EMORY | LAW

Emory Law Journal

Volume 59 | Issue 1 Article 5

2009

I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships

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I OBJECT: THE RLUIPA AS A MODEL FOR PROTECTING THE CONSCIENCE RIGHTS OF RELIGIOUS OBJECTORS TO SAME-SEX RELATIONSHIPS[†]

ABSTRACT

In most states, the battle over same-sex marriage has become a showdown with either gay rights activists or religious conservatives prevailing. Each side is fearful of losing ground to the other. Many scholars have noted the threats to religious liberty that arise upon the recognition of same-sex marriage, but few have given significant attention to how religious liberty might be protected without abolishing the rights of same-sex couples. This Comment focuses on one manifestation of the conflict between same-sex rights and religious liberty: the conflict that arises when individuals and organizations are compelled by their religious beliefs to violate state civil rights statutes protecting same-sex couples. Such violations expose them to civil liability for acting in accordance with their religious beliefs.

This Comment examines the shortcomings of the United States Supreme Court's current free exercise jurisprudence as well as current broad-based statutes like the Religious Freedom Restoration Act (RFRA) in protecting religious objectors in the context of same-sex rights. It then proposes a number of possible ways to protect religious objectors, concluding that while state statute-specific exemptions would be a more direct, and perhaps preferred, method of protecting religious objectors, the absence of state solutions and the need to implement a uniform approach to rights of conscience suggest a federal approach. A statute modeled on the Religious Land Use and Institutionalized Persons Act, (RLUIPA) would provide a more comprehensive and balanced approach than the funding legislation that has typically been used by Congress to protect other types of conscience rights. By providing some protection for religious individuals, such a federal conscience statute could lessen the tension between advocates for gay rights and advocates for religious liberty. While this Comment focuses explicitly on certain classes of religious objectors in the context of same-sex rights, the

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[†] This Comment received the 2008 Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

proposed solution could include provisions covering any class of religious objectors.

INTRODUCTION

> *But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.*
>
> —Justice Robert Jackson[1]

Guadalupe Benitez is a lesbian woman who decided with her partner Joanne to have a child.[2] After several unsuccessful attempts to become pregnant, Benitez was diagnosed in 1999 with polycystic ovarian syndrome, a condition that is characterized by irregular ovulation.[3] As a result, Benitez was referred to the North Coast Women's Care Medical Group, Inc. (North Coast), where she met with Dr. Christine Brody, an obstetrician–gynecologist.[4] Dr. Brody informed Benitez of the possibility of using a procedure called intrauterine insemination (IUI) to get pregnant.[5] Unlike the more common practice of self-insemination that Benitez had been using, during IUI a doctor inserts semen directly into the patient's uterus through a catheter.[6] In explaining this procedure, however, Dr. Brody told Benitez up front that if IUI became necessary, she would not be able to perform the procedure for Benitez because of her religious beliefs.[7]

Following their initial conversation, Dr. Brody continued to treat Benitez for infertility, performing diagnostic surgery and prescribing ovulation-inducing medication to be used in conjunction with self-insemination.[8] At some point in 2000, based in part on Dr. Brody's advice, Benitez decided to try IUI.[9] Dr. Douglas Fenton, another physician at North Coast, was asked to

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[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[2] N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 963 (Cal. 2008).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* Dr. Brody asserts that her religious beliefs precluded her from performing IUI, or any other medical procedure that facilitates pregnancy, for any unmarried woman, but Benitez suspects that Dr. Brody's refusal was based on her sexual orientation. *Id.*

[8] *Id.*

[9] *Id.* at 964.

perform the procedure, but he also refused because of his religious beliefs.[10] Dr. Fenton referred Benitez to a physician outside the North Coast practice who performed the IUI.[11] Benitez did not become pregnant as a result of the procedure but eventually resorted to in vitro fertilization, which enabled her to conceive in 2001.[12] Shortly thereafter, Benitez filed suit against North Coast, Brody and Fenton, alleging violation of California's Unruh Civil Rights Act, which prohibits discrimination on the basis of sexual orientation.[13] Among other defenses, Brody and Fenton asserted that their refusal to perform IUI for Benitez was protected under the free exercise clauses of the U.S. and California constitutions.[14]

In August 2008, the California Supreme Court ruled on the doctors' defenses, holding that, to the extent their refusal to perform the procedure was based on Benitez's sexual orientation, the act of refusal was not protected under either the federal or state constitutions.[15] Advocates for same-sex rights celebrated the decision as a victory over "fundamentalist Christian doctors."[16] Benitez spoke out saying, "it's a win for everyone, because anyone could be the next target if doctors are allowed to pick and choose their patients based on religious views about other groups of people."[17] Not everyone shared this enthusiasm, however. Americans United for Life, an anti-abortion advocacy group, issued a news release entitled "California Supreme Court Ruling Threatens Medical Care and Religious Freedom."[18] The group argued that the decision will only worsen the shortage of healthcare workers and that,

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[10] *Id.*

[11] *Id.* At the time, Dr. Fenton believed that Benitez would be using fresh sperm in the procedure, and since he was the only doctor at North Coast who was licensed to prepare fresh sperm, Dr. Fenton referred Benitez to Dr. Michael Kettle, a physician outside the North Coast practice. *Id.*

[12] *Id.*

[13] *Id.* at 967*; see also* CAL. CIV. CODE § 51 (West 2007).

[14] *N. Coast*, 189 P.3d at 967.

[15] *Id.* at 968–69. Although the doctors claim that their decision was based on the plaintiff's marital status rather than her sexual orientation, and therefore they did not violate the state civil rights statute, regardless of the doctors' intentions in this particular case, *North Coast* illustrates of the type of conflict that may arise between the rights of a lesbian patient and the religious conscience of a doctor whose religious beliefs prohibit him or her from performing IUI for that patient.

[16] Press Release, Lambda Legal, California Supreme Court Rules in Favor of Lambda Legal Lesbian Client Denied Infertility Treatment by Christian Fundamentalist Doctors (Aug. 18, 2008), http://www.lambdalegal.org/news/pr/california-supreme-court-benitez-decision.html.

[17] *Id.*

[18] Press Release, Matthew Eppinette, Americans United for Life, California Supreme Court Ruling Threatens Medical Care and Religious Freedom (Aug. 18, 2008), http://blog.aul.org/2008/08/18/california-supreme-court-ruling-threatens-medical-care-and-religious-freedom/.

ultimately, forcing healthcare workers to perform procedures that violate their conscience will not benefit patients.[19]

The dispute in *North Coast Women's Care Medical Group Inc. v. San Diego County Superior Court* is just one example of the sort of conflict that can arise between the statutory right of a same sex couple to be free from discrimination and the right to religious freedom of a private party who refuses to perform procedures that violate their conscience. In recent years, similar conflicts have arisen between individuals seeking to effect their rights to reproductive health services, including abortion, and health care providers who, for example, refuse to perform abortions or dispense oral contraception.[20] This Comment specifically addresses conflicts that, as in *North Coast*, arise between the rights of same-sex couples and the religious liberty of those who object to performing certain services for same-sex couples. Part I of this Comment discusses the current landscape of rights afforded to same-sex couples under state and federal law and provides examples of specific conflicts that could arise.[21] This Part suggests that in determining the proper scope of any religious exemptions, potential conflicts should be evaluated based on several factors, including the availability of alternative service providers and how directly the views of the individual or organization refusing to provide services conflict with the requirements of the law protecting same-sex couples. Part II presents both policy-based arguments and historical precedents for providing exemptions for certain categories of religious objectors whose duties conflict with same-sex rights.[22] This discussion demonstrates that far from

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[19] *Id.*

[20] *See* Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77 (Douglas Laycock, et al. eds., 2008) [hereinafter EMERGING CONFLICTS] (describing various state and federal responses to protect doctors and pharmacists who refuse to perform abortions or issue contraceptives).

[21] This Comment takes no position on the appropriateness of laws either prohibiting or enabling same-sex marriage. Further, although this Comment suggests certain limited religious exemptions from laws protecting against discrimination on the basis of sexual orientation, it in no way seeks to encourage such discrimination or to legitimize bigotry toward same-sex couples.

[22] This Comment touches on some of the history and policy reasons for protecting religious objectors, but for a more comprehensive treatment of this issue, see J. Brady Brammer, *Religious Groups and the Gay Rights Movement: Recognizing Common Ground*, 2006 B.Y.U. L. REV. 995 (2006) (arguing that suppression of religious speech in opposition to the gay rights movement would erode fundamental conscience rights important to both gay rights and religious activists); Alvin C. Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719 (2001) (arguing for the general applicability test for religious freedom claims to avoid creating exemptions from antidiscrimination statutes); Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Market-Place*, 17 STAN. L. & POL'Y REV. 83, 85–86 (2006) (arguing for a marketplace approach to protecting the right of conscience for pharmacists).

being a radical solution, religious exemptions are grounded in the American historical tradition.

Part III discusses the shortcomings of the Supreme Court's current free exercise jurisprudence, demonstrating that the U.S. Constitution, as currently interpreted by the Court, provides little functional protection for religious objectors in the context of same-sex rights. Part III also examines free exercise protections under state constitutions and concludes that, while state constitutions may offer more protection for religious objectors than the U.S. Constitution, the end result is often the same. Part IV analyzes the effectiveness of a variety of statutes that have been used to expand the free exercise of religion, including statute-specific exemptions as well as statutes such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), which raise the level of scrutiny for certain free exercise claims. Part IV concludes that these statutes do not adequately protect religious objectors[23] in the context of same-sex marriage.

Given the diversity of state statutes and constitutional provisions protecting free exercise and the weak interpretations by courts of these provisions, Part V argues that a federal statute that provides religious exemptions is the best way to achieve an appropriate balance between the rights of same-sex couples and the religious liberty of religious objectors. Specifically, a federal statute modeled on RLUIPA, which effectively requires the application of strict scrutiny to free exercise claims against states involving prisoners and land use, would provide a balanced, uniform approach to protecting the rights of religious objectors in all states without nullifying the rights of same-sex couples.

I. THE CONFLICT BETWEEN SAME-SEX RIGHTS AND RELIGION

Over the past few decades, much controversy has ensued over the issue of same-sex relationships.[24] Scholars have debated from religious, social, and economic perspectives the pros and cons of allowing same-sex marriage, civil

[23] Throughout this Comment, this phrase will be used to refer to any individual whose religious beliefs cause him or her to refuse to perform a legally recognized obligation.

[24] Kari Huus, *Battle Joined over Same-Sex Marriage: Regional Cases Foreshadow Fight over U.S. Constitution*, MSNBC, Feb. 27, 2004, http://www.msnbc.msn.com/id/4304099/.

unions, and other legal relationships.[25] Legislatures have responded to these debates in a variety of ways. Section A provides an overview of the current state of the law regarding the rights of same-sex couples. Section B examines the scope of the conflicts that arise between one party's civil rights to engage in same-sex relationships[26] and another party's rights to religious freedom, arguing that the more direct the religious objector's role in establishing marriage or family, the greater the need for religious exemptions from laws that establish the rights of same-sex couples.

A. Rights of Same-Sex Couples Under Current Law

The country is currently divided over the issue of same-sex relationships.[27] The rights afforded same-sex couples by the federal government are slim, mirroring the rights of same-sex couples in the majority of states.[28] States have responded to the issue of same-sex marriage in a variety of ways. Some have extended a variety of rights to same-sex couples, including civil rights, civil unions, and same-sex marriage. Some have explicitly foreclosed the right to same-sex marriage while still providing civil rights or civil unions.[29] An overview of these state responses is necessary to understand the scope of the conflict between the right to same-sex marriage and religious liberty, the present patchwork of same-sex rights implicated in this conflict, and the continuing reluctance by many states and the federal government to recognize same-sex rights.

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[25] *See, e.g.*, Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN'S RTS. L. REP. 115 (2001) (presenting an economic rationale for recognizing same-sex marriage); Erwin Chemerinsky, *Same Sex Marriage: An Essential Step Towards Equality*, 34 SW. U. L. REV. 579, 580 (2005) ("[A]t the very least, civil union has to be regarded as a basic civil right."); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL'Y 581, 593–644 (1999) (defending the rationales for traditional, heterosexual marriage and arguing against recognition of same-sex marriage); Paul Royal, *The Right to Say "I Do": The Legality of Same-Sex Marriage*, 20 LAW & PSYCHOL. REV. 245, 246 (1996) ("[S]tates should allow gay marriages not only because the present marriage statutes are unconstitutional, but also because no valid policy supports the ban."); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. Rev. 1365 (arguing that the recognition of same-sex marriage has detrimental effects on society).

[26] Throughout this article, the phrase "rights of same-sex couples" will be used to denote the right to same-sex marriage as well as the right to be free from discrimination based on sexual orientation.

[27] *See* Andrea Stone, *Battle over Gay Marriage Renewed on California Ballot*, USA TODAY, June 12, 2008, at 2A, *available at* http://www.usatoday.com/news/religion/2008-06-11-Gaymarriage_N.htm (describing the renewed struggle over same-sex marriage in various states).

[28] *See* Breslau, *infra* note 40.

[29] *See infra* note 47 and accompanying text.

1. Rights of Same-Sex Couples Under Federal Law

Although two of the Court's decisions have expanded the rights of same-sex couples,[30] neither the Court nor Congress has recognized a right to same-sex marriage or imposed a broad prohibition against discrimination on the basis of sexual orientation. The Court recognized a right to privacy for same-sex couples in *Lawrence v. Texas*, where it struck down a Texas law that prohibited certain homosexual conduct.[31] The Court based its decision on the due process liberty interests of the defendants, who were charged under the Texas criminal statute at issue.[32]

Prior to *Lawrence*, in *Romer v. Evans*, the Court struck down an amendment to the Colorado Constitution that prohibited any action by the state or by local governments to grant "special rights" or protections to homosexuals.[33] The Court found that the Colorado provision violated the Equal Protection Clause because it had no rational basis.[34] While *Lawrence* and *Romer* indicate that the Court might be willing to recognize constitutional rights for same-sex couples at some point in the future, the Court has not gone so far as to recognize a fundamental right to same-sex marriage under the Due Process or Equal Protection Clauses, or designate sexual orientation as a suspect classification justifying strict scrutiny.[35]

Currently, federal legislation offers even less protection for same-sex couples than the Court's jurisprudence. Discrimination on the basis of sexual orientation is not covered by federal civil rights statutes such as Title VII of the Civil Rights Act of 1964.[36] Furthermore, the federal Defense of Marriage Act (DOMA) rejects the notion of same-sex marriage by specifically defining marriage—for federal purposes—as a union between a man and a woman.[37]

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[30] *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

[31] *Lawrence*, 539 U.S. at 558.

[32] *Id.* at 562–63.

[33] *Romer*, 517 U.S. at 620.

[34] *See id.* at 635 ("We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.").

[35] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 787 (3d. ed. 2006).

[36] *See generally* 42 U.S.C. §§ 2000e–2000e(15) (2006).

[37] 1 U.S.C. § 7 (2006). Although President Obama pledged to seek a repeal of DOMA law during his 2008 presidential campaign, the law's future remains uncertain. In the early days of his administration, the President has avoided taking a strong stance on gay rights. *See* Brian Montopoli, *Obama Faces Gay Groups' Growing Anger*, CBS NEWS, http://www.cbsnews.com/blogs/2009/06/15/poliitcs/politicalhotsheet/entry5090503.shtml (discussing the Obama Administration's DOJ brief in support of DOMA and the resulting frustration of gay rights advocates).

The Executive Branch has offered some limited protection to same-sex couples through executive orders that institute an internal policy banning discrimination in employment on the basis of sexual orientation.[38] Although Congress and the President implemented a "don't ask, don't tell" policy in 1993, governing men and women serving in the military, the policy has curtailed, not expanded, homosexual rights.[39]

2. *Rights of Same-Sex Couples Under State Law*

States have responded to the debate over same-sex marriage in a variety of ways. The majority have passed laws that, like the federal DOMA, define marriage as a union between a man and a woman.[40] Unlike the federal DOMA, however, at least thirty states have adopted these provisions as state constitutional amendments,[41] making the state definitions more difficult to change than the federal definition. Six states currently allow same-sex marriage.[42] The high courts of Massachusetts, Connecticut, and Iowa have recognized the right to same-sex marriage under their respective state constitutions..[43] Statutes providing for same-sex marriage have been passed in Maine,[44] New Hampshire,[45] and Vermont.[46]

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[38] *See* U.S. Office of Pers. Mgmt., Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights, http://www.opm.gov/er/address2/Guide01.asp (last visited July 14, 2009) (referring to Executive Order 13087, which "prohibits discrimination based upon sexual orientation within Executive Branch civilian employment").

[39] 10 U.S.C. § 654 (2006). While this policy was initially introduced by President Clinton to give more rights to homosexuals than the previous policy of a complete ban on homosexuals in the military, the statute passed by Congress maintained the ban on homosexuals in the military where there are findings of regular homosexual conduct or where the individual openly acknowledges his or her sexual orientation. The policy has been heavily criticized over the past fifteen years. *See* Mark Thompson, '*Don't Ask, Don't Tell' Turns 15*, TIME, Jan. 28, 2008, http://www.time.com/time/nation/article/0,8599,1707545,00.html (discussing the history behind the "don't ask, don't tell" policy and describing aspirations of Democrats to eliminate it).

[40] *See* Karen Breslau, *After the Vows: What's Next in the Fight over Same-Sex Marriage*, NEWSWEEK, June 17, 2008, http://www.newsweek.com/id/141935 (noting that as of June 2008, forty-four states had passed prohibitions against same-sex marriage). For example, the Georgia Constitution provides that the "state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state." GA. CONST. art. I, § 4.

[41] *E.g.*, ALASKA CONST. art. I, § 25; LA. CONST. art. XII, § 15. For a complete list of states with current amendments, see DOMA Watch, *Marriage Amendment Summary*, http://www.domawatch.org/amendments/amendmentsummary.html (last visited July 14, 2009).

[42] The California Supreme Court also recognized a state constitutional right to marriage in *In re Marriage Cases*, 183 P.3d 384 (2008), but the court's decision was subsequently overridden by the passage of Proposition 8 in November 2008, an amendment to the California Constitution defining marriage as "between a man and a woman." Jessica Garrison, et al., *ELECTION 2008: GAY MARRIAGE; Nation Watches as State Weighs Ban; Prop. 8 Battle Drew Money and Attention from Across the U.S.*, L.A. TIMES, Nov. 5, 2008, at A1.

[43] *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that a denial of marriage rights to same-sex couples violates equal protection rights of Connecticut citizens); Goodridge v. Dept. of Pub.

Some states also grant rights to same-sex couples through laws permitting civil unions or statutes that ban discrimination based on sexual orientation. However, even some states that have defined marriage as a heterosexual monogamous union have passed laws permitting civil unions for same-sex couples and banned discrimination based on sexual orientation.[47] A handful of states provide rights to same-sex couples through civil union or domestic partnership statutes.[48] At least twenty states and the District of Columbia currently prohibit discrimination on the basis of sexual orientation in employment, and some of these states prohibit discrimination in housing or places of public accommodation as well.[49] Even some states that have defined marriage as a heterosexual monogamous union provide for civil unions for same-sex couples and prohibit discrimination based on sexual orientation.[50] Though same-sex couples currently enjoy some rights in less than half of the states, conflicts between same-sex rights and religious liberty have already begun to surface.

Health, 798 N.E.2d 941 (Mass. 2003) (holding that denial of marriage rights to same-sex couples violates equal protection rights of Massachusetts citizens); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (striking down an Iowa statute that defined marriage as between a man and a woman as a violation of the equal protection rights of Iowa citizens).

[44] An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Legis. Serv. 82 (West) (providing for same-sex marriage in Maine).

[45] 2009- 59 N.H. Rev. Stat. Ann. Adv. Legis. Serv. 1 (LexisNexis) (providing for same-sex marriage in New Hampshire).

[46] An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009-3 Vt. Adv. Legis. Serv. 5 (LexisNexis) (providing for same-sex marriage in Vermont effective Sept. 1, 2009).

[47] *See*, *e.g.*, CAL. CONST. art. 1 § 7.5 (defining marriage as between a man and a woman); CAL. CIV. CODE § 51 (West 2007) (protecting against discrimination based on sexual orientation); WASH. REV. CODE § 26.04.010 (2009) (defining marriage as between a male and a female); WASH. REV. CODE §§ 26.60.010–26.60.901 (2009) (establishing domestic partnerships for same-sex couples).

[48] Through civil union or domestic partnership statutes, California, Hawaii, New Jersey, Oregon, Washington, and the District of Columbia ensure that same-sex couples are granted at least some of the same rights or benefits as heterosexual married couples. *See* Christine Nelson, NAT'L CONFERENCE OF STATE LEGISLATURES, *Civil Unions & Domestic Partnership Statutes, National Conference of State Legislatures*, Mar. 2008, http://www.ncsl.org/programs/cyf/civilunions_domesticpartnership_statutes.htm (describing the rights given to same-sex couples in each of these states).

[49] *See* NAT'L GAY & LESBIAN TASK FORCE, *State Nondiscrimination Laws in the U.S.*, http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_08.pdf (last visited July 14, 2009) (showing a map of states that prohibit employment discrimination on the basis of sexual orientation or gender identity).

[50] *See*, *e.g.*, CAL. CONST. art. 1 § 7.5 (defining marriage as between a man and a woman); CAL. CIV. CODE § 51 (West 2007) (protecting against discrimination based on sexual orientation); WASH. REV. CODE § 26.04.010 (2009) (defining marriage as between a male and a female); WASH. REV. CODE §§ 26.60.010–26.60.901 (2009) (establishing domestic partnerships for same-sex couples).

B. Conflicts Between Same-Sex Rights and Religious Liberty

Following Massachusetts's recognition of same-sex marriage in 2003,[51] scholars began to examine the conflicts between the rights of same-sex couples and the religious freedom of individuals and organizations opposed to same-sex marriage based on religious reasons.[52] Within this broad range of conflicts lies the subset of conflicts at issue here: the civil liability of private individuals and organizations that refuse to perform services for same-sex couples.

This section will examine two subcategories of conflicts involving same-sex rights and religious objectors: "first order conflicts" and "second order conflicts." These categories were first defined in an essay by Robin Fretwell Wilson, who has authored several works on the conflicts arising between same-sex marriage and religious liberty. Wilson refers to "first order conflicts" as those related to the solemnization of marriage itself.[53] These conflicts arise between the same-sex couple and the state or church representatives responsible for licensing or performing the marriage ceremony.[54] "Second order conflicts" are those involving the same-sex couple and private individuals or organizations who are not acting on behalf of the state.[55] This category of second order conflicts includes a wide spectrum of conflicts, but this section suggests that not all of these conflicts should give rise to a religious exemption. Instead, it will provide examples of conflicts that should warrant an exemption and those that should not, and will suggest several factors for distinguishing between them.

1. Examples of First Order Conflicts

To date, no U.S. court has dealt with the issue of whether ministers and public officials are required to solemnize same-sex marriages against their religious beliefs.[56] The dearth of case law in this area could be due to the fact that same-sex couples prefer to find officials who support same-sex marriage

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[51] Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[52] *See, e.g.*, Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007) (arguing that the recognition of same-sex marriage could create civil liability for religious institutions and individuals who are opposed to it and could prevent religious institutions from accessing government benefits); Marc. D. Stern, *Same-Sex Marriage and the Churches*, *in* EMERGING CONFLICTS, *supra* note 20, at 1, 1 (discussing how conflicts between same-sex marriage and religious liberty might impact free speech, civil liability, and possible ineligibility for public funding).

[53] Wilson, *supra* note 20, at 97.

[54] *Id.*

[55] *Id.*

[56] *See id.* at 95 (referring to potential court reactions to this conflict in hypothetical terms).

to perform their ceremonies. However, first order conflicts still might arise in the future. The lack of case law also is likely due in part to the small number of states that recognize same-sex marriage.[57] While the second order conflicts described below tend to arise out of the more common civil rights statutes prohibiting discrimination on the basis of sexual orientation,[58] first order conflicts will only arise in states that recognize a right to same-sex marriage.[59] Currently, this right is recognized in only six states, and the rights in four of these states were recognized in 2009.[60] Further, the three states that recognize same-sex marriage by statute, New Hampshire, Maine, and Vermont, provide that members of the clergy are not required to perform same-sex marriages.[61]

Some scholars argue that there is no case law on first order conflicts because potential claimants recognize that, even in states that do not formally exempt clergy from performing same-sex marriage ceremonies, courts are generally not allowed to involve themselves in the internal affairs of a religious body.[62] While it would be surprising, and perhaps constitutionally suspect under the Establishment Clause, for courts to examine the reasons given by a member of the clergy for refusing to perform a marriage ceremony, given current court doctrines such as the ministerial exception and the avoidance of excessive entanglement, one cannot say for certain how a court would rule on

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[57] *See supra* Part I.A.2 (listing the states that recognize same-sex marriage).

[58] NAT'L GAY AND LESBIAN TASK FORCE, *supra* note 49.

[59] The conflict in states providing for civil unions exists when a government official refuses to participate in the formation of a civil union. *E.g.*, Brady v. Dean, 790 A.2d 428, 430 (Vt. 2001) (affirming the dismissal of claims brought by town clerks who asserted "that their obligation under the civil union law to either issue a civil union license or to appoint an assistant to do so" violated their free exercise rights under the Vermont Constitution). While this conflict deserves attention, it is less controversial than the conflict involving same-sex marriage where ministers and religious institutions are affected.

[60] *See supra* notes 43–46.

[61] 2009-59 N.H. Rev. Stat. Ann. Adv. Legis. Serv. 4 (LexisNexis); An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Legis. Serv. 82 (West); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009-3 Vt. Adv. Legis. Serv. 9 (LexisNexis). New Hampshire passed a separate religious freedom statute relating to marriage, which provides that a religious organization:

> shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request . . . is related to the solemnization of marriage, the celebration of marriage, or the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith.

2009 61 N.H. Rev. Stat. Ann. Adv. Legis. Serv. 2 (LexisNexis). Though courts have not yet interpreted the statute, the terms "promotion of marriage" and "celebration of marriage" could have far-reaching effects.

[62] Wilson, *supra* note 20, at 97.

this issue.[63] It is also possible that, since members of the clergy are licensed to solemnize marriages on behalf of the state, state legislatures could require them to perform same-sex marriages in order to keep their licenses.[64] Thus, while protections for clergy who refuse to perform same-sex marriages should be obsolete, this is not a foregone conclusion. The exemptions proposed in this Comment would ensure that clergy have the right to refuse to perform same-sex marriage ceremonies despite any contrary state law or court ruling that might otherwise arise.[65]

In those jurisdictions that recognize a right to same-sex marriage, both in the United States and abroad, there have already been some signs of the potential for first order conflicts. Following the *Goodridge* decision, which recognized a state constitutional right to same-sex marriage in Massachusetts, twelve justices of the peace in Massachusetts resigned from their positions to avoid solemnizing same-sex marriages.[66] Other countries have dealt with the potential for first order conflicts up front to avoid dealing with them in practice. Canada has attempted to resolve any such conflicts before they arise by enacting a religious exemption for members of the clergy who object to same-sex marriage, and the European Union has issued an advisory opinion recommending exemptions for clergy opposed to same-sex marriage where possible.[67] These examples show that the United States need not wait until conflicts arise to adopt a solution.

2. *Examples of Second Order Conflicts*

Second order conflicts are those that involve a conflict between the rights of two private parties, where one party is asked to recognize the rights of the

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[63] It is conceivable that courts might choose to allow clergy and religious groups autonomy for decisions on who to marry generally but with an exception stating that refusal cannot be based on the couples' sexual orientation.

[64] This would be similar to the current situation for pharmacists in states that have passed "duty to fill" laws requiring pharmacists to issue prescriptions for contraceptive pills despite religious objections. For an examination of these laws, see Erica L. Norey, Note, *Duty to Fill? Threats to Pharmacists' Professional and Business Discretion*, 52 N.Y.L. SCH. L. REV. 95 (2007).

[65] *See* Wilson, *supra* note 20, at 102 (predicting that litigation will arise over the duties of individuals and organizations to support same-sex couples and arguing that "[s]tates can deflect this litigation, as they have with abortion and other deeply divisive questions in healthcare, by deciding now whether issues of conscience matter").

