SAME-SEX MARRIAGE IN AMERICA

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There is certainly no country in the world where the tie of marriage is so much respected as in America...[W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace....[H]e afterwards carries [that image] with him into public affairs.” Alexis de Tocqueville, 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

The United States Supreme Court, on Friday, June 26, 2015, released its opinion in Obergefell v. Hodges. This opinion has spoken to the rights of Americans to engage in same sex marriage or, stated another way, the constitutionality of state statutes that authorize the denial of marriage licenses to same sex couples. The response has made international news: Americans can legally engage in same sex marriage and states can no longer deny the issuance of marriage licenses to applicant couples otherwise qualified who are members of the same sex.

A Short History of the LGBTQ Movement in America

1969

Most social commentators cite the Stonewall Riots of 1969 as the beginning of the modern LGBTQ movement in America. These riots began when regular patrons of a gay bar in Greenwich Village, the Stonewall Inn, fought back against a regular policy
raid on June 27, 1969. The riot that began lasted for three (3) days and is cited as the beginning of a nationally recognized, wide spread protest for equal rights and acceptance.

1973

The American Psychiatric Association removed homosexuality from its official list of mental disorders on December 15, 1973. The Association had classified homosexuality as a mental illness in 1952, including it in the Diagnostic and Statistical Manual of Mental Disorders (DSM-1). Prior to 1952, psychologists and psychiatrists had looked on homosexuality not as an illness but as a perversion and deviant behavior. In its 1973 action, the organization said that homosexuality does not meet the criteria for being a psychiatric disorder. Finally the DSM took out all references to homosexuality except in the diagnosis “Sexual Disorders Not Otherwise Specified” describing significant distress about one’s sexual orientation.

1977

In 1977, Dade County, an ordinance was passed making sexual orientation discrimination illegal. (You may remember the campaign led by Anita Bryant, of Florida Orange Juice fame, to overturn the ordinance. The vote was 70% to 30% to overturn it.)

1979

In 1979 there was a National March on Washington for Lesbian and Gay Rights in D.C. About 750,000 participated, making it the largest political gathering in support of LGBTQ rights in American until that date.

1980

At the 1980 Democratic National Convention, a plank was adopted: “All groups must be protected from discrimination based on race, color, religion, national origin, language, age, sex or sexual orientation.”

1982

Wisconsin, in 1982, became the first state in the nation to outlaw discrimination on the basis of sexual orientation.
1984

In 1984, Berkeley, California, became the first city in America to offer its employees domestic-partnership benefits.

1993

The “Don't Ask, Don't Tell” policy was instituted for the U.S. military in 1993; it permitted gays to serve in the military but banned homosexual activity.

On April 25, 1993, an estimated 800,000 to one million people participate in the March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation. The march is a response to “Don't Ask Don't Tell”, Amendment 2 in Colorado, as well as rising hate crimes and ongoing discrimination against the LGBT community.

1996

In 1996, the US Supreme Court, in Romer v. Evans, determined Colorado's Amendment 2 unconstitutional. The amendment denied gays and lesbians protections against discrimination. Justice Anthony Kennedy, who authored the Obergefell decision, said that the protections that the amendment denied to the LGBTQ community “constitute ordinary civil life in a free society.”

2000

Vermont, in 2000, became the first state in the nation to recognize civil unions between LGBTQ couples. Vermont’s statutes define marriage as a heterosexual union, and the 2000 action did not recognize gay “marriage” but stated that LGBTQ couples would be entitled to the same benefits, privileges and responsibilities as spouses.

2003

In 2003 the US Supreme Court ruled that sodomy laws in the US were unconstitutional; the landmark case which decriminalized homosexual acts between consenting adults is Lawrence v. Texas. Justice Kennedy, again writing the opinion, said “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”
Later in 2003, In November, the Massachusetts Supreme Judicial Court ruled that barring gays and lesbians from marrying violates the state constitution. The Massachusetts Chief Justice concluded that to “deny the protections, benefits, and obligations conferred by civil marriage” to gay couples was unconstitutional because it denied “the dignity and equality of all individuals” and made them “second-class citizens.” Strong opposition followed the ruling. However, on May 17, 2004, same sex marriages became legal in Massachusetts.

2005

Civil unions became legal in Connecticut in October of 2005.

2006

Civil unions became legal in New Jersey in December of 2006.

2007

In November of 2007, the US House of Representatives approved a bill ensuring equal rights in the workplace for gay men, lesbians, and bisexuals. The US Senate did not act in concert with the House.

