

SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS.
Edited by Douglas Laycock, Anthony R. Picarello, Jr. and Robin Fretwell
Wilson. Rowman and Littlefield Publishers, Inc. 2008. Pp. 320. \$28.59.
ISBN: 0-742-56326-X.

This book contains thoughtful essays written by some very well known and respected individuals on a topic that will remain in the public eye for the foreseeable future. A great many cases are discussed that relate to LGBT (lesbian, gay, bisexual or transgender) rights, religious liberty, or both, which makes the volume valuable as a resource on that basis alone. The volume is also valuable in offering a range of views on same-sex marriage and on the protections that should be afforded to those who act in particular ways based on their religious beliefs. Regrettably, there is at least one respect in which there is a lack of divergence of view—all of the writers seem to envision LGBT rights as inevitably in conflict with religion, whereas in actuality religious groups themselves differ about the rights that should be accorded to members of the LGBT community. While an accurate representation of the division within religious groups would not somehow negate the conflicts that do exist between those supporting and those rejecting LGBT rights, such a representation would nonetheless have been helpful if only because the reader would then have more readily understood the costs and benefits associated with the adoption of some of the suggested positions.

Marc Stern's essay discusses a wide variety of contexts in which certain religious groups and those supporting LGBT rights are at odds. While admitting that no one "seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them," he nonetheless claims that recognition of "same-sex marriage would work a sea-change in American law." (1) Of course, same-sex marriages are already recognized in some states, and it is not at all clear that those states have undergone a legal sea-change. For example, in both Massachusetts and Connecticut, both members of a same-sex couple could establish legal relations with the child that they were raising even before those states recognized same-sex marriage. Indeed, the same point might be made about those states recognizing civil unions. Ironically, one of the arguments marshaled by those opposing California's recognition of same-sex marriage was that California same-sex couples would gain *no* legal advantage by marrying that they could

not also have by entering into a domestic partnership. It is not at all clear that a sea-change in California state law would have occurred were the California Supreme Court to have struck down Proposition 8 (which by referendum amended the California Constitution to preclude same-sex couples from marrying).

Stern apparently fears that if same-sex marriage is recognized, speech condemning LGBT individuals and relationships will be less protected and religious organizations may find it more difficult to discriminate against LGBT individuals. However, many of the cases he cites as illustrations of these phenomena occur in jurisdictions that do not recognize same-sex marriage. Indeed, there seems to be a growing recognition that discrimination on the basis of orientation or gender identity/expression, like other kinds of discrimination, should be disfavored, even in states that do not recognize same-sex marriage.

It is misleading to suggest that recognition of same-sex marriage would cause religious groups to be less able to discriminate, as if religious groups will be given free rein as long as marriage recognition can be prevented. A more plausible account is that a more widespread recognition of same-sex marriage would as much indicate as cause a greater acceptance of the equality of LGBT individuals and a corresponding reduction in support for the permissibility of discrimination on the basis of orientation or gender identity/expression.

Jonathan Turley, who favors same-sex marriage, addresses how tax policy should treat those who have religious objections to interracial or same-sex unions. He described *Bob Jones v. United States*¹ as “ill-conceived,” (60) believing that the Court should distinguish between groups receiving tax exemptions and those receiving government funds. (75) Certainly, the Court could treat those differently, although too little argument is offered to establish why it should. As a separate point, the adoption of such a distinction would not resolve current difficulties but only shift the discussion, for example, to whether religious institutions wishing to discriminate against members of the LGBT community are being treated unfairly if they are denied access to funding that non-discriminating organizations might receive.

Robin Fretwell Wilson suggests that public servants should be permitted to refuse to serve same-sex couples if another individual could perform the relevant service instead. Perhaps that is so, although one wonders whether the same accommodation would be offered for someone religiously objecting to married couples based on their race,

1. 461 U.S. 574 (1983).

religion, age, etc. She notes that the “religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination,” (101) but fails to explain why not. Individuals with longstanding and sincere religious beliefs discriminate on a whole host of bases, including race.

