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RELIGIOUS FREEDOM IN FAITH-BASED EDUCATIONAL INSTITUTIONS IN THE WAKE OF *OBERGEFELL V. HODGES*: BELIEVERS BEWARE

Charles J. Russo*

I. INTRODUCTION

*“[I]t’s certainly going to be an issue. I . . . don’t deny that. I don’t deny that, Justice Alito. . . . [I]t is going to be an issue.”*¹

Solicitor General Donald Verrilli’s fateful words, uttered in response to a question posed by Justice Samuel Alito during oral arguments in *Obergefell v. Hodges*,² likely sent chills up the spines of leaders in faith-based educational institutions, from pre-schools to universities. In *Obergefell*, a bare majority

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¹ Transcript of Oral Argument, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1929996, at *38. This same language is cited in the proposed Federal First Amendment Defense Act:

Sec. 2 (3) Nevertheless, in 2015, when asked whether a religious school could lose its tax-exempt status for opposing same-sex marriage, the Solicitor General of the United States represented to the United States Supreme Court that “[i]t’s certainly going to be an issue.”

H. R. 2802, 114th Cong. (2015), was introduced on June 17, 2015. For a more thorough discussion of this proposed law, see *infra* notes 173 *et seq.* and accompanying text.

² 135 S. Ct. 2584 (2015).

of the Supreme Court legalized same-sex unions in the United States. Verrilli's words, combined with the outcome in *Obergefell*, have a potentially chilling effect on religious freedom. The decision does not only impact educational institutions—the primary focus of this article—but also a wide array of houses of worship. Other religiously affiliated institutions that may be affected include health and social services agencies, such as those working with adoptions³ and ministering to the needy.⁴ These educational institutions and other agencies designed to assist the common good run the risk of being shuttered as a form of punishment, to the detriment of many, if they remain true to their faith—a decidedly un-American prospect.

As noted at the outset, Verrilli's comment came in response to a question from Justice Alito. Justice Alito inquired: “[w]ell, in the *Bob Jones* case,⁵ the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?”⁶ During the first oral argument in *Obergefell*, as part of a ninety minute session on whether the Fourteenth Amendment requires states to grant marriage licenses to two people of the

³ See *infra* note 171 and accompanying text.

⁴ See John Agnew, *Deus Vult: The Geopolitics of the Catholic Church*, 15 *GEOPOLITICS* 39, 47 (2010), <http://www.sscnet.ucla.edu/geog/downloads/856/391.pdf> (stating that the Roman Catholic Church is “the largest single supplier of health services and education in the world.”). For example, 2014 data from a position statement by the United States Conference of Catholic Bishops revealed that “645 Catholic hospitals in the United States assist 87,972,910 patients annually; [o]ne in six patients in the U.S. is cared for in a Catholic hospital; [t]here are over 19.5 million emergency room visits and over 102 million outpatient visits in Catholic hospitals during a one-year period; [and] [o]ver 5.2 million patients are admitted to Catholic hospitals annually[.]”, *Catholic Health Care and Social Services*, U.S. CONF. OF BISHOPS, <http://www.migrate.usccb.org/about/media-relations/backgrounders/health-care-social-service-humanitarian-aid.cfm> (last visited Feb. 9, 2016).

⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (revoking the university's tax exempt status under the Internal Revenue Code, pursuant to which individuals who donated money were entitled to tax deductions on their federal income taxes, because its officials engaged in discriminatory admissions practices with regard to race when they refused to admit African-Americans and forbade interracial dating, based on the institution's religious doctrine). For representative commentary, see William A. Drennan, *Bob Jones University v. United States: For Whom will the Bell Toll?*, 29 *ST. LOUIS U. L.J.* 561 (1985); Ralph D. Mawdsley & Steven Permut, *Bob Jones University v. United States: A Decision with Little Direction*, 12 *EDUC. L. REP.* 1039 (1983).

⁶ Transcript of Oral Argument, *supra* note 1, at *38.

same sex, Chief Justice Roberts addressed a related question to the Solicitor General:

Counsel, I'd like to follow up in a line of questioning that Justice Scalia started. We have a concession from your friend that clergy will not be required to perform same-sex marriage, but there are going to be harder questions. Would a religious school that has married housing be required to afford such housing to same-sex couples?⁷

Verrilli refused to answer the question directly, responding instead that “issues are going to arise no matter which way you decide this case, because these questions of accommodation are going to arise in situations in States where there is no same-sex marriage . . . and, in fact, they have arisen many times.”⁸ As noted in the opening sentence, this exchange raises serious concerns for the future of not-for-profit faith based schools, and other institutions that are admittedly beyond the scope of this article. Such questioning is serious because it seems to reveal governmental intent to punish believers for remaining faithful to teachings they have accepted for ages.

As discussed below, Justice Kennedy’s majority opinion is bereft of constitutional analysis or grounding, particularly his analysis of the substantive due process right to liberty and equal protection. Even as he referred condescendingly to people of faith, Kennedy ostensibly sought to allay concerns that the imposition of same-sex unions on the United States via judicial fiat would negatively impact believers who seek to exercise their rights to religious freedom.⁹ As reflected by the stridency of the dissenting Justices,¹⁰ Kennedy’s musings did little to offer much in the way of protection for religious freedom. As a consequence of these trivial musings, supporters of *Obergefell* now hasten to enact legislation.¹¹

⁷ *Id.* at *36.

⁸ *Id.* at *37.

⁹ See Brian Walsh, *Religious Freedom After the Supreme Court’s Same-Sex Marriage Decision*, WASH. TIMES (D.C.) July 1, 2015, <http://www.washingtontimes.com/news/2015/jun/30/brian-walsh-religious-freedom-after-supreme-courts/> (reporting that *Obergefell* “offers these Americans [of faith] decidedly scant reassurance.”).

¹⁰ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting) (voicing concern that *Obergefell* “will be used to vilify Americans who are unwilling to assent to the new orthodoxy . . . by those who are determined to stamp out every vestige of dissent.”).

¹¹ See *infra* note 196 and accompanying text.

Obergefell was handed down amid a growing body of actions demonstrating hostility to religion, not all of which have been litigated. The upshot of much of this activity is that it evidences a great deal of antipathy for Christianity. The attacks on Roman Catholicism in particular and its reverence for the Eucharist as the Body and Blood of Christ¹² reveal that anti-Catholicism remains the “anti-Semitism of the intellectuals” (and progressives).¹³ Incidents evidencing the aforementioned trend have occurred both on and off campuses in an attempt to restrict, if not eliminate,¹⁴ religious and other forms of free speech¹⁵ at faith-based colleges and universities with overt Christian affiliations as well as public educational institutions.¹⁶ The goal of such concerted activities is apparently to restrict the free flow of ideas ,especially those of

¹² Members of the gay group ACT-UP chained themselves to pews in St. Patrick’s Cathedral, shouted down Cardinal O’Connor at a Sunday Mass before others, “received” Eucharist but spat it out, and desecrated the Sacrament by stepping on the consecrated hosts. While conceding that the protestors such as these undoubtedly represent a small fringe minority, this is a particularly egregious example and one can only wonder what kind of outrage this behavior might have stirred had it occurred in a house of worship of some other faith. See Mike Dorning, *Animosity Over Gays Threatens St. Pat Parade: New York’s Irish March Will Go On, But Sexual Minority Plans a Protest*, CHI. TRIB., Mar. 15, 1993, 1993 WLNR 4062014. The purported “newspaper of record” in New York City, the *Times*, did not initially report on this highly insensitive incident. See, e.g., Bruce Weber, *Tangle of Issues in St. Patrick’s Brouhaha*, N.Y. TIMES, Mar. 16, 1992, at B3, 1992 WLNR 3351573; Sam Roberts, *One More Time, With Turmoil: True to Tradition, St. Patrick’s Marchers Face Controversy*, N.Y. TIMES, Mar. 17, 1993, at B1, 1993 WLNR 3367862.

¹³ “It has been many years since the poet and essayist Peter Viereck called anti-Catholicism ‘the anti-Semitism of the intellectuals.’” wrote Peter Steinfeld in *Beliefs*, N.Y. TIMES, May 3, 1997. Viereck’s actual words were that “Catholic-baiting is the anti-Semitism of the liberals.” Peter Viereck, *SHAME AND GLORY OF THE INTELLECTUALS* 45 (1953). While Viereck’s words are misquoted regularly, the spirit of his comment remains true. See Mark S. Massa, *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* 7 (2003) (acknowledging anti-Catholicism as the “anti-Semitism of the intellectuals”).

¹⁴ See, e.g., *infra* notes 19–26 and accompanying text for a discussion of *Christian Legal Society v. Martinez*.

¹⁵ See, e.g., FREEDOM FROM RELIGION FOUNDATION, *PRAY TO PLAY: CHRISTIAN COACHES AND CHAPLAINS ARE CONVERTING FOOTBALL FIELDS INTO MISSION FIELDS* (2015), <http://ffrf.org/images/PraytoPlayReport.pdf>. For a summary of the report, see FREEDOM FROM RELIGION FOUNDATION, *State/Church Watchdog Issues Report Damning College Football Chaplains, Coaches*, Aug. 17, 2015, <http://ffrf.org/news/news-releases/item/23528-state-church-watchdog-issues-report-damning-college-football-chaplains-coaches> (calling on officials at public colleges and universities to whom the report was sent to terminate the employment of chaplains, and instead hire counselors, or face legal action).

¹⁶ See *infra* note 149 for a brief discussion of *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (*en banc*).

a religious nature, from the public marketplace of ideas (known as American higher education) in favor of the politically correct flavor of the day.

Against this backdrop of threats to religious freedom on the post-*Obergefell* horizon, the remainder of this article is divided into three substantive parts. The first section briefly reviews recent Supreme Court judgments undercutting religious freedom when it comes into conflict with the interests of individuals who are gay, showing that the Justices have not sought to forge a path of compromise protecting the rights of persons on both sides of the issue. The first section also reviews the judicial history of *Obergefell* along with a summary, analysis, and critique of key portions of the Justices' opinions. The second section reflects on the status of religious freedom for faith-based institutions and their employees, cautioning them to be aware of the coming legal battles at a time when some of their most cherished rights are under steady attack by those who would usher in a fundamental transformation of the United States leading to a "closing of the American mind."¹⁷ The fourth section discusses possible solutions for religiously affiliated institutions that feel threatened. The article rounds out with a brief reflection on the status of religious freedom in the United States.

II. SUPREME COURT CASES

This section briefly highlights three recent Supreme Court cases impacting religious freedom¹⁸ before focusing on the

¹⁷ This idea mirrors the title of Allan Bloom's seminal 1987 best-seller, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students*.

¹⁸ In fairness, the Supreme Court did uphold religious liberty in three other cases not involving issues of sexual preference that were decided during this time frame. In *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunities Comm'n*, 132 S. Ct. 694 (2012), a unanimous Court, in an opinion by Chief Justice Roberts, upheld the ministerial exception, reasoning that Church officials, rather than the Federal Equal Employment Opportunities Commission, had the right to decide who qualified as a minister. For commentary on this case, see Charles J. Russo & Paul E. McGreal, *Religious Freedom in American Catholic Higher Education*, 39 REL. & EDUC. 116 (2012). Two years later, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), a five-to-four judgment authored by Justice Kennedy upheld a policy of a town governing board allowing its meetings to be opened with a prayer offered by a member of the clergy selected from the congregations listed in a local directory. For a commentary, see Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO SUP. CT. REV. 71

Court's judgment in *Obergefell*.

A. Christian Legal Society v. Martinez

*Christian Legal Society v. Martinez*¹⁹ involved a dispute from the public university, Hastings College of the Law, where Christian law students failed in their challenge to a campus policy.²⁰ The policy forbade them from retaining their status as members of a recognized campus organization entitled to benefits unless they accepted individuals for leadership positions who did not share their values.²¹ The challenge arose because the Christian society required members and officers to sign a "Statement of Faith," directing them to comply with its principles, such as the belief that sexual activity should not occur outside of marriage between a man and a woman.²² The Statement also refused affiliation to anyone who participated in "unrepentant homosexual conduct."²³

In a five-to-four judgment written by Justice Ginsburg, the Supreme Court upheld the constitutionality of what campus officials described as their "all-comers" policy.²⁴ Under this policy, groups had to accept all persons for leadership roles, even if individuals did not share in organizational values or missions. Justice Alito's dissent sought to invalidate the all-comers policy as unreasonably infringing on the rights of members of the Society because it placed a substantial burden

(2014). During the same term, in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), in a five-to-four opinion authored by Justice Alito, the Court decided that insofar as closely held for-profit corporations are legal persons, they do not have to comply with regulations imposing an abortifacient mandate that are not part of the Affordable Health Care Act. The Court reasoned that even if the government had a compelling interest in mandating such coverage, it substantially burdened the free exercise of the owners' right to religious freedom in violation of the Religious Freedom Restoration Act because the regulations failed to achieve their goal in the least restrictive manner and so conflicted with the owners' deeply held religious beliefs.