2008

In February of 2008, the state of New York determined, by common law, that same sex marriages performed in other states must be recognized by New York employers. In the same month, Oregon passed a law to allow same sex couples to register as domestic partners allowing them some spousal rights known to heterosexual married couples.

In May of 2008, the California Supreme Court ruled that same sex couples have a constitutional right to marry. By the following November, over 18,000 same sex couples married in California. On November 4, 2008, California voters approved Proposition 8, which banned same sex marriage in California. California’s Attorney General took the validity of Proposition 8 to the California Supreme Court; the Court upheld the constitutionality of Proposition 8, but allowed all couples married before November 4 to remain married. California was not the only state to act: Arizona and Florida banned same sex marriage on November 4, and Arkansas passed a measure intended to bar gay men and lesbians from adopting children.
In October of 2008, the Supreme Court of Connecticut ruled that same sex couples have a right to marry and that the state’s civil union law did not provide same sex couples with the same rights as heterosexual couples, which this ruling would do. Same sex marriages began to be performed officially in Connecticut on November 12.

2009

On April 3, 2009, the Iowa Supreme Court unanimously rejected the state law banning same sex marriage, requiring the granting of marriage licenses after a period of 21 days.

On the 7th, the Vermont legislature overrode the governor’s veto of a bill allowing gays and lesbians to marry. Vermont was the first state to legalize gay marriage through the legislature. Massachusetts, Connecticut and Iowa had approved same sex marriage by judicial action.

On May 6, 2009, the governor of Maine legalized same sex marriage. Citizens of Maine voted to overturn the law in November, making Maine, in November 2009, the 31st state to ban same sex marriage.

On June 3, 2009, New Hampshire governor John Lynch signed legislation allowing same-sex marriage. The law stipulates that religious organizations and their employees will not be required to participate in the ceremonies. New Hampshire became the sixth state in the nation to allow same-sex marriage.

On June 17, President Obama signed a referendum allowing the same-sex partners of federal employees to receive benefits, although they were not allowed full health coverage.

2010

March 3, 2010, the US Congress approved a law signed in December 2009 that legalized same-sex marriage in the District of Columbia. In August of that year, Chief US District Judge Vaughn Walker of California ruled Proposition 8 violative of the 14th Amendment’s equal protection clause. In his opinion Walker wrote: "Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents."
December 18, 2010, the U.S. Senate votes 65 to 31 in favor of repealing Don’t Ask, Don’t Tell, the Clinton-era military policy that forbids openly gay men and women from serving in the military. President Obama officially repealed the "Don’t Ask, Don’t Tell" military policy.

2011

On June 24, 2011, New York passed a law to allow same-sex marriage.

2012

On February 7, 2012, the Ninth Circuit Court of Appeals in California ruled 2–1 that Proposition 8, the 2008 referendum that banned same-sex marriage in state, was unconstitutional, affirming District Judge Walker’s decision.

Six days later, Washington became the seventh state to legalize gay marriage.

On March 1, Maryland became the eighth state to legalize gay marriage.

On February 13, Washington became the seventh state to legalize gay marriage.

On March 1, Maryland passes legislation to legalize gay marriage, becoming the eighth state to do so.

In the November election, Maine and Maryland vote in favor of allowing same-sex marriage. In addition, voters in Minnesota reject a measure to ban same-sex marriage.

2013

April 29, 2013, Jason Collins of the NBA's Washington Wizards announced in an essay in Sports Illustrated that he is gay. "I’m a 34-year-old N.B.A. center. I’m black and I’m gay," he wrote. "I’ve reached that enviable state in life in which I can do pretty much what I want. And what I want is to continue to play basketball. I still love the game, and I still have something to offer. My coaches and teammates recognize that. At the same time, I want to be genuine and authentic and truthful." Collins was the first active athlete in the NBA, NFL, NHL, or MLB to make the announcement.
May 2, 2013, after same-sex marriage legislation passed in both houses of Rhode Island’s legislature, Governor Lincoln Chafee signed it into law. The new law, legalizing same-sex marriage, went into effect on August 1, 2013.

On May 7, 2013, Governor Jack Markell signed the Civil Marriage Equality and Religious Freedom Act, legalizing same-sex marriage for the state of Delaware, effective July 1.

On May 14, Minnesota Governor Mark Dayton, signed legislation allowing gay couples to marry in Minnesota effective August 1, 2013.

