
RELIGIOUS LIBERTIES

“CONSCIENCE EXEMPTIONS”

By Lynn D. Wardle*

Note from the Editor:

This paper discusses the meaning, history, and present application of conscience exemptions under the U.S. Constitution. As always, The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about the constitutional and policy issues involved with conscience exemptions. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- Mark Strasser, *On Same-Sex Marriage and Matters of Conscience*, 17 WM. & MARY J. WOMEN & L. 1 (2010): <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1301&context=wmjowl>
 - Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169 (2012): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969560
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The term “conscience exemptions” is used today to describe provisions of law that are intended to protect personal rights of conscience (including especially religious conscience) by creating exceptions to particular legal commands or prohibitions. While concern over protecting rights of conscience is as old as our nation, and an essential cornerstone of our Constitution, the contemporary term “conscience exemption” is a misleading phrase that does not fully capture the meaning and importance of protecting rights of conscience of individuals and groups of individuals in our constitutional system.

“Conscience exemptions” regarding two subjects in particular have been the focus of political controversy in the past forty years: abortion and same-sex marriage. Since the Supreme Court mandated in *Roe v. Wade* that all states and the federal government permit elective abortions throughout most or all of pregnancy,¹ there has been debate over proposed “conscience protection” laws to protect health care providers who have religious or moral objections to abortion from being forced to participate in or facilitate providing abortions.² In 1973 (just months after the *Roe* decision) Congress passed the “Church Amendment,”³ which prohibits organizations receiving federal health funds from discriminating in employment or extension of staff privileges “because [the person] refused to perform or assist in the performance of . . . abortion on the grounds that his performance or assistance in the performance of the . . . abortion would be contrary to his religious beliefs or moral convictions”⁴ Since then, Congress has expanded the Church Amendment,⁵ and enacted several other conscience-protecting federal protections, including the 1988 “Danforth Amendment,” prohibiting any educational institution from

requiring any individual or institution to pay for or be penalized for declining to perform abortion-related services,⁶ the 1996 Snowe-Coats Amendment,⁷ blocking a medical education accreditation mandate requiring all OB/GYN programs to require abortion training and barring discrimination against persons or entities for their refusal to do so, and the Weldon Amendments (beginning in 2004), barring federal funding of any organization that discriminates against individuals or entities that do not provide, pay for, or refer for abortion.⁸ At least forty-seven states and the District of Columbia also have enacted conscience-protection laws relating to abortion.⁹

Likewise, when it appeared that some state might legalize same-sex marriage,¹⁰ and especially since 2003 when the Massachusetts became the first state to announce that it would legalize same-sex marriage,¹¹ there has been proposal, discussion, and some limited adoption of “conscience exemptions” that protect some individuals and entities with religious or moral objection to same-sex marriage from any legal duty to or liability for declining to assist in creating same-sex marriages. All seven states that have legalized same-sex marriage by some political process (legislative or popular initiative) have enacted some explicit-but-limited statutory protection for some rights of conscience.¹² On the other hand, both of the states that have legalized same-sex marriage by judicial decree have no similar conscience protections—either by judicial decision or legislation.¹³

Protection for rights of conscience of objectors to same-sex marriage has become a critical factor in the contest over legalizing same-sex marriage. After thirty-two consecutive defeats in state-wide votes about same-sex marriage (in thirty-one states where voters approved state “marriage amendments” barring same-sex marriage, plus Maine, where voters “vetoed” legislation legalizing same-sex marriage in 2009), all three states (Maine, Maryland and Washington) where voters approved same-sex marriage in November 2012 saw pro-same-sex-marriage campaigns that followed a new strategy of reassuring voters that

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rights of conscience would not be impaired.¹⁴

