2014

Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections

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MARRIAGE OF NECESSITY: SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY PROTECTIONS*

Robin Fretwell Wilson[†]

ABSTRACT

Since the U.S. Supreme Court heard oral arguments in *Hollingsworth v. Perry* and *U.S. v. Windsor*, the number of states recognizing same-sex marriage has exploded. Even though the Supreme Court “stopped short of deciding whether the Constitution guaranteed a right to same-sex marriage,” the Court’s basic

* Between the date of the Law Review Symposium on October 22, 2013, and final publication, a flurry of activity around same-sex marriage has occurred; state elections have also changed which party controls the legislature and occupies the governor’s office in at least one state. *See infra* notes 225 and 232 (discussing Virginia). This Article takes into account changes to same-sex marriage laws as of January 14, 2014, but it uses a snapshot of the political terrain as of the symposium date, October 22, 2013.

† Roger and Stephany Joslin Professor of Law and Director, Family Law and Policy Program, University of Illinois College of Law. I am grateful to Helen Alvarez, Joyce Chen, Rep. Gordon Denlinger, Josh Fairfield, Richard Garnett, Kent Greenawalt, Howard Katz, Andy Koppelman, Douglas Laycock, Tim MacDonnell, Steve McAllister, Tamara Piety, Steven Smith, Mark Tushnet, and Todd Zywicki for their thoughtful comments, as well as the insights of the panelists and audience at the Case Western Law Review Symposium and presentations at the Institute for American Constitutional Heritage at the University of Oklahoma, UC Davis Law School, George Mason University School of Law, Kansas University School of Law, Penn State University School of Law, the International Academy for the Study of the Jurisprudence of the Family, and the Law & Religion Roundtable at Washington University School of Law. I would also like to thank the students in the Seminar for Gay Rights and the Courts at Yale University’s Trumbull College for our dinner conversation about religious liberty and same-sex marriage. I am part of a group that urges robust religious liberty protections in any same-sex marriage legislation. This group, which takes no position for or against same-sex marriage as a group in its filings, includes: Thomas C. Berg (St. Thomas (Minn.)), Carl H. Esbeck (Missouri), Richard W. Garnett (Notre Dame), Edward McGlynn Gaffney (Valparaiso), and myself. This group works in tandem with a second group of law professors, all of whom support same-sex marriage and religious liberty protections; that group includes Douglas Laycock (Virginia), Bruce S. Ledewitz (Duquesne), Christopher C. Lund (Wayne State) and Michael Perry (Emory), as well as Professor Berg. I am indebted to Cameron Flynn for his diligent research, without which the empirical analysis presented here would not have been possible.

vindication of same-sex couples' right to equal treatment has spurred newly enacted legislation as well as judicial decisions recognizing same-sex marriage. The net effect has been to erase a boundary that had largely confined same-sex marriage to the Northeast.

In jurisdictions that voluntarily enacted same-sex marriage, religious liberty protections for religious objectors who adhere to a heterosexual view of marriage—exempting them from requirements to facilitate marriages inconsistent with their religious beliefs, by providing a reception hall, for example—proved vital to the legislation's success. In many Enacting Jurisdictions, more robust protections resulted in successful legislation where a bill with thinner or nonexistent protections had failed just years before.

Even though same-sex marriage recognition in the Enacting Jurisdictions has thus far been yoked to religious liberty protections—delivering important gains to supporters and opponents alike—prominent voices on each side now caution against compromise. Buoyed by their recent judicial victories, some supporters have hardened against compromise. With the recent spate of favorable judicial decisions, compromise may simply appear increasingly unnecessary.

Opponents are hardening in their stance, too. Far from folding in the face of the momentum carrying same-sex marriage across the country, some thought-leaders urge opponents to double down on their opposition. These opponents see only one way forward: fighting to the bitter end.

This Essay contends that we stand at a critical moment in the same-sex marriage movement. A clear-eyed examination of the marriage movement's success—and the challenges facing it going forward—reveals that both sides will benefit from remaining at the bargaining table, although the gains to each will be different.

For same-sex couples, voluntary recognition of same-sex marriage by legislation delivers the benefits and security of marriage today. True, many believe that the juggernaut of lower court decisions requiring same-sex marriage will lead in the near term to a favorable Supreme Court decision. Although that result is increasingly likely, it is nonetheless not assured. Moreover, the unanimity of decisions striking marriage bans may, ironically, delay an ultimate resolution by the Supreme Court, which often declines review until a meaningful circuit split arises. For marriage equality opponents, the voluntary embrace of same-sex marriage permits legislators to consider competing considerations, including concrete ways to permit those who adhere to a traditional view of marriage to continue to do so without facing civil lawsuits or government penalty.

Part I shows that same-sex marriage has spread across America through three different avenues: judicial decisions, state laws enacting same-sex marriage, and ballot initiatives—with judicial decisions being fraught with risk for religious dissenters while legislative or

popular enactments offer important, if flawed, protections to religious organizations and individuals.

Parts II and III document that a “perfect storm” of characteristics favoring marriage equality in jurisdictions that voluntarily embraced same-sex marriage, together with extensive bargaining around religious liberty, nudged same-sex marriage legislation over the finish line. Even with these favorable conditions, marriage equality bills just barely squeaked over the line to enactment, helped by religious liberty exemptions.

That advantageous political terrain is now nearly exhausted, as Part IV documents. Going forward, one would reasonably expect more robust religious liberty protections to play a central part in any legislative compromises over same-sex marriage, at least for the near term.

Part V evaluates the impulse of some opponents of same-sex marriage to dig in, resisting same-sex marriage at all costs. In part, opponents rely on constitutional bans against same-sex marriage. Constitutional bans may well not survive judicial challenge. However, even without court action striking a ban, constitutional amendments banning same-sex marriage do not provide the bulwark against change that some assume since many can be repealed almost as easily as enacting ordinary legislation.

Part VI concludes that, in the tougher political terrain that looms, those who care about marriage equality can continue to sew up legislative victories—but the price tag in the short term will be to agree to robust religious liberty protections for dissenters. Those who wish to protect religious objectors from the unintended consequences of same-sex marriage should act with all deliberate speed to lock in robust religious liberty protections, because the window for securing them is almost certainly closing.

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INTRODUCTION

In the space of nine short months—from oral arguments before the U.S. Supreme Court in *Hollingsworth v. Perry*¹ and *United States v. Windsor*² to a pair of federal district court decisions invalidating state constitutional bans on same-sex marriage in direct reliance on

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1. 133 S. Ct. 2652, 2668 (2013) (reinstating the federal district court decision invalidating Proposition 8, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)). The United States Court of Appeals for the Ninth Circuit had affirmed the lower court's decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), but the Supreme Court found that the parties lacked standing to appeal. 133 S. Ct. at 2668.
 2. 133 S. Ct. 2675, 2696 (2013) (holding that the Fifth Amendment requires the federal government to recognize same-sex marriages that are valid under state law). The Court heard oral argument in the cases on March 26 and 27, 2013. *Argument Audio*, SUPREME COURT OF THE UNITED STATES (March 26 & 27, 2013), http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (listing the date of oral arguments).

*Windsor*³—the number of states recognizing same-sex marriage has exploded. If one includes the now-stayed decisions in Oklahoma⁴ and Utah,⁵ as of January 14, 2014, 19 states and the District of Columbia permit same-sex marriage, a leap from ten states mere months before.⁶ Newly enacted legislation in five states⁷ and judicial decisions in four others,⁸ together with *Hollingsworth*'s restoration of same-sex marriage

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3. Bishop v. United States ex rel. Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014) (striking Oklahoma's constitutional same-sex marriage ban on equal protection grounds, using rational basis review); Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6697874, at *30 (D. Utah Dec. 20, 2013) (striking Utah's constitutional same-sex marriage ban on due process and equal protection grounds), *stay granted*, 134 S. Ct. 893 (2014).
 4. In *Bishop*, the district court judge stayed the decision until “final disposition of any appeal to the Tenth Circuit Court of Appeals.” *Bishop*, 2014 WL 116013, at *33.
 5. In *Herbert*, the district court judge did not stay the decision while on appeal to the U.S. Court of Appeals for the Tenth Circuit. *Herbert*, 2013 WL 6697874. On January 6, 2014, the Supreme Court stayed the decision “pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit.” *Herbert v. Kitchen*, 134 S. Ct. 893, 893 (2014). In the weeks between the decision and the Supreme Court's stay, nearly 1,300 same-sex couples married. While the federal government has said it will acknowledge the marriages as valid, Utah is “largely refusing to do so.” Charlie Savage and Jack Healy, *U.S. to Recognize 1,300 Marriages Disputed by Utah*, N.Y. TIMES Jan. 11, 2014, at A1.
 6. Eleven jurisdictions permit same-sex marriage by legislation alone: Delaware, District of Columbia, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. See *infra* Table A1. One state, Connecticut, passed legislation recognizing same-sex marriages on the heels of a judicial decision requiring recognition. See *infra* Table A1. One state, Maine, adopted same-sex marriage by a ballot initiative. See *infra* Table A1. Finally, seven states recognize same-sex marriage as a result of a judicial decision alone: California, Iowa, Massachusetts, New Jersey, New Mexico, Oklahoma, and Utah. See *infra* Table A1.

As of this writing, the decisions in Utah and Oklahoma are stayed. See *supra* notes 4–5.

7. Since March 2013, Delaware, Hawaii, Illinois, Minnesota, and Rhode Island have all legislatively enacted same-sex marriage. See H.B. 75, 147th Gen. Assemb. (Del. 2013) (codified as DEL. CODE ANN. TIT. 13 § 101 (2013)); S.B.1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (codified as HAW. REV. STAT. §572-1 (West 2013)); S.B. 0010, 98th Gen. Assemb. (Ill. 2013) (to be codified at 750 ILL. COMP. STAT. 5/201 (2014)); H.F. 1054, 88th Sess. (Minn. 2013) (codified as MINN. STAT. ANN. §517.01 (West 2013)); H.B. 5015B, 2013 Reg. Sess. (R.I. 2013) (codified as R.I. GEN. LAWS § 15-1-1 (2013)). See also Table A1 *infra*.
8. See Bishop v. United States ex rel. Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014); Kitchen, 2013 WL

in California,⁹ erased a boundary that had largely confined same-sex marriage to the Northeast.¹⁰

Even though the Supreme Court “stopped short of deciding whether the Constitution guaranteed a right to same-sex marriage,”¹¹ the Court’s basic vindication of same-sex couples’ right to equal treatment¹² hastened a spate of judicial decisions requiring state recognition of same-sex marriage.¹³ Just as significant, the Court’s “historic decisions”¹⁴ fueled state legislation as well. In Hawaii, Senator Brickwood Galuteria introduced SB1 to enact same-sex marriage during a special legislative session. The bill’s text explained that “[t]he legislature acknowledges the recent decision of the United

6697874 at *30; *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (authorizing same-sex marriage in New Mexico); *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (striking down New Jersey’s civil union statute as violative of the New Jersey Constitution and requiring the state to permit same-sex couples to marry). Prior to *Griego*, New Mexico law neither explicitly banned nor authorized same-sex marriages. *Griego*, 316 P.3d at 871.

9. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
10. Of the early exceptions to the geographic cluster (Iowa, D.C. and Maryland), Iowa recognized same-sex marriage by judicial decision while D.C. and Maryland did so by statute. *See Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009); *see also* Bill 18-0482 (D.C. 2009) (codified as D.C. CODE § 46-401 (LexisNexis 2012)); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (codified as MD. CODE ANN., FAM. LAW §§2-201 (LexisNexis 2012)). Maryland voters subsequently approved Maryland’s same-sex marriage law by popular referendum by a vote of 52% to 48%. *See infra* note 114.
11. Adam Liptak, *Utah Ruling Means No Respite for the Supreme Court on Same-Sex Marriage*, N.Y. TIMES, Dec. 27, 2013, at A1.
12. The federal district court decision invalidating Oklahoma’s constitutional ban on same-sex marriage references *Windsor* 65 times. *See Bishop*, 2014 WL 116013, at *17 (“This Court interprets *Windsor* as an equal protection case holding that [the invalidated federal Defense of Marriage Act (“DOMA”)] drew an unconstitutional line between lawfully married opposite-sex couples and lawfully married same-sex couples). The decision invalidating Utah’s constitutional ban on same-sex marriage references *Windsor* 34 times. *See Kitchen*, 2013 WL 6697874, at *7 (“The court agrees with Justice Scalia’s interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”).
13. *See supra* note 8.
14. *Marriage at the Supreme Court in 2013*, FREEDOM TO MARRY (June 26, 2013), <http://www.freedomtomarry.org/landscape/entry/c/supreme-court> (“The Supreme Court’s historic decisions will dramatically improve the lives of same-sex couples across the country, allowing many couples the ability to protect each other and their families.”).

States Supreme Court in *United States v. Windsor*”¹⁵ and seeks to “ensure that same-sex couples are able to take full advantage of federal rights, benefits, protections, and responsibilities granted to married opposite-sex couples by allowing same-sex couples to marry under the laws of this State.”¹⁶ In Illinois, where proponents introduced the ultimately successful same-sex marriage bill before the Supreme Court’s later decisions, *Windsor* lent further support.¹⁷

Even before this Court-powered juggernaut toward marriage equality, state recognition of same-sex marriage over the last decade¹⁸ evolved from a labored, slow moving phenomenon to a steady, seemingly inexorable one.¹⁹ As Figure 1 illustrates,²⁰ the movement

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15. S.B.1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (codified as HAW. REV. STAT. §572-1 (West 2013)).
 16. *Id.* Governor Abercrombie also referenced *Windsor* when he floated his own bill text to recognize same-sex marriage. *See* Press Release, Gov. Neil Abercrombie, Proclamation and Marriage Equity Bill (Sept. 9, 2013) (“[T]he Governor believes that, in keeping with the United States Supreme Court’s recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the State of Hawaii should extend to same-sex couples the right to marry and receive all the same rights, benefits, protections, and responsibilities of marriage as opposite-sex couples receive under the laws of this State.”).
 17. *See* David Masci, *Supreme Court’s DOMA decision driving same-sex marriage efforts in states*, PEW RES. CENTER (Oct. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/10/21/supreme-courts-doma-decision-driving-same-sex-marriage-efforts-in-states/> (discussing Illinois’s prior attempts to legislate same-sex marriage).
 18. Recognition of same-sex marriage rights started in 2003 with *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) and gained speed after 2008, which was marked by a judicial decision in California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), as well as a judicial decision and subsequent legislation in Connecticut. *See* *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); S.B. 899, 2009 Legis., Jan. Sess. (Conn. 2009) (codified as CONN. GEN. STAT. § 46b-20 (2009)).
 19. *See* Liptak, *supra* note 11 (“Since then, the pace of change has been very rapid. . . . [I]n March, same-sex marriage was permitted in nine states and the District of Columbia. If the Utah decision stands, the number of states allowing such marriages will have doubled, to 18.”).
 20. Figure 1 reflects the date that a judicial decision was handed down or legislation was signed into law (or for some states, both). These dates do not always match the first date on which same-sex couples could marry. Some states, like Illinois, postponed by months the date when state officials were authorized to issue marriage licenses to same-sex couples. *See* S.B. 0010, 98th Gen. Assemb. (Ill. 2013) (to be codified at 750 ILL. COMP. STAT. 5/201 (2014)).

gathered momentum when state legislatures began acting independently, as Vermont did, to “ensure that equality was there.”²¹

FIGURE 1: Same-Sex Marriage Timeline

In jurisdictions that enacted same-sex marriage (“Enacting Jurisdictions”),²² religious liberty protections for religious objectors who adhere to a heterosexual view of marriage—exempting them from requirements to facilitate marriages inconsistent with their religious beliefs, like providing a reception hall—proved vital to the legislation’s success. After New York’s watershed same-sex marriage law, the *New York Times* observed that the religious liberty protection:

proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage. Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive

21. Telephone Interview by Anthony Kreis with Heidi Schuermann, Member of the Vt. House of Representatives (June 28, 2012). See Anthony Kreis & Robin Fretwell Wilson, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. (forthcoming 2014).
22. The Enacting Jurisdictions either recognized same-sex marriage by legislation alone or with legislation codifying a judicial decision requiring same-sex marriage. The Enacting Jurisdictions include Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. For the enacting legislation, see *infra* Table A1.

protections for religious organizations and helped pull the legislation over the finish line²³

For some legislators, religious liberty protections shifted the question from *whether* to embrace marriage equality to *how* to balance marriage equality and religious liberty. For example, New Hampshire State Representative Rick Watrous explained:

[Religious liberty protections] were very important. As you can see by the closeness of the vote, I think it was the crucial difference that made success. . . . These types of very personal and religious freedoms are very important to New Hampshire.²⁴

In many Enacting Jurisdictions, more robust protections resulted in successful legislation where a bill with thinner or nonexistent ones had failed just years before.²⁵

In fact, every single bill over a decade that has offered hollow religious liberty “protections” limited only to the clergy, who simply do not require protection,²⁶ has failed to garner sufficient support to become law.²⁷ This remains true after the Supreme Court’s decisions.²⁸

One would expect legislation with enlarged protections to succeed because legislators inherently balance competing interests in a

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23. Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.
24. Telephone Interview by Anthony Kreis with Rick Watrous, N.H. State Representative (June 29, 2012). See Kreis & Wilson, *supra* note 21.
25. See Kreis & Wilson, *supra* note 21 (drawing on interviews with state legislators intimately involved in legislative battles to show that expanded and honed religious liberty protections allowed for same-sex marriage in states like Maryland and New York, where earlier bills had failed).
26. The clergy do not need statutory protections because of the First Amendment. See John Corvino, *The Slippery Slope of Religious Exemptions* (Nov. 22, 2009), <http://johncorvino.com/2009/11/the-slippery-slope-of-religious-exemptions/> (“[T]he gay-rights debate concerning religious accommodation is not about worship. No serious person argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will. That would violate the First Amendment, and beyond that, it would be foolish and wrong.”).
27. See *infra* Part I.
28. See Kreis & Wilson, *supra* note 21. The religious liberty protections may be thinning, however. See *infra* notes 35–36 (discussing efforts by same-sex marriage advocates in Hawaii to provide a stripped-down exemption for religious organizations that was ultimately enlarged by the legislature). For a comparison of the religious liberty protections enacted in Hawaii with those put in place by earlier Enacting Jurisdictions, see Table A3.

pluralistic, democratic society.²⁹ The many clashes over same-sex marriage have highlighted, for some legislators, the need to insulate religious organizations from unintended consequences.³⁰ In the words of Washington State Senator Mary Margaret Haugen:

Once I made the decision [to support same-sex marriage], I felt very strongly that those provisions [protecting religious liberty] needed to be there. We have many wonderful organizations. We need to respect each other's space. We need to treat and respect others like we want to treat ourselves.³¹

Even though same-sex marriage recognition in the Enacting Jurisdictions has thus far been yoked to religious liberty protections—delivering important gains to supporters and opponents alike—prominent voices on each side now caution against compromise.

Buoyed by their recent victories, some supporters have hardened against compromise. Some supporters have long said that religious liberty protections are “politically unwise.”³² Now, with a spate of judicial decisions, compromise may appear increasingly unnecessary,

29. The first openly gay legislator to vote against same-sex marriage, Hawaii Representative Jo Jordan, was guided by one question: “[A]re we creating a measure that meets the needs of all?” Diane Lee, *Exclusive: Why Rep. Jo Jordan Voted Against Marriage Equality*, HONOLULU MAGAZINE (Nov. 2013), <http://www.honolulumagazine.com/Honolulu-Magazine/November-2013/Exclusive-Why-Rep-Jo-Jordan-voted-against-Marriage-Equality/>. Representative Jordan explained that she was “really . . . not happy with the exemptions. Too narrow. I’m not here to protect the big churches or the little churches, I’m saying we can’t erode what’s currently out there. We don’t want to scratch at the religious protections at all.” *Id.*

30. See *infra* Part I for a discussion of the loss of government contracts by religious organizations. See *infra* note 128 for discussion of a small business facing penalty for a refusal to celebrate same-sex marriage. See *infra* Part I for a discussion of how justices of the peace, judges, and government clerks may face firing or other penalty for not providing services for a same-sex marriage even if other willing individuals are immediately available to provide the needed service. Although somewhat dated, see Marc Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds., 2008) [hereinafter *Emerging Conflicts*] for a discussion of conflicts between religious liberty and same-sex marriage.

31. See Kreis & Wilson, *supra* note 21; Telephone Interview by Anthony Kreis with Mary Margaret Haugen, Wash. State Senator (July 16, 2012).

32. Jana Singer, *Balancing Away Marriage Equality*, SCOTUSblog (Aug. 29, 2011, 1:00 PM), <http://www.scotusblog.com/2011/08/balancing-away-marriage-equality/> (arguing for same-sex marriage legislation stripped of any protections for religious organizations or individuals).

too. For example, after *Garden State Equality v. Dow*,³³ Senate Democrats in New Jersey initially supported and then declined to back state legislation that would have codified same-sex marriage, explaining that the influential same-sex marriage advocate Lambda Legal didn't "want any kind of religious exemption."³⁴

In Hawaii, where same-sex marriage resulted from legislation rather than judicial decision, some advocates downplayed religious liberty concerns. They argued strenuously that:

[t]he proposed marriage equality law ensures that no clergy can be required to perform any marriage to which they object. This protects religious freedom. And the law goes further, by clarifying that churches or other religious organizations need not allow anyone to use their facilities for weddings, so long as those facilities aren't rented for weddings to the general public for a profit.³⁵

Believing that a broader exemption was needed, the Hawaii legislature approved slightly more robust protection for religious nonprofit organizations.³⁶

Opponents are hardening in their stance, too. Far from folding in the face of the momentum carrying same-sex marriage across the country, some thought-leaders urge opponents to double down on their opposition. They say that the "the preservation of meaningful religious liberty . . . is inseparable from the preservation of . . . [heterosexual] marriage. They stand or fall together."³⁷ In the Enacting Jurisdictions, they contend that bargaining has "gotten exactly nowhere."³⁸ That is, efforts to shield religious objectors "have

33. 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013).

34. Ken Klukowski, *NJ Stalls Same-Sex Marriage Bill To Kill Religious Protections*, BREITBART (Dec. 18, 2013), <http://www.breitbart.com/Big-Government/2013/12/18/War-on-Christians-in-New-Jersey> ("Democratic Senate Majority Leader Loretta Weinberg pulled the bill that she was supporting because of objections from gay-rights organizations such as Lambda Legal. The reason? Weinberg explained, 'They don't want *any kind* of religious exemption, so out of respect for that, I will [pull the bill] (emphasis added).'""); *see also infra* note 63.

35. HAWAII FACTS ON MARRIAGE: TELLING THE TRUTH ABOUT MARRIAGE EQUALITY IN HAWAII, <http://www.factsonmarriage.com/> (last accessed Feb. 22, 2014).

36. *See infra* Table A3.

37. Matthew J. Franck, *Same-Sex Marriage and Religious Freedom, Fundamentally at Odds*, PUBLIC DISCOURSE (June 18, 2013), <http://www.thepublicdiscourse.com/2013/06/10393/>.

38. *Id.* ("When the above-mentioned religious liberty scholars have pleaded for accommodation of such persons and groups, they have gotten exactly nowhere. It seems that for same-sex marriage proponents, the religious

signally [sic] failed to achieve much, if any, meaningful accommodation of religious freedom in the recent legislative enactments of same-sex marriage in New York, Minnesota, Rhode Island, and Delaware.”³⁹

These opponents see only one way forward: fighting to the bitter end. As one commentator encapsulates this position:

[T]hey have to win this battle entirely or be crushed everywhere, as segregationists were, and for the same reason: their views will be deemed too abhorrent to be tolerated. On this view, preserving religious liberty cannot be separated from preserving traditional marriage.⁴⁰

This Article contends that we stand at a critical moment in the same-sex marriage movement. On both sides, some perceive that the delicate state of affairs that has thus far yoked enactment of same-sex marriage to protection of religious liberty is dissipating. However, a clear-eyed examination of the marriage movement’s success—and the challenges facing it going forward—reveals that both sides will benefit from remaining at the bargaining table, although the gains for each will be different.

Marriage equality advocates have exhausted those jurisdictions in which a “perfect storm” of popular support, political characteristics, and background legal protections coalesced to yield marriage equality. As advocates move to more difficult political terrain, trading religious liberty protections will remain essential to securing marriage equality, at least in the near term,⁴¹ since it is unclear whether and when the U.S. Supreme Court will weigh in. On the other side, opponents rightfully worry about the existing scope and degree of protections for religious dissenters. But as the movement moves to more difficult political terrain, opponents will be in a considerably stronger position to get more robust protections. The price tag for those protections, however, will be to agree to recognition of same-sex marriage on the merits.

freedom of saying ‘no’ to same-sex weddings belongs only to ‘religious organizations,’ not to similarly situated religious *persons*, despite the obviously personal character of the First Amendment’s free exercise of religion.” (emphasis in original).

39. *Id.*

40. Rod Dreher, *Does Faith = Hate?: Gay Marriage and Religious Liberty Are Uneasy Bedfellows*, AM. CONSERVATIVE (Oct. 2013), at 12, 15 (attributing this view to Robert George).

41. See *infra* note 54 and Part V. The near-term benefit of bargaining assumes that judicial decisions from lower courts striking state marriage bans, as in Oklahoma and Utah, are stayed pending ultimate resolution. See *supra* notes 4–5.

Part I demonstrates that same-sex marriage has spread across American through three different avenues: judicial decisions, state laws enacting same-sex marriage, and ballot initiatives. One of these avenues, judicial decisions, is fraught with risk for religious dissenters precisely because it leaves no meaningful opportunity for balancing competing goods, namely, marriage equality with religious liberty. Six of the seven states recognizing same-sex marriage by judicial decision gave *no* new protections to religious objectors. By contrast, the one ballot initiative state and the Enacting Jurisdictions all offer important, if flawed, protections to religious organizations and individuals. Although they could have gone farther, these protections were enhanced over the course of legislative consideration through extensive negotiation.

Parts II and III document that the “perfect storm” of characteristics favoring marriage equality in the Enacting Jurisdictions, together with extensive bargaining around religious liberty, nudged same-sex marriage legislation over the finish line. In every Enacting Jurisdiction except one, a majority of the populace supported same-sex marriage at the time of enactment⁴²—a marked departure from the states that have not recognized same-sex marriage. In virtually all of the Enacting Jurisdictions, Democrats controlled both houses of the legislature;⁴³ Democrats held the Governor’s office;⁴⁴ and the state ranked among the least religious in the U.S.⁴⁵ but among the most educated⁴⁶—all characteristics that political scientists say matter to support for same-sex marriage.⁴⁷ In every Enacting Jurisdiction, same-sex marriage recognition was

42. Passage of a law may not be assured even when a majority of the public supports it if one chamber of a state’s legislature is controlled by legislators strongly opposed to it. Consider the Employment Non-Discrimination Act (ENDA); more than seventy percent of Americans support ENDA, yet U.S. House of Representatives Speaker John Boehner will not permit the bill to receive a vote in the U.S. House of Representatives. Nonetheless, where majority support is lacking, enactment of a law is less likely. *See* Andrew Gelman, *Polls Say ENDA Has Majority Support in Every Congressional District*, THE MONKEY CAGE (Nov. 20, 2013), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/20/polls-say-enda-has-majority-support-in-every-congressional-district/>.

43. New York is the sole exception, where Republicans controlled the Senate. *See infra* Table A5.

44. *See infra* notes 185–186 (discussing Connecticut and Vermont).

45. Eight of the enacting jurisdictions are in the bottom third for religiosity, while the rest are in the middle third. *See infra* Figure 13.

46. All but Hawaii are in the top third for post-secondary educational attainment. *See infra* Figure 14.

47. *See infra* Part III.

preceded by a statewide law prohibiting discrimination based on sexual orientation. And in no Enacting Jurisdiction did the state constitution enshrine a ban against same-sex marriage. Notwithstanding these favorable conditions, marriage equality bills just barely squeaked over the line to enactment,⁴⁸ helped in part by religious liberty protections.⁴⁹

That advantageous political terrain is now nearly exhausted, as Part IV documents. In the thirty-one states that have not enacted same-sex marriage or recognized it by judicial decision (“Nonrecognizing States”), the characteristics that favored legislative recognition splinter and, in some places, vanish entirely. Where the Enacting Jurisdictions are heavily blue states, the Nonrecognizing States are heavily red states. Republicans occupy the Governor’s office in 24 states and control the legislature in twenty-six states, while splitting control in two others. More than 80% of the Nonrecognizing States rank among the top two-thirds of states for religiosity and the bottom two-thirds for educational attainment.⁵⁰ Only four Nonrecognizing States assure sexual orientation nondiscrimination by state law.⁵¹ And twenty-seven of the thirty-one Nonrecognizing States ban same-sex marriage in the state’s constitution, erecting a significant (but not impossible) hurdle to voluntary same-sex marriage recognition.⁵² Going forward, one would reasonably expect more robust religious liberty protections to play a central part in any legislative compromises over same-sex marriage, at least for the near term.

