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AN UNEASY UNION: SAME-SEX MARRIAGE AND RELIGIOUS EXEMPTION IN WASHINGTON STATE

Peter Dolan

Abstract: Same-sex marriage promises to be one of the defining issues of the twenty-first century. While supporters of same-sex marriage have welcomed a shift in the public's perception and increasing acceptance of same-sex marriage in the last decade, controversy remains over how to balance the competing rights between marriage equality and religious freedom. While most same-sex marriage statutes around the country include religious exemptions for religious officials, it is unclear how, or whether, these protections should extend to wedding service providers who have a religious objection to same-sex marriage. Conflicts between same-sex couples seeking wedding services and wedding service providers who have religious objections to same-sex marriage are inevitable, and despite the relatively recent legalization of same-sex marriage in Washington, such conflicts have already occurred and will undoubtedly continue to take place in the future. In order to balance these competing rights, this Comment argues that the Washington Legislature should adopt a "refuse and refer" method that allows wedding service providers with a religious objection to same-sex marriage, in limited circumstances, to decline to provide wedding services to same-sex couples. Such a solution would safeguard the dignitary interests of same-sex couples while also protecting wedding service providers with deep-seated religious objections to same-sex marriage from litigation for refusing to provide wedding services to same-sex couples.

INTRODUCTION

On February 13, 2012, Washington Governor Christine Gregoire signed Senate Bill 6239 into law, legalizing same-sex marriage in Washington for the first time.¹ A referendum challenge to the new law was launched almost immediately, giving Washington's citizens an opportunity to decide the same-sex marriage question themselves by popular vote.² Washington's citizens exercised this right and approved

1. *Washington Governor Signs Gay Marriage Law*, REUTERS (Feb. 13, 2012, 10:20 PM), <http://www.reuters.com/article/2012/02/14/us-gaymarriage-washington-idUSTRE81C15L20120214>; see also S.B. 6239, 62d Leg., Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239.pdf> (providing a copy of the bill passed by the Washington legislature to legalize same-sex marriage in Washington for the first time).

2. *Washington Voters Approve Gay Marriage*, SEATTLE TIMES (Nov. 8, 2012, 3:06 PM), http://seattletimes.com/html/localnews/2019640072_apusgaymarriage4thldwritethru.html [hereinafter *Washington Voters Approve Gay Marriage*]. See also COMPLETE TEXT REFERENDUM MEASURE 74 (2012), available at https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/R-74_complete_text.pdf (last visited June 29, 2013) (containing the actual language of Referendum 74).

Referendum 74 on November 6, 2012.³ Hard-fought by both sides of the same-sex marriage debate,⁴ the passage of Referendum 74 was by no means certain and was merely one step in the long journey of incorporating same-sex marriage into the laws and social mores of Washington's residents. While proponents of same-sex marriage hailed the passage of Referendum 74 as a step in the direction of equality of marriage for all,⁵ those opposed to same-sex marriage now stand in the uncertain position of adapting to the reality of the legalized practice of same-sex marriage in Washington State.

The issue of same-sex marriage is both politically and socially polarizing because it is so often closely tied to deeply-held personal convictions, beliefs, and principles. For many, "[t]he debate over same-sex marriage has become for the twenty-first century what the abortion debate was for the twentieth century: a single, defining issue that divides the country in a zero-sum political battle."⁶ As the battle lines between those who supported and opposed same-sex marriage during the Referendum 74 debate slowly dissolve, important issues still remain regarding the impact of same-sex marriage in Washington. One such issue is how far religious exemptions should extend for those who are morally opposed to same-sex marriage on the basis of their religious beliefs. Religious exemptions are a tool that can be used by a legislature to exempt certain groups from compliance with certain parts of a law, such as an exception for churches or religiously-affiliated hospitals that might otherwise be required to provide emergency contraceptives.⁷

Washington's Senate Bill 6239 lays out the religious exemption clause that the Washington Legislature included for same-sex marriages.⁸ Senate Bill 6239 provides:

3. COMPLETE TEXT REFERENDUM MEASURE, *supra* note 2; *Washington Voters Approve Gay Marriage*, *supra* note 2.

4. *Washington Approves Gay Marriage in Referendum 74 Vote (UPDATE)*, HUFFINGTON POST (Nov. 7, 2012, 3:38 PM), http://www.huffingtonpost.com/2012/11/07/washington-referendum-74-gay-marriage_n_2050539.html.

5. *Gay Couples Get Marriage Licenses in Washington State*, CBS NEWS (Dec. 6, 2012, 12:29 PM), http://www.cbsnews.com/8301-201_162-57557560/gay-couples-get-marriage-licenses-in-washington-state/.12/Pdf/Bills/Session%20Laws/Senate/6239-S.SL.pdf.

6. Jonathan Turley, *Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 59, 59 (Douglas Laycock et al. eds., 2008).

7. *See, e.g., Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1184 (W.D. Wash. 2012) (providing a religious exemption for pharmacists who are morally opposed on religious grounds to stocking and dispensing emergency contraceptives).

8. S.B. 6239, 62nd Leg., Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239.pdf>.

No regularly licensed or ordained minister or any priest, imam, rabbi, or similar official of any religious organization is required to solemnize or recognize any marriage. A regularly licensed or ordained minister or priest, imam, rabbi, or similar official of any religious organization shall be immune from any civil claim or cause of action based on a refusal to solemnize or recognize any marriage under this section.⁹

Despite this provision's language that will protect religious officials from being required to officiate same-sex marriages, the Washington Legislature's failure to protect anyone besides religious officials from potential lawsuits may lead to legal issues for wedding service providers with religious objections to same-sex marriage.

While legal conflicts between same-sex couples and wedding service providers who object to same-sex marriage on religious grounds are just now beginning to emerge in Washington, similar conflicts have occurred in other states in recent years. For example, in 2006 a same-sex couple successfully sued a photographer in New Mexico who declined to take pictures of their commitment ceremony.¹⁰ In *Elane Photography v. Willock*,¹¹ the New Mexico Court of Appeals held that the photographer's refusal to photograph the same-sex couple's commitment ceremony violated the New Mexico Human Rights Act, affirming the trial court's decision to grant the plaintiff's motion for summary judgment.¹² Many conservative Americans opposed to same-sex marriage were concerned about the potential implications of this ruling, and the court's decision became a rallying cry for efforts to overturn same-sex marriage statutes, or at least to strengthen the protections for those with sincere religious objections to same-sex marriage.¹³

In January 2013, a situation similar to that in *Elane Photography* arose when the owners of the Sweet Cakes Bakery in Gresham, Oregon, declined to bake a wedding cake for a same-sex couple's wedding ceremony.¹⁴ The couple that owns the bakery contended that they acted

9. *Id.*

10. See generally *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012) (holding that *Elane Photography's* refusal to photograph a lesbian commitment ceremony violated New Mexico's Human Rights Act and that the defendant photographer's constitutional and statutory rights to freedom of speech, freedom of expression, and freedom of religion were not violated).

11. *Id.*

12. *Id.* at 445.

13. *New Mexico's Gay Marriage Lawsuit May End Couple's Decade in Limbo*, BLOOMBERG.COM (Apr. 17, 2013, 9:01 PM), <http://www.bloomberg.com/news/2013-04-18/new-mexico-gay-marriage-lawsuit-may-end-couple-s-decade-in-limbo.html>.

14. *Gresham Bakery Says Oregon Constitution Protects Refusal of Same-sex Wedding Cake*

within their rights under the Oregon State Constitution when they refused to bake a cake for a same-sex wedding.¹⁵ Article I, Section 3 of the Oregon State Constitution states that, “No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.”¹⁶ On August 13, 2013, the lesbian couple that unsuccessfully tried to order a wedding cake from the bakery filed a complaint with the civil rights division of Oregon’s Bureau of Labor and Industries, which plans to move forward in investigating whether this constitutes a violation of the Oregon Equality Act.¹⁷ This is a good example of the type of issue that is becoming increasingly prevalent in a nation that contains people who hold genuine and heartfelt beliefs at either end of a politically-charged spectrum: that same-sex marriage is either natural and acceptable, or morally dubious.

In light of this, the Washington Legislature should reconsider the religious exemption provisions in its new same-sex marriage law. These religious exemption protections should be balanced with the need to protect same-sex couples from undue discrimination and an effective status as second-class citizens. Professor Jonathan Turley noted, “I believe (and hope) that the nation will evolve toward a greater protection of homosexuals and greater recognition of civil unions. This evolution will not, however, occur if the government is viewed as unfairly trying to pre-determine the debate or harass one side.”¹⁸ Both sides of this debate have a concrete interest in finding a middle ground that both groups can find acceptable.

This Comment begins by outlining the background of same-sex marriage laws at the federal level in Part I. Part II discusses the legalization and subsequent impact of same-sex marriage at the state level. Part III explains Washington State’s history with the issue of same-sex marriage and its process of legalizing same-sex marriage. Washington’s religious freedom protections are analyzed in Part IV to show procedurally how Washington courts treat a legal challenge on a

Order, OREGON LIVE, http://www.oregonlive.com/gresham/index.ssf/2013/02/gresham_bakery_says_oregon_con.html (last updated Feb. 13, 2013).

15. *Id.*

16. OR. CONST. art. I, § 3.

17. *Sweet Cakes by Melissa, Oregon Bakery, Under State Investigation for Anti-Gay Discrimination*, THE HUFFINGTON POST (Aug. 16, 2013, 11:13 AM), http://www.huffingtonpost.com/2013/08/16/sweet-cakes-by-melissa-bakery-anti-gay-discrimination_n_3767646.html; see also OR. REV. STAT. § 659A.403 (2008).

