A Free Speech Tale of Two County Clerk Refusals

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The ever-expanding Free Speech Clause has made possible claims that would have been unthinkable until recently. This symposium Essay examines the compelled speech claims of two hypothetical county clerks who believe that marriage should be limited to unions between one man and one woman, and who argue that forcing them to issue marriage licenses to gay and lesbian couples compels them to speak in favor of same-sex marriage in violation of the Free Speech Clause.

When a government employee such as a county clerk speaks, she may not be speaking as just a private individual. She may also be speaking as the government. This governmental component affects each side of the speech versus equality analysis. First, the Free Speech Clause interests in speech are weaker (sometimes to the point of extinguishment) when the speech is not purely private. Second, to the extent the government employee's conduct is the government's, then it amounts to state action, and the Equal Protection Clause is triggered. Part II addresses the free speech claims of a county clerk who is terminated after she informs a same-sex couple that by reason of her beliefs, she cannot grant them a marriage license. The outcome here is straightforward: she loses. Because her refusal will be treated as the government's own, her individual free speech interests are at their lowest while the government's equal protection interests are at their highest. Part III addresses the free speech claims of a clerk who has found a coworker willing to cover for her, but her supervisor declines to accommodate her and instead fires her for refusing to do her job. The analysis here is more complicated, as it raises questions about expressive conduct, official duties, and expressive harms.

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I. INTRODUCTION

The ever-expanding Free Speech Clause has made possible claims that would have been unthinkable until recently. In particular, businesses have challenged regulations that would not have even been on the free speech radar in earlier times.[1] Among them are claims by commercial wedding vendors that public accommodations laws banning discrimination on the basis of sexual orientation violate their free speech rights.[2] Private business entities are not alone. Government employees have made similar complaints. Most notoriously, after the Supreme Court held that same-sex marriage bans were unconstitutional, Kim Davis, a county clerk in Kentucky, refused to issue any marriage licenses rather than grant them to same-sex couples.[3]

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[1] *See, e.g.*, Tana Ganeva, *Secretive Drug Supplier Insists that Selling Lethal Injection Drugs Is Free Speech*, RAW STORY (Sept. 26, 2016), http://www.rawstory.com/2016/09/secretive-drug-supplier-insists-that-selling-lethal-injection-drugs-is-free-speech/ [https://perma.cc/4FJJ-G9TJ].

[2] *See generally* Caroline Mala Corbin, *Speech or Conduct: The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 251 (2015) (analyzing free speech claims of wedding vendors with religious objections to complying with antidiscrimination laws).

[3] Sarah Kaplan & James Higdon, *The Defiant Kim Davis, the Ky. Clerk Who Refuses To Issue Gay Marriage Licenses*, WASH. POST (Sept. 2, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/meet-kim-davis-the-ky-clerk-who-defying-the-supreme-court-refuses-to-issue-gay-marriage-licenses/?utm_term=.8f4e309be405 [https://perma.cc/B4KG-Y42P].

One might think that the more natural constitutional argument would be that requiring clerks to serve same-sex couples violates their religious liberty, since their core argument is that participating in these unions contravenes their deeply held religious beliefs. However, ever since the Supreme Court decided *Employment Division v. Smith*,[4] neutral laws of general applicability do not violate the Free Exercise Clause, and few would dispute that antidiscrimination statutes qualify as neutral, generally applicable laws. After all, their goal is to promote equality, not target religion.[5]

Accordingly, government employees, like businesses and business owners before them, may turn to the Free Speech Clause. Generally speaking, under the Free Speech Clause, the government may not censor speech it dislikes or compel speech it prefers.[6] Religious objectors to antidiscrimination requirements argue that forcing them to serve gay and lesbian couples violates their free speech rights by compelling them to express approval of same-sex marriage.[7]

There are notable differences between a business owner and a public employee challenging, on free speech grounds, the requirement that everyone have equal access to their services. In particular, when a government employee speaks, she may not be speaking as just a private individual. She may also be speaking as the government.[8] This governmental component affects each side of the speech versus equality analysis. First, the Free Speech Clause interests in speech are weaker (sometimes to the point of extinguishment) when the speech is not purely private. Second, to the extent the government employee's conduct is the government's, then it amounts to state action, and the Equal Protection Clause is triggered.

This Essay examines the compelled speech claims of two hypothetical county clerks who believe that marriage should be limited to unions between one man and one woman, and argue that forcing them to issue marriage licenses to gay and lesbian couples compels them to speak in favor of same-sex marriage in violation of the Free Speech Clause.

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[4] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–79 (1990).

[5] Potential "First Amendment Freedom Act" claims, should the proposed law pass, are beyond the scope of this Essay. I note, however, that the law likely violates both the Establishment Clause and the Equal Protection Clause. *See, e.g.*, Barber v. Bryant, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016) (holding that a similar Mississippi law, Protecting Freedom of Conscience from Government Discrimination Act, violated both those clauses), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017).