On June 26, 2013 the US Supreme Court ruled the Defense of Marriage Act unconstitutional, and that the Act interfered with the states’ rights to define marriage. It is a case of first impression in the US Supreme Court. The decision was a 5-4 one.

On July 17, Queen Elizabeth II approved a same-sex marriage bill for England and Wales, allowing same sex couples to marry in both religious and civil ceremonies and allowing those who had previously entered into civil unions to convert their status to marriage.

On October 21, the New Jersey Supreme Court denied Governor Chris Christie’s request to delay implementation of same sex weddings. As a result, same sex marriages began in New Jersey, making it the 14th state to recognize same sex marriage.

On November 5, Illinois became the 15th state to recognize same-sex marriages; the law was implemented on June 1, 2014.

On November 12, Hawaii became the 16th state to recognize same-sex marriages when the Senate passes a gay marriage bill, which had already passed in the House. Governor Neil Abercrombie, a vocal supporter of gay marriage, said he would sign the bill. Thus, beginning December 2, gay couples who are residents of Hawaii as well as tourists could marry in the state. Hawaii is already a very popular state for destination weddings. State Senator J. Kalani English says, "This is nothing more than the expansion of aloha in Hawaii."
January 6, The United States Supreme Court blocked any further same-sex marriages in Utah while state officials appeal the decision made by Judge Shelby in late December of 2013. The block created legal limbo for the 1,300 same-sex couples who received marriage licenses since Judge Shelby’s ruling.

On January 10, the Obama administration announced that the federal government will recognize the marriages of the 1,300 same-sex couples in Utah even though the state government has currently decided not to do so. In a video announcement on the Justice Department website, Attorney General Eric Holder said, "I am confirming today that, for purposes of federal law, these marriages will be recognized as lawful and considered eligible for all relevant federal benefits on the same terms as other same-sex marriages. These families should not be asked to endure uncertainty regarding their status as the litigation unfolds." With federal approval, same-sex couples would be able to receive spousal benefits, like health insurance for federal employees and filing joint federal income tax returns.

On May 19, same-sex marriage became legal in Oregon when a U.S. federal district judge ruled that the state’s 2004 constitutional amendment banning same-sex marriage violates the Equal Protection clause in the U.S. Constitution.

On May 20, a judge struck down the same-sex marriage ban in Pennsylvania, making the state the 18th to legalize gay marriage. The judge ruled that Pennsylvania’s 1996 ban on same-sex marriage was unconstitutional. Pennsylvania was the last in the Northeast to legalize same-sex marriage. Before this action, Pennsylvania did not recognize domestic partnerships or civil unions.

On October 6, U.S. Supreme Court declined to hear appeals of rulings in Indiana, Oklahoma, Utah, Virginia, and Wisconsin that allowed same-sex marriage. The move paved the way for same-sex marriages in the five states. In fact, Virginia announced that unions would begin that day.

On November 12, the U.S. Supreme Court denied a request to block same-sex marriage in Kansas.

On November 19, a federal judge struck down Montana’s ban on same-sex marriage as unconstitutional.
On November 20, the U.S. Supreme Court denied a request to block same-sex marriage in South Carolina. The ruling meant that South Carolina became the 35th U.S. state where same-sex marriage is legal.

2015

On June 26, the U.S. Supreme Court ruled, 5–4, in Obergefell v. Hodges, that same-sex couples have the fundamental right to marry and that states cannot say that marriage is reserved for heterosexual couples. "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right," Justice Anthony Kennedy wrote in the majority opinion.

Decisions Leading to Obergefell

The Obergefell decision follows an interesting history of actions, on a national and local basis. Before one can understand the recent holdings, it is important to look back from where America has come socially in the last 50 years.

- **Loving v. Virginia** held that bans on interracial marriage were constitutional in 1967. The legal reasoning in Loving has provided a threshold upon which same sex advocates have built.

- Hawaii’s Supreme Court became the first of the highest state courts in America address same sex marriage. (Baehr v. Lewin, 1993) While this decision is often pointed to as the first to allow same sex marriage, this is not precisely correct. In 1993, Hawaii stated that the state law which restricted marriage to opposite sex couples was a law that constituted a classification on the basis of sex and was therefore the subject of strict scrutiny under the Hawaii Constitution. This decision did not, of itself, legalize same sex marriage in Hawaii. But it was a catalyst for a number of states to readress their respective state positions on the issue and, in most cases, to strengthen their legislation against same sex marriages. It was a catalyst for the federal government as well.