18. See Turley, *supra* note 6, at 75–76.

religious freedom issue. To provide an analogy to a similar issue, Part V demonstrates that the Washington Legislature was able to protect pharmacists with a religious objection to selling emergency contraceptives and could use a similar method in the context of same-sex marriage. This Comment then argues in Part VI that greater religious-exemption protections will benefit both sides of the same-sex marriage debate and that the Washington Legislature should adopt a balancing test that allows independent business owners and individuals, in limited circumstances, to decline to perform wedding services for same-sex weddings when they deem those ceremonies to be against their religious beliefs. This Comment concludes by demonstrating why a compromise, which is by definition not ideal for either side, is nonetheless the best solution for the problems facing this state in a new age allowing same-sex marriage.

I. THE FEDERAL DEFENSE OF MARRIAGE ACT HAS BEEN RULED UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT

By July 2013, thirteen states had legalized same-sex marriage.¹⁹ The United States District Court for the Northern District of California commented that, in light of the country as a whole, “[o]nly a handful of states have successfully passed legislation legalizing same-sex marriage, and only a few more have been required to afford equal marital rights to gay and lesbian individuals through judicial decisions.”²⁰ In addition, as of 2012 “[t]hirty states [had] passed constitutional amendments banning same-sex marriage,”²¹ thus significantly limiting the reach of same-sex marriage in the United States, at least for the time being. At the federal level, same-sex marriage law was largely controlled by the Defense of Marriage Act (DOMA), passed by Congress in 1996, which prevented the federal government from recognizing same-sex marriages and purported to allow each state to refuse recognition of same-sex marriages performed in other states.²² Perhaps most significantly, DOMA expressly defined marriage as a union between one man and one

19. See *Where State Laws Stand*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited July 7, 2013).

20. *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 988 (N.D. Cal. 2012).

21. *Id.*

22. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006)), *invalidated by* *United States v. Windsor*, ___U.S.___, 133 S. Ct. 2675, 2682–83 (2013).

woman,²³ thus precluding recognition of same-sex relationships at the federal level.

On July 8, 2010, Massachusetts Federal District Court Judge Joseph Tauro held that the denial of federal rights and benefits to lawfully married Massachusetts same-sex couples was unconstitutional under the Tenth Amendment.²⁴ The Tenth Amendment maintains that, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”²⁵ This language has generally been interpreted to allow states to pass laws in areas that are not expressly delegated to the federal government.²⁶ State legislation has traditionally included the area of marriage, and a study by *The Christian Post*, in June 2013, indicated that a majority of Americans support the idea of allowing states to decide on the issue of same-sex marriage themselves.²⁷

DOMA has been challenged in federal court on several occasions, and multiple courts have found it to be unconstitutional.²⁸ In *Windsor v. United States*,²⁹ the Second Circuit held that sexual orientation was a quasi-suspect classification deserving of intermediate scrutiny,³⁰ which was sufficient to strike down Section 3 of DOMA³¹ as applied to the

23. *Id.*

24. *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that the Commonwealth of Massachusetts had standing to challenge DOMA’s constitutionality, that DOMA exceeded Congress’s power under the Spending Clause of the U.S. Constitution, and that DOMA violated the Tenth Amendment).

25. U.S. CONST. amend. X.

26. *See, e.g.*, *United States v. Hubbard*, 474 F. Supp. 64, 73 (D.D.C. 1979) (“Power is allocated among the federal government and the states by specifying those powers the Congress might exercise and by emphasizing in the tenth amendment that undelegated powers were reserved to the states or respectively to the people.”).

27. *Most Americans Say States Should Decide on Same-Sex Marriage, Poll Finds*, CHRISTIAN POST (June 8, 2013, 1:48 PM), <http://www.christianpost.com/news/most-americans-say-states-should-decide-on-same-sex-marriage-poll-finds-97588/>.

28. *See, e.g.*, *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012) (holding that the appropriate level of scrutiny to use when reviewing statutory classification based on sexual orientation was heightened scrutiny, that DOMA did not satisfy this heightened scrutiny, and that DOMA did not satisfy a rational basis test); *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (2010) (holding that the Commonwealth of Massachusetts had standing to challenge DOMA’s constitutionality, that DOMA exceeded Congress’ Spending Clause powers, and that DOMA violated the Tenth Amendment).

29. *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (holding that Section 3 of DOMA is unconstitutional as applied to the plaintiff).

30. *Id.* at 400.

31. Section 3 of DOMA limited the definition of marriage to “a legal union between one man and one woman as husband and wife.” *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)), *invalidated by* *United States v. Windsor*, ___ U.S. ___,

plaintiff as unconstitutional.³² The United States Supreme Court agreed to grant review of the decision in *Windsor* and held that DOMA's definition of marriage was unconstitutional as a deprivation of the personal liberties guaranteed by the Fifth Amendment.³³ The Court reasoned:

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.³⁴

The Court's decision in *Windsor* opens the door for same-sex couples to receive benefits that have been denied to them because of the prohibitions contained in DOMA,³⁵ and the Court's decision will likely also strengthen calls for legalizing same-sex marriage in additional states.³⁶

In addition to *Windsor*, the Supreme Court recently considered the constitutionality of California's Proposition 8, which mandated that only marriages between a man and a woman were valid in California.³⁷ In *Hollingsworth v. Perry*,³⁸ the United States Supreme Court held that proponents of Proposition 8 did not have standing to appeal the district court's order declaring Proposition 8 unconstitutional.³⁹ In finding that the petitioners did not have standing, the Supreme Court effectively declared Proposition 8 unconstitutional without making its holding

133 S. Ct. 2675, 2682–83 (2013).

32. *Windsor*, 833 F. Supp. 2d at 406.

33. *United States v. Windsor*, __U.S.__, 133 S. Ct. 2675, 2696 (2013).

34. *Id.* at 2694.

35. *Id.*

36. *See, e.g., Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013, 10:38 PM), <http://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541/> (stating that support for same-sex marriage in America has never been higher than after the approval of the two landmark Supreme Court same-sex marriage cases in June 2013). A record 55% of Americans supported same-sex marriage at the time of the study. *Id.*

37. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that Proposition 8 was unconstitutional because it violated the Due Process and Equal Protection clauses of the Fourteenth Amendment).

38. __U.S.__, 133 S. Ct. 2652 (2013).

39. *Id.* at 2668.

broad enough to affect other states.⁴⁰

II. EACH STATE HAS THE POWER TO LEGALIZE SAME-SEX MARRIAGE

While federal benefits for same-sex couples have been recognized as a result of the Supreme Court's decision in *Windsor*,⁴¹ each state has historically had the power to decide on its own whether or not to legalize same-sex marriage, and *Windsor* allows each state to maintain that power.⁴² Massachusetts was the first state to recognize legal same-sex marriages with its landmark 2003 decision in *Goodridge v. Department of Public Health*.⁴³ In reasoning its way to an approval of same-sex marriage, the court in *Goodridge* found that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."⁴⁴ This decision acknowledged the religious freedom issues that would likely follow, but did not directly address those issues, stating:

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married Neither view answers the question before us.⁴⁵

Other state supreme courts have followed the Supreme Court of Massachusetts' lead in holding that laws restricting marriage to heterosexual couples violate state constitutions. For example, the Supreme Court of Connecticut ruled in 2008 that laws restricting civil marriage to heterosexual couples violated same-sex couple's equal protection rights under the Connecticut constitution.⁴⁶ The Court

40. *Id.*

41. See *United States v. Windsor*, __U.S.__, 133 S. Ct. 2675, 2675 (2013).

42. *Id.* at 2692 (noting that "DOMA . . . departs from [the] history and tradition of reliance on state law to define marriage").

43. See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that, as a matter of first impression, the limitation of protections, benefits, and obligations of civil marriage to individuals of opposite sexes lacked rational basis and as such violated state constitutional equal protection privileges).

44. *Id.* at 968.

45. *Id.* at 948.

46. See generally *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

explained:

Although we traditionally have viewed that right [to marriage] as limited to a union between a man and a woman, “if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.”⁴⁷

An oft-cited case involving religious freedom and same-sex marriage at the state level is the New Mexico Court of Appeals’ decision in *Elane Photography*.⁴⁸ In *Elane Photography*, the court found the defendant’s photography business liable under New Mexico’s Human Rights Act after the defendant refused to photograph a commitment ceremony for a lesbian couple.⁴⁹ The court noted:

The [New Mexico Human Rights Act] prohibits “any person in any *public accommodation* to make a distinction, directly or indirectly, in offering or refusing to offer its services . . . to any person because of race, religion, color, national origin, ancestry, sex, *sexual orientation*, gender identity, spousal affiliation[,] or physical or mental handicap.”⁵⁰

The court held that “Elane Photography’s refusal to photograph [the plaintiffs’] commitment ceremony violated the [New Mexico Human Rights Act]” and furthermore that “[i]n enforcing the [New Mexico Human Rights Act], the [New Mexico Human Rights Commission] and the district court did not violate Elane Photography’s constitutional and statutory rights based upon freedom of speech, freedom of expression, freedom of religion, and the [New Mexico Religious Freedom Restoration Act].”⁵¹ The New Mexico Supreme Court granted a writ of certiorari to review this case and oral arguments were heard on March 11, 2013.⁵²

On August 22, 2013, the Supreme Court of New Mexico issued its decision in the case of *Elane Photography, LLC v. Willock*⁵³ and found

47. *Id.* at 481–82 (quoting *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008)).