[6] Black letter law is that content-based regulations of speech are subject to strict scrutiny. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015). Slightly different rules may apply when dealing with commercial speech. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985). And as this Essay will discuss, the rules also differ for government employees. *See infra* Part II.A.

[7] *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[8] *See* Garcetti v. Ceballos, 547 U.S. 410 (2006).

Part II addresses the free speech claims of a county clerk who is terminated after she informs a couple that, by reason of her beliefs, she cannot grant them a license. The outcome here is straightforward: She loses. Because her refusal will be treated as the government's own, her free speech interests are at their lowest while the government's equal protection interests are at their highest. Part III addresses the free speech claims of a clerk who has found a coworker willing to cover for her, but her supervisor declines to accommodate her and instead fires her for refusing to do her job. The analysis here is more complicated.

II. SCENARIO ONE: "I AM SORRY MA'AMS, YOU HAVE TO FIND SOMEONE ELSE."

In my first hypothetical, a government employee on duty refuses to provide a marriage license for a same-sex wedding, loses her job, and then brings a free speech claim. The hypothetical begins with a happy couple approaching the county clerk's window to request a license. The clerk refuses on the ground that her deeply held religious beliefs prevent her from communicating approval of a sinful union. After the clerk is terminated, she brings a free speech claim against the county, arguing that, however unpopular her viewpoint may be, the government cannot force her to express approval of same-sex marriage.

This case is fairly straightforward. The clerk ought to lose on at least two grounds. To start, under the government-employee speech doctrine, any speech connected to her refusal to issue marriage licenses is unprotected government speech and not protected private speech.[9] Moreover, for the government to deny a marriage license to a same-sex couple violates the Equal Protection Clause.[10]

A. *Speech Analysis*

The speech rules for government employees differ from those that apply to private citizens. When public employees speak, they may speak not only for themselves, but also for the government.[11] Consequently, government-employee speech is less protected, and in certain circumstances, completely unprotected. In fact, despite the general trend towards ever-increasing free speech protection, the trend for government employees is to retract it, especially after *Garcetti v. Ceballos*.[12] *Garcetti* held that government-employee speech

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[9] *Id.* at 421.

[10] Equal protection is not the only constitutional problem. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding that bans on same-sex marriage violate the fundamental right to marriage protected by substantive due process).

[11] *Cf. Garcetti*, 547 U.S. at 422–23 (2006) ("Official communications have official consequences . . . . [Government] [s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.").

[12] *Id.*

made fulfilling one's job responsibilities is not covered by the Free Speech Clause: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[13]

Garcetti suggests, although it does not explicitly state, that government-employee speech pursuant to official duties is government speech.[14] Indeed, one of the dissents complained that "[t]he majority accepts the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government's own speech."[15]

When a member of the public approaches a clerk at the county office to request a license, and the clerk responds, the clerk is responding in her capacity as a government official. The clerk is denying a license on behalf of the government, and so her speech as the government's representative is government speech. Thus, even assuming that the clerk's conduct amounts to speech—and there are plenty of reasons to think it does not[16]—it would not be private speech. Government speech, of course, does not trigger the Free Speech Clause.[17] Rather, the Free Speech Clause is meant to protect private individuals from the government.[18] Therefore, the first county clerk's free speech claim would fail.

B. *Equal Protection Analysis*

As suggested by the free speech analysis, the clerk's refusal to provide a marriage license is not a private action. To the contrary, the clerk's rejection amounts to state action, and therefore triggers the Equal Protection Clause. Although the presence or absence of state action can be opaque,[19] there is no doubt of its existence here. Public employees discharging their official duties will be treated as the state for state action purposes.[20] As the Supreme Court has observed, "generally, a public employee acts under color of state law while

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[13] *Id.* at 421. Pushing against this retraction, however, is *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014), which held that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties" was not government speech. *Id.*

[14] *See Garcetti*, 547 U.S. at 421.

[15] *Id.* at 436 (Souter, J., dissenting).

[16] *See infra* Part III.A.1.

[17] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245–46 (2015) ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

[18] *Pleasant Grove City,* 555 U.S. at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

[19] Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (describing state action doctrine as a "conceptual disaster area").

[20] West v. Atkins, 487 U.S. 42, 50 (1988).

acting in his official capacity or while exercising his responsibilities pursuant to state law."[21] Thus, this refusal is a paradigmatic example of state action.