[66] Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

[67] E.U. Network of Indep. Experts on Fundamental Rights, *Opinion No. 4-2005: The Right to Conscientious Objection and the Conclusions by EU Member States of Concordats with the Holy See* (Dec. 14, 2005), *available at* http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf.

other party in a way that would violate the first party's religious beliefs. Subsection a describes two examples of second order conflicts that are directly related to marriage and family: fertility treatment and adoption. Subsection b provides other examples of second order conflicts that are more loosely connected to marriage and the family and offers several factors for determining whether a second order conflict should give rise to a religious exemption.

a. Conflicts Directly Related to the Family

Two recent California lawsuits provide examples of second order conflicts that can arise between same-sex rights and religious conscience rights in the contexts of medical treatment and adoption. First, second order conflicts are likely to arise in the area of healthcare and fertility services. Although the physicians in *North Coast* maintained that their refusal to facilitate Benitez's pregnancy through IUI was based on the fact that she was unmarried, the California Supreme Court held that if the doctors' decision was based on Benitz's sexual orientation their action violated California law.[68] The case thus illustrates the potential tension between the rights of same-sex couples and the religious liberty of healthcare workers whose job it is to facilitate pregnancies.

The second context in which second order conflicts are likely to arise is in the area of adoption. In *Butler v. Adoption Media, LLC*, same-sex partners filed suit against the owners of Adoption.com, which offers a service that allows prospective adoptive parents to post a profile online that can be viewed by women who plan to give their children up for adoption.[69] The plaintiffs alleged that the defendants' rejection of their application to post a profile on the website based on the plaintiffs' sexual orientation constituted a violation of California's civil rights statute.[70] The parties ultimately settled the dispute before trial,[71] but the *Butler* case is not the only example of the tension between the rights of same-sex couples and the mission of certain adoption organizations. Perhaps the most noted example of this conflict came in 2006, when Catholic Charities stopped placing children for adoption in Massachusetts after the state refused to grant the organization an exemption

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[68] N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 963 (Cal. 2008).

[69] Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1025 (N.D. Cal. 2007).

[70] *Id.*

[71] Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 476 (2008).

from state law that prohibited discrimination on the basis of sexual orientation.[72] This not only shows the potential for conflict between the religious beliefs motivating certain adoption agencies and state laws protecting same-sex couples but also demonstrates the potential negative consequences of failing to provide an exemption for certain adoption agencies. Rather than serve same-sex couples, Catholic Charities chose to stop providing services in Massachusetts altogether.[73]

b. Distinguishing Among Second Order Conflicts

In her statements to the press,[74] Benitez, the plaintiff in *North Coast*, recognized the importance of limiting religious exemptions or accommodations in the interest of protecting same-sex couples. The California decision thus demonstrates that without limiting accommodations for religious objectors, laws like the California civil rights statute at issue in *North Coast* will become a mere policy view of the state, offering no real protection. The rights of same-sex couples must be considered in crafting religious exemptions, and the exemptions must be applied in a way that protects religious objectors without encouraging mere prejudice against same-sex couples. This Comment suggests using the directness of participation required by the religious objector as a way to measure the severity of the burden on the religious objector and limit the scope of religious exemptions. For example, the doctors in *North Coast* did not refuse to treat Benitez altogether; their religious objection applied only to IUI because IUI would have directly facilitated the pregnancy.[75] Thus, the doctors' objections were based not merely on their patient's sexual orientation but also on the direct link between their own actions and the establishment of a family for Benitez.

In determining whether a particular conflict rises to a level that calls for a religious exemption, the following factors should be considered: the nature of the activity that the religious objector seeks an exemption from; the centrality of the activity and/or the objection to the objector's religious views; and the availability of alternative service providers. Thus, if the objection is based on

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[72] *Id.* at 479–80.

[73] *See* Wilson, *supra* note 20, at 102 (noting that by not providing an exemption for Catholic Charities, Massachusetts "prodded Catholic Charities to cease providing adoption services altogether, forcing other agencies to absorb the placement of those children and likely lengthening the placement process").

[74] *See supra* text accompanying notes 16 & 17.

[75] N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 963 (Cal. 2008).

religious views of same-sex relationships, the more directly the objector participates in establishing or promoting this relationship, the more central the objection will be to his or her religious beliefs.[76] For example, activities like performing a marriage ceremony or providing IUI are directly related to the establishment of the family, or a same-sex relationship, but activities like treating a cold or serving dinner to a same-sex couple in a public restaurant are not.[77] The connection between the latter hypothetical activities of the objector and the existence of the same-sex relationship is attenuated at best.

The difficulty, of course, is that second order conflicts range across a rather broad spectrum, with many activities falling into gray areas. For instance, should exemptions apply to a restaurant owner who refuses to host the wedding ceremony or reception of a same-sex couple?[78] Similarly, should an exemption be provided for a doctor who goes one step further than Dr. Brody and refuses to prescribe fertility medications to a lesbian patient? Part of the analysis must rest on the interests of the same-sex couple or lesbian patient, reviewing the availability of alternatives and the effect that allowing an exemption will have on the purpose of the laws promoting same-sex rights. It is difficult to pinpoint the precise dividing line between situations that call for a religious exemption and those that do not. In applying any sort of religious exemption, courts will need to define the scope of the exemption as applied to the facts of a particular case. This section suggests that when defining the scope of exemptions, courts and legislatures should consider the nature of the activity that the religious objector seeks an exemption from, which indicates the burden on the religious objector; the centrality of the activity and/or the objection to the objector's religious views, which points to the burden on the objector and the sincerity of religious belief; and the availability of alternative service providers, which goes to whether the obligations otherwise imposed on

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[76] *See* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 87 (2d ed. 1995) (providing the text of debates over drafts of the First Amendment religion clauses in which representatives remark on the depth of the convictions of conscientious objectors to military service as a reason for providing exemptions to service).

[77] While the restaurant owner and doctor in these examples might argue that by serving a same-sex couple he or she is facilitating the same-sex relationship, these activities are distinguished from "true" second order conflicts because they do not play a direct role in forming or legitimizing a same-sex relationship or in establishing a family. These are also the types of activities that were at the heart of the application of Title II of the Civil Rights Act, 42 U.S.C. § 2000a (2006), in cases like *Katzenbach v. McClung*, 379 U.S. 294, 296–97 (1964), and *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 243–44 (1964).

[78] *See* Wilson, *supra* note 20, at 100 (providing examples of individuals like florists and bakers who might refuse to participate in a same-sex ceremony).

the religious objector are the least restrictive means of achieving the goal of promoting the rights of same-sex couples.

II. THE POLICIES AND PRECEDENTS FOR RECOGNIZING RELIGIOUS EXEMPTIONS

Some scholars have argued that religious exemptions undermine the force and purpose of the law—particularly in the area of civil rights, which encompasses the rights of same-sex couples in certain states—and, therefore, should not be allowed.[79] This Part offers reasons for providing at least some exemptions for religious objectors to same-sex relationships. Section A explains why advocates for both same-sex rights and religious liberty should favor limited exemptions for strategic policy reasons. Section B shows that the recognition of exemptions would not be a radical departure from historical tradition or from the historical understanding of religious liberty in the United States.

A. Policy Reasons for Providing Religious Exemptions

Advocates of religious liberty seek exemptions from laws promoting same-sex rights because these exemptions would protect the freedom of religious professionals and organizations to act in accordance with their religious beliefs. Under this view, exemptions would enhance religious freedom and promote the free exercise of religion and religious pluralism, ideals that have been valued since the founding of the United States.[80] However, religious individuals and organizations might not be the only beneficiaries of such exemptions.

Society as a whole may benefit from ensuring that private individuals and organizations like doctors and adoption agencies are not forced to discontinue services because they refuse to act against deeply held religious beliefs.[81] Same-sex couples could actually benefit as well. A major source of objection to same-sex rights is that permitting same-sex marriage, or promoting same-

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[79] *See* Lin, *supra* note 22, at 721 ("[E]xemptions for religious free exercise from sexual orientation antidiscrimination statutes undermine the two underlying purposes of the statutes: (1) eliminating from decisionmaking . . . irrelevant moral objections to somebody's sexual orientation; and (2) making a symbolic gesture of acceptance and tolerance of homosexuality.").

[80] *See* WITTE, supra note 76, at 41 (referring to "free exercise" and "religious pluralism" as values underlying eighteenth-century American ideas regarding religious liberty).

[81] *See supra* Part I.B.2a.

sex rights, will severely limit the religious liberty of those who disagree with such relationships.[82] Limited exemptions would demonstrate that the battle over same-sex rights need not be winner-take-all.[83] Religious exemptions could decrease opposition to same-sex relationships, resulting in more rights for same-sex couples in states that currently refuse to recognize such rights. In most cases, both groups can enjoy their rights without detracting from the other.[84] Thus, while exemptions would have some effect on the ability of same-sex couples to choose their service providers, exemptions might serve as a catalyst for recognizing new rights for same-sex couples.[85]

B. The Historical Precedent for Religious Exemptions

The sections below describe the historical precedent for recognizing both statutory and constitutional religious exemptions. Recounting this history serves two purposes. First, it demonstrates that religious exemptions from laws and government policies have been both legitimate and effective, and, second, it serves as a reminder of the value that the United States has placed on freedom of conscience as a component of religious freedom since independence.[86] Indeed, one might argue that the values underlying religious exemptions are woven into the very fabric of our system of government.[87]

1. Historical Recognition of Statutory Exemptions

The United States has a long tradition of statutory exemptions for those who are conscientiously opposed to specific government programs. Exemptions for conscientious objectors to military service pre-date the Constitution.[88] The Framers considered including an Amendment in the Bill of

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[82] *See* Stern, *supra* note 52 (outlining the consequences of recognizing same-sex rights for religious individuals and organizations).

[83] *See* Vischer, *supra* note 22, at 84 (referring to the winner-take-all approach in the pharmacist arena).

[84] One element of the strict scrutiny test outlined *infra* Part V would take into account whether other sources of service are available.

[85] *See supra* Part I.A.2 (showing that only six states recognize same-sex marriage, and less than half provide protections against discrimination on the basis of sexual orientation).

[86] *See* WITTE, *supra* note 76, at xxi (referring to "liberty of conscience" as a principle of religious freedom recognized by the founders).

[87] *See* United States v. Macintosh, 283 U.S. 605, 632 (1931) (Hughes, C.J., dissenting) (arguing that enforcement of the oath requirement at issue in the case should be viewed not only as "contrary . . . to the specific intent of the Congress but as repugnant to the fundamental principle of representative government").

[88] *See* KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION 49 (2006) ("[E]xcusing people from military service remains the quintessential exemption, against which we can compare many other conflicts of legal duty and religious conscience.").

Rights to protect conscientious objectors to military service but ultimately concluded that it was a function of the states or the responsibility of Congress to provide for such exemptions.[89] Since that time, Congress has provided exemptions for religious objectors to military service through various statutes, including the 1864 Draft Act, the Draft Act of 1917 and the 1940 Selective Service Act.[90] The Court has played an active role in defining the scope of these statutory exemptions[91] and has also recognized, as an extension of the exemptions from military service, an implicit exemption from the oath requirement of the Nationality Act for immigrants who object to swearing an oath to bear arms for the United States.[92] In addition to providing exemptions for objectors to military service, Congress has more recently provided religious exemptions to other laws in a variety of contexts such as abortion, employment discrimination, and taxes.[93]

2. *Supreme Court Jurisprudence Regarding Exemptions*

The jurisprudence surrounding the Free Exercise Clause is heavily concerned with whether individuals should be exempt from government laws or policies that affect the practice of their religion, and the Supreme Court has recognized such exemptions in certain contexts.[94] The Court has not, however, directly addressed whether the Free Exercise Clause requires exemptions for

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[89] *See* WITTE, *supra* note 76, at 81–87 (providing the text of the draft amendment and the debates surrounding the religion clauses in general). The Supreme Court has never directly addressed whether the Constitution would provide an exemption for religious conscientious objectors to military service, but it has indicated in dicta that it would not. *See* GREENAWALT, *supra* note 88, at 59 (noting that the Court stated in dicta in *Macintosh* that the Free Exercise Clause did not confer such a right to objectors absent legislation;, and noting that the Court in *Gillette v. United States*, 401 U.S. 437 (1971), stated that selective service objectors did not have a constitutional right of exemption; , but also pointing out that the Court has not yet decided the ultimate issue of whether religious objectors would enjoy an exemption derived from the Free Exercise Clause).

[90] GREENAWALT, *supra* note 88, at 50–51.

[91] *Id.* at 59–67. *See also* United States v. Seeger, 380 U.S. 163 (1965) (interpreting the phrases "religious training and belief" and "belief in a Supreme Being" used in the Universal Military Training and Service Act); Welsh v. United States, 398 U.S. 333 (1970) (extending the conscientious objector exemption under the Military Service Act to individuals whose ethical or moral beliefs prevent them from serving in the military).

[92] Girouard v. United States, 328 U.S. 61 (1946).

[93] See *infra* Part IV.A for a discussion of exemptions involving abortion and employment discrimination. For a description of other exemptions enacted by Congress, see Diana B. Henriques, *In the Congressional Hopper: A Long Wish List of Special Benefits and Exemptions*, N.Y. TIMES, Oct. 11, 2006, at A20.

[94] *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the application of state compulsory school-attendance laws to Amish parents violated the First and Fourteenth Amendments); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that a state's denial of unemployment compensation to a claimant who quit his job because it required him to participate in the production of materials used to manufacture arms, in violation of his religious beliefs, violated the Free Exercise Clause).

religious objectors to civil laws promoting the private rights of individuals. The debates and drafts of the Framers have led scholars to different conclusions as to whether the Framers intended to include in the Free Exercise Clause a right of conscience that would allow exemptions from civil statutes.[95] The evidence regarding the original intent of the Framers is inconclusive and perhaps irrelevant since the Framers most likely did not envision the array of civil statutes that has accompanied the growth of the modern administrative state.[96] Perhaps it is not surprising, then, that the Supreme Court's jurisprudence on free exercise claims has varied significantly over time,[97] with some of the Court's decisions suggesting that the Free Exercise Clause could provide exemptions from civil statutes and others suggesting the opposite. The Court's earliest cases suggest that the Free Exercise Clause did not contemplate exemptions from government laws or policies.[98] However, the Court began employing a broader interpretation and applying heightened forms of scrutiny to free exercise claims in 1940, when the clause was first applied to the states.[99]

The Court's post-1940 decisions demonstrate a concern over requiring individuals to participate in activities that go against their religious beliefs and a willingness to recognize exemptions from such requirements. For example, in *West Virginia State Board of Education v. Barnette*, the Court held that a local board of education's policy requiring students to either salute the flag or face expulsion violated the First Amendment rights of students who, based on their beliefs as Jehovah's Witnesses, believed that saluting the flag would violate the biblical commandment against worshipping a "graven image."[100] Although it is unclear whether the Court would have extended its decision in

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[95] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414–15 (1990) (arguing that the Framers contemplated religious exemptions from statutes). *But see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (critiquing McConnell's argument and concluding that the evidence does not establish the Framers' intent to provide religious exemptions from civil statutes).