48. *See generally* *Elane Photography v. Willock*, 284 P.3d 428 (N.M. Ct. App. 2012).

49. *Id.* at 445.

50. *Id.* at 433 (emphasis in original) (citing N.M. Stat. § 28–1–7(F)).

51. *Id.* at 445.

52. *Elane Photography v. Willock*, 296 P.3d 491 (N.M. 2012) (granting writ of certiorari).

53. 2013-NMSC-040, No. 33, 687 (N.M. Aug. 22, 2013).

three reasons to affirm the judgment of the New Mexico Court of Appeals.⁵⁴ First, the court found that “a commercial photography business that offers its services to the public, thereby increasing its visibility to potential clients, is subject to the antidiscrimination provisions of the [New Mexico Human Rights Act] and must serve same-sex couples on the same basis that it serves opposite-sex couples.”⁵⁵ Second, the court held that the New Mexico Human Rights Act does not violate free speech guarantees “because the [New Mexico Human Rights Act] does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another.”⁵⁶ Third, the court found that the New Mexico Religious Freedom Restoration Act was inapplicable in this case because the government was not a party.⁵⁷ As of this writing, New Mexico has not legalized same-sex marriage, but this case aptly demonstrates the possibility of conflict between same-sex couples and those who have a religious opposition to same-sex marriage.⁵⁸

This issue is further highlighted by the path that same-sex marriage legalization has taken in Rhode Island. On January 3, 2013, legislation was introduced in the Rhode Island Legislature to legalize same-sex marriage.⁵⁹ However, the proposal faced opposition from Catholic groups, and Bishop Thomas Tobin stated that it was “immoral and unnecessary” to push for same-sex marriage instead of civil unions, which had been legalized in Rhode Island in 2011.⁶⁰ The Rhode Island House Judiciary Committee approved the legislation on January 22, 2013, and the House passed the bill two days later.⁶¹ However, the fate

54. *Id.* at *3.

55. *Id.* at *4.

56. *Id.*

57. *Id.*

58. See, e.g., *With New Legal Challenge, Gay Marriage Debate in New Mexico Heats Up*, N.Y. TIMES (June 6, 2013), http://www.nytimes.com/2013/06/07/us/with-new-legal-challenge-gay-marriage-debate-in-new-mexico-heats-up.html?_r=0 (explaining that a “vigorous campaign” was under way in New Mexico to legalize same-sex marriage at the time).

59. See H. 5015, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013), available at <http://webserver.rilin.state.ri.us/BillText13/HouseText13/H5015.pdf>. See also *Same-sex Marriage Bills Introduced in RI House and Senate*, PROVIDENCE J. (Jan. 3, 2013, 4:58 PM), <http://news.providencejournal.com/politics/2013/01/same-sex-marriage-bills-introduced-in-ri-house-and-senate.html> (explaining that lawmakers in the Rhode Island House and Senate introduced bills on January 3, 2013 to legalize same-sex marriage in Rhode Island).

60. *Providence Bishop Says Gay Marriage ‘Unnecessary,’* BOSTON.COM (Jan. 7, 2013), <http://www.boston.com/news/local/rhode-island/2013/01/07/providence-bishop-says-gay-marriage-unnecessary/JtoXYibZLRh3puJhmCAJKO/story.html>.

61. See *R.I. House Committee Sends Same-sex Marriage Bill to House Floor*, PROVIDENCE J.

of this legislation in Rhode Island remained uncertain because some religious groups remained concerned about the lack of religious-exemption provisions.⁶² In January 2013, Rhode Island State Senator M. Teresa Pavia-Weed reported that several Rhode Island senators wanted more expansive religious exemption protections to help shield religious leaders, charities, churches, and organizations that do not support same-sex marriage from lawsuits.⁶³ The final same-sex marriage bill in Rhode Island included a religious exemption for clergy members, which helped assuage concerns from lawmakers that religious leaders could be sued for abiding by their religious convictions.⁶⁴ On May 2, 2013, Rhode Island became the tenth state to legalize same-sex marriage.⁶⁵

III. WASHINGTON STATE HAS A LONG AND COMPLICATED PAST WITH SAME-SEX MARRIAGE

The process of legalizing same-sex marriage in any state can be a difficult and contentious journey, and Washington's journey towards legalizing same-sex marriage is no exception. Washington entered into the same-sex marriage debate long before most states' courts had begun to consider same-sex marriage issues with the Washington Court of Appeals' 1974 decision in *Singer v. Hara*.⁶⁶ In *Singer*, two gay activists requested a marriage license from King County, which denied the request.⁶⁷ The activists then brought suit, alleging that the denial violated the Equal Rights Amendment of the Washington State Constitution.⁶⁸ The court denied *Singer*'s claim, framing its decision in language that left no doubt as to the court's position:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis This

(Jan. 22, 2013), <http://news.providencejournal.com/breaking-news/2013/01/house-committee-sends-same-sex-marriage-bill-to-house-floor.html>.

62. *Rhode Island Gay Marriage Bill Faces Uncertain Future*, HUFFINGTON POST (Jan. 25, 2013, 1:49 PM), http://www.huffingtonpost.com/2013/01/25/rhode-island-gay-marriage_n_2549762.html.

63. *Id.*

64. *See* Substitute H.B. 5015, 2013 Gen. Assemb., Jan. Sess. (R.I. 2013), *available at* <http://webserver.rilin.state.ri.us/PublicLaws/law13/law13004.htm>.

65. *See id.*

66. *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974) (holding that the statutory prohibition in Washington against same-sex marriage did not violate the Washington State Constitution).

67. *Id.* at 248, 522 P.2d at 1188.

68. *Id.*

historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend.⁶⁹

The Washington State Supreme Court did not grant review.⁷⁰

Questions regarding the right to same-sex marriage in Washington were not raised again until 2004 when the Washington State Supreme Court considered two similar cases in *Andersen v. King County*⁷¹ and *Castle v. State*.⁷² In both cases, same-sex couples challenged the constitutionality of Washington's Defense of Marriage Act and Washington's laws banning same-sex marriages.⁷³ The cases were consolidated for review before the Washington State Supreme Court in *Andersen v. King County*⁷⁴ in 2006. Finding against the plaintiffs and reversing the trial court, the Court held:

Applying the current case law that governs our decision and the narrow issues on which the plaintiffs requested we rule, we hold that the plaintiffs have not established that the Washington State Defense of Marriage Act is unconstitutional under the state privileges and immunities clause, Article I, Section 12, the state due process clause, Article I, Section 3, the state constitution's privacy provision, Article I, Section 7, or the state's Equal Rights Amendment, Article XXXI, Section 1.⁷⁵

Although the Court did not find a judicial path to same-sex marriage legalization in Washington, the Court left open the opportunity that the legislature might decide otherwise, stating “[o]ur decision accords with the substantial weight of authority from courts considering similar constitutional claims. We see no reason . . . why the legislature or the people acting through the initiative process would be foreclosed from extending the right to marry to gay and lesbian couples in Washington.”⁷⁶

69. *Id.* at 264, 522 P.2d at 1197 (quotations omitted).

70. *Singer v. Hara*, 84 Wash. 2d 1008 (1974) (denying review of *Singer*, 11 Wash. App. 247, 522 P.2d 1187).

71. *Andersen v. Sims*, No. 04-2-04964-4, slip op. (Wash. 2004).

72. *Castle v. State*, No. 04-2-0061404, slip op. (Wash. 2004).

73. *See Andersen v. King County*, 158 Wash. 2d 1, 8-9, 138 P.3d 963, 968 (2006) (holding that, under a rational basis standard of review, Washington's Defense of Marriage Act was rationally related to the state's interest, did not violate the state constitution's equal protection clause, was not invalid as a violation of privacy interests protected by the state constitution, and did not violate the Equal Rights Amendment).

74. *Id.*

75. *Id.* at 53, 138 P.3d at 990.

76. *Id.* at 8, 138 P.3d at 968.

In January 2007, the Washington Defense of Marriage Alliance filed Initiative 957 in an attempt to increase examination of the same-sex marriage question in Washington.⁷⁷ Initiative 957 proposed that marriage be limited to heterosexual couples who were able to have children and that all other marriages should be “unrecognized.”⁷⁸ Proponents of I-957 acknowledged that the initiative was “absurd” and was merely designed to ignite discussion on the same-sex marriage issue.⁷⁹ Initiative 957 was withdrawn by its sponsor before a final vote could occur.⁸⁰

In January 2012, the legalization of same-sex marriage in Washington moved forward when the Senate Government Operations, Tribal Relations, and Elections Committee approved Senate Bill 6239 to legalize same-sex marriage.⁸¹ The Washington State Senate approved Senate Bill 6239 on February 1, 2012.⁸² The legislation then passed to the House, which approved the bill on February 8, 2012.⁸³ Governor Christine Gregoire signed the same-sex marriage bill into law on February 13, 2012.⁸⁴

While the law was slated to take effect ninety days after the end of the legislative session, opponents of same-sex marriage successfully blocked the law’s implementation by collecting enough signatures to place the

77. *I-957 Would Require Married Couples to Have Kids*, KOMO NEWS (Feb. 6, 2013, 6:19 PM), <http://www.komonews.com/news/local/5566451.html>; see also *Initiative 957*, WASHINGTON SECRETARY OF ST., <http://www.sos.wa.gov/elections/initiatives/text/i957.pdf> (last visited July 3, 2013).

