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## Formal Marriage

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Nor should Plaintiffs and members of the putative class have to endure the humiliation and stigma associated with the receipt of marriage licenses that are effectively imprinted with [Kim] Davis' opprobrium. The marriage licenses currently issued by the Rowan County Clerk's Office are so materially altered that they create a two-tier system of marriage licenses throughout [sic] state. The adulterated marriage licenses received by Rowan County couples will effectively feature a stamp of animus against the LGBT community.

—Motion by the American Civil Liberties Union of Kentucky to the  
Federal District Court in the Eastern District of Kentucky<sup>1</sup>  
September 21, 2015

[T]he prime purposes for which public policy maintained legal-tender money most of the time were those of the administrative regularity and convenience of the market and of government fiscal operations, and not to foster popular acceptance of particular money.

—James Willard Hurst  
*A Legal History of Money in the United States, 1774-1970*<sup>2</sup>

## FORMAL MARRIAGE

JEFFREY A. REDDING\*

The aftermath of two recent and widely-anticipated United States Supreme Court decisions, *Burwell v. Hobby Lobby Stores*<sup>3</sup> and *Obergefell v. Hodges*,<sup>4</sup> has been as noteworthy as most people anticipated, and quite literally so.

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1. Motion to Enforce September 3 and September 8 Orders at 8, *Miller v. Davis*, No. 0:15-cv-00044-DLB (E.D. Ky. Sept. 21, 2015), ECF No. 120, [http://www.aclu.org/sites/default/files/field\\_document/motion\\_to\\_enforce\\_final\\_filed.pdf](http://www.aclu.org/sites/default/files/field_document/motion_to_enforce_final_filed.pdf) [<http://perma.cc/NS7N-CEAT>].

2. JAMES WILLARD HURST, *A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970* 44 (1973).

\* Associate Professor, Saint Louis University School of Law. This Article is based on a talk delivered at the 2015 Richard J. Childress Memorial Lecture on “Religious Freedom, Social Justice and Public Policy” at Saint Louis University School of Law. The keynote lecture at this event was delivered by Lawrence Sager, and I would like to thank him and the other presenters at this event—namely Nelson Tebbe, Christopher Lund, Matt Bodie, Elizabeth Sepper, and Jessie Hill—for their comments, critiques, and suggestions. I would also like to thank Chad Flanders for the initial invitation to present, Monica Eppinger for her insights and encouragement, Lucas Jackson for his helpful research assistance, and Micah Stanek for engaging in endless hours of conversation with me about Kim Davis. This Article is dedicated to the band Survivor.

3. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

4. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Indeed, after *Hobby Lobby* and *Obergefell*, paper forms—notes of a sort—have become a new and hotly contested frontier in mediating the relationship between religion and state in the United States.

For example, shortly after *Hobby Lobby* and the Court's holding there that closely held, religiously motivated, and contraceptively opposed corporations cannot—according to the terms of the Religious Freedom Restoration Act (RFRA)<sup>5</sup>—be compelled by the federal government to provide employee health insurance benefits inclusive of contraceptive coverage,<sup>6</sup> religiously motivated employers pressed a subsequent legal<sup>7</sup> right to not fill out paper governmental forms<sup>8</sup> declaring these employers' religious objections to paying for contraceptive coverage. According to these plaintiffs, their objection to form-filling was motivated by their view that any completion of these governmental forms would, via the operation of the Patient Protection and Affordable Care Act of 2010,<sup>9</sup> trigger contraceptive coverage (albeit through the more indirect mechanism of a third-party provider). Hence, to the extent that, post-*Hobby Lobby*, persons are legally protected from having to themselves provide religiously objectionable contraceptive coverage, so should they be protected from having to fill out governmental forms which will produce “the same” objectionable result. Or so the argument has gone.

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5. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

6. Justice Samuel Alito, writing for the majority, described the question presented by this case as follows: “We must decide [in this case] whether the Religious Freedom Restoration Act of 1993 (RFRA) . . . permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.” *Hobby Lobby*, 134 S. Ct. at 2759. Alito answered this question presented by writing, for the majority, that “the [HHS] regulations that impose this obligation violate RFRA.” *Id.*

7. I say “legal” here to indicate that these challenges were premised on an interpretation of the requirements of RFRA, rather than *constitutional* (First Amendment) grounds. *But see* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015) (argued and decided on both RFRA and First Amendment grounds). In general, Circuit Court of Appeals decisions in this line of cases include Catholic Health Care Sys. v. Burwell, 796 F.3d 207 (2d Cir. 2015); Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3rd Cir. 2015); East Texas Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015); Michigan Catholic Conference v. Burwell, 807 F.3d 738 (6th Cir. 2015); Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015); Wheaton Coll. v. Burwell, 791 F.3d 792 (7th Cir. 2015); Grace Sch. v. Burwell, 801 F.3d 788 (7th Cir. 2015); Sharpe Holdings v. U.S. Dep't of Health & Human Servs., 801 F.3d 927 (8th Cir. 2015); Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229 (D.C. Cir. 2015).

8. The objections included not only an objection to filling out the federal Employee Benefits Security Administration's “Form 700” but also an alternative developed by the federal Department of Health and Human Services in response to concerns about Form 700 raised in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), a companion case to *Hobby Lobby*.

9. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010).

And after the Supreme Court's holding in the *Obergefell* case that same-sex couples have a fundamental right to marry under the United States Constitution,<sup>10</sup> another set of high-profile disputes over paper forms—this time, marriage licenses—broke out in Kentucky. These disputes proved so intense that the now famous clerk for Kentucky's Rowan County, Kim Davis, ultimately suffered imprisonment by a federal district court judge for Davis' refusal to (post-*Obergefell*) issue marriage licenses (to anyone<sup>11</sup>) because of her religious objections to being involved with same-sex marriage.<sup>12</sup> When Davis was first sued for not issuing these marriage licenses, she defended herself (in part) by arguing that, as an Apostolic Christian opposed to same-sex marriage, she had a First Amendment Free Exercise Clause right to disregard the thrust of the *Obergefell* decision and its seeming mandate that same-sex marriage be available everywhere in the United States. When this argument failed at the federal district court level,<sup>13</sup> and then at the Sixth Circuit Court of Appeals,<sup>14</sup> and then again at the Supreme Court,<sup>15</sup> Davis nonetheless refused to

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10. This case, while decided on Equal Protection and Due Process grounds, can also be considered to be a case about religion-state relations. Indeed, Justice Kennedy's majority opinion went out of its way to note that, despite the Court's opinion,

[Opposing] religions, and those who adhere to religious doctrines [opposing same-sex marriage], may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons . . . 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.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

11. See Memorandum Opinion and Order at 1, *Miller v. Davis*, No. 0:15-cv-00044-DLB (E.D. Ky. Aug. 12, 2015), EFC No. 43, <http://www.aclu-ky.org/wp-content/uploads/2015/08/Bunning-Rowan-Ruling-81215.pdf> [<http://perma.cc/6W8C-Y8EN>] (describing how, nearly immediately after the Supreme Court's announcement of its *Obergefell* decision, "Davis announced that the Rowan County Clerk's Office would no longer issue marriage licenses to any couples").

12. See Civil Minutes-General at 2, *Miller*, No. 0:15-cv-00044-DLB (E.D. Ky. Sept. 3, 2015), ECF No. 75, <http://www.clearinghouse.net/chDocs/public/PB-KY-0006-0010.pdf> [<http://perma.cc/KK4M-2VGS>]. For additional details concerning the timeline of this ongoing legal controversy, see Ruth Colker, *Religious Accommodation for County Clerks?*, 76 OHIO ST. L.J. FURTHERMORE 87 (2015), <http://moritzlaw.osu.edu/students/groups/oslj/files/2015/10/Vol.-76-87-101-Colker-SCR-Essay.pdf> [<http://perma.cc/REB6-DDQL>]; Jeffrey B. Hammond, *Kim Davis and the Quest for a Judicial Accommodation*, 7 FAULKNER L. REV. 105 (2015).

