

June 10, 2006

BELIEFS

Will Same-Sex Marriage Collide With Religious Liberty?

By PETER STEINFELS

Correction Appended

Is same-sex marriage on a collision course with religious liberty? It wasn't surprising that before the constitutional amendment banning same-sex marriage died in the Senate this week, several senators supporting it raised that danger.

But when highly respected legal experts on civil liberties, including ones favoring same-sex marriage, raise the same possibility, their concerns cannot be dismissed as partisan debating points.

Marc D. Stern, whose many years handling religious freedom cases for the American Jewish Congress have made him an expert in the area, can hardly be identified as a conservative agitator. Yet he firmly believes that legal recognition of same-sex marriage will make clashes with religious liberty "inevitable."

"No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them," Mr. Stern has written. But for other individuals and institutions opposed on religious grounds to same-sex marriage, its legal acceptance would have "substantial impact."

He has in mind schools, health care centers, social service agencies, summer camps, homeless shelters, nursing homes, orphanages, retreat houses, community centers, athletic programs and private businesses or services that operate by religious standards, like kosher caterers and marriage counselors.

One example, which he did not anticipate when first undertaking his analysis, was the Boston Catholic Charities' decision to withdraw from providing adoption services because the state license required placing children with gay married couples on the same basis as heterosexual married couples.

Chai R. Feldblum, a professor at Georgetown University Law Center and a proponent of same-sex marriage, agrees that permitting gay couples equal access to civil marriage will inevitably burden the religious liberty of those religiously opposed.

Mr. Stern and Professor Feldblum were among the First Amendment scholars participating in a conference last December sponsored by the Becket Fund for Religious Liberty. The conference was first widely reported

in a May 15 cover article by Maggie Gallagher in *The Weekly Standard*. Those conservative auspices could also feed the impression that these constitutional arguments were only a scare tactic by opponents of same-sex marriage.

The Becket papers themselves, however, do not confirm that impression. They are serious legal analyses. And, though virtually all the writers see same-sex marriage creating potential conflicts with the religious liberty of institutions and individuals rejecting such marriages on religious grounds, the writers by no means agree on how serious those conflicts are or how they might be resolved.

One of Ms. Gallagher's most interesting observations, in fact, is that the legal scholars opposed to same-sex marriage seemed more sanguine about overcoming potential conflicts than those, like Professor Feldblum or Jonathan Turley, a professor at George Washington Law School, who favor same-sex marriage, or those, like Mr. Stern, who simply feel that the culture is moving almost inexorably in that direction.

Needless to say, the legal arguments are intricate; that, after all, seems to be the definition of legal arguments. The lawyers are back and forth on whether continuing opposition to same-sex marriage, if it were recognized, might put a religiously affiliated institution at risk of losing its tax-exempt status, as Bob Jones University did for prohibiting interracial dating and marriage on the grounds that they were unbiblical.

Asked by a reporter for *The Chicago Tribune* whether a conservative Christian college would risk its tax-exempt status by refusing to admit a legally married gay couple to married-student housing, Cass Sunstein, a constitutional scholar at the University of Chicago Law School who had not been at the Becket conference, answered, "Sure — and if pigs had wings, they would fly." He dismissed the idea as a scenario "generated by advocacy groups trying to scare people."

But Professor Sunstein, as it happened, had been asked only about this specific question and not the whole range of the Becket papers' arguments, which he had not read. After quickly reading Professor Feldblum's paper and dipping into Mr. Stern's, he granted that they pointed to conflicts that were "real and serious."

Besides possible, even if remote, risks regarding tax exemption, the scholars' papers noted laws forbidding discrimination in hiring or toleration of a hostile workplace environment. They noted antidiscrimination provisions in many local or state laws licensing commercial enterprises and professional activities, as well as in the ethics codes of professional associations that have a role in accrediting professional schools, licensing professionals or resolving civil suits. And of course they noted the civil rights laws, federal, state and local, barring discrimination in places of public accommodation, housing and education.

Many of these laws contain exemptions for religious bodies or even for the personal moral beliefs of some professionals like doctors. A number of such exemptions arose in the wake of the legalization of abortion,

and one paper at the Becket conference, by Robin Fretwell Wilson, a professor at the [University of Maryland School of Law](#), reviews the lessons they might have for the legalization of same-sex marriage.

But Ms. Wilson and Mr. Stern make clear that such religious exemptions are not only under challenge by reproductive rights advocates in several states but also follow, in Mr. Stern's phrase, "a crazy quilt pattern," exempting different kinds of religious institutions from the provisions of different laws regarding different sorts of actions in different localities.

After one pushes through these legal thickets do any clear conclusions emerge? For Professor Sunstein, same-sex marriage does not raise qualitatively new issues so much as intensify existing tensions "between antidiscrimination norms and deeply held religious convictions."

For Professor Feldblum, the only honest position is to admit that "we are in a zero-sum game in terms of moral values." In her view, the dignity and equality of gay people should almost always outweigh considerations of religious freedom, though she believes that such freedom might weigh more heavily for religious institutions "geared just towards members of the faith" as opposed to those that interact broadly with the general public.

For Mr. Stern, "this is going to be a train wreck" — one that he believes can be avoided only if advocates on both sides renounce what he called "a winner take all" attitude.

And for just about anyone with political savvy, one conclusion is that a long series of court battles regarding same-sex marriage and religious freedom could be in the offing, with ample room, given the multiplicity of statutes and complexity of precedents, for unpredictable, inconsistent and controversial rulings.

Whatever the ultimate impact on religious freedom, then, won't the first great impact, as the debate in Congress showed, be on the political climate? "No question," Professor Sunstein said.

Correction: June 14, 2006

A sports article yesterday about the absence of World Cup soccer games on the Armed Forces Network misstated the surname of a Pentagon spokesman who said the network's budget did not include money to pay for broadcast rights. He is Cmdr. Greg Hicks, not Kicks.

Copyright 2006 The New York Times Company

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [XML](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)