78. See KOMO NEWS, *supra* note 77.

79. *Id.*

80. *Proposed Initiatives to the People - 2007*, OFFICE OF THE SECRETARY OF ST., <http://www.sos.wa.gov/elections/initiatives/people.aspx?y=2007> (last visited Aug. 26, 2013).

81. See S.B. 6239, 62nd Leg., Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239.pdf>. See also *Same-sex marriage bill passes in Senate committee*, CAPITOL REC. (Jan. 26, 2012), <http://capitolrecord.tvw.org/2012/01/same-sex-marriage-bill-passes-in-senate-committee/#.UScJvzCR8r8> (explaining that the Senate Government, Operations, Tribal Relations & Elections committee approved a bill to legalize same-sex marriage in Washington in January 2012).

82. *Washington Gay Marriage: State Senate Approves Bill To Allow Same-sex Couples To Wed*, HUFFINGTON POST (Feb. 1, 2012, 11:44 PM), http://www.huffingtonpost.com/2012/02/01/washington-gay-marriage_n_1248801.html.

83. *Washington State Legislature Votes to Approve Same-sex Marriage*, CNN NEWS (Feb. 9, 2012, 12:56 PM), <http://www.cnn.com/2012/02/08/us/washington-same-sex-marriage/index.html>.

84. See Engrossed Substitute S.B. 6239, 62nd Leg., Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/6239-S.SL.pdf>; see also REUTERS, *supra* note 1 (stating that Washington’s Governor Christine Gregoire signed Washington’s same-sex marriage bill into law on February 13, 2012).

measure on the ballot in November 2012 as Referendum 74.⁸⁵ Referendum 74 was ultimately approved, with 53.7% voting for and 46.3% voting against the measure.⁸⁶ On December 6, 2012, Washington issued its first same-sex marriage licenses.⁸⁷

Almost immediately, conflict began to surface in Washington between same-sex couples seeking wedding services and wedding service providers with strong religious objections to same-sex marriage.⁸⁸ In one of the first such high-profile cases, a Richland florist declined to provide flowers for a same-sex wedding, providing her religious beliefs about same-sex marriage as the reason.⁸⁹ Citing Washington's antidiscrimination law,⁹⁰ both the American Civil Liberties Union and the Washington State Attorney General's Office filed suit against Arlene's Flowers and its proprietor.⁹¹ The proprietor countersued against the Washington Attorney General's office, arguing that the Attorney General was attempting to force her to act in a manner contrary to her religious convictions in violation of her constitutional rights.⁹² Opponents of same-sex marriage have used this case as a rallying cry and an example of the threat that looms over religious objectors to same-sex marriage.⁹³ If no further steps are taken, this case is in all likelihood the first of many that will attempt to litigate these same issues.

85. *Anti-gay Marriage Measure Qualifies for Wash. State Ballot*, USA TODAY (June 12, 2012, 8:56 PM), <http://content.usatoday.com/communities/ondeadline/post/2012/06/anti-gay-marriage-measure-qualifies-for-wash-state-ballot/1#.UScM-TCR8r9>.

86. *2012 Washington State Election Results*, SEATTLE TIMES (Nov. 27, 2012), <http://seattletimes.com/flatpages/politics/2012-washington-election-results.html>.

87. *Washington Starts Issuing Same-sex Marriage Licenses*, CNN NEWS (Dec. 6, 2012, 2:32 PM), <http://www.cnn.com/2012/12/05/us/washington-same-sex-marriage>.

88. *State's Case Against Florist Fires Up Gay-marriage Critics*, SEATTLE TIMES (Apr. 18, 2013, 10:36 AM), http://seattletimes.com/html/localnews/2020803087_weddingflowersxml.html.

89. *Id.*

90. WASH. REV. CODE. § 49.60.215 (2010).

91. *Washington State and the ACLU Sue Florist for Refusing to Sell Flowers for Gay Wedding Because of Christian Beliefs*, NYDAILYNEWS.COM (Apr. 18, 2013, 8:58 PM), <http://www.nydailynews.com/news/national/flower-shop-sued-shunning-gay-wedding-article-1.1321259>.

92. *Richland Florist Sues State for Violating Her Religious Freedom*, TRI-CITY HERALD (May 16, 2013), <http://www.tri-cityherald.com/2013/05/16/2397325/richland-florist-sues-state-for.html>.

93. See SEATTLE TIMES, *supra* note 88.

IV. RELIGIOUS FREEDOM IS RECOGNIZED FEDERALLY AND IN WASHINGTON AS A FUNDAMENTAL RIGHT DESERVING STRONG PROTECTIONS

Litigation concerning wedding service providers' obligation to serve same-sex couples has already begun and will likely continue as more same-sex couples are married.⁹⁴ For those with strong feelings on the issue of same-sex marriage, the stakes are similar to the political and social debates over abortion rights that began decades ago and continue still today.⁹⁵ However, this issue need not devolve into an ideological struggle that pits those in favor of same-sex marriage against those opposed to it in a destructive war of words and costly litigation. It is of paramount importance that the state government find a way to make both sides in this debate feel that they are being heard, that their needs are being addressed, and that they can be confident in the exercise of their beliefs in an open and reasonable manner without fear of reprisal, discrimination, or litigation.

A. *The United States Has a Strong History of Protecting Religious Freedom*

Religious freedom in the United States is protected both by state constitutions and statutes and the First Amendment to the Constitution, which provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁹⁶ However, freedom of religion in the United States is not absolute, and it has been interpreted by the Supreme Court to mean that while laws generally cannot interfere with an individual's religious *belief* and *opinions*, they may interfere with religious *practices* that may endanger others.⁹⁷ For example, religions may not engage in practices such as human sacrifice or religiously-sanctioned murder, even if it is mandated by their religious "beliefs."⁹⁸

When governments pass laws and ordinances that affect religious activity, they must do so in a manner that is of general applicability and

94. See discussion, *supra* Part III (referencing examples of pending litigation between same-sex couples and wedding service providers with religious objections to same-sex marriage).

95. See Turley, *supra* note 6, at 59.

96. U.S. CONST. amend. I.

97. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (posing extreme hypothetical situations to make the point that government must sometimes intervene to override certain dangerous religious practices).

98. *Id.*

which advances a substantial government interest in order to justify the impact on religious activity.⁹⁹ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁰⁰ the Court analyzed whether the City of Hialeah had improperly targeted a religion that engaged in the practice of animal sacrifices by passing an ordinance that forbade the killing of animals in a public or private ritual or ceremony.¹⁰¹ The Court stated that, “[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”¹⁰² Furthermore, “[t]he First Amendment right to free speech necessarily protects any speech, no matter how trivial. The First Amendment right to free exercise necessarily protects (within the limits of current Supreme Court doctrine) any religious belief, no matter how trivial.”¹⁰³

While decisions in cases like *Lukumi Babalu* make it clear that religious *beliefs* are much more easily protected than religious *practices*, it is not always clear how the court should weigh religious practices when they burden the rights of other groups in society.¹⁰⁴ Nevertheless, religious freedom is a fundamental and longstanding right in the United States, and one that courts and legislatures should consider very carefully when weighing the legalization of same-sex marriage.¹⁰⁵

B. Washington’s Constitution Contains Even Stronger Religious Freedom Protections than the Federal Constitution

The religious freedom protections in the Washington State Constitution are generally seen as even stronger than those found in the Federal Bill of Rights.¹⁰⁶ Washington also has a long history of

99. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

100. *Id.*

101. *Id.* at 523–25.

102. *Id.* at 547.

103. Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 123, 140 (Douglas Laycock et al. eds., 2008).

104. See *Lukumi Babalu*, 508 U.S. at 547 (noting that “[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”).

105. *Id.*

106. See, e.g., *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 224, 840 P.2d 174 (1992) (noting that “Our state [constitutional] provision ‘absolutely’ protects freedom of worship and bars conduct that merely disturbs another on the basis of religion.”); see also *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012) (holding that forcing pharmacists to deliver emergency Plan B contraceptives despite their sincerely-held religious beliefs violated the free exercise clause of the First Amendment and the equal protection clause of the Fourteenth Amendment).

extending strong protections to the free exercise of religion.¹⁰⁷ Furthermore, while the Federal Constitution protects only the exercise of religion, the Washington State Supreme Court has held that the State Constitution can protect both freedom of belief and conduct.¹⁰⁸ Washington's State Constitution guarantees that:

Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be granted to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.¹⁰⁹

Therefore, the Washington Constitution guarantees “[a]bsolute freedom of conscience in all matters of religious sentiment” subject only to the qualification that this not be construed to excuse licentious conduct or justify practices that would be contrary to public policy.¹¹⁰

In addition to freedom of conscience protections, Washington's courts have interpreted the extent of Article 1, Section 11's religious freedom protections on multiple occasions.¹¹¹ Generally, there are three prerequisites that must be met for a successful free exercise challenge.¹¹² The first prerequisite to any free exercise challenge under the Washington State Constitution is whether the parties have “a sincere religious belief.”¹¹³ To meet this requirement, an individual need only prove that his or her religious conviction is “sincere and central to their beliefs.”¹¹⁴ Once sincerity is “proven,” the court will not inquire further into the “truth” or “reasonableness” of the individual's convictions.¹¹⁵

107. *First Covenant Church of Seattle*, 120 Wash. 2d at 225–26, 840 P.2d at 187.

108. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 37 (2nd ed. 2013).

109. WASH. CONST. art. I, § 11.

110. *Id.*

111. *See, e.g., First Covenant Church of Seattle*, 120 Wash. 2d at 224–25, 840 P.2d at 186–87.

