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# Moral Mandate or Personal Preference? Possible Avenues for Accommodation of Civil Servants Morally Opposed to Facilitating Same-Sex Marriage

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# Moral Mandate or Personal Preference? Possible Avenues for Accommodation of Civil Servants Morally Opposed to Facilitating Same-Sex Marriage

## I. INTRODUCTION

As many states begin allowing same-sex marriage, civil servants with certain religious beliefs will be forced to either perform marriages they morally oppose or resign, effectively "choos[ing] between conscience and livelihood."[1] This clash of belief and vocation has already occurred for some individuals,[2] and it will certainly reoccur as same-gender marriage is permitted in a growing number of states.[3] Despite this conflict, no state has accommodated the religious beliefs of the civil servants directly involved in the marriage process.[4]

Recently, scholars have argued that both empirical evidence[5] and the very justifications for same-sex marriage[6] support the accommodation of civil servants with a conscientious objection to facilitating same-sex marriages. They argue that, although some individuals may see religious beliefs as mere preferences, this attitude ignores the role of religion in the history of our nation and in the life of the believer and the goal of creating a tolerant and accepting society, a goal proponents of same-sex marriage advocate.[7]

1. Robin Wilson, *Gay Marriage Laws Should Allow for Conscientious Objectors*, PRESS OF ATLANTIC CITY, May 10, 2009, http://www.pressofatlanticcity.com/opinion/commentary/article_22a9dd43-3de8-502b-b09b-b83d93cbce29.html; *see also infra* Part II.

2. *See infra* notes 30–31 and accompanying text.

3. Many states are still in the process of determining whether they will allow same-sex marriage, and some likely will. *See, e.g.*, GLAAD, *Rhode Island Working Towards Legal Gay Marriage*, OPPOSING VIEWS (Jan. 6, 2011), http://www.opposingviews.com/i/rhode-island-working-towards-legal-gay-marriage (stating that a bill that would allow same-sex marriage is currently being considered by the Rhode Island legislature).

4. Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 320 (2010), *available at* http://www.law.northwestern.edu/journals/njlsp/v5/n2/6/6Wilson.pdf.

5. *Id. passim.*

6. *See infra* Part II.C.

7. *See* J. David Bleich, *The Physician as a Conscientious Objector*, 30 FORDHAM URB. L.J. 245, 248 (2002) (arguing that seeing religious beliefs as mere preferences "not only fails to respect the role of religion in the life and value system of the religionist, but also fails to recognize the historical and pragmatic basis from which the principle of religious freedom

This Comment agrees with other scholars who assert that civil servants' beliefs are legitimate, important, and worthy of accommodation, and furthers this discussion by reviewing *how* these beliefs may best be accommodated. When considering how to best accommodate civil servants with a conscientious objection to same-sex marriage, it can be helpful to examine how conscience is already accommodated in other situations. This Comment examines both the primary avenues of accommodation[8] and the specific accommodations available[9] in a variety of contexts.

This Comment, based on a review of other exemptions, concludes that enacting legislation to accommodate civil servants while still providing equal service to all members of the public[10] would be both the most effective method of accommodation and the method most likely to be enacted by legislatures. The current methods of accommodation provide little protection for conscientious objectors because legislatures enact them infrequently and courts interpret them narrowly.[11]

Before reaching these conclusions, Part II of this Comment first describes the current state of the law. It does this by 1) providing an overview of the limited religious accommodations that currently exist for objectors to same-sex marriage and 2) summarizing justifications for accommodation of civil servants. Part III then presents the history and development of conscientious objection in the United States. Part IV provides an overview of the currently available avenues of accommodation of religious belief in the United States. Part V reviews how various avenues are used to accommodate conscientious objectors in a variety of different contexts. Finally, in Part VI, this Comment 1) concludes that the best avenue for accommodation is ad hoc exemptions and 2) explores how ad hoc

developed"); *see also infra* Part II.C.

8. *See infra* Part IV.

9. *See infra* Part V.

10. This method is similar to methods proposed by other scholars. *See, e.g.*, Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL'Y 206, 226–32 (2010), *available at* http://www.law.northwestern.edu/journals/njlsp/v5/n2/1/1Berg.pdf. This is also similar to an information-forcing system suggested by some scholars. *See, e.g.*, Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Health care Context*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 98 (Douglas Laycock et al. eds., 2008).

11. *See infra* Part V.

exemptions can effectively accommodate civil servants who object to facilitating same-sex marriage.

## II. CURRENT STATE OF AFFAIRS: THE NEED FOR ACCOMMODATION OF CIVIL SERVANTS WHO OBJECT TO SAME-SEX MARRIAGE

### *A. Public Concern About Effects of Same-Sex Marriage on Religious Organizations*

In the same-sex marriage debate, there has been a great deal of concern over the effect that same-sex marriage would have on religious organizations. For example, when Proposition 8, a proposed amendment to the California constitution stating that "[o]nly marriage between a man and a woman is valid or recognized in California,"[12] was under consideration by the citizens of that state, many supporters of the amendment argued that without it, individuals' religious freedom would be taken away.[13]

One specific ad quoted San Francisco Mayor Gavin Newsom's statement that "[same-sex marriage is] gonna happen, whether you like it or not."[14] This ad, seen as one of the most effective ads supporting the amendment,[15] proceeded to list what the proponents of the amendment felt could happen if it were not passed, which included the claim that "churches could lose their tax exemption."[16] Other ads endorsing the amendment cautioned that if the

12. Proposition 8 became law in 2008. *See* CAL. CONST. art. I, § 7.5.

13. *See, e.g.*, *infra* notes 17–19.

14. VoteYesonProp8, *Yes on 8 TV Ad: Whether You Like It Or Not*, YOUTUBE (Sept. 29, 2010), http://www.youtube.com/watch?v=4kKn5LNhNto.

15. Jonathan Darman, *Hoping that Left Is Right*, NEWSWEEK, Jan. 26, 2009, at 44, *available at* http://www.newsweek.com/2009/01/16/hoping-that-left-is-right.html. Another story noted that:

> Those words would come back to haunt Newsom and the campaign in support of same-sex marriage. It became the battle cry of the opponents of same-sex marriage, featured in radio and TV advertisements to display not just Newsom's perceived arrogance, but also the fear that supporters of gay and lesbian rights planned to trample over the beliefs of the rest of the state.

Erin Allday, *Newsom Was Central to Same-Sex Marriage Saga*, SFGATE.COM (Nov. 6, 2008), http://articles.sfgate.com/2008-11-06/news/17128179_1_same-sex-marriage-gays-and-lesbians-city-hall/5; *see also* Michael Foust, *'Historic' Campaign Scored Prop 8's Win in California*, BAPTIST PRESS, Nov. 6, 2008, http://www.bpnews.net/BPnews.asp?ID=29277 ("Those over-the-top words made their way into the first Yes on 8 commercial and helped energize Prop 8 supporters.").

16. Foust, *supra* note 15.

amendment was not passed, "churches that rent out their facilities for marriages could be forced to allow same-sex marriages on their properties,"[17] and that churches could even be forced to marry same-sex couples or lose their tax-exempt status, thereby being "taxed out of existence."[18] Concerns about the effect that same-sex marriage could have on religious liberty were widespread enough that they were specifically addressed both by news reports and by those who opposed Proposition 8.[19] Ultimately, these concerns seemed to strike a chord with many of those who voted for the amendment[20] and may have made a difference in the passage of Proposition 8, which ultimately passed by only a 4.6% margin.[21]

States that have allowed same-sex marriage have manifested similar concerns about the effect of same-sex marriage on religious organizations. A recent review of these accommodations by Robin Fretwell Wilson[22] found that the states where same-sex marriage is allowed "that have embraced meaningful[23] religious liberty

17. PreservingMarriage, *YES on Proposition 8 (Prop 8) Your Rights*, YOUTUBE (Oct. 16, 2010), http://www.youtube.com/watch?v=A-jc4ujp9Ok. This concern was realized when "New Jersey's Ocean Grove Campground, a religious nonprofit, lost its tax-exempt status in 2007 because the organization refused to rent its facility to a lesbian couple for a civil commitment ceremony." Dean R. Broyles, *Gay Rights and the 1st Amendment on a Collision Course*, LATIMES.COM (Oct. 27, 2008), http://www.latimes.com/news/opinion/la-oew-broyles-jean27-2008oct27,0,7357456.story.

