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Carl Tobias
University of Richmond School of Law

MARRIAGE EQUALITY COMES TO VIRGINIA

Carl Tobias *

INTRODUCTION

Marriage equality is sweeping the United States. Across 2014, numerous federal circuit and district court judges throughout America invalidated state constitutional bans or legislative restrictions which proscribe same-sex marriage. Accordingly, it was predictable that Judge Wright Allen of the United States District Court for the Eastern District of Virginia would rule that Virginia's prohibitions were unconstitutional and enjoin their enforcement on February 13,[1] even as the jurist stayed her decision.[2] Marriage equality in Virginia comprises a significant legal issue and has telling effects on numerous people, but its status remained less than clear until recently. Marriage equality in the jurisdiction deserves analysis, which this piece undertakes.

Part I of this article chronicles marriage equality's rise and development nationally. It ascertains that challenges, which fostered the invalidation of marriage prohibitions that essentially govern nearly all jurisdictions, including Virginia, have triggered some controversy. Part II scrutinizes Judge Wright Allen's resolution of the Virginia litigation and the United States Court of Appeals for the Fourth Circuit determination, which affirmed her ruling. This portion finds that the district jurist comprehensively assessed the relevant legal and factual issues when striking down

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1. Bostic v. Rainey, 970 F. Supp. 2d 456, 483–85 (E.D. Va. 2014); *see* Robert Barnes, *Federal Judge Strikes Down Va. Ban on Gay Marriage*, WASH. POST (Feb. 14, 2014), http://www.washingtonpost.com/politics/federal-judge-strikes-down-va-ban-on-gay-marriage/2014/02/13/c65b7674-9528-11e3-83b9-1f024193bb84_story.html?hpid=z1.

2. Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014).

the proscription while the Fourth Circuit appropriately upheld her opinion. Part III then derives lessons from the story recounted because it ascertains that marriage equality in Virginia has clarified, even as the national landscape continues to be relatively unclear. Part IV proffers suggestions for the future.

I. A BRIEF HISTORY OF MARRIAGE EQUALITY

A. United States v. Windsor

The history of marriage equality warrants comparatively limited review in this article because others have thoroughly explored the background,[3] and the current situation is most important. The 2013 *United States v. Windsor* Supreme Court opinion[4] provoked the recent wave of marriage equality lawsuits, while that determination has concomitantly figured prominently in the rulings which numerous appellate and district court judges have authored invalidating the bans.[5] The litigation has apparently been organic, with challenges pursued in all of the states that prohibit same-sex marriage.[6]

The *Windsor* majority held that section three in the Defense of Marriage Act ("DOMA") violated the Fourteenth Amendment.[7] It was unclear about the proper level of scrutiny, but the majority seemed to deploy elevated, albeit less than strict, scrutiny.[8] The Court found insufficient justification for the imposition on dignity

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999); MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013); MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON (2014).

4. 570 U.S. __, 133 S. Ct. 2675 (2013).

5. *See* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 870–74 (2014).

6. The ACLU has pursued much litigation, but local individuals and counsel have filed a number of cases. David Boies and Theodore Olson assisted Virginia counsel in the Eastern District suit, while the ACLU filed the Western District case. Harris v. Rainey, 299 F.R.D. 486 (W.D. Va. 2014); *see* Robert Barnes, *Second Judge Ponders Virginia's Same-Sex Marriage Ban*, WASH. POST (Feb. 19, 2014), http://www.washingtonpost.com/politics/second-judge-ponders-virginias-same-sex-marriage-ban/2014/02/19/f930b3a6-9989-11e3-b931-0204122c514b_story.html.

7. *See* 570 U.S. at __, 133 S. Ct. at 2696; *see* Michael Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 140 (2013).

8. *See Windsor*, 570 U.S. at __, 133 S. Ct. at 2693–96; Franklin, *supra* note 5, at 872.

that DOMA exacted and believed the injury visited upon same-sex couples and their children was troubling.[9] While the majority failed to specifically mention state-level bans, it waxed eloquent about the value of federalism.[10] This treatment left unclear precisely what effect, if any, *Windsor* had on the state proscriptions, although marriage equality champions seized upon the opinion when attacking bans and courts relied on *Windsor* to invalidate prohibitions. In a dissenting opinion, Chief Justice Roberts expressly remarked that the question of state marriage laws' constitutionality was not before the Court,[11] while Justice Scalia agreed, but contended that the arguments employed when invalidating DOMA could similarly apply to state proscriptions.[12] On the same day, the Court did not reach the merits of an appeal that sought to invalidate California's ban, as a majority found the petitioners lacked standing to appeal.[13]

B. *The Federal Challenges to State Bans*

Twenty-seven district courts have fully invalidated prohibitions and several others have partially done so, but only Eastern District of Louisiana and District of Puerto Rico judges have found bans constitutional.[14] The Fourth, Seventh, Ninth, and Tenth Circuits have affirmed district court opinions, even as the Sixth Circuit reversed Kentucky, Michigan, Ohio, and Tennessee decisions striking down proscriptions in a case which the Justices agreed to hear on January 16, 2015.[15] However, appeals currently are pend-

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9. *See Windsor*, 570 U.S. at __, 133 S. Ct. at 2694–95.

10. *Id.*; *see infra* note 190 and accompanying text.

11. *Windsor*, 570 U.S. at __, 133 S. Ct. at 2696 (Roberts, C.J., dissenting); *see* Klarman, *supra* note 7, at 158.

12. *See Windsor*, 570 U.S. at __, 133 S. Ct. at 2697 (Scalia, J., dissenting); Franklin, *supra* note 5, at 870.

13. Hollingsworth v. Perry, 570 U.S. __, 133 S. Ct. 2652, 2668 (2013). *See generally* William N. Eskridge, Jr., *The Ninth Circuit's* Perry *Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (2012) (discussing the merits of *Perry* in the lower court where the Ninth Circuit struck down California's Proposition 8 on equal protection grounds), *available at* http://www.stanfordlawreview.org/online/perry-marriage-equality.

14. Conde-Vidal v. Garcia-Padilla, 2014 WL 5361987 at *11 (D.P.R. Oct. 21, 2014); Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014); *see* ALLIANCE FOR JUSTICE, FEDERAL CHALLENGES TO STATE SAME-SEX MARRIAGE BANS (2015), *available at* http://www.afj.org/reports/latest-updates-love-and-the-law.

15. Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); Baskin v. Bogan, 766

ing before the First, Fifth, Eighth, Ninth, and Eleventh Circuits.[16] The jurists who invalidated bans found that they violated due process or equal protection with most applying a form of heightened scrutiny.[17]

In December 2013, a Utah district judge issued the first opinion that rejected a ban.[18] The next month, an Oklahoma trial court jurist struck down the state's ban.[19] During February 2014, a Texas district court judge, as well as Judge Wright Allen of the Eastern District of Virginia, invalidated those jurisdictions' prohibitions.[20] The following month, a Michigan jurist deemed its ban unconstitutional.[21] In May, district courts in Idaho, Oregon, and Pennsylvania overturned the states' restrictions.[22] During June, Indiana and Wisconsin judges ascertained that the jurisdictions' bans were unconstitutional.[23] In July, Colorado and Kentucky jurists invalidated those states' prohibitions.[24] During August, a Florida judge found its ban violated the Constitution.[25] Throughout October, Alaska, Arizona, North Carolina, and Wyoming ju-

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F.3d 648, 656 (7th Cir. 2014), *cert. denied sub. nom.* Bogan v. Baskin, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-277); Latta v. Otter, 771 F.3d 456, 472–73 (9th Cir. 2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied sub. nom.* Smith v. Bishop, 135 S. Ct. 271 (U.S. Oct. 6, 2014) (No. 14-136). The Sixth Circuit consolidated the Kentucky, Michigan, Ohio, and Tennessee decisions in a case styled as *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). These decisions were *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2014), and *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014). The Supreme Court granted certiorari to each on January 16, 2015. Bourke v. Beshear, 135 S. Ct. 1041 (U.S. Jan. 16, 2015) (No. 14-574); DeBoer v. Snyder, 135 S. Ct. 1040 (U.S. Jan. 16, 2015) (No. 14-571); Obergefell v. Hodges, 135 S. Ct. 1039 (U.S. Jan. 16, 2015) (No. 14-556); Tanco v. Haslam, 135 S. Ct. 1040 (U.S. Jan. 16, 2015) (No. 14-562).

16. *See Conde-Vidal*, 2014 WL 5361987, at *10–11; Rosenbrahn v. Daugaard, No. 4:14-CV-04081-KES, 2015 WL 144567, at *11 (D.S.D. 2015); *supra* note 12; *infra* notes 18, 20, 25, 28 and accompanying text.

17. This article emphasizes the Fourth Circuit opinion. *See infra* Part II.B.

18. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013).

19. Bishop v. United States, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014).

20. De Leon v. Perry, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 483–84 (E.D. Va. 2014).

21. *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014).

22. *See* Latta v. Otter, 19 F. Supp. 3d 1054, 1060 (D. Idaho 2014); Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1133 (D. Or. 2014); Whitewood v. Wolf, 992 F. Supp. 2d 410, 415 (M.D. Pa. 2014). A magistrate judge ruled in the Idaho case.

23. Baskin v. Bogan, 12 F. Supp. 3d 1144, 1150 (S.D. Ind. 2014); Wolf v. Walker, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014).

24. *See* Burns v. Hickenlooper, 2014 WL 3634834, at *5 (D. Colo. July 23, 2014); Bourke v. Beshear, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014).

