ARTICLES

THE LGBTQ EQUALITY GAP AND FEDERALISM

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ABSTRACT

LGBTQ people in the United States live with an Equality Gap that seems to grow wider with each legislative session. The majority of states do not have non-discrimination protections in place for LGBTQ people. In the absence of blanket federal non-discrimination protections, a same-sex couple can be denied service by bakers, catering halls, and photographers while trying to exercise their constitutionally protected right to marry. A transgender person can be denied access to a public bathroom that matches their gender identity. A federally funded adoption agency can refuse to work with LGBTQ persons who wish to adopt. In addition, many states have enacted explicitly anti-LGBTQ measures and prohibitions that exacerbate the Equality Gap and further underscore regional disparities. Even states with non-discrimination protections for LGBTQ people have considered expanding religious exemptions in a way that could greatly undercut the effectiveness and scope of existing non-discrimination protections. As a result of this mismatch of laws, the lived experience of LGBTQ people varies wildly depending on where they reside. For example, LGBTQ people living in New York enjoy many more protections and suffer none of the disabilities that are imposed on LGBTQ people living in Mississippi. The regional disparities are so extreme that some countries have issued travel advisories for their citizens visiting certain parts of the United States.

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This article examines the role federalism has played in the trajectory of LGBTQ rights and the creation of the Equality Gap. The first Section of this Article explores federalism as an institutional choice that strikes a balance between state and national power. The second Section reviews the instrumental use of federalism by LGBTQ advocates to advance the legal strategy that ultimately led to nationwide marriage equality. It also provides an overview of corresponding and complementary visions of federalism expressed in both Windsor and Obergefell. The last Section reviews the current Equality Gap and the most recent anti-LGBTQ initiatives that are being considered on the state and local levels in light of Bostock v. Clayton County, the 2020 US Supreme Court case that extended Title VII non-discrimination protections to sexual orientation and gender identity. A brief Conclusion closes with the observation that federalism has proven to be a pragmatic, but also imperfect, institutional choice for LGBTQ rights advocates because state-level civil rights protections are, by their nature, partial, not portable, and especially vulnerable to majoritarian bias. This observation has particular salience for both our understanding of federalism and the future of LGBTQ advocacy.

TABLE OF CONTENTS

Introduction 3
I. Strategic Institutional Choice 10
A. Federalism as an Institutional Choice 11
B. The Elements of Strategic Institutional Choice 14
1. Competency 15
2. Responsiveness 19
3. Resilience 22
II. The Road to Marriage Equality 24
A. The Importance of Federalism to Marriage Equality 24
B. The Demand for Marriage Equality 26
C. The Demand for Marriage Prohibitions 33
D. The Federal Cases 36
1. DOMA – *United States v. Windsor* 37
2. Marriage equality – *Obergefell v. Hodges* 43
III. The Future of the Equality Gap 47
A. Anti-LGBTQ Laws and Policies 49
B. Religious Exemptions 56
Conclusion 63
Appendix A: State Statues 65
Appendix B: State Constitutional Amendments 70

INTRODUCTION

LGBTQ people in the United States live with an Equality Gap that seems to grow wider with each legislative session.[1] The majority of states do not have non-discrimination protections in place for LGBTQ people,[2] and there are significant gaps in federal nondiscrimination laws. The 2020 U.S. Supreme Court case, *Bostock v. Clayton County*,[3] held that discrimination "because of sex" under Title VII necessarily includes sexual orientation and gender identity.[4] Presumably, this protection extends to companion statues that are read in concert with Title VII and cover education, housing, and credit, to name a few.[5] Significant gaps remain, however, specifically in terms of public accommodation laws and federal programs.[6] In the absence of blanket federal non-discrimination protections, this mismatch of laws means that a same-sex couple can be denied service by bakers, catering halls, and photographers while trying to exercise their constitutionally protected right to marry.[7] A transgender person can be denied access to a gender

1. The Equality Gap has both a vertical and a horizontal axis. *See* Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?* 9 NW. J. L. & SOC. POL'Y 206, 221–22 (2014). Vertical equality or equity examines the differing treatment of LGBTQ individuals at different levels of government: federal, state, and local. *See id.* Horizontal equality or equity compares similarly situated LGBTQ people who live in different states. *See id.* For a discussion of horizontal and vertical equity in the tax policy context, see *id.*

2. As of publication, only twenty-three states and the District of Columbia prohibit discrimination against LGBTQ people. *See infra* notes 290–91 and accompanying text (discussing state-level prohibitions).

3. 140 S. Ct. 1731 (2020).

4. *Id.* at 1743.

5. *See, e.g.*, 15 U.S.C. § 1691(a)(1) (2018) (Equal Credit Opportunity Act); 20 U.S.C. § 1681(a) (2018) (Title IX); 42 U.S.C. § 3631 (2012) (Fair Housing Act).

6. For example, Title II of the Civil Rights Act of 1964 bars discrimination in public accommodations, 42 U.S.C. § 2000a(a) (2012), but it does not include "sex" as a protected category.

7. The phrase "Married on Sunday, but fired on Monday" was widely used by LGBTQ even prior to the U.S. Supreme Court decision that mandated nationwide marriage equality, *Obergefell v. Hodges*, 135 S. Ct 2584 (2015). *See* Gene Robinson, *State of LGBT Rights: Married on Sunday, but Fired on Monday*, DAILY BEAST (Dec. 14, 2014, 6:45 AM), https://www.thedailybeast.com/state-of-lgbt-rights-married-on-sunday-but-fired-on-monday [https://perma.cc/5DY9-YSM7].

appropriate public bathroom.[8] A federally funded adoption agency can refuse to work with LGBTQ people who wish to adopt.[9]

In addition, many states have enacted explicitly anti-LGBTQ measures and prohibitions that exacerbate the Equality Gap and further underscore regional disparities.[10] Even states with non-discrimination protections for LGBTQ people have considered expanding religious exemptions in ways that could greatly undercut the effectiveness and scope of existing non-discrimination protections.[11] As a result, the lived experience of LGBTQ people varies wildly depending on where they reside. LGBTQ people living in New York enjoy many more protections and suffer none of the disabilities that are imposed on LGBTQ people living in Mississippi.[12] The regional disparities are so

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8. *See* Brian S. Barnett et al., *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science*, 46 J. AM. ACAD. PSYCHIATRY L. 232, 232–33 (2018). Sex is not a protected category in the context of public accommodations. Moreover, the federal public accommodations law covers a relatively narrow category of accommodations. *See* § 2000a(a)–(b) (extending protection against discrimination in public accommodations on the basis of "race, color, religion, or national origin").

9. *See* Peter Gallucci, *Thou Shall Not Adopt: Sexual Orientation Discrimination in the Adoption Process*, 23:2 CARDOZO J.L. & GENDER 465, 467, 479 (2017) (asserting that publicly funded adoption agencies can discriminate against LGBTQ people). Sex is not a protected category under Title VI of the Civil Rights Act of 1964. *Cf.* § 2000d (prohibiting discrimination in federal assistance programs on the basis of "race, color, or national origin").

10. For a discussion of the anti-LGBTQ legislative measures pending before state legislatures, see *infra* notes 301–02, 331–40 and accompanying text (discussing state-level anti-LGBTQ legislation).

11. *See, e.g.*, UTAH CODE ANN. §§ 63G-20-101, 63G-20-301 (West 2015) (authorizing denial of service by religious organizations and clergy as part of the chapter entitled "Religious Protections in Relation to Marriage, Family, or Sexuality"); UTAH CODE ANN. § 17-20-4 (West 2015) (requiring county clerk to establish policies to ensure a willing designee is available to solemnize marriages); Kelsey Dallas, *Five Years Ago, Utah Passed Landmark Legislation on LGBTQ and Religious Rights. Why Didn't Other States Follow Its Lead?*, DESERET NEWS (Mar. 11, 2020, 10:00 PM), https://www.deseret.com/indepth/2020/3/11/21163307/utah-lgbtq-rights-religious-freedom-lgbt-fairness-for-all-mormon-equality-act-congress [https://perma.cc/AA8P-92K4] (discussing Utah's approach to LGBTQ legislation, which included expanding protections for LGBTQ people while also creating religious exemptions). It also remains to be seen what religious challenges will be brought against *Bostock v. Clayton County*.

12. *See* H.B. 1523, 131st Leg. Sess. (Miss. 2016) (protecting "sincerely held" religious beliefs including that a person's gender is set at birth); *see also* N.Y. Exec. Order No. 156 (Apr. 5, 2016) *(banning non-essential travel to Mississippi as a response to H.B. 1523)*. New York has comprehensive protections for LGBTQ people, whereas Mississippi does not. *See* N.Y. Exec. L. § 291 (2019); Campbell Robertson, *Mississippi Law Protecting Opponents of Gay Marriage Is Blocked*, N.Y. TIMES (July 1, 2016),

extreme that some countries have issued travel advisories for their citizens traveling in certain parts of the United States.[13]

There are generally two ways to view this LGBTQ Equality Gap: a glass half full or a glass half empty. The "glass half full" approach reflects the optimistic progressive vision of federalism famously expressed by Justice Brandeis where "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[14] Under this view, a "courageous state" that moves ahead of its sister states and the federal government can become a persuasive beacon for change. For example, when Massachusetts became the first state to embrace marriage equality in 2003,[15] its experience also helped normalize same-sex marriage for a skeptical nation.[16] In contrast, the "glass half empty" view argues that an advancement in one jurisdiction necessarily leaves

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https://www.nytimes.com/2016/07/02/us/mississippi-law-protecting-opponents-of-gay-marriage-is-blocked.html ("[T]he law created 'a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity.'" (quoting Barber v. Bryant, 193 F. Supp. 3d 677, 710 (S.D. Miss. 2016)). Moreover, Mississippi imposes certain disabilities on LGBTQ people. Merrit Kennedy, *Controversial Mississippi Law Limiting LGBT Rights Not Heading to Supreme Court*, NPR (Jan. 8, 2018, 5:13 PM), https://www.npr.org/sections/thetwo-way/2018/01/08/576500364/controversial-mississippi-law-limiting-lgbt-rights-not-heading-to-supreme-court [https://perma.cc/6L7D-5QSM] (describing a Mississippi law that allows businesses and government officials to deny services to LGBTQ individuals based on conflicting religious beliefs).

13. Peter Holley, *Britain Issues Warning for LGBT Travelers Visiting North Carolina and Mississippi*, WASH. POST (Apr. 20, 2016, 4:29 PM), https://www.washingtonpost.com/news/worldviews/wp/2016/04/20/britain-issues-warning-for-lgbt-travelers-visiting-north-carolina-and-mississippi [https://perma.cc/SBD8-FMZT] (cautioning same-sex couples against showing affection in public and telling couples to check that their hotel accepts bookings from same-sex couples).

14. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

15. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (finding that same-sex marriage cannot be prohibited under the Massachusetts Constitution). The *Goodridge* decision was not implemented until 2004 when Massachusetts began issuing marriage licenses to same-sex couples. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), https://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html [https://perma.cc/CYF5-L7F8].

16. *See* Clare Kim, *10 Years After Legalization in Massachusetts, Marriage Equality Expands*, MSNBC (Nov. 18, 2013, 3:30 PM), http://www.msnbc.com/msnbc/10th-anniversary-marriage-equality-ma [https://perma.cc/TKF9-2M99] (quoting an LGBTQ advocate: "Anti-gay activists said the sky would fall, but the sun has shone; they said marriage would become weaker and that Americans would turn their backs on our nation's founding principle of equality for all, but we've only moved closer").

others behind and creates space for the expression of anti-LGBTQ bias and initiatives.[17] According to the first view, the Equality Gap should be seen as a temporary condition that will be remedied as other states are encouraged to expand protections for LGBTQ people.[18] The second view suggests that the Equality Gap reflects entrenched regional disparities that will only bend to intervention at the national level.[19] In either case, the current Equality Gap remains real and glaring for LGBTQ people, at least for the foreseeable future.[20]

This Article suggests that both views misapprehend the nature of federalism. Federalism is an institutional choice; not an ideology. It gallantly served as the foundation for certain Progressive Era reforms, such as state workmen's compensation laws,[21] but the banner of "states' rights" also provided the rationalization for Jim Crow laws and the "massive resistance" segregationist movement.[22] Today, federalism

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17. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 56 n.270, 57 n.271 (2004) (discussing the "race to the bottom" that federalism can create in the context of affirmative action and when federal intervention is required).

18. *See* Kenneth T. Walsh, *Power to the States*, U.S. NEWS (Apr. 10, 2015), https://www.usnews.com/news/blogs/ken-walshs-washington/2015/04/10/power-to-the-states ("[T]his is the way the federal system is supposed to work, with the states acting as incubators of solutions to society's problems, especially when the federal government can't find a national consensus.").

19. The federal Equality Act would provide nationwide protections for LGBTQ people by amending the Civil Rights Act of 1964. H.R. 5, 116th Cong. §§ 2(a)(9), 2(a)(11), 3–6 (2019). It was passed by the House of Representatives on May 17, 2019. *Id.*; *see also* Eric Bachman, *What Is the Equality Act and What Will Happen if It Becomes a Law?*, FORBES (May 30, 2019, 9:29 AM), https://www.forbes.com/sites/ericbachman/2019/05/30/what-is-the-equality-act-and-what-will-happen-if-it-becomes-a-law/#149915d55fe4 [https://perma.cc/WJ2A-XCFW].

20. The federal Equality Act is currently stalled in Congress where the Republican-led Senate will not allow the bill to advance. S. 788, 116th Cong. (2019); Tal Axelrod, *Schumer Calls on McConnell to Hold Vote on Equality Act*, HILL (May 17, 2019, 4:34 PM), https://thehill.com/homenews/senate/444341-schumer-calls-on-mcconnell-to-hold-vote-on-equality-act [https://perma.cc/DHC9-EPT8]. Moreover, states with anti-LGBTQ laws and prohibitions have arguably become more entrenched. There has been a record number of expressly anti-LGBTQ legislation introduced in state legislatures since the 2016 Presidential election. Julie Moreau, *Dozens of Anti-LGBTQ State Bills Already Proposed in 2020, Advocates Warn*, NBC NEWS (Jan. 23, 2020, 10:28 AM), https://www.nbcnews.com/feature/nbc-out/dozens-anti-lgbtq-state-bills-already-proposed-2020-advocates-warn-n1121256 [https://perma.cc/GD6G-YWC3].

21. *See* John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 720–22 (2004) (describing the origin of workmen's compensation laws).

22. *See generally* FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE 62–70 (1973) (describing and critiquing the core assumptions of states-rights federalism,

allows states the freedom to experiment with novel solutions to the pressing questions of the day, such as health care, climate change, and LGBTQ rights.[23] It can facilitate either a progressive or a conservative impulse, and, in the case of LGBTQ rights, it has done both. As some states move to expand LGBTQ rights and protections, others seek to enact prohibitions that restrict and erase LGBTQ identities.[24] Federalism does not provide any substantive answers to these pressing issues. It simply answers the question at the heart of all institutional choices, namely who decides?[25]

Support for LGBTQ rights in the United States is at an interesting regional and partisan impasse. Clear majorities of Americans support LGBTQ rights, including marriage equality and non-discrimination protections.[26] But favorable opinion polls citing high levels of approval for LGBTQ rights hide hard truths about increased polarization over certain issues.[27] Although sixty-one percent of the general population support same-sex marriage, that number drops to only forty-four percent among Republicans, and twenty-nine percent among white Evangelicals.[28] In 2018, nearly one-in-four Americans still believed that

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including a preference for decentralized government and restricted federal authority to intervene in states' business).

23. *See, e.g.*, Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?* 38 URB. LAW. 1015, 1020 (2006).

24. *See, e.g.*, Devan Cole, *Idaho Legislature Sends Bill Prohibiting Transgender People from Altering Birth Certificates to Governor for Approval*, CNN POL. (Mar. 18, 2020), https://www.cnn.com/2020/03/18/politics/idaho-transgender-birth-certificate-changes/index.html [https://perma.cc/E448-34NQ] (explaining that the Idaho legislature passed a bill prohibiting people from changing their listed sex on their birth certificate more than one year after birth).

25. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–5 (1994) (discussing importance of "who decides").

26. *Gay and Lesbian Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/WRU4-TAW8] (finding that 67% of people polled in 2020 think that same-sex couples should be able to marry and enjoy the same rights as opposite-sex couples and that 93% of people polled in 2019 think LGBTQ persons should have equal rights in employment opportunities).

27. *See* Cameron Brick & Sander van der Linden, *How Identity, Not Issues, Explains the Partisan Divide*, SCI. AM. (June 19, 2018), https://www.scientificamerican.com/article/how-identity-not-issues-explains-the-partisan-divide [https://perma.cc/8L55-SF2U] (exploring how polarization is related more to group membership, such as a political affiliation than to actual policy stances).

28. *Fact Sheet: Attitudes on Same-Sex Marriage*, PEW RES. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage [https://perma.cc/X4WC-TXBK].

homosexuality should be criminalized, and close to one-in-three believed that same-sex relationships were immoral.[29] In terms of gender identity, fifty-four percent of Americans believed that a person's sex was determined at birth, but that number goes up to eighty percent among Republicans.[30] Accordingly, it makes sense that when Republicans are in power—whether it be in a Red State, Congress, or the Presidency—they seek to enact anti-LGBTQ policy initiatives. This polarization and the ever-growing divide between the so-called Blue States and Red States feeds the Equality Gap.[31]

Since the 1970s, LGBTQ rights advocates have pursued reforms in multiple, and sometimes unexpected, venues.[32] In a signal example of strategic institutional choice, they have engaged major institutions, such as the market, science, religion, and the media, as well as all branches of government on the federal, state, and local levels.[33] Choosing among "imperfect alternatives," LGBTQ advocates have had to weigh potential avenues for reform in terms of their competence, responsiveness, and resilience.[34] Advocates have often pursued partial, but attainable, goals at the state and local levels, rather than wait for

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29. *Gay and Lesbian Rights*, *supra* note 26.

30. Anna Brown, *Republicans, Democrats Have Starkly Different Views on Transgender Issues*, PEW RES. CTR. (Nov. 8, 2017), https://www.pewresearch.org/fact-tank/2017/11/08/transgender-issues-divide-republicans-and-democrats [https://perma.cc/4VWS-6HWV].

31. *See id.* Surprisingly, the U.S. Supreme Court, in a 6-3 decision, held that discrimination "because of sex" under Title VII necessarily includes discrimination on account of sexual orientation and gender identity. Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020); *see also* Emma Green, *The LGBTQ-Rights Movement Is Changing, and so Is the Supreme Court*, ATLANTIC (Oct. 8, 2019), https://www.theatlantic.com/politics/archive/2019/10/supreme-court-lgbtq/599608 [https://perma.cc/J9QQ-YNYK]. One of President Trump's appointees to the Court, Justice Gorsuch, authored the majority opinion. *See Bostock*, 140 S. Ct. at 1736.

32. LGBTQ advocates have sought reforms from the marketplace and all branches of government at all levels of government. Beginning in the late 1960s, LGBTQ advocates targeted medicine and lobbied strenuously to declassify homosexuality as a mental illness. *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 40 (1981). Homosexuality was finally declassified in 1973. *Id.*

33. Their efforts have taken the form of litigation, legislative initiatives, executive action, and popular referenda. *See* Janice Thom, *LGBT History Month: Uncovering History in the Task Force Archives*, NAT'L LGBTQ TASK FORCE, https://www.thetaskforce.org/lgbt-history-month-uncovering-history-in-the-task-force-archives [https://perma.cc/V98P-K3V5].

34. *See* KOMESAR, *supra* note 25, at 5–6. Komesar uses the term "imperfect alternatives" to describe the inevitable result of comparative institutional analysis because no single institutional choice will produce an optimal result. *Id.*

blanket federal protections.[35] During the run up to marriage equality, these simultaneous and overlapping advocacy efforts resulted in a confusing patchwork of laws and prohibitions relating to the recognition of same-sex relationships.[36] Today, a similar patchwork of laws exist with regard to LGBTQ non-discrimination protections,[37] anti-LGBTQ laws and prohibitions, and expansive religious exemptions, and more are introduced each legislative season.[38] The resulting Equality Gap exacts a heavy toll on LGBTQ people, who can find their rights all too often determined by their zip codes.

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35. *Infra* note 119 and accompanying text. *See generally* Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, WILLIAMS INST., Oct. 2011, at 1, https://escholarship.org/uc/item/2nr871sf [https://perma.cc/86ZS-PSH5].

36. *See* Nancy J. Knauer, *LGBT Elders in a Post-*Windsor *World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN GENDER & L. 1, 18–26 (2014) (describing patchwork of laws and forms of relationship recognition).

37. For example, only fewer than half of the states provide non-discrimination protections for LGBTQ people. Susan Miller, *'Shocking' Numbers: Half of LGBTQ Adults Live in States Where No Laws Ban Job Discrimination*, USA TODAY (Oct. 8, 2019), https://www.usatoday.com/story/news/nation/2019/10/08/lgbt-employment-discrimination-half-of-states-offer-no-protections/3837244002 [https://perma.cc/7CUT-HMKT].

38. *See, e.g.*, S.B. 377, Gen. Sess. (Ala. 2015) (ending state issuance of marriage licenses and replacing them with marriage contracts); H.B. 1879, 90th Gen. Assemb. (Ark. 2015) (authorizing businesses, religious organizations, and individuals who oppose a marriage to refuse marriage-related services to the couple); Marriage and Conscience Act of 2015, H.B. 707, 2015 Reg. Sess. (La. 2015) (allowing entities and individuals to act according to their religious beliefs about marriage without penalty, including deny service to LGBTQ couples); MICH. COMP. LAWS § 722.124e (2015) (exempting child services and adoption from serving families that conflict with the organization's religious beliefs); Minnesota Freedom of Conscience Act, S.F. No. 2158, 89th Reg. Sess. (Minn. 2015) (allowing denial of service by religious entities and private persons); H. 1107, 98th Gen. Assemb. (Mo. 2015) (prohibiting taxpayer funds for same-sex marriage and providing for termination of state employees who issue marriage licenses to same-sex couples); N.C. GEN. STAT. § 51-5.5 (2015) (establishing recusal mechanism for county clerks and magistrates); H.B. 1125, 55th Leg. Sess. (Okla. 2015) (eliminating state issuance of marriage licenses); S. 788, 55th Leg. Sess. (Okla. 2015) (allowing government officials and clergy to refuse of to officiate based on religious belief); H.B. 3022, 121st Gen. Assemb. (S.C. 2015) (prohibiting the use of taxpayer funds for same-sex marriage and providing for the termination of state employees who issue marriage licenses to same-sex couples); TEX. FAM. CODE ANN. § 2.601 (West 2015) (allowing religious organizations to refuse service); H.B. 2977, 84th Leg. (Tex. 2015) (prohibiting state funds for same-sex marriage licenses and prohibiting employees from issuing same-sex marriage licenses); UTAH CODE ANN. § 63G-20-301 (West 2015) (authorizing denial of service by religious organizations and clergy); UTAH CODE ANN. § 17-20-4 (West 2015) (requiring county clerk to establish policies to ensure a willing designee is available to solemnize marriages).

In order to better understand the origins of the Equality Gap, this Article examines the role federalism has played in the trajectory of LGBTQ rights. The first Section of this Article explores federalism as an institutional choice that strikes a balance between state and national power.[39] It also discusses LGBTQ advocates' practice of strategic institutional choice within the wider context of comparative institutional analysis.[40] The second Section reviews the instrumental use of federalism by LGBTQ advocates to advance the legal strategy that ultimately led to nationwide marriage equality, as well as the confounding range of relationship recognition laws and prohibitions that sprung up in the two decades leading up to *United States v. Windsor*[41] and *Obergefell v. Hodges*.[42] Additionally the second Section provides an overview of corresponding and complementary visions of federalism expressed in both *Windsor* and *Obergefell*.[43] The last Section examines the current Equality Gap and the most recent state and local anti-LGBTQ initiatives in light of *Bostock v. Clayton County*.[44] A brief Conclusion closes with the observation that federalism has proven to be a pragmatic, but also imperfect, institutional choice for LGBTQ rights advocates because state-level civil rights protections are generally not portable, and they remain especially vulnerable to majoritarian bias. This observation has particular salience for both our understanding of federalism and the future of LGBTQ advocacy.

I. STRATEGIC INSTITUTIONAL CHOICE

This Section examines the focus on state and local reforms as an example of strategic institutional choice within the broader context of comparative institutional analysis. Advocates for social change necessarily practice a form of strategic institutional choice where they evaluate

39. *See* KOMESAR, *supra* note 25, at 3 (discussing importance of "who decides").

40. Neil Komesar is the architect of comparative institutional analysis, which is a method of public policy. *Id.* at 3–5. Komesar defines institutions as "large-scale social decision-making processes—markets, communities, political processes, and courts." NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 31 (2001).

41. 570 U.S. 744, 775 (2013) (holding that Section 3 of Defense of Marriage Act (DOMA) violated the Due Process and Equal Protection clauses of the Fifth Amendment).

42. 135 S. Ct. 2584 (2015).

43. *Windsor* invalidated a federal definition of marriage, 570 U.S. at 751, whereas *Obergefell* invalidated a state definition of marriage, 135 S. Ct. at 2593, 2608.

44. 140 S. Ct. 1731, 1743 (2020) (holding discrimination "because of sex" under Title VII includes sexual orientation and gender identity).

institutions in terms of their competency to provide the desired policy change, their responsiveness to demands for change, and the durability of any policy changes. This process of evaluation then informs how advocates target and allocate resources among various institutional alternatives. The practice is not designed to identify the "best or least imperfect" alternative to the exclusion of all others,[45] but instead it often leads to a multi-pronged approach where advocates may proceed on a number of different fronts simultaneously. For example, in the case of marriage equality, advocates pursued state and local gains despite the fact that the gains were partial and sometimes short-lived.[46] These advocacy efforts underscored the inverse relationship between innovation and uniformity that has produced our current Equality Gap.

A. Federalism as an Institutional Choice

Comparative institutional analysis is a method of public policy analysis that begins with the simple observation that our primary decision-making processes—institutions, such as the market, the courts, and the political process—are each subject to certain structural constraints that effect the institution's ability to provide the desired relief or to further an agreed upon social goal.[47] This method of public policy analysis recognizes that each institution is necessarily limited by its design, leaving only "imperfect alternatives."[48] Comparative institutional analysis urges policymakers to avoid the trap of "single institutionalism," which critiques the performance of a target institution and then identifies

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45. Neil K. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350, 1350 (1981) (explaining the choice as being for the "least imperfect, institution to implement a given societal goal"); *see also* KOMESAR, *supra* note 25, at 160 (providing an example of an "imperfect alternative").

46. *Compare* Baker v. Vermont, 744 A.2d 864, 886 (Vt. 1999) (finding that same-sex couples had a right to the same benefits and protections of the law as opposite-sex couples), *with* Baehr v. Miike, 910 P.2d 112, 115–16 (Haw. 1996) (finding that same-sex couples were not prohibited from marrying under Hawaii law, and thus, the clergy members did not present a legitimate interest to allow them to intervene in the case), *rev'd*, 994 P.2d 566 (1999).

47. *See* KOMESAR, *supra* note 40, at 9 (asserting "law and rights are the product of tough institutional choices impacted by systemic variables such as the costs of participation and numbers and complexity").

48. *See* KOMESAR, *supra* note 25, at 5–6; *supra* note 34 (discussing Komesar's use of the term "imperfect alternatives").

a rescue institution.[49] Instead, comparative institutional analysis advocates for a rigorous examination of the strengths and weaknesses of multiple institutions.[50] Otherwise, the rejection of the target institution is a foregone conclusion because all institutions are imperfect, and the choice of the rescue institution is most likely determined by the ideology.[51] The practice of identifying rescue institutions by ideological preference explains the tendency to conflate certain social goals with particular institutions.[52] For example, market-based solutions are traditionally identified with a conservative political ideology, whereas top-down government intervention would be associated with liberal social goals.[53]

In the real world, advocates and social movements intuitively engage in a more pointed or instrumental form of comparative institutional analysis that is better understood as *strategic* institutional choice. In order to achieve their social and political goals, advocates need to determine which institutions are most likely to produce desirable results. As explained more fully in the next Section, this analysis involves three distinct, but interrelated considerations: competence, responsiveness, and resilience.[54] The result of this process is not so much a singular "choice," but rather a ranking of institutional options–of imperfect alternatives.[55] Different social movements may identify different institutional alternatives depending on their individual characteristics and modes of subordination.[56] For example, psychiatry was an especially targeted institution for the early gay liberation movement because homosexuality was classified as a mental illness

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49. KOMESAR, *supra* note 25, at 6. Given that all institutions are flawed and limited, every inquiry regarding the desirability of a particular institution will reveal some form of failure. *See* KOMESAR, *supra* note 40, at 23 ("All institutions are imperfect and choice between alternatives can be sensibly made only by considering their relative merits.").

50. KOMESAR, *supra* note 40, at 23.

51. Komesar observes that "the implicit assumption" of single institutionalism "is that a perfect or idealized institution is waiting in the wings." *Id.* at 24.

52. Komesar explains the frequency with which certain goals are associated with certain institutions by reference to a tendency on the part of commentators to "hardwire" institutions to goals. *Id.* at 174.

53. *Liberalism: Contemporary Liberalism*, ENCYCLOPEDIA BRITANNICA (Feb. 5, 2020), https://www.britannica.com/topic/liberalism.

54. *See infra* Sections B.1–B.3.

55. KOMESAR, *supra* note 25, at 6.

56. KOMESAR, *supra* note 40, at 29 (noting relevant institutions "will vary depending on the subject studied and the inclinations of the investigator").

until 1973.[57] Religion, education, and the media could also be counted as institutions with particular relevance to LGBTQ rights and recognition, in addition to the obvious suspects of the courts, legislature, executive, and market.

Federalism adds an additional dimension of analysis because advocates must not only choose among the different branches of government, but they must choose among these branches of government at three different levels: federal, state, and local.[58] Accordingly, federalism embodies a fundamental institutional choice. It calibrates the balance of power between the state and national governments largely through court-made doctrine that attempts to flesh out the framework of institutional authority outlined in the U.S. Constitution.[59] Although federalism answers the all-important question of who should decide a particular issue, it does not provide an answer to the underlying substantive question. For example, federalism may reject a federal definition of marriage because the regulation of marriage has traditionally been the province of the states, but it remains agnostic as to the substance of that state regulation,[60] provided, of course, that it does not violate the U.S. Constitution.[61]

As discussed in the Introduction, federalism can facilitate either a progressive or a conservative impulse. Today, progressive advocates invoke principles of federalism to support state-level innovations with respect to the legalization of marijuana, right-to-die initiatives, climate change measures, and health care reform.[62] At the same time,

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57. For a discussion of the effort to declassify homosexuality as a mental illness, see BAYER, *supra* note 32, at 91–92.

58. At the local level, some jurisdictions do not have what would be considered a strong executive model. This is the case with County Commissioners, who often serve both legislative and executive functions. *See Your Responsibilities as County Commissioner*, MRSC, http://mrsc.org/Home/Explore-Topics/Governance/Offices-and-Officers/Your-Responsibilities-as-a-County-Commissioner.aspx [https://perma.cc/Y2CS-BET6] (last modified Oct. 28, 2019) (describing the roles of Washington County Commissioners).

59. U.S. CONST. amend. X.

60. United States v. Windsor, 570 U.S. 744, 775 (2013) (holding that Section 3 of DOMA, a federal statute, violated the Due Process and Equal Protection clauses of the Fifth Amendment).

61. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (finding that a state regulation prohibiting same sex marriage violated the Constitution).

62. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425, 1445 (2009) (arguing that state laws allowing medical marijuana are not preempted by federal bans

conservative advocates also employ federalism to support socially conservative causes, including broad religious exemption laws and restrictive abortion laws.[63] As explained more fully in Section III below, federalism facilitated both a progressive and a conservative response in the case of LGBTQ rights. Both sides appealed to federalism and states' rights to advance their cause, and both sides abandoned these appeals when they no longer advanced their respective goals.[64]

B. The Elements of Strategic Institutional Choice

Understanding the strategic nature of comparative institutional choice can help shed light on what might appear at first glance to be puzzling choices or results, such as the decision of the LGBTQ movement to devote so much time and resources to secure partial gains at the state and local levels.[65] This Section discusses the three core components of strategic institutional choice. It also outlines the use of extra-institutional responses to reverse or blunt gains made in other institutional settings. After first addressing the relative competence of each institution to grant the desired relief, advocates must also assess the relative responsiveness and resilience of each institution. In other words, assuming the target institution has the power to grant the desired relief, is such relief politically attainable, and will the form of the relief granted be sufficiently durable to withstand attempts to overturn it?

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on marijuana and principles of federalism have allowed for this state-based legalization approach, despite contrary federal law).

63. *Cf.* J. Harvie Wilkinson III, *Of Guns, Abortion, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254, 305–06 (2009) (discussing how federalism had been used to secure abortion regulation prior to *Roe v. Wade*, 410 U.S. 113 (1973), and that *Roe*—and *District of Columbia v. Heller*, 554 U.S. 570 (2008)—are rejections of federalism and failures of conservativism).

64. *Compare infra* Section II.B (exploring the progressive appeal to, and eventual abandonment of, federalism in favor of marriage equality), *with infra* Section III.B (exploring the conservative use of both state and federal policies to prohibit marriage equality).

65. Similarly, during the Obama administration LGBTQ advocacy organizations embarked on a concerted program of administrative advocacy even though those gains were relatively fragile. The Trump administration has undone or reversed many of those administrative and regulatory pro-LGBTQ gains. *See infra* text accompanying notes 309–30.

1. Competency

All three branches of government (e.g., executive, legislature, and judiciary) at all three levels of government (e.g., federal state, and local) are competent to advance LGBTQ equality. The market is also able to provide some level of recognition through best practices and hiring policies.[66] Indeed, all institutions in society are probably competent to advance the cause of LGBTQ rights because of the pervasive and stubborn nature of anti-LGBTQ bias. That said, a nationwide grant of civil rights, whether it is marriage equality or non-discrimination protections, would generally be preferable to a state or local solution because of the ability to secure uniform and predictable rights across the country. A blanket grant of rights eliminates the potential for an Equality Gap or the "married on Sunday, fired on Monday" scenario that existed prior to *Bostock v. Clayton County*.[67]

In terms of non-discrimination protections, LGBTQ advocates have pursued federal legislation as well as a federal litigation strategy designed to secure federal protections for LGBTQ individuals. The Equality Act was first introduced in Congress in 1974 and has been reintroduced in nearly every session of Congress since then.[68] It has taken a number of forms. The first version of the Equality Act sought to amend the Civil Rights Act of 1964 to provide protections based on sexual orientation.[69] The Equality Act was later narrowed to be a standalone bill that focused solely on employment non-discrimination.[70] The current version of the Equality Act goes back to its original roots and would amend the Civil Rights Act of 1964, along with other important civil rights acts, to provide protections for LGBTQ people.[71]

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66. According to the Human Rights Campaign, as of 2018, ninety one percent of all Fortune 500 companies provided non-discrimination protection on the basis of sexual orientation and eighty-three percent provided non-discrimination based on gender identity. *Workplace Discrimination Laws and Policies*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/Workplace-Discrimination-Policies-Laws-and-Legislation [https://perma.cc/D2Y4-FGVP].

67. *See* Robinson, *supra* note 7 (arguing that the country "need[s] comprehensive LGBT nondiscrimination legislation at the federal level" in order to prevent discrimination "based on the ZIP code [LGBTQ members] happen to live in").

68. *See* Katy Steinmetz, *Why Federal Laws Don't Explicitly Ban Discrimination Against LGBT Americans*, TIME (Mar. 21, 2019, 7:36 PM), https://time.com/5554531/equality-act-lgbt-rights-trump [https://perma.cc/FE7B-89Q3].

69. Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31, 33 (2015).

70. *Id.*

71. *See* H.R. 5, 116th Cong. §§ 2(9), 2(11), 3–6 (2019).

In addition, LGBTQ advocates had aggressively pushed courts to recognize that the language in Title VII and Title IX prohibiting discrimination "because of sex" includes discrimination on the basis of LGBTQ identity.[72] This litigation strategy was finally successful in 2020 when the U.S. Supreme Court held in a 6-3 opinion in *Bostock v. Clayton County* that the language "because of sex" in Title VII necessarily includes discrimination on account of sexual orientation and gender identity.[73]

Despite the recent U.S. Supreme Court victory in *Bostock v. Clayton County*, federal statutory non-discrimination protections for LGBTQ people have proved elusive. The Equality Act passed the House of Representatives in 2019, but Senate leadership refused to bring the bill to the floor for a vote.[74] During the Obama administration, the LGBTQ movement made important gains at the administrative level.[75] In many instances, these gains were regulatory, but some were simply sub-regulatory guidance or a subtle policy shift, meaning that they were easily reversed by subsequent administrations.[76]

LGBTQ advocates were able to secure partial success on the state and local level with respect to non-discrimination protections. States and municipalities are permitted to grant greater protections than those offered by the federal government, provided the protections do not violate the U.S. Constitution.[77] Wisconsin became the first state to

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72. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 343, 345 (7th Cir. 2017) (advocating for the court to protect LGBTQ identity under Title VII). When the Equality Act was last introduced, there was an increased consensus among the courts that discrimination based on gender identity constitutes sex discrimination within the meaning of Title VII and Title IX. *See, e.g.*, *id.* at 351–52 (holding that discrimination based on sexual identity is covered under Title VII). Although the U.S. Equal Employment Opportunity Commission agreed, the U.S. Department of Justice filed a brief in *Bostock* in support of the employers. Harry Litman, *The Trump Administration Jumps into a High-Stakes Court Case in Support of Intolerance*, WASH. POST (Aug. 27, 2019), https://www.washingtonpost.com/opinions/2019/08/27/trump-administration-says-lgbtq-workers-arent-protected-by-civil-rights-law-supreme-court-will-decide-just-time-election [https://perma.cc/2ES9-LJW2].

73. 140 S. Ct. 1731, 1741 (2020).

74. H.R. 5, 116th Cong. (2019) (as referred to the S. Comm. on the Judiciary, May 20, 2019).

75. *See infra* text accompanying note 309 (discussing Obama-era administrative pro-LGBTQ gains).

76. *Id.*

77. *See* Virginia v. Moore, 553 U.S. 164, 171 (2008) ("We have treated additional protections exclusively as matters of state law."); *cf.* Obergefell v. Hodges, 135 S. Ct.

enact such legislation in 1982, but municipalities and private businesses had started putting protections in place even earlier.[78] Currently, not quite one-half of the states have non-discrimination protections in place for LGBTQ people.[79] Again, this is important because of the resulting Equality Gap given the absence of blanket federal non-discrimination protections.

The question of portability is an important aspect of institutional competency because gains made on a state or local level are rarely transferable to another jurisdiction. State and local benefits are necessarily limited in scope to those that the granting jurisdiction has to offer. This was a serious sticking point on the road to marriage equality where a married couple could suddenly be unmarried by simply crossing state lines.[80] Although a couple married in a state that recognized marriage equality could file their taxes jointly for state purposes, they were not recognized as being married for any federal purposes because of the 1996 federal Defense of Marriage Act (DOMA).[81] In the case of non-discrimination protections, the current patchwork of state and local protections is what has led to our Equality Gap.[82]

2584, 2593 (2015) (finding that a state regulation prohibiting same sex marriage violated the Constitution).

78. Ryan Thoreson, *Midwest Has Shown It's Ready for Transgender Rights*, COLUMBUS DISPATCH (Mar. 7, 2020), https://www.dispatch.com/opinion/20200307/column-midwest-has-shown-its-ready-for-transgender-rights [https://perma.cc/B4RP-WPWP] ("In 1975, . . . Minneapolis was the first city to prohibit discrimination against transgender people in public accommodations.").

79. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/B6JR-WQGF]. While thirty-one states have non-discrimination protections that include sexual orientation and gender identity for state employees, only twenty-two states and the District of Columbia have non-discrimination protection laws on housing, employment, public accommodations, or credit. *Id.*

80. Of course, with respect to marriage equality, there was a complicating factor because marriage was traditionally a state issue, along with questions of divorce, inheritance, adoption, and tort claims. The traditional view is that family law is a state matter. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (identifying family law as "an area that has long been regarded as a virtually exclusive province of the States").

81. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (1997)), *invalidated by* United States v. Windsor, 570 U.S. 744, 775 (2013).

82. The resulting lack of uniformity creates a level of uncertainty that complicates daily life for LGBTQ people in ways that non-LGBTQ people need never consider. In fact, when both the American Psychological Association and the American Psychiatric Association came out in support of marriage equality, they cited the extreme minority stress experienced by same-sex couples due to the absence of uniform relationship

On the local level, the scope of available benefits is even more limited. By ordinance, many municipalities and counties have established non-discrimination protections for LGBTQ people and also their own employees.[83] As explained in greater detail in the third Section, localities were also the first movers with respect to marriage equality.[84] Although they did not have the power to grant marriage licenses, cities and counties created domestic registry systems to formalize same-sex relationships and recognized same-sex couples who registered as "domestic partners."[85] The registries provided a governmental acknowledgement of the relationship, but the rights obtainable under such ordinances were necessarily limited to those rights that a municipality or county could grant, such as the right to visit a same-sex partner incarcerated at a county prison, municipal tax benefits enjoyed by married couples, and the ability to transfer certain municipal licenses, such as a liquor license, to a same-sex partner.[86]

The market was also an early adopter of LGBTQ non-discrimination protections and relationship recognition. Today, non-discrimination protections for LGBTQ people are commonplace in corporate America, and the vast majority of Fortune 500 companies offer such

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recognition. NANCY J. KNAUER, GAY AND LESBIAN ELDERS: HISTORY, LAW, AND IDENTITY POLITICS IN THE UNITED STATES 91 (2011). The American Psychological Association specifically mentioned that relationship recognition granted by one jurisdiction is rarely "portable." *Id.*

83. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender [https://perma.cc/4XZP-ZBFE].

84. THE SAGE ENCYCLOPEDIA OF LGBTQ STUDIES 661 (Abbie E. Goldberg, ed., 2016) ("The first ordinance to recognize same-sex domestic partners was introduced in San Francisco in 1982 . . . . Berkeley eventually became the first municipality in the United States to extend domestic partner benefits to its city employees in 1984.").

85. West Hollywood was the first city to establish a domestic partner registry in 1985. *Id.*

86. Such ordinances granted relative few benefits to non-municipal employees. *See* Knauer, *supra* note 82, at 91. However, the San Francisco domestic partnership ordinance went one step further and required all city contractors to offer domestic partnership benefits equal to those provided for spouses. S.D. Myers, Inc. v. City of S.F., 253 F.3d 461, 468, 472, 474 (9th Cir. 2001) (upholding ordinance). In this way, the ordinance benefited a much wider class of employees. Under the Obama administration, a similar approach was used to further non-discrimination protections administratively by requiring certain government contractors to provide such protections for their employees. Exec. Order No. 13,672, 3 C.F.R. 2014 Comp., p. 282–83 (July 21, 2014).

protections for their workers.[87] Obviously, market-based solutions are inadequate to provide wide-spread equality protections because they only extend to a limited class of workers,[88] but they often make a significant difference in the lives of the individuals involved.[89] Market-based solutions also have potential transformative value. Each grant of LGBTQ rights furthers the larger social goal of the normalization of LGBTQ people and provides precedent on which to base future decisions.

2. Responsiveness

Beyond assessing the competency of an institution, strategic institutional choice must be predictive in nature. Inquiring how responsive a given institution will be to a demand for reform or change ensures that resources are not imprudently allocated to an ideal, but unlikely, institutional choice.[90] This assessment involves issues of design, including structural roadblocks and susceptibility to majoritarian influence

87. *Supra* note 66 and accompanying text.

88. *See id.* It is likely further limited to the full-time employees of such employers, as part-time employees typically work without benefits.

89. For example, workplace domestic partner benefits were very valuable due to the structure of health care in the United States where health insurance is linked to employment. *See* Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. TIMES (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html [https://perma.cc/7Q4J-2N3S] (describing the history of linking healthcare to employment in the United States). A married worker whose employment package included health insurance could generally elect to cover their spouse and children, resulting in greater costs for the employer and an additional co-pay for the employee. *See* Paul Fronstin & M. Christopher Roebuck, *The Cost of Spousal Health Coverage*, 35 EMP. BENEFIT RES. INST., Jan. 30, 2014, at 2, 4 (detailing the cost-sharing of health insurance plans between employers and employees). In addition to health insurance benefits, employment packages often include a variety of spousal benefits, including bereavement or sick leave, tuition reimbursement, and retirement or pension benefits. Alison Doyle, *Types of Employee Benefits and Perks*, BALANCE CAREERS, https://www.thebalancecareers.com/types-of-employee-benefits-and-perks-2060433 [https://perma.cc/5LQ4-NWLA] (last updated Dec. 20, 2019). In advance of marriage equality, domestic partnership benefits extended these spousal benefits, or some subset of them, to same-sex partners. Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 563–64 (2000).

90. An example of this would have been a decision to pursue marriage litigation in the 1970s or federal marriage litigation prior to 2008. The result of either course of action would have most likely been an accumulation of bad precedent.

or bias.[91] For example, the early efforts to secure non-discrimination protections for LGBTQ people were often met with measures designed to blunt or otherwise overturn them, such as ballot initiative and other appeals to direct democracy.[92] During the Obama administration, the executive branch was much more responsive to demands for LGBTQ rights and protections than Congress.[93] Accordingly, LGBTQ advocates advanced a sophisticated administrative lobbying effort designed to secure favorable rulemaking and guidance even though these gains were vulnerable to being undone by subsequent administrations.[94]

In the case of marriage equality, the institutional jockeying of opponents to LGBTQ rights produced a number of structural roadblocks that were specifically designed to inhibit an institution's ability to respond to a demand for marriage equality. After the first favorable state supreme court ruling on marriage equality in 1993, anti-LGBTQ advocates pushed for legislation to take the power to define marriage away from the courts.[95] Advocates later upped the ante by pushing for state constitutional amendments, rather than rely on legislation that could be overturned in a subsequent legislative session.[96] These early efforts served as the template for the widespread adoption of state-level defense of marriage acts, as well as state constitutional amendments defining marriage as the union of one man and one woman.[97] As of 2006, two years after Massachusetts became the first state to issue marriage licenses to same-sex couples, forty-four states had either a state-wide DOMA or a state constitutional amendment restricting marriage.[98] A number of states had decided to

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91. *See* KOMESAR, *supra* note 25, at 65–66 (describing two-force model of majoritarian and minoritarian bias).

92. Romer v. Evans, 517 U.S. 620, 635 (1996) (finding that a state constitutional amendment that barred local and state governments from creating laws that would protect LGBTQ individuals as a class did not satisfy the Equal Protection clause).

93. *See, e.g.*, Exec. Order No. 13,672, 3 C.F.R. 2014 Comp., p. 282–83 (July 21, 2014) (granting nondiscrimination protections to federal contract employees).

94. *See, e.g.*, discussion *infra* text accompanying notes 309–29.

95. Baehr v. Lewin, 852 P.2d 44, 70 (1993) (remanding the case to the trial court to apply the strict scrutiny test to the prohibition on providing licenses for same-sex couples).

96. MICH. CONST. art. I, § 25; NEB. CONST. art. I, § 29; *see infra* text accompanying notes 165–87 (discussing states' various responses to LGBTQ advocacy).

97. David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG. (May 9, 2004), https://www.nytimes.com/2004/05/09/magazine/toward-a-more-perfect-union.html [https://perma.cc/78HQ-GBX2] (describing evolution of coordinated same-sex marriage litigation).

98. *See infra* note 198.

play it safe and enacted both legislative and constitutional prohibitions.[99] The widespread adoption of these types of roadblocks demonstrated that the goal of LGBTQ equality was particularly vulnerable to majoritarian influence or bias.[100]

Despite the erection of these roadblocks, the states were more responsive to the demand for marriage equality and non-discrimination protections than the federal government. However, state-level reform measures are an imperfect institutional choice with respect to securing minority civil rights because any gains are necessarily partial and, as discussed above, not portable.[101] In the specific case of marriage, state-level reforms were inadequate to secure broad-based minority rights without the guarantee of Full Faith and Credit. Moreover, state-level reforms, particularly those initiated by judicial decisions, were uniquely susceptible to majoritarian forces that sought to overturn them.[102] For this reason, state-level reforms are inevitably partial and potentially transitory.

By far, the earliest gains with respect to LGBTQ rights were at the local and individual level: employers adopted domestic partnership and non-discrimination policies, local governments established domestic partnership registries and enacted non-discrimination ordinances, and individual court cases provided ad hoc relief.[103] Accordingly, there was, and in many ways continues to be, an inverse relationship between an institution's responsiveness to demands for LGBTQ rights and its competency to provide comprehensive relief; the first movers are often

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99. *See* Appendix for a list of state constitutional amendments and legislative marriage bans.

100. Initially, these federal and state anti-marriage provisions were largely of academic interest because no state recognized same-sex marriage until the implementation of the *Goodridge* decision in June of 2004. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 974 (Mass. 2003). However, the implementation of *Goodridge* and the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), led to a renewed interest in anti-marriage legislation on both the federal and state level. *See* Garrow, *supra* note 97.

101. *See supra* notes 81–83 (discussing portability).

102. *See, e.g.*, *infra* notes 191–94 and accompanying text (explaining how voters approved amending the Hawaii constitution, mooting the Supreme Court of Hawaii's decision that held denying same-sex couples' marriage licenses violated the Equal Rights Amendment to the Hawaii constitution).

103. *See supra* notes 82–85 and accompanying text (describing local governments' efforts to provide some level of relationship recognition to same-sex couples); GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 116–17 (2004) (describing how companies and government agencies provided health and death benefits to the same-sex partners of employees).

the least competent. For example, employer-provided domestic partnership benefits were commonplace prior to marriage equality, but they were at best only a partial benefit reserved for a privileged few.[104] As noted above, many municipalities and counties enacted some form of relationship recognition for same-sex couples, but the recognition was largely symbolic.[105] Courts also recognized same-sex partners as family in very specific instances beginning in the 1980s, such as protection from eviction under municipal rent control guidelines,[106] standing to sue for wrongful death,[107] and the right to take from a partner's estate.[108] However, these decisions were based on the notion of a "functional" family or equitable principles, not a declaration of equality for same-sex couples.[109]

3. Resilience

The question of resilience attempts to measure the potential longevity of any gain by predicting an institution's ability to withstand counter-demands from anti-LGBTQ advocates. Often these counter-demands are made through intra-institutional channels and represent the common give and take associated with politics. For example, the anti-LGBTQ rights movement voraciously lobbies against pro-LGBTQ

104. Elizabeth Ashack, *Employer-Sponsored Benefits Extended to Domestic Partners*, 3 BUREAU LAB. STATS.: BEYOND NUMBERS 12 (Mar. 2014), https://www.bls.gov/opub/btn/volume-3/pdf/employer-sponsored-benefits-extended-to-domestic-partners.pdf.

105. *See supra* note 86 and accompanying text (discussing quantum of benefits available under municipal ordinances).

106. The ground-breaking 1989 case of *Braschi v. Stahl Associates Co.* extended rent-control protection to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence. 543 N.E.2d 49, 50, 53–54 (N.Y. 1989). New York City rent control guidelines allowed a member of the decedent's immediate family who shared the household to stay in a rent-controlled apartment even where the family member was not a named party to the lease. *Id.* at 50.

107. The California Superior Court in San Francisco allowed a surviving same-sex partner to bring a wrongful death action. Smith v. Knoller, No. 319532, 2001 WL 36128129, at *1–3 (Cal. Super. Ct. Aug. 9, 2001) (order overruling defendants' demurrer and denying defendants' motion to strike).

108. *See, e.g.*, Vasquez v. Hawthorne, 33 P.3d 735, 736 (Wash. 2001) (en banc) (upholding a same-sex partner's equitable claim against the estate of his deceased partner).

109. *Braschi*, 543 N.E.2d at 54 (finding that the term "family" in the context of rent-control laws was meant to protect those residing in households that have "all of the normal familial characteristics").

legislation and policies. The anti-LGBTQ rights movement has waged consumer boycotts of firms with pro-LGBTQ track records,[110] threatened to impeach judges who are perceived to be pro-LGBTQ,[111] and worked to frustrate the re-election attempts of legislators who supported relationship recognition.[112] However, the anti-LGBTQ rights movement also successfully employed extra-institutional avenues, such as attempting to moot a court decision by legislation or a state-constitutional amendment.[113] In addition to this institutional jockeying, sometimes LGBTQ gains can be reversed simply because they are fragile, as in the case of the Obama-era administrative gains that have largely been walked back by the Trump administration.[114]

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110. For example, the Southern Baptist Convention, which represents the nearly 16 million Southern Baptists in the U.S., organized a boycott of the Walt Disney Company shortly after the company began to offer domestic partner benefits in 1996. Gustav Niebuhr, *Baptists Censure Disney for Gay-Spouse Benefits*, N.Y. TIMES (June 13, 1996), https://www.nytimes.com/1996/06/13/us/baptists-censure-disney-for-gay-spouse-benefits.html [https://perma.cc/H3XH-8VNK]. The boycott was largely regarded as a failure and ended eight years later. *See Baptists End Disney Boycott*, N.Y. TIMES (June 23, 2005), https://www.nytimes.com/2005/06/23/us/national-briefing-religion-baptists-end-disney-boycott.html [https://perma.cc/2HR3-X44P] (quoting the Southern Baptist Convention resolution that stated "[t]he boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values").

111. *See, e.g.*, Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST (Apr. 9, 2005), https://www.washingtonpost.com/archive/politics/2005/04/09/and-the-verdict-on-justice-kennedy-is-guilty/d77eaed6-3bb2-45db-8e06-275295ce2d0b [https://perma.cc/ARV9-NGKP] (reporting on a meeting of conservatives where consensus was that Justice Kennedy, author of majority opinion in *Lawrence*, "should be impeached, or worse").

112. For example, the Christian Coalition publishes a Congressional scorecard that rates the annual performance of members of Congress on a scale of zero to one hundred. *Congressional Scorecards*, CHRISTIAN COAL., http://www.cc.org/webform/congressional_scorecards.

113. *See* CHAUNCEY, *supra* note 103, at 126 (describing how court decisions validating same-sex marriage in Hawaii and Arizona were overturned by state constitutional amendments).

114. Under the current Trump administration, numerous Obama-era administrative gains have been reversed. *See generally* ROBIN MARIL, HUM. RTS. CAMPAIGN, TRUMP'S ADMINISTRATIVE ABUSE AND THE LGBTQ COMMUNITY 1–2, 5–7 (2017), https://www.hrc.org/resources/trumps-administrative-abuse-and-the-lgbtq-community [https://perma.cc/X87H-LAWF] (describing how the Trump Administration has made substantive errors within the administrative rulemaking process that effectively rolled back protections established by the Obama Administration for LGBTQ people, including by removing sexual orientation from the National Survey of Older Americans

II. THE ROAD TO MARRIAGE EQUALITY

This Section examines how LGBTQ advocates used federalism to advance the legal strategy that ultimately led to nationwide marriage equality, including how federalism spawned a confounding range of relationship recognition laws and prohibitions in the two decades that led up to *United States v. Windsor*[115] and *Obergefell v. Hodges*.[116] It also provides an overview of corresponding and complementary visions of federalism expressed in both *Windsor* and *Obergefell*.

A. The Importance of Federalism to Marriage Equality

Beginning with the 1993 Supreme Court of Hawaii decision in *Baehr. v. Lewin*,[117] LGBTQ advocates secured significant victories based on state constitutional claims.[118] These claims remained the primary basis of pro-marriage litigation until 2009 and reflected an express strategic decision to build positive case law at the state level before mounting federal challenges.[119] Despite periodic victories, the vast majority of the states rejected marriage equality and took steps to block same-sex marriage through legislative action and state constitutional amendments.[120] To this end, anti-marriage equality groups organized many successful citizens' initiatives and excelled in the use of direct democracy to blunt the potential impact of favorable court rulings or legislative action. But these groups were also willing to put their commitment to states' rights aside and support the enactment of DOMA in 1996,[121] which imposed a restrictive national definition of marriage in an area historically

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Act Participants and removing data collection and notice requirements for Housing and Urban Development LGBTQ programs).

115. 133 S. Ct. 2675 (2013) (invalidating DOMA).

116. 135 S. Ct. 2584 (2015) (invalidating restrictive state marriage prohibitions).

117. 852 P.2d 44 (Haw. 1993).

118. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates the state constitution).

119. Garrow, *supra* note 97 (describing the evolution of coordinated same-sex marriage litigation).

120. *See* Kurt G. Kastorf, Comment, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule*, 54 EMORY L.J. 1633, 1636–38 (2005) (describing steps taken by Georgia's legislature to restrict marriage to that between a man and a woman).

121. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (1997)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

reserved to the states.[122] The advocates of marriage equality also eventually turned away from state-level reforms to focus instead on federal constitutional claims—first to defeat DOMA and then to mandate nationwide marriage equality.[123]

This tumultuous process of state-level reform produced a perplexing array of innovative state-level marriage laws, some of which recognized same-sex marriage or a lesser status, such as domestic partnership or civil unions, but most of which prohibited marriage equality or any recognition of same-sex relationships.[124] DOMA added a second layer of complexity by mandating that marriage was a "union between one man and one woman" for all federal purposes.[125] Under DOMA, a couple could be married under state law but still considered unmarried for the purposes of all federal benefits.[126] The result was an increasing lack of uniformity that, when combined with a highly mobile society, placed an untenable burden on same-sex couples.[127] Marriages would disappear as a couple crossed the state line and prove meaningless at tax time.[128]

The question of marriage equality was finally resolved at the federal level in two landmark U.S. Supreme Court cases. In 2013, *United States v. Windsor* invalidated the restrictive federal definition of marriage under DOMA.[129] Two years later, *Obergefell v. Hodges* put an end to the confusing patchwork of state-level marriage laws by invalidating state laws that restricted marriage to the union of one man and one woman.[130] Both decisions are considered historic civil rights cases, but each case seemed to strike a different balance between the powers of

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122. *Id.* § 3 (defining marriage as "only a legal union between one man and one woman"); *see, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (identifying domestic relations as "an area that has long been regarded as a virtually exclusive province of the States").

123. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (invalidating restrictive state marriage prohibitions); United States v. Windsor, 133 S. Ct. 2675, 2682 (2013) (invalidating DOMA).

124. *See infra* notes 198–99 (discussing the number of states with anti-marriage legislation and/or state constitutional amendments).

125. Defense of Marriage Act § 3.

126. *Id.* § 2. On the federal level alone, there are an estimated 1138 benefits attached to marriage. Letter from Dayna K. Shah, Assoc. Gen. Counsel, United States Gen. Accounting Office, to Hon. Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004).

127. *See supra* note 82 (explaining minority stress due to lack of uniformity).

128. DOMA also purported to empower states to refuse to recognize marriages performed in sister states. Defense of Marriage Act § 2.

129. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

130. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

the state and national governments. *Windsor* affirmed the primacy of a state's definition of marriage,[131] but then two years later, the very same Justices voted in *Obergefell* to invalidate restrictive state definitions of marriage.[132]

The Court's apparent love-hate relationship with federalism in the context of marriage equality invited speculation that the rulings represented yet another example of politicized decision making where Justices act more like advocates than impartial arbiters.[133] An institutional view of federalism, however, can help clarify that the visions of federalism expressed by the majority opinions in *Windsor* and *Obergefell* are not necessarily at odds. Deference to the states represents an institutional choice, but, as with any institution, federalism has both specific competencies and limitations. Even the most innovative state "experiment" must comport with the constitutional safeguards of the Fourteenth Amendment.[134] Although *Windsor* may have affirmed that states retain the authority to define and regulate marriage, *Obergefell* reminds us that such authority is necessarily constrained by the federal constitutional guarantees of liberty and equal protection.[135] Accordingly, *Obergefell* remains true to the template of federalism sketched out by the Tenth Amendment, which refers to not only the powers delegated to the national government, but also the powers prohibited to the States by the Constitution: "The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people."[136]

B. The Demand for Marriage Equality

A handful of marriage equality cases were brought in the 1970s during the early days of the Gay Liberation movement,[137] but the concerted

131. *Windsor*, 113 S. Ct. at 2691.

132. *Obergefell*, 135 S. Ct. at 2607–08.

133. *See, e.g.*, Megan Garber, *The U.S. Supreme Court Is Acting like Congress*, ATLANTIC (June 27, 2015), https://www.theatlantic.com/politics/archive/2015/06/9-angry-judges/396989 [https://perma.cc/D4M4-V2FJ] (arguing that the Supreme Court has become increasingly politicized, with notions of morality driving the opinions).

134. *See* U.S. CONST. amend. XIV (requiring any person within each state to be equally protected by the laws of that jurisdiction and that life, liberty, or property not be denied without due process).

135. *Id.*

136. *Id.* amend. X (emphasis added).

137. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973) (finding no "constitutional issue" with the denial of a marriage certificate to a same-sex couple); Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971) (holding that state laws and the

push for marriage equality did not start until the mid-1990s when a series of positive decisions from the Hawaii state courts in *Baehr v. Lewin* and *Baehr v. Miike*[138] signaled that same-sex couples could secure the right to marry under state constitutions.[139] For LGBTQ advocates, the decision to focus on state constitutional law was a pragmatic and strategic one. The 1986 U.S. Supreme Court decision *Bowers v. Hardwick*[140] had upheld the constitutionality of criminal sodomy laws, making it highly unlikely that the Court would recognize a fundamental right to marry for same-sex couples based on *Loving v. Virginia*.[141] In addition, the U.S. Supreme Court had dismissed one of the early marriage equality cases, *Baker v. Nelson*,[142] for want of a federal question in 1972.[143] *Bowers v. Hardwick* was not overruled until *Lawrence v. Texas*[144] in 2003—the same year that the Supreme Court of Massachusetts mandated marriage equality.[145] Finally, marriage was traditionally a state issue, notwithstanding DOMA.[146]

The demand for marriage equality was in many ways a natural extension of the broader goals of equality and individual freedom espoused by the gay rights movement, but it was never a universally shared goal within the LGBTQ community.[147] The initial wave of the HIV/AIDS epidemic in the 1980s highlighted the disadvantages faced

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state constitution did not require a county clerk to issue a marriage license to a same-sex couple); Singer v. Hara, 522 P.2d 1187, 1188–89, 1197 (Wash. Ct. App. 1974) (finding against same-sex appellants who argued being denied a marriage certificate violated their state and federal constitutional rights).

138. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), *superseded by constitutional amendment*, HAW. CONST. Art. 1, § 23, *as recognized in* Baehr v. Miike, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999).

139. Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993); Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21.

140. 478 U.S. 186, 189 (1986) (upholding the constitutionality of criminal sodomy law), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

141. 388 U.S. 1, 12 (1967) (recognizing a fundamental right to marry).

142. 191 N.W.2d 185 (Minn. 1971).

143. *Id.*, *appeal dismissed*, 409 U.S. 810 (1972).

144. 539 U.S. 558 (2003).

145. *Id.* at 578; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that limiting access to "the protections [and] benefits . . . of civil marriage" violates the state constitution).

146. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (1997)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

147. Paula L. Ettelbrick, *Since when Is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L LESBIAN & GAY Q., Fall 1989, at 9, 14–17.

by same-sex couples because they were not able to marry or otherwise formalize their relationships.[148] As the gay community was being devastated by an unrelenting disease, same-sex partners were refused hospital visitation rights, disregarded in medical decision making, evicted from apartments, and denied the property rights typically extended to surviving spouses or other family members.[149] These experiences brought into sharper focus the human costs involved in the lack of relationship recognition. Regardless of the length or quality of their relationship, same-sex partners were considered "legal strangers." Against this backdrop, it became clear to the burgeoning gay rights movement that it was essential to secure some form of legal recognition for same-sex relationships in order to safeguard loved ones.[150] The only question for debate was what form that recognition should take.[151] Whereas some advocates championed full marriage equality,[152] others favored different forms of nonmarital recognition that could provide legal protections without the traditional trappings of marriage.[153]

In response to the demand for legal recognition, state and local legislatures began to craft a number of mechanisms to address the glaring inequities experienced by same-sex couples, especially surviving same-sex partners. The legislative reforms provided varying levels of legal recognition and protection, ranging from the limited grant of domestic partner employee benefits to laws that created a parallel status that extended all the rights and obligations of marriage.[154]

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148. *See generally* CHAUNCEY, *supra* note 103, at 3 (discussing historical roots of efforts to obtain relationship recognition).

149. *Id.* at 95–102.

150. *Id.* at 95–98.

151. *Id.* at 102.

152. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK: NAT'L LESBIAN & GAY Q., Fall 1989, at 9, 9–13 (arguing that while the institution of marriage has been historically oppressive, the gay rights movement should pursue the right for same-sex partners to marry because the institution provides practical benefits, formal recognition of the relationship could reduce discrimination against LGBTQ individuals, and extending the right to marry to same-sex couples could change the sexist nature of the marriage institution).

153. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 49–50, 58–61 (2008) (discussing how opponents to the marriage institution sought relationship recognition based on family values, including commitment and caring, and how employers and municipalities provided the status of "domestic partnership," which granted some or all of the same benefits as marriage).

154. *Id.* at 49–52 (reviewing various policies and laws enacted to formalize same-sex relationships, such as employers extending fringe benefits to unmarried partners,

Often the legislative reforms were enacted following a favorable decision by the state's highest court and were designed specially to forestall a full grant of marriage equality.[155]

As noted in Section II.B, the first tangible, albeit modest, gains were on the local or municipal level. The earliest ordinances were enacted in the 1980s and extended spousal benefits, specifically health insurance, to the same-sex partners of city employees.[156] These benefits came to be known as domestic partner benefits.[157] At the same time, major employers also began to offer domestic partnership benefits to their employees.[158] Later, more comprehensive ordinances established domestic partnership registries, extended full spousal rights to domestic partners, and, in some instances, required city contractors to provide domestic partner benefits.[159] Many of these ordinances were largely symbolic and granted few substantive rights because they could only extend to same-sex couples the rights that were within the power of the city or municipality to grant, such as municipal spousal tax benefits, and the ability to transfer certain municipal licenses to a same-sex partner.[160]

To achieve state-wide marriage equality, advocates focused their constitutional litigation in states with Equal Rights Amendments and gender-neutral marriage laws.[161] After favorable court rulings were later nullified by citizens' initiatives,[162] it also became clear that it was important to focus on states with constitutional structures that were difficult to amend through appeals to direct democracy. The long-term

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universities allowing bereavement leave for anyone the employee defined as family, and city ordinances providing the right to access government employer fringe benefits and the right to hospital visitations for those who registered as "domestic partners").

155. CHAUNCEY, *supra* note 103, at 90–91.

156. POLIKOFF, *supra* note 153, at 50.

157. CHAUNCEY, *supra* note 103, at 116.

158. *Id.* at 116–17; POLIKOFF, *supra* note 153, at 49.

159. S.D. Myers, Inc. v. City of S.F., 253 F.3d 461, 465, 470–74 (9th Cir. 2001) (upholding a San Francisco ordinance requiring city contractors to offer domestic partnership benefits equal to those provided for spouses).

160. *See* CHAUNCEY, *supra* note 103, at 117–19 (describing how domestic partnership policies did not provide the same federal tax benefits or pension protections provided to married couples).

161. Nancy J. Knauer, *Federalism, Marriage Equality, and LGBT Rights*, *in* CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY 97 (Christopher P. Banks ed., 2018); *see* Garrow, *supra* note 97 (discussing LGBTQ advocates' coordinated litigation strategy).

162. *See* CHAUNCEY, *supra* note 103, at 125–26 (providing examples of favorable court rulings for marriage equality in Hawaii and Alaska that were later invalidated by constitutional amendments supported by conservative groups).

strategy was to build sufficient support among the states before bringing a federal claim. During this period, plaintiffs were actively discouraged from initiating federal claims in order to avoid the creation of negative precedent at the federal level.[163] It was not until 2009 that advocates began to bring federal challenges to restrictive marriage laws.[164]

The first state-wide legal recognition for same-sex couples was enacted in 1997 when Hawaii approved the Reciprocal Beneficiaries Act ("the Act") in response to ongoing marriage litigation.[165] The legislation was an attempt to take the steam out of the push for marriage equality by addressing some particular areas where same-sex couples were disadvantaged, such as inheritance rights and medical decision making.[166] Under the Act, the legislature created the status of "reciprocal beneficiary" and extended approximately sixty rights and responsibilities commonly associated with marriage to individuals who registered as "reciprocal beneficiaries."[167] The Act was not expressly limited to same-sex couples in order to appease the opponents of same-sex marriage who saw the legislation as validation of what they pejoratively referred to as the "homosexual lifestyle."[168]

Three years later, Vermont became the second state to adopt state-wide relationship recognition. As was the case in Hawaii, the Vermont legislature enacted legislation to provide recognition that was short of marriage in response to a favorable court ruling.[169] In 1999, the Vermont

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163. Garrow, *supra* note 97 (reporting one advocate's position that federal same-sex marriage litigation needed to be postponed "for as long as possible"); ACLU ET AL., MAKE CHANGE, NOT LAWSUITS 1–2 (2009), https://www.aclu.org/sites/default/files/field_document/make_change_20090527.pdf [https://perma.cc/86BE-H9UK] (urging couples not to sue the federal government by arguing that pursuing federal law suits too soon could lead to bad precedent).

164. Jo Becker, *A Conservative's Road to Same-Sex Marriage Advocacy*, N.Y. TIMES (Aug. 18, 2009), https://www.nytimes.com/2009/08/19/us/19olson.html [https://perma.cc/Y8VJ-JFD7].

165. Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 1211 (codified at HAW. REV. STAT. ANN. §§ 572C-1 to -7 (West 2008)).

166. *Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States*, NAT'L CTR. LESBIAN RTS., https://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf [https://perma.cc/PY76-GYXE] (last updated June 2017).

167. HAW. REV. STAT. ANN. §§ 572C-1 to -3; *see, e.g.*, *id.* § 560:2-102 (inheritance rights).

168. *See id.* § 572C-4.

169. VT. STAT. ANN. tit. 15, §§ 1201-07 (West 2018).

Supreme Court ruled in *Baker v. State*[170] that same-sex couples were entitled to the same rights and privileges afforded to married couples under the Vermont Constitution.[171] The decision did not mandate same-sex marriage. Instead, it suspended the issuance of marriage licenses to same-sex couples until the state legislature could remedy the situation.[172] A year later, the Vermont legislature created civil unions for same-sex couples that provided all the rights and privileges of marriage.[173] The Vermont civil union legislation represented the first time a state created a parallel status for same-sex couples that was the legal equivalent to marriage.[174]

As the states continued to grapple with the question of relationship recognition, they developed a range of statutory schemes that varied considerably in terms of scope and went by different names, such as reciprocal beneficiaries, domestic partnerships, and civil unions.[175] During this time, there developed a clear inverse relationship between innovation and uniformity. As innovation and complexity increased, uniformity and consistency decreased. Some of the statutory schemes were restricted to same-sex couples, whereas others were open to different-sex couples.[176] Some states created an alternative status to marriage that provided a lesser quantum of rights, whereas other states created a statutory category that granted same-sex couples all of the rights and obligations of marriage, but withheld the formal designation of marriage.[177] The states that created a marriage equivalent status did so in order to maintain marriage as a special status reserved for

170. 744 A.2d 864 (Vt. 1999).

171. *Id.* at 867.

172. *Id.*

173. VT. STAT. ANN. tit. 15, §§ 1201-04.

174. Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES (Apr. 26, 2000), https://www.nytimes.com/2000/04/26/us/vermont-gives-final-approval-to-same-sex-unions.html [https://perma.cc/P29V-E2UA].

175. CAL. FAM. CODE §§ 297, 297.50, 298, 298.5 (West 2020) (registered domestic partners); HAW. REV. STAT. ANN. §§ 572C-1 to -3 (West 2008) (reciprocal beneficiaries); VT. STAT. ANN. tit. 15, §§ 1201-04 (civil unions).

176. *See, e.g.*, HAW. REV. STAT. ANN. §§ 572C-1 to -3 (open to all couples).

177. For example, Massachusetts's legal recognition of same-sex couples granted equivalent rights and benefits as heterosexual couples, while the legal recognition provided by the District of Columbia, Maine, and New Jersey only conveyed a few select rights and benefits of marriage. Julie L. Davies, *State Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L. 1079, 1093–94 (2006).

different-sex couples, thereby raising equal protection concerns.[178] All of the states that extended some form of recognition for same-sex relationships later adopted marriage equality in advance of *Obergefell v. Hodges*.[179]

In 2004 Massachusetts became the first state to issue marriage licenses to same-sex couples.[180] A year earlier, the Massachusetts Supreme Court held in *Goodridge v. Department of Public Health*[181] that the Massachusetts Constitution required equal treatment of same-sex couples with respect to marriage.[182] In an advisory opinion, the majority of the Justices of the Massachusetts Supreme Court concluded that Vermont-style civil union legislation would not cure the constitutional infirmity.[183] Although aggrieved voters mobilized around a state constitutional amendment, they were not able to overcome procedural hurdles unique to the Massachusetts amendment process.[184]

As more states joined Massachusetts and embraced marriage equality, the confusion over relationship recognition intensified. Despite gains, the majority of states continued to ban same-sex marriage and refused to recognize same-sex marriages performed in other jurisdictions.[185] Depending on where a couple lived and worked, they could be considered legal strangers, spouses, or something in between. Regardless of their status under state law, DOMA ensured that they would be considered unmarried for federal purposes, including taxes, social

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178. *See, e.g.*, Susan K. Livio, *Commission Says New Jersey Should Allow Gay Marriage*, STAR LEDGER (Dec. 10, 2008), https://www.nj.com/news/2008/12/goldstein.html [https://perma.cc/TRG8-27EY] (summarizing a report of the New Jersey Civil Union Review Commission, criticizing the state's civil union law as "unjust" and harmful).

179. *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201 [https://perma.cc/W6ET-7BC2] (last updated July 29, 2020).

180. Belluck, *supra* note 15.

181. 798 N.E.2d 941, 969 (Mass. 2003).

182. *Id.* at 948–49.

183. Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

184. Pam Belluck, *Massachusetts Plans to Revisit Amendment on Gay Marriage*, N.Y. TIMES (May 10, 2005), https://www.nytimes.com/2005/05/10/us/massachusetts-plans-to-revisit-amendment-on-gay-marriage.html [https://perma.cc/4UEF-2LBM].

185. See Appendix A and B for a complete list of state-level marriage bans and state constitutional amendments; *see also* Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognize Them*, 2012 UTAH L. REV. 393, 412 (2012) ("[A]pproximately 40 of those expressly refuse to recognize same-sex marriages of other jurisdictions . . . ." (quoting Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, 36 FAM. L. REP. (BNA) 1383, 1385 (2010)).

security, and veterans' benefits.[186] The lack of reciprocity among the states meant that a couple would lose their legally recognized status if they ventured into a non-recognition jurisdiction. The complex and transitory nature of relationship recognition was a source of considerable emotional and economic stress for same-sex couples, who quickly realized that they had to travel at their own risk. In 2004, both the American Psychiatric Association and the American Psychological Association passed resolutions in support of marriage equality, specifically citing the extreme stress experienced by same-sex couples due to the lack of uniform relationship recognition.[187]

C. The Demand for Marriage Prohibitions

The restrictive marriage laws that were invalidated by *Windsor* and *Obergefell* were relatively new developments. When the Hawaii litigation began in the 1990s, the majority of marriage statutes in the United States were actually gender-neutral.[188] The definitional view of marriage as a union between one man and one woman was so strong that there was no perceived need to limit marriage to different-sex couples. Indeed, the early Gay Liberation marriage cases had been decided solely on definitional grounds and often in a cursory fashion. The courts simply ruled that marriage, by definition, could only be a union between a man and a woman—end of discussion.[189] Over forty years later, this definitional approach to marriage continued to have judicial adherents, and it figured prominently in the dissenting opinions in both *Windsor* and *Obergefell*.[190]

The definitional certainty with which courts had addressed marriage claims was upended in 1993 when the Supreme Court of Hawaii held in *Baehr v. Lewin* that the denial of marriage licenses to same-sex couples presumptively violated the Equal Rights Amendment to the Hawaii Constitution.[191] The court reasoned that the denial constituted discrimination based on gender because the plaintiff would have been granted a marriage license to marry a woman if she had been a man.[192] In 1998, while the case was still being appealed to the state supreme

186. *See* Defense of Marriage Act § 3 (explaining federal benefits denied under DOMA).
187. KNAUER, *supra* note 82, at 91.
188. CHAUNCEY, *supra* note 103, at 90–91.
189. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589–90 (Ky. 1973).
190. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2619 (Roberts, C.J., dissenting).
191. 852 P.2d 44, 54, 58–59, 67 (Haw. 1993).
192. *Id.* at 59, 67.

court, the voters approved the first state constitutional amendment designed to prohibit same-sex marriage.[193] They amended the Hawaii state constitution to provide that the definition of marriage could only be changed by legislative action.[194]

The Hawaii marriage litigation and the specter of marriage equality sent shockwaves across the country. Losing no time, Congress enacted DOMA in 1996 while the litigation was still pending in Hawaii and, for the first time, created a federal definition of marriage.[195] At the state level, anti-marriage equality forces organized highly successful campaigns to amend state constitutions to prohibit same-sex marriage even when there was no threat of a pending court case.[196] Unlike the constitutional amendment in Hawaii, this next round of amendments enshrined the restrictive definition of marriage directly in the state constitution,

193. *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN (Nov. 3, 1998), http://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot [https://perma.cc/DU47-4GDV].

194. HAW. CONST. art. I § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). The Supreme Court of Hawaii eventually affirmed the trial court's decision in favor of marriage equality, but by then the constitutional amendment had rendered the court's decision moot because it no longer had the power to alter the definition of marriage. *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999) (ruling the constitutional amendment rendered the lower court decision moot).

195. *See, e.g.*, 142 CONG. REC. 10468–69 (1996) (statement of Sen. Nickles) (citing court challenges as a driving force behind the need for a definition of marriage). The recognition of same-sex marriage by even a single state would have had repercussions on the federal level and potentially created a domino effect among the states. Prior to DOMA, there was no federal definition of marriage because it was traditionally governed by state law. *See id.* at 10468. In questions involving federal law, such as taxes or federal benefits, the validity of a marriage was generally determined by reference to the definition of marriage in the state where the couple lived unless there was a specific direction to the contrary in the statute. *Id.* Without DOMA, the federal government would have been required to recognize all same-sex marriages that were valid under state law. Moreover, the Full Faith and Credit Clause of the U.S. Constitution could have required states to recognize same-sex marriages performed in other jurisdictions. *See* U.S. CONST. art. IV, § 1, cl. 1. DOMA addressed both of these eventualities head on through two substantive provisions: it adopted a restrictive definition of marriage for all federal purposes and purported to authorize states to refuse to recognize out-of-state same-sex marriages. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (1997)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

196. CHAUNCEY, *supra* note 103, at 125–27.

rather than leave the question to the legislature.[197] This constitutional approach eliminated the power of the courts to use state constitutional protections to compel same-sex marriage. It also left legislatures without the power to enact marriage equality and, in many cases, to enact any form of relationship recognition.

Eventually, forty-four states enacted anti-marriage laws that restricted marriage to a union of one man and one woman, known as mini-DOMAs.[198] Just for good measure, thirty of those states also adopted constitutional amendments that banned marriage equality.[199] Fifteen of the amendments also banned civil unions;[200] and five of them took it one step further and banned the grant of any of the "incidents of marriage" to same-sex couples.[201] These broader amendments were in reaction to the state-level experimentation that had occurred with respect to relationship recognition that fell short of marriage equality. They prohibited *any* form of relationship recognition, including civil unions, domestic partnerships, municipal registries, and the grant of domestic partner employee benefits to public employees.[202] In 2004 a Federal Marriage Amendment was introduced in Congress.[203] This amendment would have placed a restrictive definition of marriage as a union between one man and one

197. Davies, *supra* note 177, at 1084–89 (providing an overview of the fifteen states that passed constitutional amendments between 2004 and 2005 restricting marriage to only between a man and a woman).

198. *See* Appendix A. The six states that did not have legislation restricting marriage to different sex couples were: Delaware, Massachusetts, New Mexico, New York, Rhode Island, and Vermont.

199. *See* Appendix B. Alabama (2006), Alaska (1999), Arizona (2008), Arkansas (2004), California (2008), Colorado (2006), Florida (2008), Georgia (2004), Idaho (2006), Kansas (2005), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000), Nevada (2002), North Carolina (2012), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2007), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2005), Virginia (2007), Wisconsin (2007).

200. *See* Appendix B. Alabama (2006), Arkansas (2004), Florida (2008), Georgia (2004), Idaho (2006), Kansas (2005), Kentucky (2004), Louisiana (2004), North Carolina (2012), North Dakota (2004), Ohio (2004), South Carolina (2007), Texas (2005), Utah (2005), and Wisconsin (2006).

201. *See, e.g.*, OKLA. CONST. art. II, § 35A ("Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon the unmarried couples or groups."). The states were: Michigan (2004), Nebraska (2000), Oklahoma (2004), South Dakota (2006), and Virginia (2007).

202. *See, e.g.*, Nat'l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524, 543 (Mich. 2008) (prohibiting the grant of domestic partner benefits to public employees).

203. Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003).

woman in the U.S. Constitution, but it ultimately failed to receive sufficient congressional support.[204]

D. The Federal Cases

Beginning in 2009, the focus of the marriage litigation shifted from the state level to the federal level, as litigants argued that marriage equality was guaranteed under the U.S. Constitution in the much-anticipated case of *Hollingsworth v. Perry*.[205] *Perry* challenged a California ballot proposition, known as Proposition 8, that amended the California state constitution to prohibit same-sex marriage and block the impact of a state supreme court decision mandating marriage equality.[206] The decision to bring *Perry* was controversial within the LGBTQ advocacy community and was met with objections that it was too soon to bring a federal challenge.[207] The state-level efforts had produced impressive results. A total of sixteen states and the District of Columbia eventually embraced marriage equality.[208] Ten states and the District of Columbia adopted marriage equality through legislation.[209] The highest courts of five states mandated marriage equality,[210] and one state,

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204. *See* Sheryl Gay Stolberg, *Same Sex Marriage Amendment Fails in House*, N.Y. TIMES, Oct. 1, 2004, at A14 (noting that vote was 227 to 186 in favor of the amendment, but short of two-thirds majority needed).

205. 570 U.S. 693 (2013).

206. *Id.* at 701–02.

207. Michael A. Lindenberger, *A Gay-Marriage Lawsuit Dares to Make Its Case*, TIME (Jan. 05, 2010), http://content.time.com/time/nation/article/0,8599,1951520,00.html [https://perma.cc/7GCQ-PBBM].

208. *See Same-Sex Marriage Fast Facts: U.S. Timeline*, CNN, https://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html [https://perma.cc/A2KN-AR23] (last updated August 27, 2020, 9:34 AM) (detailing the sequence of events surrounding same-sex marriage litigation and legislation).

209. An Act to Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Existing Civil Unions to Civil Marriages, 79 Del. Laws 19 (2013); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 2009 D.C. Sess. L. Serv. Law 18-110, Act 18-248 (West); Hawaii Marriage Equality Act of 2013, 2013 Haw. Sess. Laws 1; Religious Freedom and Marriage Fairness Act, 750 Ill. Comp. Stat. 80 / 1, 5, 10 (2014); Civil Marriage Protection Act, 2012 Md. Laws 9; 2013 Minn. Laws ch. 74; An Act Relative to Civil Marriage and Civil Unions, 2009 N.H. Laws ch. 59; Marriage Equality Act, 2011 N.Y. Sess. Laws ch. 95 a. 8354 (McKinney); 2013 R.I. Adv. Legis. Serv. ch. 13-5 (13-S 38A) (West); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009 Vt. Legis. Serv. no. 3 (S.115); 2012 Wash. Legis. Serv. ch. 3 (S.B.B. no. 6239) (West).

210. *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008), *superseded by statute*, California Marriage Protection Act, 2008 Cal Legis. Serv. Proposition 8 (West);

Maine, approved same-sex marriage in a citizens' referenda.[211] The remaining states held on to their prohibitions and restrictive definitions of marriage, many of which had been written into their state constitutions.[212] Only a ruling by the U.S. Supreme Court could provide the type of security same-sex couples desired by mandating uniform rules and overcoming the state constitutional amendments.

Although the U.S. Supreme Court granted certiorari, it dismissed *Perry* for lack of standing because the state of California had declined to defend Proposition 8.[213] The result left a favorable lower court decision in place, but it carried no precedential weight. The same day that the Court dismissed *Perry*, it decided *United States v. Windsor* and invalidated section 3 of DOMA, which was the federal definition of marriage.[214] After *Windsor*, the federal litigation intensified, and challenges were brought throughout the country. By the time the Supreme Court decided *Obergefell v. Hodges* in June 2015, lower federal courts had invalidated many state-level marriage prohibitions, and they continued in effect in only fourteen states.[215] *Obergefell* invalidated these remaining state-level marriage bans and mandated nationwide marriage equality.[216]

1. DOMA – United States v. Windsor

Although DOMA was enacted in 1996, same-sex couples were not able to marry legally until 2004 when Massachusetts became the first

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Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013).

211. Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012, 2:24 PM), http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage [https://perma.cc/79XY-WRDM].

212. *See supra* note 199.

213. United States v. Windsor, 570 U.S. 693, 715 (2013).

214. 744, 752, 775. *Windsor* did not address section 7 that purported to empower states to refuse to recognize same-sex marriages performed in sister states. *Obergefell* invalidated that section of DOMA. Obergefell v. Hodges, 135 S. Ct. 2584, 2597, 2607–08 (2015).

215. *See Obergefell*, 135 S. Ct. at 2597, 2608–11 (noting the proliferation of District Court and Courts of Appeals decisions in favor of same-sex marriage and incorporating an Appendix of those decisions); Lyle Denniston, *Marriage Now Open to Same-Sex Couples*, SCOTUSBLOG (June 26, 2015, 3:01 PM) https://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples [https://perma.cc/WY62-S4WA].

216. *Obergefell*, 135 S. Ct. at 2607–08.

state to issue marriage licenses.[217] Once states began to adopt marriage equality, the inequities created by DOMA became clear.[218] Couples who were legally married under state law were considered unmarried for federal purposes and denied access to a wide range of significant federal benefits.[219] By 2013, three major cases had worked their way through the federal courts and were on appeal to the Supreme Court: *Gill v. OPM*,[220] *Massachusetts v. HHS*,[221] and *United States v. Windsor*.[222] All of the DOMA challenges had been successful in the lower courts, but they presented different arguments. *Gill v. OPM* and *United States v. Windsor* rested their objections to DOMA on the Due Process Clause and the equal protection guarantees of the Fifth Amendment.[223] *Massachusetts v. HHS* based its objection to DOMA on federalism, relying on the Tenth Amendment and the Spending Clause to argue that Congress had overstepped its authority.[224] The Court dismissed

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217. Belluck, *supra* note 15.

218. On the federal level alone, there are an estimated 1138 benefits attached to marriage. Shah, *supra* note 126.

219. *See id.* (providing a comprehensive list of federal laws involving marital status, all dependent upon DOMA's definition of marriage).

220. 682 F.3d 1 (1st Cir. 2012), *aff'g* 699 Fed. Supp. 2d 374 (D. Mass. 2010).

221. *Id.*

222. 570 U.S. 744 (2013). The U.S. Department of Justice (DOJ) had initially defended DOMA in the federal court challenges, while clearly stating that the Obama "Administration believes that the [Defense of Marriage] Act is discriminatory and should be repealed." Josh Gerstein, *Obama Softens Gov't Tone in Gay-Marriage Suit*, POLITICO (Aug. 17, 2009, 10:53 AM), http://www.politico.com/blogs/under-the-radar/2009/08/obama-softens-govt-tone-in-gay-marriage-suit-020693 [https://perma.cc/4S57-7J7D]. During the course of the DOMA litigation, the U.S. Attorney General, Eric Holder, announced that the U.S. Department of Justice would no longer defend DOMA because he had determined that DOMA violated the U.S. Constitution. Eric H. Holder, Jr., *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DEP'T OF JUST. (Feb. 23, 2011), https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act [https://perma.cc/86QZ-X3JN]. Specifically, Holder had concluded that sexual orientation was entitled to heightened scrutiny and that the government could not carry its burden under that level of review. *Id.* Congressional interests intervened, and the U.S. House of Representatives Bipartisan Legal Advisory Group (BLAG) continued the defense of the statute in federal court. Matthew I. Hall, *How Congress Could Defend DOMA in Court (and Why the BLAG Cannot)*, 65 STAN. L. REV. ONLINE 92, 93 (2013) (discussing BLAG's intervention).

223. *Windsor*, 570 U.S. at 753; Gill v. OPM, 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

224. U.S. CONST. amend. X; U.S. CONST. art. I, § 8, cl. 1. Many of the marriage cases grew out of compelling personal narratives of bereavement and loss that were then compounded by demeaning treatment under restrictive marriage laws. *E.g.*, Obergefell

the petitions for certiorari in *Massachusetts v. HHS*, along with *Gill v. OPM*, the day after it decided *Windsor*.[225]

Windsor invalidated section 3 of DOMA and the federal definition of marriage as a union between one man and one woman.[226] The five-to-four ruling opened the door for the first legal recognition of same-sex marriage on the federal level. Justice Anthony Kennedy authored the majority opinion, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.[227] Despite Justice Kennedy's attempt to limit his holding to the constitutionality of the federal statute, his rationale for striking down DOMA quickly served as the basis for numerous federal court decisions invalidating state marriage prohibitions.[228] Just

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v. Hodges, 135 S. Ct. 2584, 2594–95 (2015). In *Massachusetts v. HHS*, however, the plaintiff was the Commonwealth of Massachusetts and the core issue presented was federalism or states' rights, not individual rights. 698 F. Supp. 2d 234, 236 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012). Massachusetts argued that DOMA represented an attack on its sovereignty by an overreaching federal government. Complaint at 2, Massachusetts v. HHS, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT). It contended that DOMA violated the Tenth Amendment and the Spending Clause of Article I of the U.S. Constitution. *Id.* at 22–23. Massachusetts argued that its retained powers included "the authority to regulate and define marriage for [its] citizens" under the Tenth Amendment. *Id.* at 22. DOMA, it claimed, "trespasse[d] on a core area of state sovereignty by creating two distinct and unequal categories of married persons." *Id.* at 11. The U.S. District Court for the District of Massachusetts ruled that section 3 of DOMA violated the Tenth Amendment and fell outside Congress's authority under the Spending Clause. 698 F. Supp. 2d at 251, 253. A unanimous decision by the U.S. Court of Appeals for the First Circuit affirmed the lower court decision and declared section 3 of DOMA unconstitutional, but it based its decision on the Due Process Clause and equal protection guarantees of the Fifth Amendment. 682 F.3d at 7, 13, 15–17.

225. The U.S. Supreme Court considered the petition for certiorari in *United States v. Windsor* while the petitions in *Massachusetts v. HHS* and *Gill v. OPM* were pending. The attorneys in *Windsor* had taken the unusual step of filing the petition for certiorari while the case was still before the Second Circuit, which is known as a petition for a writ of certiorari before judgement. Petition for Writ of Certiorari Before Judgment at 1, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307). The Court chose to hear *Windsor* over the consolidated Massachusetts cases. It was widely reported that the Court had deferred action on the Massachusetts cases because Justice Elena Kagan had expressed her intention to recuse herself due to the fact that she had worked on the cases while she was U.S. Solicitor General. Lyle Denniston, *Kagan, DOMA, and Recusal*, SCOTUSBLOG, (Nov. 2, 2012, 4:59 PM), http://www.scotusblog.com/2012/11/kagan-doma-and-recusal [https://perma.cc/6U9T-LAC3].

226. 570 U.S. at 775.

227. *Id.* at 747.

228. *See id.* at 775 (specifying that the holding only applies to marriages in states where same-sex marriage is legal).

as the dissents in *Windsor* had predicted,[229] the case ultimately helped to pave the way for nationwide marriage equality and *Obergefell v. Hodges*.[230]

The plaintiff was Edie Windsor, an eighty-three-year-old widow.[231] She and her wife, Thea Spryer, had been together for over forty years before they were legally married in Canada in 2007.[232] Their marriage was recognized under the law of the state of New York where they lived at the time of Spryer's death, but it was not recognized on the federal level due to DOMA.[233] When Spryer died, Windsor received a federal estate tax bill of over $363,000 because they were not entitled to the unlimited marital deduction, a relief provision that is designed to maximize the assets available for a surviving spouse.[234] The clear command of DOMA limited the relief provided by the deduction to different-sex married couples. Windsor remarked on the restrictive statute, saying that if Thea's name had been "Theo" everything would have been different.[235]

Unlike *Massachusetts v. HHS*, Windsor argued that section 3 of DOMA violated her individual rights, specifically those protected by the Due Process Clause and equal protection guarantees of the Fifth Amendment of the U.S. Constitution.[236] Windsor also argued that heightened scrutiny was the appropriate level of review for state actions

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229. *See, e.g.*, *id.* at 792, 800 (Scalia, J., dissenting).

230. 135 S. Ct. 2584, 2597 (2015).

231. Adam Gabbatt, *Edith Windsor and Thea Spyer: 'A Love Affair that Just Kept on and on and on'*, GUARDIAN (June 26, 2013, 11:54 AM), https://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma [https://perma.cc/9LL7-JB8R].

232. Robert D. McFadden, *Edith Windsor, Whose Same-Sex Marriage Fight Led to Landmark Ruling, Dies at 88*, N.Y. TIMES (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/us/edith-windsor-dead-same-sex-marriage-doma.html [https://perma.cc/3LH9-T6BT].

233. *Windsor*, 570 U.S. at 753.

234. *Id.*

235. Nina Totenberg, *Meet the 83-Year-Old Taking on the U.S. over Same-Sex Marriage*, NPR (Mar. 21, 2013, 4:36 PM), http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over-same-sex-marriage [https://perma.cc/8PGA-2PP7].

236. Petition for Writ of Certiorari Before Judgment at 3–4, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307). DOMA claims arose under the Fifth Amendment rather than the Fourteenth Amendment because DOMA was a federal statute. Massachusetts v. HHS, 682 F.3d 1 (1st Cir. 2012). The Fifth Amendment protects individuals from overreaching federal action, whereas the Fourteenth Amendment protects individuals from state action, such as Proposition 8. *Compare, e.g.*, *Windsor*, 570 U.S. at 753 (arguing that DOMA violates equal protection under the Fifth Amendment), *with* Hollingsworth v. Perry, 570 U.S. 693, 702 (2013) (arguing that Proposition 8 violates equal protection under the Fourteenth Amendment).

that involved matters of sexual orientation.[237] In 2011, the District Court for the Southern District of New York held that section 3 of DOMA did not pass the rational basis test and violated Windsor's equal protection guarantees under the Due Process Clause of the Fifth Amendment.[238] The decision ordered the federal government to refund Windsor the tax that she had paid.[239] The following year, the Second Circuit of the U.S. Court of Appeals affirmed the district court opinion on the same grounds, but also held that heightened judicial scrutiny was the appropriate level of review.[240] It was the first federal appellate court opinion that adopted the standard of heightened scrutiny for cases involving sexual orientation.[241] This represented a major accomplishment for LGBTQ advocates who had urged that heightened scrutiny was the appropriate standard of review for decades.[242] The decision also conformed to the position taken by the U.S. Department of Justice under Attorney General Eric Holder that distinctions based on sexual orientation warranted heightened judicial review.[243]

Justice Kennedy's majority opinion spoke in sweeping and sympathetic terms about the disabilities that DOMA imposed on married same-sex couples, asserting that section 3 of DOMA "demean[ed] the couple, whose moral and sexual choices the Constitution protects."[244] Although the proponents of marriage equality applauded the majority's strong language, its opponents sharply criticized the opinion for its lack of focus and doctrinal rigor.[245] Justice Kennedy concluded that DOMA violated the equal protection guarantees of the Fifth Amendment because the statute did not serve a legitimate purpose, indicating that

237. Petition for Writ of Certiorari Before Judgment, *supra* note 236, at 4a.

238. Windsor v. United States, 833 F. Supp. 2d 394, 402, 406 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012).

239. *Id.* at 397, 406.

240. Windsor v. United States, 699 F.3d 169, 181, 188 (2d Cir. 2012), *aff'g* 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff'd*, 570 U.S. 774 (2013).

241. David S. Kemp, *The End of an Unjust Law: The Second Circuit Strikes down DOMA and Sets the Stage for Supreme Court Review*, JUSTIA (Oct. 22, 2012), https://verdict.justia.com/2012/10/22/the-end-of-an-unjust-law [https://perma.cc/T3CX-DSVH].

242. *See* High Tech Gays v. Def. Indus. Sec. Clearance Off., 895 F.2d 563, 571, 573–74 (9th Cir. 1990) (holding that sexual orientation was neither a suspect nor quasi-suspect classification, therefore only rational basis review applied).

243. Eric H. Holder, Jr., *supra* note 222.

244. United States v. Windsor, 570 U.S. 744, 772 (2013).

245. *See, e.g.*, *id.*, at 791–94 (Scalia, J., dissenting).

he applied a rational basis test, rather than heightened scrutiny.[246] Of course, there is no need to reach the question of whether sexual orientation should trigger heightened scrutiny if that statute fails the lowest level of constitutional scrutiny.[247]

Despite his reliance on Fifth Amendment individual protections and guarantees, federalism issues were also present in Justice Kennedy's opinion. Before turning to his discussion of individual rights, he devoted many pages to a detailed discussion of how DOMA offended the principles of federalism, noting that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[248] After making a forceful argument that the federal government has long deferred to the states in matters of domestic relations, Justice Kennedy nonetheless found that it was not necessary to rule on whether DOMA was a valid "federal intrusion on state power."[249] Instead, Justice Kennedy used the intrusive and extraordinary nature of the legislation to support his conclusion that DOMA did not further a legitimate state purpose and was intended to harm and demean same-sex couples.[250]

Chief Justice John Roberts, and Justices Antonin Scalia and Samuel Alito, authored dissenting opinions that were joined by Justice Clarence Thomas. Chief Justice Roberts's dissent had the most extensive and explicit discussion of federalism.[251] He rejected the federalism concerns outlined in the majority opinion and argued that intervention in this traditional area of state authority was justified to further the federal government's interest in uniformity and stability.[252] However, he also went to great pains to underscore the central role that respect for states' rights played in Justice Kennedy's opinion, asserting that federalism

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246. *See id.* at 775 (majority opinion).

247. *Id.* Justice Kennedy wrote:

> The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Id.

248. *Id.* at 764.

249. *Id.* at 768.

250. *Id.* at 774.

251. *Id.* at 777 (Roberts, C.J., dissenting).

252. *Id.* at 775.

was "the dominant theme of the majority opinion."[253] In a clear attempt to cabin the majority's reasoning and limit its influence in future cases challenging state marriage laws, Chief Justice Roberts declared that "it is undeniable that its judgment is based on federalism."[254]

Justice Scalia's dissent was largely taken up with jurisdictional issues, but he strongly seconded Chief Justice Roberts's concern that *Windsor* would be used, improperly in his view, to overturn state marriage prohibitions.[255] As noted above, the concerns of the dissenters proved to be well-founded. *Windsor* quickly served as the justification for a rash of federal court decisions from all over the country invalidating restrictive marriage laws.[256] At first glance it might appear paradoxical that a decision invalidating a federal intrusion on state power to define marriage would then serve as the basis for invalidating state definitions of marriage. However, Justice Kennedy's discussion of federalism contained an important proviso. He acknowledged that states have the authority to regulate in the field of domestic relations, but also warned that the regulation had to "respect the constitutional rights of persons."[257] In so doing, Justice Kennedy had set the stage for the invalidation of restrictive state marriage laws provided the courts recognized that same-sex couples had a fundamental right to marry. Lower federal courts lost no time connecting the dots.