It is likely that controversy over “conscience exemptions” will not merely continue but increase. One reason is the political momentum which the November 2012 votes legalizing same-sex marriage in Maine, Maryland, and Washington (bringing to total number of U.S. states that allow same-sex couples to marry to nine—eighteen percent of the states) generated increases the likelihood that same-sex marriage will be legalized in at least some of the remaining seventeen (of twenty-six total “blue”) states that voted for President Obama in the 2012 presidential election that still prohibit same-sex marriage.¹⁵ Likewise, growing interstate movement of more married same-sex couples into states that do not allow same-sex marriage will create recognition-of-sister-state-marriage-validity controversies. As same-sex marriage has spread, persons with moral objections to same-sex marriage in both public positions and private employment have been pressured to provide, and some have refused to provide, services and products that facilitate same-sex marriage, stimulating heated debate over “conscience exemptions” that will persist and grow as same-sex marriage spreads.¹⁶ Also, continuing “pro-choice” criticisms of and challenges to “conscience clause” laws that have the potential effect of reducing the availability of elective abortion in some areas; and increasing criticism of “conscience exemption” by both supporters of legalized same-sex marriage (who see such exceptions as improper) and by opponents who consider such exemptions to be too narrow, will fuel the conflict.

In 2013 the legislative battle over whether to legalize same-sex marriage continues across the nation, and one of the key issues involved concerns “conscience exemptions.” In Rhode Island, the only New England state that has not yet legalized same-sex marriage, “[r]eligious exemption [is the] key to [passing the proposed] Rhode Island gay marriage law.”¹⁷ Thus, “conscience exemption” is one of the major, oft-arising, civil liberties issues of this generation.

Lost in the political maneuvering and rhetoric surrounding efforts to preserve or limit “conscience exemptions” today are three critical principles. First, so-called “conscience exemptions” are not really “exemptions” at all, but are essential, indispensable cornerstones of the structure of the American government itself. Second, the Founders considered protection of rights of conscience (particularly religious conscience) a crucial cornerstone in the substructure upon which the superstructure of liberties, and constitutional systems were founded. Third, rights of conscience are individual civil rights that belong to all Americans, not just to clergy or churches.

I. EXEMPTIONS OR ESSENTIALS?

First, it is misleading to categorize fundamental purposes and essential requirements as simply “exemptions.” What is minimized today with the term “conscience exemption” is no more an “exemption” than “due process of law” is an “exemption” in constitutional criminal law, or freedom of speech is an “exemption” in the regulation of politics and media. Protection for individual exercise of rights of conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of

the Bill of Rights. As Professor Brett G. Scharffs puts it:

The second fundamental problem with the rhetoric of religious freedom is how vindicating religious freedom rights are characterized as “exemptions” from the supposedly general and neutral laws. Characterizing something as an exemption has the effect of styling it as something unique and requiring special treatment. But exceptions to general rules are commonplace in the law and they are almost never described as exemptions, or if they are, it is without the loaded characterization of “special treatment” that we see in the context of religious freedom.¹⁸

Similarly, “[w]hen the U.S. Supreme Court strikes down a law for violating the First Amendment’s prohibition on restrictions on free speech, it does not characterize this as an exemption from the law, but as a vindication of freedom.”¹⁹ Protection of rights of conscience is an indispensable part of the core of our Constitution and Bill of Rights, and it should not be labeled “exemption” or “exception”—terms which suggest some special privilege or discriminatory preference.

II. BEDROCK OF REPUBLICAN CONSTITUTIONAL GOVERNMENT

The Framers of the Constitution of the United States believed that protection of rights of conscience was not merely a matter of “exemptions” or “exceptions” to good government but essential to establish the rule of law in a republican form of government, and they constructed our Constitution on that foundation. Without protection for rights of conscience, the moral basis for the rule of law, for obedience to the unenforceable, or for voluntary submission to rules of political and social order, is missing or meaningless. Thus, the Founders’ concern for protecting rights of conscience was not just to protect minority churches and their members, but to protect political society as a whole by nurturing the conditions needed for citizens to develop the quality of virtue without which a republican form of government cannot succeed. They believed that virtue was the essential foundation of republican government (what we would call liberal democracy). For example, James Madison, the “Father” of the Constitution and of the Bill of Rights, declared: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”²⁰ For such civic virtue to develop, liberty to follow one’s conscience was essential.²¹