112. *Open Door Baptist Church v. Clark Cnty.*, 140 Wash. 2d 143, 152, 995 P.2d 33, 38–39 (2000) (holding that requiring a church to apply for a conditional use permit or cease its business activities did not place an impermissible burden on the free exercise of religion).

113. *Id.* (quoting *Munns v. Martin*, 131 Wash. 2d 192, 199, 930 P.2d 318 (1997) (holding that the city's demolition permit ordinance, which had the potential to delay a Catholic bishop's plans to demolish school building to construct a pastoral center, violated the church's right of free exercise of religion as guaranteed by the Washington State Constitution)).

114. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321 (quoting *Backlund v. Board of Comm'rs*, 106 Wash. 2d 632, 639, 724 P.2d 981 (1986)).

115. *Munns*, 131 Wash. 2d at 199, 930 P.2d at 321.

The second threshold for a religious freedom analysis is whether the challenged enactment or action is a “burden” on the free exercise of religion.¹¹⁶ Generally, if the coercive effect of an enactment is to operate against a party in the practice of his or her religion, then it unduly burdens the free exercise of religion.¹¹⁷ The Washington State Supreme Court has reasoned that “[a] facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate Article 1, Section 11, if it indirectly burdens the exercise of religion.”¹¹⁸ Thus, even an indirect burden on the freedom of religion may be prohibited by Article 1, Section 11 of the Washington Constitution.

The third threshold question for a religious freedom challenge in Washington is whether the burden on religion is offset by a compelling state interest.¹¹⁹ State action that might burden the exercise of a sincere religious belief is constitutional under Article 1, Section 11 only if the action has not resulted in the infringement of a citizen’s right to religious freedom, or if the burden on that citizen’s exercise of religion is justified by a “compelling state interest.”¹²⁰ A “compelling state interest” is defined as one that has a “clear justification . . . in the necessities of national or community life.”¹²¹ Examples of compelling interests are those based “in the necessities of national or community life such as clear threats to public health, peace, and welfare.”¹²² Furthermore, to avoid a violation of religious freedom, the state must also demonstrate that the chosen means to achieve the compelling interests are necessary and that it is using the least restrictive means available to achieve its stated goal.¹²³

C. Washington State’s Law Against Discrimination Conflicts with Religious Freedom Protections for Religious Objectors

While Washington has strong protections for religious freedom, Washington also has several laws that prohibit public discrimination.

116. *Id.* at 200, 930 P.2d at 321–22.

117. *Id.*

118. *Id.* (citing *City of Sumner v. First Baptist Church of Sumner*, 97 Wash. 2d 1, 7–8, 639 P.2d 1358, 1362–63 (1982)).

119. *Mums*, 131 Wash. 2d at 200–01, 930 P.2d at 321–22.

120. *Id.* at 199, 930 P.2d at 321.

121. *Id.*

122. *Id.*

123. *Id.*

Washington's primary anti-discrimination law is section 49.60.215 of the Revised Code of Washington, which states:

It shall be an unfair practice for any person or the person's agent or employee to commit an act which directly or indirectly results in any distinction, restriction, or discrimination . . . [on the basis] of race, creed, color, national origin, sexual orientation, sex, honorably discharged veteran or military status, status as a mother breastfeeding her child, the presence of any sensory, mental, or physical disability¹²⁴

While homosexual individuals are not presently recognized as a true "protected class"¹²⁵ under Washington law, section 49.60.215 does protect individuals in Washington from discrimination on the basis of sexual orientation.¹²⁶ Thus, same-sex marriage objectors' right to exercise their religious beliefs can sometimes conflict with same-sex couples' right to live their lives free from undue discrimination.¹²⁷

Some wedding service providers who oppose same-sex marriage argue that they should be able to exercise their religious beliefs in good faith by refusing to provide services to same-sex couples.¹²⁸ Those in opposition to same-sex marriage for religious reasons are sometimes portrayed as bigots, and some have even gone so far as to draw comparisons with groups like the Ku Klux Klan.¹²⁹ Yet some groups who are resistant to same-sex marriage on religious grounds feel that they must stand up for their beliefs, even if doing so offends others.¹³⁰

124. WASH. REV. CODE § 49.60.215 (2010).

125. *See Windsor v. United States*, 833 F. Supp. 2d 394, 400–01 (S.D.N.Y. 2012) (discussing that classifications that disadvantage a quasi-suspect class, such as those who are homosexual, are subjected to a heightened standard of constitutional review and should be reviewed with intermediate scrutiny). A protected class is analogous to a "suspect class," which the court, in *Windsor*, defined as a class having "a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class's ability to perform in or contribute to society." *Id.* at 401. Despite this federal precedent, there is no comparable case law in Washington finding that homosexual persons are part of a "protected class." *See Andersen v. King Cnty.*, 158 Wash. 2d 1, 67, 138 P.3d 963, 998 (2006) (the Supreme Court of Washington noted in a footnote that federal case law has reached different conclusions on the question of whether homosexuals constitute a protected class, but the Court failed to mention any such determination in Washington State).

126. WASH. REV. CODE § 49.60.215 (2010).

127. *See Turley*, *supra* note 6, at 60.

128. *See OREGON LIVE*, *supra* note 14.

129. *See, e.g., Opponents of Gay Marriage Say They're No Bigots*, RELIGION NEWS SERV. (Mar. 25, 2013), <http://www.religionnews.com/2013/03/25/opponents-of-gay-marriage-say-theyre-no-bigots/> (explaining that opponents of gay marriage have been portrayed by others as "bigots" and "likened to the racists and the sexists of yesteryear").

130. *Id.*

All in all, it is likely that those who support same-sex marriage have downplayed the potential impact of same-sex marriage laws on others' religious practices, and those who seek a religious exemption for providing same-sex marriage services downplay the impact that such exemptions would have on same-sex couples.¹³¹

*D. Wedding Service Providers' Refusal to Serve Same-Sex Couples
Fulfills All Requirements of a Free Exercise of Religion Claim*

The effect of Washington's same-sex marriage law is, in some circumstances, to burden the free exercise of religion in violation of established legal doctrine in Washington. As discussed, the first element to a free exercise challenge is whether a sincerely held religious belief is at stake. With regard to same-sex marriage, there is little doubt that many people have deeply-held religious beliefs that prevent them from embracing same-sex marriage. The fact that many proponents of same-sex marriage characterize those in opposition as bigots is perhaps not surprising, as there can be "a tendency on the gay-rights side to dismiss these feelings of moral responsibility on the religious side."¹³² As Professor Douglas Laycock explained, "There is nothing unique, or even unusual, about traditional believers feeling personal moral responsibility if they facilitate, or help celebrate, what they consider to be a deeply immoral relationship."¹³³

The first prong of the religious freedom test readily being met, the second threshold question is whether there is a burden on the free exercise of religion. While the burden on the actual exercise of religion for those who have a religious opposition to same-sex marriage may not be evident at first, to the people holding such beliefs, the burden is real. It is not an appropriate role of the government to second-guess an individual's stated beliefs and determine that the conduct in question is not a substantial burden on that person's beliefs.¹³⁴ Professor Chai R. Feldblum gives the example of an elderly Christian woman who sincerely believes that if she permits unmarried couples to rent and have extramarital sex in her rental units, she will be judged by God and will be unable to meet her deceased husband in the afterlife.¹³⁵ Thus, an act

131. See Feldblum, *supra* note 103, at 125.

132. Douglas Laycock, *Afterword*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 195 (Douglas Laycock et al. eds., 2008).

133. *Id.* at 196.

134. See Feldblum, *supra* note 103, at 144.

135. *Id.* at 143. Professor Feldblum's essay points out that a person in the elderly landlady's

by the government compelling landlords to rent units to unmarried couples may constitute a burden on the practice of her beliefs and religion, even if the majority of people do not hold her same beliefs. Because of this, Professor Feldblum concludes that “we should err on the side of accepting the person’s allegation for purposes of deciding whether a burden on [belief] liberty *exists*.”¹³⁶

The Washington State Supreme Court in *First Covenant Church*¹³⁷ also recognized that legitimate burdens on religious freedom should not be considered trivial, noting that “[t]he possible loss of significant [historical] architectural elements is a price we must accept to guarantee the *paramount right* of religious freedom.”¹³⁸ The Court also stated that “[o]ur state [constitutional] provision ‘absolutely’ protects freedom of worship and bars conduct that merely ‘disturbs’ another on the basis of religion. Any action that is not licentious or inconsistent with the ‘peace and safety’ of the state is ‘guaranteed’ protection.”¹³⁹ Furthermore, the Court has stated that only dangers which are “clear and present, grave and immediate” justify an infringement on a person’s religious freedom.¹⁴⁰ The Court also noted that religious freedom is “vital,” and that it is the “most important dut[y] of our courts to ever guard . . . religious liberty, and to see to it that these guarantees are not narrowed or restricted because of some supposed emergent situation.”¹⁴¹ For wedding service providers with religious objections to same-sex marriage, being forced to provide wedding services despite their sincerely held moral qualms constitutes a burden on their religious freedom of the kind forbidden in *First Covenant Church*,¹⁴² *Holcomb v. Armstrong*,¹⁴³ and *Bolling v. Superior Court*.¹⁴⁴

situation could also choose to take up a different occupation and thus, in a sense, creates this sort of conflict of her own volition. While this argument may have some merit, it fails to address the ultimate problem because it merely skirts around it. Even with such a solution, one is still left with a significant burden on religious liberty for the person who must choose a different line of work to avoid the conflict, because he or she must choose between their economic livelihood and their sincere religious beliefs. Professor Feldblum and this Comment argue that, as much as possible, we should strive not to put anyone in such a position. *Id.* at 144.