¹⁹ *Christian Legal Soc'y Chapter of the Univ. of California v. Martinez*, 561 U.S. 661 (2010). For a much more detailed analysis of this case, see William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 EDUC. L. REP. 473 (2010). See also Zachary R. Cormier, *Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus*, 17 TEX. WESLEYAN L. REV. 287 (2011).

²⁰ *Christian Legal Soc'y*, 561 U.S. at 662.

²¹ *Id.* at 661.

²² *Id.*

²³ *Id.* (internal quotations omitted).

²⁴ *Id.* at 669.

on their free exercise of religion.²⁵ Although the law school officials had not relied on the “all-comers” policy until the Christian group challenged the denial of its request for recognized status, the Court rejected the concerns of the students and Justice Alito’s dissent that the policy imposed a significant restriction on religious freedom.

On remand, the Ninth Circuit rejected the Society’s remaining claims that university officials violated their right to religious freedom.²⁶ The court rejected this because the Society’s leaders failed to preserve their argument that officials selectively applied the policy.

B. United States v. Windsor

*United States v. Windsor*²⁷ was decided on the same day as *Hollingsworth v. Perry*.²⁸ *Windsor*, which was decided on the merits of the claim, rather than on the procedural question of standing over the status of same-sex unions, has significant potential to impact operations in faith-based educational institutions at all levels. *Windsor* arose when a taxpayer in New York, as the surviving partner of a same-sex couple, successfully challenged²⁹ being denied the benefit of a spousal tax deduction due to definition of “marriage” and “spouse” provided in the Defense of Marriage Act (DOMA).³⁰ In response to the plaintiff’s suit seeking a refund of federal estate taxes as well as a declaration that the pertinent provision of DOMA could not deny the liberty protected by the Due Process Clause of the Fifth Amendment,³¹ the Supreme Court affirmed an

²⁵ *Id.* at 706 (Alito, J., dissenting). Justice Alito’s dissent was joined by Chief Justice Roberts along with Justices Scalia and Thomas.

²⁶ See *Christian Legal Soc’y v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010).

²⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013). For representative commentary on this case, see Marc R. Poirier, “*Whiffs of Federalism*” in *United States v. Windsor: Power, Localism, and Kulturkampf*, 85 U. COLO. L. REV. 935 (2014); Susannah W. Pollvogt, *Marriage Equality*, *United States v. Windsor*, and *the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045 (2014); Jamie L. Johnson, *DOMA: Turning the Love Boat into the Titanic How the United States v. Windsor Opinion Affects Maritime Law*, 14 LOY. MAR. L.J. 408 (2015).

²⁸ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁹ A federal trial court entered a judgment in favor of the plaintiff, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) and the Second Circuit affirmed on her behalf, 699 F.3d 169 (2nd Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012).

³⁰ Pub. L. No. 104-199, 110 Stat. 2419 (1996).

³¹ In relevant part, the Fifth Amendment reads: “No person shall . . . be deprived of life, liberty, or property without due process of law[.]”

earlier order in her favor.

In a five-to-four judgment authored by Justice Kennedy,³² the Supreme Court invalidated DOMA, regarding it as an unconstitutional deprivation of the right to liberty of the person protected by the Fifth Amendment because it defined marriage as a union of one man and one woman as husband and wife.³³ The Court added that this definition operated to deprive same-sex couples of the benefits and responsibilities accompanying the federal recognition of their marriages, thereby placing a stigma on those who entered into same-sex unions.³⁴

According to Justice Kennedy, “[i]n determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ . . . require careful consideration.”³⁵ Absent any proof of a discriminatory animus, Kennedy added that “no legitimate purpose overcomes the purpose and effect [of DOMA] to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”³⁶

Disagreeing vociferously with Kennedy, Justice Scalia rejected the majority’s assertion “that the motivation for DOMA was to ‘demean;’ to “‘impose inequality;’ to “‘impose . . . a stigma;’ to deny people ‘equal dignity;’ to brand gay people as ‘unworthy;’ and to “‘humiliat[e].”³⁷ Scalia questioned the Supreme Court’s authority to invalidate legislation enacted as part of the democratic process. This is an issue of the Court’s authority again came to the fore in *Obergefell*, wherein the Court essentially granted the judiciary supremacy over Congress and the president. The Court granted itself such power even though Congress enacted DOMA in 1996 by margins of 342 to 67 in the House of Representatives³⁸ and 85 to 14 in the Senate.³⁹ President Bill Clinton subsequently

³² Justice Kennedy delivered the opinion of the Court and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

³³ Chief Justice Roberts at 133 S. Ct. 2696 filed a dissenting opinion. Justice Scalia, *id.* at 2697, filed a dissenting opinion, in which Justice Thomas and in which Chief Justice Roberts joined as to Part I. Justice Alito, *id.* at 2711, filed a dissenting opinion, in which Justice Thomas joined as to Parts II and III.

³⁴ *Id.* at 2693.

³⁵ *Windsor*, 133 S. Ct. at 2693 (2013) (citations omitted).

³⁶ *Id.* at 2697.

³⁷ *Id.* at 2708 (Scalia, J., dissenting) (citations and emphasis omitted).

³⁸ 142 CONG. REC. 103, H7505 (daily ed. July 12, 1996).

³⁹ 142 CONG. REC. 123, S10129 (daily ed. Sept. 10, 1996).

signed DOMA into law.

In light of DOMA's legislative history, it is puzzling at best why Kennedy made such a sweeping and ultimately mean-spirited statement about DOMA's legislative intent absent evidence, especially insofar as the Court's dramatic action was virtually unthinkable as recently as fifteen or twenty years ago. However, this much is certain: Justice Kennedy's statements on behalf of the Court invalidating DOMA—essentially describing supporters of marriage between one man and one woman as being motivated by hate and refusing to recognize legitimate religious beliefs—should serve as a stark warning to religious leaders about the precarious status of the Free Exercise Clause as well as the conflicts to come. Moreover, in light of Justice Alito's comment that believers may be vilified⁴⁰ for remaining true to their faiths, it remains to be seen what may happen to faith-based schools for continuing to teach the values their religions have sincerely held through the ages.

C. *Hollingsworth v. Perry*

*Hollingsworth v. Perry*⁴¹ arose when same-sex couples who were denied marriage licenses due to California's Proposition 8 sued the Governor and various state officials. Proposition 8 was a voter-enacted ballot initiative amending the state Constitution to provide that only marriage between a man and a woman was valid. The plaintiffs successfully alleged that the initiative eliminated their right to marry while violating their rights to due process and equal protection under the Fourteenth Amendment.⁴²

Without reaching the merits of the underlying claims, in another five-to-four judgment, this one authored by Chief

⁴⁰ *Obergefell*, 135 S. Ct. at 2642.

⁴¹ 133 S. Ct. 2652 (2013), *on remand*, 725 F.3d 1140 (9th Cir. 2013) (dismissed for lack of jurisdiction). For representative commentary on this case, *see, e.g.*, Matthew A. Melone & George A. Nation III, "Standing" on Formality: *Hollingsworth v. Perry and the Efficacy of Direct Democracy in the United States*, 29 *BYU J. PUB. L.* 25 (2014); Glenn S. Koppel, "Standing" In the Shadow of Erie: *Federalism in the Balance in Hollingsworth v. Perry*, 34 *PACE L. REV.* 631 (2014).

⁴² Starting with *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), this case had a lengthy procedural history culminating in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *rehearing en banc denied*, 681 F.3d 1065 (9th Cir. 2012), *cert. granted sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

Justice Roberts,⁴³ the Court affirmed an earlier order that the plaintiffs lacked the ability to intervene to defend the initiative. More specifically, the Court maintained that private parties lack standing⁴⁴ to defend the constitutionality of state statutes because the plaintiffs had what the Court described as an individualized grievance and they were not agents of the State,⁴⁵ even where public officials charged with the duty to do so chose not to act.⁴⁶ As with *Windsor*, arguably less to the point insofar as it primarily addressed standing, if supporters of same sex unions are unwilling to demonstrate the tolerance of religious institutions that they demand in return, then faith based schools may be subject to litigation ultimately resulting in their financial demise.

D. Obergefell v. Hodges

1. Facts and judicial history

The facts in *Obergefell* are as straightforward as Justice Kennedy's majority opinion was fractured. The litigation began when fourteen same-sex couples and two men whose same-sex partners were deceased successfully filed suit in Michigan,⁴⁷ Kentucky,⁴⁸ Ohio,⁴⁹ and Tennessee⁵⁰ to obtain marriage licenses or recognition of their partnerships. All of the jurisdictions, which make up the Sixth Circuit, defined marriage as being between one man and one woman. The courts ruled in favor of the plaintiffs who alleged that the statutory and state constitutional provisions at issue violated the Fourteenth Amendment by denying them the right to marry or to have their marriages that were performed in other jurisdictions recognized where they lived.

On further review, the Sixth Circuit consolidated the

⁴³ See *Hollingsworth*, 133 S. Ct. at 2659 (Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Scalia, Ginsburg, Breyer, and Kagan.).

⁴⁴ *Id.* at 2666.

⁴⁵ *Id.*

⁴⁶ Interestingly, although he was author of the Supreme Court's opinion in *Windsor*, Justice Kennedy filed a dissent at 2668 which was joined by Justices Thomas, Alito, and Sotomayor.

⁴⁷ *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

⁴⁸ *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014).

⁴⁹ *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014).

⁵⁰ *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014).

actions into one case, reversing in favor of the states on the ground that their officials did not have constitutional duties to grant licenses to same-sex couples who wished to marry or to recognize such arrangements entered into in other jurisdictions.⁵¹ Not surprisingly, the advocates appealed to the Supreme Court which reversed in their favor, establishing same-sex unions as the law of the land by judicial fiat in a closely divided opinion.

2. *Justice Kennedy for the Court.*

At the outset of the majority opinion, Justice Kennedy, in a five-to-four judgment,⁵² identified the two questions before the Court. He stated that,

The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.⁵³

Justice Kennedy devoted the first four sections of his analysis to the first issue, but a scant three paragraphs to the second question.

Justice Kennedy opened his analysis by paying lip service to the centrality of marriage, citing to no less a figure than Cicero.⁵⁴ In so doing, Kennedy conceding that “[i]t is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”⁵⁵

The second section of the opinion began with Justice Kennedy’s musings about changes in marriage over the years such as appropriately affording women greater roles and

⁵¹ *DeBoer v. Snyder* 772 F.3d 388 (6th Cir. 2014).

⁵² *Obergefell*, 135 S. Ct. at 2584 (Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts’s dissent was joined by Justices Scalia and Thomas. Justice Scalia’s dissent was joined by Justice Thomas. Justice Thomas’s dissent was joined by Justice Scalia. Justice Alito’s dissent was joined by Justices Scalia and Thomas).

⁵³ *Id.* at 2593.

⁵⁴ *See id.* at 2594 (Cicero wrote, “The first bond of society is marriage; next, children; and then the family.”) (internal citations omitted).

⁵⁵ *Id.*

ensuring their equality; he aptly described such transformations as helping to strengthen the institution of marriage. Using this as a departure point, Kennedy embarked on a review of attitudes toward those in same-sex relationships, noting that until relatively recently, homosexuality was considered a psychological illness.⁵⁶ Later in the twentieth century, he pointed out, same-sex couples began to lead more open lives and establish their own families which, in turn, led to litigation over their status.

Moving into the heart of his order, Justice Kennedy reviewed the evolution of key litigation starting with *Bowers v. Hardwick*.⁵⁷ *Bowers* was the first case in which the Court addressed the status of homosexuals,⁵⁸ but it upheld the constitutionality of a law from Georgia criminalizing a variety of intimate acts between homosexuals. Justice Kennedy observed that change was in the offing, starting with his own opinion in *Romer v. Evans*,⁵⁹ in which the Court invalidated a provision of the Colorado Constitution intended to deny protection to individuals based on their sexual orientations as lacking a rational relationship to a legitimate governmental purpose.

Justice Kennedy identified his 2003 opinion in *Lawrence v. Texas* as the big breakthrough with regard to gay lifestyles.⁶⁰ Justice Kennedy remarked that not only did *Lawrence* strike down as unconstitutional a Texas statute making it a crime for two consenting males to engage in specified intimate sexual conduct in the privacy of their home, but also explicitly overturned *Bowers*. Justice Kennedy acknowledged that in the same year as *Bowers*, Congress enacted, and President Clinton signed into law, DOMA.⁶¹ DOMA defined marriage as being between one man and one woman, a definition that the Court subsequently invalidated in *Windsor*.⁶²

With *Romer* as a kind of impetus, Justice Kennedy

⁵⁶ See *id.* at 2596.

⁵⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1988).

⁵⁸ The author is aware that “gay” has replaced homosexual, but uses the word when it appears in the Court’s opinion.

⁵⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶¹ 1 U.S.C. § 7.