Furthermore, denying equal access to marriage on the basis of sexual orientation now constitutes a paradigmatic equal protection violation. In both *United States v. Windsor*[22] and *Obergefell v. United States*,[23] the Supreme Court held that same-sex marriage bans violated the Equal Protection Clause, and that denying a marriage license is essentially denying same-sex couples the right to marry.[24] That marriage is a fundamental substantive due process right[25] only makes the equal protection case stronger, as Justice Kennedy has underscored the "synergy"[26] and "interrelation"[27] of the Due Process and Equal Protection Clauses.[28] In short, a government official who informs a couple at the county clerk's office that she will not grant them a marriage license not only cannot invoke the Free Speech Clause but also violates the Equal Protection Clause.[29]

III. SCENARIO TWO: "BOSS, SOMEONE ELSE HAS OFFERED TO COVER FOR ME."

In my second hypothetical, another county clerk who opposes same-sex marriage refuses to provide marriage licenses to gay and lesbian couples, but this one has colleagues willing to cover for her. That is, sympathetic coworkers offer to discharge her marriage-license responsibilities when same-sex couples are involved. The government, however, declines to provide the accommodation and terminates the clerk for refusing to do her job. She too brings a compelled speech claim. How has the analysis changed?

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[21] *Id.*

[22] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[23] Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[24] *Id.* at 2602 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws.").

[25] *See id.* at 2604 (holding that "the right to marry is a fundamental right inherent in the liberty of the person").

[26] *Id.* at 2603.

[27] *Id.*

[28] *See id.* at 2602–03 ("The Due Process Clause and the Equal Protection Clause are connected in a profound way.").

[29] Indeed, the Sixth Circuit ruled against Kim Davis in part because "it cannot be defensibly argued that the holder of the Rowan County Clerk's office, apart from who personally occupies that office, may decline to act in conformity with the United States Constitution as interpreted by a dispositive holding of the United States Supreme Court." Miller v. Davis, No. 15-5880, 2015 WL 10692640, at *1 (6th Cir. Aug. 26, 2015).

A. *Speech Analysis*

1. *Is It Speech?*

In the first hypothetical, I assumed that the Free Speech Clause covers the act of issuing a marriage license.[30] This assumption does not necessarily hold. As mentioned earlier, the Free Speech Clause protects against compelled speech as well as censored speech, so the fact that the county clerk's claim involves compulsion rather than censorship is not an issue.[31] However, the Free Speech Clause generally protects speech rather than conduct; only if the conduct has an expressive component will it trigger free speech protection.[32] Is granting a license the type of expressive conduct that merits speech (as opposed to religious) protection? What, if anything, does this act communicate?

The objecting clerk, paraphrasing bakers who refuse to bake cakes for gay and lesbian couples, would likely argue that "compelling [her] to [issue a marriage license] for a same-sex wedding is equivalent to forcing [her] to 'speak' in favor of same-sex weddings."[33]

The clerk's interpretation, however, is not dispositive. As the Supreme Court has pointed out, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[34] All conduct risks becoming expressive conduct if only the intent of the speaker is considered. Consequently, the Court insists that to be expressive conduct, the conduct's particular message must be understood by the audience as well.[35]

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[30] *See supra* Part II.

[31] *See, e.g.*, W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (stating that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

[32] *See* Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam).

[33] Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 7 (Colo. Admin. Ct. Dec. 6, 2013), https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf [https://perma.cc/E54R-MFBA], *aff'd*, No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014), https://www.aclu.org/sites/default/files/field_document/masterpiece_--_commissions_final_order.pdf [https://perma.cc/ZH5G-3WCD], *aff'd*, 370 P.3d 272 (Colo. App. 2015), *aff'd*, 370 P.3d 282 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017). Notably, this claim is different from clerks' religious claim that providing a form facilitates or enables sinful conduct. The claim here is not that providing a form facilitates conduct that their religion condemns, but rather that it communicates approval of that conduct.

[34] United States v. O'Brien, 391 U.S. 367, 376 (1968); *see also* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65–66 (2006) (repeating the same concern as in *O'Brien*).

[35] Whether conduct has a legally recognized expressive element is (often but not always) determined by the test laid out in *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam): conduct is deemed expressive if the actor intended to express a particularized message and that message is understood by the audience as such.

Conduct that is "inherently expressive" is obviously easier for an audience to read as communicating a message. In fact, recent case law suggests that an act must be "inherently expressive" in order to trigger free speech scrutiny.[36] Handing out government forms is not inherently expressive in the way that burning an American flag is.[37] Nevertheless, conduct that is not inherently expressive may present as expressive in the right context. For example, sitting is not inherently expressive, but sitting at a segregated lunch counter may well be expressive.[38]

That being said, generally when a county clerk furnishes you with a government form at a government office open to all and sundry, she does not communicate endorsement of the form's subject matter. Consider all the forms available besides marriage licenses: divorce forms, death certificates, fictitious business name forms, business entity registration forms, quitclaim deed forms, forms for property tax exemptions and church exemptions, forms to contest driver's license suspension, to name just a few. It cannot be that clerks approve of every divorce, every corporation, every property transfer, every religious organization, every challenge to a driver license suspension for which they hand out a form. We simply do not understand the act of providing an official government form as expressing approval of the conduct authorized by the form. Consequently, providing a marriage form at a county clerk's office is not expressive conduct.

In short, providing a form is just providing a form, not expressing a message.[39] But even if it were covered speech, it is unlikely that it would be protected by the Free Speech Clause.

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[36] *See, e.g.*, *Rumsfeld*, 547 U.S. at 66 ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.").

[37] *Cf., e.g.*, Texas v. Johnson, 491 U.S. 397, 410 (1989) (discussing flag burning as expressive conduct).

[38] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 306 (1984) (Marshall, J., dissenting) ("[S]itting or standing is not conduct that an observer would normally construe as expressive conduct. However, for Negroes to stand or sit in a 'whites only' library in Louisiana in 1965 was powerfully expressive; in that particular context, those acts became 'monuments of protest' against segregation."); *cf.* Brown v. Louisiana, 383 U.S. 131 (1966) (protesters at segregated library); Garner v. Louisiana, 368 U.S. 157 (1961) (protesters at segregated lunch counters).

[39] *Cf.* Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008, at 9 (Colo. Admin. Ct. Dec. 6, 2013), https://www.aclu.org/sites/default/files/assets/initial_decision_case_no._cr_2013-0008.pdf [https://perma.cc/E54R-MFBA] ("[The bakers] have no free speech right to refuse because they were only asked to bake a cake, not make a speech."), *aff'd*, No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014), https://www.aclu.org/sites/default/files/field_document/masterpiece_--_commissions_final_order.pdf [https://perma.cc/ZH5G-3WCD], *aff'd*, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

2. *Whose Speech Is It?*

A county clerk at the county seat handing out government licenses to the public is a paradigmatic example of a county clerk acting "pursuant to official duties."[40] In this capacity, she represents the government, and any speech linked with this activity unquestionably amounts to government speech. But what if she refuses to issue licenses behind the scenes? Is this act still pursuant to official duties? This scenario differs in two ways from the paradigmatic example. First, it occurs outside the public eye. Second, it involves an omission rather than a commission. Do either of these differences make her speech (to the extent her refusal counts as "speech") private rather than governmental?

Either of these factors on its own would not make the government employee's speech nongovernmental. Just because an employee's duties do not involve direct interaction with the public does not mean that her performance of them is not "pursuant to official duties." *Garcetti* itself, after all, involved an internal office memo.[41] Consequently, that a government employee's conduct occurs outside public view should not change the analysis. Nor should it matter if a clerk who is interacting with the public refuses to execute her official duties rather than performs them.[42] Either way, she is the official face of the government, and therefore her refusal is a government refusal.

What if the speech involves both—such as a clerk who refuses to fulfill her responsibilities to the public but also refuses behind the scenes—should that still be categorized as pure government speech with no free speech protection? In that case, perhaps it is possible to conceive of her refusal as occurring before she dons her government-employee hat. Once she wears her government-employee hat, her conduct, as a government employee, is more likely to be conflated with the government. But if her refusal is viewed as occurring before the government-employee hat goes on, while she retains her private citizen status, perhaps her refusal might be considered private to some degree.

This permutation presents a less open and shut case than the earlier ones. At the same time, the clerk's free speech claim hinges on the message conveyed by her issuing licenses, something she does only in her capacity as a government official.[43] Moreover, it still ultimately involves a county clerk's actions with

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[40] *See supra* note 13 and accompanying text (describing how government employee speech "pursuant to official duties" is not protected by the Free Speech Clause).

[41] *See* Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (rejecting free speech claim by deputy district attorney who was punished after he criticized an affidavit used to procure a search warrant and recommended dismissal of a case because advising superiors on upcoming cases was part of his job responsibilities).

[42] *See supra* Part II.A.

[43] *See* Miller v. Davis, 123 F. Supp. 3d 924, 942 (E.D. Ky. 2015) (asking whether Kim Davis was acting as a citizen and answering: "The logical answer to this question is no, as the average citizen has no authority to issue marriage licenses.").

regard to her official duties.[44] At least doctrinally, that renders any speech associated with those duties governmental.[45] In short, a clerk's performance of her job responsibilities, or her refusal to perform them, is ultimately pursuant to official duties, and the government employee speech doctrine dictates that the refusal is a government refusal.

B. *Equal Protection Analysis*

Even assuming the county clerk's refusal were speech, and even assuming it were partially private speech entitled to some protection, the government would not be obligated to accommodate the government employee if the accommodation itself violated the Equal Protection Clause. Whether it would or not is the focus of this subsection.

1. *State Action*

No equal protection analysis is necessary unless there is state action.[46] Notably, the state action in the second hypothetical is not (solely) the government employee's refusal, but the government's willingness to excuse that clerk from some of her official duties. Thus, the presence of state action does not depend on whether the clerk's action or inaction amounts to government conduct.[47] Rather, it is satisfied by the government's decision to accommodate an employee's belief that providing a marriage certificate compels her to express a message anathema to her.[48]

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[44] *Cf.* Frank S. Ravitch, *Complementary or Competing Freedoms: Government Officials, Religious Freedom, and LGBTQ Rights*, 11 FIU L. REV. 163, 175 (2015) ("[T]he very issue arises from performance of government duties so any speech involved would be in the actors' capacity as government officials or employees.").

