Written by **Jack Kenny** on January 30, 2015

State Legislators Renew Battle Against Same-sex Marriage Decrees

In what has been described as a new front in the battle over same-sex marriage, legislators in several states under judicial orders to confer marital status on same-sex couples have introduced bills to forbid state or local officials from issuing marriage licenses to couples of the same gender. The bills would also strip the salaries of employees who issued the licenses, the *New York Times* reported Thursday.

The bills have been introduced in the legislatures of Oklahoma, South Carolina, and Texas, with South Carolina also considering a bill that would allow officials to opt out of issuing such licenses if it conflicts with their "sincerely held religious beliefs." Lawmakers in North Carolina and Utah have bills before them with similar opt-out provisions. And Roy Moore, chief justice of Alabama, has told officials in his state that they need not comply with a federal court order in favor of same-sex marriage in Alabama, in part because "nothing in the United States Constitution grants the federal government the authority to redefine the institution of marriage."

More than 40 federal court rulings declaring a right to same-sex marriage have been handed down since the Supreme Court in 2012 struck down a provision of the federal Defense of Marriage Act that limited federal marriage benefits to opposite-sex couples only. On the same day, the justices also let stand a lower court decision that California's ban on same-sex marriage, adopted by voters in a referendum in 2008, was unconstitutional. Last October the high court refused to hear an appeal from rulings requiring five states to grant legal equality between heterosexual and same-sex marriage, thereby increasing the the number of states permitting marriage for same-sex couples at that time from 19 to 24. It has since been made legal in a dozen more states, bringing the total to 36 states and the District of Columbia, encompassing 70 percent of the nation's population.

Earlier this month, the Supreme Court agreed to hear a case brought by 15 plaintiffs in four states, appealing a ruling by the Sixth Circuit Court of Appeals in Cincinnati that upheld bans on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee. In writing the majority opinion, Judge Jeffrey Sutton said the voters and legislators, not judges, should decide the issue. The Supreme Court has scheduled an extraordinary two-and-a-half hour hearing on the questions of whether the Constitution requires the states to license a marriage between two people of the same sex and, if so, whether states must recognize the same-sex marriages of other states.

Those inquiries bring up a larger question: What provision in the Constitution gives any branch of the federal government — legislative, executive, or judicial — authority to reconstruct the meaning of marriage? The post-Civil War 14th Amendment guarantee that no state "shall deny to any person within its jurisdiction the equal protection of its laws," was adopted to assure the safety and protection of African-Americans, especially those who had recently been freed from slavery. It surely was never the intention of the Congress that passed it or the states that ratified it to create an authority for the

federal judiciary to impose on the laws of every state the peculiar novelty of our own time, namely that a union between two men or two women may be considered a legally valid marriage.

In the senate of South Carolina, Republican Lee Bright is the sponsor of a bill to allow state employees to opt out of issuing marriage licenses on religious grounds, an option he likens to provisions of existing laws that permit healthcare workers to refuse to assist in abortions. It seems likely to pass in a state where 78 percent of the voters in 2006 approved a constitutional amendment affirming marriage as a union between a man and a woman.

Some legal experts predict judges will be offended by state actions that impede their efforts to impose same-sex marriage in states where either voters or their elected representative have rejected it. "I think they'll be angry," Risa Goluboff, a law professor at the University of Virginia, told the *New York Times*. "I think they'll see this as outright defiance and treat it that way."

But defiance is sometimes the only way the people in their respective states can attempt to check a federal government that exceeds the authority delegated to it in our Constitution. So argued James Madison and Thomas Jefferson in their writings against the federal Alien and Sedition Acts in the Virginia and Kentucky Resolutions. After the Supreme Court delivered its Dred Scott decision in 1857, Abraham Lincoln did not call for defiance, but he did suggest that a Supreme Court decision may be subject to ongoing challenges. As he stated in his first Inaugural Address:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government.… At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

The people of 21st century America have largely ceased to be their own rulers, due in no small part to an exaggerated deference to "that eminent tribunal."

Such measures as are now being considered in a few of our states are a sign that the republican spirit, though long slumbering, is not yet dead.