2. Marriage equality – Obergefell v. Hodges

In *Obergefell v. Hodges*, the U.S. Supreme Court ruled in a five-to-four decision that same-sex couples have a fundamental right to marry guaranteed under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[258] The decision invalidated state laws prohibiting same-sex marriage and further held that no state had the right to refuse to recognize a same-sex marriage performed in another state.[259] *Obergefell* put an end to the uncertain status of same-sex marriage once and for all by imposing a

253. *Id.* at 777.
254. *Id.*
255. *Id.* at 799–800 (Scalia, J., dissenting).
256. Baskin v. Bogan, 766 F.3d 648, 671–72 (7th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014).
257. Windsor, 570 U.S. at 766 (majority opinion).
258. 135 S. Ct. 2584, 2591, 2604 (2015).
259. *Id.* at 2608. In so doing, the case invalidated the portion of DOMA that purported to empower states to refuse to recognize same-sex marriages performed in sister states—a provision that had not been challenged in *Windsor*. *Id.*

nationwide rule. Married same-sex couples could now travel from state to state without fear that their relationship would be nullified when they crossed state lines. They were also entitled to federal benefits regardless of their state of residence.

The *Obergefell* decision involved six consolidated cases from four different states: Kentucky, Michigan, Ohio, and Tennessee.[260] The plaintiff in the lead case, Jim Obergefell, became the public face of marriage equality while the case was pending before the Court.[261] As a widower, he had a particularly poignant story to share. When Obergefell's partner of many years, John Arthur, was diagnosed with amyotrophic lateral sclerosis (ALS), they travelled from Ohio, where they lived, to Maryland, where they could legally marry.[262] By that time, Arthur was extremely frail and had to travel on a medical transport plane.[263] On July 11, 2013, Obergefell and Arthur were married in Baltimore on the tarmac at the airport.[264] Arthur died three months later, and the state of Ohio refused to list Obergefell as his spouse on Arthur's death

260. The plaintiffs included sixteen same-sex couples, seven of their children, a surviving same-sex spouse, an adoption agency, and a funeral director. Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015). All of the cases presented essentially the same question of law. The plaintiffs argued that the state marriage prohibitions violated the U.S. Constitution. In each case, the state either refused to grant a same-sex couple a marriage license or refused to recognize a marriage performed in another state. The plaintiffs all prevailed at the trial court level. The different federal district courts that heard the cases all ruled in favor of the plaintiffs and invalidated the applicable state law prohibitions on same-sex marriage. Bourke v. Beshear, 996 F. Supp. 2d 542, 550 (W.D. Ky. 2014), *aff'd*, 135 S. Ct. 2584 (2015); Love v. Beshear, 989 F. Supp. 2d 536, 549–50 (W.D. Ky. 2014), *aff'd*, 135 S. Ct. 2584 (2015); DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *aff'd*, 135 S. Ct. 2584 (2015); Henry v. Himes, 14 F. Supp. 3d 1036, 1061–62 (S.D. Ohio 2014), *aff'd*, 135 S. Ct. 2584 (2015); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 997 (S.D. Ohio 2013), *aff'd*, 135 S. Ct. 2584 (2015); Tanco v. Haslam, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014), *aff'd*, 135 S. Ct. 2584 (2015). On appeal, the Sixth Circuit consolidated and reversed *all six cases*. DeBoer v. Snyder, 772 F.3d 388, 421 (6th Cir. 2014), *rev'd*, 135 S. Ct. 2584 (2015).

261. Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html [https://perma.cc/GRP2-CFML].

262. *Id.*

263. Julie Irwin Zimmerman, *Mr. Obergefell Goes to Washington*, CIN. MAG. (May 29, 2015), https://www.cincinnatimagazine.com/citywiseblog/mr-obergefell-goes-to-washington [https://perma.cc/65NR-TWT2].

264. Rosenwald, *supra* note 261.

certificate.[265] Obergefell sued to be included as surviving spouse on his husband's death certificate and to have his husband's status at death recorded as "married."[266]

Two years to the day after the *Windsor* decision, the Supreme Court ruled in favor of marriage equality.[267] Justice Kennedy again authored the majority opinion, which again was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.[268] Justice Kennedy's opinion cited as precedent the 1967 Supreme Court case *Loving v. Virginia*,[269] which had overturned criminal anti-miscegenation laws.[270] *Obergefell* affirmed that marriage is a fundamental right guaranteed under the Due Process Clause of the Fourteenth Amendment.[271] The Court then found that restrictive state marriage laws violated the Equal Protection Clause of the Fourteenth Amendment.[272] The Court rejected the argument that the decision of whether to permit same-sex couples to

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265. *Id.*

266. Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973, 976 (S.D. Ohio 2013), *rev'd*, 135 S. Ct. 2584 (2015). The *Obergefell* cases were appealed in 2014 to the U.S. Court of Appeals for the Sixth Circuit, which has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee. DeBoer v. Snyder, 772 F.3d 388, 389 (6th Cir. 2014), *rev'd*, 135 S. Ct. 2584 (2015). The Sixth Circuit decision broke ranks with four other federal courts of appeal that had earlier that year found in favor of marriage equality. *Id.* at 389–90. On November 6, 2014, a three-judge panel of the Sixth Circuit ruled two to one to uphold the state law marriage prohibitions. *Id.* at 395–96, 421. The majority opinion concluded that "[n]ot one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." *Id.* at 402–03. Writing for the two-judge majority, Judge Sutton framed his opinion in terms of federalism. *Id.* at 396. He identified the central question as "Who decides?" and asked "[i]s this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?" *Id.* at 396. In particular, Judge Sutton rejected using *Windsor*'s reasoning as support for marriage equality. *Id.* at 413. Instead, as the Chief Justice had urged in his dissent in *Windsor*, Judge Sutton asserted that *Windsor* was principally a case about federalism, stating, "Why was DOMA anomalous? Only federalism can supply the answer." *Id.* at 414. The Sixth Circuit decision provided the circuit split that commentators had suggested was necessary to get the Supreme Court to grant certiorari to a case challenging state marriage prohibitions. *Obergefell v. Hodges*, JURIST (Feb. 7, 2015, 9:03 PM), https://www.jurist.org/archives/feature/overview-of-the-petitions-for-writ-of-certiorari-and-the-courts-grant [https://perma.cc/9GVL-M4MP].

267. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

268. *Id.* at 2591.

269. 388 U.S. 1 (1967).

270. *Id.* at 11.

271. *Obergefell*, 135 S. Ct. at 2604.

272. *Id.*

marry should be left to the states, as well as the argument that allowing same-sex couples to marry would harm the institution of marriage.[273] The majority concluded:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[274]

Chief Justice Roberts and Justices Scalia, Thomas, and Alito all authored separate dissenting opinions. Chief Justice Roberts's dissent was joined by Justices Scalia and Thomas.[275] Not surprisingly, the Chief Justice disagreed with the majority's Due Process and Equal Protection analysis, but his dissent is most notable for its claim that the Court had overstepped its constitutional authority.[276] According to Chief Justice Roberts, the question of marriage equality should have been left to the political process rather than decided by the Court.[277] He also warned that the majority's opinion would have negative consequences for religious liberty and said that Justice Kennedy had unfairly maligned the opponents of marriage equality.[278]

Central to his argument was a strong definitional view of marriage that recalled the early marriage cases.[279] In fact, Chief Justice Roberts's opinion discussed *Baker v. Nelson* in some detail.[280] His primary critique, however, was based on what he perceived to be the majority's judicial activism: "By deciding this question under the Constitution, the Court removes it from the realm of democratic decision."[281] He objected

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273. *Id.* at 2607–08.
274. *Id.* at 2608.
275. *Id.* at 2611 (Roberts, C.J., dissenting).
276. *Id.* at 2611.
277. *Id.* at 2625.
278. *Id.* at 2625–26.
279. *Id.* at 2614.
280. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); *see Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J., dissenting).
281. *Obergefell*, 135 S. Ct. at 2625.

strenuously to the Court's answer to the age old question of "Who Decides?," instead asserting that the political process would be the best arbiter.[282] Specifically, with regard to federalism, Justice Roberts claimed that "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."[283]

Justice Scalia's dissent minced no words and called the majority's decision a "threat to American democracy" because it usurped the power of the people to define marriage.[284] Although the major target of his dissent was substantive due process, he also discussed federalism. Justice Scalia reminded the majority that only two years earlier they had asserted in *Windsor* that marriage was "a virtually exclusive province of the States" and the federal government had long "deferred to state-law policy decisions with respect to domestic relations."[285]

Justice Alito's dissent also expressly discussed federalism. After concluding that the Constitution does not answer the question of whether same-sex couples should be permitted to marry, Justice Alito praised the innovation and experimentation that is the hallmark of robust federalism.[286] He expressed his regret that the majority chose to make a blanket determination for the entire country, noting that "[t]he system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation."[287] Justice Alito had a strong preference for state-level variation where some states allow same-sex marriage and others prohibit it.[288] Of course, it was exactly that type of state-level variation that placed an untenable burden on same-sex couples across the nation.

III. THE FUTURE OF THE EQUALITY GAP

The advent of nationwide marriage equality did not fully resolve the regional disparities and state-level variations that weighed so heavily on the LGBTQ community. Instead, it resulted in a serious Equality Gap—or perhaps an equality leap, because there were no blanket LGBTQ

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282. *Id.* at 2615 (Roberts, C.J., dissenting).

283. *Id.* at 2611. He distinguished *Loving* with a finely parsed discussion of marriage and how same-sex marriage changes the "core definition of marriage" whereas *Loving* left that definition in place. *Id.* at 2619.

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

285. *Id.* at 2628.

286. *Id.* at 2643 (Alito, J., dissenting).

287. *Id.*

288. *Id.*

anti-discrimination protections at the federal level[289] or even in the majority of the states[290] when *Obergefell* was decided in 2015. Currently, only twenty-three states and the District of Columbia have anti-discrimination protections for LGBTQ people.[291] *Bostock v. Clayton County* only applies to Title VII protections in employment.[292] Although it is likely that the same statutory construction will be adopted under Title IX and the Fair Housing Act of 1968,[293] the Equality Gap will continue to persist in the areas not covered by *Bostock*. For example, an LGBTQ person can still be denied service at a place of public accommodation or access to a federally funded adoption service.[294] A transgender person can still be barred from a gender-appropriate bathroom as a result of "bathroom bills" and other legislative attempts to deny or demonize the existence of transgender identity.[295]

Marriage equality spurred a new wave of anti-LGBTQ laws and policies that further exacerbate the Equality Gap. This Section reviews this new generation of anti-LGBTQ initiatives by dividing them into two camps: (1) laws and policies that impose disabilities on LGBTQ

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289. At the federal level, there were no anti-discrimination employment protections and other similar protections were nonexistent. However, sexual orientation was included under the Violence Against Women Act and the Matthew Shepard-James Byrd Hate Crimes Act. 18 U.S.C. § 249 (2012); 34 U.S.C. § 12291 (39) (2018) (including sexual orientation and gender identity as an "underserved population").

290. For an up-to-date discussion of state-level anti-discrimination protections in employment, see *State Maps of Laws & Policy—Employment*, HUM. RTS. CAMPAIGN (Apr. 15, 2020), https://www.hrc.org/state-maps/employment. For an overview of anti-discriminations in housing, see *State Maps of Laws & Policy—Housing*, HUM. RTS. CAMPAIGN (Apr. 15, 2020), https://www.hrc.org/state-maps/housing (showing twenty-two states and DC). For an overview of anti-discrimination in public accommodations, see *State Maps of Laws & Policy—Public Accommodations*, HUM. RTS. CAMPAIGN (Apr. 15, 2020), https://www.hrc.org/state-maps/public-accomodations (showing twenty-one states and DC).

291. There remains one state (Wisconsin) that only extends protections based on sexual orientation and does not cover gender identity. HUM. RTS. CAMPAIGN, *supra* note 290.

292. Bostock v. Clayton County, 140 S. Ct. 1731, 1737, 1744 (2020).

293. *Id.* at 1778, 1780 (Alito, J., dissenting). The same would be true of any statute read in concert with Title VII.

294. For an overview of anti-discrimination in public accommodations, see *State Maps of Laws & Policy—Employment*, *supra* note 290.

295. The National Conference of State Legislatures has been tracking "bathroom bills" since 2013 and provides a detailed overview of the flood of "bathroom bills" introduced at the state level in 2017. Joellen Kralik, NAT'L CONFERENCE OF STATE LEGISLATURES, *"Bathroom Bill" Legislative Tracking*, (Oct. 24, 2019), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/MY3D-AFPN].

people and (2) laws and policies that empower religious and moral objectors to discriminate against LGBTQ people (i.e., religious exemptions). There are initiatives that seek to ensure parents have access to conversion therapy for their children.[296] Other initiatives restrict the access of LGBTQ people to certain spaces.[297] And some initiatives seek to define transgender people out of existence.[298] These anti-LGBTQ laws and religious exemptions are largely, but not exclusively, contained to the so-called "Red States"[299]—the states that are more likely to not have anti-discrimination protections.[300] What this means is that many of the anti-LGBTQ laws introduced in these states are not actually necessary because discrimination is not prohibited in those states. Accordingly, anti-LGBTQ laws primarily serve a signaling function that expresses an official rejection of LGBTQ identities and rights.

A. Anti-LGBTQ Laws and Policies

Today, expressly anti-LGBTQ laws and policies generally fall into three categories: anti-transgender laws that reject the concept of gender identity and enforce the belief that one's sex is determined at

296. Garrard Conley, *GOP's Support of Conversion Therapy Is a 'Death Sentence'*, TIME MAG. (July 16, 2016, 4:45 PM), http://time.com/4410894/rnc-conversion-therapy [https://perma.cc/RVG6-TBR9].

297. *See infra* note 332 (describing "bathroom bills" that require people to use the bathroom for the sex they were assigned at birth).

298. *See infra* note 317 (describing federal policy change to deny transgender identity).

299. The exceptions are Illinois, Massachusetts, and New Jersey. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. AM. PROGRESS ACTION FUND, 1, 3 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf [https://perma.cc/L636-56EF].

300. The states without blanket protection in employment for sexual orientation and gender identity are: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin (does not protect gender identity). *State Maps of Laws & Policy—Employment*, *supra* note 290.

birth,[301] anti-marriage laws that deny the validity of same-sex marriage,[302] and anti-protection laws that limit the ability of municipalities to pass laws providing protections based on sexual orientation and gender identity.[303] The majority of new anti-LGBTQ legislation and policy is directed toward transgender people and is designed to mandate that sex is determined at birth and is inalterable.[304] The goal of these measures is to define transgender identity out of existence in the same way that the DOMAs took a definitional approach to marriage. They advance the view that transgender identity is somehow delusional and that the state and third parties should not be forced to respect such a delusion.[305] The strong adherence to sex assigned at birth is contrary to the prevailing opinions of the scientific and medical communities.[306]

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301. For example, a proposed bill in Indiana requires schools to use a student's "biological sex" to determine the terms of participation in sports and other activities. H.B. 1525, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019). The Bill describes biological sex as "the physical condition of being male or female, as determined by an individual's chromosomes and identified at birth by the individual's anatomy." *Id.* Ch. 19 § 2.

302. The proposed Tennessee Natural Marriage Defense Act declares that natural marriage between a man and a woman is the policy of the state and that the decision of the U.S. Supreme Court in *Obergefell* is null and void. H.B. 892, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017); S.B. 752, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017). It further prohibits state and local agencies from "giv[ing] force or effect to any court order that has the effect of violating Tennessee's laws protecting natural marriage." *Id.* § 1(e). *See generally* Gwen Aviles, *'Tennessee Natural Marriage Defense Act' Seeks to Strip Gay Marriage Rights*, NBC NEWS (Feb. 12, 2019, 11:18 AM), https://www.nbcnews.com/feature/nbc-out/tennessee-natural-marriage-defense-act-seeks-strip-gay-marriage-rights-n970596 [https://perma.cc/4GA3-JFQU].

303. These laws are similar to Amendment 2 that was the subject of *Romer* but are framed differently in an attempt to avoid a finding of animus. *See supra* note 92.

304. The ACLU maintains a list of anti-LGBTQ legislation that is introduced at the state level that is updated weekly. Four months in to the 2019 legislative cycle, the express anti-LGBTQ laws (as opposed to religious exemptions) are almost exclusively targeted toward transgender people. *See Legislation Affecting LGBT Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbt-rights-across-country [https://perma.cc/2ZW6-VV25] (last updated Mar. 20, 2020).

305. Mark Joseph Stern, *North Carolina Tells Court Trans People Aren't Really Trans, Just "Delusional"*, SLATE (Aug. 19, 2016, 5:01 PM), https://slate.com/human-interest/2016/08/north-carolina-tells-court-trans-people-are-delusional.html [https://perma.cc/K524-3DFG].

306. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1004 (Mass. 2003) (Cordy, J., dissenting) ("Thirty years ago, The Diagnostic and Statistical Manual, the seminal handbook of the American Psychiatric Association, still listed homosexuality as a mental disorder. Today, the Massachusetts Psychiatric Society, the American Psychoanalytic Association, and many other psychiatric, psychological, and social science organizations

The anti-transgender legislation often stems from strong religious beliefs about the nature of men and women and appropriate gender roles.[307] As discussed in the following Section, broad religious exemptions have been proposed to allow medical care professionals to refuse to treat transgender people entirely, as well as refuse to treat individuals based on sexual orientation.[308]

At the federal level, LGBTQ advocates obtained tremendous policy gains during the Obama administration.[309] Because these gains were not statutory, and the majority were not even regulatory, it was relatively easy for the Trump administration to reverse many of these Obama-era advancements.[310] For example, the Obama administration directed public schools in 2016 to allow students to use bathrooms that align with their gender identity, even if that conflicted with the gender on their birth certificates.[311] The policy was announced by the Department of Education and Department of Justice in the form of a "Dear Colleague Letter," which is a common form of sub-regulatory guidance used by the Department.[312] Dear Colleague Letters explain how the Departments interpret the relevant laws and regulations that apply to educational contexts.[313] In this case, the interpretation

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have joined in an amicus brief on behalf of the plaintiffs' cause."), *aff'd sub nom.*, Largess v. Supreme Judicial Court, 317 F. Supp. 2d 77 (D. Mass. 2004).

307. The role of religion is evident from the large number of proposed and enacted religious exemptions that now expressly include references to gender identity. Ryan Thoreson, *"All We Want Is Equality" Religious Exemptions and Discrimination Against LGBT People in the United States*, HUM. RTS. WATCH 1–2 (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf [https://perma.cc/Q8S4-R4UJ].

308. *See* discussion *infra* Section III.B.

309. *See* Scott Horsley, *Not Always a 'Thunderbolt': The Evolution of LGBT Rights Under Obama*, NPR (June 9, 2016, 5:02 AM), https://www.npr.org/2016/06/09/481306454/not-always-a-thunderbolt-the-evolution-of-lgbt-rights-under-obama [https://perma.cc/E7Z6-JL95] ("President Obama's years in office have seen a flowering of gay and lesbian rights").

310. Under the current Trump administration, numerous Obama-era administrative gains have been reversed. *See generally* Maril, *supra* note 114, at 6.

311. Dear Colleague Letter from Catherine E. Lhamon, Dep't of Educ., and Vanita Gupta, Dep't of Justice (May 13, 2016) [hereinafter Dear Colleague Letter], https://www.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (extending protections under Title IX for transgender students).

312. *Id.*

313. For an explanation of agency "Dear Colleague Letters," see generally OSEP POLICY LETTERS, U.S. DEP'T OF EDUC., https://www.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#pl [https://perma.cc/PJ38-ABCF] (last modified July 6, 2020) (discussing policy letters regarding implementation of Individuals with Disabilities Education Act).

announced in the letter was based on a determination that barring transgender students from public school bathrooms that matched their gender identities was a form of sex discrimination prohibited under Title IX.[314] At the time, the issue of access to bathrooms and locker rooms for transgender students was the subject of several ongoing and high-profile court cases, most notably the case brought by Gavin Grimm.[315] In February 2017, the Department of Education rescinded the guidance by issuing a new Dear Colleague Letter, stating that the first one had been based on insufficient legal analysis.[316] The recent ruling in *Bostock v. Clayton County* should invalidate the 2017 Trump administration guidance because it is contrary to the interpretation of "sex" under Title IX, but the majority opinion expressly noted that the question of bathroom access was not before the Court.[317]

The Trump administration is also considering a global policy change that would introduce a federal definition of gender, which provides that a person's sex is determined at birth.[318] In this way, the initiative is similar to the legislative definition of marriage that was introduced at

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314. *See* Dear Colleague Letter, *supra* note 311, at 1.

