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Marriage Equality Comes To Wisconsin

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MARRIAGE EQUALITY COMES TO WISCONSIN

CARL TOBIAS*

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Marriage equality has swept America. Numerous federal judges, including Western District of Wisconsin Judge Barbara Crabb, have invalidated state proscriptions on same-sex marriage. This paper scrutinizes U.S. litigation, Crabb’s opinion, Seventh Circuit affirmance, and Supreme Court resolution. Finding that Wisconsin shows how to efficaciously institute full marriage equality, even as other states have not, the piece affords future suggestions.

I. MARRIAGE EQUALITY LITIGATION

*United States v. Windsor*¹ triggered the new cases² in all states which banned same-sex marriage.³ The Court ruled that the Defense of

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1. 133 S. Ct. 2675 (2013); see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 871–74 (2014).

2. Most cite it. See, e.g., *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014). For marriage equality analyses, see MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR* (2013); MARC SOLOMON, *WINNING MARRIAGE* (2014). State constitutions and statutes include bans. See, e.g., WIS. CONST. art. XIII, § 13 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”); LA. CIV. CODE ANN. art. 86 (“Marriage is a legal relationship between a man and a woman that is created by civil contract.”).

3. The ACLU pursued the Wisconsin case, see *Wolf*, 986 F. Supp. 2d at 986, but local parties and counsel have pursued numerous others, see, e.g., *Bostic v. Rainey*, 970 F. Supp. 2d 456, 459–60 (E.D. Va. 2014).

Marriage Act (DOMA)⁴ violated the Constitution⁵ by harming dignity, financial, and other interests of same-sex couples and their children.⁶ It praised federalism without treating state bans.⁷ In dissent, Chief Justice John Roberts asserted that the Court did not address their validity,⁸ while Justice Antonin Scalia agreed but presciently claimed that the arguments for striking down DOMA could similarly govern the bans.⁹ Almost thirty federal district court judges overturned limitations; two upheld them.¹⁰ Four circuit courts of appeals affirmed invalidations, ruling that bans violated the Equal Protection¹¹ and Due Process Clauses.¹² On November 6, 2014, the Sixth Circuit upheld bans, and on January 16, 2015, the Court granted certiorari.¹³

II. WISCONSIN LITIGATION

A. District Court

In February 2014, plaintiffs challenged Wisconsin's laws, and that June, Judge Barbara Crabb invalidated them in *Wolf v. Walker*.¹⁴ The parties agreed that marriage is central to society, which she linked with "our sense of self, personal autonomy and public dignity."¹⁵ This required scrutiny to ascertain whether the bans violated constitutional guarantees, which prompted her conclusion that "defendants are . . .

4. Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012).

5. *Windsor*, 133 S. Ct. at 2696; see Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 140–42 (2013).

6. It seemed to use elevated scrutiny. *Windsor*, 133 S. Ct. at 2693–96. *But see* Franklin, *supra* note 1, at 872 (noting that lower federal and state courts disagree about what standard of review the Court applied).

7. *Windsor*, 133 S. Ct. at 2693–96.

8. *Id.* at 2696 (Roberts, C.J., dissenting); see Klarman, *supra* note 5, at 158.

9. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting); see Franklin, *supra* note 1, at 870.

10. See ALLIANCE FOR JUSTICE, LOVE AND THE LAW: FEDERAL CASES CHALLENGING STATE BANS ON SAME-SEX MARRIAGE (2015), <http://www.afj.org/wp-content/uploads/2015/06/Federal-Marriage-Equality-Report-6.23.15-POSITIVE.pdf>

11. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

12. *Bostic v. Schaefer*, 760 F.3d 360 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

13. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1039–41 (2015) (mem.); Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), <http://nyti.ms/15eovQN>.

14. 986 F. Supp. 2d 982 (W.D. Wis. 2014).

15. *Id.* at 987.

denying equal citizenship to plaintiffs” by not allowing their marriage.¹⁶ When the state deprives a whole “class of citizens of a right as fundamental as marriage,” it must at least show that this advances a legitimate interest apart from a desire to maintain the status quo.¹⁷

Crabb found “[un]persuasive” arguments to immunize the ban from review. *Baker v. Nelson*¹⁸ was not controlling when later doctrinal developments made it suspect,¹⁹ as the Court “has denounced the view implicit in cases such as *Baker* that gay persons are ‘strangers to the law.’”²⁰ She analyzed the idea that judges should not question state voters’ decisions about whether and when to permit same-sex marriage²¹ but decided that a general federalism interest, although important, could not trump the Fourteenth Amendment,²² which grants federal courts well-established power to determine whether state laws violate individuals’ constitutional rights.²³

Crabb assessed the review standard for whether bans denied a fundamental due process right to marry and equal protection by discriminating against plaintiffs on “the basis of sex and sexual orientation.”²⁴ She asserted, “The ‘liberty’ protected by the due process clause . . . includes the ‘fundamental right’ to marry, a conclusion that the Supreme Court has reaffirmed many times.”²⁵ The Justices have

16. *Id.* (“[M]arriage is not merely an accumulation of benefits. It is a fundamental mark of citizenship.” (quoting Andrew Sullivan, *State of the Union*, NEW REPUBLIC (May 8, 2000), <http://www.newrepublic.com/article/politics/75716/state-the-union>)).

17. *Id.* at 987–88 (“[P]ersonal beliefs, anxiety about change and discomfort about an unfamiliar way of life must give way to a respect for the constitutional rights of individuals . . .”).

18. 409 U.S. 810 (1972) (summarily dismissing “for want of a substantial federal question”).

19. *Wolf*, 986 F. Supp. 2d at 988–91.

20. *Id.* at 990–91 (citing *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996)). “To the extent *Romer* and *Lawrence* left any room for doubt whether the claims in this case raise a substantial federal question, that doubt was resolved in *United States v. Windsor* . . .” *Id.* at 990 (citation omitted).

21. *Id.* at 993–97. Wisconsin based this on federalism and marriage regulation as a traditional state matter. *Id.* at 994.

22. *Id.* “States may not ‘experiment’ with different social policies by violating constitutional rights.” *Id.*

23. *Id.* She said that the Court in *Windsor* used “DOMA’s encroachment on state authority as evidence that the law was unconstitutional,” *id.* at 997, and *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), “said nothing about state laws . . . that require discrimination.” *Wolf*, 986 F. Supp. 2d at 996.

24. *Wolf*, 986 F. Supp. 2d at 997. Each clause poses review standard issues, and the rights that each insures “frequently overlap.” *Id.* at 997 (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003)).

25. *Id.* at 997–98 (collecting cases).

stated that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right’ . . . the law ‘cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.’”²⁶ Crabb analyzed the right’s scope, asking whether the “wish to marry someone of the same-sex falls within the right to marry already firmly established in Supreme Court precedent,” finding it does.²⁷ She treated marriage’s purposes, rejecting procreation as the sole reason for constitutional protection, since the Supreme Court has never made this a requirement.²⁸ Because the state offered no reason that same-sex couples cannot fulfill marriage’s purposes “just as well as opposite-sex couples,” Crabb interpreted the right to include same-sex marriage²⁹ and concluded the issue is whether a right exists “from which same-sex couples can be excluded.”³⁰

She addressed the claim that same-sex marriage’s inclusion would contradict *Washington v. Glucksberg*,³¹ in which the Court “stated that its substantive-due-process jurisprudence . . . has been a process whereby the outlines of the liberty specially protected by the Fourteenth Amendment . . . have . . . been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”³² Crabb had difficulty squaring that case with two in which the “Court recognized . . . rights . . . [not] ‘deeply rooted’ in the country’s legal tradition at the time.”³³ She found that *Glucksberg* “involved the question whether a right to engage in certain conduct . . . should be expanded to include a right to engage in different conduct,”³⁴ whereas “the conduct at issue [in *Wolf*] [wa]s exactly the same as that already protected: getting married.”³⁵ Crabb said two major cases show “that the state cannot rely on a history of exclusion to narrow the scope of [a] right,”³⁶ which “must be framed in neutral terms to prevent

26. *Id.* at 998 (first alteration in original) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

27. *Id.* at 998–99.

28. *Id.* at 999.

29. *Id.* at 1000.

30. *Id.* at 1001.

31. 521 U.S. 702 (1997).

32. *Wolf*, 986 F. Supp. 2d at 1001–02 (quoting *Glucksberg*, 521 U.S. at 722) (internal quotation marks omitted).

33. *Id.* at 1002 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

34. *Id.*

35. *Id.*

36. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967)).

arbitrary exclusions of entire classes of people,”³⁷ and history is not determinative, especially given more recent legal and societal changes.³⁸ She concluded that Wisconsin laws interfere significantly with the right to marry, so they required support in “sufficiently important state interests . . . closely tailored to effectuate only these interests.”³⁹

Crabb treated the equal protection claim,⁴⁰ saying that “[m]ost classifications must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁴¹ However, elevated review may apply.⁴² For a “suspect” classification, the Supreme Court uses “strict scrutiny,” which requires that states show the classification is “narrowly tailored” to attain a “compelling” interest.⁴³ For others, namely gender, the Justices employ “intermediate scrutiny,” so “classifications must be substantially related to the achievement of an important governmental objective.”⁴⁴

Plaintiffs argued for elevated scrutiny, as the ban discriminates based on sex and sexual orientation.⁴⁵ Because the Supreme Court and Seventh Circuit had not endorsed the first, Crabb eschewed it.⁴⁶ As to sexual orientation discrimination, she found that the Supreme Court has never explicitly applied heightened review, but some assert that two cases show it uses elevated review.⁴⁷ Crabb, thus, assessed the criteria that the Justices apply: “(1) whether the class has been subjected to a history of discrimination; (2) whether individuals in the class are able to contribute to society to the same extent as others; (3) whether the

37. *Id.* at 1003.

38. *Id.*; see *Lawrence*, 539 U.S. at 572 (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (alteration in original) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

39. *Wolf*, 986 F. Supp. 2d at 1006 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

40. She did so because defendants would probably appeal. *Id.*

41. *Id.* at 1007 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)) (internal quotation marks omitted).

42. *Id.*

43. *Id.* (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976)).

44. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)) (internal quotation marks omitted).

45. *Id.*

46. *Id.* at 1007–09.

47. *Id.* at 1009–10. Absent clearer guidance, it was difficult to rely on *Romer v. Evans*, 517 U.S. 620 (1996), or *United States v. Windsor*, 133 S. Ct. 2675 (2013), to apply that scrutiny. *Wolf*, 986 F. Supp. 2d at 1010–11.

characteristic defining the class is immutable; and (4) whether the class is politically powerless.”⁴⁸ She analyzed immutability, deeming sexual orientation basic to a person’s identity, even if not immutable.⁴⁹ Crabb found that the last criterion was not relevant;⁵⁰ the idea “would be challenging to apply” and “it is difficult to understand why a group’s political power should be determinative.”⁵¹ Insofar as the concept is pertinent, she thought it best stated “as whether the class is inherently vulnerable in the context of the ordinary political process, either because of its size or history of disenfranchisement.”⁵² Given “that gay persons make up only a small percentage of the population and that there is no dispute that they have been subjected to a history of discrimination,” Crabb easily concluded that this factor was met.⁵³

In short, sexual orientation discrimination received elevated scrutiny but was most akin to sex among the classifications with this protection.⁵⁴ “Because sex discrimination receives intermediate scrutiny and the difference between intermediate scrutiny and strict scrutiny is not dispositive,” she used intermediate scrutiny, so Wisconsin had to show that its ban was substantially related to attaining an important state goal.⁵⁵ Crabb, thus, assessed whether the state had shown that the ban furthers a legitimate purpose and found that the interests advanced were like those urged by jurisdictions in other ban cases and the DOMA defenders⁵⁶ in *Windsor* that the Supreme Court did not credit.⁵⁷ However, deciding whether *Windsor* controlled was unnecessary

48. *Wolf*, 986 F. Supp. 2d at 1012 (citations omitted) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)) (internal quotation marks omitted) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985); *Murgia*, 427 U.S. at 313). She said all courts considering the issue since *Windsor* found that each “applies to sexual orientation discrimination.” *Id.* at 1012 (citations omitted). Defendants did not contest the first two. *Id.*

49. *Id.* at 1013.

50. *Id.* at 1013–14.

51. *Id.* at 1014.

52. *Id.*

53. *Id.*

54. *Id.* (“The Supreme Court has not explained how to distinguish a ‘suspect’ classification from a ‘quasi-suspect’ classification, but sexual orientation is most similar to sex among the different classifications that receive heightened protection.” (citation omitted)).