⁶² *Windsor*, 133 S. Ct. at 2675. *Supra* notes 27–40 and accompanying text for a discussion of *Windsor*.

documented how lower courts⁶³ entered the fray. To this end, Justice Kennedy commented that only the case at bar and a dispute from the Eighth Circuit⁶⁴ deviated from the judicial norm that preventing same-sex couples from being allowed to marry was unconstitutional.⁶⁵ Justice Kennedy entered the third, and lengthiest, part of his analysis by citing the Due Process Clause of the Fourteenth Amendment, pursuant to which “no State shall ‘deprive any person of life, liberty, or property, without due process of law.’”⁶⁶ He added that fundamental liberties include “intimate choices that define personal identity and beliefs.”⁶⁷ Even so, Justice Kennedy conceded that the Court has yet to devise a formula in protecting such fundamental rights. In an unintended irony, Justice Kennedy determined that those who “wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning,”⁶⁸ essentially providing cover for the judicial activism displayed in the remainder of his order.

After a brief review of cases wherein the Supreme Court interpreted the Constitution as protecting the right to marry,⁶⁹ Justice Kennedy made a quantum judicial leap. Lacking precedent to support his position, he declared that “[i]t cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners.”⁷⁰ Justice Kennedy then identified four principles and traditions under which he applied the constitutional principles associated with marriage to same-sex couples.

Justice Kennedy went on to say that “[a] first premise of the

⁶³ See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Hawaii 1993) (although not imposing same-sex unions as a matter of law, the court declared that a law restricting marriage on the basis of sex was subject to strict scrutiny); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 945 (Mass. 2003) (determining that limiting the “protections, benefits and obligations of civil marriage to individuals of opposite sexes lacked [a] rational basis and violated the state constitutional equal protection principles.”).

⁶⁴ *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

⁶⁵ *Obergefell*, 135 S. Ct. at 2608–09.

⁶⁶ *Id.* at 2597.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2598.

⁶⁹ *Id.*

⁷⁰ *Id.*

Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."⁷¹ It is certainly true, as he declared, that decisions about marriage and family are among the most intimate individuals can make, shaping their destinies in enduring bonds. However, Justice Kennedy failed to make the case why members of same-sex unions who cannot procreate should have the same rights to marriage, and why religious believers and institutions should run the risk of being charged with discrimination if they disagree with the vision he shared with the advocates and *amici* behind *Obergefell*.

Kennedy started with the fair proposition that the right "to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."⁷² However, he stopped short of explaining why same-sex unions can be allowed to change the meaning of marriage that has stood the test of ages.

In another unintended irony, Kennedy observed that "[a] third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."⁷³ While this is accurate—and readily conceding that same-sex couples can provide loving homes to children, without considering the psychological impact on their well-being—he once more failed to justify why it was necessary to allow five unelected-judges to radically redefine marriage rather than allow changes to play out through the democratic process. If anything, this section of his opinion stands out as shortsightedly placing the primary focus on the desires of adults rather than the needs of children, seemingly putting the cart before the horse in terms of sound child-rearing.

The final premise that Justice Kennedy touched on was the belief that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."⁷⁴ After reciting various aspects of marriage such as inheritance and property rights, visitation rights in hospitals, and medical decision-making power—all of which can be available without

⁷¹ *Id.* at 2599.

⁷² *Id.*

⁷³ *Id.* at 2600.

⁷⁴ *Id.* at 2601.

redefining marriage—he recognized marriage as being at the center of a multitude of aspects in American social life and order. In describing marriage as being at the center of life, Justice Kennedy was of the view that insofar as there is no difference between same-sex and opposite-sex couples, excluding the former from this arrangement denied them many state benefits. He maintained that such exclusions demean gays and lesbians because it prevents them from enjoying the fundamental right to marry and, in so doing, rejected arguments to the contrary.⁷⁵

Kennedy sought to buttress his assertion that the right to marry is a form of liberty protected by the Fourteenth Amendment and expanded his view to describe it as a synergy working in conjunction with the Equal Protection Clause.⁷⁶ Insofar as Justice Kennedy failed to support his position by discussing equal protection analysis, Chief Justice Roberts later took him to task for this omission.⁷⁷ Justice Kennedy commented that the Court's equal protection analysis "has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged[.]"⁷⁸ a claim that Justice Scalia scathingly rejected.⁷⁹ In doing so, Justice Kennedy cited to an array of equal protection cases, particularly his own opinion in *Lawrence*, arguing that the marriage laws at issue limited both the liberty and equal protection rights of the petitioners by imposing continuing harms on them that he was unable to identify. One can only wonder how this will play out if same sex couples wish to enroll their children in faith based schools even though they openly live in a manner inconsistent with the express teachings of the governing religious bodies of these institutions.

In the fourth section of his analysis, Justice Kennedy unconvincingly sought to rebut the dissenters who reasoned that the Court acted too hastily, shortchanging the democratic process by imposing same-sex unions as the law of the land. Rejecting a call for caution in creating a new fundamental

⁷⁵ See *id.* at 2602.

⁷⁶ *Id.*

⁷⁷ See *infra* notes 99–100 and accompanying text.

⁷⁸ *Obergefell*, 135 S. Ct. at 2603.

⁷⁹ *Id.* at 2631.

right, Justice Kennedy worried that any other result would have inflicted pain and humiliation on gays and lesbians, creating grave harm to their dignity.⁸⁰

In the final paragraph of the fourth section, and a scant five paragraphs from the end of his opinion,—perhaps inadvertently demonstrating that the Court did not view religious liberty as deserving a more central role in its order—Justice Kennedy unpersuasively sought to allay the concerns of believers:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.⁸¹

Interestingly, Justice Kennedy spoke of the rights of believers to advocate and teach their positions. Yet, just as in *Windsor*, he failed to demonstrate any respect for the positions of people of faith early in his opinion and wrote little about concrete protections they would be afforded to safeguard their constitutional right to freedom of religion.

In the briefest and final section of the Court's opinion, Justice Kennedy addressed "whether the Constitution requires States to recognize same-sex marriages validly performed out of State."⁸² He summarily found that if same-sex couples can exercise their right to enter marriages in their home states, there is no lawful ground on which to refuse to recognize such unions if they are performed in other jurisdictions. He thus concluded by granting the petitioners the right to be equal to opposite-sex couples under the law.

3. *Dissenting Opinions*

a. *Chief Justice Roberts.* Chief Justice Roberts's fairly lengthy dissent, which was joined by Justices Scalia and Thomas, conceded at its outset that the petitioners made strong

⁸⁰ See *Id.* at 2607.

⁸¹ *Id.*

⁸² *Id.*

arguments, and acknowledged that eleven states and the District of Columbia allow same-sex unions.⁸³ At the same time, though, he stressed that the judicial branch was meant to determine what the law is, not make it or redefine it, a theme running through the dissents. Roberts added that “this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”⁸⁴

In the following paragraph, Roberts added that compelling policy arguments in support of redefining marriage aside, no such legal arguments existed, emphasizing that “[t]he fundamental right to marry does not include a right to make a state change its definition of marriage.”⁸⁵ Further, he described the Court’s ruling as “an act of will, not [a] legal judgment”⁸⁶ because the majority essentially confused its own preferences with what the law requires in its headlong rush to bypass the democratic process. At this point, Roberts made his first of sixteen, mostly highly critical, references to *Lochner v. New York*. In *Lochner*, the Court invalidated a law designed to regulate the number of hours bakers could work in a day or week.⁸⁷ The *Lochner* Court struck the law down as an unnecessary interference with the liberty to enter into contracts protected by the Fourteenth Amendment. Chief Justice Roberts later cautioned that the Court avoid the same mistake as in *Lochner* by “converting personal preferences into constitutional mandates”⁸⁸ that might impact the ability of faith-based schools to operate.

Roberts then specified that his dissent was not about the Court’s action in changing the definition of marriage. Rather, he emphasized that he was concerned with whether such an important task as redefining marriage should have been left to the people and the democratic process instead of five lawyers

⁸³ *Id.* at 2611.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2612.

⁸⁷ *Lochner v. New York*, 198 U.S. 45 (1905). For representative commentary on this case, see David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469 (2005); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

⁸⁸ *Obergefell*, 135 S. Ct. at 2618.

assigned to resolve legal disputes.⁸⁹

Part one of Chief Justice Roberts's dissent focused on his concern over the majority's having paid lip service to marriage as it existed over the millennia even as its own "precedents have repeatedly described marriage in ways that are consistent with its traditional meaning."⁹⁰ Amid shifting public opinion and the workings of the political process, he was dismayed by how the Court ignored the judgment of the Sixth Circuit, which would have left the decision in the hands of voters.⁹¹

Chief Justice Roberts opened the second part of his dissent by criticizing Justice Kennedy's four "principles and traditions," reasoning that they lacked a basis in either except for the "unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner*."⁹² Chief Justice Roberts discussed the nature of the petitioners' fundamental rights claim, noting that they viewed marriage not as an enumerated right, which it clearly never was. Instead, he observed that the petitioners relied on the Supreme Court's interpretation of Fourteenth Amendment Due Process Clause as including a substantive aspect designed to protect liberties that are so deeply grounded in American society as to be considered fundamental and cannot be denied absent a compelling governmental interest.

The Chief Justice went on to debunk the majority's reliance on cases dealing with the right to marriage such as *Loving v. Virginia*, wherein the Supreme Court invalidated a ban on interracial marriage.⁹³ He distinguished the earlier cases from the current issue to the extent that the petitioners in *Obergefell* desired same-sex unions while the precedents on which they relied addressed the traditional definition of marriage as being between one man and one woman. Expanding on his rationale, Chief Justice Roberts thought that the petitioners inaptly relied on *Griswold v. Connecticut*,⁹⁴ wherein the Court struck down a ban on contraceptives, and *Lawrence v. Texas*,⁹⁵

⁸⁹ *Id.* at 2612.

⁹⁰ *Id.* at 2614.

⁹¹ *See id.* at 2615.

⁹² *Id.* at 2616.

⁹³ *See id.* at 2619; *see also* *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹⁵ *Lawrence*, 539 U.S. at 558. *See supra* note 60 for a brief discussion of *Lawrence*.

discussed earlier. Chief Justice Roberts conceded that the cases the petitioners relied on touched on different dimensions of privacy in light of the intimate conduct of individuals in same-sex unions. However, he rejected the application of these cases insofar as the right they pursued was anything but private because they were seeking public recognition of their relations, accompanied by governmental benefits.

Remarking that the majority was unable to find genuine support in the Court's precedent, he suggested that the only case it could rely on was his *bette noir* of the day, *Lochner*, which he criticized in four references over three paragraphs. Chief Justice Roberts was troubled because rather than proceed slowly in defining fundamental rights in light of the "debacle" of *Lochner*, "the majority casts caution aside and revives the grave errors of that period."⁹⁶ Reviewing the majority's reliance on *Lochner* to argue that permitting same-sex unions would not harm themselves or others, Chief Justice Roberts pointed out that what he described as the "harm principle" was more of a philosophical than legal position.⁹⁷ Rejecting this approach, Roberts maintained "that when unelected judges strike down democratically enacted laws" via the democratic process in "discovering" implied fundamental rights, "they do so based on something more than their own beliefs."⁹⁸ This approach, however, was absent in *Obergefell*.

In the third, and briefest, part of his dissent, the Chief Justice rebutted the majority's reliance on what he described as an inapt synergy between the Equal Protection⁹⁹ and Due

⁹⁶ *Obergefell*, 135 S. Ct. at 2621.

⁹⁷ *Id.* at 2622.

⁹⁸ *Id.* at 2622–23.

⁹⁹ Briefly stated, according to the Equal Protection Clause, "No state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. IV, § 1. Further, under equal protection analysis, individuals or groups that are "similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

In equal protection analysis cases, ". . . if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. Conversely, classifications based on constitutionally suspect factors such as race, legislatively protected categories such as race, or fundamental constitutional rights are unlikely to survive strict scrutiny unless they serve compelling governmental interests that are narrowly tailored to achieve their goals. While not using this language, the Court essentially applied this standard in *Brown v. Board of Education*, 347 U.S. 483 (1954). Amazingly, though, the Court applied rational basis in *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-

Process Clauses.¹⁰⁰ Chief Justice Roberts rejected this approach because he was of the view that the majority neither framed the dispute within the usual framework for an equal protection claim nor made more than conclusory claims to explain how or why this clause provided an alternative justification for the outcome. If anything, he was convinced that an equal protection claim should have failed because treating same-sex and opposite-sex couples in the same manner is “rationally related to States’ legitimate state interest’ in ‘preserving the traditional institution of marriage.’”¹⁰¹

Briefly stated, in the final portion of his dissent, Chief Justice Roberts ruminated on how the majority essentially ignored the democratic process, instead making itself the supreme law of the land. To this end, and as witnessed by ongoing controversy over abortion, he presciently wrote that “[p]eople denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of things courts usually decide.”¹⁰²

Turning to what may be described as the issue of the day, the Chief Justice addressed his concerns about how the Court’s imposition of same-sex unions would impact religious freedom. In fact, he highlighted how the Solicitor General “acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage,”¹⁰³ adding that this and similar questions would soon be subject to litigation because “people of faith can take no comfort in the treatment they receive from the majority today.”¹⁰⁴ Rounding out this part of his dissent, the Chief

Americans during World War II based on their ancestry). When courts apply the compelling interest test, governmental actions typically fail.