[45] *Cf.* Glicksman v. N.Y.C. Envtl. Control Bd., 345 F. App'x 688, 690 (2d Cir. 2009) (finding that Administrative Law Judge's failure to adhere to TLC [Taxi and Limousine Commision] adjudication procedure at inquest hearings was pursuant to official duties and therefore unprotected speech); Davis v. Chicago, 162 F. Supp. 3d 726, 732 (N.D. Ill. 2016) (holding investigator's refusal to change investigative reports, which were made pursuant to his official duties, was not protected under the First Amendment).

[46] *See* The Civil Rights Cases, 109 U.S. 3, 13 (1883).

[47] If the clerk's refusal is government action, then the equal protection analysis from Part I.B applies, and the equal protection analysis of the government's accommodation is no longer needed.

[48] Laws that expressly exempt objecting government employees present a more obvious example of this kind of state action. *See, e.g.*, H.R. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (Mississippi's "Protecting Freedom of Conscience from Government Discrimination Act"). I am focusing on accommodations made outside of the public eye (as opposed to laws that tend to be at the center of a storm of publicity) because they present a more complex equal protection question.

2. *Harm*

One might argue that if a colleague volunteers to take over her coworker's duties, then there is no harm, especially if the county clerk's office continues to grant marriage licenses to same-sex couples without the public ever learning about the accommodations for some employees working in it. If there is no harm, whether it be material harm or expressive harm, then there is no equal protection violation. However, the risk of both types of harm is very much present.

a. *Material Harm*

If the government's accommodation of protesting clerks resulted in an office without anyone willing to issue a license, so that a same-sex couple had to drive to another county to obtain one, the couple would clearly have suffered a material harm. Even if a coworker volunteers to step in, the material harm evaluation turns on exactly which duties are assumed. Services would still be equal if the colleague assumes responsibility for all marriage licenses. If the coworker is covering only the same-sex requests, however, allowing county clerks to opt out of providing licenses to gay and lesbian couples might create tangible obstacles—such as waiting until the replacement clerk comes on duty—that only same-sex couples have to face.[49]

Several scholars have argued that the extra wait (or even the extra drive) is merely a minor inconvenience and does not amount to a true equal protection harm.[50] Yet state action that disadvantages a suspect class on its face always triggers the Equal Protection Clause.[51] While the degree of disparate impact matters for facially neutral state actions, the degree of disparate treatment has never mattered for state actions that are not neutral on their face. For example, if the state charged white couples $50.00 for their marriage licenses and charged black couples $50.01 for theirs, that differential treatment would trigger—and

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[49] *But cf.* Slater v. Douglas Cty., 743 F. Supp. 2d 1188, 1195 (D. Or. 2010) ("So long as the [same-sex] registration is processed in a timely fashion, the registrants have suffered no injury.").

[50] For example, Robin Fretwell Wilson would allow some delay or inconvenience, as long as it did not rise to the level of "hardship." Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 321–22, 334 (2010) ("This Article argues that government employees who have religious objections should be permitted to step aside from facilitating same-sex marriages when it poses no hardship for same-sex couples . . . . [T]he proposed hardship exemption will involve some line drawing; specifically, what will count as 'promptly' or 'inconvenience' or 'delay.'"); *see also id.* at 340 (arguing only "significant interference" would "trigger[] an Equal Protection violation").

[51] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); *cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

likely violate—the Equal Protection Clause, even though the difference is a single penny. Consequently, if the government's accommodation for its employees opposed to same-sex marriage means two clerks will provide marriage licenses to straight couples but only one to gay couples, that differential treatment is unlikely to be constitutional.

Nor can it be maintained that classifications based on sexual orientation are not suspect. Gay and lesbian people satisfy the indicia of suspect classes: sexual orientation is rarely relevant to legitimate government purposes; there is a long history of discrimination against the LGBT community; and laws that harm them usually reflect a defect in the democratic process.[52] Granted, neither *Windsor* nor *Obergefell* pinpoint what level of equal protection scrutiny applies to laws that disadvantage gays and lesbians.[53] Nonetheless, the Supreme Court conducted some form of heightened scrutiny review.[54] Had it been rational, the Court would have accepted rather than rejected the government's proffered justifications.[55] Consequently, state actions that facially discriminate on the basis of sexual orientation, particularly in the marriage context, will at the very least be subject to some kind of heightened scrutiny.

If subject to heightened scrutiny, the state's accommodation will probably fail to satisfy it. There is a strong presumption that the rationales given for obstacles to same-sex marriage are mere pretexts, suggesting that the state

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[52] *Cf.* United States v. Carolene Prods. Co. 304 U.S. 144, 152 n.4 (1938) (discussing the potential for heightened judicial scrutiny of legislation directed at "religious, . . . national, . . . or racial minorities"); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) ("[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (rejecting heightened scrutiny for a group because "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.").