25. *See* Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014).

rists ruled the states' proscriptions unconstitutional.[26] In November, Arkansas, Kansas, Mississippi, Missouri, Montana, and South Carolina judges held bans invalid.[27] During January 2015, Alabama and South Dakota jurists struck down limitations, and in March, a Nebraska judge invalidated a ban.[28] A number of these decisions remain on appeal. For example, the Fifth Circuit heard oral arguments in the Louisiana, Mississippi, and Texas appeals on January 9,[29] Alabama and Florida appealed to the Eleventh Circuit,[30] and Idaho and Alaska sought en banc review from the Ninth Circuit.[31]

District judges in a few jurisdictions have partially invalidated bans, essentially requiring the states to recognize same-sex marriages valid in states where they occurred. The Indiana and Kentucky jurists broadened their earlier partial, into complete, inval-

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26. *See* Hamby v. Parnell, No. 3:14–cv–00089–TMB, 2014 WL 5089399, at *1 (D. Alaska Oct. 12, 2014); Majors v. Horne, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014); General Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014); Fisher-Borne v. Smith, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014); Guzzo v. Mead, No. 14–CV–200–SWS, 2014 WL 5317797, at *8 (D. Wyo. Oct. 17, 2014).

27. *See* Jernigan v. Crane, No. 4:13–cv–00410, 2014 WL 6685391, at *24 (E.D. Ark. Nov. 25, 2014); Marie v. Moser, No. 14–cv–02518–DDC/TJJ, 2014 WL 5598128, at *1 (D. Kan. Nov. 4, 2014); Campaign for S. Equal. v. Bryant, No. 3:14–CV–818–CWR–LRA, 2014 WL 6680570, at *2 (S.D. Miss. Nov. 25, 2014); Lawson v. Kelly, No. 14–0622–CV–W–ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); Rolando v. Fox, 23 F. Supp. 3d 1227, 1235 (D. Mont. 2014); Condon v. Haley, 21 F. Supp. 3d 572, 576 (D.S.C. 2014).

28. *See* Searcy v. Strange, No. 14–0208–CG–N, 2015 WL 328728, at *5 (S.D. Ala. Jan. 23, 2015); Waters v. Ricketts, No. 8:14CV356, 2015 WL 852603, at *16 (D. Neb. Mar. 2, 2015); Rosenbrahn v. Daugaard, No. 4:14–CV–04081–KES, 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015).

29. Lauren McGaughy, *Social Issues; Appeals Court Hearing Buoys Same-Sex Marriage Advocates*, HOUS. CHRON., Jan. 10, 2015, at A1; Andy Grimm, *Appeals Judges Ask More Questions from Gay Marriage Opponents at Hearing on Louisiana's Ban*, TIMES-PICAYUNE, http://www.nola.com/politics/index.ssf/2015/01/louisiana_gay_marriage_appeals.html (last updated Jan. 10, 2015, 1:09 AM); *see supra* notes 12, 18.

30. Katie Lepri, *Florida Begins Appeal of Decision Allowing Same-Sex Marriage*, MIAMI HERALD (Nov. 15, 2014), http://www.miamiherald.com/news/local/community/gay-south-florida/article3955145.html; 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/.

31. Chris Johnson, *Idaho, Alaska Seek Full Ninth Circuit Review of Marriage Rulings*, WASH. BLADE (Oct. 23, 2014), http://www.washingtonblade.com/2014/10/23/idaho-alaska-seek-full-ninth-circuit-review-marriage-rulings/; Pamela MacLean, *Alaska Loses Round in Gay Marriage Appeal*, TRIAL INSIDER (Nov. 19, 2014), http://www.trialinsider.com/?p=5321; *Larger 9th Circuit Panel Won't Rehear Idaho Gay Marriage Case*, IDAHO STATESMAN (Jan. 9, 2015), http://www.idahostatesman.com/2015/01/09/3582910/larger-9th-circuit-panel-wont.html.

idations.[32] A few Ohio and Tennessee district judges partially struck down the states' bans.[33]

Many district jurists have relied on similar reasoning, with a number citing earlier cases in other districts. They found that the bans violate the Fourteenth Amendment, more specifically its Due Process or Equal Protection Clause.[34] The judges were less uniform when deciding the level of scrutiny that should apply. Most employed various forms of heightened scrutiny, a few explicitly adopted strict scrutiny and some used the rational basis test.[35]

On October 6, 2014, the Justices denied seven petitions for certiorari seeking review of the Fourth, Seventh, and Tenth Circuit decisions.[36] This rejection governed similar prohibitions in other states of those circuits where the districts had not invalidated the bans. The Supreme Court's denial led government officials from Arizona, Colorado, Montana, Nevada, West Virginia, and Wyoming to permit marriages, even as their counterparts in Alaska, Kansas, North Carolina, and South Carolina persisted in defending these jurisdictions' restrictions.[37] Challenges have been filed

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32. Baskin v. Bogan, 983 F. Supp. 2d 1021, 1029 (S.D. Ind. 2014); Love v. Beshear, 989 F. Supp. 2d 536, 547 (W.D. Ky. 2014).

33. *See* ALLIANCE FOR JUSTICE, *supra* note 14; Amanda Holpuch, *Gay Marriage Is Legal in 32 States—But What About the Other 18?*, GUARDIAN (Oct. 27, 2014), http://www.theguardian.com/us-news/2014/oct/27/gay-marriage-legal-us-states.

34. The Fourth and Tenth Circuits used due process. The Seventh and Ninth used equal protection. *See supra* note 13.

35. The Seventh and Ninth Circuits used heightened scrutiny, and many judges found no rational basis for the bans. Baskin v. Bogan, 766 F.3d 648, 655–56 (7th Cir. 2014), *cert. denied sub. nom.* Bogan v. Baskin, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-277); Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014); *see also* Baskin v. Bogan, 12 F. Supp. 3d 1144, 1163 (S.D. Ind. 2014) (concluding that the Indiana "law fail[ed] rational basis review").

36. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014), *cert. denied sub. nom.* Bogan v. Baskin, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-277); Walker v. Wolf, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-278); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied sub. nom.* Smith v. Bishop, 135 S. Ct. 271 (U.S. Oct. 6, 2014) (No. 14-136); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied sub. nom.* Herbert v. Kitchen, 135 S. Ct. 265 (U.S. Oct. 6, 2014) (No. 14-124). The Supreme Court also separately denied certiorari to the consolidated cases in *Bostic v. Schaefer*. McQuigg v. Bostic, 135 S. Ct. 314 (U.S. Oct. 6, 2014) (No. 14-251); Rainey v. Bostic, 135 S. Ct. 286 (U.S. Oct. 6, 2014) (No. 14-153); *see* Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 7, 2014, at A1.

37. *See* ALLIANCE FOR JUSTICE, *supra* note 14; Holpuch, *supra* note 33.

with district courts in Georgia and North Dakota, but they are pending resolution.[38]

In short, the overwhelming majority of circuit and district court judges across the nation, who resolved the question of whether same-sex marriage bans violated the Fourteenth Amendment's Due Process or Equal Protection Clause, determined that the proscriptions were unconstitutional. A number of these jurists concomitantly applied some form of elevated scrutiny. The next section of this article evaluates the Virginia litigation by first analyzing Judge Wright Allen's district court treatment, which struck down Virginia's marriage laws, and then scrutinizing the Fourth Circuit opinion, which affirmed her decision.

II. THE VIRGINIA LITIGATION

In July 2013, plaintiffs challenged the Virginia prohibitions and the case was assigned to Judge Wright Allen.[39] She conducted preliminary hearings, set a briefing schedule, and held oral arguments on the legal issues that the challenge raised.[40] On February 14, the jurist issued a twenty-four-page opinion that invalidated the proscriptions and enjoined their application, but issued a stay pending the appeal's resolution.[41]

A. *The Eastern District Opinion*

1. Introduction

Judge Wright Allen commenced her opinion by invoking *Loving v. Virginia*, which sounded a theme particularly resonant for the Commonwealth. She began with a quotation from Mildred Loving:

> I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to

38. *See supra* note 34; Chris Johnson, *Court Halts Same-Sex Marriage Lawsuits in North Dakota*, WASH. BLADE (Jan. 20, 2015), *available at* www.washingtonblade.com/2015/01/20/court-halts-sex-marriage-lawsuits-north-dakota/.

39. Court Docket for Bostic v. McDonnell, No. 2:13-cv-00395AWA-LRL (E.D. Va. July 18, 2013).

40. *Id.*

41. Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014).

> marry. Government has no business imposing some people's religious beliefs over others. . . . I support the freedom to marry for all. That's what *Loving*, and loving are all about.[42]

The jurist observed that a spirited, controversial debate about who enjoys the right to marry in America was underway.[43] She found that the United States had pursued a difficult and sometimes "painful and poignant" journey to make and keep its citizens free, while the ultimate exercise of freedom is choice.[44] The judge stated that one of the courts' noblest endeavors is scrutinizing laws, which are "rooted in unlawful prejudice."[45] Judge Wright Allen stated the plaintiffs' claim that Virginia's proscriptions "on their freedom to choose to marry the person they love infringes on the rights to due process and equal protection."[46] She applied heightened scrutiny and determined that Virginia's laws banning same-sex marriages violated both the Due Process and Equal Protection Clauses in the Fourteenth Amendment.[47]

2. Preliminary Issues

In July 2013, plaintiffs filed their complaint under 42 U.S.C. § 1983 against the former Governor and Attorney General of Virginia, as well as the Clerk of the Norfolk Circuit Court, seeking declaratory and injunctive relief and a finding that Virginia's marriage laws violate due process and equal protection.[48] The jurist recounted that the General Assembly revised the Virginia Code in 1997 to prohibit "marriage between persons of the same sex" and render every same-sex marriage entered into elsewhere "void in all respects in Virginia."[49] During 2004, after successful challenges to same-sex marriage prohibitions in other states, the Assembly proposed a constitutional amendment to ban same-sex

42. *Id.* at 460 (citing Mildred Loving, Loving for All, Public Statement on the 40th Anniversary of *Loving v. Virginia* (June 12, 2007)). I use the terms Virginia and Commonwealth interchangeably in this article.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 461.