315. *See* Perry Stein, *Gavin Grimm, Transgender Student Who Sought to Use Boys' Restroom, Back in Court*, WASH. POST (July 23, 2019, 7:06 PM), https://www.washingtonpost.com/local/education/gavin-grimm-transgender-student-who-sought-to-use-boys-restroom-back-in-court/2019/07/23/11611bf4-ad7b-11e9-a0c9-6d2d7818f3da_story.html [https://perma.cc/354L-N4A5] (discussing Gavin Grimm's 2015 court case alleging Gloucester County school board's rule mandating students use restrooms according to their biological genders violated Title IX).

316. Dear Colleague Letter from Sandra Battle, Dep't of Educ., and T.E. Wheeler, II, Dep't of Justice (Feb. 22, 2017), https://www.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/27MF-5FG2] (withdrawing policy guidance on transgender students). The notice contends that the Obama-era directives did not "contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process." *Id.*; *see also* Sandhya Somashekhar, Emma Brown & Moriah Balingit, *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.d8406945a6d5 [https://perma.cc/K6JE-ZXQS] (withdrawing the earlier directive because it lacked "extensive legal analysis," did not go through public vetting, sowed confusion, and was susceptible to legal challenges).

317. Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020) ("Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.").

318. Emanuella Grinberg, *What It Means for the Trump Administration to Legally Define 'Sex'*, CNN (Oct. 25, 2018), https://www.cnn.com/2018/10/24/politics/transgender-protections-hhs-memo-defining-sex/index.html [https://perma.cc/963L-LL3L].

the federal level by DOMA. A blanket policy would also avoid the piecemeal reversal of the Obama-era administrative gains. One of the most significant gains that President Trump has reversed is the policy that allowed transgender people to serve openly in the military.[319] Under the new Trump policy, transgender individuals may continue to serve, but they must do so in the gender they were assigned at birth.[320] Moreover, they need a doctor's certificate stating that they have been stable in their sex assigned at birth for at least thirty-six months and have not transitioned.[321]

Three days before the decision in *Bostock*, the Trump administration rescinded a hard-fought Obama-era regulation, known as the 1557 regulations, that interpreted the non-discrimination provisions of the Affordable Care Act (ACA)—section 1557.[322] Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities by specifically incorporating the categories protected under Title VI and Title IX.[323] For purposes of this discussion, Title IX is the relevant incorporation because it includes "sex" whereas Title VI does not.[324] The reach of section 1557 is extremely broad and covers any health program or activity funded or administered by the U.S. Department of Health and Human Services (HHS), which includes any activity or program receiving Medicare or Medicaid funding.[325] LGBTQ advocates worked on the 1557 regulations for six years to ensure that the term "sex" was interpreted to include gender identity.[326] The Trump administration rescinded that portion of the 1557 regulations relating to gender identity, stating that the inclusion of gender identity was a "legislative change[]" that was beyond the statutory authority of HHS.[327] The Final

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319. Rebecca Kheel, *Pentagon Signs Directive to Implement Transgender Military Ban*, HILL (Mar. 12, 2019), https://thehill.com/policy/defense/433788-pentagon-signs-directive-to-implement-transgender-military-ban [https://perma.cc/A8MY-CBSB].

320. *Id.*

321. *Id.*

322. 42 U.S.C. § 18116 (2018).

323. *Id.* § 18116(a).

324. *See* 20 U.S.C. § 1681(a) (2018).

325. *See* § 18116(a).

326. Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/politics/trump-transgender-health-care.html [https://perma.cc/TK3N-QUNP] (noting rule was promulgated in 2016 which is six years after the ACA was enacted).

327. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37161–62 (June 19, 2020).

Rule provides that its non-discrimination coverage "reverts to, and relies upon, the plain meaning of the term [sex] in the statute."[328] In support of its position, the Final Rule cites to the federal government's amicus brief filed in *Bostock*.[329] Obviously, the administration seriously jumped the gun on releasing this rule. *Bostock* should invalidate the Final Rule to the extent the Final Rule expressly omits non-discrimination protections for gender identity because the meaning of "sex" under Title IX is interpreted consistently with Title VII.[330]

At the state level, these anti-transgender measures have taken many forms. The most well-known are the "bathroom bills" which bar access to—or even criminalize—the use of gender appropriate facilities by transgender people.[331] Some states are attempting to amend their criminal indecent exposure laws to include transgender people who expose their genitals or buttocks in a bathroom that is not consistent with the sex they were assigned at birth.[332] These laws specifically provide that a diagnosis of gender dysphoria is not a defense to a criminal charge.[333] The stated rationale for "bathroom bills" is that they

328. *Id.* at 37178. The reference to "the statute" refers to Title IX.

329. *Id.* at 37178 n.74.

330. The Final Rule admits that the definition of "sex" under Title IX is interpreted in accordance with that term under Title VII by citing the government's brief in *Bostock*. *See id.*; Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, Bostock v. Clayton County, 140 S. Ct. 1731, 2019 WL 4014070, at *25 (U.S. 2019) (arguing that discrimination on the basis of sex under Title VII means discrimination on the basis of the fact that an individual is biologically male or female).

331. Amber Phillips, *The First Major Poll on 'Bathroom Bills' Is Good News for Transgender Advocates*, WASH. POST (May 10, 2016, 7:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/05/10/the-first-major-poll-on-bathroom-bills-is-here-and-its-good-news-for-transgender-advocates/?utm_term=.6882d538f449 [https://perma.cc/4JWJ-H8WJ].

332. For example, a bill pending in Washington state adds to the definition of "indecent exposure" a person who "[i]s a biological male and intentionally makes any open and obscene exposure of his person in a restroom facility that is designated for use by women." H.B. 2088, 66th Leg., Reg. Sess. (Wash. 2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/2088.pdf?q=20200813085837 [https://perma.cc/YX48-GTYQ]. The bill contains an identical provision for what it refers to as a "biological woman." *Id.*

333. *See, e.g.*, H.B. 1151, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019); S.B. 1297, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB1151 [https://perma.cc/6WQN-K7YV] ("A medical, psychiatric, or psychological diagnosis of gender dysphoria, gender confusion, or similar conditions, in the absence of untreated mental conditions . . . does not serve as a defense to the offense of indecent exposure.").

are necessary to ensure the safety of women because of the fear that men will pretend to be women to invade sex-segregated spaces.[334] Of course, the real danger and threat of violence exist when transgender people are forced to use bathrooms that are not congruent with their gender identity.[335]

Other laws have been introduced to deny transgender students the ability to participate fully in sports[336] or to silence any mention of transgender identity in the course of instruction at public schools.[337] These sorts of laws targeting schools should be invalid under *Bostock*, assuming that the interpretation of "sex" to include gender identity is also followed under Title IX. A number of states have introduced laws authorizing health care discrimination against transgender people.[338] Some states have prohibited funds from being used for transgender medical care.[339] A pending bill in Illinois would prohibit a physician from providing certain care to transgender individuals who were under

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334. Emma Ockerman, *The Biggest Argument for "Bathroom Bills" Was Destroyed by This Study*, VICE NEWS (Sept. 12, 2018, 2:51 PM), https://news.vice.com/en_us/article/pa8dby/the-biggest-argument-against-bathroom-bills-was-destroyed-by-this-study [https://perma.cc/AUJ3-PRUB]. Justice Alito repeated this unfounded concern in his dissent in *Bostock*. *See Bostock*, 140 S. Ct. at 1778–79 (Alito, J., dissenting).

335. Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (Mar. 15, 2016, 7:48 AM), https://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk [https://perma.cc/5W42-DFFT] (noting that seventy percent of respondents from a survey sample of ninety-three transgender and gender nonconforming people experienced harassment and/or physical assault while using the restroom).

336. For example, a proposed bill in Indiana requires schools to use a student's "biological sex" to determine the terms of participation is sports and other activities. H.B. 1525, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019). The Bill describes biological sex as "the physical condition of being male or female, as determined by an individual's chromosomes and identified at birth by the individual's anatomy." *Id.* Chapter 19 § 2.

337. H.B. 1108, Legis. Assemb., 94th Sess. (S.D. 2019), https://sdlegislature.gov/docs/legsession/2019/Bills/HB1108P.pdf [https://perma.cc/8A45-GEHZ] (prohibiting certain gender dysphoria instruction in public schools).

338. For example, the proposed Texas Health Care Right of Conscience Act provides wide religious exemptions for providers and health care facilities when dealing with transgender patients. S.B. 1107, 2019 Leg., 86th Sess. (Tex. 2019), https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB01107I.pdf#navpanes=0 [https://perma.cc/GM6T-CAE8].

339. A proposed bill in Alaska prohibits the state expenditure of funds for gender reassignment treatment or surgery. H.B. 5, 31st Leg., 1st Sess. (Alaska 2019), http://www.akleg.gov/PDF/31/Bills/HB0005A.PDF.

the age of eighteen.[340] These laws should also be prohibited under *Bostock* to the extent that the ACA non-discrimination provisions incorporate the definition of "sex" under Title IX and *Bostock* informs the reading of that term.

Some states have taken steps to make it more difficult for transgender people to get official identification documents with their correct name and gender.[341] These laws deny the existence of transgender identity and may serve to block access to trans-competent care.[342] In 2020, Idaho passed legislation that forbids a transgender person from changing the gender marker on their birth certificates, thereby denying them the ability to secure identification that matches their gender identity.[343] These laws go directly to the visibility and legibility of transgender people and invite violence when transgender people are forced to carry identification that does not reflect their gender identity.

B. Religious Exemptions

Following *Obergefell*, there was an uptick in legislation designed to provide broad religious exemptions with respect to LGBTQ rights.[344] There is no question that religious beliefs that express bias against and even animus towards LGBTQ individuals enjoy absolute protection

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340. H.B. 3515, 101st Gen. Assembl., Reg. Sess. (Ill. 2019), http://www.ilga.gov/legislation/billstatus.asp?DocNum=3515&GAID=15&GA=101&DocTypeID=HB&LegID=120154&SessionID=108 [https://perma.cc/9R8W-3ELP] (titled the Youth Protection Act).

341. Evan Urquhart, *A Proposed Utah Bill Defining Biological Sex Points to the Future of Anti-Trans Legislation*, SLATE (Feb. 6, 2019, 6:13 PM), https://slate.com/human-interest/2019/02/utah-biological-sex-transgender-birth-certificate.html [https://perma.cc/S2PM-BQ7J].

342. Pamela Levesque, *Culturally-Sensitive Care for the Transgender Patient*, OR NURSE, 18, 20 (2015) https://nursing.ceconnection.com/ovidfiles/01271211-201505000-00005.pdf [https://perma.cc/S4CF-N85C] (discussing components of culturally-competent health care and national organizations' standards to guide the provision of culturally-congruent care for transgender persons).

343. Associated Press, *Idaho Bill Targets Transgender Birth Certificate Changes*, NBC NEWS (Mar. 18, 2020), https://www.nbcnews.com/feature/nbc-out/idaho-bill-targets-transgender-birth-certificate-changes-n1162666 [https://perma.cc/A4XF-QFF5].

344. By the time the U.S. Supreme Court affirmed a fundamental right to same-sex marriage in *Obergefell v. Hodges* in June 2015, religious marriage exemptions were either pending or had been enacted in eleven state legislatures and the U.S. Congress. *See Anti-LGBTQ Religious Refusals Legislation Across the Country: 2015 Bills*, ACLU, https://www.aclu.org/anti-lgbt-religious-refusals-legislation-across-country-2015-bills [https://perma.cc/LLE4-QQAT].

under the Free Exercise Clause.[345] However, when religious beliefs translate into public action they traditionally step over the line and become subject to state regulation.[346] In *Employment Division v. Smith*,[347] the U.S. Supreme Court held that the First Amendment does not require religious or moral exemptions to laws of general applicability that are not otherwise targeted at religion.[348] Accordingly, a county clerk who refuses to issue a marriage license to a same-sex couple could face internal discipline or criminal charges for failure to discharge their official duties or a federal lawsuit for deprivation of civil rights.[349] Religious exemptions are designed to provide greater protection than demanded by the First Amendment and would protect the clerk from any adverse actions, provided the refusal was based on their religious belief that marriage is between one man and one woman.[350]

Three years after *Smith* was decided, Congress enacted the Religious Freedom Restoration Act (RFRA) that statutorily overruled *Smith* by codifying pre-*Smith* case law and allowing individuals to challenge federal action that "substantially burden[s] religious exercise."[351] The

345. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("Thus the Amendment embraces two concepts . . . freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

346. Reynolds v. United States, 98 U.S. 145, 164–65 (1878). In *Reynolds*, the Court quoted *Memorial and Remonstrance* in part, noting "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* at 163. It then concluded: "[i]n these two sentences is found the true distinction between what properly belongs to the church and what to the State." *Id.*

347. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

348. *Id.* at 885.

349. *See infra* text accompanying notes 387–88 (discussing North Carolina's recusal law for county officials).

350. John Mura & Richard Pérez-Peña, *Marriage Licenses Issued in Kentucky County, but Debates Continue*, N.Y. TIMES (Sept. 4, 2015), http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html [https://perma.cc/U9P8-VS3T] (discussing Kim Davis, the county clerk of Rowan County Kentucky, who refused to issue marriage licenses to same-sex couples).

351. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. *But see* City of Boerne v. Flores, 521 U.S. 507, 532, 534, 536 (1997) (holding Religious Freedom Restoration Act to be unconstitutional and not applicable to the states and further stating that "[t]his is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"). RFRA recites that its purpose is: "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*,

government then has an opportunity to defend the practice that allegedly burdens religious exercise by showing that it serves a compelling state interest and is the least restrictive alternative.[352] Many states also have state-level RFRAs in place, some of which are much more expansive than the federal version.[353]

After *Obergefell*, however, there was a change in emphasis and states began to consider targeted religious exemptions that specifically focused on LGBTQ rights, such as marriage equality or non-discriminatory access to medical care.[354] These targeted religious exemptions are very different from a RFRA claim, which requires balancing the interests involved.[355] Instead, religious exemptions provide a blanket exception from a law of general applicability[356] and, in the context of LGBTQ rights, they insulate religious objectors from the increased legal and social acceptance of LGBTQ individuals. Although religious exemptions have been used in the healthcare field for many years, they only came to prominence in the LGBTQ area after marriage equality.[357] Religious exemptions uniformly cover both religious and moral beliefs because of the concern that narrowly focusing on

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406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.*; 42 U.S.C. § 2000bb(b)(1) (2018). In *Employment Division v. Smith*, Justice Scalia said that imposing a higher standard was not something that should be "discerned by the courts," but rather that "accommodation" should be left "to the political process." 494 U.S. at 890.

352. Religious Freedom and Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488–89.

353. *See State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/CFZ7-2H9Q]. For example, Alabama implemented a Religious Freedom Amendment that "guarantee[s] that the freedom of religion is not burdened by state and local law." ALA. CONST. art. I, § 3,01 (1999).

354. At the federal level, the First Amendment Defense Act (FADA) was introduced in the U.S. House and Senate ten days in advance of the *Obergefell* decision. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015); First Amendment Defense Act, S. 1598, 114th Cong. (2015). FADA provides that the federal government can take no action against individuals who act "in accordance with a religious belief or moral conviction that marriage is . . . [between] one man and one woman." *Id.*

355. Religious Freedom Restoration Act § 2.

356. *See* Thoreson, *supra* note 307, at 2 (discussing how exemptions to laws to accommodate religious beliefs or practices, with few exceptions, "create blanket exemptions for religious believers to discriminate").

357. *See id.* (discussing new laws that "permit people to infringe on the rights of LGBT individuals . . . to the extent they believe that discriminating against them is necessary to uphold their own religious or moral beliefs" after the *Obergefell* decision).

religious beliefs would raise Establishment concerns.[358] These measures represent a departure not just from First Amendment jurisprudence, but also from the tradition of enacting robust civil rights protections without individual religious carve-outs.[359] The absolute exemption provided under these laws extends state protection beyond questions of individual belief and conscience. Instead, these laws cover public acts that in other contexts would clearly be recognized as discriminatory regardless of their religious motivation.[360]

The new wave of targeted religious exemptions cover religious and moral objections in a wide range of situations where LGBTQ individuals are trying to navigate through the world.[361] A number of state-level religious exemptions specifically target health care and would allow medical care professionals to refuse to treat transgender people entirely, as well as refuse to treat individuals based on sexual orientation.[362] These laws allow religious objectors to refuse to provide

358. U.S. CONST. amend. I.

359. Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GEN. 177, 183 (2015).

360. For example, if a business owner in a jurisdiction with a non-discrimination law refused to provide goods or services to a same-sex couple, the business owner would be subject to a claim of discrimination.

361. Mississippi has a law that allows businesses and government officials to deny services to LGBTQ people on religious grounds. H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

362. Recently, there have been a number of cases where hospitals affiliated with the Catholic Church have denied appropriate medical care to transgender patients. *See, e.g.*, Erin Allday, *Transgender Man Sues over Eureka Hospital's Refusal to Perform Hysterectomy*, S.F. CHRON. (Mar. 22, 2019, 11:51 AM), https://www.sfchronicle.com/health/article/Transgender-man-sues-over-Eureka-hospital-s-13707502.php [https://perma.cc/B8QK-2WN7]. Catholic hospitals must comply with the Ethical and Religious Directives written by the U.S. Conference of Catholic Bishops. U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 4 (6th ed. 2018), http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf [https://perma.cc/P5S9-BU88]. The Ethical and Religious Directives mandate that health care providers follow religious standards set by popes, bishops, and Vatican councils. *Id.* The Conference of Catholic Bishops periodically reissues the Directives and they are currently in their sixth edition. *Id.* The denial of trans-competent health care is especially problematic because of the large number of religiously affiliated hospitals in the United States. As of 2016, 18.5 percent of hospitals in the U.S. were religiously affiliated. Maryam Guiahi et al., *Patient Views on Religious Institutional Health Care*, JAMA NETWORK OPEN 2 (Dec. 27, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2757998. Moreover, in forty-six United States areas, Catholic hospitals are the "sole community hospital," which means there are no other hospitals within a thirty-five-mile radius. *Id.*

medical care and to refuse to follow professional standards.[363] For example, a bill pending in Texas allows mental health professionals, including guidance counselors and substance abuse counselors, to refuse to provide services that would violate a "sincerely held religious belief."[364] A similar Texas bill covers health care facilities, but is broadened to include moral convictions.[365] There are also religious exemptions that allow adoption and foster care agencies to refuse to provide services that violate their religious convictions.[366] Other bills require public universities to allow discrimination by student organizations if this discrimination is based on religious or moral beliefs.[367]

The impact of many of these state-level religious objections may now be limited due to *Bostock*.[368] The extension of federal non-discrimination protections in the context of employment will presumably also reach the fields of education, housing, and health care because courts traditionally interpret the term "sex" the same across the relevant statutes.[369] Accordingly, an individual who objects to the reach of the federal non-discrimination laws in these areas would have to rely on federal religious exemptions, rather than state laws. Federal level non-discrimination laws generally contain narrowly drawn exemptions. For

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363. *See, e.g.*, H.B. 95, 2017 Leg., Reg. Sess. (Ala. 2017) (granting health care service providers the "authority to refuse to perform or to participate in health care services that violate their conscience; immunity from civil, criminal, or administrative liability for refusing to provide or participate in a health care service that violates their conscience").

364. S.B. 85, 86th Leg., Reg. Sess. (Tex. 2018), https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00085I.pdf#navpanes=0 [https://perma.cc/P9LK-47MR].

365. H.B. 2892, 86th Leg., Reg. Sess. (Tex. 2019).

366. Julie Moreau, *Religious Exemption Laws Exacerbating Foster and Adoption 'Crisis,' Report Finds*, NBC NEWS (Nov. 22, 2018, 12:23 PM), https://www.nbcnews.com/feature/nbc-out/religious-exemption-laws-exacerbating-foster-adoption-crisis-report-finds-n939326 [https://perma.cc/M9CX-M9EQ] (reporting ten states have religious exemptions for foster care and adoption).

367. Samantha Sokol, *Trending: State Legislation that Allows College Student Groups to Use Religion to Discriminate*, AM. UNITED SEPARATION CHURCH & ST.: WALL OF SEPARATION BLOG (Apr. 4, 2019), https://www.au.org/blogs/wall-of-separation/trending-state-legislation-that-allows-college-student-groups-to-use [https://perma.cc/5R9H-3ZRA] (three states have passed laws—Arkansas, Iowa, South Dakota—and three states have bills pending—Missouri, Montana, Texas).

368. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (holding that an employer cannot fire an employee merely because of their sexual orientation or gender identity under Title VII). Even so, state-level religious exemptions do not apply to a federal statute.

369. *See* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017) (considering definition of sex in Title VII when construing a Title IX claim).

example, Title VII carves out exceptions for the hiring of co-religionists,[370] and courts have created a broad "ministerial" exemption under the First Amendment.[371] An objector who failed to fit within one of these limited exemptions would have to raise a RFRA claim.[372] The employer in one of the cases consolidated with *Bostock* unsuccessfully raised a RFRA claim in the lower courts, but it remains to been seen whether courts will be receptive to these claims.[373] Writing for the majority in *Bostock*, Justice Gorsuch suggested that the answer could be yes. He wrote: "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[374] This view contradicts the majority opinion in *Burwell v. Hobby Lobby Stores, Inc.*,[375] where Justice Alito rejected "the possibility that discrimination in hiring . . . might be cloaked as religious practice to escape legal sanction."[376] He wrote, "[o]ur decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce . . . ."[377]

Given the Equality Gap, state-level religious exemptions that involve areas not impacted by *Bostock*, such as public accommodation or government programs, will continue to be in play in states that have enacted comprehensive non-discrimination protections. However, fewer than half of the states have enacted comprehensive non-discrimination

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370. Currently religious organizations benefit from a broad set of religious exemptions to federal employment discrimination law. These expansive exemptions amply protect religious employers from government intrusion. Specifically, the religious exemptions provided under section 702 of Title VII, 42 U.S.C. § 2000e-1(a) (2018) and section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) (2018) provide that certain religious organizations are permitted to prefer co-religionists with respect to hiring and certain other employment decisions.

371. A Free Exercise claim would not be successful unless it sought to overrule *Smith*. Emp't Division v. Smith, 494 U.S. 872, 877, 890 (1990).

372. As discussed in the Supreme Court case *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*—in which a discrimination claim brought by a teacher at a religious school was denied—the First Amendment ministerial exemption has been frequently applied to employees serving in roles quite removed from the traditional ministerial role. 565 U.S. 171, 190 (2012).

373. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 592–93 (6th Cir. 2018), *aff'd*, 140 S. Ct. 1731 (2020).

374. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

375. 573 U.S. 682 (2014).

376. *Id.* at 733.

377. *Id.*

laws that include sexual orientation and gender identity.[378] Moreover, these sorts of religious exemptions are much more likely to be enacted in states that have not chosen to extend the non-discrimination protections.[379] In those states, it remains legal to discriminate against LGBTQ people in the areas not covered by *Bostock*. Religious exemptions are not necessary in these states and serve a largely symbolic function.[380]

Immediately following *Obergefell*, a number of governors, attorneys general, and judges in non-recognition states denounced the opinion and sought ways to limit its effect. Governor Sam Brownback of Kansas issued executive order 15-05, *Preservation and Protection of Religious Freedom*[381] that prohibits the state from taking any discriminatory action against a member of the clergy or a religious organization, including those providing social services, on the basis of a "religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman."[382] The Attorney General of Texas issued an opinion stating that "county clerks, justices of the peace, and judges may refuse to issue same-sex marriage licenses or conduct same-sex marriage if doing so would violate their sincerely held religious beliefs."[383] The Supreme Court of Alabama issued an order designed to stay the issuance of marriage licenses to same-sex couples for twenty-five days.[384]

Some of the state-level religious marriage exemptions have specifically targeted government officials who object to same-sex marriage on religious or moral grounds. Government officials who refuse to discharge their duties may be subject to internal censure and criminal sanctions

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378. *See supra* note 299–300 (discussing states that have anti-LGBTQ laws and religious exemptions).

379. *See* Thoreson, *supra* note 356, at 14.

380. *Id.* at 2, 6–7.

381. Kansas Exec. Order 15-05.

382. *Id.*

383. Re: Rights of Government Officials Involved with Issuing Same-Sex Marriage Licenses and Conducting Same-Sex Wedding Ceremonies, Op. Att'y Gen. of Texas, No. KP-0025 (June 28, 2015); *see also* Mark Joseph Stern, *Texas Attorney General Encourages Clerks to Refuse Marriage Licenses to Gay Couples*, SLATE (June 29, 2015, 9:26 AM), http://www.slate.com/blogs/outward/2015/06/29/texas_attorney_general_encourages_clerks_to_refuse_marriage_licenses_to.html [https://perma.cc/RU23-4S86].

384. Corrected Order, *Ex parte* State of Alabama *ex rel.* Alabama Policy Institute, No. 1140460 (Ala. June 29, 2015).

depending upon state law.[385] For example, in North Carolina a magistrate or recorder of deeds who refuses to issue or record a marriage license could be charged with "willfully failing to discharge duties," which is a Class 1 misdemeanor.[386] In June 2015, the North Carolina legislature amended the law, over the governor's veto, to provide a recusal mechanism for magistrates and recorders of deeds who refused to issue or record a marriage license "based upon any sincerely held religious objection."[387]

In Utah, the religious marriage exemption covers religious leaders, religious organizations, and government officials with objections based on "religious or deeply held beliefs about marriage, family, and sexuality."[388] The exemption provides that county clerks must solemnize marriage only if they are "willing."[389] County clerks who are not "willing" are authorized to "delegate or deputize another individual to perform the function of solemnizing a marriage."[390]

CONCLUSION

Marriage equality was facilitated by federalism and a strong respect for state and local variation. The early gains on the state and local level helped normalize the legal recognition of same-sex relationships while also providing meaningful protection for couples covered by the laws. These protections, however, were limited and in many respects fragile because they were not portable and were especially vulnerable to being overturned through majoritarian measures such as citizens' initiatives.

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385. David Wexelblat, *Trojan Horse or Much Ado About Nothing – Analyzing the Religious Exemptions in New York's Marriage Equality Act*, 20 J. GENDER SOC. POL'Y L. 961, 976 (2012). They can also be subject to a federal lawsuit under 42 U.S.C. § 1983 (2018) for deprivation of rights. *See* Complaint at 1, Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015) (No. 0:15-cv-00044-HRW). Liam Knox, *Texas Judge Who Refused to Marry Gay Couples Sues Commission that Sanctioned Her*, NBCNEWS, (Dec. 18, 2019, 9:43 PM), https://www.nbcnews.com/feature/nbc-out/texas-judge-who-refused-marry-gay-couples-sues-commission-sanctioned-n1104471 [https://perma.cc/LJA6-SLBX] (sanctioning a Texas state judge by the State Commission over Judicial Conduct for her refusal to perform same-sex marriages).

386. N.C. GEN. STAT. § 14-230 (2015).

387. *Id.* § 51-5.5 (establishing recusal mechanism for county clerks and magistrates).

388. S.B. 297, 2015 Leg., Reg. Sess. (Utah 2015); *see* UTAH CODE ANN. § 17-20-4 (LexisNexis) (requiring county to clerk to establish policies to ensure a willing designee is available to solemnize marriages).

389. UTAH CODE ANN. § 17-20-4.

390. *Id.* § 30-1-6(4). This provision removes prior requirement that the delegate be an employee of the office. *See* § 17-20-4.

They represented an imperfect, but pragmatic, institutional alternative on the road to nationwide marriage equality.

With the advent of marriage equality, the LGBTQ movement leapfrogged over certain important legal milestones, most notably blanket non-discrimination protections, resulting in an Equality Gap. In more than half of the states, individuals can be refused service at a place of public accommodation because of their sexual orientation or gender identity and a transgender person can be denied access to a gender-appropriate public bathroom. Where protections are in place, opponents of LGBTQ rights have lobbied for the adoption of expansive religious exemptions. The next chapter in LGBTQ advocacy will address the lack of universal non-discrimination protections and push for broad religious exemptions. Central to this pursuit will be the question: Who decides?

STATE LAWS AND CONSTITUTIONAL AMENDMENTS PROHIBITING MARRIAGE EQUALITY

Forty-four states enacted anti-marriage laws that restricted marriage to a union of one man and one woman and were also referred to as mini-DOMAs. Thirty of those states also adopted constitutional amendments that banned marriage equality. Fifteen of the amendments also banned civil unions, and five of them took it one step further and banned the grant of any of the "incidents of marriage" to same-sex couples.

APPENDIX A: STATE STATUTES

States	**Anti-Marriage Equality Statute**	**Relevant Language**
Alabama	ALA. CODE § 30-1-19 (1998).	"Marriage is a sacred covenant, solemnized between a man and a woman . . . ." "No marriage license shall be issued in the State of Alabama to parties of the same sex." "The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."
Alaska	ALASKA STAT. § 25.05.013 (1996), *invalidated by* Hamby v. Parnell, 56 F. Supp. 3d 1056 (D. Alaska 2014).	"A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its terminations, are unenforceable in this state" "A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage."
Arizona	ARIZ. REV. STAT. ANN. § 25-101 (1996).	"Marriage between persons of the same sex is void and prohibited."
Arkansas	ARK. CODE ANN. § 9-11-109 (1997), *invalidated by* Jernigan v. Crane, 796 F.3d 976, 979 (8th Cir. 2015) (per curiam).	"Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void."
California	CAL. FAM. CODE § 308.5 (West 2000).	"Only marriage between a man and a woman is valid or recognized marriage in California."
Colorado	COLO. REV. STAT. § 14-2-104 (2000).	"[A] marriage is valid in this state if . . . it is only between one man and one woman."
Connecticut	CONN. GEN. STAT. § 46b-38nn (2005) (repealed 2010).	"Parties to a civil union shall have all the same benefits, protections and responsibilities under

		law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."
Florida	FLA. STAT. § 741.212 (1997).	"Marriages between persons of the same sex . . . whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state."
Georgia	GA. CODE ANN. § 19-3-3.1 (1996).	"It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state."
Hawaii	HAW. REV. STAT. ANN. § 572-1 (LexisNexis 1994), *invalidated by* McDermott v. Ige, 349 P.3d 382 (Haw. 2015).	The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. "Requisites of valid marriage contract . . . which shall be only between a man and a woman . . . ."
Idaho	IDAHO CODE § 32-201 (1995), *invalidated by* Latta v. Otter, 771 F.3d 456 (9th Cir. 2014).	"Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary."
Illinois	750 ILL. COMP. STAT. 5/201 (1996), *amended by* 2013 Ill. Laws 597.	"A marriage between a man and a woman licensed, solemnized and registered as provided in this Act is valid in this State."
Indiana	IND. CODE § 31-11-1-1 (1997), *invalidated by* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014).	"Only a female may marry a male. Only a male may marry a female." "A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."
Iowa	IOWA CODE § 595.2 (1998), *invalidated by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).	"Only a marriage between a male and a female is valid."
Kansas	KAN. STAT. ANN. § 23-2501 (2011), *invalidated by* Marie v. Mosier, 122 F. Supp. 3d 1085 (D. Kan. 2015).	"The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void."
Kentucky	KY. REV. STAT. ANN. § 402.020 (West 1998), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).	"Marriage is prohibited and void: . . . Between members of the same sex . . . ."

Louisiana	LA. CIV. CODE ANN. art. 3520 (1999), *invalidated by* Robicheaux v. Caldwell, 791 F.3d 616 (5th Cir. 2015).	"A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage."
Maine	ME. STAT. tit. 19, § 91 (1997), *repealed by* PL 1995, c. 694 § B-1.	"To support and strengthen traditional monogamous Maine families against improper interference from out-of-state influences or edicts . . . [s]ame sex marriage [is] prohibited, persons of the same sex may not contract marriage."
Maryland	MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 1991).	"Only a marriage between a man and a woman is valid in this [s]tate."
Michigan	MICH. COMP. LAWS ANN. § 551.1 (West 1995), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).	"Marriage is inherently a unique relationship between a man and a woman." "A marriage contracted between individuals of the *same sex* is invalid in this state."
Minnesota	MINN. STAT. § 517.03 (1997).	"The following marriages are prohibited: . . . a marriage between persons of the same sex."
Mississippi	MISS. CODE ANN. § 93-1-1 (1997), *invalidated by* Campaign for S. Equal. v. Bryant, 197 F. Supp. 3d 905 (S.D. Miss. 2016).	"Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi."
Missouri	MO. ANN. STAT. § 451.022(1)–(2), (4) (West 1996), *invalidated by* Lawson v. Kelley, 58 F. Supp. 3d 923 (W.D. Mo. 2014).	"It is the public policy of this state to recognize marriage only between a man and a woman." "Any purported marriage not between a man and a woman is invalid." "A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."
Montana	MONT. CODE ANN. § 40-1-401(1)(d) (West 1997), *invalidated by* Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014).	"The following marriages are prohibited: . . . a marriage between persons of the same sex."
Nevada	NEV. REV. STAT. ANN. § 122.020(1) (LexisNexis 1973).	"A male and a female person . . . may be joined in marriage."
New Hampshire	N.H. REV. STAT. ANN. §§ 457:1-457:3 (1991).	Same sex marriages not recognized in New Hampshire "No man shall marry . . . any other man." And "No woman shall marry . . . any other woman." Such a marriage contract would be declared "void."

New Jersey	N.J. STAT. ANN. § 26:8A-2(e) (West 2004) (providing gender specific language that the New Jersey Supreme Court held to prohibit same-sex marriage in Lewis v. Harris, 908 A.2d 196, 208 (N.J. 2006)).	"[P]ersons . . . of the same sex . . . are . . . unable to enter into a marriage with each other that is recognized by New Jersey law . . . ."
North Carolina	N.C. GEN. STAT. ANN. § 51-1.2 (West 1996).	"Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."
North Dakota	N.D. CENT. CODE ANN. § 14-03-01 (West 1997).	"Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. . . . A spouse refers only to a person of the opposite sex who is a husband or a wife."
Ohio	OHIO REV. CODE ANN. § 3101.01(A)–(B)(1) (West 2004) *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).	"A marriage may only be entered into by one man and one woman. Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state."
Oklahoma	OKLA. STAT. ANN. tit. 43, § 3.1 (West 1996).	"A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."
Oregon	OR. REV. STAT. ANN. § 106.010 (West 1975), *invalidated by* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014).	"Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age."
Pennsylvania	23 PA. STAT. AND CONS. STAT. ANN. § 1704 (West 1996), *invalidated by* Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).	"It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."
South Carolina	S.C. CODE ANN. § 20-1-15 (1996), *invalidated by* Bradacs v. Haley, 58 F. Supp. 3d 514 (D.S.C. 2014).	"A marriage between persons of the same sex is void ab initio and against the public policy of this State."

South Dakota	S.D. Codified Laws § 25-1-1 (1996), *invalidated by* Rosenbrahn v. Daugaard, 61 F. Supp. 3d 862 (D.S.D. 2015), *aff'd per curiam*, 799 F.3d 918 (8th Cir. 2015).	"Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary."
Tennessee	TENN. CODE ANN. § 36-3-113 (1996), *invalidated by* Obergefell v. Hodges, 576 U.S. 644 (2015).	"The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state."
Texas	TEX. FAMILY CODE ANN. § 6.204 (West 2003), *invalidated by* DeLeon v. Abbott, 791 F.3d 619 (5th Cir. 2015).	"A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state."
Utah	UTAH CODE ANN. § 30-1-4.1 (LexisNexis 2004), *invalidated by* Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).	"It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter."
Virginia	VA. CODE ANN. § 20-45.2 (1997), *repealed by* Acts 2020, cc. 75, 195 and 900.	"A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable."
Washington	WASH. REV. CODE § 26.04.020 note (1998) (Finding—Intent—1998 c 1).	"It is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of MARRIAGE as a union between a man and a woman as husband and wife and to protect that institution."
West Virginia	W. VA. CODE § 48-2-603 (2001).	"A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state."
Wisconsin	WIS. STAT. ANN. § 765.001 (West 1959).	"Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support."

Wyoming	WYO. STAT. ANN. § 20-1-101 (1977).	"Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential."

APPENDIX B: STATE CONSTITUTIONAL AMENDMENTS

States	**Anti-Marriage Equality Amendment**	**Relevant Language**
Alabama	ALA. CONST. art. I, § 36.03 (2006) (banning marriage equality and civil unions).	"The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex." "A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage."
Alaska	ALASKA CONST. art. I, § 25 (1998) (banning marriage equality).	"To be valid or recognized in this State, a marriage may exist only between one man and one woman."
Arizona	ARIZ. CONST. art. XXX, § 1 (2008).	"Only a union of one man and one woman shall be valid or recognized as a marriage in this state."
Arkansas	ARK. CONST. amend. LXXXIII, § 1 (2004) (banning marriage equality and civil unions).	"Marriage consists only of the union of one man and one woman."
California	CAL. CONST., art. I § 7.5. (2008) (banning marriage equality).	"Only marriage between a man and a woman is valid or recognized in California."
Colorado	COLO. CONST. art. II, § 31 (2006) (banning marriage equality).	"Only a union of one man and one woman shall be valid or recognized as a marriage in this state."
Florida	FLA. CONST. art. I, § 27 (2008) (banning marriage equality and civil unions).	"Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."
Georgia	GA. CONST. art. I, § 4, ¶ I (2004) (banning marriage equality and civil unions).	"This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state." "No union between persons of the same

		sex shall be recognized by this state as entitled to the benefits of marriage."
Idaho	IDAHO CONST. art. III, § 28 (2006) (banning marriage equality and civil unions).	"A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."
Kansas	KAN. CONST. art. XV, § 16 (2005) (banning marriage equality, civil unions, and incidents of marriage).	"The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void." "No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."
Kentucky	KY. CONST. § 233A (2004) (banning marriage equality and civil unions).	"Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."
Louisiana	LA. CONST. ANN. art. XII, § 15 (2004) (banning marriage equality and civil unions).	"Marriage in the state of Louisiana shall consist only of the union of one man and one woman . . . A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."
Michigan	MICH. CONST. art. I, § 25 (2004) (banning marriage equality, civil unions, and incidents of marriage).	"To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."
Missouri	MO. CONST. art. I, § 33 (2004) (banning marriage equality).	"That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."
Mississippi	MISS. CONST. art. XXIV, § 263A (2004) (banning marriage equality).	"Marriage may take place and may be valid under the laws of this State only between a man and a woman."
Montana	MONT. CONST. art. XIII, § 7 (2004) (banning marriage equality).	"Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."
Nebraska	Initiative Measure 416 1999 Bill Tracking NE V. 10 (LexisNexis 2000). NEB. CONST. art. I § 29 (2000) (banning marriage equality,	"Only marriage between a man and a woman shall be valid or recognized in Nebraska."

	civil unions, and incidents of marriage), *invalidated by* Waters v. Ricketts, 159 F. Supp. 3d 992 (D. Neb. 2016).	"Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."
Nevada	NEV. CONST. art. I, § 21 (2002) (banning marriage equality).	"Only a marriage between a male and female person shall be recognized and given effect in this state."
North Carolina	N.C. CONST. art. XIV, § 6 (2012) (banning marriage equality and civil unions).	"Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State."
North Dakota	N.D. CONST. art. XI, § 28 (2004) (banning marriage equality and civil unions).	"Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."
Ohio	OHIO CONST. art. XV, Section 11 (2004) (banning marriage equality and civil unions).	"Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions."
Oklahoma	OKLA. CONST. art. II, § 35 (2004) (banning marriage equality and civil unions).	"Marriage in this state shall consist only of the union of one man and one woman."
Oregon	OR. CONST. art. XV, § 5a (2004) (banning marriage equality).	"It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."
South Carolina	S.C. CONST. art. XVII, § 15 (2007) (banning marriage equality and civil unions).	"A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State."
South Dakota	S.D. CONST. art. XXI, § 9 (2006) (banning marriage equality, civil unions, and incidents of marriage).	"Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."
Tennessee	TENN. CONST. art. XI, § 18 (2006) (banning marriage equality).	"The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state."

Texas	TEX. CONST. art. I, § 32 (2005) (banning marriage equality and civil unions).	"Marriage in this state shall consist only of the union of one man and one woman." "This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."
Utah	UTAH CONST. art. I, § 29 (2004) (banning marriage equality and civil unions).	"Marriage consists only of the legal union between a man and a woman." "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."
Virginia	VA. CONST. art. I, § 15-A (2007) (banning marriage equality, civil unions, and incidents of marriage).	"That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions."
Wisconsin	WIS. CONST. art. XIII, § 13 (2006) (banning marriage equality and civil unions).	"Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."