[53] *See, e.g.*, Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIR. 107, 113 (2015) (noting that *Obergefell* lacks "any discussion of the tiers of review that have traditionally been necessary to an analysis under the Equal Protection Clause").

[54] *See, e.g.*, Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity As a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 11 (2016) ("The *Obergefell* opinion did not use the magic words of 'heightened scrutiny,' but it is clear from the language and disposition of the case that the Supreme Court gave same-sex couples exactly the ruling and the underlying reasoning they asked for in their briefs.").

[55] Indeed, the majority barely acknowledged the justifications offered to support the challenged law. *See* United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("The majority . . . makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them.").

would lack even a legitimate—let alone important—justification for the accommodation.[56] That was the conclusion in both *Windsor* and *Obergefell*.[57]

It is true that unlike the marriage equality cases, the state here arguably has an interest in protecting the free speech (and free exercise) rights of government employees. This interest, however, will be diluted by the extent that the provision of marriage licenses does not represent private but government speech—assuming it amounts to speech at all. If the government employee's speech vis-à-vis marriage licenses is the government's, then the Constitution does not reach it; or, if it is a mixture of public and private speech, the Constitution may not reach it with equal force. Against this diminished interest is not just the material harm that might result from government-enabled refusals but also the potential expressive harm. Thus, the final balancing must also consider the expressive harm associated with government accommodation of its representatives who refuse to serve members of an often-targeted suspect class.

b. *Expressive Harm*

Even if the material harm is slight, the expressive harm may not be. Under an expressivist view of equal protection, the harm to equality is caused by the expressive content of the challenged government action.[58] The focus is on the message conveyed by the state's conduct rather than its intent or its practical effect. State conduct—such as providing unequal service to protected class members—violates the Constitution's guarantee of equality if it undermines the government's duty to treat each person with equal dignity.[59] That is, "the government may not express, in words or deeds, that it values some of us more than others."[60] For example, offering civil unions instead of marriages to mixed-race or same-sex couples, even if the unions came with exactly the same tangible

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[56] *See id.* at 2696 (majority opinion) ("[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *id.* at 2710 (Scalia, J., dissenting) ("By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is 'no legitimate purpose' served by such a law . . . .").

[57] *See id.* at 2707 ("The majority concludes that the only motive for this Act was the 'bare . . . desire to harm a politically unpopular group' . . . . It makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them.").

[58] *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000).

[59] *See* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 380–81 (2012).

[60] Hellman, *supra* note 58, at 13.

benefits, would violate the Equal Protection Clause because it treats those couples as second-class citizens.[61]

This expressivist strand has existed from the earliest Equal Protection Clause cases. In the nineteenth century case of *Strauder v. West Virginia*, the Supreme Court recognized that state-sponsored race discrimination harmed blacks not just because it denied them equal opportunity, but because it conveyed a message of second-class citizenship: "The very fact that colored people are singled out and expressly denied [equal access to jury duty] because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority . . . ."[62] *Brown v. Board of Education* likewise acknowledged the expressive injury that accompanies state discrimination.[63]

Although post-*Brown* the Supreme Court retreated to a more limited view of the Equal Protection Clause,[64] the expressive strand has reemerged in the marriage equality cases. When Justice Kennedy writes in *Windsor* about the "resulting injury and indignity"[65] of marriage bans or in *Obergefell* about the advantages of "offering symbolic recognition and material benefits to protect and nourish the union,"[66] he acknowledges both the material and expressive aspects of marriage laws. In *Windsor*, the Supreme Court emphasizes the message that unequal treatment conveys: "[I]t tells those couples, and all the world, that their otherwise valid marriages are unworthy[,] . . . a second-tier marriage. The differentiation demeans the couple . . . ."[67] While the Equal Protection Clause is less prominent in *Obergefell*, the language about communicating second-class citizenship is not. After explicitly noting that the

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[61] Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1275 (2011) ("[T]his Article ultimately concludes that laws withholding the term marriage from same-sex couples unconstitutionally convey the message of second-class citizenship.").

[62] Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

[63] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

[64] For example, rather than explicitly deny any message of inferiority or second-class status like it did in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976), simply failed to address the expressive component of the government's decision to rely on an employment test it knew black applicants failed at four times the rate. Likewise, the Supreme Court never considered in *Personnel Administrator v. Feeney* what messages might be conveyed by a government policy that essentially excluded women from higher ranking state jobs. Pers. Adm'r v. Feeney, 442 U.S. 256 (1979).

[65] United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

[66] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

[67] *Windsor*, 133 S. Ct. at 2694. Justice Kennedy's expressivist language appears again when he writes "DOMA *instructs* all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696 (emphasis added).

harms of same-sex marriage bans were "more than just material burdens,"[68] the Court held that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[69]

Windsor's holding that the "practical effect of the law here in question [is] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages"[70] could easily be paraphrased to apply to the proposed accommodation: "The practical effect of the accommodation here is to impose a separate status and so a stigma upon all who seek to enter into same-sex marriages." Accordingly, a federal district court struck down on equal protection grounds a Mississippi law allowing county clerks to recuse themselves so long as the recusal did not cause any delay, holding that "the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment . . . . Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected [in *Windsor* and *Obergefell*]."[71] In short, for the government to allow public employees to refuse to serve same-sex couples because they condemn the union conveys a message of second-class citizenship, even when others step in.[72]

One rejoinder is that the true message (as well as the true motive) is about individual conscience, and therefore accommodating refusals communicates a commitment to free speech, not a disregard for LGBT equality. Of course, that argument requires several presumptions, any one of which may not be true. The first is that providing a marriage license qualifies as speech.[73] The second is that

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[68] *Obergefell*, 135 S. Ct. at 2601 ("This harm results in more than just material burdens.").

[69] *Id.* at 2602; *see also id.* ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.").

[70] *Windsor*, 133 S. Ct. at 2693.

[71] Barber v. Bryant, 193 F. Supp. 3d 677, 711 (S.D. Miss. 2016), *rev'd on other grounds*, 860 F.3d 345 (5th Cir. 2017); *see also id.* ("'A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.' There cannot be one set of employees to serve the preferred couples and another who is 'willing' to serve LGBT citizens with a 'clear conscience,' as Senator Branning put it." (citation omitted) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))).

[72] *Cf.* Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236, 241 (2010) ("To be candid, I find myself unnerved by proponents' failure to recognize the dignitary harm at the heart of public refusals to serve historically marginalized groups."); Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2586 (2015) ("Even if the government can provide for affected third parties in alternative ways, these alternatives may not shield third parties from dignitary harms.").

[73] *See supra* Part III.A.1 (discussing whether provision of a marriage license by a county clerk amounts to expressive conduct).

this speech is not pure government speech.[74] In any event, discriminatory treatment in the name of free speech is still discrimination. While discriminatory treatment motivated by animus is worse, discriminatory treatment without animus does not reverse the ultimate message, which is that same-sex couples do not merit equal respect. It is not clear that any government interest, especially a circumscribed interest in protecting a government employee's semiprivate, semigovernmental expressive conduct, suffices to surmount a direct violation of the equal protection prohibition against treating some citizens as second-class because of a protected characteristic. Under an expressivist theory, therefore, accommodating an employee's refusal to serve is likely barred by the Equal Protection Clause.[75]

What if, however, the accommodation was behind the scenes and outside the public eye? That is, what if it were, first, arranged beforehand, so no couple would ever experience a clerk telling them that someone else would be providing their license, and second, arranged informally, to avoid the widespread publicity that accompanies enacted laws?[76] Is there still a message if there is no audience to receive it?[77] In some ways, this presents the equal protection equivalent of the age-old conundrum: if a tree falls in a forest and no one hears it, does it still make a sound?

Perhaps a slightly different hypothetical would help. Imagine a white county clerk whose religion teaches that she should never touch a black person lest she become contaminated by them. Imagine she seeks a similar accommodation—beforehand, informally, and behind the scenes. Would the state violate the Equal Protection Clause by accommodating her patently racist beliefs?

The protesting county clerks would no doubt argue that the two religiously motivated refusals to serve members of a protected class are not analogous. One

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[74] *See supra* Part III.A.2 (discussing whether a government employee's behind-the-scenes refusal qualifies as government speech because it is "pursuant to official duties"). Even if private, the state is not accommodating purely private speech, but speech that is to some extent (or to a large extent) the government's own speech, thereby diminishing its entitlement to constitutional protection.

[75] Moreover, just as Herbert Wechsler's claim that segregation involved a clash between equal competing rights in *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) overlooked that one group was powerful and one subordinated, so too with objecting clerks and the LGBT community. *See* Flynn, *supra* note 72, at 257–59; *see also id.* at 258 ("Importantly, however, this assumption ignores the subordination inherent in state-sponsored permission to discriminate against an unpopular minority."); *cf.* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 35 (2008) ("To demean thus requires not only that one express disrespect for the equal humanity of the other but also that one be in a position such that this expression can subordinate the other.").

[76] Or the result of a very public Religious Freedom Restoration Act claim. *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. 2000bb).