55. *Id.*

56. *Id.* at 1017.

57. *Id.* “[T]he Court stated that ‘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.’” *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013)).

because defendants “failed to show that the ban furthers a legitimate state interest.”⁵⁸

She then reviewed Wisconsin’s interests. Crabb first explored tradition, which “can be important because it often reflects lessons of experience,”⁵⁹ but deemed critical the reasons underlying traditions and that courts must decide whether they satisfy equal protection.⁶⁰ Traditions also “may endure because of unexamined assumptions about a particular class of people rather than because the laws serve the community as a whole,”⁶¹ prompting the Supreme Court to say that the “[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.”⁶² “Thus, if blind adherence to the past is the only justification for the law, it must fail.”⁶³ Crabb found that the most common defense was “that procreation is the primary purpose of marriage and that same-sex couples cannot procreate with each other.”⁶⁴ A problem with this idea was how denying same-sex couples marriage “encourage[s] opposite-sex couples to have children.”⁶⁵ Another was obvious: “if the reason same-sex couples cannot marry is that they cannot procreate, then why are opposite-sex couples who cannot or will not procreate allowed to marry?”⁶⁶

The third was optimal child rearing, which the judge found experts and jurists have seriously questioned and conflicts with the second.⁶⁷ Even if courts “assume that children fare better with two biological parents,” four reasons undercut the idea.⁶⁸ First, it was “another incredibly underinclusive argument.”⁶⁹ “Second, even if being raised by two biological parents provides the ‘optimal’ environment on average,

58. *Id.* at 1018. Similarly, the level of scrutiny applied did not matter because Crabb concluded that the marriage ban failed constitutional review under the equal protection clause regardless of what level of scrutiny she applied. *Id.* at 1016.

59. *Id.* at 1018 (quoting Brief of *Amici Curiae* Julaine K. Appling, Jo Egelhoff, Jaren E. Hiller, Richard Kessenich & Edmund L. Webster at 7, *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014) (No. 14-cv-64)) (internal quotation marks omitted).

60. *Id.* The U.S. has rejected “darker traditions,” namely slavery, as denials of equality. *Id.* at 1019.

61. *Id.*

62. *Id.* (alteration in original) (quoting *Heller v. Doe*, 509 U.S. 312, 326 (1993)).

63. *Id.* at 1020 (citing O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

64. *Id.*

65. *Id.*

66. *Id.* at 1021.

67. *Id.* at 1022.

68. *Id.* at 1023.

69. *Id.*

this would not necessarily justify a discriminatory law.”⁷⁰ Third, whether or not same-sex couples are married, some will rear children, as they long have, so the ban’s most direct effect was fostering “less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide.”⁷¹ Finally, defendants also did not “explain how banning same-sex marriage helps to insure that more children are raised by an opposite-sex couple.”⁷²

She assessed the fourth idea, protecting the marital institution, and doubted that the Court would even find this interest legitimate.⁷³ It “suffer[ed] from the same problem of underinclusiveness as the other asserted interests,”⁷⁴ and no cogent argument supported defendants’ “belief that allowing same-sex couples to marry somehow will lead to the de-valuing of children in marriage or have some other adverse effect on the marriages of heterosexual couples.”⁷⁵ “Under any amount of heightened scrutiny, this interest undoubtedly fails.”⁷⁶

Crabb ended by urging that marriage equality had been elusive for decades, as courts and citizens were slow to “appreciate that the guarantees of liberty and equality in the Constitution should not be denied because of an individual’s sexual orientation.”⁷⁷ She intimated that jurists seem to be approaching “a consensus that it is time to embrace full legal equality for gay and lesbian citizens,” as evidenced by *Windsor* and later opinions.⁷⁸ Crabb asserted that she had a duty to resolve plaintiffs’ claims now by applying many Court cases,⁷⁹ which convinced her that plaintiffs merit the same treatment as heterosexual couples and the laws were unconstitutional.⁸⁰

70. *Id.* With heightened scrutiny, the state “may ‘not rely on overbroad generalizations about the different talents, capacities, or preferences of’ different groups.” *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

71. *Id.* (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963–64 (Mass. 2003)).

72. *Id.* She, thus, concluded that the ban cannot be justified as furthering optimal results for children. *Id.* at 1024.

73. *Id.*

74. *Id.*

75. *Id.* at 1025. Thus, she doubted “whether defendants’ belief even has a rational basis.” *Id.*

76. *Id.* The “wait and see” idea repeated concerns about same-sex marriages’ potential adverse effects. *Id.*

77. *Id.* at 1027. Initial resistance is evidence that justice moves slowly, not proof that claims lack merit. *Id.* at 1026–27.

78. *Id.* at 1027.

79. *Id.* at 1027–28.

80. *Id.* at 1028.

From Crabb's June 6 decision until her June 13 stay, clerks issued marriage licenses to same-sex couples, and "about 500 couples" wed.⁸¹ At the injunction and stay hearing, she modified plaintiffs' suggested injunction and ruled that the Supreme Court's order staying the Utah injunction bound her.⁸²

B. Seventh Circuit

Wisconsin promptly appealed. The Seventh Circuit combined Wisconsin's case with a similar Indiana appeal and swiftly affirmed.⁸³ Judge Richard Posner reiterated the Supreme Court's insistence that equal protection does not allow "courts to judge the wisdom, fairness, or logic of legislative choices [And a] classification that neither proceeds *along suspect lines* nor infringes fundamental constitutional rights must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" it.⁸⁴ He said Wisconsin offered no "reasonable basis" to forbid same-sex marriage and more was required because the "challenged discrimination is . . . along suspect lines."⁸⁵ State discrimination "against a minority" premised on an immutable characteristic "occurring against an historical background of discrimination . . . makes the discriminatory law or policy constitutionally suspect,"⁸⁶ creating a presumption that it denies equal protection, which only a compelling showing that the discrimination's benefits to "society as a whole clearly outweigh" its victims' harms can rebut.⁸⁷

81. Jason Stein & Patrick Marley, *Gay Marriages to Resume in Wisconsin as Supreme Court Rejects Appeal*, MILWAUKEE J. SENTINEL (Oct. 6, 2014), <http://www.jsonline.com/news/statepolitics/gay-marriages-to-resume-in-wisconsin-as-supreme-court-rejects-appeals-b99365650z1-278229621.html>. The stay created "legal limbo." Complaint for Declaratory & Injunctive Relief at 7, *Bloechl-Karlsen v. Walker*, No. 14-cv-627 (W.D. Wis. Sept. 17, 2014). The state would not recognize their marriages during the appeal, so four couples filed a recognition suit, *see id.*, which certiorari's denial vitiated. *See* *Bloechl-Karlsen v. Walker - Freedom to Marry in Wisconsin*, ACLU, <https://www.aclu.org/cases/bloechl-karlsen-v-walker-freedom-marry-wisconsin> (last updated Sept. 17, 2014); *infra* note 114.

82. *Wolf*, 26 F. Supp. 3d at 870 (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014)). "[Governor] Scott Walker, in his official capacity, is permanently enjoined to direct all [his appointees and their agents] to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." *Id.* at 872.

83. *Baskin v. Bogan*, 766 F. 3d 648 (7th Cir. 2014).

84. *Id.* at 654 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)) (internal quotation marks omitted); *supra* note 41 and accompanying text.

85. *Id.*

86. *Id.*

87. *Id.* at 654–55.

The major focus was “the states’ arguments, which [we]re based largely on the assertion that banning same-sex marriage is justified by the state’s interest in channeling procreative sex into (necessarily heterosexual) marriage,” and he engaged the “arguments on their own terms,”⁸⁸ permitting resolution based on four questions.⁸⁹ The cases were “straightforward,” as

[t]he challenged laws discriminate[d] against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.⁹⁰

The discrimination was “irrational, and therefore unconstitutional even if . . . not subjected to heightened scrutiny.”⁹¹

Posner first asked if the ban “discriminat[ed] against homosexuals by denying them a right . . . grant[ed] to heterosexuals.”⁹² There is “little doubt that sexual orientation, the ground of the discrimination, is

88. *Id.* at 655. Posner found the “approach . . . straightforward but . . . wrapped . . . in a formidable doctrinal terminology—the terminology of rational basis, of strict, heightened, and intermediate scrutiny, of narrow tailoring, fundamental rights, and the rest.” *Id.*

89. *Id.*

1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?

2. Is the unequal treatment based on some immutable or at least tenacious characteristic of the people discriminated against . . . ?

3. Does the discrimination, even if [so based], nevertheless confer an important offsetting benefit on society as a whole?

4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved [less harmfully], or underinclusive because the government’s purported rationale . . . implies that it should equally apply to other groups as well?

Id. The first two comport with the “formulas for what entitles a discriminated-against group to heightened scrutiny . . . and questions 3 and 4 capture the essence of the Supreme Court’s approach in heightened-scrutiny cases” *Id.* at 656.

90. *Id.*

91. *Id.* This is why he elided closer cases’ more complex analysis and eschewed due process analysis. *Id.* at 656–57.

92. *Id.* at 657.

an immutable . . . characteristic,”⁹³ and “[t]he harm to homosexuals . . . of being denied the right to marry is considerable.”⁹⁴ He found “considerable” marriage’s “tangible as distinct from . . . psychological benefits,” which also inure to the marriage’s children, enumerating many under state law.⁹⁵ Posner deemed “[o]f great importance [marriage’s] extensive *federal* benefits.”⁹⁶ Their denial prompted *Windsor*’s invocation because its criticisms “apply with even greater force to [state] law.”⁹⁷ He then recited *Windsor*’s lengthy description of federal benefits that DOMA denied married same-sex couples, believing particularly relevant its determination that this imposes economic harm on the couples’ children.⁹⁸ Posner said that analysis made apparent that the states’ “*groundless* rejection of same-sex marriage . . . must be a denial of equal protection” and, thus, both jurisdictions must show “a clearly offsetting governmental interest” to prevail.⁹⁹ Whether either had done so was the only remaining issue, “and the balance of th[e] opinion is devoted to it.”¹⁰⁰

He rejected state arguments for bans.¹⁰¹ First, Indiana and Wisconsin argued for tradition, which “runs head on into *Loving v. Virginia*,”¹⁰² as many states by tradition confined marriage to persons of the same race when the Court invalidated it.¹⁰³ Thus, if a tradition confers no social benefit “*and* it is written into law *and* it discriminates against a number of people and does them harm beyond just offending

93. *Id.* Wisconsin did not dispute this. *Id.*

94. *Id.* at 658. “Because homosexuality is [involuntary] and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights . . . is a source of continuing pain” *Id.*

95. *Id.* “Because Wisconsin allows domestic partnerships, some spousal benefits are available to same-sex couples in that state. But others are not” *Id.*

96. *Id.* There are many, such as “social security spousal and surviving-spouse benefits.” *Id.*

97. *Id.* at 659. He applied to state bans the litany of harms caused by denial that *Windsor* enumerated. *Id.* (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

98. *Id.* “It raises the cost of health care denies or reduces benefits allowed to families upon the loss of a spouse and parent [and] divests married same-sex couples of the duties and responsibilities that are an essential part of married life” *Id.* (quoting *Windsor*, 133 S. Ct. at 2695).

99. *Id.* The focus here is Wisconsin, but he treated Indiana similarly. *Id.*

100. *Id.* He affirmed Crabb’s treatment of *Baker*, saying that it was decided in “the dark ages so far as litigation over discrimination against homosexuals is concerned.” *Id.* at 660. *Lawrence*, *Romer*, and *Windsor* “make clear that *Baker* is no longer authoritative. *Id.*; see *supra* notes 18–20 and accompanying text.

101. *Baskin*, 766 F. 3d at 660–72.

102. 388 U.S. 1 (1967).

103. *Baskin*, 766 F. 3d at 666 (citing *Loving*, 388 U.S. 1).

them . . . it is a violation of the equal protection clause.”¹⁰⁴ Second, Indiana and Wisconsin argued that the ban’s retention is prudent and cautious, and they should be permitted to collect adequate data before transforming society’s cornerstone.¹⁰⁵ Yet, a state must provide “*some* evidence, *some* reason to believe, however speculative and tenuous, that allowing same-sex marriage will or may transform” the institution.¹⁰⁶ Because the percentage of Americans who are homosexual is small, “it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying its fears; it . . . provided none.”¹⁰⁷ Posner considered Wisconsin’s last claim—“that the ban on same-sex marriage is the outcome of a democratic process”¹⁰⁸—but repeated that “homosexuals are only a small part of the state’s population,” and said, “Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”¹⁰⁹ He urged that “more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other . . . interest . . . is necessary to justify discrimination on the basis of sexual orientation,” and Wisconsin’s reasons “[we]re not only conjectural; they [we]re totally implausible.”¹¹⁰

Wisconsin quickly sought certiorari,¹¹¹ arguing that its case was “the ideal vehicle to fully and finally resolve *all* issues regarding this compelling nationwide ‘debate between two competing views of marriage,’”¹¹² and requested a Seventh Circuit stay, which was

104. *Id.* at 667.