Presumably, the differentiating feature will not be based on which views are “correct” since each group claims to represent God’s view. If the reason relates to how many hold the relevant views, then racial, religious and orientation discrimination will all be equally unacceptable if the relevant numbers are equivalent. But counting heads to determine whether religious groups should be permitted to discriminate neither gives adequate respect to persons on the one hand nor adequate protection to religious liberty on the other. Regrettably, no suggestions are offered to help us know which, if any, kinds of discrimination should be viewed as justifiable.

Douglas Kmiec is willing to assume for purposes of the article that racial and orientation discrimination are analogous. (104) He then argues that *Bob Jones* should not be extended because the state does not have as much of an interest in eradicating orientation discrimination as it does in eradicating racial discrimination. But this is to deny the analogy. Indeed, one infers that the argument *sub silentio* is that orientation discrimination is permissible. No doubt some believe that, but many who wish to discriminate on religious grounds against a whole host of groups believe that they are correct. Regrettably, no persuasive argument is offered for why orientation discrimination is permissibly subsidized through government funding or tax exemption but racial discrimination is not.

Chai Feldblum argues that due process rights (which might include the right to marry a same-sex partner) should trump religious liberty. Perhaps that is so, but it buys into the dichotomy between LGBT rights and religious liberty, and does nothing to further the analysis respecting what to do when religious convictions collide. In addition, acceptance of this dichotomy obscures one of the arguments that might be offered in support of the recognition of same-sex marriage. Many couples, whether composed of individuals of the same sex or of different sexes, are motivated to marry, at least in part, because doing so is religiously supported, if not required. Denying same-sex couples civil recognition of their religious unions *undermines* rather than supports religious liberty. Were a state to deny recognition to the marital unions celebrated within some of the religious traditions represented in this volume, there would be a great outcry about the state’s denial of religious liberty.

The claim here is not that all religious unions must be recognized—*Reynolds v. United States*² upheld the permissibility of banning polygamous unions. That said, however, merely because a state is permitted to refuse to recognize some religious marriages if there are compelling interests justifying that position does not mean that the state is given *carte blanche* with respect to which marriages to recognize.

In the past decade, there have been several decisions addressing whether state marriage bans pass constitutional muster. In none of those cases were compelling or even important interests articulated by the state to justify those bans. Rather, what divided the various courts was whether the articulated interests were even *legitimate*. Were courts and commentators to take seriously that same-sex marriage bans undermine religious liberty, one would expect these decisions to read quite differently.

Charles Reid emphasizes the religious aspect of marriage and traces some of our current societal problems to the desacralization of marriage. Bracketing whether liberalizing divorce laws has been an all-things-considered benefit or detriment to society, recognition of same-sex marriage need not involve a rejection of religion. Indeed, that denominations are having internal struggles over the extent to which LGBT individuals should be treated equally provides ample evidence that the subject of this collection of essays is more accurately described not merely as a conflict between the secular and religious but also as a conflict among the religious.

Our society is becoming more and more religiously diverse, and one of the challenges that we shall face will involve what to do when we have conflicting religious views about a great variety of issues. Are there any instances in which tax exemptions should be denied to religious groups because of the content of their beliefs? If, as *Bob Jones* suggests, the answer is “Yes,” then we will need an analysis of when such a content-based denial is permissible and when not. Or, by the same token, if there are some conditions under which religious organizations should not be entitled to state funding, then we shall have to figure out what those conditions are.

Given the great variety of religious beliefs and practices in this country, we shall have an ever-growing number of claims that particular individuals should be exempted from following certain rules and that certain state practices should not be permitted because they involve favoritism toward certain religious groups. We will have to figure out

2. 98 U.S. 145 (1879).

some sensible way to address these claims.

This volume seeks to address a serious issue—how we should balance the competing implicated claims when some religious groups sincerely disapprove of others' marriages. This is by no means easily resolved. However, pretending that the groups fall into the religious and the anti-religious is counterproductive for several reasons. First, it is simply inaccurate. Second, it undercuts an important reason that same-sex couples should be allowed to marry. Third, it offers no guidance with respect to what to do when religious beliefs, attitudes, and practices conflict. Regrettably, while this volume has a number of virtues, one is left with the feeling that it might have offered much more guidance with respect to what admittedly will be very contentious disputes that we shall be forced to confront in the not-too-distant future.

*Mark Strasser**

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio.