

Banned in Boston

The coming conflict between same-sex marriage and religious liberty.

by Maggie Gallagher

05/15/2006, Volume 011, Issue 33

CATHOLIC CHARITIES OF BOSTON made the announcement on March 10: It was getting out of the adoption business. "We have encountered a dilemma we cannot resolve. . . . The issue is adoption to same-sex couples."

It was shocking news. Catholic Charities of Boston, one of the nation's oldest adoption agencies, had long specialized in finding good homes for hard to place kids. "Catholic Charities was always at the top of the list," Paula Wisniewski, director of adoption for the Home for Little Wanderers, told the *Boston Globe*. "It's a shame because it is certainly going to mean that fewer children from foster care are going to find permanent homes." Marylou Sudders, president of the Massachusetts Society for the Prevention of Cruelty to Children, said simply, "This is a tragedy for kids."

How did this tragedy happen?

It's a complicated story. Massachusetts law prohibited "orientation discrimination" over a decade ago. Then in November 2003, the Massachusetts Supreme Judicial Court ordered gay marriage. The majority ruled that only animus against gay people could explain why anyone would want to treat opposite-sex and same-sex couples differently. That same year, partly in response to growing pressure for gay marriage and adoption both here and in Europe, a Vatican statement made clear that placing children with same-sex couples violates Catholic teaching.

Then in October 2005, the *Boston Globe* broke the news: Boston Catholic Charities *had* placed a small number of children with same-sex couples. Sean Cardinal O'Malley, who has authority over Catholic Charities of Boston, responded by stating that the agency would no longer do so.

Seven members of the Boston Catholic Charities board (about one-sixth of the membership) resigned in protest. Joe Solmonese, president of the Human Rights Campaign, which lobbies for lesbian, gay, bisexual, and transgender equal rights, issued a thundering denunciation of the Catholic hierarchy: "These bishops are putting an ugly political agenda before the needs of very vulnerable children. Every one of the nation's leading children's welfare groups agrees that a parent's sexual orientation is irrelevant to his or her ability to raise a child. What these bishops are doing is shameful, wrong, and has nothing to do whatsoever with faith."

But getting square with the church didn't end Catholic Charities' woes. To operate in Massachusetts, an adoption agency must be licensed by the state. And to get a license, an agency must pledge to obey state laws barring discrimination--including the decade-old ban on orientation discrimination. With the legalization of gay marriage in the state, discrimination against same-sex couples would be outlawed, too.

Cardinal O'Malley asked Governor Mitt Romney for a religious exemption from the ban on orientation discrimination. Governor Romney reluctantly responded that he lacked legal authority to grant one unilaterally, by executive order. So the governor and archbishop turned to the state legislature, requesting a conscience exemption that would allow Catholic Charities to continue to help kids in a manner consistent with Catholic teaching.

To date, not a single other Massachusetts political leader appears willing to consider even the narrowest religious exemption. Lieutenant Governor Kerry Healey, the Republican candidate for governor in this fall's election, refused to budge: "I believe that any institution that wants to provide services that are regulated by the state has to abide by the laws of the state," Healey told the *Boston Globe* on March 2, "and our antidiscrimination laws are some of our most important."

From there, it was only a short step to the headline "State Putting Church Out of Adoption Business," which ran over an opinion piece in the *Boston Globe* by John Garvey, dean of Boston College Law School. It's worth underscoring that Catholic Charities' problem with the state didn't hinge on its receipt of public money. Ron Madnick, president of the Massachusetts chapter of Americans United for Separation of Church and State, agreed with Garvey's assessment: "Even if Catholic Charities ceased receiving tax support and gave up its role as a state contractor, it still could not refuse to place children with same-sex couples."

This March, then, unexpectedly, a mere two years after the introduction of gay marriage in America, a number of latent concerns about the impact of this innovation on religious freedom ceased to be theoretical. How could Adam and Steve's marriage possibly hurt anyone else? When religious-right leaders prophesy negative consequences from gay marriage, they are often seen as overwrought. The First Amendment, we are told, will protect religious groups from persecution for their views about marriage.

So who is right? Is the fate of Catholic Charities of Boston an aberration or a sign of things to come?

I PUT THE QUESTION to Anthony Picarello, president and general counsel of the Becket Fund for Religious Liberty. The Becket Fund is widely recognized as one of the best religious liberty law firms and the only one that defends the religious liberty of all faith groups, "from Anglicans to Zoroastrians," as its founder Kevin J. Hasson likes to say (referring to actual clients the Becket Fund has defended).

Just how serious are the coming conflicts over religious liberty stemming from gay marriage?

"The impact will be severe and pervasive," Picarello says flatly. "This is going to affect every aspect of church-state relations." Recent years, he predicts, will be looked back on as a time of relative peace between church and state, one where people had the luxury of litigating cases about things like the Ten Commandments in courthouses. In times of relative peace, says Picarello, people don't even notice that "the church is surrounded on all sides by the state; that church and state butt up against each other. The boundaries are usually peaceful, so it's easy sometimes to forget they are there. But because marriage affects just about every area of the law, gay marriage is going to create a point of conflict at every point around the perimeter."

For scholars, these will be interesting times: Want to know exactly where the borders of church and state are located? "Wait a few years," Picarello laughs. The flood of litigation surrounding each point of contact will map out the territory. For religious liberty lawyers, there are boom times ahead. As one Becket Fund donor told Picarello ruefully, "At least you know you're not in the buggy whip

business."

Picarello is a Harvard-trained litigator experienced in religious liberty issues. But predicting the legal consequences of as big a change as gay marriage is a job for more than one mind. So last December, the Becket Fund brought together ten religious liberty scholars of right and left to look at the question of the impact of gay marriage on the freedom of religion. Picarello summarizes: "All the scholars we got together see a problem; they all see a conflict coming. They differ on how it should be resolved and who should win, but they all see a conflict coming."

These are not necessarily scholars who oppose gay marriage. Chai Feldblum, for example, is a Georgetown law professor who refers to herself as "part of an inner group of public-intellectual movement leaders committed to advancing LGBT [lesbian, gay, bisexual, transsexual] equality in this country." Marc Stern is the general counsel for the center-left American Jewish Congress. Robin Wilson of the University of Maryland law school is undecided on gay marriage. Jonathan Turley of George Washington law school has supported legalizing not only gay marriage but also polygamy.

Reading through these and the other scholars' papers, I noticed an odd feature. Generally speaking the scholars most opposed to gay marriage were somewhat less likely than others to foresee large conflicts ahead--perhaps because they tended to find it "inconceivable," as Doug Kmiec of Pepperdine law school put it, that "a successful analogy will be drawn in the public mind between irrational, and morally repugnant, racial discrimination and the rational, and at least morally debatable, differentiation of traditional and same-sex marriage." That's a key consideration. For if orientation is like race, then people who oppose gay marriage will be treated under law like bigots who opposed interracial marriage. Sure, we don't arrest people for being racists, but the law does intervene in powerful ways to punish and discourage racial discrimination, not only by government but also by private entities. Doug Laycock, a religious liberty expert at the University of Texas law school, similarly told me we are a "long way" from equating orientation with race in the law.

By contrast, the scholars who favor gay marriage found it relatively easy to foresee looming legal pressures on faith-based organizations opposed to gay marriage, perhaps because many of these scholars live in social and intellectual circles where the shift Kmiec regards as inconceivable has already happened. They have less trouble imagining that people and groups who oppose gay marriage will soon be treated by society and the law the way we treat racists because that's pretty close to the world in which they live now.

The (Gay) Public Intellectual

Of all the scholars who attended, perhaps the most surprising is Chai Feldblum. She is a Georgetown law professor who is highly sought after on civil rights issues, especially gay civil rights. She has drafted many federal bills to prohibit orientation discrimination and innumerable amicus briefs in constitutional cases seeking equality for gay people. I ask her why she decided to make time for a conference on the impact of same-sex marriage on religious liberty.

"Not because I was caught up in the panic," she laughs. She'd been thinking through the moral implications of nondiscrimination rules in the law, a lonely undertaking for a gay rights advocate. "Gay rights supporters often try to present these laws as purely neutral and having no moral implications. But not all discrimination is bad," Feldblum points out. In employment law, for instance, "we allow discrimination against people who sexually abuse children, and we don't say 'the only question is can they type' even if they can type *really* quickly."

To get to the point where the law prohibits discrimination, Feldblum says, "there have to be two things: one, a majority of the society believing the characteristic on which the person is being discriminated against is not morally problematic, and, two, enough of a sense of outrage to push past the normal American contract-based approach, where the government doesn't tell you what you can do. There has to be enough outrage to bypass that basic default mode in America. Unlike some of my compatriots in the gay rights movement, I think we advance the cause of gay equality if we make clear there are moral assessments that underlie antidiscrimination laws."

But there was a second reason Feldblum made time for this particular conference. She was raised an Orthodox Jew. She wanted to demonstrate respect for religious people and their concerns, to show that the gay community is not monolithic in this regard.

"It seemed to me the height of disingenuousness, absurdity, and indeed disrespect to tell someone it is okay to 'be' gay, but not necessarily okay to engage in gay sex. What do they think being gay *means*?" she writes in her Becket paper. "I have the same reaction to courts and legislatures that blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious *means*?"

To Feldblum the emerging conflicts between free exercise of religion and sexual liberty are real: "When we pass a law that says you may not discriminate on the basis of sexual orientation, we are burdening those who have an alternative moral assessment of gay men and lesbians." Most of the time, the need to protect the dignity of gay people will justify burdening religious belief, she argues. But that does not make it right to pretend these burdens do not exist in the first place, or that the religious people the law is burdening don't matter.

"You have to stop, think, and justify the burden each time," says Feldblum. She pauses. "Respect doesn't mean that the religious person should prevail in the right to discriminate--it just means demonstrating a respectful awareness of the religious position."

Feldblum believes this sincerely and with passion, and clearly (as she reminds me) against the vast majority of opinion of her own community. And yet when push comes to shove, when religious liberty and sexual liberty conflict, she admits, "I'm having a hard time coming up with any case in which religious liberty should win."

She pauses over cases like the one at Tufts University, one of many current legal battles in which a Christian group is fighting for the right to limit its leaders to people who subscribe to its particular vision of Christianity. She's uncertain about Catholic Charities of Boston, too: "I do not know the details of that case," she told me. "I do believe a state should be permitted to withhold tax exempt status, as in the Bob Jones case, from a group that is clearly contrary to the state's policy. But to go further and say to a group that it is not permitted to engage in a particular type of work, such as adoptions, unless it also does adoptions for gay couples, that's a heavier hand from the state. And I would hope we could have a dialogue about this and not just accusations of bad faith from either side."

But the bottom line for Feldblum is: "Sexual liberty should win in most cases. There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win because that's the only way that the dignity of gay people can be affirmed in any realistic manner."

The Litigator

Marc Stern has known Chai Feldblum since she was eight years old. "Vivacious, really extraordinary," he says as he smiles, shaking his head at the memories of the little girl whose father he knew well. "Chai is among the most reasonable [gay rights advocates]," he says. "If she's having trouble coming up with cases in which religious liberty should win, we're in trouble."

As general counsel for the American Jewish Congress, Marc Stern knows religious liberty law from the inside out. Like Anthony Picarello, he sees the coming conflicts as pervasive. The problem is not that clergy will be forced to perform gay marriages or prevented from preaching their beliefs. Look past those big red herrings: "No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them. Same-sex marriage would, however, work a sea change in American law. That change will reverberate across the legal and religious landscape in some ways that are today unpredictable," he writes in his Becket Fund paper.

Consider education. Same-sex marriage will affect religious educational institutions, he argues, in at least four ways: admissions, employment, housing, and regulation of clubs. One of Stern's big worries right now is a case in California where a private Christian high school expelled two girls who (the school says) announced they were in a lesbian relationship. Stern is not optimistic. And if the high school loses, he tells me, "then religious schools are out of business." Or at least the government will force religious schools to tolerate both conduct and proclamations by students they believe to be sinful.

Stern agrees with Feldblum that public accommodation laws can and should force truly commercial enterprises to serve all comers. But, he asks, what of other places, such as religious camps, retreats, and homeless shelters? Will they be considered by courts to be places of public accommodation, too? Could a religious summer camp operated in strict conformity with religious principles refuse to accept children coming from same-sex marriages? What of a church-affiliated community center, with a gym and a Little League, that offers family programs? Must a religious-affiliated family services provider offer marriage counseling to same-sex couples designed to facilitate or preserve their relationships?

"Future conflict with the law in regard to licensing is certain with regard to psychological clinics, social workers, marital counselors, and the like," Stern wrote last December--well before the Boston Catholic Charities story broke.

Think about that for a moment. Of all the experts gathered to forecast the impact of gay marriage on religious organizations, no one, not even Stern, brought up adoption licenses. "Government is so pervasive, it's hard to know where the next battle will be," he tells me. "I thought I had a comprehensive catalog, but the adoption license issue didn't occur to me."

Will speech against gay marriage be allowed to continue unfettered? "Under the American regime of freedom of speech, the answer ought to be easy," according to Stern. But it is not entirely certain, he writes, "because sexual-harassment-in-the-workplace principles will likely migrate to suppress any expression of anti-same-sex-marriage views." Stern suggests how that might work.

In the corporate world, the expression of opposition to gay marriage will be suppressed not by gay ideologues but by corporate lawyers, who will draw the lines least likely to entangle the company in litigation. Stern likens this to "a paroxysm of prophylaxis--banning 'Jesus saves' because someone might take offense."

Or consider a recent case at William Paterson University, a state school in New Jersey. A senior

faculty member sent out a mass email inviting people to attend movies with a gay theme. A student employee, a 63-year-old Muslim named Jihad Daniel, replied to the professor in a private email asking not to receive messages "about 'Connie and Sally' and 'Adam and Steve.'" He went on, "These are perversions. The absence of God in higher education brings on confusion. That is why in these classes the Creator of the heavens and the earth is never mentioned." The result: Daniel received a letter of reprimand for using the "derogatory and demeaning" word "perversions" in violation of state discrimination and harassment regulations.

Interestingly, Stern points out, a single "derogatory or demeaning" remark not seeking sexual gratification or threatening a person's job security does not constitute harassment under ordinary federal and state sexual harassment law originally intended to protect women in the workplace. Moreover, Stern says, "our entire free speech regime depends on the principle that no adult has a right to expect the law will protect him from being exposed to disagreeable speech."

Except, apparently in New Jersey, where a state attorney general's opinion concluded, "[C]learly speech which violates a nondiscrimination policy is not protected." "This was so 'clear' to the writer," notes Stern, "that she cited not a single case or law review article in support." Ultimately, the school withdrew its reprimand from Daniel's employment file after receiving negative publicity and the threat of a lawsuit from the Foundation for Individual Rights in Education (FIRE).

Sexual harassment law as an instrument for suppressing religious speech? A few days after I interviewed Stern, an Alliance Defense Fund press release dropped into my mail box: "OSU Librarian Slapped with 'Sexual Harassment' Charge for Recommending Conservative Books for Freshmen." One of the books the Ohio State librarian (a pacifist Quaker who drives a horse and buggy to work) recommended was *It Takes a Family* by Senator Rick Santorum. Three professors alleged that the mere appearance of such a book on a freshman reading list made them feel "unsafe." The faculty voted to pursue the sexual harassment allegation, and the process quickly resulted in the charge being dropped.

In the end the investigation of the librarian was more of a nuisance--you might call it harassment--than anything else. But the imbalance in terms of free speech remains clear: People who favor gay rights face no penalty for speaking their views, but can inflict a risk of litigation, investigation, and formal and informal career penalties on others whose views they dislike. Meanwhile, people who think gay marriage is wrong cannot know for sure where the line is now or where it will be redrawn in the near future. "Soft" coercion produces no martyrs to disturb anyone's conscience, yet it is highly effective in chilling the speech of ordinary people.

Finally, I ask Stern the big question on everyone's mind. Religious groups that take government funding will almost certainly be required to play by the nondiscrimination rules, but what about groups that, while receiving no government grants, are tax-exempt? