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The flip-side of same-sex marriage

Those who object on religious grounds need legal protection too.

May 03, 2009 | Robin Wilson | Robin Wilson is a professor of law at Washington and Lee University School of Law.

As a growing number of states stand poised to pass same-sex marriage laws, they should consider this: It's possible to legalize gay marriage without infringing on religious liberty. But it takes careful crafting of robust religious protections. And no state has gotten that right yet.

The country is deeply divided on same-sex marriage. But once it is recognized legally, all kinds of people -- clerks in the local registrar's office, photographers, owners of reception halls, florists -- might not have the legal right to refuse to provide services for same-sex weddings, even if doing so would violate deeply held beliefs. Religious organizations could be affected too. For example, a Catholic university that offers married-student housing might have to rent to married same-sex couples or risk violating state law.

These are not imagined or speculative concerns. Flash-points over same-sex unions are already occurring across the United States. In Iowa, the state's attorney general told county recorders that they must issue licenses to same-sex couples or face criminal misdemeanor charges and even dismissal. New Mexico's Human Rights Commission fined a husband-wife photography team more than \$6,000 because they declined to photograph a same-sex commitment ceremony. In New Jersey, authorities yanked the property tax exemption of a church group that denied requests by two lesbian couples to use the group's boardwalk pavilion for their commitment ceremonies.

So what should states do to respond to these clashes between same-sex relationships and religious liberty?

What they should not do is what New Hampshire's Senate did last week: pay lip-service to religious freedom while enacting meaningless protections. New Hampshire's bill provides that "members of the clergy ... shall not be obligated ... to officiate at any particular civil marriage or religious rite of marriage in violation of their right to free exercise of religion." But this is a hollow guarantee: The 1st Amendment already provides such protection.

Last month, Connecticut and Vermont became the first states to pass conscience protection for religious dissenters in their same-sex marriage laws. Both states provide that religious groups "shall not be required to provide services, accommodations, advantages, facilities, goods or privileges to an individual if the request ... is related to the solemnization of a marriage or celebration of a marriage." Both also bar civil suits by people denied such wedding-related services.

Connecticut went even further. In that state, a "religious organization" providing adoption services may continue to place children only with heterosexual married couples as long as it gets no government money. Thus, in Connecticut, unlike in Massachusetts, Catholic Charities will not have to close its doors or face litigation threats.

As important as these exemptions for organizations are, states still weighing same-sex marriage should do better. Wedding advisors, photographers, bakers, caterers and other service providers who prefer to step aside from same-sex ceremonies for religious reasons also need explicit protection.

Some have argued that gay-marriage laws do not need such guarantees because they don't require religious objectors to do any particular thing. But new laws are interpreted in light of existing statutes, and Vermont and Connecticut -- as well as all six states still considering same-sex marriage -- have laws on the books prohibiting discrimination on the basis of sexual orientation.

Because of those laws, many people could have to choose between conscience and livelihood. In Massachusetts, individuals violating the non-discrimination statute can be fined up to \$50,000. In Connecticut, business owners can be sentenced to 30 days in jail.

Conscience protections are a thoroughly American idea. Since Colonial times, legislatures have exempted religious minorities from laws inconsistent with their faith. Such exemptions allow Americans with radically different views on moral questions to live in peace and equality in the same society.

Connecticut and Vermont have gone part of the way toward recognizing that the rights of same-sex couples should not come at the expense of the religious people who believe that marriage means a husband and a wife.

Now, New York, Illinois, New Hampshire, Maine, Rhode Island and the District of Columbia should take the time to get same-sex marriage right.