13. See Memorandum Opinion and Order, *supra* note 11.

14. See Order, *Miller*, No. 15-cv-00044-DLB (E.D. Ky. Aug. 26, 2015), ECF No. 28-1, <http://www.aclu-ky.org/wp-content/uploads/2015/08/028-1-Order-Denying-Motion-to-Stay.pdf> [<http://perma.cc/943S-6C87>].

issue marriage licenses. As a result, she was jailed for five days in September 2015 for contempt of court. However, Davis was then released when the federal judge overseeing the situation was able to secure assurances that others in Davis' office would issue marriage licenses to all legally entitled to them.<sup>16</sup> Nonetheless, Davis quickly found herself again in the midst of controversy, and again under legal fire from the American Civil Liberties Union (ACLU), as a result of accusations that she was tampering with what had been the standard template for Rowan County-issued marriage licenses.<sup>17</sup> Ultimately, after many other legal twists and turns, this controversy appears to have been at least temporarily resolved by the election, in late-2015, of a new (Republican) Governor of Kentucky, Matt Bevin, who issued an executive order soon after taking office altering Kentucky's marriage licenses to omit any requirements that county clerks (like Kim Davis) affix their personal names to these licenses.<sup>18</sup> And then, in early-2016, Governor Bevin signed into law a bill passed by the Kentucky legislature making changes to Kentucky marriage licenses along the lines of Bevin's earlier executive order.<sup>19</sup>

In several ways, the emerging constitutional and legal concern with paper forms in the domain of religion-state relations is surprising, and calls out for

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15. See Order in Pending Case, *Miller*, 15-cv-00044-DLB (E.D. Ky. Aug. 31, 2015), <http://www.aclu-ky.org/wp-content/uploads/2015/08/SCOTUS-ruling-83115.pdf> [https://perma.cc/DK2L-NR9T].

16. See Order, *Miller*, 15-cv-00044-DLB (E.D. Ky. Sept. 8, 2015), ECF No. 89, <http://www.clearinghouse.net/chDocs/public/PB-KY-0006-0011.pdf> [https://perma.cc/SD8U-XWMS].

17. See Motion to Enforce September 3 and September 8 Orders, *supra* note 1, at 8. Specifically, in this latest round of litigation in *Miller v. Davis*, the ACLU (representing Miller) alleged that, after her release from jail, Kim Davis

[c]onfiscated all the original [Rowan County marriage license] forms, and provided a changed form which deletes all mentions of the County, fills in one of the blanks that would otherwise be the County with the Court's styling, deletes her name, deletes all of the deputy clerk references, and in place of deputy clerk types in the name of [Rowan County Deputy Clerk] Brian Mason, and has him initial rather than sign.

*Id.* Moreover, the ACLU's motion went on to describe how

Davis made substantial and material alterations to the forms that include forcing [Rowan County Deputy Clerk Brian] Mason to issue the licenses as a "notary public" rather than a Deputy Clerk, eliminating any mention of the County, and changing the forms to state instead that they are issued "Pursuant to Federal Court Order #15-CV-44 DLB."

*Id.*

18. See Eyder Peralta, *Per Governor's Order, Kentucky Marriage Licenses No Longer Need Clerk's Name*, NPR (Dec. 23, 2015), <http://www.npr.org/sections/thetwo-way/2015/12/23/460790418/per-governors-order-kentucky-marriage-licenses-no-longer-need-clerks-name> [http://perma.cc/RZZ3-7YYV].

19. See Bruce Schreiner, *Kentucky Governor Signs Off on Single Marriage License Form*, ASSOCIATED PRESS (Apr. 13, 2016), <http://bigstory.ap.org/article/7447b8cfe59f4de89adf7a1c2a298b35/kentucky-governor-signs-single-marriage-license-form> [http://perma.cc/R6S4-XS4U].

exploration and explanation.<sup>20</sup> For example, one might wonder how it is that the United States Supreme Court has, post-*Hobby Lobby*, tasked itself with the low-level task of drafting bureaucratic forms for the Executive Branch.<sup>21</sup> Similarly, one might also wonder how it is that the federal judiciary, as a whole, has been both drawn into and possibly seduced by efforts to subject state marriage license forms to heightened scrutiny in order to head off Kim Davis-inspired subversions of same-sex marriage rights.<sup>22</sup> Indeed, fundamentally, the federal judiciary's emerging concerns with form and paper in these arenas are mysteriously far removed from the pomp and circumstance usually accompanying the high judicial art of pronouncing on rights and justice.

This Article aims to account for the emerging constitutional and legal concern with paper forms, especially in the context of marriage rights in the United States.<sup>23</sup> The goal of this Article's exploration of "formal marriage" is

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20. Jeffrey Hammond has recognized a link between the post-*Hobby Lobby* and post-*Obergefell* "formal" disputes as well. See Hammond, *supra* note 12, at 114. As the discussion below will make clear, however, our analyses of these situations—and, in particular, the Kim Davis controversy—is quite different.

21. This is a point made too by Justice Sonia Sotomayor, dissenting in *Wheaton College v. Burwell*, a companion case to *Hobby Lobby*. *Wheaton College* concerned a federal district court's refusal to issue a preliminary injunction forbidding the federal government from forcing the plaintiff to declare its religious objections to providing contraceptive coverage under the Affordable Care Act via the federal Employee Benefits Security Administration's "Form 700." The plaintiff in this case had brought suit asking for a declaration that this bureaucratic Form 700 filing requirement violated the plaintiff's rights according to the terms of RFRA. Chastising the Supreme Court majority's decision to overrule the federal district court's refusal to issue an injunction pending this district court's final decision on the merits of the plaintiff's RFRA claim, Sotomayor wrote: "Stepping into the shoes of [the Department of Health and Human Services], the [majority on the] Court sets out to craft a new administrative regime . . . . This Court has no business rewriting administrative regulations. Yet, without pause, the Court essentially does just that." *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2814 (2014).

22. See, e.g., Motion to Enforce September 3 and September 8 Orders, *supra* note 1, at 8. See also Stephen Young, *Denton JP's Plan for Same-Sex Weddings: Make Them Unpleasant*, DALLAS OBSERVER (July 13, 2015), <http://www.dallasobserver.com/news/denton-jps-plan-for-same-sex-weddings-make-them-unpleasant-7388916> [<http://perma.cc/7W78-XME3>]; *Marriage Declaration Ceremony*, DENTON COUNTY, TEX., <http://dentoncounty.com/Departments/Justice-of-Peace-Pcts/Justice-of-the-Peace-Precinct2/Marriage-Ceremonies.aspx> [<http://perma.cc/4PRP-T33K>] (last visited Sept. 1, 2016); *Acknowledgment Form*, DENTON COUNTY, TEX., [http://dentoncounty.com/~media/Departments/Justice-of-Peace-Pcts/Justice-of-the-Peace-Precinct2/PDF/Wedding-Letter-and-receipt\\_2015\\_07.pdf](http://dentoncounty.com/~media/Departments/Justice-of-Peace-Pcts/Justice-of-the-Peace-Precinct2/PDF/Wedding-Letter-and-receipt_2015_07.pdf) [<http://perma.cc/84DP-FVN5>].