47. *Id.* at 473, 484.

48. *Id.* at 461. The primary focus here is VA. CONST. art. I, § 15-A, the ban voters approved in 2006. *See id.* at 461 n.2.

49. *Id.* at 464 (citing VA. CODE ANN. § 20-45.2 (2008)).

marriage, which the voters ratified in 2006.[50] In late January, defendant Janet Rainey, the State Registrar of Vital Records, together with the Attorney General, tendered a change in position, relinquishing her previous defense of the laws.[51]

3. Standard of Review

Judge Wright Allen next considered Federal Rule of Civil Procedure 56's articulation that "summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law,'" as defined and elaborated by two major 1986 Supreme Court opinions.[52] She then observed that a plaintiff who seeks a "preliminary injunction must establish a likelihood of success on the merits, that the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in the plaintiff's favor, and that an injunction is in the public interest."[53]

4. Analysis

a. Preliminary Challenges

The jurist considered the assertion that the plaintiffs lacked standing by evaluating the requirements of injury in fact, causal connection, and redressability while easily concluding that plaintiff met the strictures.[54] Judge Wright Allen next examined the defendants' claim that the Supreme Court's summary disposition, "for want of a substantial federal question," in the 1972 case of *Baker v. Nelson* precluded her exercise of jurisdiction.[55] She, as

50. *Id.* at 464–65. It also passed the Affirmation of Marriage Act, which proscribed civil unions, partnerships and other arrangements between same-sex couples and voided in Virginia those arrangements made in other states. *Id.* at 465 (citing VA. CODE ANN. § 20-45.3 (2008)).

51. *Id.* at 461–62 ("Intervenor-Defendant was granted leave to adopt Ms. Rainey's prior motion and briefs in support of that motion.").

52. *Id.* at 465–466 (quoting FED. R. CIV. P. 56(a)); *see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–50 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986)).

53. Bostic v. Rainey, 970 F. Supp. 2d 456, 466 (E.D. Va. 2014) (citation omitted).

54. *Id.* at 466–68.

55. *Id.* at 468–70 (citing Baker v. Nelson, 409 U.S. 810, 810 (1972)).

many other judges deciding marriage equality lawsuits, concluded that "doctrinal developments since 1971 compell[ed] the conclusion that *Baker* is no longer binding."[56]

b. Constitutional Challenges

i. Due Process Clause

The judge initially observed that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."[57] She declared "there can be no serious doubt that in America the right to marry is a rigorously protected fundamental right[, as the Court] has recognized repeatedly that marriage is a fundamental right protected by both the Due Process and Equal Protection Clauses."[58] The jurist elaborated that the "right to marry is inseparable from our rights to privacy and intimate association," reciting the paean to "marriage's noble purposes" in the landmark Supreme Court *Griswold v. Connecticut* opinion.[59] She then considered, and summarily rejected, the assertion that plaintiffs sought to "create and exercise a new[] right" because the couples were asking for the same right which heterosexuals enjoy: making a "'public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond.'"[60] Virginia's marriage laws "interject profound government interference into one of the most personal" sacred choices persons make; the nature of the "interference compels careful judicial examination" to ensure the choices are "free from unwarranted government interference."[61]

56. *Id.* at 469. She invoked the Second Circuit's *Windsor* opinion and the Utah district's *Kitchen v. Herbert* case. *Id.* at 469–70; *see supra* notes 12, 18, 23, 25, 28 and accompanying text; *see also infra* notes 102–04 and accompanying text.

57. Bostic v. Rainey, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014) (citation omitted).

58. *Id.* at 470–71. She cited many classic cases, such as *Loving*. *See id.* at 471.

59. *Id.* at 471 (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

60. *Id.* at 472 (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202–03 (D. Utah 2013)); *see also id.* ("This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference.") (quoting *Kitchen*, 961 F. Supp. 2d at 1203).

61. *Id.* at 472–73 (citations omitted).

The jurist found that state regulations are generally presumed valid and upheld when "rationally related to a legitimate state interest," but that closer scrutiny applies to "'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'"[62] Employing strict scrutiny, she observed that "regulations pass constitutional muster only if they are narrowly tailored to serve a compelling state interest."[63] Because Judge Wright Allen deemed marriage a fundamental right, she proceeded to assess the major justifications offered for Virginia's laws to ascertain whether they were compelling and closely tailored.[64]

The judge first analyzed traditions and the claim of the laws' advocates that the prohibitions discourage people from abusing marriage rights by marrying to qualify for benefits and concluded it lacked "any rational basis."[65] She found this interest was not advanced by excluding a segment of people from marriage based on sexual orientation.[66] Judge Wright Allen then said that court evaluation must stress the laws' history, which prompted the "inescapable conclusion" that the state's interest was to "avoid 'radical changes' that would [diminish a] long-held view" of marriage, but "the Supreme Court has rejected the assertion that a prevailing moral conviction can, alone, justify upholding a constitutionally infirm law."[67] She announced that practically identical concerns were considered and resolved by the Court in *Loving*, which invalidated Virginia's interracial marriage ban despite its protracted existence.[68] The jurist stated that tradition is revered in Virginia, but it could not support "denying same-sex couples the right to marry any more than it could justify Virginia's ban on interracial marriage."[69]

62. *Id.* at 473 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).
63. *Id.* (citations omitted).
64. *See id.* at 473–80 (citations omitted).
65. *Id.* at 474. A legal concept's ancient lineage does not immunize it "from attack for lacking a rational basis." *Id.* (citation omitted).
66. *Id.*
67. *Id.* at 474–75 (citation omitted).
68. *Id.* at 475 (citation omitted).
69. *Id.*

Judge Wright Allen explored the second interest, federalism, which proponents asserted. The jurist invoked *Windsor*'s protracted exposition on federal government deference to state law policymaking that implicates domestic relations while declaring she was mindful that federal intervention was best exercised rarely and domestic relations powers appropriately rest with states and localities.[70] However, she proclaimed that federal courts have properly intervened when state regulations infringed the fundamental right to marry and *Windsor*'s "citation to *Loving* is a disclaimer of enormous proportion" because it signaled that "due process and equal protection guarantees must trump objections to federal intervention."[71] The jurist observed that *Windsor* invoked the Constitution to protect gay and lesbian citizens' individual rights, and the propriety of applying that protection remained compelling when assessing state laws' constitutionality.[72]

Judge Wright Allen found meritless the proponents' related claim that the judiciary must suspend intervention in deference to possible action by the General Assembly or the people because the contention ignored the continuing injury Virginia gay and lesbian citizens suffered and the "stigma, humiliation and prejudice that would be visited upon" their children while awaiting change.[73] The judge declared that courts must act "when core civil rights are at stake" and "[i]ntervention under the circumstances presented . . . is warranted, and compelled."[74]

She next addressed the proponents' third rationale, "for-the-children," which suggested that "responsible procreation and 'optimal child rearing' are legitimate interests that support" the ban; however, this rationale failed the strict scrutiny and rational ba-

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70. *Id.* at 475–76 (citation omitted).

71. *Id.* at 476 (citation omitted).

72. *Id.* She, like the Utah district judge, invoked Justice Scalia's *Windsor* dissent. *See id.*; Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194 (D. Utah 2013) (citing Justice Scalia's dissent in *Windsor*); *see also* United States v. Windsor, 133 S. Ct. 2675, 2709 (Scalia, J., dissenting) ("As I have said, the real rationale of [the *Windsor* opinion] is that DOMA is motivated by bare . . . desire to harm couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.").

73. Bostic v. Rainey, 970 F. Supp. 2d 456, 476–77 (E.D. Va. 2014). She noted the lengthy, cumbersome revision process. *Id.* at 477 n.11.

74. *Id.* at 477. Despite the wisdom in usually deferring to states on domestic relations, "judicial vigilance is a steady beacon searching for an ever-more perfect justice and truer freedoms for our country's citizens." *Id.* (citation omitted).

sis tests.[75] Preventing same-sex marriages does not further this interest, as the ban needlessly deprives thousands of children whom same-sex couples rear of "the protection, the stability, the recognition and the legitimacy that marriage conveys."[76] The jurist found that research clearly demonstrated "gay and lesbian couples are as capable as other couples of raising well-adjusted children."[77] Moreover, this rationale could not justify the ban, as recognition of all gay and lesbian persons' "fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families."[78] The contention also failed because it would jeopardize the legitimacy of people who do not procreate.[79] Judge Wright Allen determined as well that the rationale was premised "upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents."[80] Finally, she observed this assertion "misconstrues the dignity and values inherent in the fundamental right to marry as primarily a vehicle for 'responsibly' breeding 'natural' offspring" by ignoring the "profound non-procreative elements of marriage."[81] In summarizing, Judge Wright Allen believed that "[t]he state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage," which denies marriage's benefits, dignity, and value simply because of a person's gender.[82]

ii. Equal Protection

The judge found that the marriage laws violated equal protection for the same reasons they contravened due process—the prohibitions "significantly interfere with a fundamental right, and are inadequately tailored to effectuate only" sufficiently important state interests.[83] Even absent a determination that a fun-

75. *Id.* at 477–78.