105. *Id.* at 668.

106. *Id.* (internal quotation marks omitted). The “only study” that the Seventh Circuit discovered found that permitting “same-sex marriage has no effect on the heterosexual marriage rate.” *Id.* at 668 (citing Marcus Dillender, *The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States*, 51 *DEMOGRAPHY* 563 (2014)).

107. *Id.* at 668–69.

108. *Id.* at 671. The people amended the Wisconsin Constitution. *Id.*

109. *Id.* He dismissed a fourth argument, that “same-sex marriage is analogous in its effects to no-fault divorce, which, the state argue[d], makes marriage fragile and unreliable,” because “Wisconsin *has* no-fault divorce” and presented no evidence that same-sex marriage, “or for that matter . . . no-fault divorce,” has such deleterious effects on the institution. *Id.* at 666.

110. *Id.* at 671.

111. Petition for a Writ of Certiorari, *Walker v. Wolf*, No. 14-278 (U.S. Sept. 9, 2014), 2014 WL 4418689; Jason Stein, *Van Hollen Appeals Gay Marriage Case to U.S. Supreme Court*, MILWAUKEE J. SENTINEL (Sept. 9, 2014), <http://www.jsonline.com/news/statepolitics/van-hollen-appeals-gay-marriage-case-to-us-supreme-court-b99347908z1-274492491.html>.

112. Petition for a Writ of Certiorari, *supra* note 111, at 6 (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting)).

granted.¹¹³ In October, the Supreme Court “declined to take the Wisconsin case and ones from four other states,” which lifted stays and permitted same-sex marriages in Wisconsin and the other jurisdictions.¹¹⁴ When the Sixth Circuit upheld bans, the Supreme Court granted review.¹¹⁵

C. Supreme Court

Justice Kennedy, writing for the *Obergefell v. Hodges*¹¹⁶ majority, opened by saying, “The Constitution promises liberty to all . . . to define and express their identity,” which petitioners sought “by marrying someone of the same sex and having their marriages deemed lawful” identically to opposite-sex couples.¹¹⁷ “[T]he annals of human history reveal the transcendent importance of marriage,” and its “centrality . . . to the human condition” shows why “the institution has existed for millennia across civilizations.”¹¹⁸ Marriage’s history “is one of both continuity and change,”¹¹⁹ and evolving “understandings of marriage” define a country in which freedom’s new aspects “become apparent to new generations.”¹²⁰ “This dynamic can be seen in the Nation’s experiences with the rights of gays and lesbians.”¹²¹ Kennedy said that “same-sex couples [recently] began to lead more open and public lives,” prompting “extensive discussion . . . and . . . a shift in public attitudes toward greater tolerance.”¹²² He traced the Court’s cases on “the legal status of homosexuals,”¹²³ the 1993 Hawaii and 2003 Massachusetts Supreme Court marriage opinions,¹²⁴ and the 1996

113. Order, *Wolf v. Walker*, No. 14-2526 (7th Cir. Sept. 17, 2014).

114. Patrick Marley, *Judge Makes Clear Wisconsin Gay Marriages Can Proceed*, MILWAUKEE J. SENTINEL (Oct. 8, 2014), <http://www.jsonline.com/news/statepolitics/judge-makes-clear-wisconsin-gay-marriages-can-proceed-b99367384z1-278526781.html>; see *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) (mem.).

115. See *supra* note 13.

116. No. 14-556 (U.S. June 26, 2015).

117. *Obergefell v. Hodges*, No. 14-556, slip op. at 1–2 (U.S. June 26, 2015). The parties’ factual situations illuminated the urgency of this case. *Id.* at 4.

118. *Id.* at 3.

119. *Id.* at 6. This worked “deep transformations in its structure” that strengthened marriage. *Id.* at 7.

120. *Id.*

121. *Id.*

122. *Id.* at 8. These were manifested in litigation over LGBT rights. *Id.*

123. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

124. *Id.* at 8–9 (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

Defense of Marriage Act (DOMA) passage and 2013 Court invalidation.¹²⁵ Kennedy observed that “[n]umerous cases about same-sex marriage ha[d] reached the United States Courts of Appeals in recent years,” district courts have issued “many thoughtful” opinions,¹²⁶ and the states were divided after “years of litigation, legislation, referenda, and the discussions that attended these public acts.”¹²⁷

The opinion mainly relied on due process, which protects fundamental liberties, including most in the Bill of Rights, and “personal choices central to individual dignity and autonomy.”¹²⁸ Kennedy deemed “[t]he identification and protection of [these] rights . . . an enduring part of the judicial duty to interpret the Constitution,”¹²⁹ finding that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.”¹³⁰ He said that the Bill of Rights and Fourteenth Amendment drafters and ratifiers “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.”¹³¹ “Applying th[o]se established precepts,” Kennedy asserted, “the Court has long held the right to marry is protected by the Constitution.”¹³² He found “instructive” cases that “have expressed constitutional principles of broader reach,” as they “identified essential attributes of [the marriage] right based in history, tradition, and other constitutional liberties inherent in this intimate bond.”¹³³ Kennedy argued that “in assessing whether the force and rationale of its cases

125. *Id.* at 9 (citing Defense of Marriage Act § 3, 1 U.S.C. § 7 (2012); *United States v. Windsor*, 133 S. Ct. 2675 (2013)). The Court invalidated section 3, “Definition of Marriage.” *Id.*

126. *Id.* at 9–10. Plaintiffs won most. *Id.* at 10; *see supra* note 10 and accompanying text.

127. *Obergefell*, No. 14-556, slip op. at 10.

128. *Id.* Examples “includ[e] intimate choices that define personal identity and beliefs.” *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U. S. 479, 484–86 (1965)).

129. *Id.* Judges use “reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.” *Id.*

130. *Id.* at 10–11. Judges “respect[] . . . history and learn[] from it without allowing the past alone to rule the present.” *Id.* at 11.