Moreover, protecting the exercise of conscience as a matter of *right* instead of mere prudent *policy* was a major preparatory step for our constitutional system. By the last quarter of the Eighteenth Century, tolerance of rights of conscience was widely considered appropriate and enlightened in Europe, as a matter of progressive political *policy*. But in America, a more radical view took hold, embraced and espoused eloquently by James Madison, whose view was that protection of rights of conscience was a matter of individual, inalienable *right*. Thus, for example, the Virginia Declaration of Rights was initially drafted to guarantee “fullest *toleration*” of religion; but Madison amended it and when it passed, it provided that “all men are *entitled* to the full and free exercise of [religion] according to the

dictates of conscience.²² Madison's *Memorial and Remonstrance* expressed the language of rights, not toleration: "The equal *right* of every citizen to the free exercise of his Religion according to the dictates of conscience is *held by the same tenure with all our other rights*."²³ Madison declared that religious duties "must be left to the conviction and conscience of every man; and it is the *right* of every man to exercise it as these may dictate."²⁴ It makes a big difference whether protection of rights of conscience is a matter of prudent *toleration* or whether it is an inalienable human *right*.

Thus, protection of rights of conscience is not a mere incidental aspect of the Constitution of the United States—in the political theory of the founding era, it was indispensable to the success of the great American experiment in popular self-government. In his *Memorial and Remonstrance*, James Madison explained:

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of a Civil Society, who enters into any subordinate Association, must always do it with reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.²⁵

Madison clearly understood that if men are not loyal to their God and their conscience, it is folly to expect them to be loyal to mere rulers, laws, orders, or professional duties.²⁶ When a man is forced to betray his conscience, he loses the moral basis for his fidelity to the rule of law, and the moral foundation for democracy is destroyed.²⁷ Thus, Madison declared that religious duties "must be left to the conviction and conscience of every man; and it is the *right* of every man to exercise it as these may dictate."²⁸

Thus, the intellectual environment in which the Constitution was fashioned, the very conceptual elements from which it was formed, the core values in the thinking of the Founders, and the principles imbedded by them in the foundations of, and in the Constitution underscore the great importance of protecting rights of conscience. The Constitution was created in the shadow of and reflected deep respect for rights of conscience.

III. INDIVIDUAL OR CORPORATE RIGHTS?

Finally, rights of conscience are individual civil rights. They are held by all persons. Adopting statutory protections of the rights of conscience of only religious organizations and their employees but not of *all* Americans does not provide adequate protection for basic civil rights. That is like enacting a law to protect the right to free speech of only television stations and their employees, or protecting the right to freedom of the press of only newspapers and their employees. Corporate actors certainly deserve such basic civil liberties, but they do not have a monopoly on them. Such fundamental human and constitutional rights belong to all the people, not just a preferred or powerful minority. So "conscience exemptions" that protect only clergy and churches, such as those enacted in the seven states that have legalized same-sex marriage by political

processes, are under-inclusive and inadequate.

Perhaps the most profound problem with such limited "conscience exemptions" is the symbolic or educational effect they have. They convey the misconception that rights of religious conscience are meant only to protect religious institutions and their representatives and reduce what was designed to recognize and protect the common rights of all humanity to a special interest. Further, they represent a step back to pre-constitutional times and abdicate over two centuries of advances in human rights. Finally, one shudders to think what abuses could potentially occur, not only in our nation, but globally if that retreat from respect for fundamental human rights is mimicked in other nations.

Endnotes

- 1 410 U.S. 113 (1973).
- 2 See generally Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1 (2010).
- 3 Section 401 of the Health Programs Extension Act, Pub. L. No. 93-45, 87 Stat. 91, 95 (June 18, 1973), now codified at 42 U.S.C. § 300a-7(b) (2008).
- 4 *Id.* at 42 U.S.C. § 300a-7(c)(1); *id.* at (c)(2).
- 5 Modest modifications and expansions of the programs covered by the Church Amendment were added in 1974, 1979, and 2000 by Pub.L. 93-348, Title II, § 214, July 12, 1974, 88 Stat. 353; Pub.L. 96-76, Title II, § 208, Sept. 29, 1979, 93 Stat. 583; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695; Pub.L. 106-402, Title IV, § 401(b)(5), Oct. 30, 2000, 114 Stat. 1738. See 42 U.S.C.A. § 300a-7, Credit(s).
- 6 See 64 Fed. Register 58567, at 58571-73 (October 29, 1999).
- 7 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 codified at 42 U.S.C. 238n.
- 8 Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. G, § 508(d), 121 Stat. 1844, 2209 (Dec. 26, 2007).
- 9 See, e.g., Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 47-52 (2008); Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & SOC. JUST. 327 (2006).
- 10 Baehr v. Lewin, 852 P.2d 44 (Hawaii 1993).
- 11 Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003). The effective date of ruling was delayed by the court for six months.
- 12 See generally Amber Bailey, Comment, *Redefining Marriage: How the Institution of Marriage Has Changed to Make Room for Same-Sex Couples*, 27 WIS. J.L. GENDER & SOC'Y 305 (2012). Sections 9, 10 & 11 of Vermont Senate Bill 115 that was enacted to legalize same-sex marriage included "exemptions" for churches and clergy who do not wish to participate in or solemnize same-sex marriages. *Id.* at 324. Sections 7, 17-19 of Connecticut Senate Bill 899 that was passed to legalize same-sex marriages provided protection for conscience to allow clergy and churches to refuse to provide services or accommodations for same-sex marriages (as well as adoption protections based on religious beliefs). *Id.* at 325-26. New Hampshire House Bill 436 which legalized same-sex marriages included protections for clergy and churches that had religious objection to solemnizing, officiating or accommodating same-sex marriages in Sections 59:3 and 59:4. *Id.* at 326-27. The New York Marriage Equality Act, 2011 N.Y. Sess. Laws 749 (McKinney) included Section 10-b which declares that churches do not have to recognize or provide facilities for any marriage, bar liability for any church that refuses to provide accommodations for same-sex marriages, and allows churches to limit to or give preference to members in employment, housing sales, or rentals. *Id.* at 328-29. The Washington state legislation legalizing same-sex marriage (S.B. 6239) that was approved by the legislature and which voters declined to veto in November

2012 “preserves the right of clergy or religious organization to refuse to perform, recognize or accommodate any marriage.” Washington Same-Sex Marriage Veto Referendum, Referendum 74 (2012), ballot language, *available at* http://ballotpedia.org/wiki/index.php/Washington_Same-Sex_Marriage_Veto_Referendum,_Referendum_74_%282012%29. The Maine indirect initiated state statute legalizing same-sex marriage that voters approved in November 2012 was described by supporters as “protect[ing] religious freedom by ensuring no religion or clergy be required to perform such a marriage in violation of their religious beliefs[.]” Maine Same-Sex Marriage Question, Question 1 (2012), *available at* http://ballotpedia.org/wiki/index.php/Maine_Same-Sex_Marriage_Question,_Question_1_%282012%29. The Maryland initiated veto referendum known as Question 6, by which voters in that state approved legislation that legalized same-sex marriage was described on the ballot as “protect[ing] clergy from having to perform any particular marriage ceremony in violation of their religious beliefs; . . . [and] and provid[ing] that religious organizations and certain related entities are not required to provide goods, services, or benefits to an individual related to the celebration or promotion of marriage in violation of their religious beliefs.” Maryland Same-Sex Civil Marriage Referendum, Question 6 (2012), *available at* http://ballotpedia.org/wiki/index.php/Maryland_Same-Sex_Civil_Marriage_Referendum,_Question_6_%282012%29. Additionally, Section 2 of the District of Columbia Religious Freedom and Civil Marriage Equality Amendment Act of 2009 also protected the rights of clergy and churches to refuse to perform or provide their church facilities for same-sex marriages. Bailey, *supra* note 12, at 327–38.