Part V evaluates the impulse of some opponents to dig in, resisting same-sex marriage at all costs. It first shows that constitutional amendments banning same-sex marriage do not provide the bulwark against change that some assume. Only a fourth of the constitutional amendment states (seven of the twenty-seven) erect a significant hurdle to removal of the ban. Moreover, while large swaths of the country today show deep resistance to same-sex marriage, public support is mushrooming. Increasing acceptance is fueled by increased familiarity with and acceptance of lesbians and gays by Americans. Public opposition will only recede further as the oldest

48. See *infra* Table 1 and Part II; Table A5.

49. See *infra* Part II.

50. See *infra* Part III and Table A4. Oregon, Alaska, Nevada, Wyoming, Colorado, and Montana all rank in the bottom one-third for religiosity, while Oregon, Virginia, and Colorado rank in the top one-third for post-secondary educational attainment. See *infra* Figures 18, 19.

51. See *infra* Figure 20 (showing Oregon, Nevada, Colorado, and Wisconsin).

52. See *infra* Figure 21 (showing that Wyoming, Indiana, West Virginia, and Pennsylvania do not ban same-sex marriage in the constitution).

generation passes on.⁵³ Thus, “[t]ime is on the gay-rights side.”⁵⁴ At some point, public support will swamp those characteristics that augur against same-sex marriage recognition, making enactment of same-sex marriage in the absence of religious liberty protections possible—at least in the 20 states where state constitutions can be readily amended.⁵⁵ One should not overlook the fact that court decisions striking bans under the federal constitution have already occurred in red states, creating yet more urgency to compromise now.⁵⁶

Part VI concludes that, in the tougher political terrain that looms, those who care about marriage equality can continue to sew up legislative victories—but the price tag in the short term will be to agree to robust religious liberty protections for dissenters.⁵⁷ Concededly, many believe that the early judicial decisions striking down marriage bans portend a favorable Supreme Court decision in the near term. Although that result is increasingly likely, it is nonetheless not assured. Moreover, if the lower federal courts uniformly strike down marriage bans, that success in the courts may, ironically, delay ultimate resolution by the Supreme Court, which often declines review until a meaningful circuit split arises.⁵⁸ Thus, marriage equality supporters continue to gain from the voluntary embrace of same-sex marriage.

The case for bargaining is even stronger for marriage equality opponents. Those who wish to protect religious objectors from the unintended consequences of same-sex marriage should act with all

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53. See *infra* Part II and Figs. 6–10; but compare note 156 (discussing Rice University study).
54. Dreher, *supra* note 40. See *infra* Parts II and V.
55. See *infra* Part I. See also Rachel Zoll, *Divide over Religious Exemptions on Gay Marriage*, AP, Aug. 25, 2013, <http://bigstory.ap.org/article/divide-over-religious-exemptions-gay-marriage> (quoting Douglas Laycock, a “church-state expert” from the University of Virginia who is recommending a more pragmatic course, as stating that “The more same-sex marriage seems inevitable, the less likely we are to see religious liberty protection in blue states”).
56. See *supra* Part V (discussing the deeply red character of Oklahoma and Utah, where court decisions striking state constitutional bans are presently stayed).
57. See Zoll, *supra* note 55 (quoting Douglas Laycock as stating that, “The religious community would have done much better to ask for protection for their religious liberty instead of trying to stop same-sex marriage and try to prevent it for everybody . . .”).
58. Emily Grant, Scott A. Hendrickson, & Michael S. Lynch, *The Ideological Divide: Conflict and the Supreme Court’s Certiorari Decision*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138211&download=yes.

deliberate speed to lock in robust religious liberty protections because the window for securing them is almost certainly closing. But that window will not, as some predict, slam shut if the U.S. Supreme Court recognizes same-sex marriage as a federal constitutional right in 2015 or later. The same factors that make the legislative terrain going forward difficult suggest that red states will be able to enact religious liberty protections, if for no other reasons than they will have the naked power to do so. And even after this point, same-sex marriage opponents will still have some bargaining leverage if they are willing to provide a promise of non-discrimination based on sexual orientation as the quid pro quo for religious liberty protections.

This focus on the pragmatic value of bargaining should not detract from principled arguments favoring a live-and-let-live regime that both respects marriage equality and religious diversity. The same fundamental values of personal liberty that support an individual's right to live according to his or her religious convictions also support an individual's right to follow and fulfill his or her essential identity, including sexual identity and same-sex relationships.⁵⁹

I. THE IMPORTANCE OF BARGAINING BEFORE JUDICIAL ACTION

Same-sex marriage opponents are running a race against time. As Parts II and III will show, in the next decade, swelling public support for same-sex marriage will swallow nearly all opposition to enacting it. This will likely eliminate, in the not too distant future, the need for supporters to bargain around religious liberty and same-sex marriage.⁶⁰ The more immediate threat to the opportunity to seek

59. Professor Chai Feldblum (now a Commissioner for the U.S. Equal Employment Opportunity Commission) argues that the “identity liberty” same-sex couples have in marriage and the “belief liberty” objectors have in their religious tenets are both fundamental values that deserve protection, however, these values can come into direct conflict when civil rights laws require one to accommodate the other. *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in EMERGING CONFLICTS, *supra* note 30, at 123, 157. Professor Feldblum concludes that the demand of civil rights laws “can burden an individual’s belief liberty interest” but that “[a]cknowledging [the burden’s impact] . . . does not necessarily mean that [civil rights] laws will be invalidated or that exemptions . . . will always be granted to individuals holding such beliefs.” *Id.* at 125; *see also* Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL’Y 206, 219–20, 230–32 (2010) (engaging Feldblum’s argument); *see also* Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV., IN BRIEF 1 (2013) (noting that religious freedom and marriage equality both seek to protect minorities that have been historically oppressed).

60. *See infra* Parts II and III. Mushrooming public support may lead not to just successful enactment of marriage equality legislation, but to voter

compromise is a judicial decision by a state or federal court authorizing same-sex marriage. While the U.S. Supreme Court could resolve the federal constitutional entitlement to same-sex marriage decisively,⁶¹ it is unlikely to do so until a meaningful circuit split arises and even then, not before 2015 at the earliest.⁶² Experience

led ballot initiatives as well. It is instructive that Maine, the only state to enact same-sex marriage by popular referendum to date, included tangible protections of dissenting religious organizations. *See infra* Table A1. Nonetheless, it is not at all clear that a ballot initiative will include adequately developed religious liberty protections. *See infra* Table A3. The absence of direct input of religious liberty scholars (to my knowledge), and the fact that (a) sponsors do not conduct hearings as legislators do, (b) interested parties do not have the opportunity with ballot sponsors to enlarge protections with specific constituents in mind (e.g., religiously affiliated social services agencies, like Catholic Charities), and (c) protections are not improved across the legislative cycle all auger against meaningful protections. *See infra* Parts II and III.

61. Constitutional challenges to marriage restrictions proceeded early on as challenges under state constitutional guarantees, while later challenges have now been brought under the U.S. Constitution as well. *Compare* Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that the Connecticut’s state constitution was violated by restricting marriage to heterosexual couples), *and* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that limitations for the protections of same-sex individuals violated Massachusetts’ state constitution), *with* Bishop v. United States ex rel. Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014) (holding that Oklahoma’s amendment prohibiting same-sex marriage violated the U.S. constitution), *and* Kitchen v. Herbert, No. 2:13-cv-217, 2013 WL 6697874, at *30 (D. Utah Dec. 20, 2013) (holding that Utah’s amendment prohibiting same-sex marriage violated the U.S. constitution). Dean Erwin Chemerinsky believes that early constitutional challenges under state constitutional guarantees delivered important, early judicial wins to advocates, without the threat of a federal court of appeals or Supreme Court decision going the other way. *See* Erwin Chemerinsky, Keynote at the U.C. Davis Law Review Symposium, Not Equal Yet: Building Upon Foundations of Relationship Equality (Feb. 7, 2014). A decision from a U.S. Circuit Court of Appeals under federal constitutional guarantees would answer the question dispositively in that circuit, absent a contrary ruling from the U.S. Supreme Court. For example, a decision in the 10th Circuit would encompass Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.
62. *See supra* note 58 (discussing the importance of circuit splits to Supreme Court decisions to grant review); Liptak, *supra* note 11 (“Whatever the Supreme Court does regarding a stay, it is hard to see how it could hear the larger issue in the case in the current term. But a decision in the court’s next term, culminating in a decision in June 2015, is entirely possible.”). For a discussion of avoiding unintended consequences on bargaining of a Supreme Court decision, see Robin Fretwell Wilson and Anthony Kreis, *Balancing marriage equality with other social goods*, SCOTUSBLOG (Aug. 22, 2011), <http://www.scotusblog.com/2011/08/balancing-marriage-equality-with-other-social-goods/> (“But if the Supreme Court does weigh in here, an unintended consequence of its

shows, however, that a state-specific judicial decision removes the urgency to bargain in order to secure legislative recognition of same-sex marriage in that state.⁶³

decision may be to strangle the delicate process unfolding in state legislatures across the country by changing the political calculus for granting robust accommodations. If the Court recognizes a federal constitutional right to same-sex marriage, it should take care to leave a space for individual states to continue to decide how best to balance marriage equality with other goods in society.”); *see also* Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV., IN BRIEF 1 (2013) (arguing that if the Court recognizes same-sex marriage (as they argue it should), it should expressly endorse religious liberty protections); Douglas Laycock & Thomas C. Berg, BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF THE INDIVIDUAL RESPONDENTS ON THE MERITS (2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/Marriage-Cases-AJC-Brief-Final.pdf>.

Some believe that if the Court constitutionally recognizes same-sex marriage, religious objectors will be in the place of asking for concessions because “now *they* are the ones who are the outliers hoping to be accommodated.” *See* Steven D. Smith, *Die and Let Live? The Asymmetry of Accommodation* (manuscript at 10) (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484801. As Part V explains, the more challenging terrain facing marriage equality advocates going forward will place a premium on granting religious liberty protections even after a Supreme Court decision. In the perfect world, those protections would be tied to mutual benefit to the lesbian, gay, bisexual, and transgender (LGBT) community, like a promise of nondiscrimination in state law.

63. A judicial decision recognizing same-sex marriage means that advocates need not bargain around religious liberty protections in order to achieve marriage equality. After a judicial decision, legislators may resist codifying legislation, worried that including religious liberty protections may be seen as chipping away at the broader right established by the court. *See infra* Part II. That dynamic is seen most vividly in New Jersey.

In October 2013, New Jersey joined those states recognizing same-sex marriage by judicial intervention. *See* *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (permitting same-sex marriage in New Jersey). Three weeks later, state officials dropped the state’s appeal of the decision. *See* *Dismissal of Appeal*, App Div. Doc. No. A-0521-13 (N.J. Super. Ct. Law Div. Oct. 21, 2013), available at: <http://www.judiciary.state.nj.us/samesex/AG%20Withdrawal%20of%20Appeal%20102113.pdf>. Only 8 months before, Governor Christie vetoed a 2012 same-sex marriage bill that contained modest religious liberty protection for organizations. *See* Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19. The provision would have protected religious institutions against civil suit or government penalty for refusing to “provide space, services, advantages, goods, or privileges related to the solemnization, celebration or promotion of marriage if such solemnization, celebration or promotion of marriage is in violation of the beliefs of such religious society, institution or organization.” S.B.1, 215th Leg. (N.J. 2012) (enacted).

As Figure 1 shows, state and federal courts are handing down judicial decisions more readily after *Windsor*.⁶⁴ As of this writing, seven states⁶⁵ (California,⁶⁶ Iowa,⁶⁷ Massachusetts,⁶⁸ New Jersey,⁶⁹ New Mexico,⁷⁰ Oklahoma,⁷¹ and Utah⁷²) have recognized same-sex marriage by judicial decision (“Judicial Decision States”).

In the weeks after *Garden State Equality v. Dow*, legislators considered whether to override the Governor’s veto, which would have placed that modest religious liberty protection into law. When the window for overriding the governor’s veto closed, Senators Loretta Weinberg and Raymond J. Lesniak introduced Senate Bill 3109 on December 12, 2013 to “codify the ruling . . . in *Garden State Equality v. Dow*.” S.B. 3109, 215th Leg. (N.J. 2013) (enacted), *available at* http://www.njleg.state.nj.us/2012/Bills/S3500/3109_I1.PDF. Intending to “leave decisions about religious marriage to religions, and to uphold the free exercise of religion,” SB 3109 included a limited exemption for religious organization identical to the one that Governor Christie vetoed. As noted in the Introduction, Weinberg, under pressure from same-sex marriage advocates, withdrew the bill.

Of course, this could have unfolded differently, as it did in Connecticut where the legislature followed on the heels of a same-sex marriage decision with legislation codifying the result and protecting religious liberty. *See infra* note 66 and Table A1.

64. As of Jan. 16, 2014, there have been four decisions recognizing same-sex marriage since *Windsor*, in New Jersey, New Mexico, Utah, and Oklahoma. *See cases cited supra* note 8.
65. In addition to these seven Judicial Decision States, same-sex marriage was also originally recognized in Connecticut by judicial decision. *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (concluding that the state statutory scheme impermissibly discriminated against gay persons). However, Connecticut is not treated here as a Judicial Decision State because the state enacted same-sex marriage legislation following the *Kerrigan* decision. *See infra* note 91 and Table A1.
66. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (holding in June 2013 that private parties lacked standing to appeal lower court decisions finding unconstitutional California’s state constitutional same-sex marriage ban, permitting California to resume same-sex marriages).
67. *See Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (holding that the Iowa marriage statute limiting marriage to one man and one woman violated the equal protection clause of the Iowa Constitution).
68. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that barring an individual from civil marriage simply because the person will marry someone of the same sex violated the Massachusetts Constitution).
69. *See Garden State Equality v. Dow*, 82 A.2d 336 (N.J. Super. Ct. Law Div. 2013) (striking down New Jersey’s civil union statute, which provided the only relationship recognition for same-sex couples, as violative of the New Jersey Constitution and requiring the state to permit same-sex couples to marry).
70. *See Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (authorizing same-sex marriage in New Mexico).

Same-sex marriage by judicial decision alone is the real “nightmare for religious liberty” that opponents fear.⁷³ As Figure 2 shows, judicial decisions leave religious objectors the most exposed.⁷⁴

FIGURE 2: Degrees of Protection in Same-Sex Marriage States

Six of the seven Judicial Decision States give *no* protection to religious objectors that objectors did not already have prior to the

71. See *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014) (declaring that the Oklahoma constitutional Amendment precluding same-sex couples from receiving a marriage license violates the Fourteenth Amendment to the U.S. Constitution).
72. See *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *30 (D. Utah Dec. 20, 2013) (declaring that the amendment to the Utah constitution violated the Fourteenth Amendment of the U.S. Constitution).
73. Ryan T. Anderson, *In Illinois, Redefining Marriage Threatens Marriage and Religious Freedom*, THE FOUNDRY, (Jan. 4, 2013, 1:16 PM), <http://blog.heritage.org/2013/01/04/in-illinois-redefining-marriage-threatens-marriage-and-religious-freedom/> (“As my Heritage Foundation colleague Tom Messner has documented again, and again, and again, redefining marriage has already been—and will continue to be—a nightmare for religious liberty.”).
74. After state courts in Iowa and Massachusetts held that their respective state constitutions required the recognition of same-sex marriages, the state legislatures did not revisit preexisting nondiscrimination law. See Zoll, *supra* note 55 (“Massachusetts and Iowa, where same-sex marriage won recognition through the courts, have approved no enhanced religious exemptions related to the rulings.”). California’s legislature enacted minimal protections as litigation over Prop 8 worked its way through the courts, resulting in the *Hollingsworth* decision. See *infra* Tables A1 and A3.

decisions (Iowa, Massachusetts, New Jersey, New Mexico, Oklahoma, and Utah).⁷⁵ The one Judicial Decision State that does give new statutory protections specific to marriage, California, did so by legislation, as noted below. The failure of the judiciary to protect religious objectors is hardly that fault of the courts. Courts lack the inherent ability of legislatures to conduct hearings and take testimony about how to balance competing goods in a plural society. Moreover, protecting religious objectors is not the issue presented in cases establishing a right to same-sex marriage.

Contrast this with the Enacting Jurisdictions. The Enacting Jurisdictions placed into law statutory protections specific to marriage⁷⁶ that, while imperfect, generally insulate religiously

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75. Some same-sex marriage decisions acknowledge the possibility of an impact on something other than solemnization of the marriage itself. *See, e.g., Griego v. Oliver*, 316 P.3d 865 (N.M. 2013) (“Our holding will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to *change its policies* to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs.” (emphasis added)). *Griego* cites N.M. STAT. ANN. § 28-1-9(B) & (C) (1978 & Supp. 2012), which exempts religious organizations from the New Mexico Human Rights Act, to support its holding. But judicial decisions have not, and cannot, provide the kind of protection for religious dissenters that have been forthcoming from state legislatures.

Religious objectors may or may not receive protection from the state’s background nondiscrimination laws. For example, while Iowa’s background law insulates religious organizations when hiring for a “bona fide religious purpose,” Massachusetts’ public accommodation statute provides no express protection for religious organizations. IOWA CODE ANN. § 216.7 (West 2013); *see* MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2000) (defining a public accommodation). The Massachusetts Supreme Judicial Court has interpreted the Massachusetts Constitution to require the application of strict scrutiny to free exercise claims. *See* Attorney Gen. v. Desilets, 636 N.E.2d 233, 236 (1994) (rejecting the Dep’t of Human Resources of Or. v. Smith, 494 U.S. 872 (1990), standard for free exercise claims under the Massachusetts Constitution and applying strict scrutiny). State Religious Freedom Restoration Acts (RFRAs) in the Judicial Decision States may provide some protection. *See* N.M. STAT. §§28-22-1 to 28-22-5 (2006); OKLA. STAT. ANN. tit. 51, §§251-258 (West 2010). The federal and state RFRAs all “facially require strict scrutiny of all substantial burdens on religious practices.” Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999) (arguing that while “RFRAs have more specific, binding text than does the Free Exercise Clause,” they leave open a number of questions). *See also* Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

76. Religious objectors may receive some protection from the state’s background laws. In three Enacting Jurisdictions, a state RFRA, modeled on the federal RFRA, is also in place. *See* CONN. GEN. STAT.

affiliated nonprofits from private suit *and* government penalty for refusing to solemnize or celebrate a marriage if doing so would violate their religious beliefs, as Table A3 shows.⁷⁷ Protections, especially for religious nonprofits, are crucial because religious groups have faced both lawsuits and penalty by the government. For example, the Salvation Army lost \$3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to its employees' same-sex partners.⁷⁸ In Maine, Catholic Charities lost access to municipal development funds for similar reasons.⁷⁹ In New Jersey, a Methodist nonprofit association violated New Jersey's law against discrimination when the nonprofit

ANN. §52-571b (West 2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); R.I. GEN. LAWS §§42-80.1-1 to -4 (2006). In addition, three Enacting Jurisdictions (Maine, Minnesota, and Washington) have interpreted their state constitutions to protect against neutral and generally applicable laws that substantially burden religious belief or practice. *See* First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992); Cooper v. French, 460 N.W.2d 2 (Minn. 1990); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992). These generalized protections may or may not provide anything more than the statutory protections specific to marriage. But they are there, and people can invoke them in the marriage context.

Finally, the anti-discrimination law in several Enacting Jurisdictions give modest protection to religious organizations. *See* MINN. STAT. ANN. § 363A.26 (West) (2012) (providing accommodation to religious associations in matters relating “to sexual orientation, [when] taking any action with respect to education, employment, housing and real property, or use of facilities”); MD. CODE ANN., MD. STATE GOV'T § 20-604(2) (2011) (prohibiting discrimination in employment but exempting religious organizations); N.Y. EXEC. LAW § 11 (2011) (providing religious liberty accommodations for rental and housing in discrimination ban). In some cases, however, these laws provide little sanctuary for objectors.

77. *See* CONN. GEN. STAT. § 45b-35a (Supp. 2013); D.C. CODE § 46-406(e) (LexisNexis 2012); Md. H.B. 438 §§ 2-3 (West 2012) (codified as MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (2012)); MINN. STAT. ANN. § 517.09 (West 2013); N.H. REV. STAT. ANN. § 457:37(III) (West 2004); N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2014); R.I. GEN. LAWS ANN. § 15-3-6.1 (LexisNexis 2013); VT. STAT. ANN. tit. 8, § 4502(1) (2012); WASH. REV. CODE § 26.04.010(6) (West 2012). *See also infra* Table A3.
78. *See* Manny Fernandez & April Lynch, *Salvation Army Cuts S.F. Programs: Charity Spurs City's Domestic Partner Law*, S.F. CHRONICLE, June 4, 1998, at A1, A15 (providing details on the cuts to the Salvation Army in San Francisco for refusing to provide same-sex benefits for employees).
79. *See* Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding ordinance requiring religious charity to either extend employee spousal benefit programs to registered same-sex couples, or to lose eligibility for all city housing and community development funds).

association denied two same-sex couples' requests to use the group's boardwalk pavilion for their civil union commitment ceremonies.⁸⁰

In many Enacting Jurisdictions, religious individuals, universities, social services agencies, and fraternal organizations receive protections, as well.⁸¹ As Table A3 shows:

- Four jurisdictions allow the Knights of Columbus or other religious organizations to continue to offer an insurance product for spouses in heterosexual marriages (Vermont, New Hampshire, Maryland, and Rhode Island).
- Five jurisdictions expressly say religious organizations need not promote same-sex marriage through religious counseling or retreats (Maryland, DC, New Hampshire, Rhode Island, and Washington). Three extend this to married-couple housing (Minnesota, New Hampshire, and New York).
- Four jurisdictions allow religiously affiliated adoption agencies to continue to place children only with heterosexual married couples (Connecticut, Maryland, Minnesota, and Rhode Island); three condition the exemption on not receiving government funding for the program (Connecticut, Maryland, and Minnesota).
- Six states expressly exempt individual employees of a covered entity from celebrating or promoting same-sex marriages—while it is hard to imagine who this protects, think of a lawsuit filed against a church employee, instead of suing the church (Maryland, Minnesota, New Hampshire, New York, Rhode Island, and Washington).⁸²

80. *See* *Bernstein v. Ocean Grove Camp Meeting Ass'n*, OAL DKT. CRT 6145-09, 2012 WL 169302, at *1, 2 (N.J. Adm., Jan. 12, 2012) (“The Green Acres program is designed to preserve open space and the statutory scheme authorizes a tax exemption for non-profit corporations utilizing property for conservation or recreational purposes. One condition of the exemption is that the property be ‘open for public use on an equal basis.’”); *see also* Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR (June 16, 2008, 12:12 AM), <http://www.npr.org/templates/story/story.php?storyId=91486340>. The group also lost its exemption from ad valorem property taxes on the pavilion, but that loss was hastened by the group's own decision to tie its property tax exemption to a public lands program. Although the loss of a tax exemption expressly conditioned upon “public access” to a parcel of land hardly seems unfair, *see* Kreis & Wilson, *supra* note 21, tax-exempt religious groups fear that they may lose valuable benefits if their views of marriage become “disfavored.”

81. *See infra* Table A3; *see also infra* Part II for a discussion of the extent of protection for religious objectors in state same-sex marriage laws.

82. *See* Md. H.B. 438 §§ 2-3(b) (codified as Md. Code Ann., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012); Minn. Stat. Ann. § 517.09(3)(b)

- Six states specifically carry forward religious liberty protections present in the underlying anti-discrimination statute or state Religious Freedom Restoration Act (Delaware, Illinois, Minnesota, New York, New Hampshire, and Rhode Island).⁸³
- One state, Delaware, permits justices of the peace and judges to choose to solemnize only those marriages they choose to.⁸⁴

Until Delaware, no jurisdiction had provided protection to government officials. Where protections are lacking, justices of the

(West Supp. 2013); N.H. Rev. Stat. Ann. § 457:37(III); N.Y. Dom. Rel. Law. § 10-b (1); R.I. Gen. Laws Ann. § 15-3-6.1(c)(2)(e) (LexisNexis 2013); Wash. Rev. Code § 7(a)(i).

83. Legislation in Delaware, Illinois, Minnesota, New York, New Hampshire, and Rhode Island also contained “catch-all” protections, carrying forward existing preexisting exemptions in each state’s underlying statutory scheme barring discrimination. *See* N.H. REV. STAT. ANN. § 457:37 (West 2004) (“Nothing in this chapter shall be deemed or construed to limit the protections and exemptions provided to religious organizations under RSA 354-A:18.”); SF 925, 88th Legis. Reg. Sess. (Minn. 2013) (“This chapter does not alter or affect the protections or exemptions provided in chapter 363A for a religious association, educational institution, business, labor organization, place of public accommodation, employer, or other person.”); SB 10, 98th Gen. Assm. Reg. Sess. (Ill. 2013) (“Nothing in this Act is intended to abrogate, limit, or expand . . . the Illinois Human Rights Act or the Religious Freedom Restoration Act.”); 3. N.Y. Dom. Rel. Law § 10-b. (“Nothing in this section shall be deemed or construed to limit the protections and exemptions otherwise provided to religious organizations under section three of article one of the constitution of the state of New York.”); R.I. Gen. Laws Ann. § 15-3-6.1 (“Nothing in the marriage laws of this state shall be deemed or construed to limit the protections and exemptions provided to religious organizations under GL paragraph 28-5-6(7)(ii) and subsection 34-37-4.2(a)”). Delaware’s law provides that the same-sex marriage law “does not affect rights, duties or obligations that matured or were owed, penalties that were incurred, or proceedings that were begun, before its effective date.” Delaware Laws Ch. 19 (H.B. 75 2013); *see also* Table A3.

For Enacting Jurisdictions with state RFRAs, see *supra* note 76 (cataloging those Enacting Jurisdictions that had enacted state Religious Freedom Restoration Acts before same-sex marriage). For details of the sexual orientation nondiscrimination laws that preceded same-sex marriage recognition in the Enacting Jurisdictions, see Table A2.

84. *See* Del. Code Ann. tit. 13 § 106 (2013), <http://delcode.delaware.gov/title13/c001/sc01/index.shtml> (“[N]othing in this section shall be construed to require any person (including any clergyperson or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal.”).

peace have been told to “follow the law, whether you like it or not.”⁸⁵ The Iowa Attorney General told county recorders to effect same-sex marriages or face possible “legal actions”—like firing.⁸⁶ Judges in Iowa were told they have discretion to decide which marriages over which to preside, but they better not use that discretion in a biased way, notwithstanding sincerely held religious convictions.⁸⁷

Religious liberty protections obviously redound to the benefit of people who cannot, consistent with their religious beliefs, celebrate or assist with certain marriages.⁸⁸ Often overlooked is the fact that the

85. Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15 (“Daniel B. Winslow, chief counsel for Gov. Mitt Romney said . . . ‘If you hold true to your oath of office and follow the law, whether you agree with it or not, you will fulfill your duty as a justice of the peace.’ Mr. Winslow urged any justice with qualms about officiating for same-sex couples to resign.”).

86. Statement of the Iowa Attorney General Tom Miller, County Recorders must Comply with Supreme Court’s *Varnum* Decision (Apr. 21, 2009), available at http://www.state.ia.us/government/ag/latest_news/releases/apr_2009/Marriage_Stmnt.html (“We expect duly-elected county recorders to comply with the Iowa Constitution as interpreted unanimously by the Iowa Supreme Court, the highest court in Iowa. Our country lives by and thrives by the rule of law, and the rule of law means we all follow the law as interpreted by our courts—not by ourselves. We don’t each get to decide what the law is; that would lead to chaos. We must live by and follow what the courts decide.”).

87. See Kilian Melloy, *Iowa Magistrate to Stop Performing Marriages*, EDGE BOSTON, Apr. 23, 2009, <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=90310> (quoting Bob Brammer, a spokesperson for Iowa’s Attorney General’s office).

For an argument that protections for officials who can effectively block a couple’s access to marriage should be qualified by hardship to same-sex couples, see Wilson, *The Calculus of Accommodation*, at 1480 (criticizing an “exemption for government employees or officials—unqualified by hardship—[as possibly] erect[ing] a roadblock to marriage”); Douglas Laycock, *Afterword, in Emerging Conflicts*, *supra* note 30, at 200 (arguing that “[r]eligious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point”).

88. For many scholars, it is not enough to just protect religious objectors—the interests of same-sex couples must also be taken into account. A group of scholars with which I work has argued for qualified exemptions for individuals—that is, an exemption that allows individual religious objectors to step away from facilitating any marriage but only when a hardship will not result for those seeking a service. Religious organizations would be permitted to decline to solemnize or celebrate or facilitate a solemnization or celebration, or to recognize a marriage when doing so would violate the organization’s religious tenets, notwithstanding hardship to others. For the current text of the model protection, see Letter from Thomas C. Berg et al., to Hawaii State

same provisions benefit same-sex marriage advocates because they take a powerful argument away from marriage opponents.⁸⁹ Taken as a whole, these protections extend well beyond the church sanctuary and provide greater protection than what the Supreme Court has said is constitutionally commanded.⁹⁰ Even Maine, the only jurisdiction to recognize same-sex marriage by popular ballot, included some meaningful protections for dissenting religious organizations.⁹¹ Although the scope and contours of the protection granted by Maine

Senators (May 2, 2013), *available at* <http://mirrorofjustice.blogs.com/files/hawaii-special-session-letter-10-17-13.pdf> (providing model religious liberty protections). Under this proposal, the ability to object is not limited to same-sex marriage, but extends to objections for reasons of faith to any marriage—such as interfaith marriages or second marriages. *Id.*

89. See Robin Wilson, Op-Ed, *Rhode Island marriage law should shield religious liberty*, THE PROVIDENCE J., Feb. 13, 2011, at A19. One prominent gay rights leader, Jonathan Rauch, has pointed out, the smart move is to “bend toward accommodation,” not away from it. See Jonathan Rauch, *The Majority Report*, THE ADVOCATE (Nov. 19, 2010, 4:00 AM), http://www.jonathanrauch.com/jrauch_articles/the-emerging-gay-majority/ (arguing that gay marriage advocates adopt “two important strategic changes First, accept legal exceptions that let religious organizations discriminate against gays whenever their doing so imposes a cost we can live with. Second, dial back the accusations of ‘bigot’ and ‘hater’ Not every religious accommodation is valid, and it’s not always clear where to draw all the lines. But the smart approach is to bend toward accommodation, not away from it, whenever we can live with the costs.”).
90. See *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (holding that neutral and generally applicable laws do not violate the First Amendment no matter how much they burden an individual’s or organization’s exercise of religious liberty), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(4) (2006), *as recognized in* *Sossamon v. Texas*, 131 S. Ct. 1651 (2011). Whether the *Smith* decision was correctly decided or represents an improper restraint on free exercise remains a deeply contested question. See, e.g., David B. Frohnmayer, *Employment Division v. Smith: “The Sky That Didn’t Fall”*, 32 CARDOZO L. REV. 1655 (2011); Douglas Laycock, *The Religious Exemption Debate*, 11 RUT. J. L. & RELIGION 139, n.44 (2009); KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 138 (1995) (“The decision was statist and majoritarian in a virulent form. It was inadequate whether one focuses on individual liberty, church autonomy, or long-term benefit of the polity.”). For a discussion of possible challenges to religious liberty protections based on the Establishment Clause, see Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J. L. & SOC. POL’Y 318 (2010).
91. See *infra* Table A3.

and the Enacting Jurisdictions vary from state to state, all provide far more insulation than the alternative—a judicial decision alone.⁹²

Nothing prevents a legislature from following on the heels of a judicial decision with legislation that is more protective of religious objectors.⁹³ But at the date of this Article’s writing, only Connecticut and California have followed a judicial decision requiring recognition of same-sex marriage with legislation giving religious liberty protections.⁹⁴ Connecticut expressly allows a religious organization⁹⁵ to refuse to “provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request for such . . . is related to the . . . solemnization or celebration” of *any* marriage—for example, by hosting the wedding reception—when doing so would violate their religious tenets.⁹⁶ Connecticut also shields covered groups from private civil suits for refusing to solemnize or celebrate a marriage.⁹⁷ It further protects them from state action to penalize them or withhold benefits for such refusals.⁹⁸ Lastly, Connecticut expressly allows a religiously affiliated adoption or foster care agency to place children only with heterosexual married couples so long as they receive no government funding for that program.⁹⁹

92. For additional detail, see *infra* Table A3.

93. Connecticut passed legislation on the heels of a judicial decision requiring same-sex marriage. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); Table A1.

94. See S.B. 899, 145th Gen. Assemb., Reg. Sess. (Conn. 2009) (enacted); S.B. 1140 (Cal. 2012) (amended as Section 400 of the Family Code); see also Kreis & Wilson, *supra* note 21.

95. See CONN. GEN. STAT. ANN. § 46b-35a (West Supp. 2013) (covering “a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society”).

96. *Id.*

97. See *id.* (“Any refusal . . . shall not create any civil claim or cause of action . . .”).

98. See *id.* (“Any refusal . . . shall not . . . result in any state action . . .”).

99. See CONN. GEN. STAT. ANN. § 46b-35b (West Supp. 2013) (“Nothing . . . shall be deemed or construed to affect the manner in which a religious organization may provide adoption, foster care or social services if such religious organization does not receive state or federal funds for that specific program or purpose.”). For a discussion of an exodus from the marketplace when an exemption for religiously affiliated social services was not forthcoming see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-sex Marriage, and Other Clashes Between Religion, and the State*, 53 B.C. L. REV. 1417 (2012) (chronicling the exodus of Catholic Charities after 103 years).

California enacted stand-alone legislation after Proposition 8,¹⁰⁰ giving clergy unneeded protection from a duty to solemnize any marriage, if and when same-sex marriage became legal¹⁰¹—a protection that was more symbolic than substantive since the right to refuse is almost certainly secured to them by the First Amendment.¹⁰² California's stand-alone law also assured religious denominations that they could not lose their tax exemption if they refuse to solemnize any marriage. Because the stand-alone bill protects the tax-exempt status of religious denominations only when refusing to “solemnize” a marriage, a decision surely secured to religious denominations already,¹⁰³ it is highly doubtful whether the stand-alone bill adds anything to constitutional guarantees.

It should surprise no one that the Enacting Jurisdictions provide more meaningful shelter to religious objectors than California's stand-alone legislation—and certainly than judicial decisions alone. Bargaining power is at its zenith when one party can provide something the other wants.¹⁰⁴ In the Enacting Jurisdictions, same-sex marriage opponents demanded religious liberty concessions in exchange for support of same-sex marriage.¹⁰⁵

100. S.B. 1140 (Cal. 2012) (amended as Section 400 of the Family Code).

101. See Cal. Fam. Code § 400 (West Supp. 2013) (“Although marriage is a personal relation arising out of a civil, and not a religious, contract, a marriage may be solemnized by any of the following who is 18 years of age or older: (a) A priest, minister, rabbi, or authorized person of any religious denomination. A person authorized by this subdivision shall not be required to solemnize a marriage that is contrary to the tenets of his or her faith. Any refusal to solemnize a marriage under this subdivision, either by an individual or by a religious denomination, shall not affect the tax-exempt status of any entity.”).

102. Marc Stern, *Same-Sex Marriage and the Churches*, in EMERGING CONFLICTS, *supra* note 30; see also Corvino, *supra* note 26.

103. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694, 706–07 (holding that the ministerial exception, grounded in the First Amendment's Religion Clauses, applies to an employee who works in a church-affiliated entity (e.g., in a church school), based on an overall assessment of the role of the employee, which in turn derives partially from the church's own understanding of that role, barring recovery against the entity under the Americans with Disabilities Act).

104. See Sarah Eekhoff Zylstra, *Evangelicals' Favorite Same-Sex Marriage Law?* CHRISTIANITY TODAY (Jan. 17, 2014), <http://www.christianitytoday.com/ct/2014/january-web-only/evangelicals-favorite-same-sex-marriage-law-oklahoma-utah.html> (As Professor Laycock explains, “Somebody has to credibly say, ‘Give us a real religious liberty provision and we'll withdraw our opposition.’”).

105. See *supra* Introduction and accompanying note 24 (interviewing Rick Watrous); see also *infra* note 116 (interviewing Kach); Schuermann, *supra* note 21. Clearly, some legislators vote for same-sex marriage because they view it as the right thing to do. For example,

And same-sex marriage advocates gained from the exchange, too. Consider the legislative experience enacting same-sex marriage in Maryland, charted in Figure 3.

FIGURE 3: Maryland Same-Sex Marriage Legislation

In 2008,¹⁰⁶ and again in 2009,¹⁰⁷ bills with illusory, clergy-only exemptions failed.¹⁰⁸ In 2011, the Maryland House of Delegates again

Representative Heidi Schuermann of the Vermont House of Representatives explained: “I wanted to ensure that equality was there, but at the same time, I wanted to make sure that the language in the public accommodations act allowed [religious organizations] to keep doing the things they’ve always done.” *Id.*

106. H.B. 351, 425th Leg., 2008 Reg. Sess., (Md. 2008); S.B. 290, 425th Leg., 2008 Reg. Sess. (Md. 2008).

107. H.B. 1055, 426th Leg., 2008 Reg. Sess., (Md. 2009); S.B. 565, 426th Leg., 2009 Reg. Sess., (Md. 2009).

108. Compare H.B. 351, 425th Leg., 2008 Reg. Sess., (Md. 2008) (“That this Act may not be construed to require an official of a religious institution or body authorized to solemnize marriages to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”); and S.B. 290, 425th Leg., 2008 Reg. Sess., (Md. 2008) (“That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment of the United State Constitution and by the Maryland Constitution and Maryland Declaration of Rights.”) with H.B. 1055, 2008 Reg. Sess., 426th Leg. (Md. 2009) (“That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment of the United State Constitution and by the

introduced a clergy-only bill and sent it across to the Senate, which enlarged the protections and sent it back.¹⁰⁹ Those new protections ultimately proved insufficient to satisfy hold-out legislators, so the bill died.¹¹⁰

In 2012, Governor Martin O'Malley added more protections to the failed bill, this time shielding religious adoption agencies¹¹¹ in "a conscious attempt" to "pick up additional support in the House."¹¹² The Maryland House narrowly passed the Governor's bill, with a seventy-two to sixty-seven vote, and it cleared the Senate by an

Maryland Constitution and Maryland Declaration of Rights."); S.B. 565, 2009 Reg. Sess., 426th Leg. (Md. 2009) ("That an official of a religious institution or body authorized to solemnize marriages may not be required to solemnize any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment of the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights.")

Bills with such "hollow" protections have failed everywhere they have been tried. *See* Kreis & Wilson, *supra* note 21.

109. Compare the First Reading version of H.B. 175 and the First Reading version of S.B. 116, 2011 Reg. Sess., 428th Leg. (Md. 2011), <http://mgaleg.maryland.gov/2011rs/bills/sb/sb0116f.pdf> (restating constitutional protections for the clergy only) with the second iteration of the bill at third reading: S.B. 116, 2011 Reg. Sess., 428th Leg. (Md. 2011) (providing protections for religious organizations and religiously affiliated nonprofits from any requirement to facilitate marriages through accommodations, religious programs, counseling, educational courses, summer camps, and retreats). Senate Bill 116 was amended to immunize these groups from civil claims and government penalties, available at <http://mgaleg.maryland.gov/2011rs/bills/sb/sb0116t.pdf>.
110. Kreis & Wilson, *supra* note 21, at n.90 (quoting Maryland Delegate Pam Biedle, as saying that "[t]he Speaker took a whip count and we knew we were a couple votes short"); *see also* Luke Broadwater, *Md. Bishops Call On Catholics to Oppose Same-Sex Marriage*, BALTIMORE SUN (Nov. 9, 2011), http://articles.baltimoresun.com/2011-11-09/news/bs-md-catholic-call-20111109_1_religious-liberty-roman-catholic-bishops-religious-freedom (discussing a letter from Maryland's Roman Catholic bishops criticizing the pending same-sex marriage bill for failure to include more expansive religious liberty protections).
111. H.B. 438, S.B. 241, 2012 Leg., 430th Sess. (Md. 2012). The bill introduced on February 1, 2012, broadened the 2011 protections to encompass "promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs, unless State or federal funds are received for that specific program or service." *Id.*
112. John Wagner & Aaron C. Davis, *Governor Unveils Details of his Legislative Agenda*, WASH. POST, Jan. 24, 2012), at B5 ("Religious-exemption language included in O'Malley's same-sex marriage bill is intended to pick up additional support in the House of Delegates, where a bill fell unexpectedly short last year after clearing the Senate.").

equally slim margin, twenty-five to twenty-two.¹¹³ The law survived a referendum challenge, with 52.4% of Marylanders approving it.¹¹⁴

Additional protections made all of the difference to the 2012 bill's success. Maryland House of Delegates Speaker Michael Busch said that:

We didn't want to inhibit any religious organization from practicing their beliefs. One of the issues was the adoption issue. We wanted to make sure we didn't impede on the Catholic Church for adoption services. We had a clearer initiative in 2012 and I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision to vote for it.¹¹⁵

Speaker Busch was not alone in believing that religious liberty protections were critical to the bill's passage. A last-minute vote in support of same-sex marriage came from Republican Wade Kach, who explained that "[w]ithout the religious liberty provisions, I would not have voted for the bill."¹¹⁶ Others in the legislature thought that Delegate Kach would never vote for the bill.¹¹⁷ Delegate John Olszewski, a "devoted Methodist [who] was worried about churches that did not want to perform same-sex marriages,"¹¹⁸ delivered an equally crucial vote. He said that his support solidified between 2011 and 2012 because of "the attention to the religious institution

113. *See House Bill 438; Senate Bill 241*, GENERAL ASSEMBLY OF MARYLAND (2012), <http://mgaleg.maryland.gov/webmgaleg/frmMain.aspx?tab=subject3&ys=2012rs/billfile/hb0438.htm>.

114. *See 2012 Presidential General Election Results*, MARYLAND.GOV (Nov. 28, 2012, 8:56 AM), http://elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0006S-.html.

115. Telephone Interview by Anthony Kreis with Michael Busch, Speaker of the Md. House of Delegates (July 3, 2012).

116. Telephone Interview by Anthony Kreis with Wade Kach, Member of Md. House of Delegates (Nov. 30, 2012).

117. Telephone Interview by Anthony Kreis with Luke Clippinger, Member of Md. House of Delegates (Nov. 19, 2012) (describing Wade Kach as a vote same-sex marriage advocates "never thought we would get").

118. *See Annie Linskey, Searching Souls on Gay Marriage; In the Face of Formidable Pressure, Six Delegates Cast the Deciding Votes*, BALTIMORE SUN, Feb. 19, 2012, at 1A. (noting that Del. Olszewski's vote was needed to push "the vote count past the 71 needed to pass the measure").

protections.”¹¹⁹ Had three votes gone the other way, a bill that passed seventy-two to sixty-seven would have failed sixty-nine to seventy.¹²⁰

Religious liberty provisions may have mattered to the referendum’s success as well. The ballot text emphasized religious liberty freedoms. While the extent to which Maryland voters understood and accounted for the religious liberty protections in the Civil Marriage Protection Act is unknown, supporters emphasized them in the run up to the referendum.¹²¹ Governor O’Malley emphasized that there are “strong religious freedom protections for people of all faiths” in Maryland’s same-sex marriage legislation.¹²²

In short, proponents succeeded when they expanded and honed religious liberty protections. Of course, New York’s watershed law six months before the 2012 session,¹²³ the active involvement of Governor O’Malley,¹²⁴ and growing public support for same-sex marriage certainly also factored in.¹²⁵

119. Telephone Interview by Anthony Kreis with John Olszewski, Member of the Md. House of Delegates (June 14, 2012).

120. *See House Bill 438; Senate Bill 241*, General Assembly of Maryland (2012), <http://mgaleg.maryland.gov/webmg/frmMain.aspx?tab=subject3&ys=2012rs/billfile/hb0438.htm>. *See also* Linskey, *supra* note 118.

121. *See, e.g.*, Gene Robinson, *Liberty and Justice for All in Maryland*, ON FAITH (Oct. 10, 2012), <http://www.faithstreet.com/onfaith/2012/10/10/liberty-and-justice-for-all-in-maryland/10097> (endorsing Maryland’s same-sex marriage legislation and stating “Maryland is one of many states that has demonstrated the freedom to marry and the freedom to worship are wholly compatible with one another”).

122. *Gov. Martin O’Malley for Question 6*, YOUTUBE (Nov. 3, 2012, at 0:18), <http://www.youtube.com/watch?v=Eo95lDAiBEU>; *see also Protecting Religious Freedom and All Marylanders: Rev. Donté Hickman*, YOUTUBE (Oct. 3, 2012, at 0:23), <http://www.youtube.com/watch?v=-SYSVSQnTnA> (supporting the Maryland same-sex marriage law as “protecting religious freedom and all Marylanders equally under the law”).

123. *See, e.g.*, Busch, *supra* note 115 (“Once [same-sex marriage legislation] passed in New York on a bipartisan basis that helped, too.”).

124. Maryland’s experience began with key legislators taking the lead on crafting religious liberty protections. Later, Governor O’Malley, like Governor Cuomo, guided the crafting of religious liberty protections and championed the underlying legislation. *See* Annie Linskey, *O’Malley introduces same-sex marriage bill*, BALT. SUN (Jan. 23, 2012), http://articles.baltimoresun.com/2012-01-23/news/bs-md-same-sex-bill-20120123_1_marriage-bill-religious-protections-marriage-debate (“O’Malley last year said he would sign a same-sex marriage bill if it passed the General Assembly, but he did not include such legislation in the administration’s package. This year, he has said he will lead the fight for the bill.”).

125. *See* Amanda Terkel, *Maryland Marriage Equality Poll Shows Increased Support From African-American Voters*, HUFFINGTON POST (Aug. 2, 2012, 11:05 AM), http://www.huffingtonpost.com/2012/08/02/maryland-marriage-equality_n_1732555.html (noting the shifting popular opinions

Like Maryland, in all Enacting Jurisdictions with the exception of two (Minnesota and Delaware), the successful legislation resulted after unsuccessful attempts to enact same-sex marriage *with* purely symbolic religious liberty protection limited only to the clergy.¹²⁶ Only after ponying up more robust, if imperfect, religious liberty protections did advocates achieve their goal.

Maryland's experience is typical of the progression of successful legislation thus far. Religious liberty protections expand over the course of legislative consideration. Only in Delaware did religious liberty protections not improve over the course of legislative consideration.¹²⁷ In Judicial Decision States, however, there is no opportunity for give-and-take over religious liberty protections—absent a later codifying bill.

Some critics say that bargaining for religious liberty protections has “gotten exactly nowhere”—lumping together tangible protections for religious organizations with the almost nonexistent protections for individuals.¹²⁸ Now, it is abundantly clear that existing religious liberty protections do not go far enough to protect individuals outside religious organizations. Legislators have largely ignored the plight of judges, government employees, and those in the wedding industry who cannot assist with a same-sex marriage because of a “relationship with Jesus Christ”¹²⁹—or for any other sincerely held religious reason.¹³⁰ Individuals “find little asylum outside the walls of their

towards same-sex marriage and that “a growing majority of state voters say[] they would . . . uphold a state law legalizing same-sex marriage. . . [in addition to rising] support among African-Americans”); *see also* Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What it Means*, N.Y. TIMES (Mar. 26, 2013, 10:10 AM), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/> (discussing the trend of public opinion on same-sex marriage between 1996 and 2013). *See generally infra* Part II; Table A5.

126. *See* Kreis & Wilson, Embracing Compromise, *supra* note 21.

127. *Id.*

128. *See* Franck, *infra*, note 37.

129. For example in Washington, a small florist, Arlene Flowers, which had served a same-sex couple for a decade, now faces lawsuits from the state attorney general and the couple for refusing to provide flowers for the couple's wedding because of the owner's “relationship with Jesus Christ.” Joel Connelly, *AG Sues Florist Who Refused Flowers to Gay Wedding*, SEATTLE POST-INTELLIGENCER (Apr. 9, 2013), <http://blog.seattlepi.com/seattlepolitics/2013/04/09/ag-sues-florist-who-refused-flowers-to-gay-wedding/>.

130. *See* Wilson, *supra* note 89 (discussing firings and other discipline of government clerks who could easily be staffed around without undue burden to employers or coworkers); *see also* Wilson, *supra* note 99 (describing

churches,”¹³¹ facing the cruel choice: your livelihood or your conscience.¹³² In effect, without protections, there is the real possibility that members of a number of Christian, Jewish, and other religious groups will effectively be debarred from certain professions relating to weddings.¹³³

Nonetheless, circumscribed as they are, religious liberty protections in the Enacting Jurisdictions have netted out to the gain of religious organizations. While critics legitimately fault state lawmakers for not providing all of the religious liberty protections that some urge,¹³⁴ it simply is not true that the legislative process has yielded nothing for religious objectors. As the remainder of this Article documents, acting proactively to lock-in religious liberty protections will pay dividends for all.

II. A (CLOSING) POLITICAL WINDOW FOR SECURING RELIGIOUS LIBERTY

In the past decade, support for same-sex marriage has escalated, a phenomenon that will only continue. This Part, along with Part III, demonstrates that increasing support, propelled by a constellation of characteristics in the Enacting Jurisdictions, produced a favorable environment for enacting same-sex marriage legislation.

Over the last five years, there has been a tremendous shift in favor of support for same-sex marriage. Nate Silver, a statistician whose modeling has accurately predicted the results of many same-sex

methods for staffing around religious objectors that are invisible to the public, preserving the dignity interests of same-sex couples).

131. Dreher, *supra* note 40, at 12, 15.

132. Matthew J. Franck, *Same-Sex Marriage and Religious Freedom, Fundamentally At Odds*, WITHERSPOON INSTITUTE (June 18th, 2013), <http://www.thepublicdiscourse.com/2013/06/10393/> (“No state, on the other hand, has credited or accommodated the religiously grounded objections of other private actors—professionals or small business owners—to being dragooned into offering their services on the wedding day to same-sex couples. There are several well-known cases of bakers, photographers—even a religious nonprofit property owner—facing grave legal jeopardy for their refusal to offer their services or facilities in contradiction of their felt obligations to witness to the truth about marriage as it is taught by their faith.”).

133. See Laycock, *supra* note 87 (chronicling the historical barring of Catholics from certain professions in England and Ireland, and Jews elsewhere). Stated differently, without protections specific to marriage, there will be no Evangelical photographers, Orthodox Jewish florists, and the like.

134. See *supra* note 88 (proposing model religious liberty protections specific to marriage ceremonies or recognition).

marriage ballot initiatives,¹³⁵ analyzed results from 2008 exit polls in three states.¹³⁶ From that data, he distilled more than a dozen characteristics that were influential to public support or opposition to same-sex marriage; he extrapolates from those characteristics to predict how other jurisdictions would have viewed same-sex marriage if polled in 2008.¹³⁷ Figure 4 shows Silver's calculations for 2008.¹³⁸

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135. See Nate Silver, *The Future of Same-Sex Marriage Ballot Measures*, THE N.Y. TIMES (June 29, 2011, 10:35 AM), <http://fivethirtyeight.blogs.nytimes.com/2011/06/29/the-future-of-same-sex-marriage-ballot-measures/>; Professor Erwin Chemerinsky, Keynote Speech at UC Davis Law Review Symposium (Feb. 7, 2014), *available at* <http://mediasite.ucdavis.edu/Mediasite/Play/29ec228147e74da09625f244b3de28081d>. (Professor Chemerinsky named Nate Silver “if not the best, then the most prominent pollster.”).
136. Silver, *supra* note 135 (analyzing “individual-level survey results from exit polls in 2008 in the three states that voted on same-sex marriage ballot initiatives that year (California, Florida, and Arizona). Each of these states are quite demographically diverse, and among them more than 5,000 voters were surveyed in the 2008 exit polls.”)
137. *Id.* (explaining his regression analysis: “[i]n essence, the technique is to predict how likely an individual voter is to support same-sex marriage given their particular demographic profile”).
138. A literature suggests that ballot exit polls after elections better predict actual views of voters than telephone or other polls because of what is known as the Bradley Effect. The term comes from an election contest for Governor of California in 1982 between African-American mayor of Los Angeles, Tom Bradley, and white opponent, George Deukmejian, in which polls before the election showed measurably more support for Bradley. “Analysts assume that one reason for the discrepancy between the polls and the election result was that white supporters of Deukmejian were reluctant to appear intolerant to survey researchers and thus falsely reported being ‘undecided.’” Patrick Egan, *Is There Really a “Bradley Effect” for Same-Sex Marriage Initiatives?* (Sept. 22, 2008) *available at*: http://politics.as.nyu.edu/docs/IO/4819/Egan_Bradley_Effect_in_SSM_Initiatives.pdf. As to polling about same-sex marriage, Egan believes “a careful analysis of polling data and election results indicates that if any such ‘Bradley effect’ exists with regard to same-sex marriage initiatives, it is small—and in 2006 it was effectively zero.” *Id.*; see also Patrick J. Egan, *Findings from a Decade of Polling on Ballot Measures Regarding the Legal Status of Same-Sex Couples* (June 15, 2010) *available at* <http://www.haasjr.org/sites/default/files/Marriage%20Polling.pdf>.

FIGURE 4: Projected Support for Same-Sex Marriage in Ballot Initiative (2008)

Figure 4 shows support in lighter shades and opposition in darker ones. Support exceeded 50% in only nine states located in the Northeast—not surprisingly, the incubator of same-sex marriage laws. In the remaining states, support was below 50% and in twenty-one states, below 39%.

Using the 2008 baseline, Silver projected support, state-by-state, into the present (gauged by his projections for 2012) and out as far as the year 2020.¹³⁹ Figure 5 documents a drastic change in public support between Silver’s estimates in 2008 and projections in 2012.

139. *Id.*

FIGURE 5: Projected Support for Same-Sex Marriage Ballot Initiative (2012)

By 2012, according to Silver's projections, in twenty-one jurisdictions, a majority of the population supported same-sex marriage (those in the lighter shades). In three jurisdictions, Rhode Island, D.C., and Massachusetts, support ranged as high as 63%. Only seven states showed support below 39%, with a total of thirty states having support below 50%.

Of course, Silver's estimates of support for same-sex marriage in 2008 and 2012 may be too generous or even too stingy. Yet, Silver's projections mesh with other reported increases in support for same-sex marriage. According to Gallup, public support has risen consistently since 1996.¹⁴⁰ In 1996, only twenty-seven percent of Americans believed that marriages between same-sex couples should be legally recognized, providing the same rights as traditional marriages.¹⁴¹ By

140. See Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP POLITICS (May 13, 2013), <http://www.gallup.com/poll/162398/same-sex-marriage-support-solidifies-above.aspx> (telephone interviewing those 18 and older living in all states and D.C. Gallup weights samples to adjust for "unequal selection probability, nonresponse, and double coverage of landline and cell users in the two sampling frames. They are also weighted to match the national demographics of gender, age, race, Hispanic ethnicity, education, region, population density, and phone status").

141. *Id.* ("27% in Gallup's initial measurement on gay marriage, in 1996."). Gallup asked a random sample of 1,535 adults in a May 2–7, 2013, phone interview the following: "Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?" Fifty-three percent responded that

2004, that slice grew to 42%, before falling to 37% the next year—a wobble up and down that nonetheless continued in an upward trend

it “should be valid”; 45% responded that it “should not be valid”; and 3% had “no opinion.” Jeffrey M. Jones, Same-Sex Marriage Support Solidifies Above 50% in U.S.: Support Has Been 50% or Above in Three Separate Readings in Last Year, Gallop Politics (May 13, 2013), <http://www.gallup.com/poll/162398/sex-marriage-support-solidifiesabove.aspx>.

Mere months later, pollsters at Quinnipiac University asked 1,776 American adults in a phone interview to land lines and cell phones in September 2013, “Would you support or oppose a law in your state that would allow same-sex couples to get married?” and reported that for all adults, 56% would support it, 36% would oppose it, and 8% did not know. Views of registered voters tracked these findings closely, splitting 57%, 36%, and 6%, respectively. *U.S. Catholics Back Pope on Changing Church Focus, Quinnipiac University National Poll Finds; Catholics Support Gay Marriage, Women Priests 2–1*, Quinnipiac University (October 4, 2013), available at <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1961>. It should surprise no one that results may differ since responses are sensitive to how a particular question is framed and the questions that precede it. For a survey finding significantly less support, see Pew Research Center, *infra* note 157 (discussing longitudinal study of Americans by Rice University). The well-known Bradley Effect may influence stated support. *See* Egan, *supra* note 138.

Some also point out that Gallup’s question followed a question that asked whether “gay or lesbian relations between consenting adults should or should not be legal” and suggest that the order of questions may boost stated support as a result of “priming.” Mark Regnerus, *What Polls Really Say About Gay Marriage*, CHICAGO SUN-TIMES (Aug. 20, 2013), <http://www.suntimes.com/news/otherviews/22053066-452/what-polls-really-say-about-gay-marriage.html> (citing *Neus That Matters*, by political psychologists Donald Kinder and Shanto Iyengar that “document[s] how priming shapes respondents’ answers to subsequent questions, particularly where sentiments about a previous question spill over”).

In its briefs about same-sex attitudes, Gallup presents “Trends for Comparison” to illustrate responses when the same-sex marriage question followed a sexual relations question and when it did not. Jeff Jones & Lydia Saad, Gallop News Service: Gallup Poll Social Series: Values and Beliefs Gallop Politics (May 2–7, 2013) http://www.gallup.com/file/poll/162404/Gay_marriage_130513.pdf. There, a quick review of those answers shows skewing, but in different directions at different times. Thus, in an August 22–25, 2005, poll in which the same-sex marriage question was preceded by the sexual relations question, 37% said same-sex marriage “should be valid.” *Id.* at 2. A contemporaneous survey conducted on April 29–May 1, 2005, asking only the marriage question found that slightly more, 39%, said it should be valid. By contrast, in 2004, 42% responded that same-sex marriage “should be valid” in a survey that first asked about the legality of sexual relations. In a contemporaneous survey with only the marriage question, 33% said it should be valid. *Id.* at 2 (reporting results of polls in May 2–4, 2004, and March 5–7, 2004, respectively).

for several years.¹⁴² By the end of 2010, a majority of those polled believed that “marriages between same-sex couples should . . . be recognize[d] by the law.” And that number reached 53% in 2011. Gallop reported in May 2013 that support across the United States remained at or above 50% in “three separate readings in the last year.”¹⁴³

It is worth pausing to note the explanatory power of these statistics. Until 2012, same-sex marriage opponents had “won” twenty-nine consecutive constitutional amendments fights—putting aside Arizona’s 2006 failed constitutional amendment to ban same-sex marriage and civil unions both.¹⁴⁴ That streak ended abruptly in 2012 when opponents lost the referenda over Washington¹⁴⁵ and Maryland’s same-sex marriage laws,¹⁴⁶ failed to secure a constitutional amendment in Minnesota,¹⁴⁷ and Maine voters enacted same-sex marriage at the ballot box¹⁴⁸—all of which occurred after the tide of national public opinion had shifted in favor of same-sex marriage.

Silver projects that this uptick in support will only continue. As Figure 6 shows, by 2016, more than half of all voters in a clear majority of jurisdictions, thirty-two, are projected to support same-sex marriage. Voters in only two states, Alabama and Mississippi, show support below 39%, while in nineteen states support remains below 50%. Silver projects that in thirteen states, more than 60% of voters will support same-sex marriage.

142. Jones, *supra* note 140 (presenting results of Gallup polling across time). Support grew to 46% by 2007 but fell again to 40% in years 2008 and 2009.

143. *Id.*

144. See Kreis & Wilson, *supra* note 21.

145. Voters sustained Washington’s law by a popular vote of 53% to 47% in the November 2012 referendum. See Noah Michelson, *Minnesota Amendment 1 Same-Sex Marriage Ballot Measure Fails*, HUFFINGTON POST (Nov. 7, 2012, 7:41 AM), http://www.huffingtonpost.com/2012/11/07/minnesota-amendment-1-results-2012_n_2050310.html. See generally Table A5 for support in the state at the time of legislation.

146. See *supra* notes 121–124 and accompanying text (describing Maryland’s 2012 referenda supporting same-sex marriage). See generally Table A5 for support in the state at the time of legislation.

147. See Michelson, *supra* note 145 (“Minnesota voters voted against an amendment on Nov. 6 that would have defined marriage as being between a man and woman in the state’s constitution . . .”).

148. *2012 General Election Results for Maine*, BANGOR DAILY NEWS (last updated Nov. 14, 2012), <http://web.archive.org/web/20130118025105/http://maineelections.bangordailynews.com/> (47.4% responded “no”) (accessed by searching for the original URL in the Internet Archive index).

FIGURE 6: Projected Support for Same-Sex Marriage in Ballot Initiative (2016)

By 2020, represented in Figure 7, Silver projects overwhelming support for same-sex marriage. At that point, only in Mississippi will support for same-sex marriage remain below 39%. In all states but six (South Carolina, Arkansas, Georgia, Louisiana, Alabama, and Mississippi), a majority of voters are projected to support same-sex marriage. In four of the latter (South Carolina, Arkansas, Georgia, and Louisiana), support for same-sex marriage is projected to be within two percentage points of a majority. In twenty-four jurisdictions, over 60% of voters are projected to support same-sex marriage.

FIGURE 7: Projected Support for Same-Sex Marriage in Ballot Initiative (2020)

In Silver’s view, “the steadiness” of this trend-line:

makes same-sex marriage virtually unique among all major public policy issues, and which might give its supporters more confidence that the numbers will continue to break their way.¹⁴⁹

Given all this data, it would be surprising if advocates did not think same-sex marriage was inevitable. In fact, 85% hold the belief that “legal recognition of same-sex marriage is ‘inevitable.’”¹⁵⁰

Fifty-nine percent of opponents also believe it is inevitable.¹⁵¹ Of all people polled on the question, 72% in 2013 said “legal recognition of same-sex marriage is ‘inevitable,’” up from 59% in 2004.¹⁵² In every demographic group polled, except those aged 18-29, the fraction who believed same-sex marriage to be inevitable increased from March of

149. Silver, *supra* note 125.

150. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS “INEVITABLE” 1 (2013).

151. *Id.* Interestingly, the belief of inevitability extends to those most opposed to same-sex marriage. Seventy percent of white evangelicals, only 22% of whom favor same-sex marriage, believe same-sex marriage recognition is inevitable. *Id.* at 3. While 31% of Republicans favor same-sex marriage, 73% believe recognition is inevitable. *Id.* Finally, 39% and 45%, respectively, of blacks and those 50–64 favor same-sex marriage, while 69% and 74%, respectively, believe it to be inevitable. *Id.*

152. *Id.* at 1.

2004 to May of 2013.¹⁵³ Even the most “tireless opponent” of same-sex marriage, Maggie Gallagher, believes same-sex marriage is a “foregone conclusion.”¹⁵⁴

Of course, people could be misgauging opposition, causing a rush to the judgment that “the game is over.” But at least Gallup polling suggests otherwise. When people misjudge public support, they tend to see “most Americans [as] com[ing] down on the side of *not* legalizing it.”¹⁵⁵ In other words, most people who misjudge support for same-sex marriage estimate on the low side, not the high side, but they nonetheless see same-sex marriage as inevitable.

The demographic profile of those opposed to same-sex marriage can only make same-sex marriage more inevitable.¹⁵⁶ Social scientists

153. *Id.* at 7.

154. Dreher, *supra* note 40, at 12.

155. *See* Jones, *supra* note 140 (emphasis in original).

156. It is always difficult to predict the future. One thorny question is whether, notwithstanding the broader trend of increasing support for same-sex marriage, individual attitudes will harden against same-sex marriage as those individuals age (*e.g.*, if they become more conservative with age) or for other reasons. Far more probative of this possibility than national polls over time are longitudinal surveys of the same respondents. Researchers at Rice University have tracked responses to the statement, “the only legal marriage should be between one man and one woman.” Michael O. Emerson & Laura J. Essenburg, *What Is Marriage? Americans Dividing*, Kinder Institute for Urban Research (June 24, 2013) available at http://kinder.rice.edu/uploadedFiles/Kinder_Institute_for_Urban_Research/Publications/White_Papers/Marriage%20Definition%20White%20Paper.pdf. Interviewing the same 1,294 Americans in 2006 and again in 2012, researchers found that “no significant overall change between 2006 and 2012,” with a slight majority, 57% and 53%, opposed to same-sex marriage in 2006 and 2012, respectively. *Id.* In those years, 31% and 33%, respectively, supported same-sex marriage. *Id.* at 5, Fig. 1. This rough constancy masked changes in individual attitudes.

Sixteen percent of those who originally opposed same-sex marriage (*i.e.*, agreed with the statement) changed their view to supporting same-sex marriage (*i.e.*, disagreed) over the intervening years. *Id.* at 5–6, Fig. 2. Twenty-eight percent of people who supported same-sex marriage in 2006 (*i.e.*, “disagreed” with the statement) reported being against same-sex marriage by 2012 (*i.e.*, they “agreed”). *Id.* at 6. Nearly two-thirds of those in the undecided category, “who in 2006 neither disagreed nor agreed with the statement (13% of the sample), by 2012 . . . had taken a different position: 42% disagreeing, and 23% agreeing.” *Id.* at 6. In all, among those who people changed a fixed view, a greater fraction went from supporting same-sex marriage to opposing it (*i.e.*, from “disagreeing to agreeing”); for those on the fence in 2006, a greater fraction embraced same-sex marriage by 2012.

The division in opinion between 2006 and 2012 grew “along educational, religious, and age lines,” suggesting a “growing cultural divide across the nation.” *Id.* at 1.

and polling groups alike have all documented a generational divide over same-sex marriage.¹⁵⁷ In general, younger people are more supportive of same-sex marriage, and support reliably drops off with age.

Pew, for example, found that in 2013, 66% of “Millenials,” those born after 1981, who in 2013 were less than 33 years old, supported same-sex marriage.¹⁵⁸ Fifty-two percent of “Generation X,” those born between 1965 and 1980, who in 2013 were between 33 and 49 years old, support same-sex marriage.¹⁵⁹ Only 41% of “Baby Boomers,” those born between 1946 and 1964, who in 2013 were between 49 and 67 years old, support same-sex marriage.¹⁶⁰ Only slightly more than a third, 35% of the “Silent Generation,” those born between 1928 and 1945 who in 2013 were 68 to 85 years old, favor same-sex marriage.¹⁶¹ In every age bracket, stated support in 2013 represented the record high since polling began in 2001. The gap between generations is a persistent one. For example, in no year since 2013 was the gap between the Millennials and Generation X less than 4%. This support

Importantly, the law of the jurisdiction in which the respondent lived seemed not to have influenced the findings. Researchers “examined the opinions of Americans depending on whether they live in a state that defines marriage as one man and one woman (29 states [at the time of the study]) or not (21 states [at the time of the study]),” expecting to see a red–blue divide. *Id.* at 7.

Instead they found that “[r]egardless of what type of state people live in, in 2012, 54% agreed with the marriage statement, about a third disagreed, and the remainder was uncertain.” They concluded that “how marriage is legally defined across the states has little to do with actual public opinion, and more to do with higher-level political debates and special interest groups.” *Id.*

Even though individuals who once supported same-sex marriage may harden against it, it seems unlikely that this hardening will reverse the broader trend of greater support. Younger people are not going to uniformly change their opinions to oppose same-sex marriage, even if some younger adults do as they age. *See infra* notes 156–65 and accompanying text (discussing persistent divide according to age on stated support for same-sex marriage).

157. *See* Pew Research Center, *Changing Attitudes on Gay Marriage*, PEW RESEARCH: RELIGION & PUBLIC LIFE PROJECT (June 2013), <http://features.pewforum.org/same-sex-marriage-attitudes/slide2.php> (“Younger generations express higher levels of support for same-sex marriage.”).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

among the younger generations extends even to young evangelicals,¹⁶² a group in which support for same-sex marriage is typically lower than average.¹⁶³

Opponents of same-sex marriage could afford to ignore the phenomenon of a generational divide *if* it was localized to a fraction of states. However, the phenomenon is universal across all fifty states, as Figure 8 illustrates. Taking actual polling numbers from 1994 through 2008, which they then weighted, Professors Jeffrey Lax and Justin Phillips broke down support for same-sex marriage by state and age group for 2009.¹⁶⁴ In no state did younger voters show less support than older ones.

162. Neil King Jr., *Evangelical Leader Preaches a Pullback From Politics, Culture Wars*, WALL ST. J., Oct. 22 2013, at A1. The Wall Street Journal reported in 2013 that 51% of young evangelicals, those aged 18 to 34 years, either “strongly favored” or “favored” same-sex marriage. By contrast, only 15% of evangelicals who were 65 years and older either “strongly favored” or “favored” same-sex marriage. *Id.* The reporting about these findings has been controversial. See Napp Nazworth, *Russell Moore Clarifies Misleading WSJ Article, Praises Predecessor’s ‘Prophetic Voice,’* CHRISTIAN POST REPORTER (Oct. 24, 2013), <http://www.christianpost.com/news/russell-moore-clarifies-misleading-wsj-article-praises-predecessors-prophetic-voice-107387/>.

163. See Pew Research Center, *supra* note 157 (“Support among white evangelical and black Protestants remains lower than other groups.”).

164. Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, Fig.8 (online appendix only) (2009), available at http://www.columbia.edu/~jr12124/Lax_Phillips_Gay_Policy_Responsiveness_2009.pdf.

FIGURE 8: Explicit Support for Same-Sex Marriage by State and Age. Data from 1994 to 2008; estimates weighted for 2008.¹⁶⁵

And matters are only going to get worse for opponents. To show the effects of the strongest objectors passing from the scene, Figure 9 replicates Lax and Phillips' data.¹⁶⁶ In it, each age group is weighted by their relative fraction in a given state's population, using 2010 Census data where possible.¹⁶⁷ The calculated averages in Figure 9 closely track Lax and Phillips' figure.

165. *Id.* Reprinted with permission.

166. *Id.* While Figure 9 is an approximation because it begins with data in Lax and Phillips' published figure as opposed to their data set, it illustrates the effect of the oldest generation passing away.

167. Lax and Phillips broke out state populations into four groups: 18–29, 30–44, 45–64 and 65+. *Id.* at 384. Figures 9 and 10, and the calculations used to generate them contained in Table A7, use Census data for age groups 45–64, and 65 and older. *See generally* U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS AGE AND SEX COMPOSITION: 2010 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>. Because the Census breaks down the group that is 18–44 years into those who are 18–24 years and 25–44 years, it was not possible to use Census numbers to generate the relative fraction of these groups to the voting age population. Consequently, Figures 9 and 10 and Table A7

FIGURE 9: Support for Same-Sex Marriage by State and Age, including individuals 65 years and older

Figure 10 then eliminates the oldest generation, the effect of which is that the weighted average support in every state shifts to the right, showing greater average support. In 2009, without the oldest generation, an additional eight states cross the threshold to a majority of the population supporting same-sex marriage, bringing the total to fifteen states in which a majority would have supported same-sex marriage. An additional six states would be closing in on majority

use Lax and Phillips' fractional breakdown by state for the groups 18–29 and 30–44.

See Lax & Phillips, *supra* note 164. Thus, in Alabama, the 2010 Census reported that 26.8% were between 45 and 64, and 13.8% were over the age of 65. See U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS AGE AND SEX COMPOSITION: 2010 7 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; Table A7, 3rd set of columns.

Lax and Phillips reported that 18.5% of the Alabama population was between 18 and 29, while 19.2% were 30–44. To generate weighted averages, we calculated what percent each group represented to the voting age population. In other words, the denominator did not include those under the age of eighteen.

Table A7 presents the relative weights of each age group used to produce Figures 9 and 10, as well as the state by state population broken down by age group drawn from the 2010 Census and Lax and Phillips' data. See Table A7.

support, with support above 45%. While Figure 10 can only provide a coarse approximation,¹⁶⁸ it illustrates that public support will likely balloon with time.

FIGURE 10: Support for Same-Sex Marriage by State and Age, without individuals 65 years and older

Other factors contribute to increased support, as well:

As a rule of thumb, perhaps about half of the increase in support for same-sex marriage is attributable to generational turnover, while the other half is because of the net change in opinion among Americans who have remained in the electorate.¹⁶⁹

Changing attitudes toward same-sex marriage and homosexuality among the electorate explains some of the softening of opposition. More Americans have gay family members, or now know that they do, and more have familiarity with lesbians and gays.¹⁷⁰ Many more

168. See Table A7 for data used to arrive at the weighted average without individuals who are 65 and older. To really capture how quickly the window is closing, one would have to age in new voters who turn eighteen, who presumably, like their counterparts under twenty-nine, will voice strong support for same-sex marriage.

169. See Silver, *supra* note 125.

170. See generally PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 150. By 2013, 87% of Americans “kn[e]w someone who is gay or lesbian”—up from 61% twenty years before. *Id.* at 1. Twenty-three

now do not share the view that same-sex marriage “will be bad for marriage, bad for children, and very bad indeed for those people of faith who want to maintain their faith’s teaching on marriage, in their religious institutions and in their work.”¹⁷¹

In the face of these trends, some opponents urge that religious liberty protections provided cover for cowardly legislators who otherwise would have not voted to allow marriage equality. Specifically, they say exemptions “allow[] a legislature to do the wrong thing, which is pass same-sex marriage.”¹⁷² Certainly, the close vote counts shown in Table 1 lend credence to the view that religious liberty protections mattered to the outcome in some states.

percent of people know “a lot” of gay and lesbian people while 44% know some. *Id.* Forty-nine percent have “a close family member or” a close friend who “is gay or lesbian.” *Id.* Additionally, 31% know a same-sex couple raising children. *Id.* Pew Research Center explains that “even holding demographic factors constant, those who have many gay acquaintances, or close gay friends and family members, are more likely to favor same-sex marriage than those who do not.” *Id.* at 16.

171. See Franck, *supra* note 37. A shrinking fraction of people express negative views about same-sex couples raising children. PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 150, at 11. Even a few years has made a difference. *Id.* When asked if it is a good, bad, or does not matter for “American society” to have same-sex couples raising children, in April 2013, 21% said it is good, 35% bad and 41% said not much difference in. *Id.* In March 2011, 14% said good, 35% bad, and 48% said it does not make a difference. *Id.* In February 2007, only 11% said that it was good, while 50% said it was bad and 34% said it did not make much difference. *Id.*
172. Matthew Brown, *Why America’s Long History of Protecting Religion Is at the Center of Gay Marriage Debate*, DESERET NEWS NAT’L, Nov. 14, 2013, <http://www.deseretnews.com/article/865590501/Why-Americas-long-history-of-protecting-religion-is-at-the-center-of-the-gay-marriage-debate.html?pg=all> (quoting Matt Franck as saying exemptions “‘allow[] a legislature to do the wrong thing, which is pass same-sex marriage, which is bad for marriage, bad for kids and bad for religious freedom no matter what concessions you think you are making’”).

TABLE 1: Enacting Jurisdictions Vote Counts and Support for Same-Sex Marriage

ENACTING JURISDICTION	Vote Count House			Vote Count Senate			Support at Time of Enactment
	For	Against	% For	For	Against	% For	
Connecticut	100	44	69%	28	7	80%	52%
Delaware	23	18	56%	12	9	57%	54%
District of Columbia	11	2	85%	(DC is unicameral)			57%
Hawaii	30	19	61%	19	4	83%	55%
Illinois	61	54	53%	34	21	62%	50%
Maryland	72	67	52%	25	22	53%	52%
Minnesota	75	59	56%	37	30	55%	46%
New Hampshire	198	176	53%	14	10	58%	55%
New York	80	63	56%	33	29	53%	55%
Rhode Island	56	15	79%	26	12	68%	56%
Vermont	95	52	65%	26	4	87%	54%
Vermont Veto	100	49	67%	23	5	82%	—
Washington	55	43	56%	28	21	57%	53%

As noted above, many commentators and legislators believe that protections did, in fact, matter to the legislation's ultimate success.¹⁷³ At least one legislator, Vermont House Leader Lucy Leriche, candidly says she and others would have supported a law without exemptions if it was feasible, but it was not:

We couldn't have [passed same-sex marriage legislation] without the religious liberty exemptions. If we could have, we would have, honestly. But we would not have been able to get enough votes without them.¹⁷⁴

A more salient question is whether any enacted law would have passed within a year or two, with or without protections. In every Enacting Jurisdiction (except Minnesota), a majority of the populace supported same-sex marriage at the time of enactment.¹⁷⁵ Even in the states where the vote counts were closest (Illinois, Maryland, New Hampshire, and New York), a majority, albeit slight, of the state's population supported same-sex marriage. Given growing public

173. See *supra* notes 23–31 and accompanying text.

174. Telephone Interview by Anthony Kreis with Lucy Leriche, Vt. House of Representatives Assistant Majority Leader (June 26, 2012). Not every legislator attaches the same weight to the religious liberty protections. A primary sponsor of Vermont's same-sex marriage bill, Senator Claire Ayer, minimized them as “putting a little oil in the water.” Telephone Interview by Anthony Kreis with Claire Ayer, Vt. State Senator (May 28, 2009); see Kreis & Wilson, *supra* note 21.

175. See *infra* Tables A4 and A5.

support across the country, it is likely that same-sex marriage would have passed eventually in some form—but it would have required delaying marriage for couples clamoring to marry. Making enactment of same-sex marriage in those jurisdictions all the more inevitable, the same-sex marriage movement has followed a tried and true pattern, as Part III shows.

III. A CLUSTER OF POLITICAL FACTORS SUPPORTED MARRIAGE EQUALITY

Social scientists identify a short list of demographic factors that influence support for same-sex marriage. While other factors matter to public support,¹⁷⁶ experts note that:

- 1) Democrats tend to support same-sex marriage in huge numbers,¹⁷⁷
- 2) Religious affiliation, or lack of it, matters to same-sex marriage support¹⁷⁸—as does weekly or rare church attendance,¹⁷⁹
- 3) Those with greater formal education tend to favor same-sex marriage.¹⁸⁰

Taking a deeper look at the Enacting Jurisdictions, it is no surprise that they share this cluster of characteristics.¹⁸¹ As Figure 11 shows,

176. See Silver, *supra* note 125. Silver posits that a number of other factors also influence support for same-sex marriage (“There are clearly a number of other factors that also affect opinion on same-sex marriage, however, most notably age, race, urbanity, and education levels.”).

177. See Pew Research Center, *supra* note 157.

178. See *id.*

179. Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP POLITICS (Jul. 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>. In a longitudinal study of the same 1,294 Americans in 2006 and 2012, Rice University researchers identified three characteristics as strongly influencing attitudes on same-sex marriage recognition—“most especially education, religion, and age.” Emerson & Essenburg, *supra* note 156.

180. *Id.*; see also Silver, *supra* note 125.

181. Obviously, some characteristics may influence (a) public support for same-sex marriage and (b) any specific political characteristic, like Democratic control of the legislature. For example, urbanity of a state may yield both Democratic control and high support. This Article is intended to give a descriptive account of a handful of state-level characteristics that might have influenced the legislative process. Clearly a more sophisticated analysis would control for multiple variables through regression to tease out, with greater specificity, what factors

in every Enacting Jurisdiction (except New York¹⁸²), Democrats controlled both houses of the legislature. In the sole exception, the New York Senate, a handful of holdout Republican Senators demanded, and received, religious liberty protections that exceeded those meager protections proffered by New York Governor Andrew Cuomo.¹⁸³

FIGURE 11: Legislative Control at Time of Successful Same-Sex Marriage Legislation

As illustrated in Figure 12, every Enacting Jurisdiction had a Democratic Governor, with the exception of Connecticut and Vermont.¹⁸⁴ Connecticut's Republican Governor had no choice but to sign the legislation given the Connecticut Supreme Court's decision in

matter most. With so few states having enacted same-sex marriage, a statistical analysis of this kind may not be feasible. This Article only seeks to take characteristics identified by others as influential and use them to assess the political terrain going forward.

182. See *infra* Table A4 (showing that New York's Senate was controlled by the Republican Party). See *generally* Table A4 for underlying data.

183. See Kreis & Wilson, *supra* note 21 (showing progression of legislation in New York); see also Christopher W. Dickson, *Inseparability, Religious Exemptions, and New York's Same-Sex Marriage Law*, 98 CORNELL L. REV. 181, 183 (2012) (reporting that legislators agonized over religious liberty protections).

184. See *generally* Table A4 for underlying data.

Kerrigan v. Commissioner of Public Health.¹⁸⁵ The Vermont Legislature overrode the Republican Governor's veto by a vote of twenty-three to five in the Senate and one hundred to forty-nine in the House.¹⁸⁶

FIGURE 12: Governor Party at the Time of Same-Sex Marriage Legislation

With scattered exceptions, the Enacting Jurisdictions all had populations that rank among the least religious but most educated.¹⁸⁷ To measure “religiosity,” Gallup conducts telephone interviews with individuals eighteen years and older living in all states and D.C. and asks whether “religion is an important part of their daily life and [whether] they attend religious services every week or almost every week,” and based on that response, reports the percentage of the population that is “very religious.”¹⁸⁸ To assess the influence of religiosity, Table A4 presents Gallop’s measure of “religiosity” by state. Rank-ordering the states from most religious to least allows one to then break those states into thirds. Every Enacting Jurisdiction

185. 957 A.2d 407, 412 (Conn. 2008) (striking down a law limiting marriage to heterosexual couples based on the Connecticut Constitution’s equal protection clause).

186. See VT. STATE LEGISLATURE, CURRENT STATUS OF A SPECIFIC BILL OR RESOLUTION: 2009-2010 LEGISLATIVE SESSION (2010), *available at* <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0115&Session=2010>.

187. See generally Table A4 for underlying data.

188. Frank Newport, *Mississippi Maintains Hold as Most Religious U.S. State*, GALLUP POLITICS (Feb. 13, 2013), <http://www.gallup.com/poll/160415/mississippi-maintains-hold-religious-state.aspx#1>.

ranks among the lowest third in religiosity in the country—except four (Delaware, Illinois, Maryland, and Minnesota), which occupy the lower portion of the middle third, as Figure 13 shows.¹⁸⁹

FIGURE 13: Ranking of Enacting Jurisdictions by Religiosity

Figure 14 is based on educational attainment data derived from Census Bureau reports on the percentage of the population with a bachelor's or advanced degree.¹⁹⁰ Rank ordering states from the highest to the lowest, in thirds, reveals that in the Enacting Jurisdictions, every state falls in the top one-third for educational attainment, except Hawaii. Hawaii appears near the top of the middle rung.

189. One might predict that statutory, if not constitutional, protections for religious freedom might roughly track self-identified religiosity among the states populace. Here it is interesting to note that among the Enacting Jurisdictions, three had enacted state RFRAs, modeled on the federal RFRA. *See supra* note 76 (listing Connecticut, Illinois and Rhode Island as the three Enacting Jurisdictions with state RFRAs). So, despite, the fact that Enacting Jurisdictions are generally ranked low for religiosity, three of them have enacted protections for religion.

190. *See generally* Table A4 for underlying data; Educational Attainment, US Census Bureau (2011), *available at* <http://www.census.gov/hhes/socdemo/education/>.

FIGURE 14: Ranking of Enacting Jurisdictions by Educational Attainment

The short list of demographic factors posited to influence support for same-sex marriage likely created a favorable environment for same-sex marriage recognition. But existing legal constructs surely favored enactment of marriage equality, too. Some legislators see same-sex marriage legislation as “a reasonable extension”¹⁹¹ of the non-discrimination laws that open access for lesbian, gay, bisexual, and transgender (LGBT) persons to housing, hiring, and public accommodations.¹⁹² Those same laws provide not just a platform for

191. *Religious Liberty Implications of D.C.’s Same-Sex Marriage Bill: Hearing on Bill 18-482 Before the D.C. Council*, 19th Sess. (Nov. 2, 2009) (statement of Councilmember Graham at 7:11:18) (on file with author) (“I assume that this is a reasonable extension of the Human Rights Act of the District of Columbia . . .”).

192. To be clear, it is shameful for a state not to give a basic promise of nondiscrimination in employment, housing, and public accommodations to LGBT people. Many of these laws specifically insulate religious groups from predictable violations of their religious beliefs, like opening married student housing to unmarried couples. *See, e.g.*, N.Y. EXEC. LAW § 290, 292(9) (McKinney 2010) (barring discrimination based on sexual orientation in employment, education, housing, and public accommodations); *see also* N.Y.C. N.Y., ADMIN. CODE § 8-107(12) (2010) (expressly not barring “any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated,

same-sex marriage, but a powerful rhetorical argument against religious liberty protections, which some charge will chip away at those protections. Jenny Pizer, senior counsel for Lambda Legal, succinctly captures this contention:

In some states, the price of equality in marriage has been agreeing to give up protections against discrimination as part of the negotiations In ways, I think, other politically vulnerable groups are not required to pay that price.¹⁹³

These arguments have resonated with some legislators who say that if same-sex marriage legislation is about “equality, marriage equality” then “the extent to which we keep carving away at its vitality, that’s very problematic.”¹⁹⁴ (Properly understood, religious liberty protections should not be seen as a rollback of prior protections.)¹⁹⁵

supervised or controlled by or in connection with a religious organization from . . . sales or rental of housing accommodations . . . to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained”).