Other classifications, such as illegitimacy, alienage, and gender, are subject to intermediate scrutiny. This standard is not as difficult for the government to meet as the compelling interest test since it involves less deference to legislation than rational relations. Under this test, the Supreme Court refuses to uphold classifications unless they bear “substantial relationships” to “important” governmental interests. The case coming closest to applying this standard in a school setting was *Plyler v. Doe*, 457 U.S. 202 (1982) (upholding the rights of children who were undocumented residents to attend public schools), *reh’g denied*, 458 U.S. 1131 (1982), even though the majority did not clearly indicate that it was applying this test.

¹⁰⁰ *Obergefell*, 135 S. Ct. at 2623.

¹⁰¹ *Id.* (citing to *Lawrence*, 539 U.S. at 585) (citations omitted).

¹⁰² *Obergefell*, 135 S. Ct. at 2625.

¹⁰³ *Id.* at 2626 (citations omitted).

¹⁰⁴ *Id.*

Justice disagreed with the way in which the majority repeatedly denigrated people who believe in the understanding of marriage that has existed throughout history. He feared that Kennedy's gratuitous, unfounded, and ultimately mean-spirited "assaults on the character of fairminded [sic] people will have an effect, in society and in court"¹⁰⁵ for years to come. As noted throughout, these kinds of attitudes can have direct impacts on faith based institutions insofar as they may not survive challenges to the ability to retain their values or close.

Chief Justice Roberts ended his dissent on a note of caution. He suggested that those who were happy with the outcome in *Obergefell* would be able to celebrate the Court's holding but they could not celebrate the Constitution because the judgment from which he was dissenting had nothing to do with the Constitution.¹⁰⁶

b. Justice Scalia. Justice Scalia's brief, pointed dissent, which was joined by Justice Thomas,¹⁰⁷ began with his assertion that his larger concern was not so much the way in which marriage is defined, but how a bare majority of nine judges can impose their will over 320 million Americans.¹⁰⁸ He pointed out that until the Court put an end to it, the American people demonstrated democracy at its best by engaging in a spirited debate over how to define marriage. In fact, he acknowledged that proponents of same-sex unions succeeded in eleven states even as advocates continued to press their arguments in public.¹⁰⁹

Justice Scalia chided the majority for mistakenly relying on the Fourteenth Amendment to remove this debate from the political process. He explained that when the Fourteenth Amendment was ratified in 1868, all states defined marriage as being between one man and one woman with little doubt of its constitutionality.¹¹⁰ Justice Scalia believed that insofar as the Court lacked the authority to invalidate a set of laws not expressly forbidden by the Fourteenth Amendment, its judgment was nothing more than "a naked judicial claim to

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2626.

¹⁰⁷ *Id.* at 2626 (Scalia, J., dissenting).

¹⁰⁸ *Id.* at 2627.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2628.

legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government.”¹¹¹

Continuing his criticism of what he described as a “judicial Putsch,” Scalia excoriated the majority for having

discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since [seeing] what lesser legal minds [such as] . . . Oliver Wendell Holmes, Jr., . . . Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, . . . could not.¹¹²

He thus characterized the opinion as “couched in a style that is as pretentious as its content is egotistic.”¹¹³ In sum, suffice it to say that Justice Scalia’s dissent warned the Court that its overreaching had it marching inexorably “one step closer to being reminded of our impotence.”¹¹⁴

c. Justice Thomas. Justice Thomas’s dissent, which was joined by Justice Scalia,¹¹⁵ largely addressed the constitutional notion of liberty that played a large part in the Court’s rationale. He began by providing a detailed history of the Fourteenth Amendment, noting that it traced its origins to the Magna Carta.¹¹⁶ In so doing, Justice Thomas also reviewed the history of the Fifth Amendment and its narrow use of the term “liberty,” suggesting that this limited approach likely applied to the Fifth Amendment as well.¹¹⁷ He finished this point by observing that the Court’s earliest uses of the Fourteenth Amendment “appear to interpret the Clause as using ‘liberty’ to

¹¹¹ *Id.* at 2629.

¹¹² *Id.*

¹¹³ *Id.* at 2630.

¹¹⁴ *Id.* at 2631. In light of Scalia’s statement, “[a] new Rasmussen Reports national telephone survey [released on July 24, 2015] finds that 36% of Likely U.S. Voters still think the high court is doing a good or excellent job, but that’s down from the recent high of 38% measured just after the court issued its rulings in June.” The data were gathered in response to the question “How would you rate the way the Supreme Court is doing its job,?” in a survey of 1,000 likely voters taken July 21-22, 2015. The responses as broken down were: Excellent, 9%; Good, 27%; Fair 30%; Poor 31%; Not sure, 3%. *Supreme Court Update What do Voters Think of the Supreme Court Now?* RASMUSSEN REPORTS (July 24, 2015), http://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_update.

¹¹⁵ *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

¹¹⁶ *Id.* at 2632.

¹¹⁷ *Id.* at 2633.

mean freedom from physical restraint,” which would not include the liberty to recreate marriage.¹¹⁸

Having narrowed the scope of the term “liberty,” Justice Thomas showed that liberty in this context refers to being free from government action in the form of physical restraints and imprisonment rather than an entitlement to benefits.¹¹⁹ Moreover, he was of the opinion that regardless of how one defined liberty, the petitioners had not lost their liberty because they were neither restrained nor imprisoned as a consequence of having entered into same-sex relationships.¹²⁰ Rather, he acknowledged that the petitioners were free to cohabit, raise children, and were left alone to live as they wished without any restrictions on their daily lives.¹²¹

What the petitioners really wanted, Justice Thomas maintained, were entitlements to the benefits of marriage that they claimed existed because of the government.¹²² According to Justice Thomas, among the benefits the petitioners sought were a governmental imprimatur on their relationships via official forms and a variety of monetary benefits such as reductions in death taxes.¹²³ Justice Thomas determined that the Founders would have allowed the petitioners to do as they were doing: exchange vows, raise children, and live free from governmental interference.¹²⁴ Justice Thomas even cited to Locke who wrote that, “[t]he first society was between man and wife, which gave beginning to that between parents and children.”¹²⁵ Thomas rejected the petitioners’ misunderstanding of marriage, and reminded the majority that it was dealing with a negative liberty, which protects people from restrictions rather than granting them positive rights such as those the petitioners sought.¹²⁶

Justice Thomas also identified two areas, the political process and religious liberty, in which the Court’s misunderstanding of liberty would likely cause collateral

¹¹⁸ *Id.* at 2634.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2635.

¹²¹ *Id.*

¹²² *Id.* at 2635–36.

¹²³ *Id.* at 2636.

¹²⁴ *Id.*

¹²⁵ *Id.* at 2636 (citations omitted).

¹²⁶ *Id.* at 2635.

damages. He feared that the Court undermined the political process by disrespecting its ability to respect liberty. Justice Thomas remarked that the political process had been working robustly in light of debate, evidenced by voters in thirty-two of the thirty-five states who were afforded the opportunity to reframe marriage and chose to retain its traditional definition as being between one man and one woman.¹²⁷

Turning to religious liberty, Justice Thomas worried that the Court's judgment would result in conflict between the government and religious institutions as well as people of faith. In particular, he feared that the majority was unconcerned by the fact that such conflict would arise, even though it is already happening when "individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."¹²⁸ He thus voiced his concern over the Court having short-circuited the political process by refusing to leave the definition of marriage to the voters, a process that had been well under way. Had the Court done as Justice Thomas interpreted the Constitution required, the people would have taken the impact of changing the definition of marriage into consideration rather than risk the potentially "ruinous consequences for religious liberty"¹²⁹ resulting from its order.

d. Justice Alito. Justice Alito opened his dissent, which was joined by Justices Scalia and Thomas,¹³⁰ by declaring that the Court overstepped its boundaries insofar as the Constitution's silence on marriage left it as a matter to be resolved by the States.¹³¹ At this point, he rebutted Justice Kennedy's Liberty Clause arguments noting that five unelected Justices misused their authority to impose their will on the American people.¹³² He retorted that although the Court focused on the happiness of those who choose to marry, this approach is inconsistent with the traditional view over the millennia which defined marriage as involving opposite-sex couples for the purpose of procreation.¹³³

¹²⁷ *Id.* at 2638.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2639.

¹³⁰ *Id.* at 2640 (Alito, J., dissenting).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2641.

Alito conceded that marriage has changed in the twenty-first century, acknowledging that more than 40% of children in the United States are born to unmarried women.¹³⁴ Yet, he did not agree that this changed the traditional view of marriage. Citing to his dissent in *Windsor*, he emphasized that the Court lacked the power to prevent States from preserving the traditional view of marriage as being between one man and one woman.¹³⁵

Insofar as he viewed the majority's opinion as usurping the right of the People to decide whether to keep the traditional view of marriage, Alito sounded the alarm that the Court's rationale would have other consequences, such as "be[ing] used to vilify Americans who are unwilling to assent to the new orthodoxy."¹³⁶ Reiterating that the power to define marriage should have been left to the states, Alito worried that "[b]y imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas."¹³⁷ Alito conceded that the majority sought to allay the concerns of believers. Yet, he remained deeply concerned that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."¹³⁸

III. REFLECTIONS ON THE STATUS OF RELIGIOUS FREEDOM AND EDUCATIONAL INSTITUTION CONCERNS

As voiced by Justice Alito, there is a significant risk that in the post-*Obergefell* world, the Supreme Court's ruling "will be used to vilify Americans who are unwilling to assent to the new orthodoxy . . . by those who are determined to stamp out every vestige of dissent."¹³⁹ Such a situation may occur—paean from *Obergefell's* progressive supporters to the value of diversity and openness notwithstanding—as long as one concurs with the reigning progressive orthodoxy of the day.

¹³⁴ *Id.*

¹³⁵ *Id.* at 2642.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2643.

¹³⁸ *Id.* at 2642–43.

¹³⁹ *Id.* at 2642.

Opponents of Christianity, often led by those “on the political left . . . [who] have taken to calling themselves and their causes ‘progressive,’”¹⁴⁰ rather than liberal, are typically the antithesis of open-mindedness to views not conforming with their own. If these critics of Christianity are successful in marginalizing and excluding Christians’ voices from public life, even though Christianity’s role was essential in the founding of the Republic, it would be a detriment to all because of the profoundly positive impact, with occasional pitfalls, that Christianity’s teachings have generally had on American society.

Should Justice Alito’s fear about the vilification of believers come to fruition, it is likely to transpire at the hands of their progressive opponents who apparently seek to deny tax-exempt status to faith-based institutions. Such a change would have a significantly negative impact on the ability of leaders in many religiously-affiliated, non-public educational institutions to make decisions for their schools, and would be detrimental to untold millions of students and their families, not to mention the wider society to which they have contributed so greatly.¹⁴¹ The condescending tone in Justice Kennedy’s majority opinion—his diktat that those who disagree lack a “better informed understanding of how constitutional imperatives define a liberty”¹⁴² such as the right to same-sex unions—along with Justice Kennedy’s comments in *Windsor*¹⁴³—demonstrate that there is a clear lack of respect for the sincerely held beliefs

¹⁴⁰ Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders the “Progressive” Peril*, 105 MICH. L. REV. 1233, 1245, n.50 (2007).

¹⁴¹ See, e.g., *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 247–48 (1968) (upholding loans of texts books for secular subjects to all students in New York, including those who attended religiously affiliated elementary and secondary schools (The decision acknowledged

that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.)).

(citations omitted).

¹⁴² *Obergefell*, 135 S. Ct. at 2602.

¹⁴³ See *Windsor*, 133 S. Ct. at 2675.

of those who disagree with the progressive position.

An analysis of *Obergefell* reveals three initial concerns with this deeply flawed decision that could influence the future of faith-based educational institutions. First, as illustrated by the dissent, a strong argument can be made that a bare majority of the Supreme Court exceeded its authority, acting as a kind of super legislature, in interpreting the Liberty Clause of the Fourteenth Amendment by relying on the long discredited *Lochner* doctrine. Roberts relied on *Lochner*, at least in part, to mandate the imposition of same-sex unions in jurisdictions where voters chose to retain the traditional view of marriage and, in doing so, side-stepped the democratic process that was underway.¹⁴⁴ Indeed, as was highlighted by the dissenting opinions, it is a stretch to describe *Obergefell* as being grounded in any kind of thoughtful constitutional analysis. Rather, five activist Justices were predetermined to achieve their desired outcome regardless of the rule of law as it has been practiced in the United States, essentially creating a judicial oligarchy.

