

A search for compromise as county clerks stop same-sex marriages

by [Harry Bruinius](#) in the [September 16, 2015](#) issue

([The Christian Science Monitor](#)) As a number of county clerks in Kentucky, Texas, Alabama, and other states resist issuing marriage licenses for same-sex couples, some longtime advocates for marriage equality say it may be time to compromise.

Two months after the Supreme Court's landmark ruling made same-sex marriage a constitutional right, for many religious conservatives the cultural battle now turns toward whether those with deeply held religious beliefs, including public officials, should be compelled to participate in public duties that are anathema to their faiths.

Kim Davis, clerk of Kentucky's Rowan County, has refused to issue any marriage licenses since June, defying the Supreme Court and an order from the state's governor Steve Beshear. In mid-August U.S. District judge David Bunning ruled that she must begin issuing licenses to gay and lesbian couples. However, Bunning stayed his ruling, noting "emotions are running high on both sides of this debate" and giving Davis time to bring her First Amendment claims to the Sixth U.S. Circuit Court of Appeals.

[The *USA Today* Network reported that Bunning "also found that marriage forms do not constitute an endorsement: instead, a clerk simply certifies that information is accurate and that couples are qualified to marry under state law. Davis is among a number of clerks in Kentucky who have cited concerns over issuing licenses, and Bunning argues that siding with Davis would allow other clerks to follow her approach, in what could become a 'substantial interference' in half of the state."]

Davis has also refused to allow any willing underlings to file same-sex marriage licenses, arguing that even this would compromise her religious beliefs. Most legal experts doubt she has much of a constitutional case to forgo her public duties as a matter of religious conscience, but even those who reject her legal claims see reasons for U.S. society to come to an agreement with those who have religious objections to same-sex marriage.

"The winners of this constitutional marriage equality business are not well advised to push our advantage too harshly or severely," said William Eskridge, a professor at

Yale Law School who has advocated for same-sex marriage for 25 years.

“We would be better advised to work gently and constructively with the public officials to work out arrangements so that legitimate couples seeking legitimate marriage licenses can still be served,” while attempting to “somehow accommodate the religious views of some of the clerks and administrators.”

The clashes have fostered a measure of resentment among some conservatives and raised questions about the nature and scope of religious liberty within the public sphere.

“If you get people of goodwill and good faith on both sides to sit down and talk, you end up coming out a lot happier,” said Mark Goldfeder, senior fellow at the Center for the Study of Law and Religion at Emory University in Atlanta, who has helped craft the state’s religious freedom restoration acts. “It’s good for both religious observers and for civil peace for us to shape our laws in ways that let people live in ways that are consistent with their heartfelt obligations, so long as we can find a way to make sure everyone is accommodated.”

A number of counties in Alabama continue to refuse to issue marriage licenses for religious reasons. Alabama state senator Greg Albritton has proposed legislation that would end state-issued marriage licenses in Alabama altogether, leaving all couples to enter marriage contracts on their own and then simply file them with probate judges.

After the Supreme Court decision, Katie Lang, clerk of Hood County, Texas, wrote that “the religious doctrines to which I adhere compel me to personally refrain from issuing same-sex marriage licenses.” Later, her office said it would provide staff to process same-sex marriage licenses. In August, the county settled a lawsuit from a gay couple who had initially been denied a license, paying nearly \$44,000 in damages.

“We’ve had a very fast social change on the question of marriage,” said Robin Fretwell Wilson, professor of law at the University of Illinois. “So we should want to have consideration for people who have been in these jobs for a long time, for whom their religious convictions might otherwise lead them to quit or be fired.”

Yet Wilson does not believe that a state clerk’s office or individual worker can legally create a “choke point” for a couple with a constitutional right to get married.

Some states have already done this, however. Delaware, which recognized same-sex marriage in 2013, allows judges and other officials to refuse to participate in same-sex marriages. And in June, the North Carolina legislature overrode Governor Pat McCrory's veto of a bill that would allow some register of deeds workers and magistrates to refuse to solemnize civil marriages if they hold a "sincerely held religious objection." However, if they do, they will not be able to participate in any marriage, heterosexual or same-sex, for six months.

Earlier this year religious conservatives and gay rights advocates in Utah agreed to a compromise after a federal court ordered the state to start issuing same-sex marriage licenses.

Utah carved out a legal space for county clerks with religious objections to opt out of solemnizing same-sex marriages. But state law also now requires each county to make a willing substitute available for all couples during all business hours, so no one would be turned away.

Utah also added legal protections for lesbian, gay, bisexual, and transgender people to its civil rights laws. The federal government and 31 other states do not include such protections.

"When Utah was in the same boat as the rest of the country is in now, and they had a marriage decision that they didn't agree to . . . what they said is, we're going to step up and create a duty, so that everybody who presents for a marriage license in Utah gets one, period," said Wilson, who advised the Utah legislature in the compromise. "But they also said we're going to outsource that duty to anybody in the community who is authorized to be a celebrant—like mayors, judges, clergy, whoever—and we're going to create a process that protects objectors before the fact, before anyone shows up and is told no."

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