

Background

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Same-Sex Marriage and Threats to Religious Freedom: How Nondiscrimination Laws Factor In

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Abstract: *Proponents of religious freedom have firmly established that same-sex marriage threatens religious freedom in a number of ways. In response, some have argued that certain threats to religious freedom discussed in this context have more to do with nondiscrimination laws than with the legal status of same-sex marriage. This argument reflects certain realities. Conflicts between same-sex marriage and religious freedom will often involve some type of previously adopted nondiscrimination law or policy, and nondiscrimination laws can impose burdens on religious freedom even in jurisdictions that do not legally recognize homosexual unions as marriages. But neither point diminishes the threat that same-sex marriage poses to religious freedom. Same-sex marriage is likely to trigger a number of conflicts between nondiscrimination laws and religious freedom that otherwise would not exist, and threats to religious freedom are no less troubling because they involve nondiscrimination laws and same-sex marriage, not just same-sex marriage.*

Many scholars and analysts on both sides of the marriage debate now acknowledge that same-sex marriage threatens the free exercise of religious and moral conscience in a number of ways. These concerns have been discussed in a variety of sources.

In response, some sources have argued that certain threats to religious freedom identified in this context have more to do with nondiscrimination laws than with the legal status of same-sex marriage.¹ This argument reflects two realities.

Talking Points

- Conflicts between same-sex marriage and religious freedom will often involve some type of previously adopted nondiscrimination law or policy.
- Nondiscrimination laws can impose burdens on religious freedom even in jurisdictions that do not legally recognize homosexual unions as marriages.
- Neither of these points, however, diminishes the threat that same-sex marriage poses to religious freedom.
- Same-sex marriage is likely to trigger a number of conflicts between nondiscrimination laws and religious freedom that otherwise would not exist.
- Further, threats to religious freedom are no less troubling because they involve nondiscrimination laws and same-sex marriage, not just same-sex marriage.
- Lawmakers should revisit nondiscrimination laws to make sure that they adequately protect religious and moral conscience even after dramatic legal changes such as same-sex marriage.
- Failure to update nondiscrimination laws in jurisdictions with same-sex marriage provides an additional ground for proponents of religious freedom to oppose the expansion of nondiscrimination laws in the future.

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First, in most conflicts between same-sex marriage and religious freedom, some kind of previously adopted nondiscrimination law or policy will play a role.

Second, nondiscrimination laws can threaten religious freedom even in jurisdictions that have not fully redefined marriage.

However, neither of these points diminishes the threat that same-sex marriage poses to religious freedom. Redefining marriage is likely to increase the number of conflicts between religious freedom and nondiscrimination laws significantly. Further, threats to religious liberty are no less troubling merely because they involve nondiscrimination laws and same-sex marriage, not just same-sex marriage by itself.

In America, liberty should be the starting point, not a begrudged afterthought, in every context of law and public policy. Many nondiscrimination laws included protections for religious and moral conscience when they were first enacted. Lawmakers should update those laws when radical legal changes such as same-sex marriage create new situations that are likely to trigger significant burdens on the free exercise of religious and moral conscience in the future.

Same-Sex Marriage Is Likely to Increase Conflicts Between Nondiscrimination Laws and Religious Freedom

Conflicts between religious freedom and nondiscrimination laws can occur even in jurisdictions that have not enacted laws conferring official recognition on homosexual unions. These cases present serious concerns of their own.² However, same-sex marriage is likely to increase the number of conflicts between religious freedom and nondiscrimination laws for at least five reasons.

First, by creating a presumption of sexual union, officially licensing homosexual relationships can trigger conflicts with religious and moral conscience that otherwise would not exist. In many cases, a person's sexual orientation is not relevant to individuals and institutions that hold traditional beliefs about marriage, family, and sexuality,³ but it should surprise no one if people or groups with traditional beliefs about marriage, family, and sexuality draw a principled line at facilitating or expressing moral support for certain forms of sexual conduct.⁴ Laws that officially recognize homosexual relationships—through same-sex marriage, civil unions, or domestic partnerships—make that kind of scenario more likely by creating a public presumption of sexual conduct.

