to opt out of issuing marriage licenses to same-sex couples.") (on file with the Washington and Lee Law Review); Mike Ward, *Texas Senate OKs Bill Setting New Rules When Clerks Refuse to Issue Same-Sex Marriage Licenses*, HOUS. CHRON. (Apr. 11, 2017), <https://www.chron.com/news/politics/texas/article/Senate-approves-same-sex-marriage-license-change-11066029.php> (last visited Dec. 5, 2018) ("Legislation that would allow county clerks in Texas to decline to issue same-sex marriage licenses if it conflicts with their religious beliefs was tentatively approved Tuesday by the Texas Senate.") (on file with the Washington and Lee Law Review); *supra* note 257 (discussing West Virginia's concession to stop opposing same-sex couples who wished to be married).

317. *See* Haeyoun Park, *Gay Marriage State by State: From a Few States to the Whole Nation*, N.Y. TIMES (Mar. 4, 2015), <https://www.nytimes.com/interactive/2015/03/04/us/gay-marriage-state-by-state.html> (last visited Dec. 5, 2018) (displaying a timeline for when states passed legislation, or by court order, legalized same-sex marriage) (on file with the Washington and Lee Law Review).

318. *See supra* notes 240–260 and accompanying text (showing the process that Maryland, Virginia, and the state department took to achieve equality).

departments canvassed regulations and changed all that denied marriage equality.<sup>319</sup>

The Obama White House provided same-sex couples federal benefits in jurisdictions with bans expeditiously after their rejection.<sup>320</sup> President Donald Trump insisted that marriage equality was “settled” following his November victory, while a draft executive order provision that would have implemented exemptions for those with religious objections to same-sex marriage was omitted in the final version.<sup>321</sup> However, certain Justice Department positions on LGBT equality leave Trump’s views unclear.<sup>322</sup> Because state and local officers could be reluctant

319. *See id.*

320. *See* Dep’t of Justice, *Attorney General Lynch Announces Federal Marriage Benefits Available to Same-Sex Couples Nationwide* (July 9, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynch-announces-federal-marriage-benefits-available-same-sex-couples> (last visited Dec. 5, 2018) (“Attorney General Lynch announced today that federal marriage benefits will be available to same-sex couples nationwide following the Supreme Court ruling in *Obergefell v. Hodges*.”) (on file with the Washington and Lee Law Review).

321. *See* Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017) (omitting any mention of same-sex marriage rights); Jennifer Bendery & Elise Foley, *Trump Signs Religious Liberty Executive Order That Appears to Leave LGBTQ People Alone*, HUFFINGTON POST (May 5, 2017, 10:37 PM), [https://www.huffingtonpost.com/entry/trump-order-religious-freedom\\_us\\_590a812ee4b05c39768620b1](https://www.huffingtonpost.com/entry/trump-order-religious-freedom_us_590a812ee4b05c39768620b1) (last visited Dec. 5, 2018) (“It looks like LGBTQ rights advocates can breathe a sigh of relief after President Donald Trump on Thursday signed a religious liberty executive order that doesn’t directly target LGBTQ people . . . .”) (on file with the Washington and Lee Law Review); Eli Stokols, *Trump Says He’s ‘Fine’ With Legalization of Same-Sex Marriage*, POLITICO (Nov. 13, 2016, 7:00 PM), <https://www.politico.com/story/2016/11/donald-trump-same-sex-marriage-231310> (last visited Dec. 5, 2018) (“Donald Trump said he is ‘fine with’ same-sex marriage . . . .”) (on file with the Washington and Lee Law Review).

322. Horwitz & Hsu, *supra* note 266 (“In a memo to his U.S. attorney offices and agency heads, Sessions said that Title VII of the Civil Rights Act of 1964 does not protect transgender people from workplace discrimination by private employers and state and local governments.”); Jeremy Peters et. al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> (last visited Dec. 5, 2018) (“President Trump on Wednesday rescinded protections for transgender students that had allowed them to use bathrooms corresponding with their gender identity . . . .”) (on file with the Washington and Lee Law Review); Charlie Savage, *5 Transgender Service Members Sue Trump Over Military Ban*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/2017/08/09/us/politics/5-transgender-service-members->

to adopt provisos which do ensure full equality, Congress should carefully review proposals, including the Equality Act, that would amend the Civil Rights Act of 1964 to include sex, sexual orientation, and gender identity among the prohibited categories of discrimination.<sup>323</sup> Both houses must survey all fifty jurisdictions' protections and convene hearings respecting the issue, although the last two Congresses failed to seriously evaluate legislation, despite the ample need for a law's enactment.<sup>324</sup> Without Congress' leadership, plentiful states and localities may not prescribe total equality.

#### IV. Conclusion

Fourth Circuit jurisdictions helped institute marriage equality as the law of the land.<sup>325</sup> Judge Wright Allen's thorough opinion invalidating bans; Fourth Circuit affirmance; North Carolina, South Carolina and West Virginia district cases rejecting proscriptions; and *Obergefell* brought equality to the Fourth Circuit.<sup>326</sup> These initiatives enabled same-sex couples and their families, particularly children, to secure valuable advantages, which the jurisdictions had only bestowed on heterosexual couples.<sup>327</sup> Accordingly, states in the Fourth Circuit and

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sue-trump-over-military-ban.html?login=email&auth=login-email (last visited Dec. 5, 2018) ("The lawsuit was filed in response to Mr. Trump's ban abruptly announced last month on Twitter.") (on file with the Washington and Lee Law Review).

323. See H.R. 2282, 115th Cong. (2017) (introducing a bill in the House to amend the Civil Rights Act of 1964); S. 1006, 115th Cong. (2017) (introducing the same bill in the Senate). Maryland, Virginia, North Carolina, and South Carolina Representatives and Senators from Virginia and Maryland were cosponsors.

324. See *supra* note 311 (failing to seriously evaluate the bill because it never came to the House or Senate floor); German Lopez, *The Equality Act, the Most Comprehensive LGBTQ Rights Bill Ever, Explained*, VOX (Nov. 10, 2015, 6:00 PM), <https://www.vox.com/2015/7/23/9023611/equality-act-lgbt-rights> (last visited Dec. 5, 2018) (discussing the critical need for the bill) (on file with the Washington and Lee Law Review).

325. See *supra* note 37 (finding Virginia laws that barred same-sex marriages or the recognition of them from other jurisdictions unconstitutional).

326. See *id.* (invalidating Virginia bans on same-sex marriage); *supra* note 9 (listing cases that promoted these equalities).

327. See *e.g.*, *supra* note 307 (discussing examples such as adoptive rights and birth certificates that reflect both same-sex parent names).

throughout the United States which lack complete marriage equality need to promptly implement full equality.