[77] *Cf.* Ravitch, *supra* note 44, at 170 (arguing that "accommodation should be denied or revoked when a government official acting in his or her official capacity calls attention to the refusal to perform a duty, either through contacting the media or through direct confrontation with the citizens he or she refuses to serve").

religious belief, premised on the inferiority of a particular people, is obviously discriminatory, while the other, focused on preserving the sanctity of one particular type of marriage, is not.[78] A preference for one option does not necessarily read as discriminatory against other ones. Preferring to send my child to a Jewish school does not necessarily denigrate Christians, Muslims, Buddhists, Hindus, or Sikhs, for example. However, when there is only one other option, and that other option is regularly described as a sin and an abomination, it is harder to make the case that it is just a preference for one thing rather than discrimination against the other.[79]

Obergefell makes clear that the lack of animus does not change the fact that denying equal access communicates an unconstitutional message.[80] Justice Kennedy does not assume, as the previous paragraph suggests, that the beliefs of those who oppose same-sex marriage are linked to a hierarchical world view that the government should not endorse in any way. On the contrary, Justice Kennedy depicts religious objectors' traditional beliefs as "principles" that are "fulfilling" and "central to their lives and faiths" and the traditional family as "the family structure they have long revered."[81]

Nonetheless, although the First Amendment may protect individuals' right to discuss and debate these beliefs—"those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate"[82]—the government may not act on them: "The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."[83] Thus, the Supreme Court underscores that denying access to marriage "on the same terms" need not be motivated by animus in order to deprive same-sex couples of equal dignity.[84]

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[78] *Cf.* United States v. Windsor, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting) ("[T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements . . . .").

[79] James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 123 (2015) ("[N]obody should be mistaken about the underlying reason for their opposition to same-sex marriage: they 'disapprove of homosexuality.'").

[80] *See supra* notes 64–72 and accompanying text (discussing message conveyed by government's unequal treatment).

[81] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

[82] *Id.* at 2607.

[83] *Id.*

[84] Justice Kennedy uses the term "equal dignity" in both *Windsor* and *Obergefell*. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693 ("[DOMA] interfere[s] with the equal dignity of same-sex marriages"); *Obergefell*, 135 S. Ct. at 2608 ("[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

The Court made this point even more plainly when it asserted:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.[85]

Of course, *Obergefell* involved the open and complete denial of marriage, unlike the behind-the-scenes accommodations at issue here. Still, one could conclude that for same-sex couples, the issue is ultimately the same: "They ask for equal dignity in the eyes of the law."[86] Therefore, the answer given by the Supreme Court should be the same: "The Constitution grants them that right."[87]

IV. CONCLUSION: THE CLASH OF EXPRESSIONS

In conclusion, I would like to flag one last complication that arises when a government employee refuses to issue a marriage license. I have emphasized that the government's accommodation of this refusal has an expressive component, and therefore raises serious equal protection questions. At the same time, I have also suggested that issuing a marriage license is not sufficiently expressive to trigger free speech protection for government employees. How can both these claims be true? Either issuing a marriage license is expressive or it is not.

One response is that both claims cannot be true, and that providing marriage licenses is expressive in both contexts. Indeed, anticipating this view, much of my analysis assumes that both public employees' and the government's expressive interests are in play. A slightly different response agrees that they are both expressive, but that in both cases the expression is the government's, and therefore the employee's rights are simply not implicated.[88] The expression may be the government's because a public employee performing her official duties is always the government.[89] Or it may be the government's because even if a public employee fulfilling her official responsibilities and the government are

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[85] *Obergefell*, 135 S. Ct. at 2602.

[86] *Id.* at 2608.

[87] *Id.*

[88] When the government grants a license, it tells same-sex couples that they are of equal worth and dignity; when the government accommodates a refusal, it tells them the contrary.

[89] While the focus of this Essay is on public employees' free speech rights, a parallel argument could apply to their religious rights. *See generally* Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. (forthcoming Feb. 2018) (imagining a government employee religion jurisprudence based on existing government employee speech jurisprudence).

not always conflated, they are here, when a public employee's official duties of providing marriage licenses involves, among other things,[90] contact with the public. Yet another response is that even if there is a message that can be attributed to the public employee as a private individual, it is not the one the employee claims.

Finally, it is worth noting that the potential expansiveness of *free speech* expressive conduct and *equal protection* expressive state action differs, and this too might inform how to read the public employee's provision of a license or the state's refusal or accommodation of a refusal. Granting free speech significance to the provision of services greatly expands what counts as expressive conduct, and an overly broad understanding of expressive conduct risks nullifying the distinction between speech and conduct. A very expansive category also risks diluting potential protection for that category.[91] Granting equal protection significance to the government's acts does not carry the same risks, in part because the Equal Protection Clause is triggered only when the equal dignity of a suspect class is involved.[92]

In the end, though, even if both are expressive in the way each side claims, it may be that the state's interest simply outweighs the individual's because the Equal Protection Clause does not tolerate any "interference with the equal dignity of same-sex marriages."[93]

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[90] Among those other things might be the fact that the government employee is acting as a gatekeeper to something over which the government has a monopoly, i.e., marriage licenses.

[91] *Cf.* William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 NW. U. L. REV. 558, 567 (1985) ("The more broadly rights are drawn, the more difficult it becomes to enforce those rights stringently.").

[92] In other words, this antisubordination approach (as opposed to colorblindness approach) to equal protection is triggered when a suspect class (rather than a suspect classification) is involved. *Cf. Obergefell*, 135 S. Ct. at 2604 ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

[93] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).