18. *Churches May Have Their Tax Exempt Status Challenged or Revoked*, WHAT IS PROP8?, http://whatisprop8.com/churches-may-have-their-tax-exempt-status-challenged-or-revoked.html (last visited Sept. 20, 2011); *see also Should Gay Marriage Be Legal?*, PROCON.ORG, http://gaymarriage.procon.org (last visited Sept. 20, 2011) (stating that same-sex marriage conflicts "with the beliefs, sacred texts, and traditions of many religious groups" and "[e]xpanding marriage to include same-sex couples may lead to churches being forced to marry couples and children being taught in school that same-sex marriage is the same as opposite-sex marriage").

19. *E.g.*, Michael Gardner, *Law Professors Enter Prop. 8 Fray on Church's Tax-Exempt Status*, SAN DIEGO UNION-TRIB., Oct. 30, 2008, at A3, *available at* http://www.signonsandiego.com/uniontrib/20081030/news_1n30exempt.html (stating that although some experts insisted that "no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs . . . . Some church leaders are not convinced" (internal quotation marks omitted)); Scott Bidstrup, *Gay Marriage: The Arguments and the Motives*, BIDSTRUP.COM, http://www.bidstrup.com/marriage.htm (last visited Sept. 20, 2011) (arguing that churches would not be forced to conduct same-sex marriages).

20. *See supra* note 15 and accompanying text.

21. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

22. Wilson, *supra* note 4, at 319–22.

23. As Wilson notes, some of these exemptions amount to no more than "hollow

protections have exempted religious groups and individuals authorized to preside over marriage ceremonies."[24] These exemptions insulate "private religious groups that refuse to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization of same-sex marriage" from both lawsuit and government penalty.[25]

### *B. Lack of Public Concern for the Effects of Same-Sex Marriage on Individuals*

Unfortunately, individual conscientious objectors have not received the same attention or protection that religious organizations have received. In her review of states' accommodation of individuals with a conscientious objection to same-sex marriage,[26] Wilson found that "not a single state has shielded the government employee at the front line of same-sex marriage."[27] After describing the results of this review, Wilson concluded that

> states at the leading edge of same-sex marriage legislation have disproportionately insulated large religious institutions and their employees from the conflicts ushered in by same-sex marriage, while doing relatively little for individual believers. Notably absent from these early protections are marriage registrars, clerks working in the licensing office, and others who may be asked to facilitate same-sex marriages despite their own deeply held religious beliefs.[28]

While there has been "some academic prodding"[29] and the issue has received limited media coverage,[30] the issue of accommodation

protection." *Id*. at 319 n.7.

24. *Id*. at 319–20 (footnote omitted).

25. *Id*. at 320 (internal quotation marks omitted).

26. *Id*. at 319–22.

27. *Id*. at 320.

28. *Id*. at 321.

29. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274, 275 (2010), *available at* http://www.law.northwestern.edu/journals/njlsp/v5/n2/4/4Lupu.pdf. For examples of this academic prodding, see Wilson, *supra* note 4 *passim*, and Berg, *supra* note 10, at 207 (arguing, although not specifically about government employees, that "significant religious accommodations for objectors to same-sex marriages" should be adopted).

30. *See, e.g.*, Chaz Muth, *Scholars: Church Won't Be Forced to Marry Gay Couples If Laws Change*, AMERICANCATHOLIC.ORG (Mar. 22, 2009), http://www.americancatholic.org/news/report.aspx?id=844 ("Legalizing same-sex marriage . . . could force county clerks to issue marriage licenses to same-sex couples, even if such an act goes against their religious beliefs . . . .").

for civil servants has not received much public attention. The minimal governmental discussion that has taken place has not resulted in any actual accommodation for civil servants,[31] leaving them to "choose between conscience and livelihood."[32] Faced with this choice, some governmental employees who were required to issue licenses to[33] or preside over the marriage of[34] same-sex couples chose to resign instead.[35]

This effectively gives religious belief less weight than a mere scheduling conflict—for example, justices of the peace in Massachusetts and New Hampshire were told that they could not abstain from marrying same-sex couples because of their sexual orientation, even though these same justices of the peace *could* "turn down a request to marry any individual couple . . . because the [justice of the peace] [wa]s busy, or just [did not] get along with the couple."[36]

31. In Massachusetts, justices of the peace were told "that there would be plenty of room for conscientious objectors" and "there would be user-friendly [justice of the peace} websites where same-sex couples could obtain names of [justices of the peace] who would be happy to marry them, and that there would still be room [for justices of the peace who objected to personally solemnizing marriages of same-sex couples]." *Morning Edition: Mass. Justice of the Peace Resigns Over Gay Marriage* (NPR radio broadcast May 14, 2004), *available at* http://www.npr.org/templates/story/story.php?storyId=1896321. In the end, no protections were extended, and justices of the peace were told "to resign if they were unwilling to preside over the marriage of same-sex couples." Jennifer Peter, *Justices of the Peace Warned Not to Discriminate Against Same Sex Couples*, ASSOCIATED PRESS, Apr. 25, 2004, *available at* http://www.gaypasg.org/gaypasg/PressClippings/2004/April%202004/justices_of_the_peace_warned_not.htm; *see also* Lupu & Tuttle, *supra* note 29, at 275 ("[N]o state has yet been willing to grant public officials . . . exemptions from state-created obligations to serve without discrimination based on sexual orientation.").

32. Wilson, *supra* note 1.

33. *Id.* ("In Iowa, the state's attorney general told county recorders that they must issue licenses to same-sex couples or face criminal misdemeanor charges and even dismissal.").

34. Massachusetts Governor Mitt Romney, through his legal counsel, "told the state's justices of the peace . . . to resign if they are unwilling to preside over the marriage of same-sex couples." Peter, *supra* note 31; *accord Morning Edition*, *supra* note 31.

35. *E.g.*, *Resignation Letter from Linda Gray Kelley*, JUST. OF THE PEACE ASS'NS NEWSL. (2004), http://jpus.org/newsletter/summer2004doc.htm#resign.

36. Lauren Garrison, *Some JPs Bristle at Same-Sex Marriage Law*, NEW HAVEN REG., Nov. 30, 2008, http://www.nhregister.com/articles/2008/11/30/news/a1justiceofpeace.txt?viewmode=fullstory; *see also Morning Edition*, *supra* note 31 (explaining that when justices of the peace in Massachusetts are busy, they can turn down individual couples).

This lack of public concern for the religious beliefs of individuals is likely due to the fact that there are a "relatively small number of [individuals] who find themselves morally conflicted."[37] "The problems of the few seldom become the concern of the many,"[38] and when the public at large lacks concern for an issue, representatives will likely follow suit. However, the lack of interest in protecting these individuals does not make the conflict they face any less pressing. With same-sex marriage laws being enacted in an increasing number of states, these conflicts between rights, responsibilities, and beliefs will likely be faced by a growing number of government employees.

### *C. Why Civil Servants Should Be Accommodated*

Before engaging in a review of how conscience is and has been protected in the United States, this Comment will briefly discuss various theories behind why conscientious objectors should or should not be protected. The debate centers on religious liberty and personal autonomy.

With the introduction of same-sex marriage in a number of states, many religious organizations have been accommodated, but no government employee has been afforded the same religious objection accommodation.[39] The debate surrounding religious objection accommodations seems to stem from a difference in viewpoint regarding the role of religion in individuals' lives, with those that see religious beliefs as preferences, rather than mandates,[40] calling for much less accommodation for conscientious objectors. Ironically, this suggests that many arguments against

37. Bleich, *supra* note 7, at 247.

38. *Id*.

39. *See* Wilson, *supra* note 4, at 318–22.

40. After stating that one problem with the health care mandate was the small number of individuals affected, Bleich states:

> A more serious hurdle lies in the unwillingness of many medical institutions, as well as society, to recognize the existence of a genuine moral dilemma. . . . While continuing to pay at least lip service to the role of religion in society, society simply does not take religion and religious scruples as seriously as it did in days gone by. The prevailing notion seems to be that religious preferences are precisely that, namely, preferences, but not mandates. Thus, just as recreational, aesthetic, or gastronomical preferences must bow to laws of general applicability, it is assumed that religious preferences must bow to the demands of the dominant culture that are enshrined in statute.

Bleich, *supra* note 7, at 247–48.

accommodation directly mirror arguments against same-sex marriage—some on both sides see the other as seeking special treatment to indulge a mere personal preference.