- The US Congress passed the Defense of Marriage Act [DOMA]. (1996) DOMA defined marriage, for federal purposes, as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. The significance of DOMA was that only heterosexual couples could include a spouse on various federally
recognized benefits: insurance benefits, social security survivors’ benefits, immigration, bankruptcy, and joint tax returns.

- *US v. Windsor* struck down Section 3 of DOMA in 2013, relying on the Fifth Amendment’s Due Process Clause guarantee of equal protection. (Interestingly, the Windsor decision was also issued on June 26 in the year 2013. Perhaps even more interesting is that the case of *Lawrence v. Texas*, which was also issued on June 26 in the year 2003, determined that consensual same sex intimate relations could not be criminalized.) The Windsor case invalidated DOMA to the extent that DOMA had barred the federal government from treating same-sex marriages as valid even when the marriage was lawful in the state where the license was granted.

**Obergefell v. Hodges**

*Obergefell v. Hodges* struck down Section 2 of DOMA on June 26, 2015. In *Obergefell v. Hodges* the Court considered two (2) issues placed before the Court:

1. Does the 14th Amendment require a state to license a marriage between two individuals of the same sex?

2. Does the 14th Amendment require a state to recognize a marriage between two individuals of the same sex when their marriage was lawfully licensed and performed out of state?

Dozens of *amicus curiae* briefs were filed before the Court, which consolidated *Obergefell* with *Tanco v. Haslam* (TN), *DeBoer v. Snyder* (Michigan) and *Bourke v. Beshear* (KY) by order January 16, 2015.

Journalists present at the oral argument on April 2, 2015, indicated that it was difficult to tell, based on the Justices’ questions and comments, how the decision would go. (Justice Thomas said nothing at all.) Most believe that the pivotal justices on the issues were Justice Anthony Kennedy and Chief Justice John Roberts. The Court represented that it would release the opinion before the end of the term on June 30.

The federal government and a majority of state jurisdictions recognize same sex marriage. A number of Native American tribes do so, as well. Since the decision in *US v. Windsor* (2013), courts in dozens of states have found same sex marriage bans
violate the Constitution of the United States. Other courts, state and federal, are defining the full faith and credit clause to require a state to accept as legal the marriage of a same-sex couple whose marriage was solemnized in another jurisdiction.

As mentioned earlier, social changes have moved rapidly. In 2011, a Gallup Poll indicated, for the first time, that over 50% of citizens favor the legalization of same-sex unions. In April of 2015, a similar Gallup poll indicated, for the first time, that over 60% of citizens favor same sex unions. These polls reflect the rapid pace of social movement on this issue.

The 21st Century has seen public support for same sex marriage grow exponentially. In their 2012 general elections, Maine, Maryland and Washington became the first states to legalize same-sex marriage through the popular vote, by initiative.

Alexis de Tocqueville knew that Americans were favorably disposed to marriage. It has always been culturally recognized in America, but it was officially recognized and sanctioned by the US Supreme Court in 1888 in the case of Maynard v. Hill, 125 US 190 (1888). Many cases followed, but a hallmark of the reasoning in those cases rested upon the ability to procreate and therefore sustain civilization, not the recognition of relationship.

It was not until the early 60s, with the case of Griswold v. Connecticut, 381 US 479 (1965) that the Court acknowledged that the marriage relationship was “intimate to the degree of being sacred” and was the promotion of a way of life, not a way of causes,” an institution of loyalty, not a social project. In so stating, this is the Court’s first suggestion that intimacy and privacy in marriage was the paramount feature, not mere procreation, which would have demanded heterosexual unions in those less sophisticated days of fertility medicine.

While Hawaii had authorized the legality of same sex marriages by case law in the early 60s, same-sex marriage was legal in 37 states prior to June 26, the date of the Obergefell decision: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Maryland, Maine, Minnesota, Montana, North Carolina, New Hampshire New Mexico, Nevada, New Jersey, New York, Oklahoma, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

The District of Columbia had also authorized same-sex marriage, as had the cities of St. Louis and Kansas City.
American opinion was mixed on how the Supreme Court should rule in Obergefell. Fifteen (15) states filed amicus briefs urging the Court to uphold existing bans of same-sex marriage and leave the matters to voters and lawmakers, including eight (8) states with same-sex marriage laws in existence. Alabama, Arizona, Idaho, Kansas, Montana, Oklahoma, Utah and West Virginia, while having legalized same-sex marriage, urged that the Court allow states to make their own decisions. Seven (7) states where same-sex marriage is illegal took this position as well: Arkansas, Georgia, Louisiana, Nebraska, North Dakota, South Dakota and Texas.

Now that the Court has ruled, Americans continue to have mixed feelings on the Court’s opinion.

Justice Kennedy, who was suggested by journalists to be a “questionable” justice or “swing vote” on the Obergefell case, ultimately voted in favor of the constitutionality of same sex marriages and wrote the majority opinion. Although foreign nations’ decisions are not binding, Justice Kennedy has often been interested in positions taken by other countries. Of this Kennedy said: “The world community...does provide respected and significant confirmation of our own conclusions.”

The following 17 countries allowed same-sex marriage on April 28, when Obergefell was argued: Argentina, Belgium, Brazil, Canada, Denmark, England, Finland, France, Iceland, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Scotland, South Africa, Spain, Sweden, Uruguay and Wales. (Finland’s law takes effect in 2017. Actually, the number of foreign jurisdictions is 20 if Wales, Scotland and Britain are considered separate countries.) As Lawrence R. Hefler, law professor at Duke, has commented: “Head counts don’t count. What is important is the [number of] nations that invoke US core principles of equality, liberty and due process that recognize same sex marriages.”

As an aside, Justice Scalia, an opponent of same sex marriage is also an opponent of consideration of foreign opinions. Scalia said “... that American law should conform to laws of the rest of the world should be rejected out of hand” and that his colleagues “... only [use foreign law] when supporting liberal outcomes [but ignore] foreign conservative decisions on criminal procedure, religion and abortion.”

While the Obergefell decision does not directly affect federally recognized Native American tribes, but their respective positions are worthy of note. A number of Native American tribes, with membership approaching one million individuals, do not recognize same-sex marriages. The Eastern Band of Cherokees do not allow gay couples to have marriage ceremonies on tribal lands, but do allow same-sex couples
to live on tribal lands. The Cherokee Band of Oklahoma and the Navajo Nation (both
having a population of approximately 300,000) do not recognize same sex marriage.
The Osage Nation, a smaller tribe located around Tulsa, Oklahoma, does not
recognize same sex marriage, nor do the Cheyenne, the Oklahoma Arapahos, the
Coquille band of Oregon, or the Little Traverse Bay Bands of Odawa, Michigan,
although the majority of these allow elsewhere married Native Americans to live on
tribal lands with no penalty. While most tribal decisions were based on decades old
native law and custom, at least ten (10) tribes have recognized gay marriage since
the turn of the century.

What of Mississippi?

Same sex sexual activity has been legal in Mississippi since 2003, as the result of the
US Supreme Court decision in Lawrence v. Texas. Many gay rights advocates call the
Lawrence decision the most pro-gay decision coming out of the US Supreme Court in
its history. Justice Scalia, who dissented in the Lawrence decision, inadvertently
articulated the significant argument for same sex marriage when he said: “If you
remove the moral disapproval of homosexuality as a basis for legal discrimination,
there is no justification left.”

Prior to the impact of Obergefell, Mississippi did not authorize same sex marriage,
nor did it recognize same sex marriages from other jurisdictions. Mississippi
forbad, both by statute and constitutional amendment, the recognition of same-sex
marriages and other forms of same-sex partnership (such as civil unions)
solemnized in other jurisdictions. The constitutional amendment to the Mississippi
Constitution was approved in a referendum in 2004. This amendment took a direct
hit as a result of the decision in Obergefell.

When you consider that little more than a decade ago, the Court, in the decision of
Lawrence v. Texas (2003) determined that a Texas law classifying consensual, adult
homosexual intercourse as illegal sodomy violated the privacy and liberty of adults
to engage in private intimate conduct under the 14th Amendment, social and legal
movement in the direction of LGBT rights has picked up momentum.

What of James Obergefell?

James Obergefell is an unlikely plaintiff -- and certainly did not realize he would be
the named plaintiff in the consolidated case as it went through the US Supreme
Court. James Obergefell and his partner, John Arthur, had been together for over
twenty (20) years when they went to great lengths to be married. Arthur was
diagnosed with amyotrophic lateral sclerosis (ALS) and sought to have himself listed as married on his death certificate with James being recognized as his surviving spouse. In order to effectuate this wish, the two (2) flew to the Baltimore/Washington International Airport in Glen Burnie, Maryland, when John was virtually too ill to ambulate. They flew in a private medical plane with two pilots, a nurse, numerous pieces of medical equipment, and John’s aunt, Paulette Roberts, who was the officiant.

The ceremony, which occurred on July 11, 2013, took only a few minutes. The plane was actually on the tarmac only ten (10) minutes, total.

Prior to John’s death only three (3) months later, James obtained a temporary restraining order in the US District Court in Ohio which temporarily restrained the state of Ohio from listing John Austin as unmarried on his death certificate. Sixty (60) days after John’s death, US District Judge Timothy Black held that Ohio’s ban on same sex unions was unconstitutional and that a state cannot discriminate against same sex individuals who seek marriage licenses simply because some voters do not like homosexuality. However, Judge Black’s ruling was narrow: it only dealt with death certificates.

Judge Black’s ruling in James Obergefell’s case was appealed to the 6th Circuit Court of Appeals, which reversed Judge Black’s decision. The 6th Circuit took other similar action in similar cases. Each of these 6th Circuit decisions were appealed. The U.S. Supreme Court granted certiorari and, as noted, had consolidated them for argument and opinion purposes.

In its opinion, the Supreme Court recognized four (4) features raised by the cases on appeal:

- The right to personal choice regarding marriage is inherent in the concept of individual autonomy.

- The right to marry is fundamental because it supports a two person union unlike any other in its importance to committed individuals.

- Marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education; it offers recognition, stability and predictability.

- Previous decisions of the U. S. Supreme Court and the Nation’s traditions make clear that marriage is a keystone of our social order.
In light of the Court’s consideration of the features listed above, it concluded: “The limitation of marriage to opposite sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.” (p. 12) It ruled that any ban on making marriage licenses available to qualified individuals of the same sex marriage in America was unconstitutional.

And while some citizens applaud, others warn of Armageddon. Those warning of Armageddon are individuals who are usually cast as members of a social conservative or religious right group. Will these individuals seek to obscure or undermine the Obergefell decision? And if so, how will these groups go about it?

It seems evident that some individuals will resist the Obergefell decision. Alabama Chief Justice Roy Moore has been resisting for months now. After reading the Obergefell decision, the Chief Justice Moore explained it as -- well, just plain wrong.

To support his position that the Obergefell decision is unconstitutional, he referenced the case of Dred Scott, an 1856 U.S. Supreme Court ruling in which the majority of the U.S. Supreme Court determined that determined that black individuals were property -- chattel. (At the time, women were chattel, too.) He argued: “That was the interpretation of the majority of the court. Were they right? Of course not.” He argued that the decision flies in the face of thousands of years of accepted understanding of what marriage is. He asserted that the decision represents an affront to Alabamians and Americans who deeply believe that marriage is an institution between one man and one woman.

When asked, Chief Justice Moore said that judges do not enforce the law. When asked if he expected Alabama’s probate judges (who issue marriage licenses in Alabama) to follow the law, he pointed to German judicial officers who followed immoral laws in Germany. What happened to those judges in Nuremberg? They followed immoral laws. That is the Chief Justice Moore’s analysis.

The Chief Justice was asked about Alabama Governor Robert Bentley’s statement that “Alabama will obey the law of the land. His response: “The law of the land is the U.S. Constitution. I would advise the governor to call me if he wants to know about the law.”

An Alabama federal district court judge in Mobile ruled almost immediately that all Alabama counties must abide by the court decision allowing the issuance of marriage licenses to same sex couples. U.S. District Judge Callie Granade of Mobile
issued a brief order on the 1st of July, saying state probate judges can't discriminate against gay couples since the U.S. Supreme Court has ruled gay marriage is legal everywhere.

While Chief Justice Moore is the poster child for those who are vehemently opposed to the legality of same sex marriage, he is not alone. Governor Phil Bryant released a statement on the ruling, saying that the new federal marriage standards are out of step with the wishes of many in the state. Texas’ governor is in much the same frame of mind.

With Chief Justice Moore harking back to Dred Scott, a number of pundits are suggesting that officials in states that oppose the Obergefell decision will seek to avoid the impact of the decision by some tactics utilized during the civil rights era. Examples? When Mississippi was told it must integrate its public swimming pools, the state closed them rather than integrate. [Palmer v. Thompson, 403 US 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971)] Might states simply refuse to issue licenses altogether?

Or could, for example, following the logic in the Hobby Lobby case, a legislature or court grant a religious exception to an individual who is authorized to issue marriage licenses but feels that for religious reasons he/she cannot do so? What about individuals employed at public medical facilities? They have been given the right to opt out of performing an abortion, even though the right to an abortion is a constitutionally recognized one.

Two (2) days after the Supreme Court’s ruling in Obergefell, Texas Attorney General Ken Paxton issued an advisory opinion concluding that county clerks may have a religious right to refuse to issue same-sex marriage licenses. Should one or more clerks act on that advice, litigation could quickly ensue.

The ability of a Chief Justice Moore or a Governor Bryant or an Attorney General Paxton to resist has a great deal to do with the understanding of the constituency. Most officials such as these three (3) are on sound footing with their supporters and can gage the attitudes of the majority of their constituents. If a majority of citizens cannot accept the outcome Obergefell demands, or dispute the underlying logic of the opinion, then obstruction of the decision will succeed and most likely flourish. If these officials, and their colleges of the same opinion, have misjudged the constituents’ feelings, the obvious obstructionist activities may be short-lived, but the underlying feelings will not die.
Remember school prayer. First we, particularly in the South, didn’t believe it. Then we didn’t like it. Then we ignored it. Then we found a way around it -- “a moment of silence.” Will there be this type of resistance to Obergefell?

Mississippi has a rich history of legislative actions intended to thwart social change when that change was moving too fast for its constituency. Literacy tests are one example. More recently, Mississippi legislators have searched for methods to make obtaining an abortion in Mississippi more difficult. As of July 1, 2015, the following obstacles stand in the way of a Mississippi woman obtaining an abortion in her state of residence:

- A woman must receive state-directed counseling that includes information designed to discourage her from having an abortion and then wait 24 hours before the procedure is provided. Counseling must be provided in person and must take place before the waiting period begins, thereby necessitating two separate trips to the facility.

- Health plans that will be offered in the state’s health exchange under the Affordable Care Act can only cover abortion in cases when the woman’s life is endangered, rape or incest.

- Abortion is covered in insurance policies for public employees only in cases of life endangerment, rape or incest or fetal abnormality.

- The use of telemedicine for the performance of medication abortion is prohibited.

- The parents of a minor must consent before an abortion is provided. (If the father of the minor is the father of the child she is carrying, only the minor’s mother must consent.)

- Public funding is available for abortion only in cases of life endangerment, rape, incest or fetal impairment.

- A woman must undergo an ultrasound before obtaining an abortion; the provider must offer her the option to view the image.

Certainly, Mississippians can devise obstacles to delay implementation of Obergefell should they choose to do so.
While over 60% of Americans support same sex marriage, only 29% of Mississippians do. Alternatively, 49% of Mississippians support some form of legal recognition of same sex unions; Mississippians just don’t want it called “marriage,” according to a November, 2013 Public Policy Poll. ([http://www.publicpolicypolling.com/main/2013/11/mississippi-miscellany.html](http://www.publicpolicypolling.com/main/2013/11/mississippi-miscellany.html))

In the end, the success or failure of these and other obstructionist tactics depends on social acceptance of the underlying legal norm. Changing social norms over the last several decades strongly suggest that resistance to marriage equality will not last long. But that does not mean that acceptance will come immediately. After all, sixty-one years after *Brown*, Americans—especially white Americans—are still struggling to accept racial equality in public facilities.

The Supreme Court Justices are conscious of the religious right in this country, and their opinion in *Obergefell* emphasized that “…religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same sex marriage should not be condoned.” This is a fundamental right guaranteed by the Bill of Rights. Likewise, citizens, whether traditionally religious or not, have the right to enter into a same sex marriage on the same terms afforded to individuals of the opposite sex; this also is a fundamental right.

Of course, not everyone agrees. While one of Mississippi’s circuit clerks, Linda Barnette of Grenada County, resigned four (4) days after the decision was reported rather than issue marriage licenses to same sex couples. Barnette had been Grenada County’s Circuit Clerk for over 24 years. Understanding that the duties of her office required her to do something that her conscience told her not to do, she resigned.

Others have taken a different course. Kim Davis, the county clerk in Rowan County, Kentucky, requested to be excused from issuing marriage licenses to same-sex couples. She had stopped issuing marriage licenses to any couple, gay or straight, waiting on the US Supreme Court to approve her decision and excuse her from following the law. But in late August, the Court turned down her request. The Court suggested that she face fines or even jail time if she didn’t begin issuing licenses the second Tuesday in September. She did not. She was incarcerated that week.