131. *Id.*

132. *Id.*

133. *Id.* at 12. He said three modern cases “describing the right to marry presumed a relationship involving opposite-sex partners,” but the times informed this assumption. *Id.* at 11–12 (discussing *Turner v. Safley*, 482 U.S. 78 (1987), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Loving v. Virginia*, 388 U.S. 1 (1967)). That explains *Baker v. Nelson*. *Id.* at 12 (discussing *Baker v. Nelson*, 409 U.S. 810 (1972)); *see supra* text accompanying notes 18–20.

apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.”¹³⁴

This analysis “compel[led] [his] conclusion that same-sex couples may exercise the right to marry,” as “four principles and traditions . . . demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”¹³⁵ First, Kennedy observed “that the right to personal choice regarding marriage is inherent in the concept of individual autonomy,” because “decisions concerning marriage are among the most intimate that an individual can make.”¹³⁶ The majority also stated, “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality,” which “is true for all persons, whatever their sexual orientation.”¹³⁷ Second, the opinion cited the “principle . . . that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals,”¹³⁸ and concluded that “same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”¹³⁹

Third, Kennedy argued that “protecting the right to marry . . . safeguards children and families,”¹⁴⁰ and that while “some of marriage’s protections . . . are material. . . . [M]arriage also confers more profound benefits.”¹⁴¹ Exclusion from marriage violates “a central premise of the right to marry,” as children are stigmatized by “knowing their families are somehow lesser.”¹⁴² Finally, Kennedy found, in Court opinions and traditions, that “marriage is a keystone of our social order,” an idea seen in mounting “rights, benefits and responsibilities”

134. *Obergefell*, No. 14-556, slip op. at 12.

135. *Id.*

136. *Id.* They are “[l]ike choices concerning contraception, family relationships, procreation, and childrearing.” *Id.*

137. *Id.* at 13 (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013)).

138. *Id.* It “dignifies couples who ‘wish to define themselves by their commitment to each other.’” *Id.* at 14 (quoting *Windsor*, 133 S. Ct. at 2689).

139. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

140. *Id.* “[T]he right to marry . . . draws meaning from related rights of childrearing, procreation, and education,” which the Court “has recognized . . . as a unified whole” *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

141. *Id.* at 15. “By giving recognition and legal structure to their parents’ relationship, marriage allows 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.’” *Id.* (quoting *Windsor*, 133 S. Ct. at 2694).

142. *Id.* They lack “the recognition, stability, and predictability marriage offers.” *Id.*

which states bestow on married couples.¹⁴³ The opinion detected “no difference between same- and opposite-sex couples with respect to this principle,” yet the latter’s exclusion from marriage means that they lose the “the constellation of benefits that the States have linked to marriage,”¹⁴⁴ which violates the fundamental right to marry while “impos[ing] stigma and injury of the kind prohibited by our basic charter.”¹⁴⁵

The majority conceded that *Glucksberg* required a narrow definition of due process liberty “with central reference to specific historical practice,” but it was inconsistent with treatment of fundamental rights to marry and intimacy.¹⁴⁶ The marriage cases addressed the right “in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”¹⁴⁷ Defining rights by who previously exercised them would allow historical practices to “serve as their own continued justification” and prevent new groups from “invok[ing] rights once denied,” which the Court “has rejected . . . both with respect to the right to marry and the rights of gays and lesbians.”¹⁴⁸ Kennedy deemed the right to marry “fundamental as a matter of history and tradition” yet said rights emanate “from a better informed understanding of how constitutional imperatives define a liberty that remains urgent” today.¹⁴⁹ He observed that many who find same-sex marriage wrong base this on “decent and honorable religious or philosophical premises,”¹⁵⁰ but once “sincere, personal opposition becomes enacted law and public policy,” it stamps the government’s “imprimatur . . . on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”¹⁵¹ When “same-sex couples seek in marriage the same legal treatment as opposite-sex couples,” denying them this right “disparage[s] their choices and diminish[es] their personhood.”¹⁵²

The majority urged that same-sex couples’ right to marry also derives from equal protection, as that clause and due process “are

143. *Id.* at 16–17.

144. *Id.* at 17. This poses material hurdles and instability, “teaching that gays and lesbians are unequal in important respects.” *Id.*

145. *Id.* at 18.

146. *Id.* He suggested that the treatment in *Glucksberg* may have been proper for the right to physician-assisted suicide asserted. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 18–19.

150. *Id.* at 19.

151. *Id.*; *see id.* at 27 (stressing that the First Amendment protects religions and adherents to religious doctrines who continue opposing marriage equality).

152. *Id.* at 19.

connected in a profound way, though they set forth independent principles.”¹⁵³ In specific cases, each “may rest on different precepts” and one or the other may “capture the essence of the right in a more accurate and comprehensive way, even as the[y] may converge in the identification and definition of the right.”¹⁵⁴ “This dynamic . . . applies to same-sex marriage,” as “the challenged laws burden the liberty of same-sex couples and . . . abridge central precepts of equality,”¹⁵⁵ “den[y] all the benefits afforded to opposite-sex couples and . . . bar [them] from exercising a fundamental right.”¹⁵⁶ Thus, equal protection, as due process, “prohibits this unjustified infringement of the fundamental right to marry.”¹⁵⁷

The factors above prompted “the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under [both clauses] couples of the same same-sex may not be deprived of that right and that liberty.”¹⁵⁸ The Court held “that same-sex couples may exercise the fundamental right to marry,” overruled *Baker*, and invalidated state laws “to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”¹⁵⁹

Kennedy addressed the concern that judges should “proceed with caution—to await further legislation, litigation, and debate,”¹⁶⁰ deeming the Sixth Circuit’s argument “cogent” but finding “far more deliberation than this argument acknowledges.”¹⁶¹ He said, “Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights,”¹⁶² recognizing that the plurality in *Schuette v. BAMN*¹⁶³ confirmed the importance of this notion and constitutional freedom, which secures “the right of the individual not to be injured by the

153. *Id.*

154. *Id.* This increases appreciation of “what freedom is and must become.” *Id.* The majority stated that “[t]he Court’s cases,” which address “invidious sex-based classifications in marriage” and “the rights of gays and lesbians,” “reflect this dynamic.” *Id.* at 19, 21–22.