23. This Article largely focuses on the post-*Obergefell* controversies concerning marriage certificates, and not the post-*Hobby Lobby* controversies concerning the securing of exemptions from federal government-mandated contraceptive coverage. However, as this very introduction suggests, these two controversies are related not only in time but also in the fact that they both largely concern paper forms. Moreover, as the Tenth Circuit Court of Appeals' recent decision in *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), suggests,

twofold, namely to explain how it is that marriage rights in the United States have suddenly become a matter of formal dispute and, relatedly, to elucidate what—besides paper, stamps, and signatures—is represented in these new controversies concerning marriage formalities. The key explanation that this Article offers for this formal turn in marriage disputing is dependent on a reframing of marriage rights, seeing in these rights less an understanding of (and dispute about) *marriage as dignity* but, instead, *marriage as money*. And if marriage is money, then one can begin to understand how Kim Davis' marriage licenses have become of central importance to key monetary actors including, notably, the federal government. Or so this Article will suggest.

This Article's arguments and discussions build off of previous work of mine on the law and politics of same-sex marriage in the United States.<sup>24</sup> It also builds off of a long tradition, by a wide variety of scholars and activists, of analyzing the material implications of marriage.<sup>25</sup> Here, however, the focus is

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these two lines of controversies can become interlinked in certain factual scenarios. In this respect, the Tenth Circuit observed in its majority opinion that Utah state laws which allow a same-sex marriage-opposing county clerk to seek exemption from the (new) United States constitutional mandate that all states (and their agents) marry same-sex couples raise issues parallel to those at issue in *Little Sisters of the Poor Home for the Aged* and that case's religiously-motivated protagonist's efforts to seek exemption from federal mandates to provide contraceptive-inclusive health care insurance coverage. *See id.* at 1183, n.31.

24. *See, e.g.*, Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791 (2010); Jeffrey A. Redding, *Querying Edith Windsor, Querying Equality*, 59 VILL. L. REV. TOLLE LEGE. 9 (2013); Jeffrey A. Redding, *Marriage ≠ Marriage: Querying the Relevance of Equality to the Interstate Recognition of Same-Sex Relationships*, 69 U. MIAMI L. REV. 117 (2014).

25. *See, e.g.*, RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 27 (2011) (positing that “[i]f marriage is less a necessity and more . . . a luxury, then it takes money. It is something that people do after they've established a measure of stability and reached other milestones. A job, a house, a car—these all typically come before marriage now. And if those goals are not accomplished, then often neither is marriage.”); Adrienne Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2041 (2010) (noting that “[m]arriage is not only a licensing but also a distributive justice scheme. As currently structured, it discriminates between intimates, channeling resources, preferences, and subsidies to those it recognizes and not others. Importantly, marriage also allocates resources between intimates. During marriage and after, at death or divorce, rules establish baseline entitlements, determining rights and duties, many of them economic.”); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 82 (2001) (arguing that “since much of the legal intervention in intimate relationships is related to financial issues, such as dividing debt, assets, and income when a relationship ends, models tailored to solve financial problems are well suited to address family law problems”); Janet E. Halley, *What Is Family Law?: Genealogy Part I*, 23 YALE L.J. 1, 1 (2011) (developing a critical perspective on how “Domestic Relations/Family Law are what they are by virtue of their [historical] categorical distinction from the law of contract and, more broadly, the law of the market” and “suggest[ing] that family law should be restructured to connect it for the first time to domains of law more

on “the material of the material” or, put another way, the (physical) currency-like qualities of marriage licenses (and certificates). Viewing marriage licenses as money allows us to see Kim Davis’ alteration of pieces of paper that individuals can use for tax benefits, employment privileges, and economically valuable social connections—in short, Kim Davis’ alteration of marriage licenses—as akin to the mutilation of money. In the contemporary moment, it is often forgotten that, at the time of the United States Constitution’s original framing, the drafters of the Constitution were deeply concerned with restricting states’ authority to “coin Money”<sup>26</sup> or “emit Bills of Credit.”<sup>27</sup> Or, as the late scholar James Willard Hurst put it, “the federal Constitution showed strong distrust of allowing state legislatures to set money-supply policy.”<sup>28</sup> Yet states regularly emit valuable marriage licenses and certificates, possessing key attributes of money. Given this paradoxical reality, a central federal concern begins to emerge: these state-backed coins<sup>29</sup> and bills—these state marriage documents—must be federally regulated. Indeed, their regulation would seem to be of fundamental importance to a federal system concerned with maintaining its supremacy in ordering the economic affairs of the nation. And hence the federal judiciary’s concern with Kim Davis’ Rowan County, Kentucky marriage licenses.

Paper forms have provided the text and subtext of many important developments in legal doctrine and practice in the United States. This has been especially obvious in the domain of United States civil procedure. For example, the United States Supreme Court decisions in *Bell Atlantic v.*

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readily understood to relate directly to the market: economically significant productivity, social security provision, and the fair or unfair distribution of economic resources”); Yasmin Nair, *Against Marriage, Against Equality: An Introduction*, in *AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE* 18 (Ryan Conrad ed., 2010) (describing marriage as “the neoliberal state’s most efficient way to corral the family as a source of revenue and to place upon it the ultimate responsibility for guaranteeing basic benefits like health care”); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1227–28 (2005) (noting how “proponents of same-sex marriage have highlighted the dignity and social acceptance that flow from the states’ recognition of sexual relationships . . . [b]ut [that] access to the institution of marriage is just the beginning [given that o]nce married, spouses receive tax, social security, and family-related benefits that are unavailable to nonmarried individuals”).

26. U.S. CONST., art. I, § 10.

27. *Id.*

28. HURST, *supra* note 2, at 8.

29. I use this term in the spirit of the United States Constitution’s concerns with restricting states’ ability to “coin Money.” U.S. CONST., art. I, § 10. I also use this term mindful of Robert Natelson’s arguments that the Constitution’s coinage language should not be exclusively understood according to contemporary understandings of what it means to “coin.” Rather, historically, “money . . . ‘coined’ did not need to be metallic. Paper or any other material . . . would suffice.” Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1079 (2008).

*Twombly*<sup>30</sup> and *Ashcroft v. Iqbal*<sup>31</sup> instigated intense debate concerning the proper interpretation of Federal Rule of Civil Procedure 8 (concerning pleading), and the viability of the Federal Rules of Civil Procedure's pleading forms and templates.<sup>32</sup> Similarly, the precise parameters of the United States Supreme Court's confusing *Erie* doctrine are at least somewhat motivated by the Court's concern to maintain the constitutional viability of the federal judiciary's paper practices.<sup>33</sup>

30. *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

31. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

32. Federal Rule of Civil Procedure 8(a) tells a plaintiff in the federal civil system that they must include statements as to the following three issues in any complaint they file in federal court: (1) a statement of the federal court's power (i.e. jurisdiction) to hear the case, (2) the actual nature of the dispute between the plaintiff and the defendant, and (3) what kind of remedy (e.g. monetary compensation) the plaintiff wants from the defendant. *See* FED. R. CIV. P. 8(a)(1)–(3).

These three components of a complaint are fundamental to its validity and viability, but are also relatively basic. Indeed, given the kinds of recitations that Federal Rules of Civil Procedure 8(a) often gave rise to, the Federal Rules of Civil Procedure developed template-like forms that plaintiffs could fill out to initiate a civil case in federal court. Form 11 in the Federal Rules of Civil Procedure's Appendix of Forms, for example, used to give plaintiffs a basic "fill-in-the-blank" form to use when initiating a negligence action in federal district court.