Davis has taken the media by storm. She is a self-proclaimed devout Apostolic Christian who opposes same-sex marriages and she has argued that being required to issue marriage licenses to same-sex couples would violate her religious liberties.
Davis had been one of Rowan County's deputy clerks for 26 years and was elected in November of 2014 to succeed her mother who had served for the previous 37 years.

Her lawyers, members of a Christian legal group -- Liberty Counsel -- have advised the media that Davis is a professing Apostolic Christian who attends church worship services multiple times per week, attends weekly Bible study, and leads a weekly Bible study with women at a local jail. According to counsel, she had fasted and prayed for weeks before deciding that she would not issue marriage licenses to gay couples. Apparently her conversion to apostolic Christianity is fairly recent -- within the last five (5) years. Previously she had been married four (4) times. Her son, one of her deputy clerks, has apparently not decided whether he would issue marriage licenses to same-sex couples, although Davis' four (4) other deputy clerks said they would and have been doing so.

**Reasonable Responses to the Law of the Land**

But the reasonable and rational response to the Obergefell decision, from which there is no appeal, is to consider all the impact of the decision on Mississippi residents.

While same sex unions make the headlines, marriage equality raises a number of issues for families created by these couples. For example, state law in Mississippi and most other states establish legal parentage and parenting rights to married couples. The vast majority of these statutes dealing with parentage use gendered terms such as "husband" and "wife" and "mother" and "father" which creates confusion as to how these laws should be applied to same sex couples. As states legalize same sex unions, the gendered terms inevitably result in uneven and inconsistent application of these laws.

The Obergefell decision itself profiles such a situation in addressing the facts in the case of the two (2) plaintiff nurses from Michigan, April DeBoer and Jayne Rowse. Regardless of how one views same-sex marriage, this fact situation is filled with pathos. These two (2) women had been in a committed relationship for several years and the relationship became as "legal" as it could be in Michigan in 2007. Though they could not marry, they participated in a ceremony where they committed themselves to each other.

In 2009, the couple fostered a baby boy, then adopted him. Later in the year 2009, they adopted a special needs child who had been born premature, was abandoned...
by the biological mother and required around-the-clock care. The next year a baby
girl with special needs was also welcomed into the home. But in Michigan, as
elsewhere across the nation, the law permits opposite-sex married couples or a
single individual to adopt. Thus, each of these three (3) children has only one of
their adoptive parents on their birth certificate.

The practical result is the fact that in hospitals and schools, as well as many other
entities and agencies, only the woman on the birth certificate may make decision;
the entities or agencies would not be in the least concerned with the other woman in
these children’s lives. And were one of them to die, the “unlisted” parent would
have absolutely no right over the children that she was not allowed to adopt but had
been raising for over seven (7) years. This is a potential tragedy of immense
proportion for these small children, not to mention the feeling of loss sustained by
the children and their parent’s significant other.

The Family Equity Council, a national organization working to ensure full social and
legal equality for lesbian, gay, bisexual and transgender (LGBT) parents and their
children, is seeking to bring to the attention of state legislators the need to give
guidance to state agencies and to modify statutes if and as necessary in order to
accommodate the over 3 million LGBT parents across the state and their 6 million
children. (As an aside, according to the Council, Mississippi has the largest
percentage of LGBT unions with children -- although not legally recognized or
counted by authorities in Mississippi -- of any state in the US.)

The Family Equity Council has identified key issues that must be addressed by the
legislature by statute and state agencies through regulation. These issues concern
the parental presumption, birth certificates, step-parent and joint adoption issues
and surrogacy and assisted conception. Will we address those issues or merely
respond when faced with litigation? Will we be proactive or reactive? Only time
will tell.
The views expressed in this brief are solely those of the author and do not necessarily reflect the views of the Stennis Institute, Mississippi State University, or any other entity.
ABOUT THE AUTHOR

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ABOUT THE INSTITUTE

Based at our state’s land grant university, the Institute is often referred to as Mississippi’s think tank, but the Institute is much more. We are frequently called upon to provide technical assistance and consultation to state officials, local governments and community leaders regarding political, governmental, and economic and community development matters. Our mission is to enhance the capacities of state and local officials to deal effectively with today’s challenges regarding many issues. If the legislature needs a definitive study on the effects of a change in state law, a municipal government desires a compensation study or salary survey, or an association of government officials’ requests training on the latest legal or policy issues, the Institute responds with its wide variety of resources and capabilities.

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