



Douglas Laycock

---

ROBERT E. SCOTT DISTINGUISHED PROFESSOR OF LAW  
HORACE W. GOLDSMITH RESEARCH PROFESSOR OF LAW  
PROFESSOR OF RELIGIOUS STUDIES  
ALICE MCKEAN YOUNG REGENTS CHAIR IN LAW EMERITUS, UNIVERSITY OF TEXAS AT AUSTIN

March 11, 2013

**Re: SB 0010**  
**Religious liberty implications of same-sex marriage**

Hon. Michael Madigan  
300 Capitol Building  
Springfield, IL 62706

Dear Rep. Madigan:

Senate Bill 0010, providing for same-sex marriage, is now before the House. We urge you to amend the bill to include robust and specific protections for religious liberty — and then that you pass the bill.

All the signers of this letter have studied and written about the law of religious liberty for many years. One of us edited and contributed to the leading book on protecting both marriage equality and religious liberty, *Same-Sex Marriage and Religious Liberty* (2008).

Any bill on same-sex marriage should include religious liberty protections on the lines proposed in the separate letters that you recently received (on or about January 23 and February 26) from a group of scholars led by Professor Robin Fretwell Wilson. We come to these issues from a rather different perspective from Professor Wilson's group, but their analysis of potential legal conflicts is accurate, and their proposed statutory language is necessary to legislation that is fair and just to all sides.

We support same-sex marriage. We think the pending bills can be a great advance for human liberty. But careless or overly aggressive drafting could create a whole new set of problems for the religious liberty of those religious believers who cannot conscientiously participate in implementing the new regime. The net effect for human liberty will be no better than a wash if same-sex couples now oppress religious dissenters in the same way that those dissenters, when they had the power to do so, used to oppress same-sex couples. Religious exemptions are the right policy; they are also right politically. Put genuine religious exemptions in the bill, and at a stroke, you take away one of the opponents' strongest arguments.

Marriage is both a legal relationship and a religious relationship. The profound religious significance of marriage means that many religious organizations and individual believers experience marriage equality as reaching deep into a fundamentally religious

institution. The challenge for any bill is to equalize civil marriage while preserving religious control over religious marriage. Senate Bill 0010 has not yet accomplished the task.

## **I. Religious Organizations**

Section 15 of the bill states a broad and helpful principle in sweeping terms: “Nothing in this Act shall interfere with or regulate the religious practice of any religious body.” This language is also part of the Illinois Religious Freedom Protection and Civil Union Act. 750 Ill. Comp. Stat. §75/15.

But the bare statement of principle leaves it to litigation to determine what is a “religious practice,” what is a “religious body,” what is interference or regulation, and whether the Assembly intended the full sweep of its language. Sections 15, and the amendments to § 209 of the Marriage and Dissolution of Marriage Act, go on to provide in great detail that clergy are not required to officiate at weddings and that one important subset of religious organizations need not provide physical facilities for weddings or wedding receptions. Some lawyers will inevitably argue that these more specific provision somehow limit the scope of the more general provision in § 15.

The issue of “solemnization” and “celebration” is important, but it is only the most obvious part of the issue for religious organizations. A bill that addresses only solemnization and celebration would do less to protect religious liberty than any other state that has enacted same-sex marriage. Equally important, and more likely to be litigated, is the issue of “recognition” of same-sex marriages by religious organizations for purposes of carrying out their religious missions.

A religious organization, in the course of carrying out its religious mission, cannot in good conscience treat as married two persons whose relationship fundamentally violates the religious organization’s understanding of marriage. Must the pastor provide pastoral counseling for a same-sex married couple? Must a religious college provide married-student housing for same-sex couples? A religious-liberty provision addressed only to solemnization and celebration neglects these and many similar issues.

We think the best solution is the more elaborate language proposed by Professor Wilson’s group. It anticipates the range of issues likely to arise and addresses them with care. But at the very least, any bill on same-sex marriage should protect all religious organizations, and it should protect decisions about “recognition” as well as decisions about solemnization and celebration.

## **II. Individuals**

Senate Bill 0010 provides no protection for individuals who provide services to help celebrate weddings or professional services to help sustain marriages. This omission threatens serious harm to a religious minority while conferring no real benefits on same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will

nearly always be able to readily obtain these services from others who are happy to serve them.

The Wilson group's letter offers carefully crafted language that would address this problem in a way that is fair to both sides. It would protect only individuals and very small businesses that are essentially personal extensions of the individual owner, and only when some other business is reasonably available to provide the same service.

It is not in the interest of the gay and lesbian community to create religious martyrs when enforcing the right to same-sex marriage. To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on an individual marriage counselor who refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex marriage. Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.

It is far better to respect the liberty of both sides and let same-sex marriage be implemented with a minimum of confrontation. Let the people of Illinois see happy, loving, committed same-sex marriages in their midst; let them see (this cannot be helped) that some of those marriages fail, just as many opposite-sex marriages fail; let them see that these same-sex marriages, good and bad, have no effect on opposite-sex marriages. Let the market respond to the obvious economic incentives; same-sex couples will pay good money just like opposite-sex couples. Let same-sex marriage become familiar to the people, and do these things without oppressing religious dissenters in the process. Same-sex marriage will be backed by law, backed by the state, and backed by a large and growing number of private institutions. The number of dissenters will continue to decline, as minds continue to change and as others acquiesce in the new circumstances and in the live-and-let-live traditions of the American people. The number of individuals in business or professional settings who assert their right to conscientious objection will be small in the beginning, and it will plunge still further over time if deprived of the chance to rally around a series of martyrs.

Exemptions for religious conscientious objectors will rarely burden same-sex couples. Few same-sex couples in Illinois will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants. And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and who grudgingly serves them only because of the coercive power of the law. The proposed exemptions in the Wilson group's letter are drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas where most of the people – and most of the same-sex couples – actually live.

### **III. Conclusion**

Enacting the right to same-sex marriage with generous exemptions for religious dissenters is the right thing to do. It respects the right of conscience for all sides. It protects the sexual liberty of same-sex couples and the religious liberty of religious dissenters. It is obviously better for the traditional religious believers; on a few moments' reflection, it is also better for the same-sex couples. Because it is better for both sides, it is better for Illinois. The language proposed in the Wilson group's letter would protect the liberty of both sides. We urge you to add it to any bill on same-sex marriage.

At the very least, the bills should protect "recognition" and should protect all religious organizations.

Each of us signs this letter in our individual capacities; none of our employers takes a position on the issues we address. We are available to discuss these issues further if that would be of any benefit.

Very truly yours,

Thomas C. Berg  
James Oberstar Professor  
of Law & Public Policy  
University of St. Thomas (Minnesota)  
tcborg@stthomas.edu

Douglas Laycock  
Robert E. Scott Distinguished Professor of  
Law and Professor of Religious Studies  
University of Virginia  
dlaycock@virginia.edu

Bruce S. Ledewitz  
Professor of Law  
Duquesne University  
ledewitz@duq.edu

Christopher C. Lund  
Assistant Professor of Law  
Wayne State University  
lund@wayne.edu

Michael Perry  
Robert W. Woodruff Professor of Law  
Emory University  
mjperry@emory.edu