

Scholars ponder same-sex marriage issues

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By Richard N. Ostling
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While many religious groups are lobbying against gay marriage, some scholars say they also need to look ahead and ponder the practical problems if such unions are one day widely legalized.

Their take: **If gay marriage becomes recognized under law across the country, religious groups could face challenges to customary ways of doing business, even to their finances.**

Although 19 states have passed anti-gay marriage amendments, Marc D. Stern, general counsel of the American Jewish Congress and an influential ally of liberals on church-state separation, thinks widespread legalization of same-sex unions is inevitable.

From his perspective, that will cause major problems for religious agencies unless they start a campaign now so their ability to dissent is guaranteed. Already, he notes, Catholic Charities Boston ended a century of adoption services because an anti-discrimination law requires placements with same-sex couples in Massachusetts, the only state where gay marriage is now legal.

Some gay rights advocates agree that conflicts would be inevitable but argue that public interest in ending discrimination should take precedence over claims of religious freedom.

"We are in a zero-sum game in terms of moral values," says Chai Feldblum of Georgetown University's Law Center, a veteran gay rights advocate. Government must choose sides.

Stern and Feldblum were among seven experts whose papers on gay marriage and religious rights were issued this month by Washington's Becket Fund for Religious Liberty and given added buzz by coverage in the conservative Weekly Standard.

Specialists say religions' legal leverage was weakened by the Supreme Court's 1990 Employment Division v. Smith decision, which ended the requirement that government must show a "compelling interest" before restricting religious freedom.

Charles Haynes, religion specialist with Freedom Forum's First Amendment Center, says liberals and conservatives strongly united behind religious liberty after the Smith ruling, but liberal support has collapsed over the gay issue.

In future marriage conflicts, Haynes says, "we need to protect religious liberty to the greatest extent possible, because that is a core principle that, from the beginning of our history, has really made this American experiment in freedom work."

Stern, an Orthodox Jew, cited more than 200 cases he said signal future trouble for agencies and individuals that uphold historic Jewish and Christian opposition to gay marriage. Pertinent laws cover a myriad number of areas including public accommodations, employment, housing, municipal contracts, college admissions and even tax exemption.

He said nonprofit or commercial religious agencies that aren't owned directly by churches and synagogues would be hardest hit because their exemption from legal rules is less secure.

Robin Fretwell Wilson, a University of Maryland law professor, said the record with legalized abortion indicates what might happen. Once women gained the right to choose, she noted, activists filed numerous lawsuits trying to force religious hospitals and individuals to provide a procedure they considered immoral. Wilson predicted the same costly conflict for religious groups that reject same-sex weddings or same-sex couples, unless they win clear legal exemptions.

Jonathan Turley of George Washington University Law School favors gay marriage but worries that after legalization, government would threaten faiths that oppose same-sex marriage with loss of tax exemption.

The reason is the Supreme Court's 1983 ruling that removed Bob Jones University's tax exemption over its religious opposition (since modified) to interracial dating and marriage because it violated public policy. Douglas Kmiec of Pepperdine University finds it inconceivable that courts would extend a ruling on Bob Jones' "morally repugnant" racial beliefs to religiously principled opposition to gay relationships.

But on the liberal side, the basis for opposing same-sex unions doesn't matter.