A second concern emerges over judicial impartiality. In light of language in the United States Code on judicial conflicts of interest,¹⁴⁵ a troubling aspect of the Supreme Court's holding is the non-recusals of Justices Ginsburg and Kagan in *Obergefell*, both of whom have officiated at same-sex unions.¹⁴⁶ Put another way, despite the fact that the Court invalidated DOMA in *Windsor*, to the extent that these justices played such formal roles in support of an issue that would soon be before them ought to have given them pause to continue hearing the case because they had already adopted public

¹⁴⁴ In this regard, Justice Roberts pointed out that eleven States plus the District of Columbia modified their laws to permit same-sex unions, *Obergefell*, 135 S. Ct. at 2611, while Justice Thomas observed that voters in thirty-two of the thirty-five states who were afforded the opportunity to redefine marriage retained its traditional status as being between one man and one woman, *id.* at 2638.

¹⁴⁵ See 28 U.S.C. § 455(a) (2015) ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.")

¹⁴⁶ See Paige Lavender, *Ruth Bader Ginsburg Officiates Another Same-Sex Wedding, Gives a Special Shout-Out to the U.S. Constitution*, HUFFINGTON POST May 18, 2015, http://www.huffingtonpost.com/2015/05/18/ruth-bader-ginsburg-gay-wedding_n_7306584.html; Jarvis Deberry, *Wasting Time—and Taxpayer Money—in Baton Rouge*, NEW ORLEANS TIMES PICAYUNE, May 5, 2015, at A 12, 2015 WLNR 13043951 (reporting that both Justices Ginsburg and Kagan have officiated at same-sex unions).

stances in support of same-sex unions.¹⁴⁷ Why these justices did not seek to avoid even the appearance of a conflict of interest, let alone a real one, is puzzling at best.¹⁴⁸

Third, even in acknowledging the authority of the Supreme Court to interpret the Constitution, a questionable proposition in *Obergefell*, it is important to bear in mind that the Court's rulings are not infallible and it may later recognize that its earlier judgments were made in error. Further, one can readily concede that *Obergefell* has not yet risen to the same level of infamy as some of the Court's universally rejected judgments on such grave errors discussed in the following paragraph. Still, people of good faith must hope that proponents of the new definition of marriage do not push their views to the extreme in seeking to remove the long engrained American ideal of religious freedom from the marketplace of ideas.

In terms of egregious holdings, one needs to look only at the Supreme Court's most notorious judgments. While in no way comparing the grave injustices associated with slavery,¹⁴⁹ racial segregation, whether in railway cars¹⁵⁰ or in schools,¹⁵¹ or discrimination based on national origin during a time of war,¹⁵² or discovering a right to abortion,¹⁵³ these opinions reveal that, as humans, the Justices are fallible products of their times. As such, Justices are often shaped by the dominant social and political perspectives of their day such that they rule without regard to the Constitution, thereby rendering judgments that, in retrospect, are acknowledged as having been unwise at best.

Surely, individuals who wish to enter into same-sex unions, form families, inherit property, visit one another when ill, and share many other aspects of life of which the Justices wrote,

¹⁴⁷ See also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Justice Scalia recused himself because he criticized the judgement of the Ninth Circuit for invalidating the words "under God" in the Pledge of Allegiance.).

¹⁴⁸ See *ABA Model Code of Professional Responsibility*, AMERICAN BAR ASSOCIATION, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf> (While not suggesting that these justices violated any professional code of ethics, it is worth noting that Canon 9 of the American Bar Association's Code of Ethics is that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety.").

¹⁴⁹ *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (current or former slaves lacked standing to litigate whether they could gain citizenship).

¹⁵⁰ *Plessy v. Ferguson*, 186 U.S. 357 (1896).

¹⁵¹ *Gong Lum v. Rice*, 275 U.S. 75 (1927); *Brown*, 347 U.S. 483.

¹⁵² *Korematsu*, 323 U.S. 214.

¹⁵³ *Roe v. Wade*, 410 U.S. 133 (1973) (finding a right to abortion).

should retain the freedom to do so. Insofar as these are related to, but distinct from education *per se*, it is important to bear in mind that litigation is arising over whether individuals who entered same sex unions can work in faith based institutions and whether their children can enroll in these schools.¹⁵⁴ As such, in failing to ensure that this respect is bilateral, *Obergefell* creates the risk that the Supreme Court's order may set in motion a process designed to bludgeon religious freedom by subjecting believers in traditional marriage to nothing short of persecution for faithfully adhering to their long and deeply held religious beliefs. Such a consequence would be hostile to the First Amendment and the basic principles on which the United States was founded.

With the preceding as a backdrop, the next section of this article examines institutional concerns associated with the potential implementation of *Obergefell* and possible responses to the challenges they present. Faith-based institutions face at least six major challenges in the post-*Obergefell* world. These matters are inter-related concerns posed by the intolerance of progressives, and are likely to remain in play until institutions and people of faith are protected from threats of vilification and reprisal for remaining true to their long held beliefs on marriage.

The first concern was highlighted at the outset of this article during the oral argument in *Obergefell*. In a manner consistent with the outcome in *Bob Jones*,¹⁵⁵ Solicitor General Verrilli suggested that a potential outcome of the Court's dramatic redefinition of marriage would be that the federal tax-exempt status of religious institutions for refusing to bow to its demands may be at risk.¹⁵⁶ While conceding that the state tax status of faith-based institutions was not at issue, it seems likely that such challenges will not be long in coming. The Solicitor General made his remark even though the definition of marriage he helped to invalidate via judicial fiat was, as noted, almost universally accepted in the United States barely fifteen or twenty years ago. Consequently, individuals who believe in marriage as being between one man and one woman now risk having their faith proscribed and vilified as

¹⁵⁴ See discussion below at note 225 and accompanying text.

¹⁵⁵ *Bob Jones Univ.*, 461 U.S. 574.

¹⁵⁶ *Obergefell*, 135 S. Ct. at 2626.

discrimination, no matter how long or deeply held these religious convictions are.

As evidence of the intensity of the ongoing battle over religious freedom, at least one opponent sued the Catholic Church¹⁵⁷ in an attempt to deny it aid in light of its pro-life positions in response to abortion.¹⁵⁸ Still other antagonists have sought to have the Catholic Church classified as a hate group in light of its stance with regard to homosexuality,¹⁵⁹ thereby demonstrating their own brand of intolerance while quick to cast the first stone, as it were, at others.¹⁶⁰ The threat of governmental overreaching through such statutes and regulations with the potential to force many faith-based services out of operation runs the risk of standing the constitutional guarantees of religious freedom long respected by the American judiciary on their proverbial ears.

Second, one wonders whether the federal government will seek to withhold financial aid, whether for direct research

¹⁵⁷ The Catholic Church is by no means alone in being singled out for criticism for its beliefs. For instance, the Southern Poverty Law Center has demonstrated broad anti-Christian attitudes without regard to particular denominations within Christianity in light of its difference of opinion with regard to a variety of issues. See Matt Barber, *Bloody Hands: The Southern Christian Poverty Law Center*, TOWNLALL.COM (Feb. 11, 2013), <http://townhall.com/columnists/mattbarber/2013/02/11/bloody-hands-the-southern-poverty-law-center-n1509321/page/full/> (“The Southern Poverty Law Center has a long history of maliciously slandering pro-family groups with language and labels that incite hatred and undermine civil discourse,” said Mat Staver, founder and chairman of Liberty Counsel.”); see also Katie Yoder, *Networks Ignore FRC Shooter’s use of SPLC ‘Hate Map’: ABC, NBC, CBS, and CNN Hide Latest on Shooting at Conservative Group*, MEDIA RESEARCH CTR CULTURE (Feb. 7, 2013, 3:47 PM), <http://www.mrc.org/articles/networks-ignore-frc-shooters-use-splc-hate-map> (detailing how the mainstream media failed to report that the map a man used to locate the headquarters of the Family Research Center in Washington, D.C., where he shot and injured a guard, was created at the SPLC; the map also identified the locations of the offices of groups with which the SPLC disagreed).

¹⁵⁸ *Abortion Rights Mobilization v. U.S. Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), cert. denied, 495 U.S. 918 (1990) (affirming that a pro-abortion group lacked standing to challenge the tax exempt status of the Roman Catholic Church based on its pro-life teachings).

¹⁵⁹ See Mary Beth Baker, *An Assault on Freedom of Religion: Discrimination is Wrong Even Against Traditional Christian Beliefs*, WASH. TIMES (Jan. 23, 2013), <http://www.washingtontimes.com/news/2013/jan/23/an-assault-on-freedom-of-religion/>; see also Michelle Bauman, *White House Petitioned to Label Catholic Church a “Hate Group,”* CATHOLIC NEWS AGENCY (Jan. 4, 2013, 4:09 AM), <http://www.catholicnewsagency.com/news/white-house-petitioned-to-label-catholic-church-a-hate-group/>.

¹⁶⁰ See John 8.7 (Jerusalem Bible, 1966 translation) (“If there is one of you who has not sinned, let him be the first to throw a stone at her.”) (the story of the woman caught in adultery).

grants for faculty and graduate students, or indirectly in the forms of Pell grants and guaranteed student loans for tuition.¹⁶¹ Such an approach, albeit not identical, arose shortly after the Supreme Court ruled in *Windsor* and *Hollingsworth*. President Obama had issued an Executive Order barring federal contractors, including those working with religious institutions, from what it describes as “discrimination” based on sexual orientation and gender identity.¹⁶² Insofar as the President ignored pleas to include a good-faith exception for bona fide occupational qualifications such as under Title VII, the Order raises a potential conundrum for employers in faith-based educational institutions.¹⁶³

In a state context, the City Council in Washington, D.C. unanimously passed a law which threatens religious freedom by a thirteen-to-nothing vote on December 2, 2014.¹⁶⁴ This law repealed the sexual orientation discrimination exemption previously available to faith-based schools. The mayor signed the Human Rights Amendment Act of 2014 into law on January 25, 2015,¹⁶⁵ even as critics asked Congress to intervene, decrying its potential to limit religious freedom.¹⁶⁶ This law revokes religious liberty protections Congress enacted in the Nation’s Capital Religious Liberty and Academic Freedom Act.¹⁶⁷ Under the new law, “the term ‘human rights

¹⁶¹ See, e.g., *Alternative to student loans, but no replacement*, MT. VERNON REG.-NEWS (Ill.) (July 31, 2015, 6:00 AM), http://www.register-news.com/opinion/alternative-to-student-loans-but-no-replacement/article_02918f9a-b735-5fb0-a26c-ac95d3f2a323.html (discussing the impact of alternatives on schools such as “Gordon College, a Christian school in Massachusetts that was at risk of losing its accreditation because the college opposes ‘homosexual practice.’”).

¹⁶² 79 Fed. Reg. 42971 (July 21, 2014), <https://www.federalregister.gov/articles/2014/07/23/2014-17522/further-amendments-to-executive-order-11478-equal-employment-opportunity-in-the-federal-government>.

¹⁶³ *DC Repeals Religious Schools’ Exemption from Law on Homosexuality*, CATHOLIC CULTURE.ORG (Dec. 5, 2014), www.catholicculture.org/news/headlines/index.cfm?storyid=23439.

¹⁶⁴ *Id.*

¹⁶⁵ The bill can be found at Human Rights Amendment Act of 2014, D.C. Act 20-605 (Jan. 25, 2015), <http://lims.dccouncil.us/Download/31754/B20-0803-SignedAct.pdf>.

¹⁶⁶ *Editorial: Congress Should Block Two D.C. Laws that Undermine Religious Freedom*, CATH. STANDARD (D.C.) (Feb. 27, 2015, 4:31 PM), <http://cathstan.org/Content/News/News/Article/Editorial-Congress-should-block-two-D-C-laws-that-undermine-religious-freedom/2/2/6506>.

¹⁶⁷ Also known as the Armstrong Act: Pub. L. No 100–462, § 145, 102 Stat 2269-14 (1988), this law was enacted essentially to overturn *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (*en banc*) (finding that officials at a Roman Catholic University could not deny tangible benefits to members of gay student groups

law' means District or federal laws related to discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, [and] family responsibilities."¹⁶⁸ Although some institutions of higher education have voluntarily invited pro-abortion speakers to address campus gatherings in violation of Roman Catholic Church teachings,¹⁶⁹ the next step may well be to attempt to require faith-based educational institutions, from elementary schools to colleges and universities, to recognize, provide funding for, and/ or allow the use of facilities by groups advocating positions directly contrary to their sincerely held religious beliefs pertaining to marriage and sexuality, refusing to provide legal protection for those who seek to live out their values and beliefs, regardless of the good they do in educating children.¹⁷⁰

As discussed throughout the second half of this article, similar developments elsewhere present threats to religious freedom. It is conceivable that religious schools run the risk of having their rights trammelled if they are required to recognize and accommodate these relationships despite their deeply and long-held beliefs that same-sex marriage is inconsistent with their teachings. However, some states take an opposite approach and can use state laws to protect believers and their institutions. For example, the governor of Michigan signed a bill into law to "prevent faith-based agencies from having policies forced on them that violate their religious beliefs,

on the basis of their sexual orientation.).