Relatively recent United States Supreme Court jurisprudence—in particular, the notable cases of *Twombly* and *Iqbal*—has suggested, however, that a plaintiff must avoid filing relatively cursory, template-like complaints for fear of not being able to convince a federal district court judge that the plaintiff's claims rise to the requisite level of being "plausible" rather than merely "conceivable." *See Twombly*, 550 U.S. at 547; *Iqbal*, 556 U.S. at 687. Moreover, even more recent changes to the Federal Rules of Civil Procedure have eliminated the Rules' pleading forms altogether. *See* Letter from John G. Roberts, Chief Justice, to John A. Boehner, House Speaker (Apr. 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\\_5h25.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf) [<http://perma.cc/7LLR-N56Z>].

33. The name of this doctrine comes from the eponymous case of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). The *Erie* doctrine works to discourage forum shopping between state and federal courts in some cases (namely, "diversity" cases) where these different kinds of courts share jurisdiction. *See generally* U.S. CONST., art. III, § 2 (declaring that "[t]he [federal] judicial Power shall extend to all Cases . . . between Citizens of different States"); 28 U.S.C. § 1332(a)(1) (2012) (declaring "[t]he [federal] district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 . . . and is between . . . citizens of different States"). The *Erie* doctrine has this discouraging effect by directing federal district courts to (broadly speaking) apply the same law as would be applied in the relevant state court. As the Supreme Court has described the *Erie* doctrine's intent elsewhere: this doctrine should ensure that a plaintiff's choice of federal versus state court is not "outcome determinative." *See Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) (explaining that "[*Erie*] expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that . . . the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court").

Yet all sorts of different legal rules pervade the operation of federal and state civil courts, and affect outcomes. Amongst these differences are differences in procedural norms (e.g. what must be said in a pleading) and, also, very basic filing requirements—often understood as "local

If paper has been a central concern of United States legal procedure, it is now also a fundamental concern of the substantive area of state-religion relations. This Article aims to account for the rise of these new formal concerns, especially as marriage has vividly taken center-stage in the continuing United States tug-of-war between religion and state. Towards this goal, Part I of this Article will examine the material aspects of marriage present in recent United States constitutional debates concerning same-sex marriage. As “dignity” has become the dominant frame through which the United States Supreme Court (majority) has recently understood and extended marriage rights to same-sex couples in the United States, this framing has obscured the material benefits accruing in and incentivizing marriage. Part II turns resolutely away from obfuscatory marital framings and explicitly to money, briefly explicating the complicated history of money (and particularly, currency) in the United States. One important goal of this Part is to demonstrate the plural forms that money and currency have taken historically in the United States, thus setting the stage for a consideration of how marriage licenses can be considered money—not just along the lines of Part I’s arguments, but also in these licenses’ *paper* materiality. Part III then explicitly connects the discussions in Parts I and II, demonstrating how the recent federal concern with Kim Davis’ marriage forms can be seen as just the latest chapter in the controversial story of money in the United States, whether that money be cold hard cash—or marriage.

### I. MATERIAL DIMENSIONS TO LEGAL MARRIAGE

In previous work of mine, I have worked to challenge the articulation and use of simplistic ideas of “dignity” in legal and political debates concerning same-sex marriage. In particular, I have suggested that arguments for same-sex marriage rights premised on an idea of “gay dignity” have been problematic to the extent that these dignity arguments did not simultaneously recognize the need for robust “gay agency” vis-à-vis the political and legal development of—

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rules.” See generally Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415 (2010) (describing a wide variety of local variations on ostensibly national federal civil procedure rules and norms). Any given court’s local rules can be detailed and numerous, covering aspects of filing not covered by either the Federal Rules of Civil Procedure or a given state’s equivalent code. And one common local rule concerns the size of the paper on which a claim must be filed. For example, Local Rule 5-2.01 for the federal Eastern District of Missouri states (in part): “All filings, unless otherwise permitted by leave of Court, shall be double spaced typed or legibly written on 8 ½ by 11 inch pages.” E.D. Mo. L.R. 5-2.01(A)(1). As a result, the United States Supreme Court has endeavored to shape the parameters of the *Erie* doctrine to ensure that outcome-determinative paper-size rules are not contemplated in the application of this doctrine. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (disavowing the relevance of, for the *Erie* doctrine, “nonsubstantial, or trivial, variations” between federal and state law).

historically heterosexual and otherwise majoritarian—marital norms.<sup>34</sup> However, if anything, the problematic deployment of simplistic “gay dignity” arguments—made by LGB folk and marriage-loving “straight allies” alike—only accelerated in the lead up to the Supreme Court’s recent *Obergefell* decision on same-sex marriage. This acceleration culminated in the *Obergefell* majority opinion itself, where Justice Anthony Kennedy, writing for the majority, went so far as to describe the essential plea posed by the gay and lesbian plaintiffs in this case<sup>35</sup> in the following manner: “Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for *equal dignity* in the eyes of the law.”<sup>36</sup>

The “dignified” plaintiffs in this case presented familiar cases of sympathy and respectability—one plaintiff’s partner had died from a tragic medical condition, another plaintiff-couple were mothers raising multiple children, and yet another plaintiff had deployed to Afghanistan to “serve[] this Nation to preserve the freedom the Constitution protects”<sup>37</sup>—making them ready candidates for Justice Kennedy’s bestowment of dignity rights. Yet the contemporary<sup>38</sup> (over-) framing of *marriage rites as dignity rights* obscures other equally salient aspects of marriage and the law regulating it. Indeed, while some people marry exclusively for the dignity they associate with being married, other people more quickly see the material benefits coming with marital status.<sup>39</sup> In short, framing marriage rights as exclusively about dignity

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34. See generally Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, *supra* note 24.

35. This Supreme Court case was a consolidated appeal of separate cases emanating from different states—specifically, Michigan, Kentucky, Ohio, and Tennessee—located in the federal Sixth Circuit. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

36. *Id.* at 2608 (emphasis added). Kennedy invoked the notion of dignity in many other parts of his majority opinion as well. See, e.g., *id.* at 2594; *id.* at 2595.

37. See *id.* at 2594–95.

38. By way of contrast, see Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015). Focusing on mid-twentieth century United States litigation concerning gay marriage rights, Boucai notes how

[M]arriage litigation in the wake of Stonewall had much more to do with gay liberation generally than with gay marriage specifically . . . . Indeed, the *Baker*, *Jones*, and *Singer* cases deployed the symbolism of marriage to proclaim homosexuality’s equality, legal and moral, in a society that almost ubiquitously criminalized its practice. They vividly protested the traditional gender roles that gay liberationists located at the heart of their oppression and that marriage, at the time, not only fostered but legally prescribed. They provided a platform from which to critique other aspects of marriage, such as the rule of monogamy and the state’s coercive, intrusive preference for a particular form of intimate association. And perhaps most importantly, these cases were sensational advertisements of gay people, gay relationships, and the nascent gay liberation movement.

*Id.* at 4–5.

39. Including the material benefits that may accrue (indirectly) through the social stature that marriage bestows in certain contexts.

rights often obscures marriage's material dimensions or, put another way, its "money" aspects.

Such a material/money dimension to marriage was not entirely absent in the *Obergefell* opinion. For example, discussing the relevance of marriage to childrearing, Kennedy's majority opinion first noted that "[u]nder the laws of the several States, some of marriage's protections for children and families are material," before emphasizing that "marriage also confers more profound benefits."<sup>40</sup> More generally, Kennedy also discussed that "while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities."<sup>41</sup> This list included, according to Kennedy, matters pertaining to "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; . . . workers' compensation benefits; health insurance; and child custody, support, and visitation rules."<sup>42</sup>

With this latter list, Kennedy lists numerous explicitly material benefits to marriage, yet also weaves a tight tapestry of money and affect. Indeed, as much as custodial rights to children can be deeply emotionally rewarding, these children can also be very expensive. For Kennedy, however, this material point is not one to highlight. To get a much sharper view of the material aspects to marriage (and its kinship-oriented cognates), one has to turn to *United States v. Windsor*,<sup>43</sup> the Supreme Court's stepping stone to *Obergefell*.

In this case, the plaintiff, Edith Windsor, sued the United States federal government for its refusal to recognize Windsor's same-sex spouse, Thea Spyer, as Windsor's marital partner for federal taxation purposes. Windsor and Spyer had wed in Canada in 2007, and the State of New York had subsequently recognized their Canadian marriage.<sup>44</sup> As for federal government recognition, however, Section 3 of the then-viable federal Defense of Marriage Act (DOMA) directed all parts of the federal government to take note that

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>45</sup>

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40. *Obergefell*, 135 S. Ct. at 2600.

41. *Id.* at 2601.

42. *Id.*

43. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

44. *Id.* at 2682.

45. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

As a result, when Thea Spyer died in early 2009, her and Edith Windsor's marriage was not recognized by the United States federal government for federal taxation purposes. In particular, the Internal Revenue Service refused to consider Edith Windsor as Thea Spyer's spouse for the purposes of the marital exemption to the federal estate tax. The resulting federal tax bill for Edith Windsor was significant, namely to the tune of \$363,053.<sup>46</sup>

A material context and pretext for same-sex marriage rights in the United States is brought out not only by the facts that led to *United States v. Windsor*, but also the reasoning embodied in Justice Anthony Kennedy's majority opinion in this case.<sup>47</sup> Quite vividly, Kennedy's opinion is a testament to elite values and material interests underlying contemporary marriage. For example, Kennedy laments how DOMA "*divests* married same-sex couples of the duties and responsibilities that are an *essential* part of married life."<sup>48</sup> However, one example of "marital essentialities" that Kennedy provides, and which DOMA allegedly divests same-sex married couples of, is a prohibition—as a recognized "spouse" of a Senator—"from accepting high-value gifts from certain sources."<sup>49</sup> Yet another example was DOMA's immunization of same-sex married couples from a requirement—as a recognized "spouse" of any one of "numerous high-ranking [federal] officials"<sup>50</sup>—to make extensive and burdensome official filings as to one's financial situation. In short, in this case, it seems that the injustices of marriage discrimination are embodied in Edith Windsor's tax problems. Moreover, it seems, for Justice Kennedy at least, that these grave injustices would be only more manifold if Mrs. Windsor were Senator Windsor.

As *Obergefell*—and, even moreso, *Windsor*—reveal then, a marriage license is a piece of paper that can ultimately be used for cash and other material benefits. In short, it is a paper form that has value. And as with other pieces of paper that have value, there is bound to be intense interest in regulating its issuance—both in terms of how much of this valuable paper is issued, as well as ensuring that counterfeiters are not able to introduce "fake" versions of this valuable paper. Viewed this way, we can then begin to see the federal legal system's tussle with Kim Davis over her issuance of "faulty marriage certificates" as a replay of earlier historical struggles between the federal government and states (as well as private actors) over who has authority over money. Yet before we can get to that argument, we need to understand what "money" is—or can be—including the multitudinous forms it

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46. *Windsor*, 133 S. Ct. at 2683.

47. For additional critique of this majority opinion, see Redding, *Querying Edith Windsor, Querying Equality*, *supra* note 24.

48. *Windsor*, 133 S. Ct. at 2695 (emphasis added).

49. *Id.*

50. *Id.*

has taken historically and also contemporarily. The next Part thus turns to a brief exposition of the incredibly rich and multidimensional history of money in the United States.

## II. A SHORT HISTORY OF UNITED STATES MONEY

A money-using economy may experience widely different stages of monetary control: (1) No control at all; that is, a policy of complete *laissez-faire* with respect to money. (2) A metallic standard system in which the government legislates the legal tender value of the unit of account in terms of a precious metal but lets private coin-smiths produce the prescribed coins. (3) The same system, but one in which the government monopolizes the coinage of the monetary metals. (4) A metallic standard system, such as (3), on which is superimposed a central-banking institution that is strictly limited to short-run, seasonal policies. Finally, (5) a central bank standing by itself with complete discretionary control over the supply of money entering the economic system.

—Richard H. Timberlake

*Monetary Policy in the United States:  
An Intellectual and Institutional History*<sup>51</sup>

Richard Timberlake’s ideas as to the developmental stages of money and monetary policy are compelling, not so much for any universalistic paradigm of “progress” that they set up, but for what they reveal about the historical—and ongoing—messiness of money. Indeed, what constitutes money, especially in the United States, has been subject to a great deal of historical controversy,<sup>52</sup> as well as a great deal of experimentation. While the legal and financial status of Bitcoin is, in many ways, the monetary controversy of the day,<sup>53</sup> this “peer-to-peer currency with no central bank, based on digital tokens with no intrinsic value”<sup>54</sup> provides just the latest wrinkle in the United States’ (and world’s) historical experimentations with what constitutes money. Moreover, these monetary experimentations—and the tensions between different kinds of

51. RICHARD H. TIMBERLAKE, *MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY* 235 (1978).

52. James Willard Hurst, in his magisterial work on the legal history of money in the United States describes “money” in a functional sense. According to Hurst, the usual historical purposes of money in the United States—whatever specific form money took at a particular time—have multitudinously been “to serve as a formal measure of economic values, to serve as a medium of exchange in economic transactions, to serve as a device to hold in suspension the ability to command more specific assets for specific economic uses . . . and to serve as a standard of deferred payments.” HURST, *supra* note 2, at 30. It is worth emphasizing that Hurst’s definition of “money” here still allows for this money to take a wide variety of forms.

53. See, e.g., *Bitcoin Under Pressure*, *ECONOMIST* (Nov. 30, 2013), <http://www.economist.com/news/technology-quarterly/21590766-virtual-currency-it-mathematically-elegant-increasingly-popular-and-highly> [<http://perma.cc/8C5Z-9R4R>].

54. *Id.*

private- and public-control of money that they bear witness to—have strong parallels to historical and ongoing experimentations concerning marriage in the United States. This Part provides a brief history of money in the United States; the next Part links this discussion to marriage.

As to the rich history of money in the United States, it is worth noting from the outset that the Federal Reserve notes that seem so familiar to Americans (and others) today are a relatively late monetary development—dating from the mid-nineteenth century in their inception but only achieving their current legitimacy and status later.<sup>55</sup> Before then, as the late-scholar Arthur Nussbaum<sup>56</sup> so exhaustively documented, all sorts of items circulated in the early colonial period as “media of payment,”<sup>57</sup> including “corn and beaver skins and, in the [American] South, tobacco and rice.”<sup>58</sup> In some instances, colonial settlers also adopted Native American forms of money, namely “wampum” beads (made of shells). As to wampum, according to Nussbaum, “Massachusetts elevated wampum to the status of legal tender in 1643. Other colonies followed suit, and in New York wampum remained legal tender until 1701. In frontier districts it is said to have been used until the early nineteenth century.”<sup>59</sup> Where more contemporarily recognizable objects—such as coins—circulated in what would later become the United States, they were not necessarily coins of the different North American colonies, or even British ones, but often enough Spanish ones.<sup>60</sup> Indeed, unsurprisingly, because of the prevalence of foreign coin during the colonial period, the Constitution of the newly formed United States included a provision giving Congress the authority to “regulate the value . . . of foreign coin.”<sup>61</sup>

Paper money was a relative latecomer to the United States—reportedly this kind of money was first invented by the Chinese during the tenth century<sup>62</sup>—and its development from a relatively amateurish form to the present day, highly regularized Federal Reserve note was a long one. The colony of Massachusetts appears to have been the first innovator of paper money in

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55. See discussion accompanying *infra* notes 73–86.