136. *Id.*

137. *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992).

138. *Id.* at 223, 840 P.2d at 185 (emphasis added).

139. *Id.* at 224, 840 P.2d at 186.

140. *Id.* at 225, 840 P.2d at 186–87 (quoting *Holcomb v. Armstrong*, 39 Wash. 2d 860, 864, 239 P.2d 545 (1952)).

141. *First Covenant Church of Seattle*, 120 Wash. 2d at 225, 840 P.2d at 186–87 (citing *Bolling v. Superior Court*, 16 Wash. 2d 373, 381, 385, 133 P.2d 803, 807 (1943)).

142. *First Covenant Church of Seattle*, 120 Wash. 2d at 224–25, 840 P.2d at 185–87.

143. *Holcomb*, 39 Wash. 2d at 864, 239 P.2d 548.

The burden on religious objectors to same-sex marriage is evident in a more practical sense as well. Wedding service providers who refuse to provide those services to same-sex couples based on their religious beliefs do so with the knowledge that they will lose the business of that couple, likely other same-sex couples in the future, and perhaps even other people who support same-sex marriage rights.¹⁴⁵ Indeed, it is not difficult to imagine that such businesses risk being boycotted by members of the general public who strongly disagree with their beliefs.¹⁴⁶

The first two prongs of the Washington religious freedom test being met, the third consideration is whether the burden of the law in question is offset by a compelling government interest. In determining whether a government's interest is in fact compelling, "it is useful to look first at the importance of the value underlying the regulation, and second, at the degree of proximity and necessity that the chosen regulation bears to the underlying value."¹⁴⁷ In this case, the government does have an important interest in protecting same-sex couples from discrimination on the basis of their sexual orientation.¹⁴⁸ However, the government also has a compelling and long-established interest in providing strong protections for religious freedom and freedom of conscience.¹⁴⁹ Religious freedom is the very first right that is guaranteed by the First Amendment to the U.S. Constitution,¹⁵⁰ and it likewise occupies a prominent place in Article I, Section 11 of the Washington State Constitution.¹⁵¹ Furthermore, allowing private lawsuits against wedding service providers who have a religious objection to serving same-sex couples may not best serve the state's interests. Perhaps the best resolution to this problem lies in a legislative accommodation that

144. *Bolling*, 16 Wash. 2d at 381, 133 P.2d at 807.

145. *See, e.g., Slew of online hate reviews plagues 'Sweet Cakes' bakery*, KATU.COM (Apr. 26, 2013, 1:16 PM), <http://www.katu.com/news/local/Slew-of-online-hate-reviews-plague-Sweet-Cakes-190072751.html> (noting that the Sweet Cakes Bakery in Gresham, Oregon that refused to bake a cake for a lesbian wedding simultaneously received a plethora of negative Yelp reviews online but also an increase in business from local supporters).

146. *See id.*

147. *Callahan v. Woods*, 736 F.2d 1269, 1274 (9th Cir. 1984) (citing Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. the Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967)).

148. *See* discussion, *supra* Part IV.C (detailing the anti-discrimination protections afforded by Washington law).

149. *See* discussion, *supra* Part IV.B (explaining the general importance of religious freedom in the Washington State Constitution and common law).

150. U.S. CONST. amend. I.

151. WASH. CONST. art. I, § 11.

carefully crafts a balance between the rights of same-sex couples and wedding service providers.¹⁵² Such a solution would also serve the interests of judicial efficiency by forestalling the litigation that is currently pending in the courts and preventing litigation on the same issue in the future.¹⁵³

While the issue at hand has all of the elements of a freedom of religion claim, the right to freedom of conscience is also at stake. Article I, Section 11 of the Washington Constitution guarantees the absolute freedom of conscience, subject to public policy limitations,¹⁵⁴ and wedding service providers who oppose same-sex marriage believe that this is a matter of conscience. For example, parties in opposition to claims of religious freedom have viewed the decision that confronts people of faith in the contraception context as “minor, even quaint, burdens on religious practices like regulations on facial hair, dreadlocks, drug use, land use regulation, taxation, and the like.”¹⁵⁵ It is not a court’s purpose to evaluate the relative merits of differing religious beliefs, nor is it a court’s duty to evaluate the centrality of particular beliefs to a faith.¹⁵⁶ Whether the conscientious objection is towards same-sex marriage or analogous issues such as abortion,¹⁵⁷ emergency contraceptives,¹⁵⁸ or being compelled to wield deadly weapons in defense of the state,¹⁵⁹ the freedom of conscience is a fundamental right deserving of strong protections.

When two fundamental and important rights collide with one another, the government must decide how to best protect its citizens. In this instance, “[s]tates, of course, have two [choices]: take the win-lose approach, and elevate the interests of one private party over another; or do nothing. Of these, the worst result would be to do nothing given the

152. *See, e.g.*, WASH. REV. CODE § 48.43.065 (1995). Here, in the health care context, the Washington State Legislature established a statutory conscientious objection provision for health care providers who object to specific services for reasons of conscience or religion. In a similar way, the legislature could provide statutory protections to wedding service providers who have a religious opposition to same-sex marriage.

153. *See* discussion, *supra* note 91.

154. WASH. CONST. art. I, § 11; *see also* discussion of Article I, Section 11 of the Washington State Constitution, *supra* Part IV.B (explaining the importance of religious freedom protections guaranteed by the Washington State Constitution).

155. *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1184 (W.D. Wash. 2012).

156. *Id.*

157. *See Doe v. Bolton*, 410 U.S. 179 (1973) (discussing that the right of conscience in the abortion context has been recognized as constitutionally permissible).

158. *Stormans*, 844 F. Supp. 2d at 1201.

159. WASH. CONST. art. X, sec. 6 (providing that no person having conscientious scruples against bearing arms shall be compelled to do militia duty during times of peace).

looming tide of litigation.”¹⁶⁰ Given that doing nothing is not an attractive option, states must instead seek to mitigate, as much as possible, the impact of a “win-lose approach” between same-sex couples and wedding service providers.¹⁶¹ With this “looming tide of litigation”¹⁶² in mind, this Comment argues that Washington should adopt a “live-and-let-live”¹⁶³ approach to this question, adopting a “refuse and refer” standard that allows wedding service providers to refuse service to same-sex couples in limited circumstances.¹⁶⁴

V. A FEDERAL COURT IN WASHINGTON SIDED WITH PHARMACISTS WHO VOICED RELIGIOUS OBJECTIONS TO SELLING EMERGENCY CONTRACEPTIVES

While conflicts between Washington wedding service providers and same-sex couples have not yet received definitive judicial rulings, a federal court in Washington has addressed an analogous issue in the context of pharmacists’ rights and religious objections.¹⁶⁵ This is significant because it illustrates that the freedom of religion is a fundamental right deserving of protection, and furthermore that a balance of rights can in fact be struck between conflicting parties.

In *Stormans Inc. v. Selecky*,¹⁶⁶ the United States District Court for the Western District of Washington considered the issue of whether the State could compel licensed pharmacists and pharmacies to dispense lawfully prescribed emergency contraceptives over the pharmacists’ sincere religious belief that “doing so terminates human life.”¹⁶⁷ Objecting pharmacists felt that they were being forced to choose between either violating these regulations or violating their religious belief that life begins at conception and that emergency contraceptives are thus immoral.¹⁶⁸

The plaintiffs in *Stormans* filed suit against the State, arguing that the law requiring pharmacies to stock and dispense emergency

160. Robin F. Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 102 (Douglas Laycock et al. eds., 2008).

161. *Id.*

162. *Id.*

163. *Id.* at 101.

164. *See id.*

165. *See generally* *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. 2012).

166. *Id.*

167. *Id.* at 1175.

168. *Id.* at 1175–76.

contraceptives violated their religious freedom in a manner prohibited by the Supreme Court's decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁶⁹ In *Lukumi Babalu*, the Supreme Court held that non-neutral city ordinances that were not of general applicability adversely targeted religious activity.¹⁷⁰ In the same way, the *Stormans* plaintiffs argued that the State's regulations were unfairly trying to force pharmacists to perform services that they had a religious objection to providing, effectively forcing them to choose between their religious beliefs and their economic livelihood.¹⁷¹

The State argued that the requirements for pharmacists were valid because they applied neutrally to medicines and pharmacies and promoted a governmental interest in the timely delivery of medicine, which was similar to the Supreme Court's interpretation of religious freedom in *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁷² In *Smith*,¹⁷³ the Supreme Court held that the free exercise clause did not prohibit the application of Oregon's drug laws to the ceremonial use of peyote, thus allowing the State to deny claimants' unemployment compensation for work-related misconduct based on the use of the drug.¹⁷⁴ In deciding these issues in the context of emergency contraceptives, the court had to decide whether the facts in *Stormans* bore more resemblance to those in *Lukumi Babalu* or *Smith*.¹⁷⁵

After weighing these arguments, the court sided with the plaintiffs.¹⁷⁶ The court held that requiring pharmacists, despite their sincerely-held religious beliefs, to deliver all lawfully prescribed medications, including emergency contraceptives, violated the plaintiffs' fundamental right to the free exercise of religion under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁷ The court

169. *Id.* at 1187.

170. *See generally* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that city ordinances banning animal sacrifices in public were not neutral or of general applicability and that the state's interests did not justify the targeting of religious activity).

171. *Stormans*, 844 F. Supp. 2d at 1185.