76. *Id.* at 478.

77. *Id.* (citation omitted).

78. *Id.* (citation omitted).

79. *Id.* at 478–79 (citation omitted).

80. *Id.* at 479. "Attempting to legislate a state-sanctioned preference for one model of parenting . . . is constitutionally infirm." *Id.*

81. *Id.* These included "expressions of emotional support and public commitment," "spiritual significance," and "expression of personal dedication." *Id.* (citations omitted).

82. *Id.* at 480.

83. *Id.*

damental right was implicated, she declared they violated equal protection because the laws treated differently persons "standing in the same relation to" them.[84]

Judge Wright Allen then examined the scrutiny that ought to apply and found deference unwarranted, as she detected "reasonable grounds to suspect 'prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'"[85] The jurist cited *Lawrence* for the proposition that "powerful voices [have condemned] homosexual conduct as immoral" for centuries, moral condemnation she found, "continues to manifest in Virginia in state-sanctioned activities."[86] Judge Wright Allen canvassed the levels of scrutiny and concomitant tests, ascertaining that "Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and [thus are] constitutionally infirm under even the least onerous level of scrutiny."[87] The judge admonished that she had "considered carefully" and fully evaluated the purposes that advocates proffered but found no rational link to the laws challenged.[88] The measures' goal and result was "to deprive Virginia's gay and lesbian citizens of the opportunity and right to choose to celebrate, in marriage, a loving, rewarding monogamous relationship with a partner to whom they are committed for life."[89]

iii. Conclusion

The judge maintained that "Virginia's laws [ensure] that marriage provides profound legal, financial, and social benefits, and exacts serious legal, financial, and social obligations."[90] However,

84. *Id.*

85. *Id.* at 481 (quoting United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938)).

86. *Id.* She invoked two recent examples. *Id.* (citation omitted).

87. *Id.* at 482. Thus, she "need[ed] not address Plaintiffs' compelling arguments that the Laws should be subjected to heightened scrutiny," but would have been "inclined to so find." *Id.* at 481–82 & n.16.

88. *Id.* at 482.

89. *Id.* "These results occur without furthering any legitimate state purpose." *Id.* She found plaintiffs' "Section 1983 claims are well-taken" because she had invalidated the marriage laws and there was adequate state action to grant relief under the Due Process and Equal Protection Clauses. *Id.* at 482–83.

90. *Id.* at 483.

state involvement in defining and attaching benefits to marriage "must withstand constitutional scrutiny, [while] laws that fail that scrutiny must fall despite the depth and legitimacy of the laws' religious heritage."[91] She was "compelled to conclude that Virginia's marriage laws unconstitutionally deny Virginia's gay and lesbian citizens the fundamental freedom to choose to marry," because the state's proffered interests must yield to America's "cherished protections that ensure the exercise of the private choices of the individual citizen regarding love and family."[92]

The jurist deemed this resolution consistent with the country's traditions of freedom, while its checkered "but dogged journey toward [citizens'] truer and more meaningful freedoms" has continually brought the United States "to [a] deeper understanding of the Constitution's initial three words: *we the people*."[93] She declared that "[j]ustice has often been forged from fires of indignities and prejudices suffered," and that the nation's triumphs that "celebrate the freedom of choice are hallowed."[94] The judge proclaimed, "We have arrived upon another moment in history when *We the People* becomes more inclusive and our freedom more perfect."[95] She invoked Abraham Lincoln's 1860 statement regarding fairness, concluding that the men, women, and children "whose voices join in noble harmony with Plaintiffs today, also ask for fairness, and fairness only. This, so far as it is in this Court's power, they and all others shall have."[96]

iv. Order

Judge Wright Allen found unconstitutional the marriage prohibitions "and any other Virginia law that bars same-sex marriage or prohibits Virginia's recognition of lawful same-sex marriages from other jurisdictions" as violations of due process and equal protection.[97] She granted the plaintiffs' summary judgment motion and enjoined the proscriptions, but stayed the injunction's

91. *Id.* (citation omitted).

92. *Id.*

93. *Id.* "'We the People' have become a broader, more diverse family than once imagined." *Id.* (citation omitted).

94. *Id.* at 483–84.

95. *Id.* at 484.

96. *Id.* at 484 & n.20 (citation omitted).

97. *Id.* at 484.

execution in light of the High Court's decision to grant a stay in the Utah marriage equality case styled *Kitchen v. Herbert.*[98]

B. *The Fourth Circuit Majority Opinion*

The defendants and the Attorney General of Virginia swiftly filed appeals with the United States Court of Appeals for the Fourth Circuit, which granted their requests for expedited review.[99] The Fourth Circuit panel, which comprised Judges Niemeyer, Gregory, and Floyd, conducted a May 13 oral argument that involved numerous spirited exchanges.[100] On July 28, the court issued the opinion, which Judge Floyd authored for himself and Judge Gregory, that affirmed the district court ruling, because Virginia's laws "impermissibly infringe on its citizens' fundamental right to marry," while Judge Niemeyer dissented.[101]

1. Standing

The majority initially addressed whether the plaintiffs had standing to pursue relief. Judge Floyd determined that the plaintiffs must "allege (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief."[102] He found that denial of a marriage license to the named plaintiff and his partner easily met the standing requirements.[103]

98. *Id.*; *see* Herbert v. Kitchen, 134 S. Ct. 893 (2014) (granting stay); Herbert v. Kitchen, 961 F. Supp. 2d 1181 (D. Utah 2013); *supra* notes 12, 18, 23, 25, 28 and accompanying text.

99. Markus Schmidt, *In Procedural Step, Va. Appeals Marriage Case*, RICH. TIMES-DISPATCH (Feb. 24, 2014), http://www.richmond.com/news/virginia/article_af81dd88-9da4-11e3-86ef-0017a43b2370.html.

100. Robert Barnes, *Judges Divided On Va. Gay-Marriage Ban*, WASH. POST, May 14, 2014, at A4; Adam Serwer, *Divided Panel Hears Virginia Case for—and Against—Gay Marriage*, MSNBC (May 13, 2014, 3:33 PM), http://www.msnbc.com/msnbc/gay-marriage-virginia-federal-court-ban.

101. Bostic v. Schaefer, 760 F.3d 352, 367 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225).

102. *Id.* at 370 (citation omitted).

103. *Id.* at 371. That sufficed for standing, but he also found a second couple met the strictures by showing tangible denial of benefits and stigmatic injuries traceable to the laws' enforcement, which a declaration of unconstitutionally would redress. *Id.* at 372.

2. Merits

a. *Baker v. Nelson*

Judge Floyd treated the Supreme Court's 1972 summary disposition in *Baker v. Nelson*[104] similarly to virtually all of the other judges, including Judge Wright Allen, who have addressed the 1972 opinion. The author, like the district jurist, relied on the Second Circuit *Windsor* opinion and the myriad other recent lower court decisions.[105] He remarked that the "Supreme Court's willingness to decide *Windsor* without mentioning *Baker* speaks volumes regarding whether *Baker* remains good law[, while] development of its due process and equal protection jurisprudence in the four decades following *Baker* is even more instructive."[106] After carefully scrutinizing that jurisprudence, the majority declined to find *Baker* "binding precedent," given the Justices' seeming abandonment of that case and the important doctrinal developments subsequent to *Baker*.[107]

b. Fourteenth Amendment

Judge Floyd initially stated that evaluation of the Fourteenth Amendment claims includes two constituents. First, the court must ascertain the precise level of constitutional scrutiny that applies: "either rational basis review or some [type] of elevated scrutiny, such as strict scrutiny."[108] Second, the panel applies the proper level to decide whether the Virginia marriage laws are constitutional.[109]

i. Level of Scrutiny

Judge Floyd declared that government interference with a fundamental right merits strict scrutiny under the Due Process and

104. 409 U.S. 810 (1972).

105. Bostic v. Schaefer, 760 F.3d 352, 373–74, 376, 469 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); *see supra* text accompanying note 56.

106. *Id.* at 374.

107. *Id.* at 374–75.

108. *Id.* at 375

109. *Id.*

Equal Protection Clauses.[110] The jurist analyzed whether Virginia's marriage laws infringed on a fundamental right, which derives "from the Fourteenth Amendment's protection of individual liberty" that "includes the fundamental right to marry."[111] The marriage laws' proponents relied on *Washington v. Glucksberg* to argue that the district court erred by not carefully describing the alleged fundamental liberty interest.[112] However, the majority found that "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," so it was inapplicable because the two judges concluded that the "fundamental right to marry encompasses the right to same-sex marriage."[113] Judge Floyd maintained that over time the Justices had "demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms[, p]erhaps most notably, in *Loving*, [which] invalidated a Virginia law that prohibited white individuals from marrying individuals of other races."[114]

The panel found that *Loving* and related marriage cases "speak of a broad right to marry," which reflects the Justices' conclusion that the right "is a matter of 'freedom of choice' . . . that resides with the individual."[115] When the proponents remarked those cases involved opposite-sex couples, so the Court might not grant same-sex couples the same level of constitutional protection, Judge Floyd urged that *Lawrence* and *Windsor* indicate that the choices same-sex couples make enjoy identical constitutional protections as opposite-sex couples and, thus, refused to describe the "right at issue in this case as the right to same sex-marriage."[116]

In conclusion, he admonished that "[s]trict scrutiny applies only when laws 'significantly interfere with a fundamental right.'"[117] However, the "Virginia Marriage Laws unquestionably satisfy

110. *Id.* (citation omitted).

111. *Id.* (citation omitted).

112. *Id.* at 376.

113. *Id.*

114. *Id.* (citation omitted).

