Chapter 6

The Implications of Religious Liberty

ABSTRACT

The political terrain surrounding the legalization of same-sex marriage and the need to accommodate individual’s faith based objections have been part of the public discussion since the passage of initial marriage equality statutes. These exemptions played an important part in the bill’s passage and have gone largely unquestioned from proponents of marriage equality. This chapter discusses the heightened lawmaking efforts by opponents insisting on broad protection measures for religious claims based on opposition directed towards homosexuality. This Chapter discusses the resulting tension between religious freedom and marriage equality.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…. ~ U.S. Constitution

INTRODUCTION

With the power of judicial review, the U.S. Supreme Court has a profound effect on the policy making environment in the American states. Cannon and Johnson (1999) noted, “The Court’s exercise of judicial review of state and local laws is its most important responsibility in modern times.”
to constitutional issues and challenges, policies that raise issues of morality regarding personal liberties such as freedom of speech and expression, privacy, or the separation of church and state are more likely to be challenged at the highest levels of the federal judicial system (Patton, 2007).

The Supreme Court has been active in the past several decades in its review of policies regarding same-sex marriage. These policies that involve morality are referred to as social regulatory or “cultural war” issues and elicit support or opposition based largely upon an individual’s core values. Such policies are characterized as a debate over principles where at least one group involved portrays an issue in terms of sin and uses moral arguments to support their policy position (Haider-Markel & Meier, 1996; Mooney, 2001) and the other group depicts their position as seeking equality.

Several studies have examined the impact and/or implementation of state policies following a Supreme Court ruling. Glick (1994) concludes that there is a need to “include Supreme Court decisions…in the study of state policy innovation.” Similarly, Canon and Johnson (1999) describe ways that legislatures have attempted to limit the effect of a Court decision by adopting laws that work around the ruling or that do not directly conflict with a decision (e.g. the extension of Religious Freedom bills to limit the implementation of same-sex marriage).

This Chapter focuses on conflicts that have resulted since the anticipated and actual legalization of same-sex marriage. Expanded protections under state mini Religious Freedom Restoration Acts (RFRA) are characterized by many as religious discrimination to resist the recognition of LGBT equal rights. Both religious freedom and equal protection are prized constitutional rights. The dilemma is can these rights coexist in this deeply charged culture war between religious freedom and LGBT rights. The guiding question of the following discussion is whether religious beliefs are so different from non-religious beliefs that they alone can override the state’s interest in enforcing the right to non-discrimination.

BACKGROUND

As the public awaited the U.S. Supreme Court’s same-sex marriage decision in Obergefell v. Hodges, (2015) the country braced itself for the next wave of an ongoing “kultur kampf”—the cultural war—in the name of religion
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