172. *Id.* at 1187 (noting that *Smith* illustrates a law that burdens religious conduct but is nonetheless constitutionally permissible because it is neutral and of general applicability, an argument which the State tried to apply in *Stormans*).

173. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

174. *See generally id.* (holding that the free exercise clause of the First Amendment did not prohibit the application of Oregon's drug laws to the ceremonial use of peyote, and therefore Oregon could deny claimants' unemployment compensation for work-related misconduct based on the use of peyote).

175. *Stormans*, 844 F. Supp. 2d at 1187.

176. *Id.* at 1201.

177. *Id.* at 1200.

explained, “[p]ermitting pharmacies to refuse and refer for religious reasons does not create any greater difficulties in terms of patient access than permitting pharmacies to refuse and refer for secular reasons.”¹⁷⁸ The court found that the regulations were designed to force religious objectors to dispense emergency contraceptives, and that they sought to do so despite the fact that refusals for secular reasons were permitted.¹⁷⁹

In a similar manner, a balance could be struck that protects same-sex couples and also recognizes the religious objections of wedding service providers. To address these issues, the legislature could craft a religious exemption provision, similar to that for pharmacists, that allows wedding service providers who have a religious objection to same-sex marriage to refuse to provide services to same-sex couples and instead refer the customer to another provider in the community. Such a religious exemption would contain important exceptions to help protect the dignitary interests of same-sex couples in addition to the free exercise rights of objecting providers. In crafting such an exception, the legislature could avoid future litigation in favor of a more preemptive solution to these issues.

VI. THE “REFUSE AND REFER” BALANCING TEST IS THE BEST SOLUTION TO BALANCE COMPETING RIGHTS

Crafting a test to balance fundamentally competing rights is inherently an extremely difficult venture, and “[l]egislatures will likely have to tease out on a case-by-case basis how the state will want to approach various refusals.”¹⁸⁰ That being said, “[w]ith some predictable disputes, such as those over reception halls and bakeries, it is difficult to imagine dire consequences flowing from the refusal of a particular facility or bakery.”¹⁸¹ This is not to downplay the inconvenience or embarrassment that same-sex couples may experience; rather it is simply an attempt to balance inherently competing interests. Ultimately:

[T]he right to one’s own moral integrity should generally trump the inconvenience of having to get the same service from another provider nearby. Requiring a merchant to perform services that violate his deeply held moral commitments is far more serious, different in kind and not just in degree, from mere

178. *Id.* at 1189.

179. *Id.* at 1201.

180. *See* Wilson, *supra* note 160, at 100.

181. *Id.*

inconvenience.¹⁸²

The wedding services industry employs many different types of providers, including printers, tailors, dressmakers, photographers, florists, caterers, bridal shops, and wedding registries, any of which could reasonably seek to refuse to provide these services for same-sex couples on religious grounds.¹⁸³

There is likely no perfect solution to this issue. Favoring either same-sex couples or religious objectors creates serious issues for one side or the other. This being the case, “[p]erhaps the best we can hope for is to create statutorily a live-and-let-live solution, one that provides the ability to refuse based on religious or moral objections, but limits that refusal to instances where a significant hardship to the requesting parties will not occur.”¹⁸⁴ While this solution means that protecting either wedding service providers or same-sex couples could necessarily come at the expense of one or the other in rare situations where there are real barriers to the access of wedding services and there is no alternative available to the same sex couple, it is nonetheless the best solution that will, in the vast majority of circumstances, allow both parties to live out their deeply held beliefs about marriage.¹⁸⁵

Although solutions that balance rights inevitably leave at least one side of a conflict unsatisfied, such is the nature of compromise. The health care controversy over the availability of emergency contraceptives in Washington is an excellent example¹⁸⁶ of how Washington courts have found a way to resolve clashes between those who want a service and those who have a moral objection to providing it.¹⁸⁷ Because there is no perfect solution to such problems, perhaps the best solution is one that crafts a religious exemption for those with moral objections to performing the services in question and yet still protects those seeking the services.

This Comment recommends that the “live-and-let-live” solution, also known as the “refuse and refer” method, should have five important limitations to help protect the rights of same-sex couples seeking

182. Laycock, *supra* note 132, at 198.

183. *Id.* at 194.

184. *See* Wilson, *supra* note 160, at 101.

185. *Id.* at 94.

186. *See, e.g.,* Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172 (W.D. Wash. 2012) (holding that forcing pharmacists to deliver emergency Plan B contraceptives despite their sincerely-held religious beliefs violated the free exercise clause of the First Amendment and the equal protection clause of the Fourteenth Amendment).

187. *See* health care discussion, *supra* Part V.

wedding services. First, only wedding service providers who personally provide wedding services to same-sex couples should be able to claim a religious exemption. One can easily imagine a slippery slope where a religious objection could be claimed by not only the wedding cake baker, but also the farmer harvesting the wheat, the mill processing the wheat into flour, and the deliveryman delivering the flour to the bakery.¹⁸⁸ Under the proposed test, the baker with a religious objection to same-sex marriage may be able to claim a religious exemption to providing wedding services, but the other workers in the chain of cake-baking commerce most likely would not.

Second, there should be limitations on the size of the company that could claim a religious objection. Generally, those seeking to claim a religious objection would be limited to small service providers, as “[t]ruly commercial enterprises owned by individuals with religious objections to serving same-sex couples will not succeed in challenging the applicability of public accommodation laws.”¹⁸⁹ Furthermore, larger businesses are more likely to be able to find someone who is willing to provide services to same-sex couples, even if some of the workers within the business are not. Thus far, most of the issues between wedding service providers and same-sex couples have occurred when the providers are small business owners who personally have a religiously-grounded objection to same-sex marriage. This is the type of business that those who support religious freedom in the context of same-sex marriage feel is unfairly targeted by the current same-sex marriage law in Washington. Providing a limited religious exemption to small businesses with ten or fewer employees would undoubtedly help address the concerns of such critics and, in so doing, help usher in a more general acceptance for same-sex marriages.

The third requirement of the “refuse and refer” method would mandate that a wedding service provider seeking to avoid providing wedding services to same-sex couples based on his or her religious objections must openly advertise that fact. This would help alleviate the “surprise” problem that has so far been at the root of many of the issues between same-sex couples and objecting wedding service providers. For example, in the case of the Richland, Washington florist that refused to provide flower services for a same-sex wedding, the spurned couple was quoted as saying that the rejection “really hurt”¹⁹⁰ because the florist in

188. See Wilson, *supra* note 160, at 92.

189. Marc D. Stern, *Same-Sex Marriage and the Churches*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 1, 37 (Douglas Laycock et al. eds., 2008).

190. *Barronelle Stutzman, Washington Florist Who Rejected Gay Couple, Faces Lawsuit from*

question “does amazing work” and the couple in question had been looking forward to using her flowers in their wedding because they had used her store many times in the past.¹⁹¹ For many same-sex couples, the surprise, embarrassment, and insult of going into a bakery, florist’s shop, or photographer’s studio and being turned away because of their sexual orientation is more frustrating and painful than the actual effort required to find a replacement service provider.

The advertising requirement is further strengthened by the simple truth that it will make a wedding service provider’s opposition to same-sex marriage known publicly. It is not difficult to imagine that any business advertising that it will not serve same-sex couples will face a loss of business from both same-sex couples and others who support same-sex marriage. This adverse economic impact will help ensure that only those wedding service providers who hold sincere religious objections to same-sex marriage will claim the exemption, as they must be willing to bear the cost of refusing to provide services for same-sex weddings. Therefore, any wedding service provider that has a religious objection to performing services for same-sex marriages must advertise that objection in a tasteful and respectful manner, using their standard method of advertising. These advertisements could be located in storefront windows, in printed advertisement materials, or on a website.

A potential issue with the third prong of this test is the risk that allowing wedding service providers to choose what types of customers they will and will not serve will give rise to the same sorts of discrimination, both racial and otherwise, that have been endemic in the United States throughout its history. While such concerns are valid, religious exemptions to the same-sex marriage issue can be distinguished in several ways. Professor Robin F. Wilson argues:

While the parallels between racial discrimination and discrimination on the basis of sexual orientation should not be dismissed, it is not clear that the two are equivalent in this context. The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination.¹⁹²

Additionally, whereas the Constitution ascribes no value to discrimination on the basis of race, discrimination on the basis of

State Attorney General, HUFFINGTON POST (June 25, 2013, 2:14 PM), http://www.huffingtonpost.com/2013/04/10/barronelle-stutzman-washington-florist-lawsuit-_n_3052301.html.

191. *Id.*

192. *See* Wilson, *supra* note 160, at 101.

religion oftentimes stems from the constitutionally protected right to the free exercise of religion.¹⁹³ The Supreme Court has explained that the Constitution “places no value on discrimination as it does on the values inherent in the Free Exercise Clause.”¹⁹⁴ The Court has also noted that “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections”¹⁹⁵ in the way that religious freedom has. This is not to say that religious freedom should outweigh the right to be free from discrimination, but merely that the Constitution explicitly recognizes an affirmative right to religious freedom, whereas the freedom to discriminate is not a right afforded the same value by the Constitution.