115. *Id.* at 376–77 (citation omitted). The court also referenced *Turner v. Safley*, 482 U.S. 78, 99–100 (1987), and *Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978), in reaching the conclusion that a fundamental right to marry exists.

116. Bostic v. Schaefer, 760 F.3d 352, 377 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225).

117. *Id.* (citation omitted).

this requirement: they impede the right to marry by preventing same-sex couples from marrying and nullifying the legal import of their out-of-state marriages," so strict scrutiny applied.[118]

ii. Application

When a court applies strict scrutiny, laws "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[119] Proponents assume the burden of demonstrating the challenged laws meet this standard, while "they must rely on the laws' 'actual purpose[s]' rather than hypothetical justifications." [120] The proponents offered five allegedly compelling interests to support the laws that the majority evaluated.

(1) Federalism

The panel invoked *Windsor* for the idea that throughout U.S. "history, states have enjoyed the freedom to define and regulate marriage as they see fit," while proponents cited *Windsor* in urging the court "to view Virginia's federalism-based interest in defining marriage as a suitable justification for the Virginia Marriage Laws."[121] However, Judge Floyd claimed *Windsor* undermined this position because the Court declared that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons."[122] He contended that *Windsor* "reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees[, so] Virginia's federalism-based interest in defining marriage . . . cannot justify its encroachment on the fundamental right to marry."[123]

Judge Floyd asserted the Supreme Court's recent *Schuette v. Coalition to Defend Affirmative Action* opinion did not alter the

118. *Id.*
119. *Id.* (citation omitted).
120. *Id.* (citation omitted).
121. *Id.* at 378.
122. *Id.* at 378–79 (quoting United States v. Windsor, 570 U.S. __, 133 S. Ct. 2675, 2691 (2013) (citing Loving v. Virginia, 388 U.S. 1 (1967))).
123. *Id.* at 379.

conclusion dictated by *Windsor*.[124] Because the *Schuette* majority emphasized the "need to respect the voters' policy choice" when amending the state constitution,[125] which the Justices did not closely scrutinize, the proponents urged its application to Virginia's voter-approved revision.[126] However, the Fourth Circuit stated that "the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry."[127] Thus, the majority concluded "neither Virginia's federalism-based interest in defining marriage nor our respect for the democratic process that codified that definition can excuse the Virginia Marriage Laws' infringement of the right to marry."[128]

(2) History and Tradition

Judge Floyd summarily rejected history and tradition "as a compelling interest" to sustain the marriage laws.[129] First, he declared that the Justices had clearly stated that the "ancient lineage of a legal concept does not give it immunity from attack," even under rational basis review,[130] while *Lawrence* made similarly infirm the closely related notion of promoting moral principles.[131] "Preserving the historical and traditional status quo [was thus] not a compelling interest that justifies the Virginia Marriage Laws."[132]

(3) Safeguarding the Institution of Marriage

The proponents argued that deviation from the "tradition of opposite-sex marriage [would] destabilize the institution of marriage" by severing the connection between marriage and procreation.[133] Judge Floyd remarked that, even if the panel were to view

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 379–80.
129. *Id.* at 380.
130. *Id.* (citation omitted).
131. *Id.* (citations omitted).
132. *Id.*
133. *Id.*

the theories proffered "through rose-colored glasses," they were "unfounded for two key reasons."[134] First, the Supreme Court in *Griswold v. Connecticut* rejected the notion that marriage was only about procreation by upholding "married couples' right not to procreate and articulat[ing] a view of marriage that has nothing to do with children."[135] Second, the proponents mainly based their theory on the legacy of no-fault divorce, which the judge described as a "wholly unrelated legal change to marriage."[136] Although Judge Floyd stated this modification certainly altered married life's realities "by making it easier for couples to end their relationships," he saw "no reason to think that legalizing same-sex marriage will have a similar destabilizing effect."[137] Indeed, the majority found it more logical that same-sex couples desire access to marriage so they might capitalize on its hallmarks—namely faithfulness and permanence—and that permitting "loving, committed same-sex couples to marry and recognizing their out-of-state marriages will strengthen the institution of marriage."[138]

iv. Responsible Procreation

The proponents also claimed that the marriage laws, by permitting only opposite-sex marriages, "provide stability [for] the kinds of relationships which lead to unplanned pregnancies," thus "avoiding or diminishing the negative outcomes frequently associated with unintended children."[139] However, the majority found that the laws were not properly tailored to advance this interest because they were "woefully underinclusive" in that "[s]ame-sex couples are not the only category of couples who cannot reproduce accidentally."[140] Judge Floyd analogized the laws' extreme underinclusivity to the permit stricture in *City of Cleburne v. Cleburne Living Center, Inc.*, which the Supreme Court found so underinclusive that it must have been premised on "'an irrational preju-

134. *Id.* He recognized in some cases substantial deference was owed to the Assembly's predictive judgments. *Id.*

135. *Id.* Judge Floyd, like Judge Allen, cited *Griswold's* classic description. *Id.* (citation omitted); *see supra* note 57 and accompanying text.

136. Bostic v. Schaefer, 760 F.3d 352, 381 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

dice,' rendering the law unconstitutional" and leading the *Bostic* majority "to draw the same conclusion."[141] Judge Floyd determined the responsible procreation contention also failed because strict scrutiny mandated that a "state's means further its compelling interest."[142] Therefore, he found that barring "same-sex couples from marrying and ignoring their out-of-state marriages did not serve Virginia's goal of preventing out-of-wedlock births."[143]

v. Optimal Childrearing

The proponents argued that children developed best when reared by their married biological parents in a stable family unit and emphasized the importance of "gender-differentiated parenting," and hence the laws "safeguard children by preventing same-sex couples from marrying and starting inferior families."[144] The majority found "extremely persuasive" the arguments proffered by opponents and their amici that "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation . . . [and the laws] actually harm the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters."[145]

However, the jurist found it unnecessary to resolve this dispute because the proponents' contention faltered "for at least two other reasons."[146] First, under elevated scrutiny, states cannot sustain laws with "'overbroad generalizations about the different talents, capacities or preferences of' the groups in question."[147] Second, heightened "scrutiny requires congruity between a law's means and its end[, which] is absent here."[148] Because each of the proponents' justifications for the laws failed, they could not survive strict scrutiny.[149]

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141. *Id.* at 382 (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985)).

142. *Id.*

143. *Id.*

144. *Id.* at 383.

145. *Id.* (quoting Brief for Am. Psychological Ass'n et al., as Amici Curiae Supporting Plaintiffs-Appellees at 23, Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (No. 147-1167)).

146. *Id.* at 384.

147. *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

148. *Id.*

149. *Id.*

In conclusion, the majority stated that Virginia's prohibitions contravened the Due Process and Equal Protection Clauses and, thus, affirmed the district court's summary judgment grant and injunction.[150] Judge Floyd recognized that "same-sex marriage makes some people deeply uncomfortable[, but] inertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection . . . ."[151] Because the choice "to marry is an intensely personal decision that alters the course of an individual's life[, denying] same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance."[152]

C. *The Fourth Circuit Dissenting Opinion*

Dissenting Judge Niemeyer maintained the case was about whether a "[s]tate's decision not to recognize same-sex marriage violates the Fourteenth Amendment of the U.S. Constitution[, so the] judicial response must be limited to an analysis applying established constitutional principles."[153] He criticized the majority for declaring, "*ipse dixit*, that the 'fundamental right to marry encompasses the right to same-sex marriage' and is thus protected by" substantive due process because the jurists expressly "bypasse[d] the relevant constitutional analysis" which *Glucksberg* requires by stating it is "not necessary because no *new* fundamental right is being recognized."[154] Judge Niemeyer deemed the analysis "fundamentally flawed," as it did not consider that the "marriage," which the Court has long recognized "as a fundamental right is distinct from the newly proposed relationship of a 'same-sex marriage.'"[155] He also criticized the majority for failing

150. *Id.*

151. *Id.*

152. *Id.*

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

154. *Id.* at 385–86 (quoting *id.* at 376 (majority opinion)); *see* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (establishing a two-step analysis for substantive due process claims by determining: (1) whether the right is deeply rooted in tradition and (2) articulating an appropriate description of the asserted liberty interest).

155. Bostic v. Schaefer, 760 F.3d 352, 386 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225) (Niemeyer, J., dissenting).

to "explain how this new notion became incorporated into the traditional definition of marriage except by linguistic manipulation."[156] The dissent, thus, contended that "the majority never asks the question necessary to finding a fundamental right—whether same-sex marriage is a right that is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.'"[157] Judge Niemeyer asserted, were the majority to "recognize and address the distinction between the two relationships—the traditional one and the new one—as it must, it would simply be unable to reach the conclusion that it has reached."[158] He respectfully found that "Virginia was well within its constitutional authority to adhere to its traditional definition of marriage . . . ."[159]

The jurist asserted that substantive due process only protected fundamental liberty interests, which the Court defined in *Glucksberg*.[160] In ascertaining whether there was a fundamental right, he instructed that courts must always carefully describe the claimed liberty interest, which must be characterized *"in its narrowest terms."*[161] When judges identify rights as fundamental, courts apply strict scrutiny, which "is extremely difficult for a law to withstand[, so the Court has admonished that jurists] be extremely cautious in recognizing fundamental rights because doing so ordinarily removes freedom of choice from the hands of the people."[162]

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156. *Id.* He found the failure "even more pronounced by the majority's acknowledgement that same-sex marriage is a new notion that has not been recognized 'for most of our country's history.'" *Id.* (citation omitted).