1. See, e.g., Carlos Maza, *Memo to NY Republicans: Marriage Equality Bill Doesn't Threaten Religious Liberties*, EQUALITY MATTERS (June 17, 2011), <http://equalitymatters.org/blog/201106170008> (arguing that New York same-sex marriage bill does not threaten religious liberties because, in part, New York discrimination law already imposes certain burdens sometimes cited to illustrate how same-sex marriage threatens religious freedom); Billy Hollowell, *Does NY's New Gay Marriage Law Protect Those Who Oppose Same-Sex Unions?* THE BLAZE (June 28, 2011), <http://www.theblaze.com/stories/does-ny%E2%80%99s-new-gay-marriage-law-protect-those-who-oppose-same-sex-unions> (explaining that certain sources "dismiss" certain fears that same-sex marriage could threaten religious freedom because "current laws already prevent businesses from discriminating based on sexual orientation"). See also Walter Olson, Op-Ed, *An Amen for Albany*, WALL ST. J., June 30, 2011, available at <http://online.wsj.com/article/SB10001424052702304584004576415451306860880.html> (praising exemptions in New York same-sex marriage legislation but observing that certain cases sometimes cited to illustrate how same-sex marriage is likely to threaten religious freedom involve "plain old discrimination law," not the legal status of same-sex marriage); cf. Jason Pitzl-Waters, *The Danger of Religious Exemptions in New York's Same-Sex Marriage Bill*, ON FAITH (June 23, 2011), http://www.washingtonpost.com/blogs/on-faith/post/the-danger-of-religious-exemptions-in-new-yorks-same-sex-marriage-bill/2011/06/23/AGtj9chH_blog.html (arguing that a certain exemption "could fall afoul of already-existing non-discrimination laws").
2. See, e.g., Olson, *supra* note 1 (stating that some rulings "are to be deplored as infringements on individual liberty").
3. See, e.g., Brief of Plaintiff-Appellant at 7, *Walden v. Centers for Disease Control and Prevention, et al.*, No. 10-11733-B (11th Cir. July 16, 2010) (counselor asserting that "religious beliefs do not prohibit her from counseling persons who identify as homosexual—she has and would continue to counsel such clients"); Complaint at ¶ 9, *Elane Photography v. Cordova*, No. 07-173 (D.N.M. action dismissed without prejudice on Jan. 3, 2008) (stating that owners and photographers of private photography company "do not refuse to take photographs of people because of their sexual orientation and have never done so").

Second, many religious and moral objections in this context might focus on the nature of marriage and family instead of more narrowly on the presumption of sexual conduct. Therefore, conflicts with religious freedom can be expected to arise in jurisdictions that force private citizens to participate in same-sex wedding ceremonies and celebrations. Many people of good will have “no objection generally” to providing services to same-sex couples, but assisting with a marriage ceremony is different because for many people that situation involves “religious significance” that certain other situations do not.⁵ Similar conflicts are also likely to arise where certain professionals or charities object to providing services that involve placing children with same-sex couples.

It should surprise no one if people or groups with traditional beliefs about marriage, family, and sexuality draw a principled line at facilitating or expressing moral support for certain forms of sexual conduct.

Third, because it is precisely a marital union that is recognized under laws licensing same-sex marriages, the potential for conflicts to arise under “marital status” nondiscrimination laws will be greater in states that redefine marriage. According to one source, marital status nondiscrimination

laws are “more common than laws banning sexual orientation discrimination” and less likely than sexual orientation nondiscrimination laws “to feature religious or conscience exemptions.”⁶

Fourth, by eliminating distinctions based on gender and sexual orientation in an institution as fundamental to the social order as marriage, same-sex marriage could reinforce and strengthen certain political and legal assumptions underlying nondiscrimination laws. Although political support for nondiscrimination policies has almost, if not always, preceded political support for same-sex marriage, it is likely that same-sex marriage laws will further entrench social, political, and legal ideas about homosexuality and same-sex marriage in ways that would:

- Encourage the expansion of existing nondiscrimination laws;
- Compel the rigid enforcement of those laws even in cases involving competing public policy interests; and
- Discourage protections for the liberty of individuals and institutions with traditional religious and moral viewpoints regarding marriage, family, and sexuality.

Fifth, redefining marriage to include same-sex unions could also contribute to the enactment of nondiscrimination laws in jurisdictions where they do not already exist, causing further conflicts with the free exercise of religious and moral conscience.⁷