56. See generally ARTHUR NUSSBAUM, A HISTORY OF THE DOLLAR (1957).

57. *Id.* at 3.

58. *Id.*

59. *Id.* at 6–7.

60. As Nussbaum describes the pre-Independence colonial money situation: “Strangely enough, separation from England started in the monetary field.” *Id.* at 11.

61. U.S. CONST., art. I, § 8. See also NUSSBAUM, *supra* note 56, for a description of how Congress, in 1806, renewed the legal tender status of the Spanish dollar and also extended this status to certain French coins. It was only in 1857 that Congress finally legislated an end to the legal tender status, in the United States, of foreign coins. *Id.* at 84.

62. NUSSBAUM, *supra* note 56, at 15.

North America, printing “Bills of Credit” as early as 1690.<sup>63</sup> Initially, these government-issued bills could only be used in repaying debts owed to the government but, later, they were also made legally sufficient for payments (for goods or debts) between private individuals.<sup>64</sup> The first nationally-issued paper money would have to wait for almost another 100 years when the Continental Congress in 1775, desperate for a means to raise money for its war of revolutionary insurrection against the British, started to issue paper bills of credit—later popularly known as “continentals”—“entitl[ing] the Bearer to receive three Spanish milled dollars.”<sup>65</sup>

However, this proto-Congress did not itself have the legal authority to force individuals to accept continentals as payment in their day-to-day financial transactions with other individuals.<sup>66</sup> This authority belonged to the subsidiary colonies (and then, later, states), who did exercise it—at least for several years until the continental radically deflated in value and the newly-independent states began issuing their own currencies.<sup>67</sup> Later, in the early nineteenth century, after the recently-drafted United States Constitution forbade states from “emit[ting] bills of credit,”<sup>68</sup> states evaded this prohibition by simply chartering private banks. These banks issued—often irresponsibly<sup>69</sup>—their own private notes; these private notes circulated publicly as currency. Indeed, even though people often understood the unreliability of the bank reserves underwriting these circulating notes, that did not mean the notes had no value. Writes Nussbaum: “People [just] accepted them at varying discounts.”<sup>70</sup> An altogether different source of currency also arose during this time with the creation of “shinplasters”—namely, small slips of paper of credit issued by all sorts of public and private entities as change for small-value transactions where no small-denomination bills or coins were available.<sup>71</sup> With this proliferation of banks and bank notes—the scholar A.

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63. *Id.* at 14. According to Nussbaum, paper money did not come to England itself until 1729. *Id.* at 15.

64. *See id.* at 14–15.

65. *Id.* at 35–36.

66. *Id.* at 36.

67. NUSSBAUM, *supra* note 56, at 36–42.

68. U.S. CONST., art. I, § 10.

69. Nussbaum notes that, during this time, “banking was thought of as a highly speculative enterprise with little responsibility. . . . Loans were commonly paid out by the banks in their own notes without giving much thought to specie or other reserves.” NUSSBAUM, *supra* note 56, at 64.

70. *Id.* at 65.

71. *See id.* at 66 (describing how, at the beginning of the nineteenth century, “paper money of small denominations was issued by municipalities, by bridge and turnpike companies, and by other enterprises. Commonly called ‘scrips’ or ‘shinplasters,’ they were given and accepted in payment by the issuer and as circulating media by the people.”); *see id.* at 113 (describing the Civil War period when shinplasters were “issued mostly by hotels and transportation companies,

Barton Hepburn found that “there were [approximately] 7000 kinds and denominations of notes, and fully 4000 spurious or altered varieties”<sup>72</sup> in circulation in the United States right before the beginning of the Civil War—the monetary situation became extremely pluralistic during this time.

While this pluralistic situation would not change overnight, it was dramatically influenced by the advent of the Civil War. Suddenly confronted with the need to finance escalating wartime expenditures, Congress authorized the issuance of what became known as “greenbacks”<sup>73</sup>—the forerunner of the Federal Reserve notes so widely known and used today.<sup>74</sup> As Richard Timberlake described this dramatic domestic dollar development, “[t]he new issues of greenbacks were unprecedented in that they were full legal tender for all debts public and private. . . . In addition, the quantities issued were massive compared to the earlier issues of treasury notes.”<sup>75</sup>

Given the radical nature of the greenback, it is not surprising that the legal and constitutional validity of this monetary device would soon be put to test. Ultimately, indeed, the Supreme Court was called upon to decide different disputes, arising in different states, concerning the issuance and validity of the greenback as a form of payment.

One of the more important of these disputes emanated, ironically enough, from Kentucky.<sup>76</sup> In Kentucky, and elsewhere—especially in the West—“many creditors . . . refused to accept the depreciated greenbacks on constitutional grounds”<sup>77</sup> when “debtors started to offer large amounts of greenbacks in payments of their debts, acceptance of which would have meant heavy losses to the creditors.”<sup>78</sup> The State of Kentucky’s appellate-level Court of Errors, in an outlier decision disagreeing with sixteen other states’ high

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but also by barber shops, drug stores, etc.”); *see also* TIMBERLAKE, *supra* note 51, at 122 (discussing the shinplaster situation during and after the 1861–65 Civil War period).

72. A. BARTON HEPBURN, *A HISTORY OF CURRENCY IN THE UNITED STATES* 180 (1924) (quoted in RICHARD H. TIMBERLAKE, *MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY* 84 (1978)). It is not clear whether these tallies include shinplasters.

73. *See* TIMBERLAKE, *supra* note 51, at 85.

74. The formal debut of the modern “Federal Reserve note” had to, unsurprisingly, await the actual creation of the Federal Reserve system in 1913. *See* NUSSBAUM, *supra* note 56, at 159–62 for more discussion of this important monetary system development.

75. TIMBERLAKE, *supra* note 51, at 85–86. Nussbaum notes that greenbacks (or, “United States notes,” as they were more officially known) did have one limitation on their use: they could not be used to pay United States customs dues. *See* NUSSBAUM, *supra* note 56, at 101.

76. Earlier in the century, Kentucky had also been the site of another major constitutional dispute concerning federal versus state monetary authority. *See id.* at 75–76; HURST, *supra* note 2, at 140–41.

77. NUSSBAUM, *supra* note 56, at 118.

78. *Id.* at 116–17.

court decisions,<sup>79</sup> ruled that federal laws pertaining to the greenbacks' legal tender status were not binding on creditor-debtor contracts in that state which came into force before the legislation of these federal laws. Ultimately, the United States Supreme Court, in a closely split decision, agreed with Kentucky, in the landmark decision of *Hepburn v. Griswold*.<sup>80</sup>

Subsequent decisions by the Supreme Court were, however, far more solicitous of the federal government's interests and desires. Importantly, in a combined hearing of one case emanating from Texas, *Knox v. Lee*, and another case from Massachusetts, *Parker v. Davis*, the United States Supreme Court—in an opinion that came to be known, simply, as *The Legal Tender Cases*<sup>81</sup>—declared that Congress had the constitutional power to issue greenbacks and make them legal tender for all debts public and private. The foundations for this opinion were broadened and deepened in yet another case on this topic, *Juilliard v. Greenman*,<sup>82</sup> decided over a decade later, in 1884.