193. Zoll, *supra* note 55, at 2.

Importantly, religious liberty protections appear in hundreds of U.S. and state laws including Title VII of the Civil Rights Act of 1964. *See* Title VII of the Civil Rights Act of 1964; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2010) (listing hundreds of laws with accommodations for religious believers). The state’s choice to accommodate religious dissenters is not a denial of equality by the state. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (noting that the Court “has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause”). Some have argued that the best doctrinal ground for recognizing same-sex marriage is equal treatment in a fundamental right, rather than pure equality. *See* Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010), available at SSRN: <http://ssrn.com/abstract=1594361>.

194. *See supra* note 191 (statement of Councilmember Graham).

195. Religious liberty protections in same-sex marriage laws do not roll back antidiscrimination laws, which “largely address commercial services, like hailing taxis, ordering burgers, and leasing apartments, for which it is hard to imagine that a refusal to serve another individual can reflect anything other than animus toward that individual.” Wilson, *Calculus*, *supra* note 99, at 1476. Unlike those commercial services, facilitating another’s marriage is a religiously freighted and deeply personal matter, where a denial can reflect something other than animus towards another individual. Because many nondiscrimination laws were passed decades before same-sex marriage was permitted anywhere in the world, those laws could not have foreseen application to such a deeply religious service like facilitating another’s marriage. *See, e.g.*, Title II of the 1964 Civil Rights Act (prohibiting discrimination in public accommodations on

Not surprisingly, every Enacting Jurisdiction prohibited sexual orientation discrimination in housing, employment and public accommodations well before recognizing same-sex marriage, as Figure 15 shows.¹⁹⁶ Some Enacting Jurisdictions also separately prohibited gender identity discrimination.¹⁹⁷

specified bases, like race). Moreover, the extension by the Enacting Jurisdictions of such general nondiscrimination laws to sexual orientation discrimination occurred in some cases decades before the enactment of same-sex marriage by legislation. *See* Table A2.

196. For Connecticut, *compare* CONN. GEN. STAT. § 46b-20a (Apr. 23, 2009) *with* CONN. GEN. STAT. ANN. § 46a-60 (West 2009); CONN. GEN. STAT. ANN. § 46a-64c (West 2009); CONN. GEN. STAT. § 46a-64 (West 2009); CONN. GEN. STAT. ANN. § 46a-66 (West 2009); CONN. GEN. STAT. ANN. § 46a-75 (West 2009) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education); for Delaware, *compare* H.B. 75, 147th Gen. Assemb. (Del. 2013) (July 1, 2013) *with* DEL. CODE ANN. tit. 19, § 711 (West 2013); DEL. CODE ANN. tit. 6, § 4603 (West 2013); DEL. CODE ANN. tit. 6, § 4504 (West 2013) (prohibiting sexual orientation discrimination in housing, public and private employment, and public accommodation); for the District of Columbia, *compare* D.C. CODE § 46-401 (LexisNexis 2012) (March 3, 2010) *with* D.C. CODE § 2-1402.11 (LexisNexis 2012); D.C. CODE § 32-408 (LexisNexis 2012); D.C. CODE § 2-1402.21 (LexisNexis 2012); D.C. CODE § 2-1402.41 (LexisNexis 2012) (prohibiting sexual orientation discrimination in private and public employment, housing, and education); for Hawaii, *compare* S.B. 1, 27th Leg. 2d Spec. Sess. (Haw. 2013) (Dec. 2, 2013) *with* HAW. REV. STAT. § 515-3 (West Supp. 2012); HAW. REV. STAT. § 489-3 (West Supp. 2012) (prohibiting sexual orientation discrimination in housing and public accommodation); for Illinois, *compare* S.B. 0010, 98th Gen. Assemb. (Ill. 2013) (June 1, 2014) *with* 775 ILL. COMP. STAT. ANN. 5/1-102(A) (WEST 2011) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education); for Maryland, *compare* MD. CODE ANN., FAM. LAW § 2-201 (Jan. 1, 2013) *with* MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis Supp. 2013; MD. CODE ANN., STATE GOV'T § 20-705 (LexisNexis 2009); MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis 2009); MD. CODE ANN., EDUC. § 7-424 (LexisNexis 2008) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, and education); for Minnesota, *compare* H.F. 1054, 88th Sess. (Minn. 2013) (Aug. 1, 2013) *with* MINN. STAT. ANN. § 363A.08, SUBD. 2 (West 2012), MINN. STAT. ANN. § 363A.09 (West 2012), MINN. STAT. ANN. § 363A.11, SUBD. 1 (West 2012), MINN. STAT. ANN. § 363A.16 (West 2012), SUBD. 1, MINN. STAT. ANN. § 363A.13 (West 2012) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education); for New Hampshire, *compare* N.H. REV. STAT. § 457:1-A (Jan. 1, 2010) *with* N.H. REV. STAT. § 354-A:6 (2009), N.H. REV. STAT. § 354-A:8 (2009), N.H. REV. STAT. § 354-A:10 (2009), N.H. REV. STAT. ANN. § 354-A:16 (2009); N.H. REV. STAT. ANN. § 354-A:17 (2009) (prohibiting sexual orientation discrimination in housing, private and public employment, and public accommodation); for New York,

compare N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2014) (enacted July 24, 2011) with N.Y. EXEC. LAW § 296 (McKinney 2013); N.Y. EXEC. LAW § 296-a (McKinney 2013) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education); for Rhode Island, *compare* H.B. 5015B, 2013 Reg. Sess. (R.I. 2013) (codified at R.I. GEN. LAWS § 15-1-1 (2013)) with R.I. GEN. LAWS § 28-5-7 (2003); R.I. GEN. LAWS § 34-37-4 (2011); R.I. GEN. LAWS § 11-24-2 (2002); R.I. GEN. LAWS § 28-5.1-8 (Supp. 2013) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, and education); for Vermont, *compare* VT. STAT. ANN. tit. 15, § 8 (Sept. 1, 2009) with VT. STAT. ANN. tit. 21, § 495(a), VT. STAT. ANN. tit. 9, § 4503 (Supp. 2013); VT. STAT. ANN. tit. 9, § 4502(a) (Supp. 2013); VT. STAT. ANN. tit. 8, § 10403 (Supp. 2013); VT. STAT. ANN. tit. 16, § 11 (Supp. 2013); VT. STAT. ANN. tit. 16, § 565 (Supp. 2011) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education); for Washington, *compare* WASH. REV. CODE § 26.04.010(1) (LexisNexis 2013) (enacted Dec. 6, 2012) with WASH. REV. CODE § 49.60.180 (2012); WASH. REV. CODE § 49.60.222 (2012); WASH. REV. CODE § 49.60.215 (2012); WASH. REV. CODE § 49.60.175 (2012); WASH. REV. CODE § 49.60.040(2) (2012) (prohibiting sexual orientation discrimination in housing, private and public employment, public accommodation, credit, and education). *See also States with Protections for Being Gay*, N.Y. TIMES (May 31, 2013) available at <http://www.nytimes.com/interactive/2013/05/31/business/States-With-Protections-for-Being-Gay.html?ref=your-money>; COLO. REV. STAT. ANN. §§ 24-34-401-402 (2013); IOWA CODE ANN. § 216.6 (West 2009); ME. REV. STAT. ANN. tit. 5, § 4553 (2013); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2013); NEV. REV. STAT. § 281.370 (West 2013); N.J. STAT. ANN. 10:1-1-10:1-3 (West 2013); N.M. STAT. ANN. § 28-1-2 (2012); N.M. STAT. ANN. § 28-1-7 (2012); N.M. STAT. ANN. § 28-1-9 (2012); OR. REV. STAT. § 659A.030 (2013); WIS. STAT. ANN. § 111.31(2) (West Supp. 2013). See Table A2 for a calculation of how long the earliest nondiscrimination ban in statewide law preceded same-sex marriage in each Enacting Jurisdiction.

197. *See generally* INST. OF REAL ESTATE MGMT., LAWS PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, (2013).

FIGURE 15: Sexual Orientation Protection at Time of Same-Sex Marriage Legislation

Leveraging a “perfect storm” of demographic variables, public support, and preexisting legal constructs, supporters succeeded in securing same-sex marriage in the Enacting Jurisdictions with modest religious liberty protections. Absent those protections, same-sex marriage surely would have been forthcoming, with or without protections, in a few short years.

IV. THE POLITICAL TERRAIN GOING FORWARD

So what does a die-hard opponent of same-sex marriage do in the face of these trends? What do the trends mean for those who are pursuing marriage equality? Putting aside game-changing judicial decisions,¹⁹⁸ Professor Laycock rightly concludes that opponents, who are “losing this fight . . . need to get some more liberty protections while they have a chance. Once a law is passed, it’s too late.”¹⁹⁹ But, same-sex marriage advocates should continue to bargain as well because the movement has nearly exhausted states with high support

198. See *supra* note 63 (discussing New Jersey’s judicial decision).

199. Zylstra, *supra* note 104.

for same-sex marriage and favorable political terrain,²⁰⁰ and it remains uncertain when and if the U.S. Supreme Court will take a marriage equality case.²⁰¹

But unlike the Enacting Jurisdictions, in the thirty-one Nonrecognizing States,²⁰² the characteristics favoring marriage equality fragment. In more difficult political terrain, especially states in which legislators are accountable to more “very religious” people, one might reasonably expect that legislators will tip the balance between marriage equality and religious liberty in favor of religious objectors.

Here, the “perfect storm” works against an easier victory for same-sex marriage advocates, placing a premium on bargaining. As Figure 16 demonstrates, in the thirty-one Nonrecognizing States, Democrats control only three legislatures. Republicans control the legislature in twenty-five states and split control in three others.²⁰³

200. Religious liberty advocates in the near term can deliver precious votes for same-sex marriage. Marriage equality proponents benefit from same-sex marriage with religious liberty protections when the alternative is no marriage, at least for now.

201. *See supra* note 58 (discussing the importance of meaningful circuit splits).

202. The discussion of political climate in Part III backs out Utah and Oklahoma since lower federal court decisions striking the constitutional bans on same-sex marriage in those states occurred before the date cut-off for the snapshot of state marriage laws on January 14, 2014, even though the decisions were stayed. *See supra* notes 4–5. New Jersey and New Mexico also recognized same-sex marriage by a dispositive judicial decision before January 14, 2014, and so are also not considered in Part III. *See supra* note 8.

203. *See* Table A4. *Compare* Figure 16 *with* Figure 11.

FIGURE 16: Legislative Control of States That Do Not Permit Same-Sex Marriage (2013)

Figure 17 shows that in the Nonrecognizing States only seven governors as of October 22, 2013, are members of the Democratic Party. Republicans occupy the governor's mansion in remaining twenty-four states.²⁰⁴

204. See Table A4. Compare Figure 17 with Figure 12. See *infra* note 232 for a discussion of changes in control of the governor's office since the Symposium date.

FIGURE 17: Party of Governor in States That Do Not Permit Same-Sex Marriage (2013)

In addition to being largely Republican-controlled, the Nonrecognizing States have more religious constituents.²⁰⁵ As Figure 18 shows, only six of the Nonrecognizing States rank in the bottom third for religiosity. Twenty-five of the Nonrecognizing States rank in either the top or middle third.²⁰⁶

205. See Table A4. Compare Figure18 with Figure 13.

206. Not surprisingly, thirteen of the Non-recognizing states have RFRA's. See ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2009); FLA. STAT. ANN. §§761.01-.05 (West 2010); IDAHO CODE ANN. §§ 73-401 to -404 (2009); KAN. STAT. ANN. §§ 60-5301-5305; KY. REV. STAT. ANN. § 446.350 (2013); LA. REV. STAT. §§ 13:5231-5242 (2010); MO. ANN. STAT. §§ 1.302-307 (West 2010); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West 2009); S.C. CODE ANN. §§ 1-32-10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2009); VA. CODE ANN. §§ 57-1 to -2.02 (2009). Alabama's state constitution subjects state law burdening religious practice to heightened scrutiny. See ALA. CONST. art. I, § 3.01.

Of the states with recent judicial decisions requiring same-sex marriage, New Mexico and Oklahoma have RFRA's. See N.M. Stat. Ann. §§ 28-22-1 to 28-22-5 (2006); Okla. Stat. Ann. tit. 51, §§ 251-258 (West 2010).

FIGURE 18: Religiosity Index for States That Do Not Permit Same-Sex Marriage

Figure 19 shows that the levels of formal education in the Nonrecognizing States is strikingly lower in than the Enacting Jurisdictions.²⁰⁷ While three states rank in the top tier, as nearly every Enacting Jurisdiction did, twenty-eight Nonrecognizing States rank in the bottom two-thirds for educational attainment. Only Colorado, Virginia, and Oregon defy this trend.

207. See Table A4. Compare Figure 19 with Figure 14.

FIGURE 19: Educational Attainment for States That Do Not Permit Same-Sex Marriage

Finally, same-sex marriage advocates will not have a background promise of non-discrimination working in their favor. Figure 20 shows that only a handful of remaining states, four, prohibit discrimination on the basis of sexual orientation in housing, hiring, and public accommodations.²⁰⁸ The absence of a statewide guarantee of

208. COLO. REV. STAT. § 24-34-402 (2013); COLO. REV. STAT. § 24-34-502 (2013); COLO. REV. STAT. § 24-34-601 (2013); COLO. REV. STAT. § 12-59-106(1)(s) (2013) (prohibiting discrimination in private and public employment, housing, public accommodations, and education); NEV. REV. STAT. § 613.330 (2012); NEV. REV. STAT. § 118.020 (Supp. 2013); NEV. REV. STAT. § 651.070 (West Supp. 2013) (prohibiting discrimination in private and public employment, housing, and public accommodations); OR. REV. STAT. § 659A.030 (2013); OR. REV. STAT. § 659A.421 (2013); OR. REV. STAT. § 659A.403 (2013); OR. REV. STAT. § 659.850(2) (2013) (prohibiting discrimination in private and public employment, housing, public accommodations, and education); WIS. STAT. ANN. § 111.31(2) (West Supp. 2013); WIS. STAT. ANN. § 106.50 (West Supp. 2013); WIS. STAT. ANN. § 106.52 (West Supp. 2013); WIS. STAT. ANN. § 36.12 (West 2013) (prohibiting discrimination in private and public employment, housing, public accommodations, and education). Of these states, only Wisconsin does not also prohibit gender identity discrimination. Presumably, a state

nondiscrimination is significant: it means that legislators crafting accommodations for same-sex marriage will be writing on a blank slate when deciding how little latitude—or how much—to give religious dissenters. If nothing in state or local law prohibits discrimination on the basis of sexual orientation or marital status, religious dissenters will not need religious liberty protections. Legislators interested in providing greater protections will not be

legislator weighing religious liberty exemptions is concerned only about rolling back protections for which they are accountable.

Other laws can provide important protections for LGBT individuals. Some states ban sexual orientation discrimination by public employers, like Indiana, Michigan, Montana, and Pennsylvania. See <http://employment.findlaw.com/employment-discrimination/sexual-orientation-discrimination-in-the-workplace.html#sthash.T1frmnwH.dpuf>. Executive Orders in some Nonrecognizing States do bar discrimination against public employees on the basis of sexual orientation. See, e.g., Mo. Exec. Order No. 10-24 (July 9, 2010) <http://governor.mo.gov/orders/2010/10-24.htm>; Va. Exec. Directive No. 1 (2010) <http://www.dhrm.virginia.gov/documents/ExecutiveDirectiveOne.pdf>. These states are treated here as not providing state-wide protection against sexual orientation discrimination.

Further, in states that lack statewide nondiscrimination bans, “[m]unicipal law provides powerful protections” in many localities. *Municipal Equality Index: A Nationwide Evaluation of Municipal Law* HUMAN RIGHTS CAMPAIGN (2013), available at: http://www.hrc.org/files/assets/resources/MEI_2013_report.pdf.

Because the number of municipalities providing such protections varies dramatically from state to state, localized protections are also not factored in, although they provide an important source of redress for LGBT individuals. Compare Arizona where municipal non-discrimination bans cover only Phoenix with Nevada, where nondiscrimination bans covering all major cities. See *id.* Some states, while providing no promise of non-discrimination on the basis of sexual orientation, do provide special protection based on sexual orientation in state hate crime laws. For example, Texas has some protection built into their hate crime statutes. See Act of June 19, 1993, ch. 987, 1993 Tex. Gen. Laws § 4 (codified as amended in scattered sections of the Texas Penal Code and the Texas Code of Criminal Procedure); Act of May 11, 2001, ch. 85, 2001 Tex. Gen. Laws § 1.02 (codified as amended in scattered sections of the Texas Penal Code, the Texas Education Code, the Texas Government Code, and the Texas Code of Criminal Procedure). In particular, Texas’s 2001 hate crime statute requires that, in a criminal trial, the trier of fact determines if the defendant acted on basis or prejudice against a number of different classifications including sexual preference, *id.* at § 1.02, 2001 Tex. Gen. Laws at § 1.01 (codified as TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2014)) and increases the punishment if the trier of fact finds such prejudice, Act of June 19, 1993, § 1, 1993 Tex. Gen. Laws at § 1 (codified as amended at TEX. PENAL CODE ANN. § 12.47 (West 2014)). Further, a state legislator weighing religious liberty exemptions presumably is concerned only about rolling back protections the state impressed into law.

subject to the claim—which has swayed some elsewhere—that religious liberty protections in the same-sex marriage law will “roll back” existing LGBT protections.²⁰⁹

FIGURE 20: Sexual Orientation Protections in State-Wide Law

Not only do the remaining states not offer statewide non-discrimination guarantees, nearly all of the remaining states ban same-sex marriage in the state constitution. As Figure 21 shows, in twenty-seven Nonrecognizing States the state constitution presently bars same-sex marriage.²¹⁰ Only the constitutions of Wyoming,

209. See *supra* note 180 (describing the force of this idea and why it should not be seen as rolling back protections).

210. ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. LXXXIII, § 1; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13. Utah’s and Oklahoma’s bans have been invalidated by federal district courts although the decisions are currently stayed. OKLA. CONST. art. II, § 35; UTAH CONST. art. I, § 29.

Indiana, West Virginia, and Pennsylvania do not ban same-sex marriage.²¹¹

FIGURE 21: Same-Sex Marriage Banned in State Constitution

Some of the constitutional bans have been challenged, but ultimately were left in place. *See* *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (upholding Nebraska's state conditional ban on same-sex marriage against a federal constitutional challenge). A number of challenges to state constitutional bans are pending across the country. *See* Jillian Rayfield, *4 Pivotal Gay Rights Court Cases You Should Know About: The U.S. Judicial System Has Become the Main Battlefield in the Fight for Equal Rights*, THE WEEK (Jan. 28, 2014) available at: <http://theweek.com/article/index/255595/4-pivotal-gay-rights-court-cases-that-you-should-know-about> (discussing challenges in Virginia, Michigan, Pennsylvania, and Ohio).

211. The remaining Nonrecognizing States all ban same-sex marriage by statute. *See, e.g.*, IND. CODE ANN. § 31-11-1-1 (West 2008) (making same-sex marriage unlawful in Indiana and refusing to recognize out-of-state marriages); 23 PA. CONS. STAT. ANN. § 1704 (West 2010) (defining marriage as between one man and one woman); W. VA. CODE ANN. §48-2-104 (LexisNexis 2009) (defining marriage as a lifelong union between a woman and a man); WYO. STAT. ANN. § 20-1-101 (2013) (defining marriage as a civil contract between a male and female person). Unlike a constitutional ban, the statutory ban poses no special hurdles to removal of the ban.

pending constitutional litigation in state and federal courts,²¹² and even the personal convictions of individual legislators.²¹³

V. DIFFICULT TERRAIN DOES NOT MEAN OPPONENTS CAN HOLD OUT

Same-sex marriage opponents face the real fork in the road: Should they oppose same-sex marriage to the bitter end or take a more pragmatic approach and bargain now, trading marriage equality for “substantial protections for religious dissenters[?]”²¹⁴ For some opponents (and supporters), the fight over same-sex marriage is an existential one, making it unthinkable to compromise.²¹⁵ For others,

212. As of February 2014, 42 suits challenging marriage bans were pending across U.S. *See* David Cruz at UC Davis Law Review Symposium (February 7, 2014) (citing James Esseks of the ACLU).

213. *See supra* notes 21, 24, 29 (providing interviews with individual legislators, such as Hawaii Representative Jo Jordan of Hawaii).

214. Dreher, *supra* note 40, at 15. Some vow to stay focused on fighting same-sex marriage on the merits, rather than actively (and exclusively) seeking religious liberty protections. *See supra* note 40. Some opponents do not see these approaches as an “either-or.” Caleb Dalton, an attorney for the Alliance Defending Freedom, says:

We will continue to advocate for marriage between one man and one woman as the building block of society. But in cases where a state has chosen to redefine its marriage laws, we support the active inclusion of robust religious liberty protections in pending legislation.

Id. Russell Moore, president of the Southern Baptist Convention's Ethics and Religious Liberty Commission, echoed the sentiment:

So while we're fighting for religious liberty, we're articulating why we believe marriage is significant and important. And while we're fighting for marriage, we're articulating why the religious liberty concerns that inevitably come from these discussions are significant. . . . We do both, and we don't abandon or marginalize either plank.

Id.

215. *See* Matthew J. Franck, “*Is Sex Just Like Race?*,” THE PUBLIC DISCOURSE (July 8, 2011), <http://www.thepublicdiscourse.com/2011/07/3520> (“Today it is those claiming a specious ‘freedom to marry’ who make a claim at odds with the institution’s nature and alien to its purposes. It is they who would instrumentalize it by a redefinition, a destroying and remaking, that puts marriage to a new kind of work in the service of state policy.”).

On this issue, like other deeply divisive issues, the most strident voices on each side sometimes gain by seeking a total win, because it rallies their base. Surely some people in this fight benefit from continuing to oppose compromise. A perverse conflict of interest can arise because compromise turns down the temperature on an issue. *See* Sally

central tenets of their faith tradition direct them not to compromise on the particular question of marriage equality.²¹⁶ But for those who may be swayed by pragmatic arguments,²¹⁷ a clear-eyed view of the benefits of compromise is important.²¹⁸ Arguably, the strongest reason not to compromise is that voters have foreclosed same-sex marriage by state constitutional amendment in twenty-seven states.²¹⁹ But

Steenland, *Return of the Culture Wars: Tea Party's Social and Religious Agenda and How Progressives Can Respond* (Nov. 29, 2010), available at <http://www.americanprogress.org/issues/religion/news/2010/11/29/8601/return-of-the-culture-wars-tea-partys-social-and-religious-agenda-and-how-progressives-can-respond/29292010>).

216. For example, a Vatican document instructs:

[W]here a matter of the common good is concerned, it is inappropriate for Church authorities to endorse or remain neutral toward adverse legislation even if it grants exceptions to Church organizations and institutions. The Church has the responsibility to promote family life and the public morality of the entire civil society on the basis of fundamental moral values, not simply to protect herself from the application of harmful laws (cf. no. 17).

Congregation for the Doctrine of the Faith, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons* (July 24, 1992), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html.

217. Commentator Rod Dreher believes that a “consensus is emerging . . . that the most important goal . . . [is] to secure as much liberty as possible for dissenting religious and social conservatives while there is still time.” Dreher, *supra* note 40, at 12. Dreher likely is premature about the existence of a consensus.
218. Professor Douglas Laycock argues that “conservative churches would do well to concede the liberty of the other side, including on same-sex marriage, and concentrate on defending their own liberty as conscientious objectors; and similarly, that supporters of rights to abortion, contraception, gay rights, and same-sex marriage would do well to concentrate on securing their own rights and to concede that conscientious objectors should rarely be required to support or facilitate practices they view as evil.” See Douglas Laycock, *Religious Liberty and the Culture Wars*, U. ILL. L. REV. (forthcoming 2014) (manuscript at 1); see also Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, J. CONTEMP. LEGAL ISSUES (2013); U. of St. Thomas (Minnesota) Legal Studies Research Paper No. 13-20. Available at SSRN: <http://ssrn.com/abstract=2268824> or <http://dx.doi.org/10.2139/ssrn.2268824> (arguing that religious freedom is important and that there is value in the social-service contributions of religious nonprofits).
219. See Rex W. Huppke, *Lawsuits filed in Cook County claiming state's same-sex marriage ban unconstitutional*, THE CHICAGO TRIBUNE (May 31, 2012) (“31 states have amended their constitutions to ban gay marriage.”). This tally included California’s invalidated Proposition 8.

unlike the U.S. Constitution, which cannot be amended without great difficulty, many state constitutions do no erect momentous barriers to change.

To undo a constitutional ban, some states require a supermajority (60% or more) of legislators, followed by a majority of voters, to make any change, creating a strong lock-in effect. Consider, for example, Texas, which requires two-thirds of state legislators in both houses to pass the amendment, after which a simple majority of the electorate must also approve it.²²⁰ In some of these states, an elaborate convention method also permits amendment, but still nonetheless requires a super-majority of the legislature. Seven of the Nonrecognizing States erect significant barriers to amendment, and therefore significant barriers to repeal (Georgia, Idaho, Kansas, Louisiana, North Carolina, South Carolina, and Texas).²²¹ Because

See Chris Cillizza and Sean Sullivan, *How Proposition 8 Passed in California—and Why It Wouldn't Today*, WASH. POST (Mar. 26, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/> (discussing the history and background of California's Proposition 8). Hawaii was included among the thirty-one, but its constitutional amendment, which permitted the legislature to "reserve marriage to opposite sex couples," is now mooted. *See* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

220. TEX. CONST. art. XVII, § 1.

221. *See* GA. CONST. art. X, § 1, para. 1–6 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate; Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature); IDAHO CONST. art. XX, § 1–3 (Legislative method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate); KAN. CONST. art. XIV, § 1–2 (Legislative method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate); LA. CONST. art. XIII, § 1–3 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature); N.C. CONST. art. XIII, § 1–4 (Legislative Method: requires 3/5 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature and then any amendment arising out of a convention must be approved by a simple majority of voters); S.C. CONST. art. XVI, § 1–3 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate); TEX. CONST. art. XVII, § 1 (Legislative method: requires 2/3 vote of both houses of the legislature and then a

this process is so onerous, once an amendment is adopted, it cannot easily be undone.

In another eight states, constitutional bans enjoy a mild lock-in effect. Alabama, Alaska, Kentucky, Nevada, Oregon, Tennessee, Virginia, and Wisconsin erect some barriers to repeal, but not ones as daunting as Texas'.²²² Generally, these states provide a legislative method for amendment, requiring only a majority of legislators and a majority of voters to amend the state's constitution. Some of these states also allow amendments by a periodic convention that either (a)

simple majority of the electorate). Utah's same-sex marriage ban was invalidated but would have exerted a strong lock-in effect. *See* UTAH CONST. art. XXIII, § 1-3 (Legislative method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate).

222. *See* ALA. CONST. art. XVIII, § 284-287 (Legislative Method: requires 3/5 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a simple majority of legislators from both houses plus a simple majority of voters can call a constitutional convention); ALASKA CONST. art. XIII, § 1-3 (Automatic Submission Method: Every 10 years the voters of Alaska are asked to decide whether or not to hold a constitutional convention. If the majority of voters say they want a constitutional convention, then delegates to that convention are elected during the next general election. Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate); KY. CONST. § 256-263 (Legislative Method: requires 3/5 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can be called by a simple majority of legislators in both houses plus a simple majority of voters. Any proposed amendments arising out of the convention must then be approved by a majority of voters); NEV. CONST. art. 16, § 1-2 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate); OR. CONST. art. XVII, § 1-2 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate. Legislative Revision Method: the legislature may "revise" all or part of the constitution by a 2/3 vote of both houses. The revision must then be approved by a simple majority of voters); TENN. CONST. art. XI, § 3 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can be called by a simple majority of legislators in both houses plus a simple majority of voters. Any proposed amendments arising out of the convention must then be approved by a majority of voters); VA. CONST. art. XII, § 1-2 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature); WIS. CONST. art. 12, § 1 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate).

requires approval by a simple majority of voters, but the convention may be called only after long periods of time (e.g., ten years), or (b) permits a convention to take place after two steps—approval by a majority of legislators and approval by majority of the electorate. Consider, for example, Virginia, which provides two paths to adoption or repeal: the legislative method—requiring approval by a simple majority of legislators in both houses and a simple majority of the electorate—and periodic constitutional conventions called by the Legislature, where voters can approve amendments by a simple majority.²²³ Because amendments can pass without super-majority support in the legislature, this process creates a milder lock-in effect.

Twelve states (Arizona, Arkansas, Colorado, Florida, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, and South Dakota) fall in the final category, where constitutional bans can be adopted or repealed with relative ease.²²⁴ A negligible lock-in

223. VA. CONST. art. XII, § 1–2.

224. ARIZ. CONST. art. XXI, § 1–2 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate. Voter Initiative Method: Petition must be signed by 15% of the total vote cast for governor in the preceding election. Then the proposed amendment appears on the ballot to be decided by a majority of voters in a general election. Convention Method: a convention can be called by the people by referendum); ARK. CONST. art. XIX, § 22 (Legislative Method: Simple majority of legislators from both house plus a simple majority of the electorate); COLO. CONST. art. XIX, § 1–2 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate); FLA. CONST. art. XI, § 1–5 (Legislative Method: requires 3/5 vote of both houses of the legislature and then 60% of the electorate. Initiative Method: Signatures of 8% of total electors voting in the last Presidential election for the question to be placed on the ballot. The ballot initiative is approved by 60% of voters. Convention Method: A convention can be placed on the ballot if 15% of voters based on the last Presidential election sign a petition requesting a petition. The issue is then placed on the ballot and a convention is called if a simple majority of voters approve); MICH. CONST. art. XII, § 1–3 (Voter Initiative Method: Petition must be signed by 10% of the total vote cast for governor in the preceding election. Then the proposed amendment appears on the ballot to be decided by a majority of voters in a general election. Automatic Submission Method: Every 16 years the question of whether or not to have a constitutional convention reaches the ballot in a general election. The people can vote to have a constitutional convention by a simple majority. They then can approve the proposed amendments coming out of the convention by a simple majority. Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate); MISS. CONST. art. XV, § 273 (Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Voter Initiative: “An initiative to amend the Constitution may be proposed by a petition signed over a twelve-month period by qualified electors equal in number to at least twelve percent (12%) of the

votes for all candidates for Governor in the last gubernatorial election. The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot.”); MO. CONST. art. XII, § 2-3 (Legislative Method: Simple majority of legislators from both houses plus a simple majority of the electorate. Automatic Submission Method: Every 20 years the question of whether to hold a constitutional convention is placed on the ballot. A convention can be called by a simple majority of the electorate); MONT. CONST. art. XIV, § 1-9 (Voter-Initiated Convention Method: 10% of voters in each of 2/5ths of the legislative districts must sign a petition for a constitutional convention and submit it to the secretary of state. Automatic Submission Method: Every 20 years the question of whether or not to have a constitutional convention reaches the ballot in a general election. The people can vote to have a constitutional convention by a simple majority. They then can approve the proposed amendments coming out of the convention by a simple majority. Legislative Method: requires 2/3 vote of both houses of the legislature and then a simple majority of the electorate. Legislatively-Initiated Convention Method: a convention can also be called by a 2/3 vote of both houses of the legislature. Voter Initiative: “The people may also propose constitutional amendments by initiative. Petitions including the full text of the proposed amendment shall be signed by at least ten percent of the qualified electors of the state.”); NEB. CONST. art. XVI, § 1-2 (Legislative Method: requires 3/5 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 3/5 vote of both houses of the legislature affirmed by a majority of the electorate); N.D. CONST. art. III, § 1-9 (Initiative Method: petitioners must gather signatures equaling 2% of the resident population at the last federal census for a proposed amendment to make the ballot. After crossing this threshold, the amendment is approved or disapproved by simple majority vote in the general election); OHIO CONST. art. XVI, § 1-2; 2 (Legislative Method: requires 3/5 vote of both houses of the legislature and then a simple majority of the electorate. Convention Method: a convention can only be called by a 2/3 vote of both houses of the legislature affirmed by a majority of the electorate. Automatic Submission Method: Every 20 years the voters of Ohio are asked to decide whether or not to hold a constitutional convention. If the majority of voters say they want a constitutional convention, then delegates to that convention are elected during the next general election. The convention delegates then have plenary power to amend the constitution subject only to ratification by the people by a simple majority. Voter Initiative: “The . . . power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution.”); S.D. CONST. art. XXIII, § 1-3 (Legislative Method: Simple majority of legislators from both houses plus a simple majority of the electorate. Convention Method: A convention may be called by 3/4 of legislators in both houses. Voter Initiative: “An amendment proposed by initiative shall require a petition signed by qualified voters equal in number to at least ten percent of the total votes cast for Governor in the last gubernatorial election.”).

Oklahoma’s same-sex marriage ban was invalidated but would have exerted a negligible lock-in effect. *See also* OKLA. CONST. art. 24, § 1-3 (Legislative Method: requires 2/3 vote of both houses of the legislature

state permits change with only a small fraction of voters petitioning for it followed up with a simple majority of voters voting in support of the amendment. Typically, the states require 10% of the electorate to initiate the process, but may range as low as 4% and as high as 15%.²²⁵ Arizona is emblematic of this approach. It requires a petition to be signed by 15% of the total number of voters who cast votes for governor in the preceding election. At that point, the proposed amendment appears on the ballot to be decided by a majority of voters in a general election.²²⁶

In short, state constitutional amendments are surmountable in all twenty-seven Nonrecognizing States, as Figure 23 shows. In all but seven states, constitutions can be surmounted without “super-majority” votes by the legislature.

FIGURE 23: Lock-In Effect of Constitutional Same-Sex Marriage Ban

and then a simple majority of the electorate. Convention and Initiative Methods: the voters may amend the constitution directly by referendum by a simple majority of voters).

225. See sources cited *supra* note 205.

226. ARIZ. CONST. art. XXI, § 1–2. Note that if Arizona only had a Legislative Method as opposed to a Legislative and a Voter Initiative method, then Arizona would have a mild lock-in effect.

with negligible lock-ins, by 2012, a majority of the population in ten of the twelve do support same-sex marriage or are within striking distance of majority support (Arizona, Colorado, Florida, Missouri, Montana, Michigan, Nebraska, Ohio, North Dakota, and South Dakota).²²⁸ By 2016, only four of the negligible lock-in effect states would not have majority support for same-sex marriage (Arkansas, Mississippi, Missouri, and South Dakota).²²⁹ Because the constitutions in these states are almost as easy to amend as enacting ordinary legislation, the need to bargain now is at its greatest.

FIGURE 25: Projected Support in Negligible Lock-In States

Figure 26 further illustrates the flimsiness of state constitutional amendments. Of the eight mild lock-in states, a majority of the populations in three states (Nevada, Oregon, and Wisconsin) already supported same-sex marriage by 2012, putting those bans at risk today.²³⁰ By 2016, in more than half of the states, five of the eight, a majority of the population will support same-sex marriage (Alaska, Nevada, Oregon, Virginia, and Wisconsin).²³¹

estimated in small demographic categories within each state, and then these are averaged using census information to get state-level summaries. Estimates in 2010 are projected from 2008 state-level estimates using an aggregate national estimate of forty-five percent (or fifty percent) support for gay marriage.”). The 2012 and 2016 statistics are taken from Silver, *supra* note 125. Table A6 gives actual support at the time of the amendment at the ballot box by subtracting opposition support from one hundred.

228. See *infra* Table A6.

229. *Id.*

230. *Id.*

231. *Id.*

FIGURE 26: Projected Support in Mild Lock-In States

Figure 27 does paint a different picture. The strong lock-in effect states generally show low support for same-sex marriage. The seven strong lock-in states are not likely to enact same-sex marriage in the near future, based either on public support or the strength of the constitutional amendment.²³²

FIGURE 27: Projected Support in Strong Lock-In States

In only those states where projected support likely will remain well below 50% by 2020 (Mississippi and Alabama) and those strong lock-in states (Georgia, Idaho, Kansas, Louisiana, North Carolina, South Carolina, and Texas) are opponents reasonably assured of being able to push back same-sex marriage if the question is left to the political process. While no one can predict with confidence what the

232. *Id.*

future holds,²³³ how one bargains today is often influenced by how one perceives the future and the bargain one believes one can strike tomorrow or beyond.

Even with the difficult terrain, in the long term, advocates are likely to secure same-sex marriage in the political process when popular support eventually overpowers all other characteristics. For same-sex marriage opponents who may be tempted to rely on the more difficult terrain facing advocates,²³⁴ Utah and Oklahoma are illustrative.

233. The political terrain of any state may change overnight. In 2013, same-sex couples filed suit challenging Virginia's same-sex marriage ban on federal constitutional grounds. *See Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, (E.D. Va. Feb. 13, 2014); *see also Harris v. McDonnell*, No. 5:13-cv-00077, 2013 WL 5720355, (W.D. Va. Oct. 18, 2013) (a class action lawsuit). Then-Attorney General Ken Cuccinelli defended the suits. *See Robert Barnes, Virginia to Fight Gay Marriage Ban*, THE WASHINGTON POST (Jan 23, 2014). On the heels of the November 2013 election, Virginia's new Attorney General Mark Herring will not defend Virginia's constitutional ban, saying that he believes it is unconstitutional. In the vacuum created by General Herring's decision, it is unclear who, if anyone, has standing to defend the law. For a discussion of the unique issues of standing in ballot initiatives, see Vikram D. Amar, *Should Initiative Proponents Be Permitted Under Article III to Defend in Federal Court?*, 48 UC DAVIS L. REV. (forthcoming Dec. 2014); Vikram Amar, *Revisiting Standing: Proposition 8 in the Ninth Circuit*, JURIST (Feb. 16, 2012), <http://jurist.org/forum/2012/02/vikram-amar-marriage-standing.php>. Virginia House Bill 706 seeks, after the fact, to provide the ability for any legislator to defend the laws of the Commonwealth. *See H.B. 706*, 2014 Session (Va. 2014). Even though the dynamics of any one state may quickly change in important ways, some of the characteristics favoring marriage equality are more stable than others, like educational attainment and religiosity. Moreover, while characteristics may see-saw in an individual state, the broad pattern in the 31 Nonrecognizing States is likely to remain consistent.

234. In this legislative cycle, stand-alone legislation "concerning religious freedoms with respect to marriage" has been introduced in states that are not anticipated to recognize same-sex marriage any time soon, like Kansas. *See H.B. 2453*, Session of 2014 (Kan. 2014). This Article contends that the strongest religious liberty protections will result from trading protections for marriage equality. It is possible that staggering the two goods—religious freedom protections and the recognition of marriage equality—so that they happen at different points in time, may also result in strong protections. It is hard to know whether locking in protections in advance of marriage equality would grease the way for enabling marriage equality legislation or make it more difficult.

Advocates of a staggered approach say that when enabling legislation does arise, opponents cannot then say that marriage equality will hurt religious freedom. Thus, opponents of same-sex marriage forfeit a powerful political weapon against same-sex marriage in exchange for locking in religious liberty protections.

Judicial decisions in Utah and Oklahoma underline what is at stake. Oklahoma and Utah shared a number of characteristics suggesting that both would have been among the last states to adopt same-sex marriage by legislation. Party representation, religiosity, education, lack of statewide sexual orientation protections, the presence of a constitutional amendment against same-sex marriage, and low support for same-sex marriage all played to the opposition.

A majority of people in Utah is not projected to support same-sex marriage until 2020. In 2016, Silver estimates 48.1% would support same-sex marriage. Utah's Republican-controlled legislature and Republican Governor, its status as the second most religious state in the nation behind only Mississippi, its lack of a statewide sexual orientation nondiscrimination law, and strongly locked-in constitutional amendment all would make the reasonable observer believe that Utah would not legislatively adopt same-sex marriage any time soon. Only its relatively educated populace, just outside of the top one-third and nineteenth overall for the United States, would suggest otherwise.

Oklahoma is not much different. Projected support in Oklahoma barely breaks a majority in 2020, with only 51.5% projected to favor same-sex marriage—up from a projected 44.7% in 2016. Oklahoma's Republican legislature, Republican Governor, high religiosity (top one-third), low education levels (bottom one-third), and lack of

If enacted, these protections would appear in stand-alone legislation that presumably will be revisited when, and if, the state embraces marriage equality. This approach cleanly makes religious freedom arguments on their own merits, as opposed to making them during a pitched battle over same-sex marriage recognition. When religious freedom is raised in the context of a pitched battle, some advocates, members of the public, and legislators may suspect the religious freedom arguments are nothing more than an obstructionist tactic designed to defeat same-sex marriage on the merits.

In states that lack a sexual orientation nondiscrimination ban in statewide law, it is unclear what legal risk objectors are being immunized against. *See* Figure 20. As important, unlike the model protections that I and others propose, these proposals have not contained important constraints on the size of organizations that could claim an exemption, nor do they take into consideration any hardship to same-sex couples. *See supra* note 88 (providing information about model religious liberty protections). Standalone legislation in states that do not give protections to LGBT individuals also smack of a one-sided deal because it would protect only religious objectors while giving nothing tangible to the LGBT community.

A better way forward for this kind of legislation would be to protect or enlarge the rights of both sides in the same piece of legislation—for example, by giving LGBT people a much-needed promise of non-discrimination in society, recognition of relationships, or access to marriage.

statewide sexual orientation protections suggest Oklahoma would have been a very late adopter. Oklahoma's negligible lock-in effect for its constitutional ban would have mattered little in light of very low support for same-sex marriage. Utah and Oklahoma illustrate the risks of delay for religious liberty advocates. What should legislators in Utah and Oklahoma (and elsewhere) do now? Where federal district court decisions require that same-sex marriage be recognized, legislators who otherwise may not be inclined to grant marriage equality by statute should act to do so, locking in religious liberty protections pending the appeal.

With all the attention paid to judicial decisions in Utah and Oklahoma, it is easy to forget that a number of constitutional amendment states are in play. A ballot initiative underway now in Ohio seeks to overturn Ohio's 2004 Constitutional Amendment. In Ohio, a mild lock-in effect state, public opposition to same-sex marriage has dropped precipitously since the Amendment's passage in 2004, falling to a mere 37% from 62%.²³⁵ The proposed Amendment in Ohio would mandate marriage equality without *any* religious liberty protections.²³⁶ A similar movement is underway in Oregon where voters have "collected enough signatures to give voters a chance to legalize same-sex marriage in 2014."²³⁷ The Oregon measure, like Maine's, would provide modest religious liberty protections for organizations.

Some may think that because the U.S. Supreme Court is likely to decide the entitlement to same-sex marriage by 2015, it is pointless to bargain now. Proponents may believe that it would be better to wait out the next state legislative round, hoping for a victory in the Supreme Court. Yet, there is no assurance that the Supreme Court will wade in on this question in the near term, especially in the absence of a circuit split.²³⁸ Moreover, a decision favoring marriage equality is not assured, even if increasingly likely. Thus, bargaining for marriage equality supporters delivers a concrete gain now for real families clamoring to marry.

235. Sandhya Somashekhar & Peyton M. Craighill, *Polls in 3 States See Gay-Union Support*, WASH. POST, October 10, 2012, at A8; *see* Table A6.

236. Anna Staver, *Same-Sex Marriage Amendment In Ohio Gets Green Light*, HUFFINGTON POST (April 3, 2012, 6:44 PM), http://www.huffingtonpost.com/2012/04/03/same-sex-marriage-amendment-ohio_n_1400714.html.

237. KATU News, *Oregon same-sex marriage advocates celebrate ballot measure milestone*, KATU.com (Dec. 9, 2013, 12:28 PM) <http://www.katu.com/politics/Oregon-same-sex-marriage-advocates-celebrate-ballot-measure-milestone-235105391.html>.

238. *See supra* note 59.

Even if the Court holds that marriage equality is constitutionally demanded, red states could still enact religious liberty protections at that point simply based on the state's demographics. Ironically, the chances of enacting religious liberty protections on the heels of a Supreme Court decision may be greater in 2016 than if the Court's decision comes later.²³⁹

Others may believe that a victory in the Supreme Court at any time will sideline every motivation for finding a "live and let live" approach to same-sex marriage. True, religious liberty advocates may not have any bargaining leverage on the marriage issue. But they may have bargaining leverage if they are willing to enact sexual orientation non-discrimination laws as part of a package to get religious liberty protections with respect to marriage. In short, even if the right to marry is assured by the Court, the bargaining may shift to sorely needed nondiscrimination protections, rather than disappearing entirely.

CONCLUSION

No one can say with confidence that the United States Supreme Court will not "shut down the marriage debate and impose gay marriage uniformly."²⁴⁰ Until that happens, there is a closing window of opportunity for healing the schism over same-sex marriage. The way forward in this very divisive debate is for both sides to be respectful of the other.²⁴¹ As with many deeply divisive topics, the natural impulse often is to resist compromise, but neither side can afford to do so.

Same-sex marriage by legislation has been a decidedly blue state phenomenon, but it will not remain so. The political terrain facing the marriage equality movement going forward means that religious liberty will remain yoked to same-sex marriage recognition until public support engulfs all opposition. The decision squarely in front of marriage equality advocates is whether to lock-in same-sex marriage now, with protections for religious dissenters, or to wait, relying on overwhelming public support alone.²⁴²

239. See Table A4. Compare Figure 22 with Figure 24.

240. Dreher, *supra* note 38, at 12 (quoting Maggie Gallagher).

241. For a pair of views on the divisiveness debate, see Smith, *supra* note 63 and Laycock, *supra* note 218.

242. Some would contend that marriage equality advocates have an incentive not to bargain, waiting for judicial decisions that deliver same-sex marriage without exemptions specific to marriage. Because no one can be assured of when courts will act, and what outcome they will reach, refusing to bargain necessarily puts off rights that could be secured legislatively today. For this reason, marriage equality advocates would be gambling to say, "No thanks, we will wait for Justice Kennedy."

For opponents, the more challenging political terrain also means that the best opportunity to cement meaningful religious liberty protections is now. If opponents act now, trading recognition of same-sex marriage for robust protections, then opponents will have muted the impact of same-sex marriage on like-minded believers. It is true that the struggle over same-sex marriage is an existential fight for some who may not or cannot be moved by pragmatic appeals, but for those who can, if they resist the “damage control” within their means,²⁴³ they will only have themselves to blame.²⁴⁴

243. “There is not yet a unified sense of where we go from here, except for this: there is an accelerating awareness that the consequence of marriage equality is going to be extremely negative for traditionalist Christians.” See Dreher, *supra* note 40 (quoting Maggie Gallagher).

244. For those for whom the struggle over same-sex marriage is an existential fight, pragmatic appeals may find little reception. See Smith, *supra* note 63 (arguing that both sides are acting on legitimate concerns and are not merely being intransigent—instead, the “contending parties understand that there is a struggle over who will be doing the accommodating to whom. Proponents of same-sex marriage perceive, correctly, that domestic partnership is not likely to have all of the same legal features and advantages as marriages; and even if it does, in such an arrangement, heterosexual marriage is the ‘normal’ position, and it is the same-sex couples who are being accommodated. By the same token, more traditional citizens perceive that a law recognizing same-sex marriage, even if it comes with religious freedom ‘exceptions’ or ‘exemptions,’ reverses these positions: now they are the ones who are the outliers to be accommodated.”). For anyone who may be swayed by pragmatic arguments, a clear-eyed view of the benefits of compromise is important. In the end, compromise offers the best hope for closing the schism over same-sex marriage.

APPENDIX

*Table A1: States Recognizing Same-Sex Marriage and the Methods by Which Same-Sex Marriage Is Recognized as of Jan. 14, 2014*²⁴⁵

State	Method of Same-Sex Marriage Recognition	Legislation/Decision
Maryland	Enacting Legislation	Md. Code Ann. Fam. Law §§ 2-201 (LexisNexis 2012) (effective Jan. 1, 2013).
Rhode Island	Enacting Legislation	R.I. Gen. Laws § 15-1-1 (2013) (effective Aug. 1, 2013).
New Hampshire	Enacting Legislation	N.H. Rev. Stat. § 457:1A (2010) (effective Jan. 1, 2010).
Minnesota	Enacting Legislation	Minn. Stat. Ann. § 517.01 (West 2013) (Aug. 1, 2013).
New York	Enacting Legislation	N.Y. Dom. Rel. Law § 10-a (McKinney Supp. 2014) (effective July 24, 2011).
The District of Columbia	Enacting Legislation	Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (2009) (codified as D.C. Code § 46-401 (LexisNexis 2012)) (effective Mar. 3, 2010).
Vermont	Enacting Legislation	Vt. Stat. Ann. Tit. 15, § 8 (2009) (effective Sept. 1, 2009).
Washington	Enacting Legislation	In 2012 the Washington legislature voted on and passed a same-sex marriage bill. An Act Requiring Protection For All Families IN Washington By Creating Equality In Civil Marriage And Changing Domestic Partner Laws, While Protecting Religious Freedom, ch. 3, sec. 2, 2012 Wash. Sess. Laws 199, 200 (codified as Wash. Rev. Code § 26.04.010(1) (West 2012)). The same-sex marriage bill was then put to a state vote as Referendum 74, and the Referendum passed, thereby legalizing same-sex marriage in Washington. 2012 Wash. Sess. Laws 669, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.
Illinois	Enacting Legislation	Religious Freedom and Marriage Fairness Act, S.B. 0010, 98th Gen. Assemb. (Ill. 2013) (enacted) (to be codified at 750 Ill. Comp. Stat. 5/201 (2014)) (effective, June 1, 2014).

245. Because the political landscape of same-sex marriage is in constant flux, it is worth noting that this Article accounts same-sex marriage laws as of January 14, 2014. During the editing cycle, a spate of same-sex marriage decisions continued to emerge from federal district courts. As just one example, Michigan's ban on same-sex marriage (the Michigan Marriage Amendment, MICH. CONST. art. I, § 25) has been held unconstitutional. *See Deboer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014). However, the United States Court of Appeals for the Sixth Circuit has granted the state's request to stay the judgment of the district court until the appeals court has ruled on the appeal. *See Deboer v. Snyder*, No. 14-1341 (6th Cir. Mar. 25, 2014).

Table A1 (continued): States Recognizing Same-Sex Marriage and the Methods by Which Same-Sex Marriage Is Recognized as of Jan. 14, 2014

State	Method of Same-Sex Marriage Recognition	Legislation/Decision
Hawaii	Enacting Legislation	Haw. Rev. Stat. §572-1 (West 2013) (effective Dec. 2, 2013).
Delaware	Enacting Legislation	Del. Code Ann. tit. 13 § 101 (2013) (effective July 1, 2013).
Maine	Enacting Legislation	In 2009 the Maine legislature introduced and passed a same-sex marriage bill. An Act To End Discrimination In Civil Marriage And Affirm Religious Freedom, ch. 82, sec. 2, 2009 Me. Laws 150 (codified as Me. Rev. Stat. Ann. tit. 19-A, § 650-A(2013)) (effective Dec. 29, 2012). However, the Act was repealed in a referendum in November of 2009. In November of 2012 the Act was reinstated in another state referendum, and the law took effect in late 2012.
California	Judicial Decision	<p>Prior to 1977, the California marriage statute was gender neutral, referencing neither a man or a woman. A.B. 43 2007 Reg. Sess. (Cal. 2007). When the California family code became effective on January 1, 1994 marriage was defined as a “civil contract between a man and a woman.” A.B. 2560, 1992 Reg. Sess. (Cal. 1992). In order to further combat concerns about same-sex marriage Proposition 22 was adopted by California voters adding section 308.5 to the Family Code stating that “Only marriage between a man and a woman is valid or recognized in California.” 2000 Cal. Legis. Serv. Prop. 22 (West). During the 2005-2006 session, the California Senate and State Assembly passed Assembly Bill 849 which proposed to legalize same-sex marriage. A.B. 849, 2005 Reg. Sess. (Cal. 2005). This measure was vetoed by Governor Schwarzenegger, citing Proposition 22 as his justification for the veto. Veto Message A.B. 849 (2005), http://www.leginfo.ca.gov/pub/05-06/bill_asm/ab_0801-0850/ab_0801-0850_ab_849_vt_20050929.html. In 2008, voters approved Proposition 8, which amended the California State Constitution to say “Only marriage between a man and a woman is valid or recognized in California.” 2008 Cal. Legis. Serv. Prop. 8 (West). In the meantime, the California Supreme Court had consolidated challenges to laws treating individuals differently based sexual orientation and held that Proposition 22 was unconstitutional. See <i>In Re Marriage Cases</i>, 183 P.3d 384 (2008). Despite the decision in <i>In Re Marriage Cases</i>, in 2009 the California Supreme Court held that the passage of Proposition 8 was valid as voted by the people. See <i>Strauss v. Horton</i>, 207 P.3d 48 (2009) (upholding Proposition 8 but also recognizing as valid the marriages performed between the decision of <i>In Re Marriage</i> and the passage of Proposition 8). After conflicting rulings at the state level, two same-sex couples brought action in federal court alleging that the Proposition 8 violated due process and equal protection under the Fourteenth Amendment. See <i>Perry v. Schwarzenegger</i>, 704 F. Supp. 2d 921 (2010), aff’d sub nom. <i>Perry v. Brown</i>, 671 F.3d 1052 (2012), aff’d sub nom. <i>Hollingsworth v. Perry</i>, 133 S. Ct. 2652 (2013) (holding that the constitutional amendment violated the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment).</p>

Table A1 (continued): States Recognizing Same-Sex Marriage and the Methods by Which Same-Sex Marriage Is Recognized as of Jan. 14, 2014

State	Method of Same-Sex Marriage Recognition	Legislation/Decision
Connecticut	Enacting Legislation/ Judicial Decision	Conn. Gen. Stat. § 46b-20 (2009)) (effective Apr. 23, 2009). This legislation followed on the heels of a judicial decision recognizing same-sex marriage in the state, <i>Kerrigan v. Commissioner of Public Health</i> , 289 Conn. 135 (2008).
Iowa	Judicial Decision	<i>Varnum v. Brien</i> , 763 N.W.2d 862 (2009).
Massachusetts	Judicial Decision	<i>Goodridge v. Dept. of Pubic Health</i> , 440 Mass. 309 (2003).
New Jersey	Judicial Decision	<i>Garden State Equality v. Dow</i> , 82 A.2d 336 (N.J. Super. Ct. Law Div. 2013).
New Mexico	Judicial Decision	<i>Griego v. Oliver</i> , 316 P.3d 865 (2013).
Oklahoma	Judicial Decision (Stayed)	<i>Bishop v. United States ex rel. Holder</i> , No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). This judicial decision was stayed, pending appeal, by the Judge at the end of this decision.
Utah	Judicial Decision (Stayed)	<i>Kitchen v. Herbert</i> , No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013). This judicial decision was stayed, pending appeal, by the U.S. Supreme Court. <i>Kitchen v. Herbert</i> , 134 S. Ct. 893 (2014).

Table A2: State-Wide Sexual Orientation Nondiscrimination Measures

	Same-Sex Marriage (SSM) Legislation	Employment Discrimination	Housing Discrimination	Public Accommodations	Other Nondiscrimination Measures	Years Other Protections Preceded SSM Legislation ²⁴⁶
<i>Enacting Jurisdictions</i>						
CT	2009 ²⁴⁷	1991 ²⁴⁸	1991 ²⁴⁹	1991 ²⁵⁰	1991 ²⁵¹ (Education) 2011 ²⁵² (Credit)	18 years
DE	2013 ²⁵³	2009 ²⁵⁴	2009 ²⁵⁵	2009 ²⁵⁶		4 years
DC	2009 ²⁵⁷	1977 ²⁵⁸	1977 ²⁵⁹	1977 ²⁶⁰	1977 ²⁶¹ (Education)	32 years
HI	2013 ²⁶²	1991 ²⁶³	2005 ²⁶⁴	2006 ²⁶⁵		22 years
IL	2013 ²⁶⁶	2004 ²⁶⁷	2004 ²⁶⁸	2004 ²⁶⁹	2004 ²⁷⁰ (Credit)	9 years
MD	2012 ²⁷¹	2009 ²⁷²	2009 ²⁷³	2009 ²⁷⁴	2008 ²⁷⁵ (Education)	4 years
MN	2013 ²⁷⁶	1993 ²⁷⁷	1993 ²⁷⁸	1993 ²⁷⁹	1993 ²⁸⁰ (Credit)	20 years
NH	2009 ²⁸¹	1997 ²⁸²	1997 ²⁸³	1997 ²⁸⁴		12 years
NY	2011 ²⁸⁵	2002 ²⁸⁶	2002 ²⁸⁷	2002 ²⁸⁸	2002 ²⁸⁹ (Education, Credit, and Other Various Protections)	9 years
RI	2013 ²⁹⁰	1995 ²⁹¹	1995 ²⁹²	1995 ²⁹³	1995 ²⁹⁴ (Education)	18 years
VT	2009 ²⁹⁵	1992 ²⁹⁶	1992 ²⁹⁷	1992 ²⁹⁸	2000 ²⁹⁹ (Credit)	17 years
WA	2012 ³⁰⁰	2006 ³⁰¹	2006 ³⁰²	2006 ³⁰³	2006 ³⁰⁴ (Education and Credit)	6 years
<i>Nonrecognizing Jurisdictions with Antidiscrimination Measures</i>						
CO	N/A	305	306	307	308	N/A
NV	N/A	309	310	311	N/A	N/A
OR	N/A	312	313	314	315	N/A
WI	N/A	316	317	318	319	N/A

246. This column is only relevant for the enacting jurisdictions. It is measured by the time which passed between the enactment of the earliest nondiscrimination measure protecting against sexual orientation discrimination and the enactment of same-sex marriage legislation.

247. An Act Implementing The Guarantee Of Equal Protection Under The Constitution Of The State For Same Sex Couples, Pub. Acts No. 09-13, sec. 3, 2009 Conn. Acts 78, 79 (Reg. Sess.) (codified as CONN. GEN. STAT. § 46b-20 (2009)).

248. An Act Concerning Discrimination On The Basis Of Sexual Orientation, Pub. Acts No. 91-58, sec. 3, 1991 Conn. Acts 118, 119 (codified as CONN. GEN. STAT. § 46a-60 (West 2009)).

249. An Act Concerning Discrimination On The Basis Of Sexual Orientation, Pub. Acts No. 91-58, sec. 5, 1991 Conn. Acts 118, 119-120; An Act Concerning Discriminatory Housing Practices, Pub. Acts No. 92-257,

- sec. 2, 1992 Conn. Acts 839, 840-841 (codified as CONN. GEN. STAT. § 46a-64c (West 2009)).
250. An Act Concerning Discrimination On The Basis Of Sexual Orientation, Pub. Acts No. 91-58, sec. 4, 1991 Conn. Acts 118, 119 (codified as CONN. GEN. STAT. § 46a-64 (West 2009)).
251. An Act Concerning Discrimination On The Basis Of Sexual Orientation, Pub. Acts No. 91-58, sec. 10, 1991 Conn. Acts 118, 121 (codified as CONN. GEN. STAT. § 46a-75 (West 2009)).
252. An Act Concerning Discrimination On The Basis Of Sexual Orientation, Pub. Acts No. 91-58, sec. 6, 1991 Conn. Acts 118, 120 (codified as CONN. GEN. STAT. § 46a-66 (West 2009)).
253. An Act To Amend Title 13 of the Delaware Code Relating to Domestic Relations to Provide for Same-Gender Civil Marriage and to Convert Civil Unions to Civil Marriages, H.B. 75, 147th Gen. Assemb. (Del. 2013) (enacted) (codified as DEL. CODE ANN. TIT. 13 § 101 (2013) (effective July 1, 2013)).
254. An Act To Amend Titles 6, 9, 18, 19, 25, And 29 Of The Delaware Code Relating To Discrimination In Employment, Public Works Contracting, Housing, Equal Accommodations And The Insurance Business, ch. 90, secs. 17-19, 77 Del. Laws 264, 265 (2009) (codified as DEL. CODE ANN. TIT. 19, § 711 (West 2013)).
255. An Act To Amend Titles 6, 9, 18, 19, 25, And 29 Of The Delaware Code Relating To Discrimination In Employment, Public Works Contracting, Housing, Equal Accommodations And The Insurance Business, ch. 90, sec. 7, 77 Del. Laws 264, 265 (2009) (codified as DEL. CODE ANN. TIT. 6, § 4603 (West 2013)).
256. An Act To Amend Titles 6, 9, 18, 19, 25, And 29 Of The Delaware Code Relating To Discrimination In Employment, Public Works Contracting, Housing, Equal Accommodations And The Insurance Business, ch. 90, sec. 4, 77 Del. Laws 264 (2009) (codified as DEL. CODE ANN. TIT. 6, § 4604 (West 2013)).
257. Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg 27 (Mar. 10, 2010) (codified as D.C. CODE § 46-401).
258. Human Rights Act of 1977, D.C. Law 2-38, title II, 24 D.C. Reg. 6038 (Dec. 13, 1977) (codified as D.C. CODE § 2-1402.11 (LexisNexis 2012)).
259. Human Rights Act of 1977, D.C. Law 2-38, title II, 24 D.C. Reg. 6038 (Dec. 13, 1977) (codified as D.C. CODE § 32-408 (LexisNexis 2012)).
260. Human Rights Act of 1977, D.C. Law 2-38, title II, 24 D.C. Reg. 6038 (Dec. 13, 1977) (codified as D.C. CODE § 2-1402.21 (LexisNexis 2012)).
261. Human Rights Act of 1977, D.C. Law 2-38, title II, 24 D.C. Reg. 6038 (Dec. 13, 1977) (codified as D.C. CODE § 2-1402.41 (LexisNexis 2012)).
262. Hawaii Marriage Equality Act of 2013, sec. 3, Hawaii S.B. No. 1 (2013) (codified as HAW. REV. STAT. § 572-1 (West 2013)) (effective Dec. 2, 2013).
263. A Bill For An Act Relating To Employment, Act 2, sec. 3, 1991 Haw. Sess. Laws 3, 4-5 (codified as HAW. REV. STAT. § 378-2 (West 1991)).

264. A Bill For An Act Relating To Civil Rights, Act 214, sec. 3 2005 Haw. Sess. Laws 688, 689-690 (codified as HAW. REV. STAT. § 515-3 (West Supp. 2012)).
265. A Bill For An Act Relating To Civil Rights, Act 76, sec. 3, 2006 Haw. Sess. Laws 214, 215 (codified as HAW. REV. STAT. § 489-3 (West Supp. 2012)).
266. Religious Freedom and Marriage Fairness Act, S.B. 0010, 98th Gen. Assemb. (Ill. 2013) (enacted) (to be codified at 750 ILL. COMP. STAT. 5/201 (2014)) (effective, June 1, 2014).
267. An Act Concerning Human Rights, Pub. Act No. 93-1078, art. 1, 2004 Ill. Laws 4837, 4838 (codified as 775 ILL. COMP. STAT. 5/102(A) (West 2011)).
268. An Act Concerning Human Rights, Pub. Act No. 93-1078, art. 1, 2004 Ill. Laws 4837, 4838 (codified as 775 ILL. COMP. STAT. 5/102(A) (West 2011)).
269. An Act Concerning Human Rights, Pub. Act No. 93-1078, art. 1, 2004 Ill. Laws 4837, 4838 (codified as 775 ILL. COMP. STAT. 5/102(A) (West 2011)).
270. An Act Concerning Human Rights, Pub. Act No. 93-1078, art. 1, 2004 Ill. Laws 4837, 4838 (codified as 775 ILL. COMP. STAT. 5/102(A) (West 2011)).
271. Civil Marriage Protection Act, ch. 2, sec. 1 2012 Md. Laws 9, 10 (codified as MD. CODE ANN., FAM. LAW §§2-201 (LexisNexis 2012)) (effective Jan. 1, 2013).
272. House Bill 51, ch. 120, sec. 6 2009 Md. Laws 540, 567-570 (codified as MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis Supp. 2013)).
273. House Bill 51, ch. 120, sec. 7, 2009 Md. Laws 540, 581-583 (codified as MD. CODE ANN., STATE GOV'T § 20-705 (LexisNexis Supp. 2013)).
274. House Bill 51, ch. 120, sec. 3 2009 Md. Laws 540, 554 (codified as MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis Supp. 2013)).
275. An Act Concerning Public Schools-Bullying, Harassment, An Intimidation-Policy And Disciplinary Standards, ch. 489, sec. 1, 2008 Md. Laws 4050, 4051-4054 (codified as MD. CODE ANN., EDUC. § 7-424.1 (LexisNexis 2008)).
276. An Act Relating to Marriage, ch. 74, sec. 2, 2013 Minn. Laws 404, 405 (codified as MINN. STAT. ANN. § 517.01 (West 2013)) (Aug. 1, 2013).
277. An Act Relating to Human Rights: Prohibiting Unfair Discriminatory Practices On The Basis Of Sexual Orientation, ch. 22, sec. 3, 1993 Minn. Laws 121, 122-124 (codified as MINN. STAT. ANN. § 363.08 SUBD. 2 (West 2012)).
278. An Act Relating to Human Rights: Prohibiting Unfair Discriminatory Practices On The Basis Of Sexual Orientation, ch. 22, sec. 4, 1993 Minn. Laws 121, 124-125 (codified as MINN. STAT. ANN. § 363.09 (West 2012)).
279. An Act Relating to Human Rights: Prohibiting Unfair Discriminatory Practices On The Basis Of Sexual Orientation, ch. 22, sec. 5, 1993 Minn. Laws 121, 125-126 (codified as MINN. STAT. ANN. § 363A.11, SUBD. 1 (West 2012)).

280. An Act Relating to Human Rights: Prohibiting Unfair Discriminatory Practices On The Basis Of Sexual Orientation, ch. 22, sec. 12, 1993 Minn. Laws 121, 138-139 (codified as MINN. STAT. ANN. § 363A.16 (West 2012)).
281. An Act Relative to Civil Marriage and Civil Unions, ch. 59, 2009 N.H. Laws 60, 60 (codified as N.H. REV. STAT. § 457:1A (2010)).
282. An Act Amending The Law Against Discrimination To Prohibit Discrimination On Account Of A Person's Sexual Orientation, ch. 108, 1997 H.H. Laws 88, 91 (codified as N.H. REV. STAT. § 354-A:6 (2009)).
283. An Act Amending The Law Against Discrimination To Prohibit Discrimination On Account Of A Person's Sexual Orientation, ch. 108, 1997 H.H. Laws 88, 92 (codified as N.H. REV. STAT. § 354-A:8 (2009)).
284. An Act Amending The Law Against Discrimination To Prohibit Discrimination On Account Of A Person's Sexual Orientation, ch. 108, 1997 H.H. Laws 88, 92 (codified as N.H. REV. STAT. § 354-A:10 (2009)).
285. Marriage Equality Act, ch. 95, 2011 N.Y. LAWS 749 (codified at N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2014)).
286. Act of Dec. 17, 2002, ch. 2, secs. 2, 5-6, §§ 291, 296(1)-(1-a), 2002 N.Y. LAWS 46, 46-48 (codified as amended at N.Y. EXEC. LAW §§ 291, 296(1)-(1-a) (McKinney 2013)).
287. Secs. 2, 8-9, 11, §§ 291, 296(2-a), (3-b), (5), 2002 N.Y. LAWS at 46-51 (codified as amended at N.Y. EXEC. LAW §§ 291, 296(2-a), (3-b), (5) (McKinney 2013)).
288. Secs. 2, 7, §§ 291, 296(2) 2002 N.Y. LAWS at 46, 48 (codified as amended at N.Y. EXEC. LAW §§ 291, 296(2) (McKinney 2013)).
289. Secs. 2, 10, 12-17, §§ 291, 296(4), (9)(a), (13), 296-a, 40-c, 313(1)(a), (3), 2002 N.Y. LAWS at 46, 48, 51-53 (codified as amended at N.Y. EXEC. LAW §§ 291, 296, 296-a; CIV. RIGHTS LAW § 40-c; EDUC. § 313 (McKinney 2013)).
290. An Act Relating to Domestic Relations-Persons Eligible to Marry, ch. 13-4, 2013 R.I. Pub. Laws _____ (codified as R.I. GEN. LAWS §15-1-1 (2013))(effective Aug. 1, 2013).
291. An Act Relating To Civil Rights , ch. 32, sec. 4, 1995 R.I. Pub. Laws 83, 85-88 (codified as R.I. GEN. LAWS ANN. § 28-5-7 (2003)).
292. An Act Relating To Civil Rights , ch. 32, sec. 3, 1995 R.I. Pub. Laws 83, 87-91 (codified as R.I. GEN. LAWS ANN. § 34-37-4 (2013)).
293. An Act Relating To Civil Rights , ch. 32, sec. 7, 1995 R.I. Pub. Laws 83 (codified as R.I. GEN. LAWS ANN. § 11-24-2 (Supp. 2013)).
294. An Act Relating To Civil Rights , ch. 32, sec. 7 1995 R.I. Pub. Laws 83, 107 (codified as R.I. GEN. LAWS ANN. § 28-5.1-8 (Supp. 2013)).
295. An Act Relating to Civil Marriage, no. 3, 2009 Vt. Acts & Resolves 33 (codified as VT. STAT. ANN. TIT. 15, § 8 (2009)).
296. An Act Relating To Discrimination On The Basis Of Sexual Orientation, No. 135, 1992 Vt. Acts & Resolves 26, 26-27 (codified as VT. STAT. ANN. TIT. 21, § 495(a) (2009))..

297. An Act Relating To Discrimination On The Basis Of Sexual Orientation, No. 135, 1992 Vt. Acts & Resolves 26, 28-30 (codified as VT. STAT. ANN. TIT. 9, § 4503 (Supp. 2013)).
298. An Act Relating To Discrimination On The Basis Of Sexual Orientation, No. 135, 1992 Vt. Acts & Resolves 26, 30-31 (codified as VT. STAT. ANN. TIT. 9, § 4502(a) (Supp. 2013)).
299. An Act Relating To The Modernization Of The Laws Related To Banks And Banking, No. 153, 2000 Vt. Acts & Resolves 509, 593 (codified as VT. STAT. ANN. TIT. 8, § 10403 (Supp. 2013)).
300. An Act Requiring Protection For All Families In Washington By Creating Equality In Civil Marriage And Changing Domestic Partner Laws, While Protecting Religious Freedom, ch. 3, 2012 Wash. Sess. Laws 199 (codified as WASH. REV. CODE § 26.04.010(1) (West 2012)).
301. An Act Relating To The Jurisdiction Of The Washington Human Rights Commission, ch. 4, 2006 Wash. Sess. Laws 12 (codified as WASH. REV. CODE § 49.60.180 (2012)).
302. An Act Relating To The Jurisdiction Of The Washington Human Rights Commission, ch. 4, 2006 Wash. Sess. Laws 12 (codified as WASH. REV. CODE § 49.60.222 (2012)).
303. An Act Relating To The Jurisdiction Of The Washington Human Rights Commission, ch. 4, 2006 Wash. Sess. Laws 12 (codified as WASH. REV. CODE § 49.60.215 (2012)).
304. An Act Relating To The Jurisdiction Of The Washington Human Rights Commission, ch. 4, 2006 Wash. Sess. Laws 12 (codified as WASH. REV. CODE § 49.60.040(2) (2012)).
305. An Act Concerning The Expansion Of Employment Nondiscrimination Protections, ch. 295, 2007 Colo. Sess. Laws 1254, 1254-1256 (codified as COLO. REV. STAT. § 24-34-402 (2013)).
306. An Act Concerning The Expansion Of Prohibitions Against Discrimination, ch. 341, 2008 Colo. Sess. Laws 1593, 1593-1595 (codified as COLO. REV. STAT. § 24-34-502 (2013)).
307. An Act Concerning The Expansion Of Prohibitions Against Discrimination, ch. 341, 2008 Colo. Sess. Laws 1593, 1595-1596 (codified as COLO. REV. STAT. § 24-34-601 (2013)).
308. An Act Concerning The Expansion Of Prohibitions Against Discrimination, ch. 341, 2008 Colo. Sess. Laws 1593, 1596-1597 (codified as COLO. REV. STAT. § 12-59-106(1)(s) (2013)).
309. An Act Relating to Employment Practices, ch. 419, 1999 Nev. Stat. 1935, 1938 (codified as NEV. REV. STAT. § 613.330 (2012)).
310. An Act Relating to Housing, ch. 191, 2011 Nev. State 867 (codified as NEV. REV. STAT. § 118.020 (Supp. 2013)).
311. An Act Relating to Public Accommodations, ch. 195, 2009 Nev. Stat. 716, 717 (codified as Nev. Rev. Stat. § 651.070 (West Supp. 2013)).
312. An Act Relating to Sexual Orientation Discrimination, ch. 100, sec. 29, 2007 Or. Laws 431, 443 (codified as OR. REV. STAT. § 659.850(2) (2013)).

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313. An Act Relating to Sexual Orientation Discrimination, ch. 100, sec. 4, 2007 Or. Laws 431, 432-433 (codified as OR. REV. STAT. § 659A.030 (2013)).
314. An Act Relating to Sexual Orientation Discrimination, ch. 100, sec. 8, 2007 Or. Laws 431, 434-435 (codified as OR. REV. STAT. § 659A.421 (2013)).
315. An Act Relating to Sexual Orientation Discrimination, ch. 100, sec. 5, 2007 Or. Laws 431, 433 (codified as OR. REV. STAT. § 659A.403 (2013)).
316. 1981 Wisconsin Act 112, ch. 112, sec. 2, 1981 Wis. Sess. Laws 901, 902 (codified as WIS. STAT. ANN. § 111.31(2) (West Supp. 2013)).
317. 1981 Wisconsin Act 112, ch. 112, sec. 4, 1981 Wis. Sess. Laws 901, 902 (codified as WIS. STAT. ANN. § 106.50 (West Supp. 2013)).
318. 1981 Wisconsin Act 112, ch. 112, sec.3, 1981 Wis. Sess. Laws 901, 902 (codified as WIS. STAT. ANN. § 106.52 (West Supp. 2013)).
319. 1989 Wisconsin 186, ch. 186, sec. 1, 1989 Wis. Sess. Laws 1113 (codified as WIS. STAT. ANN. § 36.12 (West 2013)).

Table A3: Religious Liberty Protections in Same-Sex Marriage States

	1	2	3	4	5	6	7	8	9	10
	Expressly exempt clergy from duty to solemnize any marriage ³²⁰	Expressly exempt a religious organization (including nonprofits) from duty to "provide services, accommodations, advantages, facilities, goods, or privileges" (or similar) for solemnization ³²¹	Expressly protect covered objectors from private suit ³²²	Expressly protect covered objectors, from government "penalty" ³²³	Expressly protect covered objectors from "promotion of same-sex marriage through religious programs, counseling, courses, or retreats" ³²⁴	Allows a religiously affiliated adoption or foster care agency to place children only with heterosexual couples unless program publicly funded ³²⁵	Expressly allow religiously affiliated fraternal organizations to limit insurance coverage ³²⁶	Expressly protect covered objectors from "promotion of marriage through . . . housing designated for married individuals" ³²⁷	Expressly exempts non-clergy authorized celebrants (e.g., judges and justices of the peace) from duty to solemnize ³²⁸	Carries forward existing exemptions from preexisting nondiscrimination statute ³²⁹
Same-Sex Marriage by Legislation										
Maryland	✓	✓	✓	✓	✓	✓	✓			
Rhode Island	✓	✓	✓	✓	✓	✓	✓			✓
New Hampshire	✓	✓	✓	✓	✓		✓	✓		✓
Minnesota	✓	✓	✓	✓		✓		✓		✓
Connecticut ³³⁰	✓	✓	✓	✓		✓				
D.C.	✓	✓	✓	✓	✓					
New York	✓	✓	✓	✓				✓		✓
Washington	✓	✓	✓	✓	✓					
Vermont	✓	✓	✓				✓			
Hawaii	✓	✓	✓	✓						
Illinois	✓	✓	✓	✓						✓
Delaware	✓			✓					✓	✓

Table A3 (continued): Religious Liberty Protections in Same-Sex Marriage States

	1	2	3	4	5	6	7	8	9	10
	Expressly exempt clergy from duty to solemnize any marriage	Expressly exempt a religious organization (including nonprofits) from duty to "provide services, accommodations, advantages, facilities, goods, or privileges" (or similar) for solemnization	Expressly protect covered objectors from private suit	Expressly protect covered objectors, from government "penalty."	Expressly protect covered objectors from "promotion of same-sex marriage through religious programs, counseling, courses, or retreats"	Allows a religiously affiliated adoption or foster care agency to place children only with heterosexual couples, unless program publicly funded	Expressly allow religiously affiliated fraternal organizations to limit insurance coverage	Expressly protect covered objectors from "promotion of marriage through ... housing designated for married individuals."	Expressly exempts non-clergy authorized celebrants (e.g., judges and justices of the peace) from duty to solemnize	Carries forward existing exemptions from preexisting nondiscrimination statute
Same-Sex Marriage by Ballot Initiative										
Maine	✓	✓	✓	✓						
Same-Sex Marriage by Judicial Decision										
California	✓			✓						*
Iowa										
Massachusetts										
New Jersey										
New Mexico	*									*
Oklahoma ³³¹										
Utah ³³²										

320. *See* CONN. GEN. STAT. § 46b-22b (West 2009); DEL. CODE ANN. tit. 13, § 106 (2013), <http://delcode.delaware.gov/title13/c001/sc01/index.shtml>; D.C. CODE § 46-406(c) (LexisNexis 2012); S.B. No. 1 H.D.1 § 572-D, 27th Leg., 2nd Spec. Sess. (Haw. 2013); S.B. 10(a-5), 98th Gen. Assemb. Reg. Sess. (Ill. 2013); MD. CODE ANN., Fam. Law §§ 2-201, 2-202, (LexisNexis 2012)); MINN. STAT. ANN. § 517.09 (West Supp. 2013); N.H. REV. STAT. ANN. § 457:37(II) (Supp. 2013); N.Y. DOM. REL. LAW § 11(1) (McKinney Supp. 2014); Vt. Stat. Ann. tit. 18, § 5144(b) (2012); R.I. GEN. LAWS ANN. § 15-3-6.1(b) (LexisNexis 2013); WASH. REV. CODE § 26.04.010(4) (LexisNexis 2013). *See also* ME. REV. STAT. Ann. tit. 19-A, § 655 (Supp. 2013). *See also* CAL. FAM. CODE § 400 (West Supp. 2013) ("Although marriage is a personal relation arising out of a civil, and not a religious, contract, a marriage may be solemnized by any of the following who is 18 years of age or older: (a) A priest, minister, rabbi, or authorized person of any religious denomination. A person authorized by this subdivision shall not be required to solemnize a marriage that is contrary to the tenets of his or her faith. Any refusal to solemnize a marriage under this subdivision, either by an individual or by a religious denomination, shall not affect

- the tax-exempt status of any entity.”); *Griego v. Oliver*, 316 P.3d. 865, 871 (N.M. 2013) (“Our holding will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to change its policies to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs.”).
321. *See* CONN. GEN. STAT. §§ 46b-22b, 46b-35a (West 2009 & Supp. 2013); D.C. CODE § 46-406(e) (LexisNexis Supp. 2013); S.B. No. 1 H.D.1 § 572-E (Haw. 2013); S.B. 10 (a-10) (Ill. 2013) (covers “facility” only; organizations with “principal purpose” to advance religion); MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012); MINN. STAT. ANN. § 363A.26(3) (West Supp. 2013); N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2013); N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2014); VT. STAT. ANN. tit. 8, § 4501(1) (Supp. 2013); R.I. GEN. LAWS ANN. § 15-3-6.1(c) (2013); WASH. REV. CODE ANN. § 26.04.010(5) (LexisNexis 2013). *See also* Me. Rev. Stat. Ann. tit. 19-A, § 655 (Supp. 2013) (provides there is no duty to “host”; encompasses “other religious institution”).
322. *See* CONN. GEN. STAT. § 46b-35a (Supp. 2013); DEL. CODE ANN. tit. 13 § 106 (2013), <http://delcode.delaware.gov/title13/c001/sc01/index.shtml>; D.C. CODE § 46-406(e)(2) (LexisNexis Supp. 2013); S.B. No. 1 H.D.1 § 572-D (Haw. 2013); S.B. 10 (a-5) (Ill. 2013); MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012); MINN. STAT. ANN. § 517.09 (West Supp. 2013); N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2013); N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2014); R.I. GEN. LAWS ANN. § 15-3-6.1 (2013); VT. STAT. ANN. tit. 8, § 5144(b) (2012); WASH. REV. CODE § 26.04.010(6) (LexisNexis 2013). *See also* ME. REV. STAT. ANN. tit. 19-A, § 655 (Supp. 2013).
323. *See* CONN. GEN. STAT. § 46b-35a (Supp. 2013); DEL. CODE ANN. tit. 13 § 106 (2013), <http://delcode.delaware.gov/title13/c001/sc01/index.shtml>; D.C. CODE § 46-406(e)(2) (LexisNexis Supp. 2013); S.B. No. 1 H.D.1 § 572-D-E (Haw. 2013); S.B. 10 (a-10) (Ill. 2013); Md. H.B. 438 §§ 2-3 (codified as MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012); MINN. STAT. ANN. § 517.09 (West Supp. 2013); N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2013); N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2014); R.I. GEN. LAWS ANN. § 15-3-6.1 (2013); WASH. REV. CODE § 26.04.010(4) (LexisNexis 2013). *See also* ME. REV. STAT. tit. 19-A, § 655 (Supp. 2013). *See also* CAL. FAM. CODE § 400(a) (West Supp. 2014) (“Any refusal to solemnize a marriage under this subdivision, either by an individual or by a religious denomination, shall not affect the tax-exempt status of any entity.”).
324. *See* D.C. CODE § 46-406(e) (2011) (LexisNexis Supp. 2013). *See also* N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2013) (exempting “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”); MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012) (this protection only applies if the program receives no state or federal funding); R.I. GEN. LAWS ANN. § 15-3-6.1 (2013) (exempting the “promotion of marriage through any social or religious programs or service”); WASH. REV. CODE ANN. § 26.04.010(7)(a)(ii) (LexisNexis 2013)). New York may protect this. *See* N.Y. DOM. REL. LAW § 10-b(2) (McKinney Supp. 2014) (“nothing in this article shall limit or diminish the right, . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization . . . from taking such action as is

- calculated by such organization to promote the religious principles for which it is established or maintained”).
325. *See* Conn. Pub. Acts No. 09-13 § 19 (2009) (requiring that “such religious organization does not receive state or federal funds for that specific program or purpose”); Md. Code Ann., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012) (no “promotion” through “social programs . . . unless state or federal funds” for “specific program”); MINN. STAT. ANN. § 517.201 (West Supp. 2014) (conditioning protection on fact that covered entity “does not receive public funds for that specific program or purpose”). Rhode Island does not condition this protection on not receiving public funds. R.I. Gen. Laws Ann. § 15-3-6.1(c)(2) (2013).
326. *See* VT. STAT. ANN. tit. 8 § 4501(b) (Supp. 2013); N.H. REV. STAT. ANN. § 457:37(IV) (Supp. 2013); MD. CODE ANN., Fam. Law §§ 2-201, 2-202 (LexisNexis 2012); R.I. Gen. Laws Ann. § 15-3-6.1(e) (2013).
327. *See* N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2013). *See also* N.Y. DOM. REL. LAW § 10-b(2) (McKinney Supp. 2014) (“[N]othing in this article shall limit or diminish the right, . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination”); MINN. STAT. ANN. § 363A.26 (West 2013) (providing that religious organization are not prohibited from “in matters relating to sexual orientation, taking any action with respect to . . . housing and real property”). *See also* N.M. STAT. ANN. § 28-1-9 (West Supp. 2012) (“B. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained, unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry; C. bar any religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization from imposing discriminatory employment or renting practices that are based upon sexual orientation or gender identity; provided, that the provisions of the Human Rights Act with respect to sexual orientation and gender identity shall apply to any other:(1) for-profit activities of a religious or denominational institution or religious organization subject to the provisions of Section 511(a) of the Internal Revenue Code of 1986, as amended; or(2) nonprofit activities of a religious or denominational institution or religious organization subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended”).
328. DEL. CODE ANN. tit. 13 § 106 (2013), <http://delcode.delaware.gov/title13/c001/sc01/index.shtml> (“[N]othing in this section shall be construed to require any person (including any clergyperson or minister of any religion) authorized to solemnize a marriage to solemnize any marriage, and no such authorized person who fails or refuses for any reason to solemnize a marriage shall be subject to any fine or other penalty for such failure or refusal.”).