[96] *See* WITTE, *supra* note 76, at 163 (referring to the pluralization of religions and the proliferation of welfare laws in the United States).

[97] *See id.* at 146–52 (explaining the variety of approaches and levels of scrutiny that the Court has applied to free exercise cases since 1940).

[98] *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (upholding the constitutionality of laws prohibiting polygamy and noting that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices").

[99] WITTE, *supra* note 76 at 149.

[100] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 626–29 (1943).

Barnette to other contexts,[101] the decision is significant because the Court recognized a constitutional right to refuse to participate in an activity that violates one's religious beliefs.[102] The Court's opinion evidences the value placed on freedom of religious conscience and freedom of expression as means to maintaining a free and peaceful society.[103]

Similarly, in *Sherbert v. Verner*, where the Court first applied strict scrutiny to a free exercise claim,[104] the Court emphasized the gravity of forcing an individual to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[105] According to the Court, this choice "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[106]

Although they are not sufficient to establish a constitutional right of exemption for all religious objectors, cases like *Barnette* and *Sherbert* illustrate the importance of protecting individuals from government laws or policies that compel them to act against their religious beliefs. Even where the Court has found that no constitutional right of exemption exists for a particular category of religious claimants, the Court has emphasized the appropriateness of providing statutory exemptions.[107] Though the current test for free exercise claims, set forth in *Employment Division, Department of Human Resources of Oregon v. Smith*, will in most instances not recognize exemptions for religious

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[101] *See id.* at 630, 634 (emphasizing that the rule infringed on the plaintiff's right to speak his own mind and noting that the plaintiff's refusal to salute the flag had little bearing on the rights of others).

[102] The concurring opinion of Justices Black and Douglas indicates that religious claimants should be required to act in discordance with their beliefs only in certain situations. *See id.* at 643–44 (Black & Douglas, JJ., concurring) ("Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity.").

[103] *See id.* at 637 (majority opinion) (noting that to enforce the Bill of Rights "is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.").

[104] WITTE, *supra* note 76, at 149.

[105] Sherbert v. Verner, 374 U.S. 398, 403–04 (1963).

[106] *Id.* at 404. The plaintiff was denied unemployment benefits after she lost her job because she refused to violate her religious beliefs by working on Saturday. The Court concluded that the denial of unemployment benefits violated her free exercise rights. *Id.* at 403.

[107] *See* Arver v. United States, 245 U.S. 366 (1918) (recognizing congressional power to enact protections for a limited class of individuals who object to military service for religious reasons).

objectors,[108] the Court in *Smith* also recognized the role of legislatures in providing broader protection for religious liberty.[109]

In short, the current battle over same-sex rights suggests the need for a policy that can relieve the tension between same-sex rights and religious liberty. The historical precedents of recognizing both statutory and constitutional exemptions for other religious objectors further demonstrate both the importance and feasibility of providing exemptions for religious objectors to same-sex rights.

III. THE NEED FOR LEGISLATIVE SOLUTIONS TO PROVIDE EXEMPTIONS

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[110] By requiring an individual to participate in an activity that is contrary to his or her religious beliefs, such as the legitimization of same-sex marriage or the establishment of a family for same-sex couples, the state is arguably requiring the individual to affirm something that is contrary to his or her religious beliefs in violation of the Free Exercise Clause.[111] Although prior to 1990, the Supreme Court might have agreed with such a broad interpretation of the Free Exercise Clause, the Supreme Court's current interpretation is narrower in scope.[112] Section A describes the current scope of free exercise rights under the First Amendment. Given the limitations of First Amendment jurisprudence in addressing the tension between same-sex marriage and the exercise of religious conscience, sections B and C examine alternative federal and state constitutional authority for religious exemptions, concluding that none of these authorities sufficiently protect religious objectors.

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[108] *See infra* Part III.A.

[109] *See* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990) (noting that it is "not surprising that a number of States have made an exception to their drug laws for sacramental peyote use").

[110] U.S. CONST. amend. I.

[111] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Murphy, J., concurring) ("Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship.").

[112] For a more comprehensive discussion of the evolution of the Supreme Court's Free Exercise Clause jurisprudence, see WITTE, *supra* note 76, at 143–69 and GREENAWALT, *supra* note 88, at 27–34.

A. The Current State of Free Exercise Jurisprudence

The current test for determining whether a state action violates the Free Exercise Clause arises out of *Smith*.[113] The subsections below discuss: (1) the test of "general and neutral applicability" arising out of *Smith* and the subsequent applications of this standard by the Supreme Court and lower courts; and (2) two specific state and lower court cases applying the *Smith* test to contexts involving religious objectors.

1. Smith and the "General and Neutrally Applicable" Standard

In *Smith*, decided in 1990, the Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[114] The plaintiffs in *Smith* had been denied unemployment compensation because they were fired for using peyote.[115] Despite the plaintiffs' assertion that they used the peyote in connection with a religious ceremony of the Native American Church,[116] the Court held that the denial of unemployment compensation did not violate their free exercise rights because the state criminal statute prohibiting the use of peyote was a valid exercise of the police power and was of neutral and general applicability.[117] The Court did not require the state to provide a compelling interest for the law or the absence of exemptions.[118] Though the Court in *Smith* stated that its decision did not overrule prior cases, the result and the test applied in *Smith* diverged from prior unemployment compensation cases.[119]

The Court in *Smith* did not do away with the strict scrutiny test altogether but instead cabined the application of strict scrutiny to laws that are either not

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[113] 494 U.S. 872 (1990).

[114] *Id.* at 879.

[115] *Id.* at 874.

[116] *Id.* at 874, 876.

[117] *Id.* at 882.

[118] *Id.* at 885. For an example of how the Court has applied the compelling interest standard in the context of free exercise, see Sherbert v. Verner, 374 U.S. 398, 406–09 (1963). The Court found that no compelling state interest supported the government's denial of unemployment compensation to the plaintiff, who was discharged from her employment because, in accordance with her religious beliefs, she refused to work on Saturday. In determining whether there was a compelling state interest, the Court noted, "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[119] *Compare Smith*, *with* Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829 (1989); *Sherbert*, 374 U.S. 398; Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981). In the three latter cases, the Court found that denial of unemployment compensation to individuals who were unemployed because of their religious objections to work duties violated the Free Exercise Clause.

neutral or not generally applicable.[120] While the post-*Smith* analysis for free exercise claims therefore turns on the threshold issue of whether a law is neutral and generally applicable, the application of this standard by the Supreme Court and lower courts has yielded conflicting results. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court, applying the *Smith* test, struck down the application of a Florida ordinance that prohibited the ritual sacrifice of animals.[121] The Court indicated that the process of determining whether a law is of general and neutral applicability extends beyond the strict language of the statute, noting that although the Florida animal cruelty statute at issue seemed neutral on its face, the state applied the statute to allow almost all types of animal slaughter except ritual animal sacrifice.[122] Because the application of the statute "singled out" religious practice, the statute was not general and neutrally applicable.[123] The Court therefore applied strict scrutiny and held that Florida's interest in protecting public health and preventing cruelty to animals could have been addressed through less restrictive means such as regulations regarding disposal of organic waste.[124]

While the Court in *Lukumi* appeared to clarify the standard for free exercise claims, ten years later, in *Locke v. Davey*, the Court confused the standard by holding that a Washington state statute, which explicitly excluded students pursuing a "degree in theology" from the state's honor scholarship program, did not require strict scrutiny.[125] The Court contrasted this provision with the statute at issue in *Lukumi*, arguing that "[i]n the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite . . . . The State has merely chosen not to fund a distinct category of instruction."[126] Having found no presumption against the constitutionality of the statute, the Court upheld the Washington law.[127] Justice Scalia, who authored the majority opinion in *Smith*, dissented, arguing that the majority in

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120 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538–39 (1993) (applying strict scrutiny where the law was applied in a discriminatory manner).

121 *Id.*

122 *See id.* at 537 (noting that hunting, euthanasia, and pest control were allowed).

123 *Id.* at 538.

124 *Id.* at 538–39.

125 Locke v. Davey, 540 U.S. 712, 715–16 (2004).

126 *Id.* at 720–21.

127 *Id.* at 725.

Locke departed from precedent by endorsing a "public benefits program that facially discriminates against religion."[128]

The vague definition of general and neutral applicability offered by the Supreme Court has also led to varied interpretations by lower courts. In *Blackhawk v. Pennsylvania*[129] and *Falwell v. Miller*,[130] the courts found that the statutes at issue were not neutral and generally applicable, and thus were subject to strict scrutiny. The state constitutional provision at issue in *Falwell* was found to be neither neutral nor generally applicable because on its face it discriminated against churches by providing that churches could not incorporate under state law.[131] In *Blackhawk*, the court found the statute neutral on its face but said the law was applied in a non-neutral way that discriminated against religious individuals.[132] In each case, the court held that the statute failed to satisfy strict scrutiny and therefore violated the Free Exercise Clause.[133] In contrast to *Falwell* and *Blackhawk*, in *Wirzberger v. Galvin*, the First Circuit found that a Massachusetts constitutional provision barring initiative amendments to the state constitution related to "religion, religious practices or religious institutions"[134] did not violate the Free Exercise Clause.[135] The court provided only a brief analysis of the plaintiffs' free exercise claims, offering several reasons for upholding the statute[136] but failing to explain why a statute that specifically singles out initiatives related to "religion, religious practices or religious institutions" should be considered neutral and generally applicable.[137]

Cases such as *Locke*, *Lukumi*, *Blackhawk*, and *Wirzburger* demonstrate that through its decision in *Smith*, the Court has not only reduced the general

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[128] *Id.* at 726 (Scalia & Thomas, JJ., dissenting).

[129] 381 F.3d 202 (3d Cir. 2004).

[130] 203 F. Supp. 2d 624 (W.D. Va. 2002).

[131] *Id.* at 628, 630–31.

[132] *Blackhawk*, 381 F.3d at 209.

[133] *See id.* at 214 (noting that even if the state had a compelling interest, the application of the statute was not the least restrictive means of promoting that interest); *Falwell*, 203 F. Supp. 2d at 632 (holding that since the state did not offer a compelling interest, the provision failed the strict scrutiny test).

[134] Wirzburger v. Galvin, 412 F.3d 271, 275 (1st Cir. 2005) (citing MASS. CONST. amend. art. XLVIII, pt. 2, §2).

[135] *Id.* at 282.

[136] *See id.* at 280–82 (concluding that the provision at issue did not violate the Free Exercise Clause because it did not infringe on the plaintiffs' freedom of religious belief; did not distinguish among particular religious groups or affiliations, and instead applied equally to all initiatives bearing any relation to religion and to all citizens regardless of their religious beliefs; did not prohibit religious conduct or religious practices; and was not motivated by religious animus).

[137] *Id.* at 275 (citing MASS. CONST. amend. art. XLVIII, pt. 2, §2).

standard for free exercise cases from one of strict scrutiny to one of general and neutral applicability, it has also failed to articulate a clear test for determining general and neutral applicability. The Court's current standard thus offers little protection or predictability for free exercise claimants. The section below attempts to define the scope of protection that the *Smith* standard provides for religious objectors in particular, concluding that while the Free Exercise Clause might still offer some protection for religious objectors, it is severely limited and is unlikely to arise in the context of laws establishing same-sex rights.

2. *Application of the Smith Standard in Religious Objector Cases*

Two cases illustrate the limited scope of protection available to religious objectors under the Free Exercise Clause. The first, *Stormans, Inc. v. Selecky*,[138] which arose in the context of pharmacists' objections to dispensing oral contraceptives, shows that the *Smith* standard may protect religious objectors from liability when the primary intent of the statute is to restrict the rights of religious objectors, but such an intent can be difficult to prove. *North Coast*, the second case (already discussed in the Introduction), illustrates the failure of the *Smith* standard to protect religious objectors from liability under civil statutes that give rights to same-sex couples.

a. Stormans*: Legislative Intent to Restrict Religious Objectors*

Over the past few years, a number of states have passed laws allowing pharmacists to refuse to fill prescriptions for oral contraceptives because of religious or moral objections.[139] In 2006, Washington's state Board of Pharmacy issued proposed rules addressing, among other things, pharmacists' refusal to dispense lawfully prescribed medication.[140] After receiving public comments, the Board adopted new regulations in 2007 that required pharmacies to fill all lawful prescriptions.[141] The regulations exempt

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[138] 571 F.3d 960 (9th Cir. 2009).

[139] For an overview of state legislation regarding the rights and duties of pharmacists, see NAT'L CONFERENCE OF STATE LEGISLATURES, PHARMACIST CONSCIENCE CLAUSES: LAWS AND LEGISLATION (2009), http://www.ncsl.org/programs/health/ConscienceClauses.htm.

[140] *Stormans*, 571 F.3d at 964. According to the district court, one of the early proposals would have allowed state-licensed pharmacists to refuse to dispense medication as long as the pharmacy or pharmacist did not "obstruct a patient's effort to obtain lawfully prescribed drugs or devices." Stormans v. Selecky, 524 F. Supp. 2d 1245, 1250–51 (W.D. Wash. 2007), *rev'd*, 571 F.3d 960 (9th Cir. 2009).

[141] *Stormans*, 571 F.3d at 965–66. A statement accompanying the regulations said that a pharmacy may accommodate an individual pharmacist's religious or moral objections, but the pharmacy itself may not refuse

pharmacies from filling prescriptions for certain reasons, such as lack of payment, suspicion that the prescription is fraudulent, lack of necessary equipment, or unavailability; but the regulations do not provide an exemption for religious objectors.[142] In response, a group of pharmacists filed for a preliminary injunction, alleging that the regulations violated their right to free exercise under the U.S. Constitution.[143]

The district court decision in *Stormans v. Selecky* and the Ninth Circuit's later reversal of that decision show that it will be difficult for religious objectors to claim that a civil statute or regulation is anything but neutral and generally applicable. The district court applied the *Smith* analysis to enjoin Washington's "duty to fill" requirement,[144] on the ground that there was sufficient evidence that the newly imposed rule was not a valid law of neutral and general applicability.[145] Rather, it was passed to limit the free exercise rights of pharmacists by requiring them to act contrary to their religious beliefs.[146]

The district court noted that the regulations were facially neutral, applying to all pharmacists and all types of medication,[147] but it looked beyond the plain language of the rule in evaluating whether it was neutral and generally applicable. Based on the history behind the rule and the news releases referring to complaints about pharmacists who refused to fill emergency contraceptives the court concluded that the evidence "strongly suggests that the overriding objective of the subject regulations was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medication."[148] The court further determined that the regulations were not generally applicable, noting, "[f]rom the very beginning of this issue, it appears that the focus of the debate has been on Plan B and on religious

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to dispense the medication. *Id.* at 966–67. Individual pharmacist plaintiffs, however, claimed that the absence of a moral or religious exemption for pharmacies would cause them to quit or lose their jobs. *Id.* at 967.

142 *Id.* at 966 n.5.

143 *Id.* at 1255.

144 *Stormans*, 524 F. Supp. 2d at 1266. For a discussion of the debate over pharmacist refusal clauses, see Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469 (2006), and for a discussion of the rights and obligations at issue in "duty to fill" laws, see Norey, *supra* note 64.

145 *Stormans*, 524 F. Supp. 2d at 1259–62.

146 *Id.*

147 *Id.* at 1257.

148 *Id.* at 1259.

objection to dispensing that drug."[149] Finally, the court noted that there was no evidence that any individual in the State of Washington had been unable to obtain an emergency contraceptive because of a pharmacist's refusal to dispense the medication,[150] ultimately concluding that the evidence did not support the state's contention that the regulations advanced a compelling state interest and were narrowly tailored for that purpose.[151]

The Ninth Circuit reversed the district court's opinion, on the ground that the legal standard for preliminary injunctions had changed since the district court issued its opinion. The Ninth Circuit further held that the district court erred in finding that the regulations were not neutral and generally applicable.[152] According to the Ninth Circuit, the district court should not have considered the legislative history of the challenged regulation. It noted that the district court relied on the *Lukumi* decision in its consideration of legislative history, but only Justices Kennedy and Stevens joined the portion of the *Lukumi* opinion discussing legislative history.[153]

The analysis of the district court in *Stormans* cautions states against intentionally limiting the free exercise of religious individuals and organizations in favor of other groups or classes.[154] However, the Ninth Circuit's opinion shows that religious objectors are unlikely to succeed in challenging the constitutionality of such state laws.. One might question the Ninth Circuit's conclusion that legislative history may not be incorporated into a free exercise analysis,[155] but the court's decision highlights an important point—unless courts can point to legislative history evidencing a clear intent to limit free exercise of religion, most civil statutes and regulations will be deemed a neutral and generally applicable law, subject only to rational basis scrutiny under *Smith*. Whether it is because courts are unwilling to review legislative history or because that legislative history does not evidence a clear intent to prohibit free exercise, most civil statutes will be deemed neutral and

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[149] *Id.* at 1260. For a description of Plan B, a hormonal emergency contraceptive, see *Stormans v. Selecky*, 571 F.3d 960, 965 (9th Cir. 2009).

[150] *Stormans*, 524 F. Supp. 2d at 1260.

[151] *Id.* at 1264. Because the plaintiffs demonstrated a likelihood of success on the merits, the court granted a preliminary injunction. *Id.* at 1266.

[152] *Stormans*, 571 F.3d at 977–79.

[153] *Id.* at 981–82.

[154] *Stormans*, 524 F. Supp. 2d at 1259 (noting that the policy was not neutral when enacted with the objective of preventing pharmacists from exercising their rights of conscience).

[155] The court itself notes, "[w]e may discern with certainty only that Chief Justice Rehnquist and Justices Scalia and Thomas did not join Part II.A.2 of the opinion due to disagreement with Justice Kennedy's use of legislative history." *Stormans*, 571 F.3d at 982 n.13.

generally applicable unless applied in a discriminatory manner. *North Coast* illustrates this point in the context of civil laws affording rights to same-sex couples.

b. North Coast*: Civil Rights Statutes and Religious Objectors*

While the decision in *Stormans* shows that the Free Exercise Clause might still place some limits on state actions that compel professionals to perform duties contrary to their religious beliefs, the decision in *North Coast* demonstrates the inadequacy of the *Smith* test to resolve most of the conflicts that arise between laws protecting same-sex couples and the freedom of religious objectors. Recall that in *North Coast*, a lesbian woman brought suit against two doctors at a fertility clinic who refused to perform IUI for her because doing so would have violated their religious beliefs.[156] The plaintiff claimed that the doctors violated her rights under California's civil rights statute, and the doctors raised defenses of free exercise under the federal and state constitutions. Applying the *Smith* test, the California Supreme Court held that the Unruh Civil Rights Act is a valid law of neutral and general applicability.[157] It therefore, found that the application of the Unruh Civil Rights Act did not violate the defendants' right of free exercise. As a result, if the defendants' refusal to perform IUI for the plaintiff was based on the plaintiff's sexual orientation,[158] the defendants violated the civil rights statute and are therefore liable to the plaintiff.[159] The opinion in *North Coast* demonstrates that, in applying the *Smith* test, courts are not likely to find that the Free Exercise Clause requires an exemption from laws that were passed to protect the rights of a separate class of individuals rather than to explicitly prevent the religious or free exercise rights of another class of individuals.[160]

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[156] For an in-depth discussion of the legal rights and duties implicated in the newly emerging field of Artificial Reproductive Technology, including IUI, see Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKLEY J. GENDER L. & JUST. 18 (2008).

[157] N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 966 (Cal. 2008). The court's analysis is brief in comparison to the analysis performed in most of the other cases referenced in this Part.

[158] The defendants maintained that their refusal to perform IUI for the plaintiff was based on her marital status rather than her sexual orientation. The trial court determined that there was a dispute of material fact on this issue that must be resolved at trial. Thus, the issue before the California Supreme Court was whether the defendants could assert a valid First Amendment defense if their actions were based on plaintiff's sexual orientation. *Id.* at 963, 970.

[159] *Id.* at 970.

[160] Although *North Coast* involved a statutory right, there is no reason to suspect that courts would apply a different analysis where there is a state constitutional right to marry for same-sex couples. The one distinction is that when bringing a constitutional claim, a plaintiff might be required to show that the private

As long as legislative history emphasizes the rights of the protected group rather than targeting religious objectors, the law will be viewed as neutral and generally applicable.

B. The Limited Promise of Other U.S. Constitutional Provisions

In the wake of *Smith*, plaintiffs might invoke other constitutional provisions to protect religious conduct. These other provisions may be used in one of two ways, neither of which offers much promise for religious objectors. The first is by pairing a free exercise claim with a claim under another constitutional provision. The Court in *Smith* suggested that even where the law at issue is neutral and generally applicable, such "hybrid rights" might justify a higher level of scrutiny than that applied to a free exercise claim alone.[161] The scope of this protection is limited, however, because lower federal courts have been hesitant to recognize the existence of other constitutional rights in free exercise cases unless these other constitutional rights are obviously implicated. No such correlative right is obvious in the case of religious objectors who refuse to serve same-sex couples.[162]

Rather than pairing another constitutional right with a free exercise right, claimants may choose to invoke an alternative provision of the Constitution that would require the court to apply a higher level of scrutiny. The Due Process Clause and the Equal Protection Clause are two potential sources, but neither offers a ready solution for religious objectors. At least one scholar has argued that the Court should recognize a general right of conscience under the Due Process Clause that would require courts to balance claims of competing interests such as those arising in the context of same-sex marriage.[163] While

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individual or organization alleged to have engaged in discrimination is a state actor. While it is doubtful that the plaintiff in *North Coast* could have established that the doctors were state actors, the question of whether clergy members are state actors in performing or refusing to perform marriages is a much closer issue because they are licensed by the state to solemnize marriages. *See* Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in* EMERGING CONFLICTS, *supra* note 20, at 103, 113–16.

[161] *See* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

[162] *See, e.g.*, *id.* (noting that although a hybrid of constitutional rights may raise the level of scrutiny, no other constitutional rights were at issue in the case); *North Coast*, 189 P.3d at 967 (rejecting defendants' claims that their refusal to perform IUI was grounded in both free speech and free exercise rights under the First Amendment).

[163] *See* Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, *in* EMERGING CONFLICTS, *supra* note 20, at 123, 138 (arguing for a right of conscience under the Due Process Clause).

this approach would serve as an effective way of resolving conflicts between the right to same-sex marriage and the right to free exercise, it would require a significant reformulation of the Court's due process jurisprudence.[164] It seems unlikely that the Court would be willing to expand the scope of the Due Process Clause to engage in a balancing test that it was unwilling to recognize under the First Amendment. A claimant could bring a claim under the Equal Protection Clause,[165] arguing either (1) that the law at issue discriminates against a protected class on its face or in application, and therefore requires strict scrutiny, or (2) that the law lacks a rational basis and is therefore unconstitutional.[166] However, if the allegation is that the provision discriminates on the basis of religion, the analysis under the Equal Protection Clause will generally mirror the analysis under the neutral and general applicability test of *Smith* in that both tests would apply rational basis scrutiny to a law that is neutral on its face and in application, and both would apply strict scrutiny to a law that discriminates against religion.[167] Thus, like *Smith*, the Equal Protection Clause will almost always warrant rational basis review for civil laws protecting same-sex couples like the civil rights statute in *North Coast*.

C. State Constitutional Interpretations: An Ineffective Solution

As demonstrated below, in several states, courts have recognized that the free exercise clause—or its equivalent—in the state constitution provides greater protection to religious claimants than the First Amendment. While it is notable that some states provide greater constitutional protection for the free exercise of religion than the protection afforded under the First Amendment since *Smith*, in practice the application of heightened scrutiny does not automatically yield different outcomes for free exercise claimants. For example, in *Rupert v. City of Portland*, the Supreme Court of Maine subjected

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[164] For an overview of fundamental rights recognized by the U.S. Supreme Court under the Due Process and Equal Protection Clauses, see CHEMERINSKY *supra*, note 35 at 791–919.

[165] *See* Marcavage v. City of Chicago, 467 F. Supp. 2d 823 (N.D. Ill. 2006) (addressing claims under the Illinois Religious Freedom Restoration Act and the Equal Protection Clause).

[166] For a basic overview of the appropriate analysis under the Equal Protection Clause, see CHEMERINSKY, *supra* note 35, at 669–74.

[167] The one distinction between the two tests arises where courts require the plaintiff to show a substantial burden before implementing the *Smith* analysis. In these instances, a claimant might win under equal protection but not under free exercise. *See* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 987–88 (N.D. Ill. 2003) (finding an equal protection violation but rejecting plaintiff's free exercise claim where a zoning ordinance was applied to religious organizations in a different manner). The court in *Vineyard* notes the oddity of this result. *Id.*

a seizure of drug paraphernalia to strict scrutiny under the state free exercise clause.[168] The court ultimately upheld the seizure, finding that it served a compelling government interest and was the least restrictive means available.[169] Similarly, courts in Washington have recognized that the free exercise clause of the Washington Constitution affords more protection than the Free Exercise Clause of the U.S. Constitution.[170] However, as the Supreme Court of Maine found in *Rupert*, the Washington court in *State v. Balzer* found that the state law prohibiting possession of marijuana satisfied a compelling government interest and was the least restrictive means for promoting that interest.[171] The court, therefore, held that there was no free exercise violation.[172]

The free exercise claims of those who object to same-sex marriage are analogous to the free exercise claims brought by landlords who refuse to rent to unmarried heterosexual couples. Even in states that apply the same or similar forms of heightened scrutiny, landlords have encountered mixed results in court. The supreme court of at least one state, Minnesota, has held that a landlord's refusal to rent to an unmarried, cohabiting heterosexual couple did not violate the couple's rights and was protected under the state constitution.[173] Although *State v. French* demonstrates that state constitutional provisions may protect religious objectors, the reasoning of the court in that case may not necessarily apply to a situation involving discrimination against same-sex couples. Because Minnesota law prohibited fornication, the state supreme court reasoned that the legislature could not have intended to include unmarried, cohabiting couples within the definition of "marital status" under the state antidiscrimination statute, and thus the state did not have a compelling interest in prohibiting discrimination against such couples.[174] However, *French* was decided in 1990, and the U.S. Supreme Court's decision thirteen years later in *Lawrence* has eradicated any analogous argument regarding cohabitation of same-sex couples.[175]

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168 Rupert v. City of Portland, 605 A.2d 63, 66 (Me. 1992).
169 *Id.*
170 State v. Balzer, 954 P.2d 931, 935–36 (Wash. Ct. App. 1998).
171 *Id.*
172 *Id.* at 940–42.
173 State v. French, 460 N.W.2d 2, 7–9 (Minn. 1990).
174 *Id.*
175 *See supra* notes 31–32 and accompanying text.

Further, the *French* decision stands in contrast to the holdings in similar cases in other states. For example, courts in Alaska[176] and California[177] have held that landlords cannot claim a religious exemption from state housing statutes even if the state constitution requires application of a higher level of scrutiny than the U.S. Constitution. The Supreme Court of California found that an antidiscrimination provision of a state housing statute did not burden the landlord's free exercise rights because the landlord's religion did not require her to rent out apartments.[178] Similarly, the Supreme Court of Alaska held that although the state's anti-discrimination law did burden the landlord's free exercise rights, the state had a compelling interest in prohibiting housing discrimination against unmarried cohabiting couples.[179] Other states have similarly held that whether an antidiscrimination provision of a state housing law violates the free exercise rights of landlords depends on whether the state can establish a compelling interest for the antidiscrimination provision.[180]

North Coast further illustrates that applying heightened scrutiny to free exercise claims under a state constitution will not guarantee a victory for religious objectors. In addition to dismissing the defendants' First Amendment defense, the court in *North Coast* determined that the defendants had no valid defense under the California Constitution.[181] The court concluded that even if strict scrutiny were to apply to cases arising under the state constitution, the state still had a compelling interest in "ensuring full and equal access to medical treatment irrespective of sexual orientation," and the Unruh Civil Rights Act provided the least restrictive means of accomplishing that goal.[182]

This holding regarding the California Constitution is significant when examining the most effective channels for enhancing protection of religious objectors to same-sex relationships. The court's opinion demonstrates the state's ability to circumvent efforts to protect religious objectors through

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176 Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

177 Smith v. Fair Employment & Housing Comm'n, 913 P.2d 909 (Cal. 1996).

178 *Smith*, 913 P.2d at 929, 931 (holding that even if the state constitution required a higher level of scrutiny than the U.S. Constitution, the landlord would have no valid objection because the higher level of scrutiny would be the same scrutiny applied under RFRA, and under that standard the landlord still could not demonstrate a burden on free exercise).

179 *Swanner*, 874 P.2d at 281–84.

180 Att'y Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994); McCready v. Hoffius, 459 Mich. 1235 (Mich. 1999).

181 N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 968 (Cal. 2008).

182 *Id.* The court failed to provide a detailed analysis of the narrow tailoring prong, concluding rather summarily that the statute is the least restrictive means available.

statutes that merely raise the level of scrutiny applied to all categories of free exercise claims.[183] Even where a higher level of scrutiny applies, the court may find that the state has a compelling interest in preserving the right to same-sex marriage or prohibiting discrimination on the basis of sexual orientation.[184] For this reason, laws such as RLUIPA, discussed below, which target specific activities or categories of claimants, might be more successful in protecting the conscience rights of religious claimants.

IV. POTENTIAL LEGISLATIVE SOLUTIONS: THE RANGE OF STATUTORY RESPONSES TO *SMITH*

Federal and state responses to *Smith* illustrate the varied ways to extend greater statutory protections to religious objectors. Although the Court in *Smith* was unsympathetic to the claimants' argument that their First Amendment rights had been violated, the Court made it clear that states and Congress are free to go beyond the minimal requirements of the U.S. Constitution and provide greater protection for the religious freedom of individuals.[185] These protections are generally found in: (1) statute-specific exemptions for religious objectors; (2) state or federal laws that effectively require the application of strict scrutiny to burdens on free exercise; and (3) RLUIPA, which raises the level of scrutiny for two specific types of claims—those made by prisoners against state and federal governments, and those regarding land use regulations.

A. Statute-Specific Exemptions

As noted in *Smith*, several states recognized statutory exemptions to state controlled substance laws prior to the Court's decision.[186] After *Smith*, other states passed laws exempting the use of peyote in religious ceremonies from state bans on controlled substances.[187] For example, Oregon law now explicitly provides for an affirmative defense where peyote is used in the

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[183] *See id.* (arguing that even if a higher level of scrutiny applies under the state constitution, the defendants' free exercise claims would still fail).

[184] *See id.*

[185] Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 890 (1990).

[186] *See id.* (citing ARIZ. REV. STAT. ANN. §§ 13-3402(B)(1)–(3) (1989); COLO. REV. STAT. § 12-22-317(3) (1985); N.M. STAT. ANN. § 30-31-6(D) (West 1989)).

[187] *See, e.g.*, OR. REV. STAT. ANN. § 475.840 (West Supp. 2009).

practice of a religious belief in a manner that is not dangerous to the user or others in close proximity.[188]

As demonstrated in the discussion above regarding the history of religious conscience rights, the recognition of explicit statutory exemptions from certain laws is not a recent phenomenon.[189] In addition to the statutory exemptions for conscientious objectors to military service and oath-swearing mentioned above, Congress and the states have provided exemptions to many other types of statutory and constitutional rights, including civil rights statutes and the judicially recognized rights to abortion and contraception. Churches and other religious organizations generally enjoy certain exemptions from employment discrimination laws.[190] For example, Title VII of the Civil Rights Act of 1964 provides that religious organizations may use religious criteria in hiring. Courts also have recognized a further implicit exemption from discrimination laws known as the "ministerial exception," which applies in cases that involve the hiring and firing of clergy.[191]

The examples of exemption legislation most relevant to the conflict addressed here are federal and state "conscience clauses" that protect doctors who refuse to perform abortions and sterilization procedures and pharmacists who refuse to dispense contraceptives.[192] For example, federal legislation, commonly referred to as the Church Amendment, prohibits federal funding of hospitals that require doctors to perform an abortion over religious objections.[193] These state and federal conscience clauses do not currently provide protection for religious objectors to statutes that grant rights to same-sex couples. However, because the vast majority of such state statutes target specific procedures like abortion or sterilization, it is unlikely they can be invoked to address objections outside of the health care context.[194] Some states have recently sought to extend these protections to pharmacists, but this issue remains controversial.[195] As noted earlier, New Hampshire, Maine, and Vermont provide that churches and members of the clergy are not required to

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188 *Id.*

189 *See supra* Part II.B (discussing the history of statutory exemptions in the U.S.). *See also* GREENAWALT, *supra* note 88, at 50.

190 *Id.* at 382–84.

191 *Id.*

192 *See* Wilson, *supra* note 20, app. at 299 (providing excerpts from state conscience clauses).

193 42 U.S.C. § 300(a)-7 (2006)

194 *See* Wilson, *supra* note 20, app. at 299.

195 *See supra* Part II.A.2.a (describing the controversy that erupted in the state of Washington over pharmacists' rights to refuse to dispense Plan B).

participate in same-sex marriage ceremonies, but in Maine and Vermont these exemptions do not extend to other activities or other types of religious objectors.[196] It is not clear how far New Hampshire's protections extend. Although these protections do cover housing and services related to the marriage ceremony, they may or may not cover services like adoption and fertility treatments.[197]

Thus far, no federal law extends protections similar to those of the Church Amendment to other contexts. The outgoing administration of President George W. Bush issued a regulation denying federal funding to health care facilities that refuse to protect employees' rights of conscience.[198] The regulation is intended to protect doctors, nurses, and other workers who do not wish to participate in procedures that go against their moral or religious beliefs.[199] This was the first rule issued by the federal government that could potentially protect health care providers like the doctors in *North Coast*, and it sparked controversy that led some members of Congress to consider passing a statute to override it.[200] A statute may prove unnecessary since President Barack Obama's administration has issued a proposal to rescind the Bush regulation.[201]

The controversy surrounding the Bush regulation highlights two potential problems. The first is characteristic of using regulations, as opposed to statutes, to provide rights in general, and the second arises from the content of this particular regulation. First, executive orders and regulations can be overridden by legislation or easily rescinded by subsequent administrations.[202] Second, those seeking to overturn the regulation argue that it will pose barriers to healthcare and will prevent patients from receiving the care they want and

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196 *See supra* Part III.A.3.

197 2009-61 N.H. Rev. Stat. Ann. Adv. Legis. Serv. 2 (LexisNexis) (referring to "services, accommodations, advantages, facilities, goods or privileges" related to "the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage").

198 Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88); *see also* Rob Stein, *Rule Shields Health Workers Who Withhold Care Based on Beliefs*, WASH. POST, Dec. 19, 2008, at A10 (describing the regulation and the associated controversy).

199 *Id.*

200 *Id.*

201 Rescission of the Regulation Entitled, "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 74 Fed. Reg. 10207 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. pt. 88).

202 *See id.* (proposing to rescind the Bush regulation only a few months after its implementation); *see also* Stein *supra* note 198 (discussing the efforts of various members of Congress to pass legislation that would trump the regulation).

need.[203] This latter issue could be addressed by including a clause requiring workers to act against their beliefs only in emergency situations where no one else could perform the necessary task.[204] This consideration could be factored into the narrow tailoring portion of a scrutiny analysis such as the one proposed in Part V. The consideration of alternatives might spur health care facilities to implement protocols for ensuring that in non-emergency situations, if there is another worker who can perform the procedure, then that worker performs the procedure instead.

B. Federal and State RFRAs (Applying Strict Scrutiny Across the Board)

In response to *Smith*, Congress and the states sought to implement a statutory scheme that would subject state and federal government actions that burden free exercise to strict scrutiny. This movement began in 1993, when Congress passed RFRA.[205] The law sought to replace the rational basis standard for laws of general and neutral applicability announced in *Smith* with a strict scrutiny standard.[206] The subsections below reveal that the success of RFRA in its application to the states was short-lived. The current patchwork of state RFRAs is not certain to offer protection for religious objectors either.

1. The Failure of the Federal RFRA

Congress relied entirely on its power under Section 5 of the Fourteenth Amendment to pass RFRA.[207] In 1997, in *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional as applied to the states because Congress lacked the authority to pass the statute under Section 5 of the Fourteenth Amendment.[208]

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[203] *Id.*

[204] *See* Wilson, *supra* note 20, app. at 310 (referring to state legislation that limits exemptions to non-emergency situations).

[205] 42 U.S.C. §§ 2000bb–2000bb-4.

[206] Michael Paisner, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 540 (2005).

[207] Some scholars have argued that Congress could have relied on other powers instead of, or in addition to, Section 5 of the Fourteenth Amendment. *See, e.g.*, Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 576 (1998) ("A constitutional strategy that diversified the underpinnings of RFRA was available and far preferable to what was used; stools always stand better on three or more legs than on one.").

[208] City of Boerne v. Flores, 521 U.S. 507 (1997).

In retrospect, the Court's decision in *Boerne* was not as devastating to the cause of religious liberty as one might think.[209] A review of federal regulations and state attorney general decisions during the three-and-a-half-year period between the Act's passage and the *Boerne* decision demonstrates that RFRA had little impact on religious liberty issues.[210] In a few cases, claimants achieved victories that they would not otherwise have secured under the First Amendment, but most of the cases brought under RFRA were unsuccessful.[211] During this period, RFRA seems to have enjoyed the most success in cases brought by prisoners, but "even there RFRA probably did not create any dramatic alteration in the climate of relations between inmates and administrators on matters of religious liberty."[212]

Ira Lupu, who has examined the application of RFRA to states before *Boerne*, has offered various explanations for the failure of RFRA. These range from the reluctance of courts to grant religious exemptions[213] to the reliance by courts on the disjointed pre-*Smith* case law regarding burdens and interests in the context of free exercise cases.[214] Courts interpreted the language requiring a "substantial burden" on religion in a way that "placed the bar very high for RFRA claimants."[215] Many of the RFRA claims decided on the merits were unsuccessful because the court found there was no "substantial burden" on religion.[216] In cases where the courts did find a substantial burden, the courts also found a compelling government interest and then used a relatively lax standard for determining whether the state used the least restrictive means for accomplishing its stated compelling interest.[217] "Rather than ask whether the state's means were *least* restrictive . . . some courts asked whether the alternative, less religion-restrictive means were so expensive, cumbersome, or inconvenient that the state could not reasonably be expected to use them."[218]

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209 *See* Lupu, *supra* note 207, at 585 (concluding that between passage of RFRA and the Court's decision in *Boerne*, "RFRA failed to produce any substantial improvement in the legal atmosphere surrounding religious liberty in the United States").

210 *Id.* at 588–90.

211 *See id.* at 591 (noting that "143 of the 168 [claims brought by prisoners] produced denials of relief, only twenty-five claims produced grants of relief (for an overall win percentage of 15% of cases decided on the merits), and . . . nine of these twenty-five were in prisoner litigation, which typically involved the most basic infringements of religious liberty").

212 *Id.* at 585.

213 *Id.* at 593 ("Courts seem especially uncomfortable with claims of religious exemption.").

214 *Id.* at 594.

215 *Id.*

216 *Id.*

217 *Id.* at 596.

218 *Id.*

2. *The Limited Success of State RFRAs*

After the Court ruled RFRA unconstitutional as applied to the states, several states passed their own versions of the law. At least thirteen states have adopted an analogous state statute or constitutional provision that effectively applies strict scrutiny to state burdens on the free exercise of religion.[219] The text of these provisions varies slightly from state to state, but every version contains a provision similar to this one: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both (1) in furtherance of a compelling governmental interest [and] (2) the least restrictive means of furthering that compelling governmental interest."[220] Thus, all state RFRA statutes effectively require the application of strict scrutiny in at least some instances where religious exercise is burdened.[221]

The most significant distinctions among state statutes relate to the terms and definitions used to describe the type of activity protected and the level of burden the claimant must show for strict scrutiny to apply. State statutes refer to the category of protected religious activity using one of the following three terms: "religious exercise,"[222] "exercise of religion,"[223] or "free exercise of religion."[224] While these terms are generally synonymous, and indeed are similarly defined, slight variations among definitions could conceivably impact the outcome of litigation. Some states do not define the relevant term at all.[225]

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[219] ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. § 761.01 (West 2005); IDAHO CODE ANN. §§ 73-401–404 (2009); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2001); MO. ANN. STAT. § 1.3 (West Supp. 2009); N.M. STAT. ANN. § 28-22 (West 2009); OKLA. STAT ANN. tit. 51, §§ 251–258 (West 2008); 71 PA. CONS. STAT. ANN. §§ 2401–2407 (West Supp. 2009); R.I. GEN. LAWS § 42-80.1 (2006); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon 2005).

[220] ARIZ. REV. STAT. ANN. § 41-1493.01(C) (2004).

[221] For an example of the application of strict scrutiny to free exercise claims, see Sherbert v. Verner, 374 U.S. 398 (1963). Some statutes clarify that the strict scrutiny test applies even to rules of general applicability, thus distinguishing the statutory test from the *Smith* test. *See* ALA. CONST. art. I, § 3.01; 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); MO. ANN. STAT. § 1.302(1) (West Supp. 2009); N.M. STAT. ANN. § 28-22-3 (West 2009); OKLA. STAT. ANN. tit. 51, § 253(A) (West 2008); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005).

[222] ALA. CONST. art. I, § 3.01.

[223] *E.g.*, ARIZ. REV. STAT. ANN. § 41-1493(2) (2004); CONN. GEN. STAT. ANN. § 52-571b(b) (West 2005).

[224] *E.g.*, MO. ANN. STAT. §1.302(1) (West Supp. 2009); 71 PA. CONS. STAT. ANN. § 2404 (West Supp. 2009).

[225] ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. ANN. § 52-571b (West 2005); R.I. GEN. LAWS § 42-80.1 (2006).

Others define the term in accordance with the U.S. or state constitution.[226] Florida defines "exercise of religion" as "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[227] Similar definitions are found in other states.[228] New Mexico employs similar language but without the statement regarding centrality to a larger system of religious belief.[229]

Similar variations exist with respect to the burden requirement. Some states require a "substantial burden" on free exercise,[230] while others require merely a "burden."[231] Further, among the states that require a "substantial burden," the precise definition varies. Some states choose not to define the term at all,[232] and a few explicitly define "burden" or "substantial burden" as to "inhibit" or "curtail" religious activity.[233] Pennsylvania lists four acts that may constitute a substantial burden.[234] A few states note that the adjective "substantial" is included merely to prevent trivial claims, thereby setting the bar for demonstrating the required level of burden relatively low.[235]

The compelling interest test under RFRA is designed to apply to all claims, but some states have more specific provisions for certain categories, such as claims by prisoners,[236] or provide that certain claims are not covered by the

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[226] OKLA. STAT. ANN. tit. 51, § 252(2) (West 2008); 71 PA. CONS. STAT. ANN. § 2403 (West Supp. 2009); S.C. CODE ANN. § 1-32-20(2) (2005).

[227] FLA. STAT. ANN. § 761.02(3) (West 2005).

[228] *See* ARIZ. REV. STAT. ANN. § 41-1493(2) (2004); IDAHO CODE ANN. § 73-401(2) (2009); 775 ILL. COMP. STAT. ANN. 35/5 (West 2001); MO. ANN. STAT. 1.302(2) (West Supp. 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (Vernon 2005).

[229] N.M. STAT. ANN. § 28-22-2(A) (West 2009).

[230] *See* ARIZ. REV. STAT. ANN. § 41-1493.01(C) (2004); FLA. STAT. ANN. § 761.03(1) (West 2005); IDAHO CODE ANN. § 73-401(5) (2009); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); S.C. CODE ANN. § 1-32-40 (2005).

[231] *See* ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. ANN. § 52-571b(b) (West 2005); *see also* N.M. STAT. ANN. § 28-22-3 (West 2009); R.I. GEN. LAWS §42-80.1-3 (2006) (using the term "restrict" instead of "burden").

[232] *See* ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. ANN. § 52-571b(b) (West 2005); FLA. STAT. ANN. § 761.03(1) (West 2005); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); S.C. CODE ANN. § 1-32-40 (2005).

[233] *See* IDAHO CODE ANN. § 73-401(5) (2009); OKLA. STAT. ANN. tit. 51, § 252(7) (West 2008).

[234] 71 PA. CONS. STAT. ANN. § 2403 (West Supp. 2009).

[235] ARIZ. REV. STAT. ANN. § 41-1493.01(E) (2004); IDAHO CODE ANN. § 73-402(5) (2009).

[236] *See* OKLA. STAT. ANN. tit. 51, § 254 (West 2008); 71 PA. CONS. STAT. ANN. §2405(g) (West Supp. 2009).

statute at all.[237] For example, under Texas law the statute cannot serve as a defense to violations of a federal or state civil rights law.[238]

Because state RFRAs were enacted relatively recently, their future effectiveness is uncertain. However, in at least some cases where courts have reached the merits, it appears that the same methods of interpretation that thwarted the intent of the federal RFRA have also surfaced. For the same reasons that higher levels of protection under state constitutions do not always lead to greater protection for religious objectors,[239] state RFRA statutes may not provide any more protection for religious objectors than federal or state constitutional claims. As with the federal RFRA, courts have used the "substantial burden" requirement to narrow the scope of state statutes.[240] Further, even where a court finds a substantial burden on religious exercise, the court may also find that the state action at issue survives strict scrutiny because the state has a compelling interest related to its action, and that action is the least restrictive means of furthering that interest.[241] These results may be explained by the fact that courts have looked to prior interpretations of the federal RFRA as a guide for interpreting state versions of the law. Even where state and federal law differ in important ways—such as the inclusion of a definition for "religious exercise" or "substantial burden"—these state statutes may not yield a result different from the federal RFRA.[242]

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[237] *See* MO. ANN. STAT. § 1.307(3) (West Supp. 2009) (providing that the statute cannot be used as a defense in personal injury cases, cases where a defendant is charged with possession of a weapon, or cases where a defendant is charged with the failure to provide child support or health care for a child's life-threatening condition); 71 PA. CONS. STAT. ANN. § 2406(b) (West Supp. 2009) (listing exceptions not covered by the statute, including criminal defense, health and safety, and reporting of abuse).

[238] TEX. CIV. PRAC. & REM. CODE ANN. § 110.011(a) (Vernon 2005).

[239] *See supra* Part III.C.

[240] *See*, *e.g.*, Warner v. City of Boca Raton, 420 F.3d 1308 (11th Cir. 2005); Seidman v. Paradise Valley Unified Sch. Dist., 327 F. Supp. 2d 1098, 1118 (D. Ariz. 2004) (granting summary judgment in favor of defendants with respect to plaintiffs' free exercise claims under the U.S. Constitution and state law, after finding that the plaintiffs "failed to show a substantial burden on the exercise of their religion" where they were required to remove a reference to "God" from an inscription in honor of their daughter that was to appear on wall tiles in a public school).

[241] *See* State v. Hardesty, 214 P.3d 1004, 1010 (Ariz. 2009) (rejecting a defendant's free exercise claim under Arizona's Free Exercise of Religion Act and holding that "there is no less restrictive alternative that would serve the State's compelling public safety interests and still excuse the conduct [possession of marijuana] for which Hardesty was tried and convicted.").

[242] *See* Steele v. Guilfoyle, 76 P.3d 99, 101–02 (Ok. Civ. App. 2003) (finding that a plaintiff failed to show that the state substantially burdened his religion even where the state statute at issue provided a relatively narrow definition of substantial burden). The statute at issue in *Steele* defined "substantially burden" as "to inhibit or curtail religiously motivated practice." OKLA. STAT. ANN. tit. 51, § 252(7) (West 2008).

C. The RLUIPA and the Prospect of Issue-Specific Federal Statutes

Though the Court struck down the federal RFRA as applied to the states, the current success of RLUIPA demonstrates that Congress may still have the power to pass a statute that would raise the level of scrutiny applied to claims by religious objectors. Following the demise of RFRA as applied to the states, Congress began to develop a narrower federal statute that could withstand a constitutional challenge. Instead of relying solely on Section 5 of the Fourteenth Amendment, as Congress had done with respect to RFRA, Congress harnessed powers from the Spending and Commerce Clauses to enact RLUIPA.[243] Because a sweeping statute applying to all free exercise claims would be too reminiscent of RFRA, Congress chose to focus on two specific areas where the rights of individuals and religious organizations have traditionally been curtailed by the states—the free exercise rights of prisoners and the land use rights of churches and religious organizations.[244]

Although both statutes require the application of strict scrutiny, RFRA applies only to certain categories of claims. In addition, RLUIPA defines certain terms that were initially undefined under RFRA. The first section of RLUIPA applies to land use regulations,[245] and the second section applies to institutionalized persons.[246] Both sections prohibit governments from "impos[ing] a substantial burden on the religious exercise of a person," unless the government can show that imposition of the burden is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[247] For both land use regulations and institutionalized persons, the statute applies where the burden is in relation to programs or activities that receive federal funding and where it affects—or would affect if removed—interstate or foreign commerce.[248]

Unlike some state RFRAs, the statute does not define "substantial burden." Instead, Congress relied on the courts to employ pre-*Smith* free exercise

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[243] *See generally* 42 USC §§ 2000cc–2000cc-5.

[244] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510 (2005).

[245] 42 USC § 2000cc.

[246] 42 USC §§ 2000cc-1.

[247] 42 USC §§ 2000cc(a)(1), 2000cc-1(3)(a). In the case of land use regulations "person" includes a religious assembly or institution. 42 USC §§ 2000cc(a)(1).

[248] 42 USC §§ 2000cc(a)(2), 2000cc-1(3)(b). These jurisdictional elements relate to Congress's authority to enact legislation under the Spending and Commerce Clauses.

jurisprudence to determine whether a substantial burden truly exists.[249] Though it does not define substantial burden, RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[250] and further clarifies that "the use, building, or conversion of real property for the purpose of religious exercise" is considered religious exercise of the person or entity that seeks to use the property for that purpose.[251] The plaintiff has the burden of proving that the government action has substantially burdened free exercise, but once this is achieved, the burden shifts to the government to prove that it has used the least restrictive means of achieving a compelling government interest.[252] The Act further requires that courts construe the language of the statute "in favor of a broad protection of religious exercise."[253]

Although the language of RLUIPA is similar to state and federal RFRA statutes, during RLUIPA's first few years of operation, claimants seem to have enjoyed greater success under it than under the federal or state RFRA statutes, particularly with respect to prisoner claims.[254] Part of this success has been attributed to Congress's definition of "religious exercise" in RLUIPA, which was initially absent from the federal RFRA.[255] Under the federal RFRA, many state and lower federal courts construed religious exercise narrowly, requiring either that conduct be mandated or compelled by the claimant's religion,[256] or be "central to" the religion to find in the claimant's favor.[257] The definitions of exercise of religion and substantial burden were thus intertwined under RFRA. A review of prisoner claims under the federal RFRA prior to *Boerne* shows that courts commonly concluded that there was no substantial burden because the conduct at issue was not central to, or mandated by, the prisoner's

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[249] Gaubatz, *supra* note 244, at 517.

[250] 42 USC § 2000cc-5(7)(A). Under this definition, conduct need not be mandated by the religion, and discretionary conduct also can receive protection if it is grounded in religious belief. Gaubatz, *supra* note 244, at 522.

[251] 42 USC § 2000cc-5(7)(B).

[252] 42 USC § 2000cc-2(b).

[253] 42 USC § 2000cc-3(g).

[254] *See* Gaubatz, *supra* note 244 (comparing the success of prisoner claims under RFRA with the success of claims under RLUIPA from 2001 to 2005).

[255] *Id.* at 505. Congress has since incorporated RLUIPA's definition of religious exercise into RFRA. 42 USC § 2000bb-2(4).

[256] *See* Gaubatz, *supra* note 244 at 510 (noting that the Eleventh, Fourth, Fifth, and Ninth Circuits, in addition to state and district courts, took this approach).

[257] *See id.* at 532 (noting the findings of the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, as well as state and district courts).

beliefs.[258] This has led some scholars to conclude that the inclusion of a broader definition of "religious exercise" under RLUIPA prevents courts from limiting the effect of RLUIPA because it discourages construing "religious exercise" narrowly.[259]

At least one study indicates that the distinctions between RFRA and RLUIPA, including the definition of the term "religious exercise" and the naming of specific categories of claims, have made an appreciable difference in the outcome of litigation. As of 2005, forty-six cases had addressed the merits in RLUIPA cases involving prisoners.[260] Of these cases, only seven were dismissed for failure to demonstrate a substantial burden on religious exercise.[261] This stands in contrast with prisoner claims brought under RFRA, of which seventy-five percent were dismissed. At least some claims regarding land use regulations have enjoyed similar success.[262]

V. A PROPOSED STATUTORY SCHEME FOR PROTECTING RELIGIOUS OBJECTORS

Because not all states provide statute-specific religious exemptions from laws that protect same-sex couples,[263] and because free exercise jurisprudence, as well as federal and state RFRA laws and RLUIPA, all fail to offer such exemptions, a new solution is needed to protect the religious liberty of those objecting to the establishment of same-sex relationships. Though at least one scholar has suggested that issues of conscience should be resolved through

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[258] *Id.* at 528.

[259] *Id.* at 505.

[260] *Id.* at 557.

[261] *Id.* at 569. Success under RLUIPA is not unlimited, however. *See, e.g.*, Fegans v. Norris, 537 F.3d 897, 906–08 (8th Cir. 2008) (holding that prison policies prohibiting male inmates from wearing beards and hair below the collar did not violate RLUIPA because the state has a compelling interest in prisoner safety and security, and the policy was narrowly tailored to serve that interest).

[262] *See, e.g.*, Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 353 (2d Cir. 2007) (finding that a zoning board's denial of a permit application for a religious school violated RLUIPA); Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 981 (9th Cir. 2006) (finding that a county's denial of a conditional use permit to build a Sikh temple on land zoned for agricultural use violated RLUIPA). *But see* Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (holding that a zoning ordinance that prohibited churches from operating in an industrial zone did not substantially burden religious exercise and therefore did not violate RLUIPA).

[263] See *supra* note 61 and accompanying text for a discussion of states that provide members of the clergy with religious exemptions from same-sex marriage laws.

social and economic, rather than legal or political, means,[264] the following sections explain that a statute protecting the right of conscience need not be as one-sided as legislation in this area has typically been. Section A compares the benefits of state and federal statutes and concludes that, although state statutes are preferable to federal ones because of limitations on congressional power, a federal statute is still needed. Thus section B proposes a federal law modeled after RLUIPA.

A. State vs. Federal Approaches

Unlike the conflict between the *federal* Constitutional right to abortion or contraception and the conscience rights of health care workers, the conflict discussed here pits the *state* rights of same-sex couples against the conscience rights of religious objectors.[265] Although in some respects this distinction indicates that the state would be the most appropriate forum for resolving the dispute, the need for uniformity and the unlikelihood that states will address the growing conflict suggest the need for a federal statute.

1. Benefits of State Solutions

State statutory solutions would be beneficial, and arguably better than federal ones, for two reasons. First, states possess broader authority to legislate than Congress. Congress's power to legislate is limited by the powers enumerated in the Constitution, but state legislatures are not similarly bound.[266] Additionally, Congress must ensure that statutes do not raise concerns of federalism or sovereign immunity under the Tenth and Eleventh Amendments,[267] but states may legislate freely without regard to these concerns as long as the legislation has not been preempted by federal law.[268] For these reasons, states may enact more comprehensive legislation in many areas, offering that offers greater protection to a broader class of potential claimants, than can Congress.

Second, most of the current rights of same-sex partners are rights conferred by state law. With the exception of a few internal government policies and two Supreme Court cases expanding rights for homosexuals (though not

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[264] *See* Vischer, *supra* note 22, at 95–98 (arguing for a marketplace approach to protect pharmacists' right of conscience).

[265] *See supra* Part I.A.

[266] *See* U.S. CONST. art. I, § 8 (listing the powers of Congress).

[267] U.S. CONST. amends. X, XI.

[268] *See infra* note 274 (discussing preemption).

recognizing a right to same-sex marriage or the treatment of homosexuals as a suspect class), same-sex partners do not enjoy special protection as a class under federal law.[269] The fact that the state is the source of the rights of same-sex couples could mean that the state is the most natural and appropriate forum for balancing these two sets of rights. However, as noted below, this fact also supports the use of a federal statute.

2. *Benefits of Federal Solutions*

Given the success of state conscience clauses in protecting the rights of doctors who refuse to perform abortions, one might wonder whether state statutes alone could provide sufficient protection for religious objectors to same-sex unions.[270] While state statutory exemptions like those in New Hampshire, Maine, and Vermont should be encouraged, there is reason to think that state statutes will not emerge in this area either as quickly or as uniformly as they did in the abortion context. By passing conscience clauses related to abortion, states were reacting to a newly recognized federal constitutional right that conflicted with the religious views of some doctors.[271] Here, the conflict arises from newly recognized *state* rights, which could make state solutions to the conflict less likely. If one views the conflict between same-sex rights and religious conscience rights as a showdown with just one winner and one loser,[272] states providing rights to same-sex couples may have already chosen a side.

Even if some states weigh in with statutory protections, it is unlikely that all states will create similar protections. This could lead to a patchwork of different levels of protection in different states similar to the existing variation in state health care conscience clauses.[273] In contrast, a federal statute would provide a uniform approach, or at least a minimum standard, for protecting religious objectors. Further, a federal statute would have the added benefit of preempting any conflicting state law that might impose an affirmative obligation on religious objectors.[274]

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269 *See supra* Part II.A.2 (describing the current rights of same-sex couples under federal law).

270 *See supra* Part IV.A (discussing state conscience clauses for pharmacists).

271 *See* Wilson, *supra* note 20, at 81–86 (describing legislative responses to protect doctors who refused to perform abortions in the wake of *Roe v. Wade*).

272 *See, e.g.*, Vischer, *supra* note 22 at 88 (criticizing scholars on both sides of the debate over the conscience rights of pharmacists for viewing the conflict as a "zero-sum game").

273 *See* Wilson, *supra* note 20, at 90 (describing variation in conscience clause protections).

274 *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.7 (2000) ("The State concedes, *as it must*, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute."

B. The RLUIPA as a Model for a Federal Conscience Statute

A comparison of the success of RLUIPA with the shortcomings of RFRA demonstrates that RLUIPA contains several improvements that could be incorporated into a religious conscience statute. First, RLUIPA provides guidance for how to create a statute that is better able to withstand constitutional challenges. Second, it shows that by narrowing the scope of the statute to specific types of claims and defining key terms in the statute, Congress can better achieve its goal of protecting the intended class of claimants. This second lesson of RLUIPA is particularly relevant as it applies to both state and federal statutes.

1. A Broader Scope: Beyond Funding Legislation

Under the RLUIPA model, Congress maximizes its authority to enact legislation by utilizing the full extent of its powers under both the Spending Clause and the Commerce Clause.[275] As with RLUIPA, the Spending Clause could cover a broad range of activities related to the rights of same-sex couples. Federal funding of healthcare facilities could be used to bring healthcare workers within the statute, and Congress could potentially regulate areas like adoption through ties to funding of state child welfare systems. It would likely be more difficult to tie federal funding to marriage.

For areas that fall outside the scope of the Spending Clause,[276] Congress should include a commerce-based jurisdictional clause similar to the one in RLUIPA, providing that the statute covers any burdens that substantially affect foreign or interstate commerce, or activities that would substantially affect such commerce if the burden were removed.[277] Such a clause might bring within the scope of the statute any situations where a couple crosses state lines to obtain services.[278] The scope of the statute could also be broadened to cover

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(emphasis added)). Because the issue of preemption is largely a matter of congressional intent, the statute should clearly state that it preempts state law. *See, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (analyzing whether the Federal Boat Safety Act preempted state common law tort claims); *see also* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149 (1998) (reviewing the history of preemption and discussing the complexities of the Court's preemption analysis).

275 *See supra* Part IV.C (discussing the powers that Congress used to enact RLUIPA).

276 U.S. CONST. art. 1, § 8, cl. 1.

277 *See supra* Part IV.C (describing the jurisdictional clauses of RLUIPA).

278 *See* United States v. Lopez, 514 U.S. 549, 559 (1995) ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or *persons* or things in interstate commerce, even though the threat may come only from intrastate activities." (emphasis added)).

a wide range of activities related to same-sex marriage ceremonies if Congress could demonstrate that in the aggregate, same-sex marriage ceremonies or civil union ceremonies have a substantial affect on interstate commerce.[279]

This argument might not be successful in light of *United States. v. Morrison*, where the Court held that, because gender-motivated violence is not an economic activity and because Congress failed to show that this activity "substantially affected interstate commerce," Congress lacked sufficient power under the Commerce Clause to pass the Violence Against Women Act (VAWA). [280] This is particularly true since the areas of marriage and family are traditionally regulated by the state.[281] However, the Court might view the provision of services in connection with marriage ceremonies as constituting economic activity in a way that violence against women does not.[282] Even if the courts were to ultimately take a narrow approach to the scope of the statute under the Commerce Clause, by utilizing a jurisdictional provision and combining congressional power under the Spending Clause and the Commerce Clause, Congress can provide protection to the fullest extent of its powers under the Constitution.[283]

2. *A Method for Limiting the Scope of Exemptions*

Some limits must be placed on the types of exemptions or accommodations allowed for religious objectors.[284] Otherwise, instead of balancing the rights at stake, exemptions will always privilege the rights of religious objectors over the rights of same-sex couples, regardless of the circumstances or nature of the religious objection. Therefore, both the nature of the exemption and the availability of alternative service providers should be considered in determining whether an exemption should be granted. These considerations can be incorporated into a strict scrutiny analysis.[285] The nature of the

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279 *See* Gaubatz, *supra* note 244, at 538 (arguing that administration of prisoners might fall within the scope of RLUIPA because states frequently send prisoners to facilities in other states).

280 United States v. Morrison, 529 U.S. 598, 615–19 (2000).

281 *See id.* at 615–16 (raising the concern that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," noting that "the suppression of [violent crime] has always been the prime object of the States' police power," and describing "family law" as an area "of traditional state regulation").

282 The economic activity would be the provision of services in connection with marriage and family rather than the marriage itself.

283 *See Morrison*, 529 at 613 (noting the absence of a jurisdictional clause in VAWA).

284 *See supra* notes 16–17 and accompanying text.

285 The analysis would mirror the analysis used in *Sherbert v. Verner*, 374 U.S. 398, 403–04 (1963), and in some post-*Smith* state constitutional decisions, discussed *supra* Part III.C. However, given the limits of

exemption goes to the weight of the burden on the claimant and the strength of the state's compelling interest. The availability of alternative service providers indicates whether the state has used the least restrictive means for achieving its interest.

By employing a strict scrutiny analysis for claims brought under the proposed statute instead of creating an absolute exemption, Congress could create a flexible scheme that would allow courts to balance the rights of same-sex couples with the rights of religious objectors.[286] This would weaken criticism that by passing the statute, Congress is attempting to completely undermine states' rights or permit religious objectors to mechanically trump the rights of same-sex couples. The requirement that states employ the least restrictive means for achieving a compelling interest would protect most religious objectors because there will generally be other providers who can perform the same services.[287] If, however, Congress chose to pass a comprehensive act, covering many different, for example, where conscience conflicts with the right to same-sex marriage, the delivery of healthcare services or pharmaceuticals, or the right to make personal decisions about healthcare treatment, a narrow tailoring requirement would become especially important and could yield different outcomes depending on the interests at stake.

In light of the problems with RFRA, any religious conscience statute, state or federal, that requires a strict scrutiny analysis should include explicit definitions of key terms.[288] This will ensure that the flexibility mentioned above does not come at the expense of claimants who Congress intended to cover under the statute. For instance, Congress could refer to burdens on "conscience" rather than burdens on "religious exercise" and could define burdens on conscience to include any requirement that an individual *directly* contribute to or participate in acts against their religious beliefs. This definition would exclude most potential claims by places of public accommodation because the act of providing services to homosexuals would not involve directly participating in the formation of a union or the

these state constitutional decisions, the statute should make it clear that the goal of prohibiting discrimination is not sufficient to overcome a strict scrutiny analysis. Instead, the narrow tailoring requirement must be examined separately in the context of each case.

[286] *See* Vischer, *supra* note 22 (arguing for a more balanced approach to the conflict between pharmacist rights and healthcare rights).

[287] See, for example, *N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct.*, 189 P.3d 959, 963 (Cal. 2008), where the plaintiff was able to receive IUI from another service provider.

[288] *See supra* Part IV.C (comparing RLUIPA to RFRA).

establishment of a family.[289] For instance, it would not cover a restaurant owner who refused to allow a same-sex couple to dine in his or her restaurant, but it would cover professionals like the doctors in *North Coast*.

The scope of the religious conscience statute should clarified by including a list of specific claimants or specific spheres of conflict.[290] The statute could either track RLUIPA by providing separate sections for each sphere of conflict or class of claimants,[291] or it could simply provide a list of examples. The benefit of including separate sections, similar to RLUIPA, is that the statute would be easier to interpret. The downside, however, is that this could foreclose relief in areas not included in the statutory list of examples.

3. An Ability to Withstand Potential Constitutional Challenges

If a federal statute is indeed the best way to protect religious conscience, in addition to ensuring that the statute is grounded in the necessary Article I powers, Congress must ensure that the measure can withstand other constitutional challenges. The most likely challenges would be raised under the Establishment Clause and the Tenth Amendment. RLUIPA has been challenged on both grounds, and the statute has survived so far. Similarly, the statute proposed here should survive any constitutional challenges on these grounds.

a. Establishment Clause Challenges

In addition to protecting free exercise of religion, the First Amendment provides that "Congress shall make no law affecting the establishment of any religion."[292] In challenging RLUIPA, opponents argued that the law was impermissible under the Establishment Clause, in part because it gave greater protection to religious rights than to other constitutional rights.[293] In *Cutter v. Wilkinson*, the Court upheld RLUIPA against exactly this claim because the law did not single out any particular religion for either special or

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289 There are exceptions to this general statement. For example, the owner of a place of public accommodation, such as a restaurant or hotel, who is asked to host a wedding ceremony might face a "burden" under the statute, although the level of burden imposed on such an owner may not rise to the same level as the burden imposed on a minister who is asked to perform the ceremony.

290 The claimants should include religious organizations as well as individuals, as under RLUIPA.

291 *See supra* Part IV.C.

292 U.S. CONST. amend. I.

293 Cutter v. Wilkinson, 544 U.S. 709, 724 (2005).

disadvantaged treatment.[294] Although the Court noted that its ruling did not foreclose the possibility of future as-applied challenges, or challenges brought under other constitutional provisions,[295] the decision in *Cutter* makes it likely that a federal statute modeled after RLUIPA will survive any facial challenges under the Establishment Clause.

b. Tenth Amendment Challenges

The Tenth Amendment limits the power of Congress to regulate state activities.[296] For example, the Supreme Court has said that the Tenth Amendment prohibits Congress from using its power to "directly compel the States to require or prohibit" certain acts.[297] Several defendants have challenged RLUIPA under the Tenth Amendment. Although this issue has not yet reached the Supreme Court, the few circuit courts that have addressed the question are in agreement that RLUIPA does not violate the Tenth Amendment.[298] As the Second Circuit has found, RLUIPA does not compel states to "require or prohibit" any specific act; instead, it allows states the discretion to regulate the activity covered by the Act as long as the state's regulation does not substantially burden religious exercise in violation of the statute.[299] By requiring a strict scrutiny analysis instead of providing a total exemption, the federal religious conscience statute proposed here would similarly give states discretion to regulate the activities at issue as long as the states do not violate the rights of objectors under the statute.

4. Effects of the Statute Outside of Litigation

Some critics might assert that this legislation would produce a flood of litigation, but the statute would most likely be used as a defense by individuals, who are accused of violating the rights of same-sex couples.[300] In this sense, the religious conscience statute would not create litigation because those

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294 *Id.*

295 *Id.*

296 U.S. CONST. amend. X.

297 New York v. United States, 505 U.S. 144, 166 (1992).

298 *E.g.*, Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 355 (2d Cir. 2007); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1242–43 (11th Cir. 2004); Mayweathers v. Newland, 314 F.3d 1062, 1069 (9th Cir. 2002).

299 *Westchester Day Sch.*, 504 F.3d at 355.

300 *See* N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959, 967 (Cal. 2008) (where the defendants invoked state and federal free exercise claims as a defense to the plaintiff's allegations that the defendants violated the state civil rights statute).

protected by the statute would use it as a defensive shield rather than a sword with which they would sue. In fact, the statute might even deter litigation by encouraging individuals and states to develop their own systems for protecting both the right of conscience and any conflicting rights so that all parties can enjoy their rights without resorting to a lengthy court proceeding.

CONCLUSION

The conflict between the rights of same-sex couples and the rights of religious objectors highlights the deficiencies in the Court's current free exercise jurisprudence, which relies heavily on states and legislatures to protect religious objectors. The rights of same-sex couples are nearly all derived from state law; thus, it makes sense to balance the rights of these two groups at the state level, through state level statutes or religious exemptions. However, *North Coast* illustrates a failure of heightened standards of scrutiny at the state level to protect the rights of religious objectors. In the wake of *North Coast*, and the overall failure of state RFRAs and stricter state interpretations of free exercise to provide greater protections for religious objectors, the need for federal protection of religious objectors is more pronounced. RLUIPA provides an effective model for creating a more effective, yet flexible, statute. By combining its power under the Spending Clause and the Commerce Clause, Congress can cover the broadest field of potential claims allowed under the Constitution. By defining terms and requiring a strict scrutiny analysis under the statute, Congress can give courts the direction needed to ensure a proper reading of the statute while still allowing courts the flexibility to consider the rights of same-sex couples who might be adversely affected by religious exemptions.

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