¹⁶⁸ Human Rights Amendment Act of 2014 (2)(A), *supra* note 183.

¹⁶⁹ Justin Petrisek, *Georgetown's Planned Parenthood Event Poses Danger to Students, Ignores USCCB's Warnings*, CATHOLIC EDUCATION DAILY (March 10, 2016, 12:30 PM), <http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4761/Georgetown%E2%80%99s-Planned-Parenthood-Event-Poses-Danger-to-Students-Ignores-USCCB%E2%80%99s-Warnings.aspx> (commenting on inviting the organization's president to speak).

¹⁷⁰ A recent example of the threat posed to Christians emerged recently in Georgia where the governor, bowing to pressure from the business community and gay groups, vetoed a law that would have protected religious liberty. Jim Galloway, *How state's movie biz has muddled 'religious liberty' fight*, ATLANTA J. CONSTIT, March 31, 2016, at B1, 2016 WLNR 9746045. Among other provisions, the law would have protected religious leaders who refused to perform same sex unions, institutions that refused to hire or retain individuals who did not comport with their beliefs, and organizations refusing to rent space to groups for events they found objectionable. Available at <http://www.legis.ga.gov/Legislation/20152016/160915.pdf>.

which have resulted in agencies closing in Massachusetts, Illinois, California, and Washington, D.C.”¹⁷¹

Third, as has already happened, credentialing agencies have threatened faith-based colleges and universities with the denial of accreditation if they refuse to accept same-sex unions and the gay lifestyle as the norm despite their beliefs in Biblical norms. For example, although Gordon College in Massachusetts¹⁷² appears to have avoided such the loss of its accreditation due to its stance on same-sex unions for the present,¹⁷³ similar threats are likely to emerge.¹⁷⁴

¹⁷¹ *Gov. Rick Snyder Signs Bills Putting Michigan Children First in Adoption, Foster Care Practices*, GOVERNOR RICK SNYDER REINVENTING MICHIGAN (June 11, 2015), <http://www.michigan.gov/snyder/0%2c4668%2c7-277—356932—%2c00.html>. For a commentary on this situation, see Todd Stearns, *It's open season on people of faith in Georgia*, FOXNEWS.COM (March 28, 2016), <http://www.foxnews.com/opinion/2016/03/28/its-open-season-on-people-faith-in-georgia.html>

¹⁷² See, e.g., Emma Green, *Gay Rights May Come at the Cost of Religious Freedom*, THE ATLANTIC ONLINE (July 27, 2015), <http://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278/> (discussing Gordon College); Paul Leighton, *Gordon Accreditation Still in 'Good Standing' After Evaluation*, THE SALEM NEWS (May 5, 2015), http://www.salemnews.com/news/local_news/gordon-accreditation-still-in-good-standing-after-evaluation/article_ca7a7a3e-7a37-5df6-965f-ff0cb2ce6e1c.html; Michael Worley, *My View: We Must Protect Religious Schools from Legal Threats*, DESERET NEWS (Nov. 7, 2014, 12:00 AM), <http://www.deseretnews.com/article/865614952/Legal-threats-on-religious-schools.html?pg=all>.

¹⁷³ Kimberly Scharfenberger, *Christian College Stands for Religious Freedom, Catholic College Retaliates by Cancelling Sports Matches*, CATHOLIC EDUC. DAILY (Mar. 11, 2015, 2:59 PM), <http://www.cardinalnewmansociety.org/CatholicEducationDaily/DetailsPage/tabid/102/ArticleID/4063/Christian-College-Stands-for-Religious-Freedom-Catholic-College-Retaliates-by-Cancelling-Sports-Matches.aspx> (Interestingly, a Catholic institution in Massachusetts, Emmanuel College cancelled its athletic schedule with Gordon after its president was one of fourteen signatories of a letter to President Obama requesting a religious exemption from his Executive Order, *supra* note 175, banning discrimination based on sexual orientation.)

¹⁷⁴ A similar controversy originated in British Columbia, Canada, involving Trinity Western Law School, a Christian institution, which was denied accreditation because of its teachings on gay lifestyles and same-sex unions. See Mark A. Kellner, *Can America's Faith-Based Law Schools Restrict Sexual Activity to Heterosexual Marriage?*, DESERET NEWS (Feb. 15, 2015), <http://national.deseretnews.com/article/3420/can-americas-faith-based-law-schools-restrict-sexual-activity-to-heterosexual-marriage.html> (addressing, in part, the travails of Trinity Western, noting that the “Nova Scotia Supreme Court declare[d] the province’s barristers’ society could not refuse to license graduates of Trinity Western’s law school because it didn’t like the school’s covenant”); Ian Mulgrew, *TWU Covenant not Unlawful, Nova Scotia Judge Rules in Law School Case*, VANCOUVER SUN (Jan. 28, 2015), http://www.vancouversun.com/story_print.html?id=10768570&sponsor=-; Hank Jager, *Are They Hypocrites?*, KITCHENER-WATERLOO REC. (Nov. 27, 2014), <http://www.therecord.com/opinion-story/5157738-are-they-hypocrites/> (indicating that British Columbia, Ontario, and Nova Scotia refused to recognize Trinity Western

Fourth, consistent with the outcome in *Christian Legal Society*, college and university officials, along with student organizations on campuses,¹⁷⁵ have sought to deny access and/or recognition to Christian groups. While university officials subsequently reversed course and allowed faith-based student groups to retain the religious requirements for their leaders at Tufts,¹⁷⁶ similar controversies are likely to continue. Earlier in the year, fourteen out of thirty Christians at Vanderbilt University stated that they would leave campus over the same issue,¹⁷⁷ rather than comply with its “policy require[ing] Christian and other religious organizations receiving student fees to drop policies banning gays or other members who are outside the organizations’ core beliefs.”¹⁷⁸ The Vanderbilt policy prompted members of Congress to ask officials to exempt faith-based organizations from the institutional “all-comers policy” on the basis that it discriminates against religious beliefs.¹⁷⁹ In response, the legislatures in Idaho,¹⁸⁰ North Carolina,¹⁸¹ Ohio,¹⁸² Tennessee,¹⁸³

graduates); *Law Society Council Upholds Trinity Western Accreditation*, CBC NEWS WORLDWIDE (Jan. 9, 2015, 9:13 AM), <http://www.cbc.ca/news/canada/new-brunswick/law-society-council-upholds-trinity-western-accreditation-1.2895025> (reporting that law graduates of Trinity Western would be allowed to practice in New Brunswick); Mark Jaskela, *TWU Ruling Shows Intolerance; Fear, Prejudice and Slippery Ethics Behind Banning Christian Law School*, VANCOUVER SUN, Dec. 19, 2014, at B9, 2014 WLNR 35965146 (reporting that British Columbia revoked the school’s accreditation).

¹⁷⁵ See Katherine Landergan, *Group of Evangelicals at Tufts Fights a ‘De-recognizing’ Effort*, BOSTON GLOBE, Oct. 27, 2012, 2012 WLNR 22802278 (reporting on efforts to de-recognize an evangelical student group because opponents objected to its religious views).

¹⁷⁶ Peter Schworm, *Tufts Shifts Course, Grants More Leeway to Student Religious Groups*, BOSTON GLOBE, Dec. 7, 2012, 2012 WLNR 26033344.

¹⁷⁷ Elizabeth Bewley, *Members of Congress Target Vanderbilt Policy*, TENNESSEAN, May 8, 2012, 2012 WLNR 9663350.

¹⁷⁸ Andy Sher, *Social Issues Stole the Spotlight This Year in the Tennessee Legislature*, TIMES FREE PRESS (May 6, 2012), <http://www.timesfreepress.com/news/news/story/2012/may/06/a1-social-issues-stole-spotlight-in-legislature-tn/77238/>.

¹⁷⁹ Elizabeth Bewley, *Members of Congress Target Vanderbilt Policy*, TENNESSEAN, May 8, 2012, 2012 WLNR 9663350 (reporting that the legislature of Tennessee enacted a law designed to ban all-comers policies, allowing campus groups to grant membership only to those who share their beliefs and missions).

¹⁸⁰ IDAHO CODE ANN. § 33-107D (2015) (Campus access for religious students).

¹⁸¹ Student Organizations/Rights & Recognition, 2014 N.C. Sess. Laws 28, SSBS. 719 (Student organizations/ rights and recognition), Senate Bill 719 / S.L. 2014-28.

¹⁸² OHIO. REV. CODE ANN. § 3345.023 (2011) (Religious student group benefits).

and Virginia¹⁸⁴ have acted to protect religious freedom by banning discrimination by officials in public institutions against faith-based student organizations.¹⁸⁵

The fifth question is already playing itself out in faith-based schools when same-sex couples seek to enroll their children in these institutions.¹⁸⁶ When these incidents occur, one cannot help but to wonder why same-sex marriage activists seem to be singling out Christian schools, particularly if the parents are openly living in violation of church teachings, and businesses, when there are undoubtedly others who would readily make their services available without controversy.

A sixth development raising potential dire consequences for religious institutions involves the actions of Southern Mutual Life Insurance Company, a firm which provides coverage to “more than 8,400 churches.”¹⁸⁷ The company’s vice president of

¹⁸³ TENN. CODE ANN. § 49-6-1805 (2015) (Religious student groups; access to school facilities).

¹⁸⁴ VA. CODE ANN. § 23-9.2:12 (2015) (Student organizations; rights and recognition). *See also* *Va. Passes Ban on Campus ‘All-Comers’ Policy*, CBN NEWS (Feb. 26, 2013), <http://www.cbn.com/cbnnews/us/2013/February/Va-Passes-Ban-on-Campus-All-Comers-Policy/> (reporting that lawmakers in Virginia enacted a law designed to ban all-comers policies, allowing campus groups to limit membership to those who share their beliefs and missions).

¹⁸⁵ For coverage of this issue, see Harry Painter, *The Supreme Court Endangered Christian Student Groups, but Some States are Coming to the Rescue*, JOHN WILLIAM POPE CTR. POLICY (Oct. 1, 2014), <http://www.popecenter.org/commentaries/article.html?id=3077#.VFVEYfnF93U>.

¹⁸⁶ *See, e.g.*, Dave Bohon, *Homosexual Couple Sues Christian Preschool for Rejecting Son as Student*, NEW AMERICAN (Dec. 24, 2012), <http://www.thenewamerican.com/culture/faith-and-morals/item/14013-homosexual-couple-sues-christian-preschool-for-rejecting-son-as-student>; Erica Meltzer, *Denver Archbishop Defends Sacred Heart of Jesus’ Decision on Lesbians’ Children at Boulder Preschool*, DAILY CAMERA (Mar. 13, 2010, 10:52 PM), http://www.dailycamera.com/ci_14640646; Lisa Wangsness, *O’Malley Post Cites “Good of the Child”: Cardinal Backs Hingham Catholic School Decision, Offers to Help Gay Couple*, BOSTON GLOBE (May 20, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/05/20/omalley_post_cite_s_good_of_the_child/. *See also* Charlie Danaher, *Tolerance Goes Both Ways*, DAILY CAMERA (Mar. 13, 2010, 1:00 AM), http://www.dailycamera.com/ci_14665405; Electra Draper, *Denver Archbishop Chaput’s Right-eous Stands*, DENVER POST (May 21, 2010, 1:00 AM), http://www.denverpost.com/news/frontpage/ci_15130873 (concerning a dispute in Colorado. Bishop Chaput has since been named Roman Catholic Archbishop of the Philadelphia Archdiocese, see <http://archphila.org>).

¹⁸⁷ Henry Stern, *SSM & Church Insurance*, INSUREBLOG (July 13, 2015, 9:30 AM), <http://insureblog.blogspot.com/2015/07/ssm-church-insurance.html> (quoting Kemberlee Kay, *Churches Refusing to Perform Same Sex Marriages may be Denied Liability Insurance*, LEGAL INSURRECTION (July 10, 2015, 1:25 PM), <http://legalinsurrection.com/2015/07/churches-refusing-to-perform-same-sex-marriages-may-be-denied-liability-insurance/>).

underwriting sent a memorandum to clients informing them that the firm would not provide liability insurance if they are sued for refusing to permit same-sex ceremonies to be performed on their premises because their actions would be in violation of the law; refusals of coverage would also likely not provide coverage for fines and related legal costs. To the extent that the owners of private wedding chapels¹⁸⁸ and other businesses¹⁸⁹ such as bakers,¹⁹⁰ photographers,¹⁹¹ trolley companies,¹⁹² and other businesses ceased operations rather than transgress their faith this suggests that faith-based educational institutions may well face the same draconian alternatives. Put another way, faith-based schools may be

¹⁸⁸ For one such incident, see Keith Cousins, *Judge Hears Hitching Post Case*, COEUR D'ALENE PRESS (July 21, 2015), http://www.cdapress.com/news/local_news/article_7094264b-659d-5a65-a271-51073b4c02bb.html (reporting on a suit filed by the owners of a wedding chapel who are allegedly being forced to violate their religious beliefs by performing ceremonies for same-sex couples in light of the city's anti-discrimination ordinance even though they argued that they are entitled to an exemption because they are a religious corporation). See also Tim Rohwer, *Huckabee: U.S. Supreme Court Should Have Term Limits*, DAILY NONPAREIL (July 2, 2015), http://www.nonpareilonline.com/news/local/huckabee-u-s-supreme-court-should-have-term-limits/article_e45d1171-b185-5dcf-99d8-34ac2efa3c59.html (including a report that a couple had to close its wedding chapel rather than be subject to fines for refusing to perform services for same-sex couples).