329. *See* N.H. REV. STAT. ANN. § 457:37 (“Nothing in this chapter shall be deemed or construed to limit the protections and exemptions provided to religious organizations under RSA 354-A:18.”); SF 925, 85th Legis. Reg. Sess. (Minn. 2013) (“This chapter does not alter or affect the protections or exemptions provided in chapter 363A for a religious association, educational institution, business, labor union, place of public accommodation, employer, or other person.”); S.B. 10, 98th Gen. Assem. Reg. Sess. (Ill. 2013) (“Nothing in this Act . . . is it intended to abrogate, limit, or expand the Illinois Human Rights Act or the Religious Freedom Restoration Act.”); R.I. GEN. LAWS ANN. § 15-3-6.1 “Nothing in the marriage laws of this state shall be deemed or construed to limit the protections and exemptions provided to religious organizations under GL paragraph 28-5-6(7)(ii) and subsection 34-37-4.2(a)”; 3. N.Y. Dom. Rel. Law § 10-b. (“Nothing in this section shall be deemed or construed to limit the protections and exemptions otherwise provided to religious organizations under section three of article one of the constitution of the state of New York.”). A catch-all provision in Delaware provides that the same-sex marriage law “does not affect rights, duties or obligations that matured or were owed, penalties that were incurred, or proceedings that were begun, before its effective date.” Delaware Laws Ch. 19 (H.B. 75 2013). *See also In re Marriage Cases*, 43 Cal. 4th 757, 784, 183 P.3d 384, 452 (2008), *vacated by* *Hollingsworth v. Perry*, 113 S. Ct. 2652 (2013) (“[a]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious \organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs. (CAL. CONST., art. I, § 4.).”); *Griego v. Oliver*, 316 P.3d. 865 (“Our holding will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to change its policies to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs.)
330. Connecticut passed legislation on the heels of a judicial decision requiring same-sex marriage. *See Kerrigan v. Commissioner of Public Health*, 957 A.2d 407(2008).
331. *Bishop v. U.S. ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33 (N.D. Okla. Jan 14, 2014) (permanently enjoining Oklahoma’s constitutional same-sex marriage ban because it “violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by precluding same-sex couples from receiving an Oklahoma marriage license.”). The court stayed execution of the permanent injunction pending any appeals in the Tenth Circuit. *Id.*
332. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *27 (D. Utah Dec. 20, 2013) (“Although the State did not directly present an argument based on religious freedom, the court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage. If anything, the recognition of same-sex marriage expands religious freedom because some churches that have congregations in Utah desire to perform same-sex wedding ceremonies but are currently unable to do so, . . . By recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.”).

*Table A4: State Political Climate*³³³

State	Region	House 2013		Senate 2013		Gov.	Constitutional Ban
		Democrat	Republican	Democrat	Republican	D/R (Ind.)	
Alabama	South	37	63	11	23	R	X
Alaska	Pacific	14	26	7	13	R	X
Arizona	West	24	36	13	16	R	X
Arkansas	South	48	51	13	21	D	X
California	West	52	25	28	12	D	
Colorado	West	37	38	18	17	D	X
Connecticut	Northeast	98	53	22	14	D	
Delaware	South	27	14	13	8	D	
DC	South					-	
Florida	South	44	75	14	26	R	X
Georgia	South	58	118	18	37	R	X
Hawaii	Pacific	44	7	24	1	D	
Idaho	West	13	57	7	28	R	X
Illinois	Midwest	71	47	40	19	D	
Indiana	Midwest	31	68	13	37	R	
Iowa	Midwest	46	53	26	23	R	
Kansas	Midwest	32	91	8	32	R	X
Kentucky	South	54	45	14	23	D	X
Louisiana	South	43	59	13	26	R	X
Maine	Northeast	89	58	19	15	R	
Maryland	South	98	43	34	11	D	
Massachusetts	Northeast	130	29	36	3	D	
Michigan	Midwest	49	59	12	26	R	X
Minnesota	Midwest	73	61	39	28	D	
Mississippi	south	58	64	20	32	R	X

333. **Sources:** Region: Chapter 6-Statistical Groupings of States and Counties, U.S. Census Bureau (last accessed Jan. 31, 2014) available at: <http://www.census.gov/geo/reference/pdfs/GARM/Ch6GARM.pdf>; House, Senate, and Governor data drawn from ballotpedia.org; Constitutional ban and lock-in effect, see Part II.D; Sexual Orientation Protection: States With Protections for Being Gay, N.Y. Times (May 31, 2013), <http://www.nytimes.com/interactive/2013/05/31/business/States-With-Protections-for-Being-Gay.html?ref=your-money>; Education: Educational Attainment, US Census Bureau (2011) available at: <http://www.census.gov/hhes/socdemo/education/>; Religiosity from State of the States, Gallop, (2012) available at: <http://www.gallup.com/poll/125066/state-states.aspx>; Nate Silver, How Opinion on Same-Sex Marriage Is Changing, and What It Means New York Times (Mar. 26 2013) available at http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0.

Table A4 (continued): State Political Climate

State	Lock In Effect	Sexual Orientation Protection	Education	Religiosity 2012	Nate Silver's Projected Support			
				% very religious	2008	2012	2016	2020
Alabama	Mild	No	30	55.7	24.4	29.9	35.9	42.5
Alaska	Mild	No	36	31.3	41.5	47.6	53.7	59.6
Arizona	Negligible	No	35	36.6	42.4	48.4	54.6	60.7
Arkansas	Negligible	No	25	52.3	31.1	36.8	42.8	49.1
California			41	34.5	48.6	54.6	60.4	66.1
Colorado	Strong	Yes	49	33.5	45.8	52	58	64
Connecticut			51	30.5	52	58.2	64.1	69.8
Delaware			40	35.2	49.2	55.7	62	68
DC			77	29.7	57.1	63.1	68.7	74
Florida	Negligible	No	34	37.6	40.4	46.6	52.9	59.3
Georgia	Strong	No	37	47.9	30.8	36.7	42.9	49.5
Hawaii			40	31.4	52.2	58.6	64.6	70.3
Idaho	Strong	No	31	45.1	36.4	42.4	48.5	54.8
Illinois			42	38	45.8	52.2	58.4	64.6
Indiana			31	42.7	37.8	43.7	49.8	55.9
Iowa			33	41.3	40.2	46.5	52.8	59.1
Kansas	Strong	No	40	45.1	36.8	42.8	48.9	55.1
Kentucky	Mild	No	30	45.4	35.7	41.8	48	54.4
Louisiana	Strong	No	28	53.3	29.3	35.1	41.4	48.1
Maine			37	24.4	44.8	51.1	57.2	63.2
Maryland			52	36.7	48.6	55	61.2	67.2
Massachusetts			55	26.5	56.4	62.9	69	74.5
Michigan	Negligible	No	34	36.5	42.7	48.9	55	61.2
Minnesota			42	38.2	46.3	52.3	58.2	64
Mississippi	Mild	No	27	58.4	20.9	25.9	31.5	37.8

Table A4 (continued): State Political Climate

State	Region	House 2013		Senate 2013		Gov.	Constitutional Ban
		Democrat	Republican	Democrat	Republican	D/R (Ind.)	
Missouri	Midwest	53	109	10	24	D	X
Montana	West	39	61	21	29	D	X
Nebraska	Midwest	0	0	0	0	R	X
Nevada	West	26	15	11	10	R	X
New Hampshire	Northeast	218	179	11	13	D	
New Jersey	Northeast	47	32	24	16	R	
New Mexico	West	37	32	25	17	R	
New York	Northeast	105	42	33	30	D	
North Carolina	South	42	77	17	33	R	X
North Dakota	Midwest	23	71	14	33	R	X
Ohio	Midwest	38	61	10	23	R	X
Oklahoma	South	29	72	12	36	R	Ruled Uncon.
Oregon	West	34	26	16	14	D	X
Pennsylvania	Northeast	92	110	23	27	R	
Rhode Island	Northeast	69	6	32	5	Ind.	
South Carolina	South	45	78	18	28	R	X
South Dakota	Midwest	17	53	7	27	R	X
Tennessee	South	27	70	7	26	R	X
Texas	South	54	95	12	19	R	X
Utah	West	14	61	5	24	R	Ruled Uncon.
Vermont	Northeast	94	45	21	7	D	
Virginia	South	32	65	20	20	R	X
Washington	West	55	43	26	23	D	
West Virginia	South	53	46	24	10	D	
Wisconsin	Midwest	39	57	15	18	R	X
Wyoming	West	8	52	4	26	R	

Table A4 (continued): State Political Climate

State	Lock In Effect	Sexual Orientation Protection	Education	Religiosity 2012		Nate Silver's Projected Support			
				% very religious		2008	2012	2016	2020
Missouri	Mild	No	35	42.1		37.5	43.6	49.7	56
Montana	Mild	No	36	34		41.9	47.8	53.7	59.6
Nebraska	Strong	No	36	44.2		37.9	44	50.2	56.5
Nevada	Mild	Yes	29	31.4		46.7	53	59.2	65.2
New Hampshire			43	23.4		50.6	57.1	63.2	69.1
New Jersey			47	34.7		50.6	57	63.1	69
New Mexico			36	43.2		43.3	49.6	55.8	61.9
New York			46	31.5		51.9	58.1	64	69.7
North Carolina	Strong	No	35	49.5		34.2	40.2	46.3	52.7
North Dakota	Negligible	No	33	41.6		38.5	44.8	51.2	57.7
Ohio	Mild	No	33	38.2		40.4	46.6	52.8	59.1
Oklahoma	Mild	No	30	47.6		32.5	38.4	44.7	51.2
Oregon	Mild	Yes	40	28.8		48	54	59.7	65.4
Pennsylvania			37	39.5		45.8	52	58	64
Rhode Island			42	29.1		56.3	63.1	69.3	75.1
South Carolina	Strong	No	32	51.9		31.6	37.3	43.3	49.7
South Dakota	Mild	No	32	45.6		37.1	43.3	49.7	56.1
Tennessee	Mild	No	31	50.3		34.5	40.3	46.3	52.6
Texas	Strong	No	34	47		33.4	39.4	45.8	52.4
Utah	Strong	No	38	56		36.3	42.1	48.1	54.2
Vermont			46	19.1		51.6	57.8	63.8	69.4
Virginia	Mild	No	48	41.1		41.1	47.2	53.3	59.5
Washington			42	30.5		49.6	55.7	61.5	67.2
West Virginia			24	41.9		37.3	43.5	49.9	56.3
Wisconsin	Mild	Yes	34	36.7		45.6	51.8	58	64
Wyoming			31	32.8		34.6	40.6	46.8	53.2

Table A5: *Vote Margins in Enacting Jurisdictions*³³⁴

ENACTING JURISDICTION	Region	Governor At time	House at time	Senate at time	Vote Count House				Vote Count Senate				Support at Time of Enactment
					For	Against	% For		For	Against	% For		
Connecticut	Northeast	(D/R)	(D/R)	(D/R)	100	44	69%		28	7	80%		52%
Delaware	South	(R)	(D)	(D)	23	18	56%		12	9	57%		54%
District of Columbia	South	(D) Mayor	-	-	11	2	85%		(DC is unicameral)				57%
Hawaii	Pacific	(D)	(D)	(D)	30	19	61%		19	4	83%		55%
Illinois	Midwest	(D)	(D)	(D)	61	54	53%		34	21	62%		50%
Maryland	South	(D)	(D)	(D)	72	67	52%		25	22	53%		52%
Minnesota	Midwest	Democratic Farmer Labo	(D)	(D)	75	59	56%		37	30	55%		46%
New Hampshire	Northeast	(D)	(D)	(D)	198	176	53%		14	10	58%		55%
New York	Northeast	(D)	(D)	(R)	80	63	56%		33	29	53%		55%
Rhode Island	Northeast	(D)	(D)	(D)	56	15	79%		26	12	68%		56%
Vermont	Northeast	(R)	(D)	(D)	95	52	65%		26	4	87%		54%
Vermont Veto					100	49	67%		23	5	82%		-
Washington	West	(D)	(D)	(D)	55	43	56%		28	21	57%		53%

SOURCES:
Region: Chapter 6-Statistical Groupings of States and Counties, U.S. Census Bureau (last accessed Jan. 31, 2014) available at: <http://www.census.gov/geo/reference/pdfs/GARM/Ch6GARM.pdf>.
Governor at time, House at time, and Senate at time collected from www.ballotpedia.org.

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*Table A6: Same-Sex Marriage Support
 (and Opposition) in Constitutional Ban States*

Strong Lock-In					
	1994-96 Support	Support at time of Ban	2008 Support	2012 Support (projected)	2016 Support (projected)
Georgia (2004)	21	23.80	34	36.7	42.9
Idaho (2006)	17	36.65	33	42.4	48.5
Kansas (2005)	24	30.00	37	42.8	48.9
Louisiana (2004)	23	22.22	36	35.1	41.4
North Carolina (2012)	21	38.94	36	40.2	46.3
South Carolina (2006)	21	22.00	32	37.3	43.3
Texas (2005)	24	23.75	35	39.4	45.8
Mild Lock-In					
	1994-96 Support	Support at time of Ban	2008 Support	2012 Support (projected)	2016 Support (projected)
Alabama (2006)	17	19.00	26	29.9	35.9
Alaska (1998)	23	31.89	45	47.6	53.7
Kentucky (2004)	18	25.00	31	41.8	48
Nevada (2002)	26	32.80	50	53	59.2
Oregon (2004)	26	43.00	52	54	59.7
Tennessee (2006)	19	19.00	31	40.3	46.3
Virginia (2006)	24	42.94	42	47.2	53.3
Wisconsin (2006)	26	41.00	44	51.8	58
Negligible Lock-In					
	1994-96 Support	Support at time of Ban	2008 Support	2012 Support (projected)	2016 Support (projected)
Arizona (2008)	25	43.80	48	48.4	54.6
Arkansas (2004)	17	25.05	29	36.8	42.8
Colorado (2006)	27	44.98	52	52	58
Florida (2008)	26	38.10	41	46.6	52.9
Michigan (2004)	26	41.00	46	48.9	55
Mississippi (2004)	17	14.00	27	25.9	31.5
Missouri (2004)	26	29.40	37	43.6	49.7
Montana (2004)	23	33.50	45	47.8	53.7
Nebraska (2000)	20	29.90	35	44	50.2
North Dakota (2004)	22	26.77	38	44.8	51.2
Ohio (2004)	24	38.29	45	46.6	52.8
South Dakota (2006)	23	48.17	38	43.3	49.7

*Table A7: Support for Same-Sex Marriage by Age,
With and Without the Oldest Generation (65 and Older)³³⁵*

STATE/ SUPPORT	65+	45-64	30-44	18-29	Average	Weighted Average	18-29	30-44	45-64	65+
Massachusetts	34	53	61	74	55.5	56.2	21.7	25.3	35.4	17.6
Vermont	33	49	57	70	52.3	52.1	20.2	22.7	38.8	18.4
Rhode Island	32	49	58	71	52.5	53.0	22.5	23.9	35.3	18.3
Connecticut	32	49	57	69	51.8	51.8	19.7	25.0	36.9	18.4
New York	32	47	56	70	51.3	51.8	22.3	25.9	34.4	17.4
New Hampshire	31	47	56	69	50.8	50.6	19.1	24.3	39.3	17.3
Maine	30	46	56	69	50.3	49.2	17.9	23.1	39.0	20.1
California	31	46	53	67	49.3	50.7	23.9	27.7	33.2	15.2
Washington	28	45	53	66	48.0	49.0	22.1	26.4	35.4	16.1
Hawaii	27	46	53	66	48.0	48.6	21.5	25.1	35.0	18.4
New Jersey	27	45	53	67	48.0	48.5	20.4	26.4	35.7	17.5
Colorado	26	44	50	63	45.8	47.4	22.7	27.6	35.3	14.4
Oregon	26	44	50	64	46.0	46.5	20.9	25.7	35.4	18.0
Nevada	26	43	49	64	45.5	46.6	21.8	28.3	34.0	15.9
New Mexico	25	43	49	63	45.0	45.7	22.2	24.5	35.7	17.6
Arizona	25	41	48	62	44.0	44.6	22.6	26.0	32.9	18.5
Minnesota	23	38	47	61	42.3	42.7	21.6	25.6	35.8	17.0
Pennsylvania	24	40	48	63	43.8	43.5	20.7	23.6	35.9	19.8
Alaska	22	36	44	57	39.8	41.9	25.0	26.9	37.6	10.5
Wisconsin	23	38	46	61	42.0	42.2	21.2	24.7	36.2	17.9
Illinois	23	38	46	60	41.8	42.5	22.2	26.7	34.5	16.5
Montana	23	38	46	60	41.8	41.5	20.8	22.4	37.7	19.1
Maryland	23	37	45	58	40.8	41.4	21.5	26.2	36.2	16.1
Delaware	23	36	45	59	40.8	40.7	21.4	24.6	35.3	18.7
Michigan	21	35	43	57	39.0	39.0	20.8	24.5	36.6	18.1
Florida	23	36	44	57	40.0	39.2	19.7	24.0	34.3	22.0
Ohio	20	34	43	56	38.3	38.2	20.7	24.6	36.3	18.5
Iowa	20	34	43	56	38.3	38.2	21.7	23.8	35.0	19.6
Virginia	19	33	40	54	36.5	37.3	22.3	26.6	35.3	15.9
Wyoming	19	32	39	54	36.0	36.6	22.8	24.2	36.7	16.3
Kansas	19	32	40	54	36.3	36.7	23.0	24.7	34.6	17.7
South Dakota	18	31	40	54	35.8	35.8	22.5	23.3	35.2	19.0
Indiana	17	30	38	53	34.5	34.9	22.0	25.5	35.2	17.3
North Dakota	16	30	39	53	34.5	35.1	25.0	22.3	34.1	18.7
Missouri	17	30	38	52	34.3	34.4	22.0	24.5	35.2	18.3
Idaho	16	30	37	51	33.5	34.3	23.1	25.7	34.1	17.1
Nebraska	16	29	36	51	33.0	33.4	22.9	24.6	34.5	18.0
West Virginia	16	29	37	52	33.5	32.6	18.9	23.9	37.0	20.3
Texas	16	28	35	48	31.8	33.2	24.3	28.5	33.0	14.2
North Carolina	15	27	34	47	30.8	31.2	21.6	26.8	34.6	17.0
Georgia	14	26	33	45	29.5	30.6	22.9	28.5	34.2	14.4
Louisiana	15	26	33	46	30.0	30.7	23.6	25.2	34.8	16.3
South Carolina	14	24	31	44	28.3	28.4	22.0	25.0	35.1	17.9
Kentucky	13	23	30	44	27.5	27.5	21.2	25.9	35.6	17.4
Tennessee	12	23	29	42	26.5	26.6	21.1	26.0	35.3	17.5
Utah	11	20	26	37	23.5	25.5	28.9	29.1	28.9	13.1
Oklahoma	12	21	27	40	25.0	25.2	23.0	24.8	34.3	17.9
Arkansas	12	21	27	40	25.0	24.9	21.6	25.0	34.4	19.0
Mississippi	10	19	25	36	22.5	22.9	22.9	25.3	34.6	17.2
Alabama	10	19	25	36	22.5	22.9	23.6	24.5	34.2	17.6

*Table A7 (continued): Support for Same-Sex Marriage by Age,
With and Without the Oldest Generation (65 and Older)*

STATE/ SUPPORT	45-64	30-44	18-29	Average	Weighted Average	18-29	30-44	45-64
Massachusetts	53	61	74	62.67	60.99	26.4	30.7	42.9
Vermont	49	57	70	58.67	56.41	24.7	27.8	47.5
Rhode Island	49	58	71	59.33	57.69	27.5	29.2	43.2
Connecticut	49	57	69	58.33	56.28	24.1	30.6	45.2
New York	47	56	70	57.67	56.03	27.0	31.4	41.7
New Hampshire	47	56	69	57.33	54.72	23.1	29.4	47.5
Maine	46	56	69	57.00	54.04	22.4	28.9	48.7
California	46	53	67	55.33	54.20	28.1	32.7	39.2
Washington	45	53	66	54.67	53.05	26.3	31.5	42.2
Hawaii	46	53	66	55.00	53.42	26.3	30.8	42.9
New Jersey	45	53	67	55.00	53.01	24.8	32.0	43.3
Colorado	44	50	63	52.33	50.98	26.5	32.3	41.2
Oregon	44	50	64	52.67	50.98	25.5	31.3	43.1
Nevada	43	49	64	52.00	50.46	25.9	33.6	40.4
New Mexico	43	49	63	51.67	50.17	26.9	29.7	43.3
Arizona	41	48	62	50.33	49.05	27.7	32.0	40.4
Minnesota	38	47	61	48.67	46.77	26.1	30.8	43.1
Pennsylvania	40	48	63	50.33	48.28	25.8	29.4	44.8
Alaska	36	44	57	45.67	44.27	27.9	30.0	42.0
Wisconsin	38	46	61	48.33	46.34	25.8	30.1	44.1
Illinois	38	46	60	48.00	46.42	26.6	32.0	41.4
Montana	38	46	60	48.00	45.87	25.7	27.6	46.6
Maryland	37	45	58	46.67	44.89	25.7	31.3	43.1
Delaware	36	45	59	46.67	44.78	26.3	30.3	43.4
Michigan	35	43	57	45.00	42.99	25.4	29.9	44.6
Florida	36	44	57	45.67	43.76	25.2	30.8	44.0
Ohio	34	43	56	44.33	42.30	25.4	30.2	44.5
Iowa	34	43	56	44.33	42.58	26.9	29.5	43.6
Virginia	33	40	54	42.33	40.77	26.5	31.6	42.0
Wyoming	32	39	54	41.67	40.01	27.2	28.9	43.9
Kansas	32	40	54	42.00	40.54	27.9	30.0	42.1
South Dakota	31	40	54	41.67	39.98	27.8	28.8	43.4
Indiana	30	38	53	40.33	38.59	26.6	30.8	42.5
North Dakota	30	39	53	40.67	39.52	30.7	27.4	41.9
Missouri	30	38	52	40.00	38.32	26.9	30.0	43.1
Idaho	30	37	51	39.33	38.02	27.9	31.0	41.1
Nebraska	29	36	51	38.67	37.24	27.9	30.0	42.1
West Virginia	29	37	52	39.33	36.84	23.7	30.0	46.3
Texas	28	35	48	37.00	36.00	28.4	33.2	38.5
North Carolina	27	34	47	36.00	34.46	26.0	32.3	41.7
Georgia	26	33	45	34.67	33.41	26.7	33.3	39.9
Louisiana	26	33	46	35.00	33.76	28.3	30.2	41.6
South Carolina	24	31	44	33.00	31.50	26.8	30.5	42.7
Kentucky	23	30	44	32.33	30.58	25.6	31.3	43.0
Tennessee	23	29	42	31.33	29.75	25.6	31.6	42.9
Utah	20	26	37	27.67	27.66	33.3	33.4	33.3
Oklahoma	21	27	40	29.33	28.13	28.0	30.3	41.7
Arkansas	21	27	40	29.33	27.91	26.6	30.9	42.5
Mississippi	19	25	36	26.67	25.54	27.7	30.6	41.7
Alabama	19	25	36	26.67	25.66	28.7	29.8	41.6

Table A7 (continued): Support for Same-Sex Marriage by Age, With and Without the Oldest Generation (65 and Older)

State	With Silent Generation					Weighted Avg.				Without Silent Generation				Weighted Avg.		
	18-29	30-44	45-64	65+	SUM	18-29	30-44	45-64	65+	18-29	30-44	45-64	SUM	18-29	30-44	45-64
MA	170	198	277	138	783	21.7	25.3	35.4	17.6	170	198	277	645	26.4	30.7	42.9
VT	160	180	308	146	794	20.2	22.7	38.8	18.4	160	180	308	648	24.7	27.8	47.5
RI	177	188	278	144	787	22.5	23.9	35.3	18.3	177	188	278	643	27.5	29.2	43.2
CT	152	193	285	142	772	19.7	25.0	36.9	18.4	152	193	285	630	24.1	30.6	45.2
NY	173	201	267	135	776	22.3	25.9	34.4	17.4	173	201	267	641	27.0	31.4	41.7
NH	149	190	307	135	781	19.1	24.3	39.3	17.3	149	190	307	646	23.1	29.4	47.5
ME	142	183	309	159	793	17.9	23.1	39.0	20.1	142	183	309	634	22.4	28.9	48.7
CA	179	208	249	114	750	23.9	27.7	33.2	15.2	179	208	249	636	28.1	32.7	39.2
WA	169	202	271	123	765	22.1	26.4	35.4	16.1	169	202	271	642	26.3	31.5	42.2
HI	167	195	272	143	777	21.5	25.1	35.0	18.4	167	195	272	634	26.3	30.8	42.9
NJ	158	204	276	135	773	20.4	26.4	35.7	17.5	158	204	276	638	24.8	32.0	43.3
CO	172	209	267	109	757	22.7	27.6	35.3	14.4	172	209	267	648	26.5	32.3	41.2
OR	162	199	274	139	774	20.9	25.7	35.4	18.0	162	199	274	635	25.5	31.3	43.1
NV	164	213	256	120	753	21.8	28.3	34.0	15.9	164	213	256	633	25.9	33.6	40.4
NM	166	183	267	132	748	22.2	24.5	35.7	17.6	166	183	267	616	26.9	29.7	43.3
AZ	168	194	245	138	745	22.6	26.0	32.9	18.5	168	194	245	607	27.7	32.0	40.4
MN	164	194	271	129	758	21.6	25.6	35.8	17.0	164	194	271	629	26.1	30.8	43.1
PA	161	184	280	154	779	20.7	23.6	35.9	19.8	161	184	280	625	25.8	29.4	44.8
AK	184	198	277	77	736	25.0	26.9	37.6	10.5	184	198	277	659	27.9	30.0	42.0
WI	162	189	277	137	765	21.2	24.7	36.2	17.9	162	189	277	628	25.8	30.1	44.1
IL	168	202	261	125	756	22.2	26.7	34.5	16.5	168	202	261	631	26.6	32.0	41.4
MT	161	173	292	148	774	20.8	22.4	37.7	19.1	161	173	292	626	25.7	27.6	46.6
MD	165	201	277	123	766	21.5	26.2	36.2	16.1	165	201	277	643	25.7	31.3	43.1
DE	165	190	272	144	771	21.4	24.6	35.3	18.7	165	190	272	627	26.3	30.3	43.4
MI	159	187	279	138	763	20.8	24.5	36.6	18.1	159	187	279	625	25.4	29.9	44.6
FL	155	189	270	173	787	19.7	24.0	34.3	22.0	155	189	270	614	25.2	30.8	44.0
OH	158	188	277	141	764	20.7	24.6	36.3	18.5	158	188	277	623	25.4	30.2	44.5
IA	165	181	267	149	762	21.7	23.8	35.0	19.6	165	181	267	613	26.9	29.5	43.6
VA	171	204	271	122	768	22.3	26.6	35.3	15.9	171	204	271	646	26.5	31.6	42.0
WY	173	184	279	124	760	22.8	24.2	36.7	16.3	173	184	279	636	27.2	28.9	43.9
KS	171	184	258	132	745	23.0	24.7	34.6	17.7	171	184	258	613	27.9	30.0	42.1
SD	169	175	264	143	751	22.5	23.3	35.2	19.0	169	175	264	608	27.8	28.8	43.4
IN	166	192	265	130	753	22.0	25.5	35.2	17.3	166	192	265	623	26.6	30.8	42.5
ND	194	173	265	145	777	25.0	22.3	34.1	18.7	194	173	265	632	30.7	27.4	41.9
MO	168	187	269	140	764	22.0	24.5	35.2	18.3	168	187	269	624	26.9	30.0	43.1
ID	168	187	248	124	727	23.1	25.7	34.1	17.1	168	187	248	603	27.9	31.0	41.1
NE	171	184	258	135	748	22.9	24.6	34.5	18.0	171	184	258	613	27.9	30.0	42.1
WV	149	189	292	160	790	18.9	23.9	37.0	20.3	149	189	292	630	23.7	30.0	46.3
TX	177	207	240	103	727	24.3	28.5	33.0	14.2	177	207	240	624	28.4	33.2	38.5
NC	164	204	263	129	760	21.6	26.8	34.6	17.0	164	204	263	631	26.0	32.3	41.7
GA	170	212	254	107	743	22.9	28.5	34.2	14.4	170	212	254	636	26.7	33.3	39.9
LA	178	190	262	123	753	23.6	25.2	34.8	16.3	178	190	262	630	28.3	30.2	41.6
SC	169	192	269	137	767	22.0	25.0	35.1	17.9	169	192	269	630	26.8	30.5	42.7
KY	162	198	272	133	765	21.2	25.9	35.6	17.4	162	198	272	632	25.6	31.3	43.0
TN	161	199	270	134	764	21.1	26.0	35.3	17.5	161	199	270	630	25.6	31.6	42.9
UT	198	199	198	90	685	28.9	29.1	28.9	13.1	198	199	198	595	33.3	33.4	33.3
OK	173	187	258	135	753	23.0	24.8	34.3	17.9	173	187	258	618	28.0	30.3	41.7
AR	163	189	260	144	756	21.6	25.0	34.4	19.0	163	189	260	612	26.6	30.9	42.5
MS	171	189	258	128	746	22.9	25.3	34.6	17.2	171	189	258	618	27.7	30.6	41.7
AL	185	192	268	138	783	23.6	24.5	34.2	17.6	185	192	268	645	28.7	29.8	41.6

335. For an explanation of where the data in this Table are taken from, and how the weighted averages were generated, see *supra* note 166.