There are a number of other similarities between the arguments for same-sex marriage and the arguments for accommodation of those who oppose it.[41] As one scholar recently noted,

> Recognition of same-sex marriage, whatever technical form legal arguments made on its behalf take, exemplifies a "live and let live" policy. That same policy should apply equally to religious believers who oppose same-sex marriage—they should not be required to act directly in opposition to their religious beliefs, that is, in ways that appear to confer their personal blessing on such marriages.[42]

The previous debate over whether same-sex marriage should be allowed is echoed in other ways as well. For example, "the refusal to consider religious liberty claims is in part fueled by anger at some of the more outrageous statements about gays made by religious leaders over the years."[43] However, these reasons are not valid if they force civil servants to violate their religious beliefs and do not overcome the empirical evidence supporting[44] equality-based justifications for accommodation of conscience.

## III. HISTORY OF RELIGIOUS ACCOMMODATION, CONSCIENCE, AND THE FIRST AMENDMENT

### *A. Historical Recognition of Conscience in the United States and Abroad*

Freedom of conscience is recognized and addressed to some degree both in the United States and internationally.[45] Explicit

41. Thomas C. Berg provides an excellent review of how "[s]everal key arguments that have led states to recognize same-sex marriage also call for broad accommodations for religious objectors." Berg, *supra* note 10, at 212–20 (discussing how both arguments deal with "Conduct Fundamental to Identity" and "Conduct Lived Out Publicly in Civil Society").

42. Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J. L. & SOC. POL'Y 307, 312–14 (2010), *available at* http://www.law.northwestern.edu/journals/njlsp/v5/n2/5/index.html (endorsing accommodation only of private actors and not government employees).

43. *Id.* at 310

44. *See* Wilson, *supra* note 4, *passim*.

45. As one example of the international recognition of conscience, Article 18 of The United Nations Universal Declaration of Human Rights of 1948 states:

Everyone has the right to freedom of thought, conscience, and religion; this right

protection of conscience in the United States was considered by the founding fathers, with Madison's initial draft of the First Amendment stating: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[46]

### *B. Development of Conscientious Objection in the United States*

Although the First Amendment does not explicitly mandate freedom of conscience, the freedom could arguably be read into its text. Furthermore, even if the Supreme Court declined to infer an unstated right to freedom of conscience from the First Amendment, the Free Exercise Clause could be read to require that laws accommodate individuals' moral beliefs. However, Supreme Court jurisprudence has led the law to the point where neither of these mechanisms requires significant accommodation of belief.

#### *1. No defined constitutional protection of conscience*

Notwithstanding the First Amendment's textual silence regarding freedom of conscience, the Court could have inferred an unenumerated right to freedom of conscience from the religion clauses. The Supreme Court first examined this issue when deciding "whether conscientious objectors have a Constitutional right to refrain from participating in the military"[47] in *United States v.*

> includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 18 (Dec. 10, 1948), *reprinted in* JOSEPH MODESTE SWEENY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM (2d ed. Doc. Supp. 1981). For additional examples, see Marie-France Major, *Conscientious Objection and International Law: A Human Right?*, 24 CASE W. RES. J. INT'L L. 349 *passim* (1992) and Emily N. Marcus, Note, *Conscientious Objection as an Emerging Human Right*, 38 VA. J. INT'L L. 507 *passim* (1998).

46. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834); *see also* B.A. Robinson, *The First Amendment to the U.S. Constitution: Religious Aspects*, RELIGIOUSTOLERANCE.ORG, http://www.religioustolerance.org/amend_1.htm (last updated July 3, 2010) (listing language of previous drafts of the First Amendment, many explicitly protecting conscience).

47. Michael P. Seng, *Conscientious Objection: Will the United States Accommodate Those Who Reject Violence as a Means of Dispute Resolution?*, 23 SETON HALL L. REV. 121, 126 (1992).

*Schwimmer*.[48] The Court held that the United States could withhold citizenship from a pacifist who was otherwise qualified for naturalization solely because, although she herself felt qualified to do so,[49] the Court "found her unable . . . to take the prescribed oath of allegiance."[50] Specifically, when asked: "'If necessary, are you willing to take up arms in defense of the country?' She answered: 'I would not take up arms personally.'"[51] That the Court declined to find a right to conscientious objection is especially surprising when one considers the facts of this case: women have never been drafted by the United States, and at over fifty years old,[52] even men her age were not eligible for the draft.[53] Therefore, she could not have been drafted, regardless of her willingness to take up arms.

In 1946, the Court in *Girouard v. United States*[54] addressed a case with facts almost identical to those in *Schwimmer*, this time finding that conscientious objectors had a right to be naturalized under the Act.[55] The majority's reasoning for their decision discussed the importance of conscience as follows:

> The struggle for religious liberty has through the centuries been an *effort to accommodate the demands of the State to the conscience of the individual*. The victory for freedom of thought recorded in our Bill of Rights recognizes that *in the domain of conscience there is a moral power higher than the State*. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.[56]

This recognition of conscience, that state law should accommodate it, and the incorporation of these principles within the First Amendment, gave "hope that the Court would hold that conscientious objection was protected by the Constitution."[57]

48. 279 U.S. 644 (1929).
49. *Id*. at 647.
50. *Id*. at 646.
51. *Id*. at 647.
52. *Id*. at 653 (Holmes, J., dissenting).
53. *Id*. at 648 (majority opinion).
54. 328 U.S. 61 (1946).
55. *Id*. at 62, 70.
56. *Id*. at 68 (emphasis added).
57. Seng, *supra* note 47, at 127.

However, the Court made it clear in *Gillette v. United States*[58] that it would not recognize such a protection in the Constitution.[59]

The accommodation that Congress had provided to conscientious objectors in the Selective Service and Training Act[60] limited its exemption to only those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war *in any form*."[61] Although the Court held in *Gillette* that the Selective Service Act did not violate the Establishment Clause,[62] it also held that the Free Exercise Clause did not require Congress to exempt individuals who objected to the draft on religious grounds from participation in a *particular* war.[63] Through this holding, the Court essentially refused to read a protection of conscience into the First Amendment.[64] This resulted in what religious-freedom scholar Eugene Volokh has termed "the statutory exemption model,"[65] where exemptions are available for religious objectors "if and only if the statute provided for one."[66]

*2. The expansion and later narrowing of the Free Exercise Clause*

Although the Court declined to read protection of conscience into the First Amendment, the text of the Free Exercise Clause itself could support a claim for exemption from laws that coerce individuals to engage in conduct that conflicts with their religious beliefs. In *Sherbert v. Verner*,[67] the Supreme Court first interpreted the Free Exercise Clause to provide this sort of protection under what has been deemed the "constitutional exemption model."[68]

58. 401 U.S. 437 (1971).

59. Seng, *supra* note 47, at 127.

60. Selective Training and Service Act of 1940, Pub. L. No. 783, ch. 720, § 5(g), 54 Stat. 885, 889 (1948) (codified as amended at 50 U.S.C. §§ 451–473 (1988)).

61. *Gillette*, 401 U.S. at 441 (emphasis added) (footnote omitted).

62. *Id.* at 452–53.

63. *Id.* at 461–62.

64. *See* Seng, *supra* note 47, at 127.

65. Eugene Volokh, *Some Background on Religious Exemption Law*, VOLOKH CONSPIRACY (June 12, 2010, 7:07 PM), http://volokh.com/2010/06/12/some-background-on-religious-exemption-law-2/.

66. *Id.*

67. 374 U.S. 398 (1963) (holding that the First Amendment compelled accommodation for a Sabbatarian who was denied unemployment benefits because she refused to accept a job that would have required her to work on Saturday).

68. Volokh, *supra* note 65.

Under this model, "sincere religious objectors had a presumptive constitutional right to an exemption," although this presumption could be overcome if the government could meet strict scrutiny by showing the law they seek to apply to the objector "is the least restrictive means of serving a compelling government interest."[69] By making religious objection a constitutional matter, this model substantially increased the accommodations that religious objectors could receive.

Notwithstanding its constitutional basis, the constitutional exception model was drastically narrowed by subsequent cases. In *Employment Division v. Smith*,[70] the Court held that the First Amendment did not require any accommodation from a law prohibiting the use of peyote for individuals who ingested peyote for legitimate and sincere religious purposes.[71] The majority opinion supported this holding with extremely broad language, stating that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[72] In doing this, the Court essentially "rejected the constitutional exemption regime" and "returned to the statutory exemption regime."[73]

The Court's holdings in *Smith* and its progeny strongly suggest that, as far as federal law is concerned,[74] "broad constitutional arguments appealing to freedom of religion or of conscience [are unlikely to] prevail before the courts in the immediate future."[75] As other scholars have noted, these cases make the likelihood of success of federal constitutional claims for accommodation of religion seem very doubtful, as plaintiffs are now required to show that the "anti-discrimination rules from which they seek exemption are not

69. *Id*. However, Volokh also notes that although the Court describes the strict-scrutiny test in the same way it is described when applied in other contexts, in practice courts give the government much more leeway than usual when applying the test in the religious freedom context. *See id*. (describing the test as going from "strict in theory, fatal in fact" generally, to "strict in theory, feeble in fact" in the religious freedom context) (citations omitted).

70. 494 U.S. 872 (1990).

71. *Id*. at 890.

72. *Id*. at 879 (quoting Minersville Sch. Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

73. Volokh, *supra* note 65. It should also be noted that the Court has not overruled the pre-*Smith* cases that required accommodations under "strict scrutiny" review.

74. State protections may still be available; *see infra* Part IV.A.2.

75. Seng, *supra* note 47, at 127–28.

'neutral, generally applicable regulatory law[s]'" to survive *Smith*.[76] "Because protections for same-sex couples do not specifically target religious conduct or motives, the Free Exercise Clause offers no support for exemption claims."[77]

## IV. AN OVERVIEW OF THE AVENUES OF ACCOMMODATION

Although the Court has not established a right to accommodation of conscience or required more than rational basis review for laws that infringe on religious exercise, other avenues of accommodation are available. This Part provides a brief overview of the remaining methods of accommodation used in the United States, and is followed by Part V, which describes the specific accommodations that have been extended. Post-*Smith*, accommodation is usually provided by the legislature,[78] either through a specific state or federal statute or a state constitution. Methods of accommodation fall into two general categories: 1) legislative measures protecting free exercise generally and 2) ad hoc legislative measures granting accommodation in specific contexts. In each of these contexts, both federal and state legislatures have provided some degree of accommodation for conscientious objectors.

76. Lupu & Tuttle, *supra* note 29, at 287 (alternation in original) (quoting *Smith*, 494 U.S. at 880). Other scholars have reached the same conclusion regarding the application of *Smith* to First Amendment claims in the religious liberty context. For example, one scholar notes:

> As a matter of current First Amendment doctrine, there is much force to the claim that there is no legally important clash between religious liberty and equal recognition of same-sex marriage. The controlling case in this area is *Employment Division v. Smith*, in which the Supreme Court held that facially neutral, generally applicable laws burdening religion need no special legislative justification and, therefore, would not be subject to compelling (or other heightened) interest analysis. Laws that mandate the acceptance of the validity of same-sex marriage would be neutral laws of general applicability and, hence, would require no special justification to satisfy the federal constitutional guarantee of free exercise of religion.

Stern, *supra* note 42, at 310 (footnotes omitted).

77. Lupu & Tuttle, *supra* note 29, at 287–88.

78. Volokh, *supra* note 65 (also admitting that this is an oversimplification).

### *A. Overview of Legislative and Constitutional Measures Protecting Free Exercise Generally*

#### *1. Congressional legislation*

Since *Smith*, the treatment of claims for religious exemption has become fractured, with the correct standard depending on context. This began soon after the *Smith* decision when Congress passed the Religious Freedom Restoration Act (RFRA).[79] This Act sought to restore the pre-*Smith* constitutional exemption regime.[80]

However, four years after its passage, the Court in *City of Boerne v. Flores*[81] struck RFRA as unconstitutional when applied against state law.[82] Congress's powers "are defined and limited," and therefore the legislation it enacts must be supported by one of those enumerated powers.[83] RFRA was passed under Section 5 of the 14th Amendment, which allows Congress to enforce the provisions of the Amendment.[84] However, the Court held that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance"[85] due to its "[s]weeping coverage" that "ensures its intrusion at every level of government."[86] This did not eliminate the Act entirely, as its scope was later amended to comply with *City of Boerne*.[87] This revision seems to be constitutionally appropriate, as

79. 42 U.S.C. § 2000bb (2006).

80. Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 205–06 (2009) ("The legislative history of RFRA provides clear evidence of Congress's intent to reverse the effect of the Smith decision." (citing 139 CONG. REC. E1243-03 to E1244-01 (daily ed. May 12, 1993) (statement of Rep. Franks); 139 CONG. REC. E1234-01 (daily ed. May 12, 1993) (statement of Rep. Cardin); 139 CONG. REC. H2356-03 to H2357-01 (daily ed. May 11, 1993) (statement of Rep. Brooks); 139 CONG. REC. H2361-03 to H2362-01 (daily ed. May 11, 1993) (statement of Rep. Tucker); S. REP. 103-111, at 1 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; H.R. REP. NO. 103-88 (1993))).

81. 521 U.S. 507 (1997).

82. *Id.* at 535.

83. *Id.* at 516–17 (internal quotation marks omitted).

84. *Id.* at 517.

85. *Id.* at 536.

86. *Id.* at 532.

87. Carl H. Esbeck, *The Application of RFRA to Override Employment Non-Discrimination Clauses Embedded in Federal Social Service Programs*, 9 ENGAGE 140, 143 n.11 (June 2008), *available at* http://library.findlaw.com/2008/ Jun/1/247208.html.

the Court has applied the amended version of the Act to matters of federal law.[88]

Congress also responded to *City of Boerne* by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA),[89] which protects both "land use as religious exercise"[90] and the "religious exercise of institutionalized persons."[91] As RLUIPA's scope is much narrower and is grounded in Congress's power under the Commerce and Spending Clauses,[92] it is a valid exercise of Congressional power.[93]

*2. State RFRAs and constitutional provisions*

Post-*City of Boerne*, the treatment of state law claims for religious exemption varies greatly from state to state. In response to the Court's invalidation of RFRA with respect to state law, many states have passed their own RFRAs or constitutional amendments requiring a return to the strict scrutiny standard for religious-exemption cases.[94] In other states, the highest court has interpreted the religious freedom protections in the state constitution as requiring either strict scrutiny or weak intermediate scrutiny.[95] Remaining states have either refused to apply strict scrutiny or have not yet determined which standard of review applies.[96]

88. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA to a federal law).

89. 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

90. *Id.* § 2000cc.

91. *Id.* § 2000cc-1.

92. Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 212 (2008).

93. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1243 (11th Cir. 2004); *see also* Cutter v. Wilkinson, 544 U.S. 709, 719–20 (2005).

94. *See* Volokh, *supra* note 65; *see also* Eugene Volokh, *Religious Exemption Law Map of the United States*, VOLOKH CONSPIRACY (July 9, 2010, 5:36 PM), http://volokh.com/2010/07/09/religious-exemption-law-map-of-the-united-states/ [hereinafter Volokh, *Religious Exemption Map*]. Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia have each passed a state RFRA, while Alabama enacted its state RFRA via constitutional amendment. *Id.*

95. *See* Volokh, *Religious Exemption Map*, *supra* note 94. Courts in Alaska, Indiana, Massachusetts, Maine, Michigan, Minnesota, Montana, North Carolina, Ohio, Washington, and Wisconsin interpret their constitutions to require strict scrutiny, while the constitutional provisions in New York have been interpreted to require intermediate scrutiny. *Id.*

96. *Id.*

### *B. Overview of Ad Hoc Legislative Accommodations in Specific Contexts*

In addition to the general protections of free exercise that have been enacted, both federal and state legislatures have enacted exemptions and accommodations on a context-by-context basis for individuals who face a test of conscience. Structural concerns dealing with enumerated powers and federalism limit the scope of accommodations for both federal and state legislative enactments.