¹⁸⁹ See Bob Ellis, *Homosexual Activists Driving Store Out of Business*, AMERICAN CLARION (Dec. 7, 2012), <http://www.americanclarion.com/2012/12/07/homosexual-activists-driving-store-out-of-business-15186/> (also reporting that a Catholic priest who "was investigated by the Canadian Human Rights Commission (CHRC) for the 'crime' of teaching what the Bible says about homosexual behavior (that it is a sin) and marriage (that it is between a man and a woman).").

¹⁹⁰ See, e.g., *Craig v. Masterpiece Cakeshop*, 2015 WL 4760453 (Colo. Ct. App. 2015) (upholding a fine against the owner of a bakery for refusing to provide a cake for a same-sex union even though the initial filing in the case by the Colorado Civil Rights Commission did not name the owner and cited the wrong portion of state law; the court applied the "relation back" doctrine to justify its action.). See also Mark Hemmingway, *Free to Shut Up: The Collision of Religious Liberty and Gay Rights in Oregon*, THE WEEKLY STANDARD (July 20, 2015), <http://www.weeklystandard.com/free-to-shut-up/article/988096> (reporting on the \$130,000 fine imposed on a bakery for refusing to provide a wedding cake for a same-sex couple).

¹⁹¹ *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 U.S. 1789 (2014) (affirming that a photographer's refusal to provide her professional services at a same-sex commitment ceremony because doing so would have violated her deeply held religious beliefs discriminated against the customer on the basis of sexual orientation in violation of state law).

¹⁹² Erin Cox, *It's Back to the Bam for Wedding Trolleys*, THE BALTIMORE SUN, Dec. 26, 2012, at A1, 2012 WLNR 27914985 (reporting that the owner of a company whose trolleys were used in marriage festivities chose to forgo what had been a profitable business activity and shut down operations rather than run the risk of having to serve same-sex couples in the wake of a recently approved change in state law legalizing such relationships).

charged with discrimination if the refuse to violate their long, deeply-held religious belief in marriage as being between one man and one woman or being subjected to legal sanctions if they refuse to permit their facilities to be used in a manner with which they disagree.

IV. RESPONSES TO INSTITUTIONAL CONCERNS

Following *Obergefell*, faith-based educational institutions that face the threat of the potential loss of their tax exempt status, among other penalties, may very well be unable to continue to operate without such assistance because this would have such a negative impact on their finances, thereby harming untold numbers of students, clients, and their employees. *Obergefell* might also render persons of faith subject to vilification for remaining true to their religious beliefs. As such, leaders in faith-based institutions, believers, and all people of good faith (even if they are non-believers), working in conjunction with their attorneys to protect their First Amendment rights to freedom of religion, may wish to ponder the following five options.

First, in the wake of *Obergefell*, and the threats to faith-based educational institutions and their employees just reviewed, a measure of judicial relief could be on the horizon in *Agency for International Development v. Alliance for Open Society International, Inc.* (“*Alliance*”).¹⁹³ In *Alliance*, the Supreme Court enunciated the unconstitutional conditions doctrine.¹⁹⁴ Pursuant to this doctrine, the constitutionality of a condition for receiving a subsidy, or in terms more applicable to religious institutions such as schools, tax exemptions for themselves and tax deductions for donors, depends on whether the condition(s) imposed by the government define or reach outside of a program. In other words, the “government may impose conditions that define the limits of the particular program, [but] may not impose” conditions that reach outside the program.¹⁹⁵ While, in theory, this means that faith-based

¹⁹³ *Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321 (2013).

¹⁹⁴ *Id.* at 2327.

¹⁹⁵ For discussions of this concept, see William E. Thro, *The Limits of Christian Legal Society*, 2014 CARDOZO L. REV. 124, 127 (2014), http://www.cardozolawreview.com/content/denovo/Thro_2014_35.pdf. See also William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 EDUC. L. REP. 867

institutions should be able to preserve their freedom of religion, it seems doubtful that the majority from *Obergefell* would be willing to apply *Alliance* insofar as they have already demonstrated their unwillingness to respect the deeply held religious beliefs of those who disagree with their dictates.

Concomitantly, the seemingly irreconcilable difference between *Alliance*, which limits the imposition of governmental conditions on the receipt of aid, and *Bob Jones*, which denied tax exempt status to institutions engaged in discriminatory practices based on race, needs to be addressed. In other words, there is a need for federal statutory intervention (addressed in the following paragraph), or additional litigation, to clarify the rights of faith-based institutions when confronted by legal compulsions to violate their long-held sincere beliefs or risk the loss of aid by being charged with discrimination in violation of the law.

Second, in an attempt to ward off progressive intolerance against faith-based institutions and individuals whose religious beliefs adhere to the millennia-old definition of marriage as being between one man and one woman, perhaps the best alternative to protect religious freedom is an act of Congress. To this end, Republican Mike Lee of Utah authored a bill he introduced in the Senate,¹⁹⁶ joined by Republican Congressman Raul Labrador of Idaho and others in the House of Representatives.¹⁹⁷ In the hope of enacting the First Amendment Defense Act (FADA)¹⁹⁸ by mid-July, 115 Republicans¹⁹⁹ signed on as co-sponsors of the proposed bill.

(2013).

¹⁹⁶ S. 1598, "To prevent discriminatory treatment of any person on the basis of views held with respect to marriage," was introduced in the 1st session of the Senate in the 114th Congress on June 17, 2015, <https://www.congress.gov/bill/114th-congress/senate-bill/1598/text>.

¹⁹⁷ H.R. RES. 399, "Expressing the sense of the House of Representatives that the House should consider legislation to protect traditional marriage and prevent taxpayer funding of abortion," was introduced in the 1st session of the Senate in the 114th Congress on July 29, 2015. Earlier, H.R. 2802, "To prevent discriminatory treatment of any person on the basis of views held with respect to marriage," was introduced in the 1st session of the House in the 114th Congress on June 17, 2015.

¹⁹⁸ Walsh, *supra* note 9 (pointing out that the proposed FADA introduced by Senator Mike Lee and Representative Raul Labrador seeks to ensure that the federal government does not discriminate against Americans of faith based on their religious beliefs and practices concerning marriage).

¹⁹⁹ See also Scott Wong, 'Religious Freedom' Bill Picks up Momentum in House, THE HILL (July 12, 2015), <http://thehill.com/homenews/house/247599-religious-freedom-bill-picks-up-momentum>.

Aimed at safeguarding religious liberty, the FADA would offer broad-based protection to persons of faith as it attempts to forge something of a compromise between those whose views on marriage differ radically. On the one hand, the FADA does not question or attack the holding in *Obergefell*. On the other hand, the FADA would prevent the federal government from discriminating against people of faith, and others, who believe that marriage is a relationship between one man and one woman. Interestingly, this language seems to reflect Justice Kennedy's attempt to allay the concerns of believers about the future of religious freedom.²⁰⁰

After citing its proposed law's short title²⁰¹ and findings,²⁰² FADA sets forth its key provisions.²⁰³ The remaining sections of the FADA address judicial relief,²⁰⁴ rules of construction,²⁰⁵ and

²⁰⁰ See *supra* notes 79, 114 and accompanying text.

²⁰¹ H.R. 2802 was introduced in the 1st session of the House in the 114th Congress on June 17, 2015, § 1. S 1598, which is identical, was introduced in Senate on the same day, June 17, 2015.

²⁰² *Id.* § 2.

²⁰³ *Id.* § 3. It reads,

SEC. 3. PROTECTION OF THE FREE EXERCISE OF RELIGIOUS BELIEFS AND MORAL CONVICTIONS.

(a) In General.—Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

(b) Discriminatory Action Defined.—As used in subsection (a), a discriminatory action means any action taken by the Federal Government to—

(1) alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under section 501(a) of the Internal Revenue Code of 1986 of, any person referred to in subsection (a);

(2) disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;

(3) withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person;

(4) withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or

(5) otherwise discriminate against such person.

(c) Accreditation; Licensure; Certification.—The Federal Government shall consider accredited, licensed, or certified for purposes of Federal law any person that would be accredited, licensed, or certified, respectively, for such purposes but for a determination against such person wholly or partially on the basis that the person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

²⁰⁴ *Id.* § 4.

definitions.²⁰⁶ Given the strong support of President Obama²⁰⁷ and most Democrats for same-sex unions,²⁰⁸ not to mention activist groups²⁰⁹ hoping to extinguish religious liberty, the FADA may face an uphill battle to passage.

At the same time, defenders of religious freedom should vigorously oppose the so-called Equality Act, co-sponsored by more than 160 democrat members of the House,²¹⁰ filed less than a month after *Obergefell* was handed down. The innocuous sounding title of this proposed law aside, it would present a range of risks to religious freedom. Among its provisions, this law would create new classifications protecting “sexual orientation” and “gender identity” while not affording exemptions for faith-based organizations that define marriage as being between one man and one woman rooted in their long-held sincere religious beliefs. In addition, this law would deny religious organizations exemptions contained in the proposed Employment Non-Discrimination Act,²¹¹ adding that the Religious Freedom Restoration Act (RFRA)²¹² cannot be used as

²⁰⁵ *Id.* § 5.

²⁰⁶ *Id.* § 6.

²⁰⁷ See, e.g., Felicia Sonmez, *Barack Obama: ‘The First Gay President?’ Newsweek Bestows Provocative Title on Barack Obama After he Shows Support for Same-Sex Marriage*, WASHINGTONPOST.COM, May 15, 2012, 2012 WLNR 23620204; *President Obama Becomes the First American Leader to Support Same-Sex Marriage*, MONTREAL GAZETTE, May 10, 2012, at A1, 2012 WLNR 9800950.

²⁰⁸ See, e.g., Alex Roarty, *Democrats to Officially Back Gay Marriage*, NAT’L J. ONLINE, June 30, 2012, 2012 WLNR 16364137; *Democrats Back Gay Marriage*, COM. APPEAL, Aug. 10, 2012, at 3, 2012 WLNR 19252814.

²⁰⁹ In a development that should come as no surprise, the American Civil Liberties Union announced that it would not defend individuals with claims under the Religious Freedom Restoration Act in disputes involving same-sex unions. See Jim Galloway, *Political Insider Blog: ACLU Disavows Support for Federal ‘Religious Liberty’ Law*, ATLANTA J. CONST. (June 29, 2015), <http://politics.blog.ajc.com/2015/06/29/aclu-disavows-support-for-federal-religious-liberty-law/>.

²¹⁰ This proposed Act was introduced in the House as H.R. 3185, and Senate as S. 1858 on July 23, 2015. Without being noted as such, this bill is apparently a successor act to The Employment Non-Discrimination Act, Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 5(A) (2013), designed to prohibit discrimination based on sexual orientation. For a slightly more detailed discussion of this proposed law, see Charles J. Russo, *Religious Freedom in the United States: “When You Come to a Fork in the Road, Take It,”* 38 U. DAYTON L. REV. 363 (2013) nn.223–26 and accompanying text.

²¹¹ H.R. 3185 § 1101 (2015–16).

²¹² 42 U.S.C. § 2000bb–4. *But see* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the RFRA as it applied to States). For representative commentaries on this case, see Ralph D. Mawdsley, *Flores v. City of Boerne: Testing the*

a defense for challenging its provisions.²¹³

Unlike the FADA, though, which seeks to mediate the differences between those with opposing views of marriage, the proposed Equality Act takes on a different tenor. If anything, the Equality Act comes across more as a declaration of the ultimate victory for those who wish to obliterate any dissent over the definition of marriage. Given the current make-up of Congress, it seems that this bill is also unlikely to be adopted at this time. Even so, the Equality Act serves as warning shot fired across the bow of religious freedom.

Third, the role of the federal RFRA²¹⁴ in conjunction with its state statutory²¹⁵ counterparts, perhaps coupled with gubernatorial Executive Orders,²¹⁶ may offer a measure of protection to faith-based institutions and their employees in their collective profession of the belief that marriage is between one man and one woman. The federal RFRA, in particular, may come into play if and when President Obama seeks to impose Executive Orders²¹⁷ implementing *Obergefell* in relation to faith-based institutions, particularly schools, colleges, and universities, because such an action may implicate the institutions' ability to file free exercise rights claims with a

Constitutionality of the Religious Freedom Restoration Act, 115 EDUC. L. REP. 593 (1997); Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783 (2002).