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4. See, e.g., Brief of Plaintiff-Appellant at 7, Walden (counselor asserting that her “religious beliefs [] forbid her from using her talents and skills as a counselor to encourage or promote romantic relationships between same-sex partners”); cf. Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment ¶ 16–18, Elane Photography, LLC v. Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. July 9, 2009) (asserting that company did not photograph a same-sex commitment ceremony for reasons including religious and moral beliefs of company owners that marriage is one man and one woman).
 5. Letter from Robin Fretwell Wilson, Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett, Marc D. Stern, and Edward McGlynn Gaffney, Jr., to Hon. Dean G. Skelos, Senator, New York State Legislature, at 14 (May 17, 2011), available at <http://mirrorofjustice.blogs.com/files/ny-letter-5-2011-skelos-copy.pdf> (emphasis omitted in second quotation).
 6. BECKET FUND FOR RELIGIOUS LIBERTY, SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2 (Jan. 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf>.
 7. See Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1182 (2005) (discussing concern that “a gay rights victory on government recognition of same-sex marriage [could] yield broader gay rights victories...as to private discrimination”); *id.* at 1183–93 (discussing various ways that same-sex marriage might contribute to expansion of nondiscrimination laws); *id.* at 1178 n.65 (explaining that opponents of nondiscrimination laws “may understandably worry that shifts in political attitude could enable those laws to be enacted in those jurisdictions [that currently lack such laws] or at the federal level”).

Threats to Religious Freedom Are No Less Troubling Because They Involve Nondiscrimination Laws and Not Just Same-Sex Marriage

The American public has become accustomed to laws banning private discrimination in certain contexts, but this does not mean that burdens on freedom from such laws require no justification. In America, liberty should be the starting point, not a begrudged afterthought, in every context involving law and public policy.

In 2009, The Becket Fund for Religious Liberty surveyed more than 1,000 state laws prohibiting discrimination on the basis of sexual orientation, gender, or marital status. That survey found that more than “350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage.”⁸ That is a hornet’s nest of potential conflict with religious freedom.

Lawmakers should fix laws that impose unjustified burdens on freedom, especially freedom of religious and moral conscience regarding marriage, family, and sexuality. This obligation is especially pressing if lawmakers created the problems in the first place.

The idea that lawmakers should protect religious freedom from unjustified burdens imposed by government dictates is not new. Many laws, including many nondiscrimination laws, already include protections for religious and moral conscience. These protections reflect legislative judgments—reached at the time those laws were passed—about how those laws could burden religious and moral conscience.

Publicly licensed same-sex unions force lawmakers to confront new circumstances that could burden religious freedom under previously enacted nondiscrimination laws. Therefore, in jurisdictions that legally recognize same-sex unions, lawmakers should update nondiscrimination laws to reflect the proper balance between the public interest in dictating certain forms of private conduct and the public interest in respecting religious and moral conscience regarding marriage, family, and sexuality.

Failure to fulfill this public duty threatens to transform the marriage debate from a culture war into a conscience war.⁹

If lawmakers fail to update nondiscrimination laws in the light of new threats from same-sex marriage, then proponents of religious freedom have additional grounds to oppose any expansion of nondiscrimination laws in the future.

Lawmakers should fix laws that impose unjustified burdens on freedom, especially freedom of religious and moral conscience regarding marriage, family, and sexuality.

Although political support for nondiscrimination laws usually, if not always, precedes political support for same-sex marriage, nondiscrimination laws heighten the threat to religious freedom from same-sex marriage by penalizing private citizens with dissenting viewpoints on marriage, family, and sexuality. If lawmakers will not address those concerns in same-sex marriage legislation, then people concerned with religious freedom have additional grounds to oppose certain nondiscrimination laws in the first place.

Conclusion

Proponents of religious freedom have firmly established that same-sex marriage threatens religious freedom in a number of ways. In response, some sources have argued that certain threats to religious freedom discussed in this context have more to do with nondiscrimination laws than with the legal status of same-sex marriage.

This argument reflects certain realities. Conflicts between same-sex marriage and religious freedom will often involve some type of previously adopted nondiscrimination law or policy, and nondiscrimination laws can impose burdens on religious freedom even in jurisdictions that do not legally recognize homosexual unions as marriages.

8. See BECKET FUND FOR RELIGIOUS LIBERTY, *supra* note 6, at 2.

9. See Thomas M. Messner, *From Culture Wars to Conscience Wars: Emerging Threats to Conscience*, HERITAGE FOUNDATION BACKGROUNDER No. 2543 (Apr. 13, 2011), available at <http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience>.

Neither of these points, however, diminishes the threat that same-sex marriage poses to religious freedom. Same-sex marriage is likely to trigger a number of conflicts between nondiscrimination laws and religious freedom that otherwise would not exist. Further, threats to religious freedom are no less troubling because they involve nondiscrimination laws and same-sex marriage, not just same-sex marriage.

Where nondiscrimination laws have been enacted without consideration of how they would inter-

act with radical legal developments like same-sex marriage, lawmakers should reconsider and update those laws wherever appropriate. Failure to do so threatens to turn the marriage debate from a culture war into a conscience war and provides an additional ground for proponents of religious freedom to oppose the expansion of nondiscrimination laws in the future.

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