Congressional accommodation has been an avenue for accommodation both pre- and post-*Smith*. However, as *City of Boerne* made clear, when Congress accommodates conscientious objectors, it must be acting within the scope of its enumerated powers.[97] Traditional powers that Congress uses to legislate include its commerce power,[98] spending power,[99] taxing power,[100] and its power to enforce the civil rights protections granted by the Fourteenth Amendment.[101]

State legislatures can also accommodate conscientious objectors on a context-by-context basis. Unlike Congress, States are not bound by certain enumerated powers[102] and are therefore they are free to legislate on a broader scope. However, the Supremacy Clause of the Constitution[103] prevents states from legislating in a way that "interferes with and frustrates" a federal interest or statute.[104] Another significant limitation on the ability of ad hoc legislative accommodations to protect conscience is that they can be trumped by a state's own constitutional provisions.[105] This was demonstrated in *Valley Hospital Ass'n, Inc. v. Mat-SU Coalition for Choice*,[106] where the Supreme Court of Alaska held that a hospital's policy to only provide abortions when special criteria were met was in violation of the state constitution.[107] Although the state's conscience clause

97. *See supra* notes 81–88 and accompanying text.
98. U.S. CONST. art. I, § 8, cl. 3.
99. *Id*. cl. 1.
100. *Id*.
101. U.S. CONST. amend. XIV, § 2.
102. *See id*. amend. X.
103. *Id*. art. VI, cl. 2.
104. *See* Felder v. Casey, 487 U.S. 131, 151 (1988).
105. Wilson, *supra* note 10, at 91.
106. 948 P.2d 963 (Alaska 1997).
107. *Id*. at 965, 973.

explicitly provided an exemption for the hospital's conduct, this was "at most a statutory right" that the legislature could not permissibly balance against constitutional rights.[108] Ultimately, the Court held that the hospital could not prevent doctors who were qualified and willing to perform abortions from doing so in its facilities.[109]

Notwithstanding these limitations, state legislative protections are ultimately the most likely means of effectively protecting civil servants who object to same-sex marriage.[110] Others have presented a compelling case for states to accommodate these civil servants in the same way that the states have recently accommodated religious beliefs in a variety of other contexts.[111]

## V. REVIEW OF SPECIFIC ACCOMMODATIONS MADE IN OTHER CONTEXTS

### *A. General Protections of Free Exercise*

Both federal and state legislatures have accommodated individuals in their beliefs in a variety of contexts. These methods of accommodation provide a helpful model for accommodating civil servants who object to same-sex marriage.

#### *1. Accommodation mandated by the First Amendment*

Even prior to *Employment Division v. Smith*,[112] the Court's protection of conscience under the First Amendment was limited.[113] However, the Court did require accommodation under the Free Exercise Clause in a few limited situations. For example, in *Sherbert v. Verner*,[114] the Court held that the First Amendment compelled accommodation for a Sabbatarian woman who was denied unemployment benefits because she refused to take a job that required her to work on Saturday.[115]

108. *Id.* at 972.
109. *Id.*
110. *See supra* Part VI.A.
111. *See supra* notes 24–27 and accompanying text.
112. 494 U.S. 872 (1990).
113. *See supra* Part III.B.1.
114. 374 U.S. 398 (1963).
115. *Id.* at 409–10.

In another case, a woman challenged a requirement that an individual's picture must appear on their driver's license, as this conflicted with her religious beliefs.[116] Here, the Eighth Circuit held that the requirement was an impermissible burden to the woman's religious freedom, the state interest was insufficient to justify the burden, and accommodation of her beliefs was required.[117] This holding was affirmed by the Supreme Court.[118]

Following the Court's holding in *Smith*, it seems doubtful that the Court would find accommodation required by the First Amendment.[119] However, the judicial branch is still a primary (although recently passive) actor in the granting of accommodation. Although the First Amendment has largely been removed as a basis for accommodation, courts still do interpret and enforce state and federal legislation requiring accommodation.

*2. Federal protections of free exercise*

RFRA, although struck as unconstitutional with respect to the states, is still controlling for questions of federal law.[120] The stated purposes of this statute are:

> 1. to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> 2. to provide a claim or defense to persons whose religious exercise is substantially burdened by government. [121]

This statute restores the strict-scrutiny tests previously used and therefore provides much more protection than the *Smith* standard, although only in limited circumstances where the Act applies.[122]

116. Quaring v. Peterson, 728 F.2d 1121, 1122–23 (8th Cir. 1984).

117. *Id.* at 1123–28.

118. Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam).

119. *See supra* Part III.B.2.

120. *See supra* notes 85–88 and accompanying text. RFRA was also amended to apply only to the federal government and the District of Colombia. Esbeck, *supra* note 87, at 140 (citing Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3(a) (1988) (amended 2001)).

121. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (2006).

122. It should be noted that strict scrutiny in the religious exemption context, as implemented by *Sherbert* and *Yoder*, has traditionally been much less strict than in other contexts. *See supra* note 69.

*3. State RFRAs and constitutional provisions*

In states that have enacted them, state RFRAs can require state laws to grant the same accommodation originally provided by the federal RFRA. In other states, the courts have provided these same accommodations by interpreting the state constitutional provisions protecting religious freedom to require strict scrutiny.[123] While these standards usually apply quite broadly, even providing "'no exceptions for the government acting in special capacities,' for instance, as an employer,"[124] they "are not frequently invoked" and "the outer limits of the state's duty to accommodate religious beliefs are not well-defined."[125]

One case where a state strict scrutiny requirement did provide an accommodation of religious belief was *Minnesota v. Hershberger*.[126] In this case, "members of the Old Order Amish ('the Amish') religion moved in the district court for dismissal of traffic citations each had received for noncompliance" with a statute requiring "slow-moving vehicles to display a fluorescent orange-red triangular sign emblem when being operated on the state's public highways."[127] When the Minnesota Supreme Court first heard this case (*Hershberger I*),[128] it held that this requirement was in violation of the individuals' First Amendment right to free exercise and approved an alternative means of safety lighting proposed by the Amish.[129] The State appealed this ruling to the U.S. Supreme Court, and "[w]hile that petition was pending, the Court handed down *Smith*. It then remanded the Amish case to the State Supreme Court in light of *Smith*."[130] On rehearing, the court again held the regulation impermissible, this time as a violation of the Minnesota constitution's religious freedom provision.[131]

123. *See* Volokh, *supra* note 65.

124. Wilson, *supra* note 4, at 347 (citing Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 635 (1999)).

125. *Id*. (citation omitted) (internal quotation marks omitted).

126. 464 N.W.2d 393 (Minn. 1990) [hereinafter *Hershberger II*].

127. Minnesota v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989) [hereinafter *Hershberger I*].

128. *Id*.

129. *Id*. at 289.

130. Ronald B. Flowers, *Government Accommodation of Religious-Based Conscientious Objection*, 24 SETON HALL L. REV. 695, 726 (1993).

131. *Hershberger II*, 464 N.W.2d at 399.

### *B. Ad Hoc Accommodation by Congress*

#### *1. Military service*

As previously discussed, Congress allows some exemptions for conscientious objectors to military service.[132] While the Supreme Court held that these accommodations were not prohibited by the Establishment Clause, they also are not mandated by the Free Exercise Clause.[133] While this ruling means that most accommodation of religious freedom must come from the legislative branch rather than being judicially administered,[134] the Court has clarified the scope of accommodation granted in statutes that Congress already enacted.

The Court clarified and expanded the scope of military accommodation allowed under the Selective Training and Service Act.[135] The Court first did this in *United States v. Seeger*,[136] where it ruled that a belief in God was not required to receive an exemption under the Act.[137] In this case, the Court held that an exemption was appropriate for an objection based on a sincere "belief in and devotion to goodness and virtue for their own sakes."[138]

The scope of accommodation for objectors to military service was extended further still in *Welsh v. United States.*[139] Here, the Court interpreted Congress's language to allow accommodation for conscientious objectors whose "opposition to war stem[s] from [their] moral, ethical, or religious beliefs about what is right and wrong" as long as "these beliefs be held with the strength of traditional religious convictions."[140] The Court stated:

132. *See supra* Part III.B.1.

133. *See supra* notes 62–66 and accompanying text.

134. Volokh, *supra* note 65. Although the Court has, on rare instances, required accommodation when none was contemplated by Congress, the chances of this happening seem small post-*Smith*. *See, e.g.*, Girouard v. United States, 328 U.S. 61 (1946) (holding that an individual who objected to serving in a combatant role, but not to military service in general, could be granted U.S. citizenship).

135. Selective Training and Service Act of 1940, Pub. L. No. 783, ch. 625, § 5(g), 54 Stat. 885, 889 (1948) (codified as amended at 50 U.S.C. app. §§ 451–473 (1988)).

136. 380 U.S. 163, 165–66 (1965).

137. *Id*.

138. *Id*. at 166.

139. 398 U.S. 333 (1970).

140. *Id*. at 340.