²¹³ *Supra* note 210, §§223, 1107.

²¹⁴ 42 U.S.C. § 2000bb-4.

²¹⁵ As of March, 2015, at least twenty states had religious freedom laws in effect. Campbell Robertson & Richard Pérez-Peña, *Bills on 'Religious Freedom' Upset Capitols in Arkansas and Indiana*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/religious-freedom-restoration-act-arkansas-indiana.html?_r=0. For examples of such laws, see ARIZ. REV. STAT. ANN. §§ 41-1493 to-1493.02; ARK. CODE ANN. § 16-123-491; CONN. GEN. STAT. § 52-571b; FLA. STAT. §§ 761.01-.05; IDAHO CODE §§ 73-401 to-404; 775 ILL. COMP. STAT. 35/1-99; IND. CODE 34-13-9-1 et seq.; KY. REV. STAT. ANN. § 466; MO. REV. STAT. §§ 1.302-307; N.M. STAT. ANN. §§ 28-22-1 to 28-22-5; OKLA. STAT. Tit. 51, §§ 251-258; 71 PA. CONS. STAT. §§ 2401-2407; R.I. GEN. LAWS §§ 42-80.1-1 to-4; S.C. CODE ANN. §§ 1-32-10 to-60; TENN. CODE § 4-1-407; TEX. CIV. PRAC. & REM. CODE §§ 110.001-012; UTAH CODE ANN. §§ 63I-5-101 to-403; VA. CODE ANN. §§ 57-1 to-2.02.

²¹⁶ See, e.g., Emily Lane, *Louisiana's Religious Freedom Bill Effectively Defeated in Committee*, THE TIMES-PICAYUNE (May 19, 2015, updated May 28, 2015), http://www.nola.com/politics/index.ssf/2015/05/louisianas_religious_freedom_b.html (also reporting that Governor Bobby Jindal signed an Executive Order into effect on May 19, 2015, to prevent the government from taking such actions as revoking licenses and tax benefits based on the beliefs of individuals or institutions that marriage is between one man and one woman); See also Executive Order BJ 15-8, Marriage and Conscience Order, <http://www.doa.la.gov/osr/other/bj15-8.htm>.

²¹⁷ See *supra* note 161 and accompanying text.

reasonable chance of success on the merits. Moreover, working together, the federal and state²¹⁸ RFRA's may be able to safeguard religious institutions by forbidding governmental intervention, placing substantial burdens on the institutions' rights to the free exercise of religion absent compelling state interests that are achieved by the least restrictive means possible.

Fourth, another possible course of action for faith-based institutions may arise under *Hosanna-Tabor*, wherein the Supreme Court unanimously upheld the right of Church leaders rather than the EEOC to decide who qualifies as a minister.²¹⁹ More specifically, insofar as the Supreme Court unanimously upheld the authority of religious officials to determine who qualifies as a minister, when proponents of same-sex unions file suits alleging discrimination because leaders in faith-based institutions refuse to hire them or their partners because they are not living lifestyles compatible with their religious missions, then this case should offer a strong defense.²²⁰

A fifth and final response available to critics of *Obergefell* is emerging in the form of non-violent civil disobedience.²²¹ Apparently, the first post-*Obergefell* instance of civil disobedience arose when the county clerk in Rowan County, Kentucky, refused to grant marriage licenses to same-sex couples and unsuccessfully sought judicial relief based on her sincerely held religious beliefs.²²² Subsequently, a judge in

²¹⁸ For a brief commentary on state RFRA's with a focus on Indiana's statute, see Fredrick Mark Gedicks, *Public, Private, Religious? Religious Freedom Restoration Acts in the U.S. States*, QUADERNI COSTITUZIONALI, NO. 3 (Bologna: Il Mulino, 2015 Forthcoming) (cited with the permission of the author), <http://poseidon01.ssrn.com/delivery.php?ID=653004094099106078074019005001071095049017031083090035064100088096008114125089029121022102098031119063013102098085004005098072000020066087035099007100021064005023059041067009080029088020113125088120122082113089112100124064006017087022093099118119&EXT=pdf>.

²¹⁹ *Supra* note 18.

²²⁰ For a commentary on point, see Charles J. Russo, *Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow their Beliefs in Hiring*, 45 U. TOLEDO L. REV. 457 (2014).

²²¹ For a commentary on point, see Sasha Volokh, *Kim Davis and the Limits of Disobedience*, WASH. POST (Sept. 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/kim-davis-and-the-limits-of-disobedience/>.

²²² The trial court and Sixth Circuit orders can be found at <http://www.scotusblog.com/wp-content/uploads/2015/08/Kentucky-marriage-15A250-application.pdf>. It should come as no surprise that Justice Kagan, a supporter of same-

Oregon refused to perform same-sex unions by also relying on his deeply held religious beliefs under the First Amendment.²²³ Further, a jurist in Tennessee denied a divorce petition in a clear protest against *Obergefell*, rooted in his contention that the Supreme Court has the duty to clarify when a marriage is no longer a marriage before he could rule.²²⁴

The dispute over the refusal of the county clerk, Kim Davis, to issue marriage licenses to same-sex couples and subsequent jail time²²⁵ garnered widespread media coverage. The time that she spent in jail is a penalty now being called into question for its severity²²⁶ as she has since been released.²²⁷ Davis was charged with being in contempt of court because she followed her conscience, amid *ad hominem* attacks on her person.²²⁸ Her

sex unions, denied the clerk's appeal. See *Davis v. Miller*, 2015 WL 5097125 (2015) (mem.).

²²³ Bryan Denson, *Oregon Judge Refuses to Perform Same-Sex Marriages, Cites First Amendment Right to Religious Freedom*, OREGONIAN (Sept. 3, 2015), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/09/oregon_judge_refuses_to_perfor.html.

²²⁴ Kendi Anderson & Zack Peterson, *Judge Declines Divorce Case, Citing Gay Marriage Ruling*, CHATTANOOGA TIMES (Sept. 3, 2015), <http://www.timesfreepress.com/news/local/story/2015/sep/03/judge-declines-divorce-case-citing-gay-marria/323201/>. The judge's order is available at <http://www.scribd.com/doc/277777194/Order-Dismissing-Complaint-Counter-complaint>. According to the judge:

With the U.S. Supreme Court having defined what must be recognized as a marriage, it would appear that Tennessee's judiciary must now await the decision of the U. S. Supreme Court as to what is *not* a marriage, or better stated, when a marriage is no longer a marriage. The majority's opinion in *Obergefell*, regardless of its patronizing and condescending verbiage, is now the law of the land. . .

Id. at p. 4.

²²⁵ See, e.g., Kevin Truong, *Kim Davis Ordered to Jail Despite 11th Hour Request for Stay*, CHRISTIAN SCI. MONITOR (Sept. 3, 2015), <http://www.csmonitor.com/USA/Justice/2015/0903/Kim-Davis-ordered-to-jail-despite-11th-hour-request-for-stay-video>; *Kentucky County Clerk Kim Davis Jailed for Not Issuing Marriage Licenses*, SEATTLE POST-INTELLIGENCER, Sept. 2, 2015, 2015 WLNR 26273879.

²²⁶ See William McGurn, *Why Must Kim Davis Be Jailed?* WALL ST. J. (Sept. 7, 2015), <http://www.wsj.com/articles/why-must-kim-davis-be-jailed-1441666727>; Ryan T. Anderson, *We don't need Kim Davis to be in Jail*, N.Y. TIMES (Sept. 7, 2015), http://www.nytimes.com/2015/09/07/opinion/we-dont-need-kim-davis-to-be-in-jail.html?_r=0.

²²⁷ David Weigel ET AL., *Kim Davis released from jail, ordered not to interfere with same-sex marriage licenses*, WASH. POST (Sept. 8, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/>.

²²⁸ See, e.g., Gabriel Arana, *Kentucky Clerk Kim Davis Is No Rosa Parks. She's The Bus Driver*, HUFFINGTON POST (Sept. 5, 2015), http://www.huffingtonpost.com/entry/kentucky-clerk-kim-davis-civil-rights_us_55eb1a09e4b093be51bbb1482015 WLNR 26415533; Andrew Husband, *KY Clerk Who Won't*

experience, no doubt, presages later criticisms of others who stand up for their faiths. Why wiser, or at least cooler, heads did not prevail is not clear. Nor is it clear why officials seeking to employ the least restrictive means available to serve a compelling government interest decided to restrict her right to the free exercise of her religious beliefs by, for instance, having others issue the license from the outset, something they have since done.²²⁹ The situation is made more puzzling when it is not clear whether the clerk's refusal to grant licenses rises to the level that requires the punishment of incarceration.²³⁰

Reactions to the stance of the county clerk in Kentucky stand in stark contrast to the silence in the face of inaction by other public officials who refused to enforce duly enacted laws on marriage and did not receive the same treatment.²³¹ If anything, silence was deafening insofar as there was a no criticism or public outcry when "California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend the law"²³² known as Proposition 8.

The controversy over Proposition 8, a voter-enacted ballot initiative approved by a clear majority of citizens amending the state Constitution of California to recognize only marriage between a man and a woman as valid, led to its ultimate demise in the Supreme Court's judgment in *Hollingsworth*.²³³

Issue Same Sex Marriage Licenses as Been Married 4 Times, MEDIAITEMEDIAITE (Sept. 2, 2015, 11:40 AM), <http://www.mediaite.com/online/ky-clerk-who-wont-issue-same-sex-marriage-licenses-has-been-married-4-times/>.

²²⁹ Lana Bellamy, *Deputy Clerks to Issue Marriage Licenses in Rowan*, DAILY INDEP. (Sept. 3, 2015), http://www.dailyindependent.com/news/deputy-clerks-to-issue-marriage-licenses-in-rowan/article_4fb71d84-5291-11e5-b750-f33152fd9a18.html.

²³⁰ For a discussion of this situation, suggesting that the clerk may have a viable claim under Kentucky's RFRA because it exempts governmental employees unless denying a request such as the clerk's was the least restrictive means available to accomplish a compelling governmental interest, see Eugene Volokh, *When Does Your Religion Legally Excuse you from Doing Part of Your Job?* WASH. POST (Sept. 4, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job/>.

²³¹ See, e.g., Melissa Quinn & Kate Scanlon, *10 Public Officials Who Defied the Law over Gay Marriage Mostly Silent on Kim Davis Case*, http://dailysignal.com/2015/09/03/10-public-officials-who-defied-the-law-over-gay-marriage-mostly-silent-on-kim-davis-case/?utm_source=heritagefoundation&utm_medium=email&utm_campaign=morningbell&mkt_tok=3RkMMJWWFF9wsRohvazPZKXonjHpfSx56eUsW6%2B%2BlMI%2F0ER3fOvrPUfGjI4ATcJhMq%2BTFAwTG5toziV8R7jHKM1t0sEQWBHm.

²³² *Hollingsworth*, 133 S. Ct. at 2660.

²³³ *Id.*

The presence of such a clear double standard when officials who selectively chose not to defend California's law on marriage did so without a word of criticism being uttered is unlikely to change because the Supreme Court has taken sides in the culture war. Consequently, it might behoove critics of *Obergefell* to point this out constantly in the hope of educating the public as to the threats facing religious freedom at the hands of duplicitous critics.

V. CONCLUSION

The United States is at a fork in the road where there are those who would limit the religious freedom of faith-based educational institutions, their employees, and business owners based on their long-term, sincerely held religious beliefs that are grounded in millennia of teachings, both religious and secular, recognizing marriage as being between one man and one woman. Those who seek to limit religious freedom would be wise to reflect on the words of Justice Jackson in *West Virginia State Board of Education v. Barnette*,²³⁴ wherein the Supreme Court upheld the rights of children who were Jehovah's Witnesses to refrain from reciting the Pledge of Allegiance because it violated their religious beliefs. Justice Jackson presciently reasoned:

freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.²³⁵

Opponents of religious liberty have staked out the boundaries in what appears to be a looming battle royale, using the newly discovered judicial right to same-sex unions that five unelected Supreme Court Justices imposed on the United States, democracy and the will of the people notwithstanding, as their battle cry. Thus, insofar as the future of religious freedom under the First Amendment is at stake, particularly

²³⁴ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

²³⁵ *Id.* at 641–42.

as it may impact educational institutions and their employees at all levels, it is imperative for believers and others of good faith to join together to preserve this most precious of American rights.

One can only hope that as issues come to a head, individuals on both sides of the divide in the dispute over defining marriage can live, and behave, in a manner demonstrating respect for the dignity of each other, even those with whom they disagree. To live this way is in line with Voltaire's often quoted dictum: "I disapprove of what you say, but I will defend to the death your right to say it."²³⁶ The battle, it seems, is soon to be joined.

²³⁶ Cited at *Young v. American Mini Theatres*, 427 U.S. 50, 63 (1976) (internal citations omitted) (upholding an ordinance imposing restrictions on the locations of theatres showing sexually explicit "adult" movies).