155. *Id.* at 22.

156. *Id.* They impose a “disability on gays and lesbians,” which “disrespect[s] and subordinate[s] them.” *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 22–23.

160. *Id.* at 23.

161. *Id.* “This has led to an enhanced understanding of the issue.” *Id.*

162. *Id.* at 24.

163. 134 S. Ct. 1623 (2014).

unlawful exercise of governmental power.”¹⁶⁴ Despite “the more general value of democratic decisionmaking,” the Constitution mandates judicial redress for violations of individual rights.¹⁶⁵ Thus, injured parties can “vindicate their own direct, personal stake” in the Constitution, “even if the broader public disagrees and even if the legislature refuses to act,” as the document “withdr[e]w certain subjects from the vicissitudes of political controversy.”¹⁶⁶

D. Responses and Lessons from Wisconsin

Supreme Court denial of Wisconsin’s certiorari petition and the *Obergefell* decision clarified marriage equality in Wisconsin, prompting the Governor and the Attorney General to announce that Wisconsin would recognize same-sex unions and implement equality.¹⁶⁷ The confusion that followed Crabb’s opinion and stay dissipated rather quickly.¹⁶⁸ Public officials seemed to adopt concerted efforts that would thoroughly institute recognition of same-sex marriages, affording same-sex spouses all of the rights and benefits of heterosexual spouses.¹⁶⁹

Equality’s arrival in Wisconsin had many practical impacts, most crucially on myriad same-sex couples and their children, who now enjoy marriage equality’s numerous advantages while experiencing less stigma, humiliation, and prejudice.¹⁷⁰ Tangible benefits include

164. *Obergefell*, No. 14-556, slip op. at 24 (quoting *Schuetz*, 134 S. Ct. 1636).

165. *Id.* This is true, even when the protection of rights “affects issues of the utmost importance and sensitivity.” *Id.*

166. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). It places “fundamental rights[, which] may not be submitted to a vote,” “beyond the reach of majorities,” making them “legal principles to be applied by the courts.” *Id.* (quoting *Barnette*, 319 U.S. at 638).

167. The Governor and Attorney General remained opposed. Stein & Marley, *supra* note 81; Marley, *supra* note 114.

168. See *supra* notes 81–82 and accompanying text.

169. E.g., *Legalization of Same-Sex Marriage in Wisconsin: Information for Members and Employers*, WIS. DEP’T EMP. TR. FUNDS (Oct. 15, 2014), <http://www.etf.wi.gov/news/ht-2014-same-sex-marriage2.htm>; *Same-Sex Couples*, WIS. DEP’T REVENUE (Oct. 21, 2014), <https://www.revenue.wi.gov/faqs/ise/samesex.html>; see Jason Stein, *Plaintiffs in Gay Marriage Case Seek More Than \$1 Million in Costs*, MILWAUKEE J. SENTINEL (Dec. 15, 2014), <http://www.jsonline.com/news/plaintiffs-in-gay-marriage-case-seek-more-than-1-million-in-costs-b99408980z1-285838141.html>.

170. I rely in this and the next two sentences on *Obergefell*, No. 14-556, slip op. at 14–16, *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014), and *Bostic v. Rainey*, 970 F. Supp. 2d 456, 476–80 (E.D. Va. 2014). See *supra* notes 95–100 and accompanying text.

economic gains and security, namely involving taxation, health care, and adoption. Less tangible ones encompass recognition, citizenship, stability, legitimacy, respect, companionship, and emotional and psychological support. Equality also yielded integral symbolic effects. Since at least 1987, Wisconsin has been a defendant in critical litigation regarding social change, which sought, for example, to increase children's protection from abuse,¹⁷¹ voting rights¹⁷² and reproductive freedom.¹⁷³ In sum, many citizens' endeavors brought Wisconsin marriage equality to which the state was receptive.

III. SUGGESTIONS FOR THE FUTURE

A. Wisconsin

Wisconsin officers, particularly the Governor and Attorney General, must continue fully effectuating the *Obergefell* and *Wolf* mandates by insuring that same-sex couples receive treatment akin to opposite-sex couples.¹⁷⁴ *Wolf's* nascent implementation proved constructive, but officials must redouble their endeavors to guarantee that the promise of comprehensive marriage equality becomes a reality.¹⁷⁵ The legislature ought to fully assess Wisconsin laws and revise any that preclude same-sex couples from achieving complete

171. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989). See generally LYNNE CURRY, *THE DESHANEY CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION* (2007).

172. *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014), *staying* 17 F. Supp. 3d 837 (E.D. Wis. 2014), *vacated*, 135 S. Ct. 7 (2014); see Adam Liptak, *Courts Strike Down Voter ID Laws in Wisconsin and Texas*, N.Y. TIMES (Oct. 9, 2014), <http://nyti.ms/1CZwzAw>.

173. *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238 (W.D. Wis. 2013), *aff'd*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014); *Karlin v. Foust*, 975 F. Supp. 1177 (W.D. Wis. 1997), *aff'd in part and rev'd in part*, 188 F.3d 446 (7th Cir. 1999), *reh'g en banc denied*, 198 F.3d 620 (7th Cir. 1999); Jason Stein & Dana Ferguson, *U.S. Supreme Court Rejects Wisconsin Appeal over Abortion Law*, MILWAUKEE J. SENTINEL (June 23, 2014), <http://www.jsonline.com/news/wisconsin/justices-reject-wisconsin-appeal-over-abortion-law-b99297080z1-264238031.html>.

174. See *supra* text accompanying note 167; see also Jenna Johnson, *Scott Walker: Constitutional Amendment on Gay Marriage Is Not a Top Focus*, WASH. POST (July 31, 2015), http://wpo.st/_str0.

175. See *supra* text accompanying note 169; see also Betsy Woodruff, *Scott Walker's Next Question*, SLATE (Feb. 24, 2015, 11:12 AM), http://www.slate.com/articles/news_and_politics/politics/2015/02/scott_walker_and_gay_marriage_why_won_t_wisconsin_s_governor_give_a_clear.html.

marriage equality.¹⁷⁶ The Wisconsin bench should be responsive to legal efforts that persons who are in or want to enter or leave same-sex marriages pursue by, for instance, generally treating lesbian, gay, bisexual, and transgender (LGBT) litigants as opposite-sex people and couples when resolving adoption, divorce, and custody suits.

Some are concerned that marriage equality could violate ban proponents' religious liberty. Examples are judges, clerk of court staff who issue marriage licenses, and vendors, like florists and bakers, whom states will putatively require to facilitate activities, including same-sex marriages, that infringe their religious beliefs.¹⁷⁷ No material apparently shows that conduct has occurred in Wisconsin. If evidence of this behavior surfaces, lawmakers must gather, evaluate, and synthesize relevant data and, should this evince problems, devise remedies.¹⁷⁸

B. Other States

The vast majority of states have complied with *Obergefell*'s mandate by instituting efforts to guarantee same-sex couples all of the rights and benefits accorded opposite-sex couples; however, certain states and numerous localities have not implemented full marriage equality or have moved slowly.¹⁷⁹ They must promptly insure that comprehensive marriage equality becomes a reality by consulting endeavors in Wisconsin and other states and localities that have expeditiously instituted thorough equality, as the Supreme Court has clearly spoken and made equality the law of the land.¹⁸⁰ If state or local officials refuse to implement full marriage equality or move very slowly, people or entities filing earlier litigation may wish to reopen it

176. Some states have moved slowly. *E.g.*, Alan Blinder, *In Alabama, One County Exits the Marriage Business*, N.Y. TIMES (June 26, 2015, 12:16 PM), <http://www.nytimes.com/live/supreme-court-rulings/in-alabama-one-county-exits-the-marriage-business>; Erik Eckholm & Manny Fernandez, *After Same-Sex Marriage Ruling, Southern States Fall in Line*, N.Y. TIMES (June 29, 2015), <http://nyti.ms/1SZ9KoB>; *see infra* text accompanying notes 181, 185.

177. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161 (2014); Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES (June 26, 2015), <http://nyti.ms/1HluJjn>; *see infra* note 181.

178. Wilson, *supra* note 177; *see* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008).

179. Editorial, *Illegal Defiance on Same-Sex Marriage*, N.Y. TIMES (July 10, 2015), <http://nyti.ms/1UIr3Mx>; *see* sources cited *supra* notes 176–177, *infra* note 181.

180. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

and perhaps suggest that federal judges hold officials in contempt.¹⁸¹ Should these parties eschew suit, others injured by the failure to implement equality might consider litigation that seeks to vindicate their rights. State and local governments must also ensure that efforts to secure equality do not violate religious freedom.¹⁸²

In the many states that have not extended protection from discrimination to LGBT individuals, legislatures and localities must seriously consider passing measures that proscribe discrimination in employment, education, and other spheres.¹⁸³ Indeed, Wisconsin adopted the first state law that proscribed discrimination on the basis of sexual orientation.¹⁸⁴ State and local elected officials could model bills and ordinances on laws enacted by states and localities which have barred that discrimination or on the recently introduced federal Equality Act.¹⁸⁵

C. *United States*

The Executive Branch granted federal benefits to same-sex couples in states with bans soon after tribunals, including the Supreme Court, invalidated them.¹⁸⁶ Because numerous states and local subdivisions

181. Examples are Alabama and Kentucky litigation. *Strawser v. Strange*, No. 14-0424-CG-C (S.D. Ala. Sept. 9, 2015); *Miller v. Davis*, Civ. Act. No. 15-44-DLB (E.D. Ky. Nov. 5, 2015); see Sandhya Somashekhar & Robert Barnes, *Supreme Court Rejects County Official's Request in Gay-Marriage Case*, WASH. POST (Aug. 31, 2015), <http://wpo.st/ofur0>; Blinder, *supra* note 176; Adam Liptak, *Supreme Court Says Kentucky Clerk Must Let Gay Couples Marry*, N.Y. TIMES (Aug. 31, 2015), <http://nyti.ms/1LPeXPF>.

182. For ideas, see sources cited *supra* notes 177–178.

183. See *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-your-state> (last visited Dec. 17, 2015); *Non-Discrimination Laws: State by State*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Dec. 17, 2015).

184. Act of Mar. 2, 1982, ch. 112, 1981 Wis. Sess. Laws 901; William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91 (2007).

185. S. 1858, 114th Cong. (2015); e.g., Assemb. 8070, 2013–2014 Reg. Sess. (N.Y. 2013) (Women's Equality act); HUMAN RIGHTS CAMPAIGN, 2014 STATE EQUALITY INDEX (2015), available at <http://www.hrc.org/resources/entry/sei-2014-view-your-states-scorecard>.

186. E.g., Press Release, 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>; Press Release, Dep't of Justice, After Supreme Court Declines to Hear Same-Sex Marriage Cases, Attorney General Holder Announces Federal Government to Recognize Couples in Seven New States (Oct. 17, 2014), <http://www.justice.gov/opa/pr/after-supreme-court-declines-hear-same-sex-marriage-cases-attorney-general-holder-announces>.

may be reluctant to adopt measures that guarantee full equality, Congress must carefully analyze the new Equality Act that bans discrimination against LGBT people in the U.S., which Senator Tammy Baldwin (D-WI) co-sponsored.¹⁸⁷ The Judiciary Committees might survey all fifty states' protections and conduct hearings on the bills. Despite the need for this legislation, Congress may not pass it ahead of the 2016 elections.

CONCLUSION

Same-sex marriage is legal nationwide, and Wisconsin figured prominently in that effort. Judge Crabb's careful invalidation of the state's constitutional ban, her decision's affirmance by the Seventh Circuit, and *Obergefell* brought full marriage equality to Wisconsin before numerous states. Thus, jurisdictions that have not experienced comprehensive equality should implement it by consulting Wisconsin's example.

187. S. 1858, 114th Cong. (2015); Dana Beyer, *The Equality Act, Part One -- Introduction*, HUFFINGTON POST (July 29, 2015, 7:59 PM), http://www.huffingtonpost.com/dana-beyer/the-equality-act-part-one_b_7880612.html; Gabrielle Levy, *Forget SCOTUS: The Next Fight Over Gay Rights Will Be in Congress*, U.S. NEWS & WORLD REP. (July 23, 2015, 6:19 PM), <http://t.usnews.com/Zbmq14>; Lisa Neff, *Equality Act to Ban Bias Introduced in Congress*, WIS. GAZETTE, (July 29, 2015, 1:29), <http://www.wisconsin Gazette.com/trending/equality-act-arrives-in-congressbreak-comprehensive-lgbt-civil-rights-bill-introduced.html>.