13 Neither of the states that legalized same-sex marriage by judicial ruling (Massachusetts or Iowa) including any protection for rights of conscience in the judicial decision, nor has any legislative protection of conscience yet been enacted in either state. Bailey, *supra* note 12, at 329–331.

14 Luis Tellez, *The myth of inevitability*, in MercatorNet, *available at* http://www.mercatornet.com/articles/view/the_myth_of_inevitability (seen 7 January 2013) (“A 2011 Research Report issued by the Democratic think tank Third Way, and used to develop the 2012 campaign to win the state ballot initiatives, stated among its six key findings that: “It is crucial to include reaffirmation of religious liberty protections as a significant part of supporters’ message framework.”).

15 See 2012 Presidential Election (Map), *available at* <http://www.politico.com/2012-election/map/#/President/2012/> (last accessed January 28, 2013).

16 Lynn D. Wardle, *Marriage and Religious Liberty: Comparative Law Problems and Conflict of Laws Solutions* 12 J. L. & FAM. STUDS. 315, 334–47 (2010) (describing incidents where public and private employees have objected on moral grounds to facilitating same-sex marriage).

17 *Religious exemption key to Rhode Island gay marriage law*, USA Today, 25 January 2013, *available at* <http://www.usatoday.com/story/news/nation/2013/01/25/rhode-island-gay-marriage/1865161/>. The bill approved by the Rhode Island House of Representatives allows religious institutions to set their own rules for who is eligible to marry within their faith and protects religious leaders against being forced to perform any marriage ceremony. However, “Paiva Weed said several senators have told her they want a more expansive religious exemption to protect religious leaders, churches, religious charities and organizations that do not support same-sex marriage. In legislative testimony, a lobbyist for the Roman Catholic Church raised concerns that Catholic schools and charitable organizations could be forced to change employee benefit policies if compelled to recognize the same-sex spouses of employees.” *Id.*

18 Brett G. Scharffs, *Accommodating Conscience: The HHS Contraception Mandate and the Problems Arising from General and Neutral Laws* (Sept. 5, 2012 draft) at 26 (copy in author’s possession). See further *Accommodating Conscience: The HHS Contraception Mandate and the Problems Arising from General and Neutral Laws* by Professor Brett G. Scharffs, Francis R. Kirkham Professor of Law, Associate Director Center for Law and Religion Studies, Religious Freedom Discussion Series, September 5, 2012, link to powerpoint slide presentation *available at* <http://www.iclrs.org/index.php?pageId=1&contentId=1&clubId=5069> (last accessed January 28, 2012).

19 *Id.* at 28.

20 THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904).

21 In *Whitney v. California*, 274 U.S. 257, 275 (1927), Justice Brandeis famously emphasized: “Those who won our independence believed that the

final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth”

22 Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 311 (1990); Jack Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 248–49 (1990).

23 James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 15, reprinted in *Everson v. Bd. of Ed.*, 330 U.S. 1, 65–66 (Rutledge, J., dissenting) (emphasis added). *Id.* at ¶ 1 (“The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”) (emphasis added).

24 *Id.* (emphasis added).

25 James Madison, *Memorial and Remonstrance*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 1, reprinted in *Everson v. Bd. of Ed.*, 330 U.S. 1, 65–66 (Rutledge, J., dissenting).

26 [T]he evidence suggests that the theoretical underpinning of the free exercise clause, best reflected in Madison’s writings, is that the claims of the “universal sovereign” precede the claims of civil society, both in time and in authority, and that when the people vested power in the government over civil affairs, they necessarily reserved their unalienable right to the free exercise of religion, in accordance with the dictates of conscience. Under this understanding, the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) (reviewing history of protection of rights of conscience).

27 Jefferson agreed. He famously explained: “The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.” Thomas Jefferson, *Notes on Virginia*, in *The Life and Selected Writings of Thomas Jefferson*, 275 (Adrienne Koch & William Peden eds., 1944), cited in Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 164 n. 58 (1991).

28 *Id.* (emphasis added).