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time . . . such an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.[141]

This holding expands the scope of conscientious objection so as to cover much more than what would be traditionally considered "religious" belief. By granting exemptions based on the belief's binding effect on the individual rather than the source of those beliefs, the Court's holding accommodates even those plaintiffs who do not consider themselves religious.[142]

However, as was discussed previously, the Court subsequently limited this holding by accommodating only those who are "conscientiously opposed to participation in war *in any form*."[143] While this holding was consistent with Congress's language in the Selective Service and Training Act,[144] it was significant that the Court held the Free Exercise Clause did not require any exemptions beyond those explicitly provided in the Act.[145]

*2. Payment of taxes*

Congress has also given partial accommodation of beliefs to individuals who have various conscientious objections to the payment and receipt of taxes. Individuals object to the payment of taxes for a variety of reasons, and Congress has accommodated some of the conscientious objections. One area where Congress has accommodated religious beliefs is in the payment and receipt of Social Security taxes by self-employed individuals.[146] Participation in this system goes against fundamental beliefs of some individuals,

141. *Id.*

142. Flowers, *supra* note 130, at 704.

143. Gillette v. United States, 401 U.S. 437, 441 (1971) (emphasis added) (quoting Military Selective Service Act of 1967, 50 U.S.C. § 456(j) (1964)) (internal quotation marks omitted).

144. Selective Training and Service Act of 1940, Pub. L. No. 783, ch. 625, § 5(g), 54 Stat. 885, 889 (1948) (codified as amended at 50 U.S.C. app. §§ 451–73 (1988)).

145. *Gillette*, 401 U.S. at 461–62.

146. Flowers, *supra* note 130, at 711–12.

such as the Amish, who promote self-sufficiency and the responsibility to take care of one's own family.[147]

Although Congress did accommodate these individuals,[148] the Court in *United States v. Lee*[149] held that this accommodation could not be extended beyond the self-employed, even if both the employer and the employee shared the same legitimate conscientious objection to participation in this program.[150] The Court reasoned that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[151] Due to Congress's narrow crafting of the statute, this exemption is also only available to active participants of "a sect that teaches both . . . self-sufficiency and rejection of government social insurance benefits."[152] This is a stark departure from the belief-focused, organization-neutral accommodation granted in the military context.[153]

One context where Congress has not accommodated individuals with a conscientious objection is the payment of taxes supporting the military. "Because government revenue finances the equipment and prosecution of war, some believe that by withholding tax payments, a protest against war can be made and, at the same time, one's conscience can be satisfied by nonparticipation."[154] There are various ways that objectors engage in war tax protest,[155] none of which have received Congressional accommodation.[156] Despite the parallels to military conscientious objection, the Court has not required any exemption for war tax protestors,[157] which is consistent with the overall treatment of requests for accommodation under the First Amendment.[158]

147. *Id.*

148. 26 U.S.C. § 1402(g) (1988).

149. 455 U.S. 252 (1982).

150. Flowers, *supra* note 130, at 712.

151. *Lee*, 455 U.S. at 260 (citations omitted).

152. Flowers, *supra* note 130, at 712–13 (citing Hughes v. Commissioner, 81 T.C. 683 (1983); Borntrager v. Commissioner, 58 T.C.M. (CCH) 1242, 1243 (1990)).

153. *See supra* Part V.B.1.

154. Flowers, *supra* note 130, at 714.

155. *See id.* (describing methods used by war tax protestors).

156. *Id.* at 714–16.

157. *See id.*

158. *See supra* Parts III.B.2, V.B.1–2.

*3. Health Care*

Congressional accommodation of conscientious objectors who provide medical care is arguably the most comprehensive protection Congress provides to conscientious objectors. The Church Amendment,[159] enacted in 1973[160] in response to *Roe v. Wade*,[161] states that the receipt of public funds

> by any individual or entity does not authorize any court or any public official or other public authority to require . . . such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.[162]

The amendment also prohibits health care providers who receive public funds from discriminating against an employee "because he refused to perform or assist in the performance of such a procedure or abortion . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."[163]

This congressional accommodation is particularly significant when its impact is considered. The amendment requires accommodation even in the face of "the very strong constitutional rights to abortion and contraception established in *Roe v. Wade*."[164] Furthermore, before its enactment, some family planning organizations were fairly successful in compelling health care providers to make controversial services available to their patients.[165] This illustrates both the power accommodation can have and the types of moral conflicts that can easily occur if accommodation is not provided.

159. 42 U.S.C. § 300a-7 (2006).

160. The Church Amendment was included as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91.

161. 410 U.S. 113 (1973).

162. § 300a-7(b)(1).

163. § 300a-7(c).

164. Wilson, *supra* note 10, at 79.

165. *Id.* (emphasis omitted).

### *C. Ad Hoc Accommodation by State Legislatures*

#### *1. Health Care*

In response to *Roe v. Wade* and to further the purpose of the Church Amendment, states began enacting legislation accommodating health care professionals with a conscientious objection to performing certain procedures.[166] By the end of 1978, virtually all states had enacted similar legislation, providing some degree of exemption for conscientious objectors.[167] However, the degree of protection and ease of claiming an exemption varies drastically from state to state.[168] For example, in order to claim an exemption, some states require only that a conscientious objector provide notice to patients beforehand.[169] Others focus more on the patient, allowing conscientious exemption as long as it would not "pose a 'road block' to the patient's ability to access the desired service from another provider."[170] Other states impose a referral requirement "requir[ing] the doctor or institution to facilitate the patient's ability to get the service from another provider."[171] Finally, some states impose more onerous terms, "permit[ting] an objection only if the objector 'shows proof' or states the reasons for objecting in writing."[172]

After the passage of the Church Amendment and subsequent state legislation, the issue laid dormant for a number of years.[173] However, nearly twenty years later the growth of managed health care providers complicated the issue, leading some states to enact further legislation.[174] For example, in 1997, Illinois, North Dakota, and Texas enacted laws that expanded the accommodations traditionally granted in two important ways.[175] "First, these newer

166. Rachel Benson Gold, *Conscience Makes a Comeback in the Age of Managed Care*, 1 GUTTMACHER REP. ON PUB. POL'Y 1 (Feb. 1998); *see also* JODY FEDER, THE HISTORY AND EFFECT OF ABORTION CONSCIENCE CLAUSE LAWS 2 (2005), *available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS2142801142005.pdf.

167. *See* Gold, *supra* note 166.

168. Wilson, *supra* note 10, at 90.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* Gold, *supra* note 166, at 1.

174. *Id.*

175. *Id.*

laws go beyond abortion and sterilization . . . to apply to any health service about which an ethical, religious or moral objection is raised."[176] For example, the statute might be invoked to accommodate a reproductive endocrinologist with a conscientious objection to providing in vitro fertilization to a lesbian couple.

The second expansion introduced by these laws is that they "explicitly take into account changes in the health care marketplace by greatly expanding the category of entities allowed to claim a conscientious objection. These now include not only health care providers . . . but also corporate payers, such as health plans."[177] This essentially "invest[s] a wide range of entities with the right to claim a corporate 'conscience' and opt out of paying for any health care service at will."[178] These protections have not been adopted as uniformly as the post-*Roe v. Wade* accommodations, leaving many organizations and health care professionals with a moral dilemma.[179]

*2. Prescription drugs*

The provision and coverage of prescription medication is one context where the expansion of accommodation described above[180] is required to protect the religious beliefs of both the pharmacists who dispense prescription drugs and corporations that may pay for them as part of their health care plans. These concerns are raised primarily with respect to prescription contraceptives, whose usage is considered a sin by the Roman Catholic Church[181] and which some pharmacists object to dispensing, considering it tantamount to participating in an abortion.[182]

*a. Employers' healthcare coverage.* In states that have not enacted legislation allowing employers to claim a conscientious objection,

176. *Id.*

177. *Id.*

178. *Id.*

179. *See infra* Part V.C.2.

180. Referring to the expansion of accommodation to 1) cover health care-related conscientious objections beyond abortion and sterilization and 2) allow corporate payers to claim a conscientious objection.

181. Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 75 (Cal. 2004).

182. Jennifer E. Spreng, *Conscientious Objectors Behind the Counter: Statutory Defense to Tort Liability for Failure to Dispense Contraceptives*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 337, 337–38 (2008).

religiously affiliated employers may be forced to pay for services or medication that they oppose. In December 2000, the Equal Employment Opportunity Commission found that an employer who had excluded prescription contraception from its health care plan "engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964."[183] Shortly after this finding, a federal district court in Washington held that engaging in this practice constituted sex discrimination under Title VII.[184] This trend suggests that more and more employers will be required to pay for prescription contraceptives, even if in direct contradiction to their religious beliefs.

Even objecting employers in states that have enacted exemptions allowing organizations to claim a conscientious objection have been forced to provide prescription contraceptives. In *Catholic Charities of Sacramento, Inc. v. Superior Court*,[185] Catholic Charities sought an injunction exempting them from the duty of providing prescription contraceptives in its health care plan as required by the Women's Contraception Equity Act (WCEA).[186] The WCEA, enacted in 1999, included explicit accommodations for religious employers that object to providing plans that cover contraceptives.[187] However, the California Supreme Court ruled that although Catholic Charities "considers itself obliged to follow the Roman Catholic Church's religious teachings" and therefore believed that it would be facilitating sin by offering insurance for prescription contraceptives, it "d[id] not qualify as a religious employer under the WCEA" and could not be exempted under the statute.[188] These examples clearly demonstrate that even in states that have enacted legislation accommodating religion, seeking to only accommodate a narrow class of individuals may leave many unprotected.

*b. Pharmacists.* Like employers who provide insurance coverage, pharmacists with a conscientious objection to providing certain

183. EEOC, DECISION ON COVERAGE OF CONTRACEPTION (Dec. 14, 2000), http://www.eeoc.gov/policy/docs/decision-contraception.html.

184. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1277 (W.D. Wash. 2001) ("[T]he exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate health care need uncovered.").

185. 85 P.3d 67 (Cal. 2004).

186. *Id.* at 73.

187. *Id.* at 74, 76.

188. *Id.* at 75–76.

medications have been accommodated in some states, while in other states they have not been afforded any protection. Many pharmacists' trial of conscience began with the advent of RU-486, which "induces abortion in the first trimester of pregnancy without surgical intervention," and "Plan B" emergency contraception, both of which are seen by some pharmacists as tantamount to abortion.[189] With the advent of these new medications, many pharmacists find themselves faced with a moral dilemma that they likely did not anticipate when they entered their professions.

The response to this moral dilemma has varied greatly from state to state. Some states have enacted legislation accommodating pharmacists with a conscientious objection to distributing these medications[190] while others have existing laws "that arguably relieve pharmacists from employment consequences, professional ethics violations, criminal liability, and civil liability for refusing to dispense."[191] The broadened conscience clause legislation recently enacted in some states may also provide protection for pharmacists, although that would depend greatly on both the language of the statute and how courts interpreted that language.[192]

This accommodation has not gone unnoticed by "[p]ro-choice activist groups" who have pushed back against legislation accommodating pharmacists.[193] Some states and pharmacy boards have shown sympathy for these arguments and have passed "must-

189. Spreng, *supra* note 182, at 337–38.

190. *Id.* at 338 n.13 (citation omitted) (citing exemptions in Arkansas, Georgia, Mississippi, and South Dakota); *accord* Steve Ertelt, *Washington State Capitulates, Sees Pro-Life Pharmacists' Conscience Rights*, LIFENEWS.COM (July 9, 2010), http://www.lifenews.com/2010/07/09/state-5241/ (same).

191. Spreng, *supra* note 182, at 339 (footnotes omitted) (citing laws in California, Georgia, Illinois, Florida, and Maine that may each provide some protection for pharmacists' beliefs).

192. *See supra* Part V.C.1; *see also* Wilson, *supra* note 10, at 79 (stating that state conscience clauses increasingly allow individuals to refuse to participate in "the dispensing of emergency contraceptives"); SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 299 app. (Douglas Laycock et al. eds. 2008) (appendix listing state accommodations of conscience in the health care context); Spreng, *supra* note 182, at 339 nn.14–18 (listing existing accommodations that may apply to pharmacists); *id.* at 374 (stating that, although "[a]pproximately fifteen states have conscience legislation that may protect religious pharmacists from legal consequences if they refuse to dispense contraceptives[,] . . . [t]he reality is far more obscure").

193. Spreng, *supra* note 182, at 340.

dispense" laws that "require pharmacists to dispense contraception regardless of conscience."[194]

The Washington state pharmacy board approved such rules in 2007 "making pharmacists dispense all drugs, including those that would violate their moral or religious views."[195] Ralph's Thriftway, a pharmacy located in the state, brought suit in federal court challenging this regulation, seeking "the right to refuse to stock or dispense Plan B . . . based on [pharmacists'] conscientious objection" as the law forces them into "choosing between their livelihoods and their deeply held religious and moral beliefs."[196] Before trial began, "attorneys for the State of Washington told a federal judge that it would create new rules for pharmacists with conscientious objections to dispensing the morning after pill," at which point Plaintiffs agreed to postpone the trial until after the rulemaking process concluded.[197] The State likely did this in light of the expected outcome of trial, as the judge had issued a preliminary injunction against the new rules, allowing pharmacists to refuse to fill a prescription if they refer customers to a pharmacy where they can get their order filled.[198]

Although the probable outcome of that case seemed like it would favor accommodation, suits challenging "must-dispense" laws or regulations in other states may not be as successful, especially in light of the *Smith* decision.[199] Furthermore, even in states that do not have "must-dispense" laws, "[m]any pharmacies have terminated refusing pharmacists" rather than allow another pharmacist to fill those prescriptions.[200] The only real way to ensure that objecting pharmacists are accommodated is through state legislation allowing them to refuse to stock certain medications.

194. *Id*. States that have enacted this legislation include California, New Jersey, Illinois, and Washington. *See* Ertelt, *supra* note 190.

195. Ertelt, *supra* note 190.

196. *Id*. (citation omitted).

197. *Id*.

198. *Id*. The judge also stated: "On the issue of free exercise of religion alone, the evidence before the court convinces it that the plaintiffs . . . have demonstrated both a likelihood of success on the merits and the possibility of irreparable injury." *Id*. (alteration in original) (citation omitted).

199. *See also* Spreng, *supra* note 182, at 341 & n.28 ("Court challenges to 'must-fill' statutes and rules have produced mixed results."); *Id*. at 365–71 (explaining why free exercise claims for accommodation are unlikely to succeed).

200. *Id*. at 341 & n.30 (citing cases where pharmacists were fired or not hired due to their refusal to distribute contraceptives).

Surveys indicate that legislation accommodating conscientious objectors is supported by most Americans, with "[s]ixty-five percent support[ing] pharmacist[s'] right to decline to fill or counsel for prescription drugs which violate their moral or religious views."[201] Professional pharmacist associations have also issued "endorsements of conscience protections for pharmacists that would not impede customer access to prescription drugs."[202] Many of the concerns that do exist relate to the customer's ability to purchase the prescription drugs.[203] However, these concerns have been and can continue to be addressed by imposing referral requirements on conscientious objectors, as many states have already done in the health care context.[204]

In spite of the popular approval and the ease with which states can address access concerns, only a small number of states have enacted legislation accommodating pharmacists. The reason more states have not enacted accommodating legislation may be due to the "relatively small number of [individuals] who find themselves morally conflicted."[205] However, the fact that some states have accommodated pharmacists who object to providing certain medications may help other states follow suit.

### *3. Adoption Agencies*

A group of conscientious objectors that have not received any accommodation for their religious beliefs are the adoption agencies that object to providing adoptions to same-sex couples. A number of recent cases have found that the Free Exercise Clause does not protect agencies from the requirement to provide adoptions that go against their religious beliefs.[206] This lack of accommodation has led

201. Ertelt, *supra* note 190.

202. Spreng, *supra* note 182, at 339.

203. *See, e.g.*, Julie Cantor & Ken Baum, *The Limits of Conscientious Objection — May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 N. ENG. J. MED. 2008, 2009–10 (2004), *available at* http://www.nejm.org/doi/full/10.1056/NEJMsb042263; Bernard M. Dickens, *Legal Protection and Limits of Conscientious Objection: When Conscientious Objection Is Unethical*, 28 MED. & L. 337, 341 (2009).

204. *See supra* notes 171–172 and accompanying text.

205. Bleich, *supra* note 7, at 247.

206. *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding that a same-sex couple may jointly adopt the two subject children).

some agencies to close their doors rather than provide these adoptions.[207]

Although these closures have not resulted in any accommodation, they have had an effect on the overall public perception of same-sex marriage. Specifically, the failure to accommodate adoption agencies may rally the public against same-sex marriage in other contexts. This was seen in California, where one of the Proposition 8 commercials stated: "If Proposition 8 fails, religious adoption agencies may be forced to place children in same sex marriages or discontinue providing adoption services altogether. That's what happened to Catholic Charities in Massachusetts."[208] This suggests that accommodation of individuals with a religious objection to same-sex marriage in states where it has been adopted may facilitate its adoption in other states.

## VI. LESSONS FROM ACCOMMODATION IN OTHER CONTEXTS

This review of the mechanisms by which conscience is protected and the key areas where it has and has not received protection can assist those considering how states can best accommodate conscientious objectors. This Comment will now apply the information in this review to the accommodation of civil servants who object to performing or facilitating same-sex marriages.

### *A. The Most Likely Avenue for Accommodation of Civil Servants*

The Court's interpretation of the First Amendment post-*Smith* will likely provide no protection for the civil servants' beliefs. Furthermore, courts consistently have found no First Amendment protection for conscientious objectors.

Congress's legislation providing general protections of religious freedom will also be of little value for civil servants who object to facilitating same-sex marriages. As a matter of state law, the provision of marriage to same-sex couples would fall outside the scope of protection of the federal RFRA. Furthermore, RLUIPA would not

207. *See, e.g.*, Berg, *supra* note 10, at 209 (discussing how Catholic Charities in Massachusetts stopped providing adoptions when faced with the choice of providing adoptions to same-sex couples or losing its license); *Same-sex 'Marriage' Law Forces D.C. Catholic Charities to Close Adoption Program*, CATHOLICNEWSAGENCY.COM (Feb. 17, 2010), http://tinyurl.com/yl5r69x.

208. PreservingMarriage, *YES on Proposition 8 (Prop 8) Your Rights*, YOUTUBE (Oct. 16, 2010), http://www.youtube.com/watch?v=A-jc4ujp9Ok.

be of any assistance, as it provides protections for prisoners and with respect to property dispute issues. Targeted congressional legislation enacted on an ad hoc basis would also have a very small chance of providing protection, as this area of law would likely be considered outside of Congress's power to legislate.

As this is a state law issue, state RFRAs and constitutional provisions may provide some objecting civil servants with protections. No state mandating strict scrutiny has addressed the issue of accommodation for religious objectors to same-sex marriage.[209] However, there is a strong argument that a case for a religious accommodation, even for civil servants, would be successful under the strict scrutiny standard.[210] The success of such a case would likely hinge on which law was challenged and what the court perceived the government interest to be.[211] The determination of this issue would need to be resolved on a state-by-state basis, and would depend entirely on the analysis of the highest court of each state hearing the issue. This makes protection both unpredictable and difficult to obtain, as it would require that a civil servant lose her job and then litigate a difficult case with no guarantee of accommodation, which in itself is quite burdensome and financially prohibitive.

209. *Cf.* Wilson, *supra* note 4, at 346–47 (failing to mention any cases when discussing this issue and specifically noting that as "state RFRAs 'are not frequently invoked,' . . . the outer limits of the state's duty to religious beliefs are not well-defined") (citation omitted). None of the states that allow same-sex marriage have constitutions that have been interpreted to require strict scrutiny. *See* Volokh, *Religious Exemption Map*, *supra* note 94. Only Connecticut, which enacted religious exemptions—although not for civil servants—when legalizing same-sex marriage, had previously enacted a state RFRA. Wilson, *supra* note 4, at 347.

210. Wilson, *supra* note 4, at 346–47.

211. There would likely be a substantial burden in a civil-servant accommodation case, as the government is "compelling someone to do something that violates his religious beliefs." Volokh, *supra* note 65. Therefore, for a statute to survive, the government would have to demonstrate that it is using the least restrictive means possible of reaching a compelling governmental interest. If same-sex marriage is taken as a given and a state's equal provision of services statute is challenged, it may very well pass strict scrutiny.

However, if a court were to apply strict scrutiny directly to the state law allowing same-sex marriage, the result may be different. These cases would likely depend on what the court perceived the governmental interest to be. If the court saw the interest being the provision of the benefits of marriage to same-sex couples, laws allowing same-sex marriage may not pass strict scrutiny, as less restrictive means, such as civil unions, would accomplish this same objective. This means that these provisions may invalidate a law allowing same-sex marriage, but may not invalidate a law compelling equal protection or provision of services.

Due to the weaknesses in the protection offered by state RFRAs and constitutional provisions, and the probable inefficacy of federal constitutional and congressional protections, the best and most likely avenue of accommodation is through ad hoc exemptions enacted by the legislature of each state.

### *B. Guidance Regarding How State Legislatures Can Best Accommodate Civil Servants*

With effective accommodation likely being left to state legislatures, these issues will ultimately be decided on a state-by-state basis. However, this review shows that protections for beliefs held by a small subset of the population are infrequently enacted and narrowly crafted, likely for the reasons discussed in Part II.C. For the states that do enact accommodating legislation, the first states that enact legislation will likely serve as a guide for states that follow. Therefore, states enacting accommodations should write legislation carefully to ensure the most effective protection for conscientious objectors.

One lesson that can be gleaned from the above review for states seeking to accommodate conscientious objectors is that statutes that are crafted too narrowly or ambiguously will leave many individuals without protection. As was discussed, courts significantly limited the individuals to which the statute applied based on the language in the statute when reviewing accommodation relating to military service, payment of taxes, and the provision of contraceptives as part of employer health care coverage. The opinions in these cases did not suggest that these individuals' beliefs were any less sincere or important; they simply fell outside the court's narrow interpretation of what the legislature explicitly protected.

The review of accommodation provided to health care providers by states offers further guidance regarding how statutes should be crafted. Accommodation in that context clearly shows that state constitutional provisions will trump statutes providing accommodation for conscientious objectors. This further suggests that states providing accommodation for their civil servants will have to carefully craft the statute so as to not run afoul of constitutional protections.

Finally, accommodations granted in both the health care and prescription drug contexts suggest that legislation that accommodates civil servants while still providing equal service to all

members of the public is the least objectionable, as both traditional and same-sex couples will be afforded equal treatment. In the prescription drug and healthcare contexts, this was accomplished through employee referrals. Scholars have suggested a similar "information forcing" system for same-sex marriage, with "rules that require refusing parties to direct couples to others who will perform the service."[212] This system would "allow protection for matters of conscience without sacrificing access or humiliating same-sex couples."[213] These types of accommodation would also be likely to pass constitutional review, as all comers would receive the same treatment.[214] Moreover, these types of accommodations will likely not have a large impact, as scholars hypothesize that few civil servants will claim this exemption.[215]

### *C. Current Methods of Accommodation Are Ineffective*

On a much broader level, methods of accommodation that are currently available may be ineffective because beliefs held by a small subset of the population are infrequently protected, and even when minority beliefs are protected, the legislation is often narrowly crafted. Furthermore, as is discussed above, courts have consistently interpreted protections narrowly, not because the beliefs of individuals were any less significant, but because the language in the statute was ambiguous. These failings of the current system suggest that further scholarship should be conducted to explore either 1) other possible avenues of accommodation or 2) ways that current avenues can be modified to provide greater protection to conscientious objectors.

212. Wilson, *supra* note 10, at 98.

213. *Id*.

214. *Id*. at 97–100.

215. For example, as Stern has observed:

> [R]eligious believers who oppose same-sex marriages . . . should not be required to act directly in opposition to their religious beliefs, that is, in ways that appear to confer their personal blessing on such marriages. While such exemptions are necessary, there are probably far fewer people around who would invoke such exemptions than is generally thought.

Stern, *supra* note 42, at 308 (although discussing accommodation only for private providers of commercial services). *But see* Lupu & Tuttle, *supra* note 29, at 295 ("[B]ecause the exemption is potentially much broader in scope than other religious exemptions, and lacks the practical constraints present in the employment context . . . proponents [may not be] correct in predicting that the exemption would have little effect on same-sex couples.").

## VII. CONCLUSION

An examination of the current methods of accommodation offers significant guidance for states considering accommodating civil servants opposed to same-sex marriage. This accommodation will most likely come from state legislatures on an ad hoc basis, and the best method of accommodation would allow civil servants to abstain from facilitating same-sex marriage while still providing the same services to same-sex couples, likely through a referral service. The accommodations currently provided in the United States do not effectively accommodate religious belief and new avenues of accommodation should be explored.

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