157. *Id.* (citing *Glucksberg*, 521 U.S. at 721); *see supra* note 60 and accompanying text.

158. Bostic v. Schaefer, 760 F.3d 352, 386 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225) (Niemeyer, J., dissenting).

159. *Id.*

160. *Id.* at 389; *see Glucksberg*, 521 U.S. at 719–21.

161. Bostic v. Schaefer, 760 F.3d 352, 389 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225) (Niemeyer, J., dissenting). *But see* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 847–48 (1992) (majority opinion) (explicitly rejecting the notion that Fourteenth Amendment liberty involving marriage must be viewed narrowly); *infra* notes 226–30 and accompanying text.

162. Bostic v. Schaefer, 760 F.3d 352, 389–90 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225) (Niemeyer, J., dissenting) (citation omitted).

Judge Niemeyer asserted that the plaintiffs and the majority "recognize that narrowly defining the asserted liberty interest would require them to demonstrate a *new* fundamental right to same-sex marriage, which they cannot do" and, thus did not "argue that same-sex marriage is, 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[163] He claimed they instead contended that the "fundamental right to marriage that has *previously* been recognized by the Supreme Court is a broad right that should apply to the plaintiffs without the need to recognize a new fundamental right to same-sex marriage[, arguing] the Supreme Court did not narrowly define the right to marriage in" *Loving*, *Turner*, or *Zablocki*.[164] The jurist admitted the Supreme Court did not recognize a new fundamental right to fit the facts in the specific cases, but was not required to do so, as each "involved a couple asserting a right to enter into a traditional marriage."[165] Thus, no case that plaintiffs cited and on which the majority relied implicated the "assertion of a brand new liberty interest."[166] He asserted that "to now define the previously recognized fundamental right to 'marriage' as a concept that includes the new notion of 'same-sex marriage' amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end."[167]

Judge Niemeyer acknowledged that "same-sex and opposite-sex relationships share many attributes[, but] there are also significant distinctions . . . that can justify differential treatment by lawmakers."[168] Thus, he found when the Court has recognized a fundamental right to marry, it has "emphasized the procreative and social ordering aspects of traditional marriage."[169] Because he found that there were "fundamental differences between traditional and same-sex marriage, the plaintiffs and the majority err by conflating the two relationships under the loosely drawn rubric of 'the right to marriage.'"[170] To "bridge the obvious differ-

163. *Id.* at 390 (citation omitted). Niemeyer said they recognized it as a recent development. *Id.* (citation omitted).

164. *Id.* (citations omitted).

165. *Id.*

166. *Id.* at 390–91.

167. *Id.* at 391.

168. *Id.* These include producing children and creating a biological family unit. *Id.*

169. *Id.*

170. *Id.*

ences between" the relationships, the judge claimed that the plaintiffs relied heavily on *Loving* to "argue that the fundamental right to marriage 'has always been based on, and defined by, the constitutional liberty to *select the partner of one's choice*.'"[171] Judge Niemeyer claimed that *Loving* fails to suggest an "unrestricted right to marry whomever one chooses," but simply held that marital restrictions could not be premised on race.[172] He asserted that "[t]o stretch *Loving*'s holding to say that the right to marry is not limited by gender and sexual orientation is to ignore the inextricable, biological link between marriage and procreation that the Supreme Court has always recognized."[173] Thus, the jurist contended the majority and the district court erred by interpreting the "Court's marriage cases as establishing a right that includes same-sex marriage."[174]

In short, Judge Niemeyer claimed that the "fundamental right to marriage does not include a right to same-sex marriage," and "[u]nder the *Glucksberg* analysis . . . there is no new fundamental right to same-sex marriage."[175] Thus, he stated that Virginia's laws must "be upheld if there is *any rational basis* for the laws."[176] Judge Niemeyer instructed that rational basis review required courts to give legislatures "heavy deference" and to simply "determine whether the classification in question is, at a minimum, *rationally related to legitimate governmental goals*."[177] Moreover, under this review, statutes bear a "strong presumption of validity, and those attacking the rationality of the legislative classification have the burden *'to negative every conceivable basis* which might support [them].'"[178] He reviewed Virginia's reasons for the laws, which included that opposite-sex marriages provide a "family structure by which to nourish and raise . . . children, . . . that a

171. *Id.* at 391–92.

172. *Id.* at 392 (asserting that *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), supported this reading of *Loving v. Virginia*, 388 U.S. 1 (1967)).

173. *Id.* (citation omitted).

174. *Id.* He also claimed the plaintiffs ignored the problem of extending marital rights to relationships states now restrict. *Id.*

175. *Id.* at 393.

176. *Id.*

177. *Id.* (citation omitted).

178. *Id.* (citation omitted).

biological family is a more stable environment, and [renouncing] any interest in encouraging same-sex marriage[s]."[179]

The jurist observed that states could "selectively provide benefits to only certain groups when providing those same benefits to other groups would not further the State's ultimate goals."[180] He proclaimed that recognizing same-sex marriages would not advance Virginia's "interest in ensuring stable families in the event of unplanned pregnancies."[181] The judge considered Virginia's argument that "marriage is a '[c]omplex social institution' with a 'set of norms, rules, patterns, and expectations that powerfully . . . affect . . . people's choices, actions, and perspectives'" and "that discarding the traditional definition of marriage will have far-reaching consequences that cannot easily be predicted."[182] He asserted that "legislative choices 'may be based on rational speculation unsupported by evidence or empirical data'" under rational basis review and that legislatures were better equipped than courts to make these assessments and plot courses of action based on predictions.[183]

Judge Niemeyer declared that "Virginia has undoubtedly articulated sufficient rational bases for its marriage laws, and [he] would find that those bases constitutionally justify the laws."[184] Because the judge determined that "Virginia's marriage laws are rationally related to its legitimate purposes, they withstand rational-basis scrutiny under the Due Process Clause."[185]

The jurist treated equal protection, as he decided the laws infringed no fundamental right.[186] Judge Niemeyer explained the levels of scrutiny but said "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 classification drawn by the statute is *rationally related* to a legitimate

179. *Id.*

180. *Id.* at 394.

181. *Id.*

182. *Id.* at 394–95.

183. *Id.* at 395 (citation omitted).

184. *Id.* They are "grounded 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.*

185. *Id.*

186. *Id.* at 398. The majority did not address this, as it found that right. *Id.* at 374–77 (majority opinion).

state interest.'"[187] Although the plaintiffs urged that Virginia's laws "should be subjected to some level of heightened scrutiny because they discriminate on the basis of *sexual orientation* . . . neither the Supreme Court nor the Fourth Circuit has ever applied heightened scrutiny to a classification based on sexual orientation."[188] The judge evaluated *Romer*, *Windsor*, and a Fourth Circuit case and found these and the "vast majority of" appellate courts had applied rational basis review.[189] Thus, following this precedent, he "would hold that Virginia's marriage laws are subject to rational-basis review . . . [and] conclude that there is a rational basis for the laws."[190]

Judge Niemeyer summarized by observing he strongly disagreed "with the assertion that same-sex marriage is subject to the same constitutional protections as the traditional right to marry."[191] Because the dissenter ascertained that "there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it," he concluded that the federal judiciary "must allow the States to enact legislation on the subject in accordance with their political processes."[192]

The Fourth Circuit majority denied the defendants' request for a stay.[193] However, those parties promptly requested a stay from the Supreme Court that granted it, while they and the Attorney General expeditiously filed appeals with the Supreme Court.[194] The Justices denied all petitions for certiorari in *Bostic* on October 6, and marriages began in Virginia shortly thereafter.[195]

Governor Terry McAuliffe, Attorney General Mark Herring, and numerous additional state and local officials across the Commonwealth quickly instituted efforts that would fully imple-

187. *Id.* at 396 (Niemeyer, J., dissenting) (citation omitted).

188. *Id.*

189. *Id.* at 396–97.

190. *Id.* at 398.

191. *Id.*

192. *Id.* He mounted a strong defense of the laws, but the Supreme Court majority will probably apply *Windsor's* reasoning to invalidate state bans. *See infra* note 217 and accompanying text.

193. Order, Bostic v. Schaefer, No. 14-1167(L) (4th Cir. Aug. 13, 2014) (denying stay).

194. McQuigg v. Bostic, 135 S. Ct. 32 (Aug. 20, 2014) (granting stay); *see* 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.

195. *See supra* note 36 and accompanying text.

ment the judicial mandate. For example, Governor McAuliffe promulgated an executive order instructing state agencies and employees to accord couples in same-sex marriages all of the benefits throughout numerous critical areas, including health care, taxation, and adoption, that opposite-sex couples possess.[196] The issuance of marriage licenses by clerk of court offices appeared to function rather smoothly because a number made concerted efforts to comply, and the seven months required to complete the appeals granted most a lengthy time to prepare and to anticipate potential difficulties by initiating efficacious systems.[197]

In sum, Judge Wright Allen concluded that the Virginia marriage laws proscribing same-sex marriage violated the Fourteenth Amendment and enjoined their application, and a Fourth Circuit panel majority affirmed her determination. With the Supreme Court's October 6, 2014 denial of certiorari petitions seeking review of *Bostic*,[198] marriage equality came to Virginia. The next section extracts lessons from the litigation that challenged the marriage laws.

III. LESSONS

Numerous lessons can be derived from the story of how marriage equality arrived in Virginia. Marriage equality's realization in the Commonwealth entailed a number of important practical and symbolic effects. The most critical pragmatic impact is that thousands of same-sex couples and families, especially the children whom these couples rear, will now be relieved of "stigma, humiliation, and prejudice" and enjoy the many tangible and intangible benefits that marriage affords.[199] Tangible advantages include economic benefits and security, namely marriage's conse-

196. *See* Exec. Order No. 30 (Oct. 7, 2014) ; *see also* Statement of Att'y Gen. Herring on Marriage Equality in Va. (Oct. 6, 2014) (detailing the work with local clerks to begin issuing marriage licenses to same-sex couples).