These late-nineteenth century developments marked a significant point of departure from the previous monetary situation in the United States. For the first time, the United States had a currency issued by the federal government intentionally designed and designated as legal tender by the federal government for (nearly<sup>83</sup>) all domestic transactions—no matter between whom.<sup>84</sup> Moreover, as the United States' international economic and political stature grew in the late nineteenth century, the United States dollar even became legal tender outside of the United States—most notably in Canada, Mexico, and even briefly in Switzerland.<sup>85</sup> Simultaneously, private state bank notes in the United States eventually disappeared as the federal government taxed them out of existence.<sup>86</sup>

Yet in all of the modern United States dollar's widespread acceptability, important limitations to—and aspects of—other kinds of money are revealed. Put another way, the ambitious reach of the late nineteenth century United States dollar is an indication of the relative uniqueness of this currency, and how other forms of money can and do operate in more limited fashions. For example, in the Federal Reserve note's declaration of validity for “all debts public and private” a distinction between public and private debts is erased—but also revealed. Before the advent of the greenback, the federal government

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79. *See id.* at 118.

80. *Hepburn v. Griswold*, 75 U.S. 603 (1870).

81. *The Legal Tender Cases*, 79 U.S. 457 (1871).

82. *Juilliard v. Greenman*, 110 U.S. 421 (1884).

83. *See* discussion *supra* note 75.

84. For discussion of an earlier (but different) example of a United States government-issued currency, see NUSSBAUM, *supra* note 56, at 70–71.

85. *See id.* at 152. Nussbaum notes how this foreign acceptance of United States currency “was a kind of reversal of the part played in earlier times by foreign coins in this country.” *Id.*

86. *See id.* at 110–12.

had, from time to time, issued notes that could be used by individuals for repayment of debts (for example, taxes) owed to the federal government—public debts, in other words.<sup>87</sup> And for a much longer period of time, private individuals had developed forms of money to use between themselves for goods and (private) debt payments. One way of understanding these two different monetary situations, then, is to see the former as involving “vertical money” and the latter “horizontal money.” Seen this way, the “innovation” of the greenback then was that it was a government-issued currency that was simultaneously both a vertical and horizontal money.

A related point also emerges here: not all “money” is universally acceptable. In many ways, this is an obvious point, for not even in our currently highly globalized world and economy is any money—not even the United States dollar—fully transferrable or universally accepted. For example, the United States dollar does not fully work as a money outside United States borders, even if it is the case—as a 2006 report by the federal government documents—that more than fifty percent of the extant United States currency in existence circulates outside of the United States.<sup>88</sup> Something similar can be said of the euro, the ruble, and the renminbi; each has an “economy” in which it is legal tender. Moreover, as the previous discussion of vertical and horizontal monies suggests, even within a particular (national) economy, not every kind of money is intended to be fully exchangeable in every which way.

These transferability, exchangeability, and recognition issues, in turn, suggest parallels between (paper) money and (paper) marriage. In particular, as with many currencies, marriage certificates are backed by particular sovereigns. Yet, for many people, in order for these certificates to be fully useful, they need to be able to cross borders. For example, a couple married in Massachusetts, and relocating to Alabama, will often enough ask for Alabama to recognize this couple’s (Massachusetts) marriage in order for this couple to receive a comparable basket of marital goods in Alabama as this couple did in Massachusetts. The next Part turns to these and other parallels between marriage and money.

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87. See, e.g., *id.* at 70–71, 86–87.

88. Specifically, this 2006 federal government report found that “\$450 billion of the \$760 billion in circulation as of December 2005, is now held abroad.” The Use and Counterfeiting of United States Currency Abroad, Part 3, Pub. L. 104-132 (Sept. 2006), <http://www.treasury.gov/about/organizational-structure/offices/Domestic-Finance/Documents/the%20use%20and%20counterfeiting%20of%20u.s.%20currency%20abroad%20%20part%203%20september2006.pdf> [<http://perma.cc/J9B4-JC98>]. Some foreign countries (for example, Ecuador and El Salvador) have officially “dollarized” their economies but, in other countries (for example, Russia), United States currency is used informally by individuals to hedge against value instability in their local currencies, which arise as a result of inflationary economic policies or political uncertainty. See *id.* at 17–18.

## III. MARRIAGE AS MONEY

Richard Timberlake's discussion of the developmental stages of money and monetary policy which opened Part II is interesting not only for what it says about the pluralistic nature of money, but also in the parallels that it suggests between the development of monetary policy and marriage policy. Indeed, the slow and uneven centralization of authority, in the United States, over what counts as "money"—and also who can make it—has also arguably transpired with respect to "marriage." For example, private coinage can be seen not only with respect to currency,<sup>89</sup> but also in the practice of common-law marriage.<sup>90</sup>

While there is a great deal more that could be said about the macro historical development (and decline) of structures of authority for both money and marriage, the focus of this Part is on the more-micro "material of the material." In other words, the focus here is on the ways in which paper marriage licenses (and certificates) resemble at least some forms of money—or, alternatively, represent a kind of money as unique as the Federal Reserve note itself. The further suggestion, then, is that a great deal of the recent concern with Kim Davis' marriage licenses is a replay of earlier (yet also ongoing) federal concerns with regulating the supply and form of money.

Seeing that one important effort of this Part is to suggest a paper money analogue to paper marital forms, it is worth emphasizing from the outset that marriage licenses are only a small part of this Part's discussions. In this respect, if an important attribute of money (or at least currency) is that it must be circulating in some way or another, marriage licenses themselves are not really the operative circulating paper here; a marriage license is, as Mary Anne Case notes, simply a *license* to marry (with its attendant privileges and duties) after all.<sup>91</sup> More important is what the license can ultimately lead to—namely,

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89. See text accompanying *supra* note 51; see also NUSSBAUM, *supra* note 56, at 84–86 (describing private coinage in the United States, which continued as late as 1901).

90. While fewer states permit the creation of common-law marriages today, the following jurisdictions still allow them to be created: Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, Utah (in some circumstances), and also the District of Columbia. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 169 (3d ed. 2012). Given that common-law marriages are created first and foremost through private interactions, not interaction with bureaucratic state officials, one state concern here has been the lack of control over the creation of marriage. Such a concern has not been unique to the United States. For example, in the well-known 2002 case of *Shamim Ara v. State of U.P. & Anr.*, AIR 2002 SC 3551 (India), the Supreme Court of India took interest in the formal attributes of any written *talaqnama*—in short, a proclamation by a Muslim husband dissolving his marriage with his wife and, in essence, a private, non-state divorce—seemingly setting the state up for final and fine-grained review of millions of Muslim divorces and their accompanying paper documents.

91. See generally Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005) (describing how in a "variety of ways over time and at present marriage has been seen to license participants in the institution"). In this work of hers, Case provocatively analogizes marriage

the marriage certificate. Hence, for the purposes of this Part's efforts, Kim Davis' marriage licenses are important to the extent that they are used to get marriage certificates. Yet this is not to say that they are completely insignificant or irrelevant. Indeed, the controversy over Kim Davis' marriage licenses can be seen (at least partly) as concern over her interference with the "marital printing press" that produces paper marriage certificates in Kentucky.

As to a convincing monetary analogue to the paper marriage certificate, one way to see this government-issued paper is as a vertical money. Indeed, somewhat like a state bill of credit,<sup>92</sup> a marriage certificate is a paper form issued to individuals from a state government containing a value redeemed towards debts—for example, taxes—owed by those individuals to the issuing state government. While the marriage certificate's statement of value may be implicit, and not a round sum easily discernible on the face of the paper document, this should not be considered fatal to the vertical monetary analogy offered here.<sup>93</sup>

One problem with this analogy is that marriage certificates are not actually physically exchanged with issuing governments when these certificates are used for payment/relief from taxes. For similar reasons, it is also somewhat hard to describe paper marriage certificates as a horizontal money *simpliciter*. Indeed, the fact that the marriage certificate has two specific parties' name on it limits the ability of either of these parties from transferring the certificate to anyone else in exchange for goods or retirement of debt. In large part, this limitation on exchange comes from the "worthlessness" of the certificate for the secondary recipient because—absent a hobbyists' (or fetishists') market driven by a curiosity in and commercialization of other peoples' marriage certificates—they themselves would find it difficult to exchange the certificate with anyone else for anything of value.<sup>94</sup>

Yet "private economies" composed of individual consumers and producers are not the only kinds of horizontal economies possible nor the only kinds of

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licenses to other kinds of legal licenses and forms, including dog licenses, driver's licenses, and corporate charters. *See id.* at 1765. This Article takes inspiration from Case's work here, yet offers another analogy altogether.