While some critics may argue that allowing wedding providers to refuse to serve same-sex couples based on religious objections is essentially akin to conduct that has been found unconstitutional in decisions like *Bob Jones v. United States*,¹⁹⁶ the conduct of wedding service providers can be distinguished. In *Bob Jones*, the Supreme Court found that nonprofit private schools that enforced racially discriminatory admission standards on the basis of religious doctrine could not receive tax exemption under the Internal Revenue Code.¹⁹⁷ However, the extension from racial discrimination to discrimination on the basis of sexual orientation should not be assumed, as, “the Court’s description in *Bob Jones* of the ‘consistent’ efforts to eliminate racial discrimination—even by military force—has no counterpart with same-sex marriage. [Additionally], the Court found [the discrimination in] *Bob Jones* to lack all public benefit insofar as it was in violation of ‘fundamental’ public policy.”¹⁹⁸ In the context of same-sex marriage, there is a definite public benefit in balancing the rights of same-sex couples and the right to religious freedom for wedding service providers, as both rights are considered fundamental and deserve heightened protection.¹⁹⁹ Indeed, it is difficult to imagine a more profound public benefit than the protection

193. Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 103, 115 (Douglas Laycock et al. eds., 2008).

194. *Norwood v. Harrison*, 413 U.S. 455, 469 (1973) (commenting on discrimination in the racial context and noting that the Constitution does not explicitly protect against such discrimination).

195. *Id.* at 470.

196. *See generally* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

197. *Id.*

198. *See* Kmiec, *supra* note 193, at 110.

199. *See* discussion of religious freedom in Washington, *supra* Part IV.B.

of religious freedom, a fundamental right protected by both the federal and state constitutions, and freedom from discrimination, a right guaranteed by Washington State law.²⁰⁰

The Court in *Bob Jones* also found a common law public policy against racial discrimination in education, a public policy that has no counterpart in the context of same-sex marriage.²⁰¹ The Supreme Court tackled issues of sexual orientation in its decision in *Lawrence v. Texas*.²⁰² Professor Douglas W. Kmiec noted that “[t]he absence of common law support for same-sex marriage can be discerned in *Lawrence v. Texas*. *Lawrence* may have overruled *Bowers v. Hardwick*, but that overruling could not revise the common law, which, even the *Lawrence* majority had to concede, did not affirmatively protect homosexual sodomy.”²⁰³ Instead, the Court in *Lawrence* simply decided that they would not be bound by common law or popular notions of morality.²⁰⁴ As such, while there is arguably a common law public policy against racial discrimination in education, there is, at least at present, no such comparable public policy in the context of same-sex marriage.²⁰⁵

The fourth requirement that any wedding service provider seeking a religious exemption would have to meet is that there be no overt insults or what could be deemed hate speech made to a same-sex couple seeking wedding services. The point of providing religious exemption protections for wedding service providers with religious objections to same-sex marriage is to protect the free exercise of religion as guaranteed by the federal and state constitutions, not to give wedding service providers free reign to wantonly discriminate in a disrespectful manner against same-sex couples. This situation is not difficult to

200. See, e.g., WASH. REV. CODE § 49.60.215 (2010) (Washington’s general anti-discrimination law).

201. Kmiec, *supra* note 193, at 110.

202. *Lawrence v. Texas*, 539 U.S. 558, 566–74 (2003) (holding that the Texas statute that made it a crime for two persons of the same gender to engage in certain intimate conduct violated the Due Process Clause of the Fourteenth Amendment).

203. Kmiec, *supra* note 193, at 110 (citing *Lawrence*, 539 U.S. at 558; citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (holding that Georgia’s sodomy statute did not violate the fundamental rights of homosexuals)).

204. *Id.*; see also *Lawrence*, 539 U.S. at 558 (holding that the Texas statute that made it a crime for two persons of the same gender to engage in certain intimate conduct violated the Due Process Clause of the Fourteenth Amendment).

205. This is not to say that there will never be a common law public policy against discrimination in relation to same-sex marriage, but rather that at present no such policy has been developed. Only time will tell whether courts will create a comparable common law public policy against discrimination in the same-sex marriage context.

imagine, as “[t]he larger problem for same-sex couples is the insult, the pointed reminder that some fellow citizens vehemently disapprove of what they are doing. But same-sex couples know that anyway, and the American commitment to freedom of speech ensures that they will be reminded of it from time to time.”²⁰⁶ Because protecting the dignity of same-sex couples is extremely important, any wedding service provider claiming religious freedom reasons for refusing service must meet all of the requirements of the proposed test, including the requirement that any rejection not rise to the level of hate speech. Evaluating the subjective nature of a person’s language while rejecting a same-sex couple’s request for services is an inherently difficult activity, but such is the task that pluralistic societies must sometimes engage in to balance fundamentally competing interests.

The fifth requirement under the proposed test is that wedding service providers who decline to provide services to same-sex couples on religious grounds would be required to refer same-sex couples to other providers of the same services in their community; namely providers who do not have the same moral qualms about serving same-sex couples. In effect, this would require wedding service providers with a religious objection to same-sex marriage to refer same-sex couples to their competition, directly causing the objectors to lose potential customers. In general, this requirement should not be unduly difficult, as many wedding service providers have no objections to providing services to same-sex couples, as evidenced by the show of support many same-sex couples have received after having been refused service on their first attempt at acquiring such services.²⁰⁷

However, there will likely be instances where a town’s sole baker, photographer, or florist has a religious objection to same-sex marriage which prevents a same-sex couple from having access to such services at all. In such a case, the legislature could decide either that the same-sex couple is simply “out of luck,” or determine that the wedding service provider’s right to moral integrity is outweighed by the same-sex couples’ right to live in the community in accordance with *their* moral beliefs.²⁰⁸ In the end, this is a policy decision that the legislature must

206. Laycock, *supra* note 132, at 198.

207. For an example, see *supra* note 14, detailing how Food Network star chef Duff Goldman offered a free wedding cake to the couple that was refused service from the Sweet Cakes Bakery in Gresham, Oregon. This is perhaps not surprising, and shows that any wedding service provider that chooses to decline to serve same-sex couples must do so with the knowledge that he or she will undoubtedly lose business as a result.

208. See Laycock, *supra* note 132, at 199.

decide on its own. Hopefully, the “live-and-let-live” solution will minimize the situations where determinations among competing rights are necessary, but there is little doubt that, on very rare occasions, these issues will arise even with this balancing test in place. In such a case, this Comment recommends that the right to live in accordance with a sincerely-held religious belief should outweigh a same-sex couple’s right to a particular wedding service. Simply put, the longstanding and fundamental right to freedom of religion should not be overridden to force, for example, a baker to bake a cake or a caterer to prepare food for a same-sex wedding, as living in accordance with one’s deeply-held religious beliefs should outweigh another’s inconvenience, as frustrating as that may be for the couple forced to find another comparable service provider.

CONCLUSION

When fundamental rights come into conflict, disagreements about how to handle those conflicts are sure to abound. In the context of same-sex marriage, both same-sex couples and wedding service providers with religious objections to same-sex marriage seek to live in accordance with their deeply held beliefs about love, family, and marriage. In certain situations, these beliefs come into conflict and thus compromise is needed. By its very nature, compromise dictates that neither side is completely satisfied with the outcome, but such is the dilemma that we as a pluralistic society must sometimes confront.

This Comment has proposed that the Washington Legislature implement five requirements that would allow wedding service providers with religious objections to same-sex marriage to refuse to provide wedding services to same-sex couples under a limited range of circumstances. First, only wedding service providers who are asked to perform a personal service for a same-sex couple could claim a religious exemption. Second, only very small businesses, generally sole proprietorships and providers with ten or fewer employees, would be granted a religious exemption. Third, any wedding service provider with a religious objection to providing services to same-sex couples would be required to openly advertise that fact. Fourth, the religious exemption would not excuse subjecting same-sex couples to hate speech and would seek to reduce, as much as possible, any dignitary effects suffered by a same-sex couple from such a refusal. Fifth, any wedding service provider refusing service to a same-sex couple for religious reasons would have to refer that couple to another similar service provider in the community. If none can be found, then the legislature would need to decide which interest outweighs the other in that situation, although this

Comment argues that in these situations religious freedom should outweigh the right to wedding services.

Societal change is difficult and can be a painful experience for everyone involved. However, history shows that while change, such as the Civil Rights Movement, may be difficult, it is necessary as a pluralistic society advances and becomes more tolerant of others. In the case at hand, both sides in the same-sex marriage debate seek to promote their vision of freedom: religious freedom for some and the freedom to marry for others. As Professor Jonathan Turley noted:

[T]he progress made toward same-sex marriage and homosexual rights is due in large part to the protection of free speech and associational rights. The rights of gay citizens will be secured not simply with legal but also with cultural changes. The latter will depend on greater, not lesser, protection of speech and association on both sides of the same-sex marriage debate.²⁰⁹

As it stands now, the right to marry for same-sex couples arguably outweighs the right to religious freedom for religious objectors to same-sex marriage in Washington State. The Washington Legislature has an unprecedented opportunity to legislate a balance of rights between same-sex couples and wedding service providers with religious objections to same-sex marriage that will help stave off future conflicts surrounding this issue by crafting a compromise in the chambers of the House and Senate rather than in a courtroom. Regardless of future legislative or judicial action, the question remains whether marriage equality proponents, oftentimes self-described as the “champions of tolerance,”²¹⁰ are themselves prepared to practice tolerance towards proponents of a different moral vision of marriage.

APPENDIX A – SAMPLE LEGISLATIVE LANGUAGE

Subject to the limitations defined in this chapter, no individual wedding service provider may be required or compelled by law or contract in any circumstances to participate in the provision of a wedding service for a same-sex wedding if they object to doing so for reasons of conscience or religion. No person may face a civil lawsuit because of such a refusal.

209. Turley, *supra* note 6, at 76.

210. *See* Stern, *supra* note 189, at 57.