197. John Woodrow Cox, *Same-Sex Couples Quickly and Joyously Wed in Va.*, WASH. POST, Oct. 7, 2014, at B01; Jim Nolan, *McAuliffe Orders Agencies to Comply with Same-Sex Marriage*, RICH. TIMES-DISPATCH (Oct. 8, 2014), http://www.richmond.com/news/virginia/article_aad77b10-8b14-5d14-807b-0b36344c6791.html.

198. *See supra* note 36.

199. *See* Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014), *cert. denied sub. nom.* Bogan v. Baskin, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-277); *supra* notes 73, 76, 81, 138, 152 and accompanying text.

quences for taxation and health care, and adoption of children.[200] The intangible advantages encompass respect, stability, companionship, legitimacy, emotional and psychological support, and recognition.[201]

Marriage equality also yielded crucial symbolic effects. Virginia has been a defendant in multiple landmark cases involving social change over the last six decades. Illustrative were lawsuits that sought to dismantle segregation in public facilities, especially schools,[202] remove impediments restricting voting,[203] terminate the ban on interracial marriage,[204] and permit admission of women to Virginia Military Institute.[205] The invocation of those and other relevant case precedents by Judge Allen and Judge Floyd demonstrated their appreciation of marriage equality's critical symbolic value.[206]

Insofar as marriage equality advocates pursued a national litigation strategy, the evaluation above suggests that Virginia figured prominently in this endeavor. Because the South and the Rocky Mountain West could generally seem less amenable to marriage equality than other regions, namely the West Coast and the Northeast, equality's champions might have perceived Virginia as comparatively hospitable to marriage equality. For instance,

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200. *Baskin*, 766 F.3d at 658.

201. *See id.*

202. *Davis v. County School Board*, 103 F. Supp. 337 (E.D. Va. 1952), was a Virginia companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 480–507 (1975) (analyzing the *Davis* case); Robert B. McKay, *Segregation and Public Recreation*, 40 VA. L. REV. 697, 706–25 (1954) (discussing case law surrounding desegregation of public facilities such as golf courses and swimming pools).

203. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666, 670 (1966); *see* David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 375 (2011).

204. Loving v. Virginia, 388 U.S. 1, 2, 12 (1967); *see* Akhil Reed Amar, *The Warren Court and the Constitution (with Special Emphasis on* Brown *and* Loving), 67 SMU L. REV. 671, 683 (2014); Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1102 (2014); *see also supra* notes 42, 68, 115, 123 and accompanying text.

205. United States v. Virginia, 518 U.S. 515, 557–58 (1996); *see* David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation's Experiment with State-Sponsored Sex Segregation in Education*, 44 SETON HALL L. REV. 339, 348–49 (2014); Rosemary Salomone, *Rights and Wrongs in the Debate over Single-Sex Schooling*, 93 B.U. L. REV. 971, 972 (2013); *see also supra* note 147 and accompanying text.

206. *See, e.g.*, *supra* notes 68–69, 114, 116, 152 and accompanying text.

the Commonwealth is the northernmost Southern jurisdiction, rather centrist politically, a state within the relatively moderate Fourth Circuit, and Virginia has been the defendant in much pathbreaking litigation over social policy questions. These ideas explain why *Bostic* was one of the first cases pursued and decided after the Supreme Court issued its ruling in *Windsor*, why it has been central to the nationwide marriage equality initiative, and why Virginia became the first southern jurisdiction in which a court recognized marriage equality.

IV. SUGGESTIONS FOR THE FUTURE

A. *Virginia*

Virginia state and local officials, encompassing the governor and the attorney general, should keep fully implementing the judicial mandate, which the *Bostic* litigation enunciated, by guaranteeing that same-sex couples and their families, particularly children, receive treatment identical to opposite-sex couples and their families by facilitating thorough marriage equality. The initial endeavors attempting to implement the *Bostic* opinion have proved valuable; however, officers throughout the Commonwealth must redouble their efforts to insure that the promise of comprehensive marriage equality does become a reality.[207]

The General Assembly ought to conduct a thorough review of the Virginia Code and revise all strictures that it determines prevent same-sex couples from enjoying full marriage equality,[208] but numerous legislators have apparently chosen to await final Supreme Court disposition.[209] The Virginia judiciary should corre-

207. *See supra* note 196 and accompanying text; *see also infra* notes 208–09.

208. State departments and agencies, with assistance from the Attorney General's office, have apparently conducted thorough reviews of pertinent rules and regulations while eliminating or modifying any that limit marriage equality for same-sex couples. *See supra* notes 196–97 and accompanying text.

209. Jenna Portnoy, *Same-Sex Marriage in Virginia Is Legal, but Maneuvering Rages on in Richmond*, WASH. POST (Jan. 12, 2015), http://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; *see* Garrett Epps, *Marriage Equality Without Equivocation*, ATLANTIC (Jan. 29, 2015), http://www.theatlantic.com/politics/archive/2015/01/marriage-equality-without-equivocation/384999; *Resistance Bands*, ECONOMIST (Feb. 3, 2015), http://www.economist.com/blogs/democracyinamerica/2015/02/gay-marriage; *supra* note 15; *infra* note 212. The ban on same-sex couple adoptions is an obvious example. *See* VA. CODE ANN. § 63.2-1232 (2012); Laura Kebede, *Lesbian*

spondingly be receptive to legal actions that people who are in or wish to enter or exit same-sex marriages pursue. For example, the Commonwealth's appellate tribunals could generally treat LGBT persons similarly to heterosexual individuals and couples when entertaining divorce and custody litigation.[210]

Observers in some jurisdictions, apart from Virginia, have expressed concern that marriage equality could permit actions that infringe upon the religious liberty of marriage equality opponents who favor a heterosexual view of marriage. Illustrations encompass judicial officials, staff in clerk of the court offices responsible for issuing marriage licenses, bakers, florists, and wedding planners whom the states might ostensibly force to participate in activities, namely same-sex marriages, which violate their religious beliefs.[211] Minimal concrete evidence indicates that analogous behavior has occurred in Virginia thus far. Should evidence of this conduct be adduced, the General Assembly ought to collect, analyze and synthesize pertinent data and, if the information shows that problems exist, consider legislative solutions that promise to remedy the difficulties.[212]

Couple Wins Right to Have Names on Children's Birth Certificates, RICH. TIMES-DISPATCH (Jan. 25, 2015), http://www.richmond.com/news/virginia/article_de7cfa92-72aa-5d19-835b-f87853b07a1a.html.

210. *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (2006), may intimate this.

211. Richard Fausset & Alan Blinder, *States Renew Fight to Stop Gay Marriage*, N.Y. TIMES, Jan. 29, 2015, at A1; Leonard Pitts, Jr., *Bakeries Now Battleground in Same-Sex Marriage Front*, DETROIT FREE PRESS (Jan. 30, 2015), http://www.freep.com/story/opinion/contributors/2015/01/29/gay-marriage-cake-wars-sex/22526991/; *see* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protection*, 64 CASE W. RES. L. REV. 1161, 1168–69 (2014); *supra* note 209 and accompanying text.

212. Wilson, *supra* note 211; *see* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008). Lawmakers have introduced some bills, but none have passed. *See, e.g.*, S. J. Res. 283 (Va. 2015); H.B. 1414 (Va. 2015); *see also* Michael Barbaro and Erik Eckholm, *Right to Deny Service to Gays Stirs Broad Uproar*, N.Y. TIMES, Mar. 28, 2015, at A1 (explaining the adverse public reaction to the passage of an Indiana law that many believe would permit discrimination against homosexuals); Robert T. Garrett, *Texas Lawmakers Pushing Back Against Gay Rights Success*, DALLAS MORNING NEWS (Feb. 4, 2015), http://www.dallasnews.com/news/politics/state-politics/20150204-texas-lawmakers-pushing-back-against-gay-rights-successes.ece (explaining how gay rights successes have affected the political lawmaking climate in Texas); Portnoy, *supra* note 209 (commenting on the partisan political dynamics and potential legislation as a result of the change in same-sex marriage legality); Markus Schmidt, *House Panel Scraps Marshall's Bill on Licensees, Gays*, RICH. TIMES-DISPATCH (Jan., 29, 2015), http://www.richmond.com/news/virginia/article_1cda4826-3936-5f56-a3b3-f2217c134487.html (reporting that a House panel defeated a proposed legislation that "would allow anyone holding a state license, including business owners, lawyers and doctors, to deny services to gay people without facing disciplinary action"); Mark Joseph Stern, *A New Virgin-*

B. *United States*

Writers have asserted that the Supreme Court's October 6 decision to reject certiorari petitions in the Fourth, Seventh, and Tenth Circuit appeals indicated the Justices would not review lower court decisions until a circuit upheld a same-sex marriage ban, as the Sixth Circuit recently did.[213] These predictions seemed prescient when the Justices accepted the Sixth Circuit appeals in January.[214] The Fifth Circuit heard arguments on Louisiana, Mississippi, and Texas appeals in early 2015, but it may not issue an opinion quickly enough for the Court to resolve the question during the 2014 Term.[215]

The unclear status of marriage equality shows that the Justices properly decided to grant the Sixth Circuit appeals. When the appellate court ruled that Kentucky, Michigan, Ohio, and Tennessee bans were constitutional, it prompted a "circuit split," fostering diverse legal regimes in those states and much of the nation's remainder. This patchwork, with marriages invalid for certain jurisdictions and legal in others, dramatically affects the lives of "real" people.[216] Examples are the 300 Michigan and 1300 Utah same-sex couples who married before higher courts stayed district opinions invalidating bans.[217] Rejection of the Fourth, Seventh, and Tenth Circuit certiorari petitions analogously

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ia Bill Would Let Schools, Hotels, Restaurants and Hospitals Turn Gays Away, SLATE (Jan. 8, 2015, 12:19 PM), http://www.slate.com/blogs/outward/2015/01/08/virginia_anti_gay_bill_would_let_schools_and_hospitals_turn_gays_away.html (staunchly challenging the proposed bill, before it had been scrapped, which would attach a "conscience clause" to licenses and certificates obtained from the Commonwealth of Virginia, effectively allowing individuals to refuse service on the basis of moral or religious opposition); Laura Vozzella, *McAuliffe Invites Firms Troubled by Indiana Law*, WASH. POST, Mar. 31, 2015, at B5 (reporting on Virginia Governor Terry McAuliffe's appeal to businesses to relocate to Virginia in the wake of backlash over Indiana's religious freedom law).

213. *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 404, 418 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (U.S. Jan. 16, 2015) (No. 14-571); Lyle Denniston, *Same-Sex Marriage: A Simple Appeal*, SCOTUSBLOG (Nov. 17, 2014, 3:04 PM), http://www.scotusblog.com/2014/11/same-sex-marriage-a-simple-appeal/; *supra* note 36 and accompanying text.

214. *See supra* notes 15, 36.

215. *See supra* note 28.

216. *DeBoer*, 772 F.3d at 410 (expressing concern for real people).

217. Caspar v. Snyder, No. 14–CV–11499, 2015 WL 224741, at *1 (E.D. Mich. 2015); Evans v. Utah, 21 F. Supp. 3d 1192, 1197 (D. Utah 2014); *see* Paul Egan, *Appellate Court Reverse Course, Issues Temporary Stay on Same-Sex Marriages Until Wednesday*, DETROIT FREE PRESS (Mar. 22, 2014), http://archive.freep.com/article/20140322/NEWS06/303220063/6th-Circuit-Court-of-Appeals-same-sex-gay-marriage-stay-Schuette.

means thousands of same-sex couples who recently married or could wed in the future experience "legal limbo."[218] Thus, the Justices correctly agreed to hear the Sixth Circuit appeals, because many persons need their marital status clarified and protracted treatment will keep injuring the same-sex couples and their children and prolong uncertainty.

The Court might resolve the marriage equality issue in a number of ways. It could apply to state bans reasoning like that the *Windsor* majority employed when invalidating section three of DOMA, as Justice Scalia foresaw.[219] No persuasive contention differentiates the situations, and *Windsor* suggested that individual rights trump federalism even respecting the marriage definition that the states conventionally regulated.[220] The Court may also invoke Equal Protection Clause analysis, as did the Seventh and Ninth Circuits and Judge Wright Allen, by considering bans a form of sexual orientation discrimination, which receives elevated scrutiny.[221]

If a majority finds these paths unconvincing or requiring too significant doctrinal modification, it could follow other, putatively narrower, avenues. The Justices might deem bans gender dis-

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218. *See supra* note 36 and accompanying text; *see also* Ginnie Graham, *More Than 3,200 Same-Sex Couples Marry in Oklahoma in Less Than Three Months*, TULSA WORLD (Jan. 18, 2015), http://www.tulsaworld.com/news/ginniegraham/more-than-same-sex-couples-marry-in-oklahoma-in-less/article_dd39267c-093f-5d13-a675-734b11637659.html. They will be in limbo until the Justices decide. Should the Court uphold bans, judges will apparently recognize their marriages. *See Caspar*, 2015 WL 224741, at *26.

219. *See supra* note 12 and accompanying text.

220. United States v. Windsor, 570 U.S. at __, __, 133 S. Ct. 2675, 2691–92 (2013); Bostic v. Schaefer, 760 F.3d 352, 379 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); Kitchen v. Herbert, 755 F.3d 1193, 1228 (10th Cir. 2014), *cert. denied sub. nom.* Herbert v. Kitchen, 135 S. Ct. 265 (U.S. Oct. 6, 2014) (No. 14-124); *see* Franklin *supra* note 5 at 871 n.248. It might use heightened scrutiny and find that the dignity, economic, and other injuries which bans impose violate the Fourteenth Amendment.

221. Baskin v. Bogan, 766 F.3d 648, 657–59 (7th Cir. 2014), *cert. denied sub. nom.* Bogan v. Baskin, 135 S. Ct. 316 (U.S. Oct. 6, 2014) (No. 14-277); Latta v. Otter, 771 F.3d 456, 467–68 (9th Cir. 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 480–83 (E.D. Va. 2014). *Bostic v. Schaefer*, 760 F.3d 352, 375, 384 (4th Cir. 2014) *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225), and *Kitchen*, 755 F.3d at 1208–22, partly used the "rights," not the "classification," equal protection strand. The Court may conclude bans fail this test, as the responsible procreation and "wait and see" rationales are insufficiently important state interests or the heterosexual-only classification has no substantial relationship to their attainment. It might even hold that bans lack a rational basis. *See supra* note 10 (Fourth, Seventh, Ninth, and Tenth Circuit majority opinions). *But see supra* note 10 (Fourth and Tenth Circuit dissents).

crimination under equal protection that warrant intermediate review, because they facially classify on the basis of sex and are premised on gender stereotypes.[222] The Court as well may employ a Due Process Clause approach—similar to notions the Fourth and Tenth Circuits and Judge Wright Allen used—by recognizing same-sex couples' fundamental right to marry, which enjoys strict scrutiny.[223] The Justices might correspondingly determine that bans contravene liberty under due process, as *Windsor*, *Lawrence v. Texas*, and the *Bostic* circuit and district court opinions intimated.[224]

In the final analysis, multiple routes now lead to marriage equality.[225] More specifically, in rejecting the states' narrow definition of the fundamental right to marry—as espoused by Judge Niemeyer in his dissent in *Bostic*[226]—the Court should rely on its decisions in *Casey*[227] and *Lawrence*,[228] which directly rejected the "narrowest-historical-context approach" enunciated by footnote six of the plurality opinion in *Michael H. v. Gerald D.*[229] There-

222. *Latta*, 771 F.3d at 485–90 (Berzon, J., concurring); *see* Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2109–10 (2014); Leslie, *supra* note 204, at 1089–95. It may find bans fail that test, as the rationales tendered are not sufficiently important government interests or the classification lacks a substantial relationship to achieving them.

223. Bostic v. Schaefer, 760 F.3d 352, 375–77, 384 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); *Kitchen*, 755 F.3d at 1229–30; Bostic v. Rainey, 970 F. Supp. 2d 456, 472–73, 483–84 (E.D. Va. 2014). *But see supra* note 15 (Fourth and Tenth Circuit dissents). It could decide that bans do not survive, as the reasons proffered are not compelling or the classification lacks narrow tailoring to their realization.

224. *Windsor*, 570 U.S. at __, 133 S. Ct. at 2689, 2692–93; Lawrence v. Texas, 539 U.S. 558, 566–67, 578–79 (2003); Bostic v. Schaefer, 760 F.3d 352, 375–77 (4th Cir. 2014), *cert. denied sub. nom.* Schaefer v. Bostic, 135 S. Ct. 308 (U.S. Oct. 6, 2014) (No. 14-225); Bostic v. Rainey, 970 F. Supp. 2d 456, 471–73 (E.D. Va. 2014); *see* Franklin, *supra* note 5, at 881–89; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011).

225. Many doctrinal tests seem satisfied. David Cruz, *Symposium: Unveiling Marriage Equality?*, SCOTUSBLOG (Jan. 17, 2015, 6:13 AM), http://www.scotusblog.com/2015/01/symposium-unveiling-marriage-equality. Homosexuality cases may eschew them. Franklin, *supra* note 5, at 871–72, 881; *see* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2003).

226. *See supra* notes 160–75 and accompanying text.

227. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 847–48 (1992) ("It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference . . . when the Fourteenth Amendment was ratified. . . . But such a view would be inconsistent with our law . . . .").

228. *Lawrence*, 539 U.S. at 566–67.

229. 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J., joined by Rehnquist, C.J.).

fore, the Court should broadly define the right to marriage as that of two people to marry, rather than a narrow right of same-sex marriage.[230]

CONCLUSION

Marriage equality swept the nation across 2014, and Virginia proved essential to that development. Judge Wright Allen's comprehensive decision, which invalidated same-sex marriage proscriptions, and the Fourth Circuit's affirmance of her opinion, have brought marriage equality to Virginia and given new meaning to the promises of liberty and equality articulated in *Loving* nearly a half century ago. This has enabled same-sex couples and their families, particularly their children, to realize innumerable valuable advantages that Virginia formerly bestowed only upon opposite-sex couples. Because marriage equality has not yet come to some jurisdictions, including a number of which where judges have found bans constitutional, thereby permitting different marriage regimes across the nation, the Justices must promptly resolve this critical issue.

230. For a full treatment of this argument, see Brief for Commonwealth of Va. as Amicus Curiae Supporting Petitioners at 19–25, Obergefell v. Hodges, __ U.S. __ (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief of Amici Curiae Professors Laurence H. Tribe and Michael C. Dorf in Support of Petitioners, Obergefell v. Hodges, __ U.S. __ (2015) (Nos. 14-556, 14-562, 14-571, 14-574).