92. *See* discussion accompanying *supra* note 63.

93. As Nussbaum notes, there are complications in using interest-bearing paper notes as currency, as a result of these notes' value not being immediately evident from their surface inscription. According to Nussbaum, "[r]eal money requires round sums and complete standardization" and "[c]irculation as currency is impossible when the payer and the payee first have to compute the interest due." NUSSBAUM, *supra* note 56, at 16, 22. While Nussbaum's broad points as to what makes currency relatively easy (or difficult) to use are well-taken, I would resist the distinction that he draws between "real" and "unreal" money if only because his own historical description demonstrates a fluidity as to what people (whether in the United States or elsewhere) have historically considered "money."

94. It is worth noting here, however, that individualized bills of exchange and promissory notes did circulate as money in North America during the (British) colonial period. *See id.* at 15.

economies in which marriage certificates could be—or, arguably, are—exchanged. With respect to more traditional (i.e. non-marital) monies, a certain kind of “public horizontal economy” has existed in the United States, with a corresponding money. In this respect, with the advent of the Federal Reserve System in the 1930s, a specific kind of paper note—the gold certificate—was created for the exclusive use of the Federal Reserve Banks of this system. As Richard Timberlake describes these certificates: “[T]hey were a *kind* of currency. The gold certificates were the same size and design as other United States currency, but were issued in a one-hundred-thousand-dollar-denomination—hardly suitable for use at the local grocery store.”<sup>95</sup>

With respect to paper marriage certificates, these certificates also function in a horizontal economy created by and between public, governmental entities. This kind of economy is a consequence of inter-state marriage recognition practices, whereby states recognize and give force to marriages entered into (legally) in other states. The phenomenon of inter-state recognition (or, conversely, lack of recognition)<sup>96</sup> of marriage is a longstanding reality of international law and practice. Within the contemporary United States, the general practice of United States states has been to recognize marriages entered into in any other United States state as long as local laws and rules in that other state, the “place of celebration,” have been complied with.<sup>97</sup> In essence then, if one gets legally married in one state, and moves to or travels in another state, the receiving state “converts” the original state’s marriage license into one of its own, and gives it effect and value as such.<sup>98</sup> In this way, the legal tender quality of marriage certificates, at least in state government-to-state government transactions emerges.

Moreover, this interstitial marriage economy is a very strong and deeply rooted one. In this respect, for a very long time, states have worked hard to ensure that their marriages—and marriage certificates—will be recognized and given effect to and value by other states. Put another way, and in doctrinal speak, states have been long and deeply concerned with creating “comity” with sister states when it comes to the issuing of marriage certificates. For example, while Massachusetts was the first United States state to issue marriage

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95. TIMBERLAKE, *supra* note 51, at 289. See also NUSSBAUM, *supra* note 56, at 197 for further description of these gold certificates.

96. Up until very recently when *Obergefell* finally resolved this issue, one of the more vexing issues in United States family law was whether—or not—an officially heterosexual United States state had to recognize a same-sex marriage entered into within the boundaries of another United States state.

97. This “place of celebration” rule is embodied in the Restatement (Second) of Conflict of Laws. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

98. See generally Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453 (2014) (explaining but also complicating common analyses of this general inter-state practice).

certificates for same-sex couples, back in 2003, Massachusetts did not—as was widely feared—become the “Las Vegas of same-sex marriage”<sup>99</sup> Instead, Massachusetts, in the spirit of inter-state comity, refused to marry any couple whose so-called home state did not permit same-sex marriage.<sup>100</sup> In other words, Massachusetts extended the converse of the “place of celebration” rule not only to refuse recognition to marriages illegally *conducted* elsewhere, but also to refuse *itself* the opportunity to marry people whose home state makes certain marriages illegal. Thus, Massachusetts would not marry an Alabama same-sex couple since Alabama, explicitly and constitutionally, did not allow same-sex marriage at the time. As the lead opinion in the Massachusetts legal decision confirming this point of law noted: “[I]t is rational, and hopeful, for the Commonwealth to believe that if it adheres to principles of comity and respects the laws of other jurisdictions, then other jurisdictions will . . . recognize same-sex marriages of Massachusetts couples.”<sup>101</sup>

Ultimately, of course, each of the monetary analogues suggested in this Part are open to suggestion and critique.<sup>102</sup> The argument here has not been to suggest an exact equivalence between marriage certificates and any current or historical form of money, but merely to suggest that there are “money-like” aspects of marriage certificates which are hard to ignore (or forget) once this Pandora’s box has been opened. Indeed, there may not be any “perfect” monetary analogue for marriage certificates because monetary forms themselves have been so experimental and pluralistic in nature over time. Indeed, towards this point, it is again worth remembering that the United States dollar is a relatively recent and radical monetary invention. It is not the only kind or form of money—paper or otherwise—that has circulated in the United States historically speaking, and it is not what marriage certificates must aspire to in order to be considered monetary in nature.

If there has been any universal, across time, with respect to money in the United States, it has been over the question of who has the authority to issue it. And in this respect, the recent controversy over what Rowan County marriage licenses must look like—and whether Kim Davis or the federal courts will decide that—is perfectly consistent with this country’s controversial monetary history. At least to the extent that we can understand marriage as being just as much (or even moreso) about money rather than dignity.

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99. See Pam Belluck, *Romney Won’t Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, at A1 (quoting Mitt Romney).

100. Massachusetts law at the time stated: “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.” Uniform Marriage Evasion Act, MASS. GEN. LAWS ch. 207, § 11 (2007).

101. *Cote-Whitacre v. Dep’t. of Pub. Health*, 844 N.E.2d 623, 645 (Mass. 2006).

102. There are also probably other ones available altogether.

## CONCLUSION

Marriage has taken many forms across the breadth of United States geography, demography, and history. The several forms of marriage witnessed in this country have sometimes been controversial. Often they have been quotidian. This Article has attempted to explain how and why a particular quotidian form—namely, the marriage license—has now become so controversial. Doing so has required a stepping back from typical narratives of marriage and rights alike.

Observers of the development of civil rights have often been tempted to see the historical struggle for civil rights as involving a sequence of pitched and sequential battles between the forces of enviable progress and lamentable tradition. According to this (simplistic) view of things, legal victories in each of these battles helps set the stage for the next struggle, eventual legal victory there, yet another stage and civil rights battle, and so on. In this way, for example, the struggle for African-Americans' rights in the United States has been described as the necessary stepping stone for women's right which, in turn, has been described as the essential precursor to gay rights, and then transgender rights.

Yet, in all this neat narrativizing, complexities get quashed. These complexities pertain not only to what civil rights struggles "preceded"—or ostensibly had to have preceded—other civil rights struggles, but also the ways in which many so-called civil rights are not strictly about justice or freedom, whether in meaning or origin. In suggesting the ways in which the latest round of controversies concerning same-sex marriage have parallels to and origins in United States constitutional and legal controversies concerning money, this Article has suggested that the struggle for same-sex marriage—like other civil right struggles—is a complex historical space. Moreover, it is one where justice and selfishness—dignity *and* dollars—can both reside.

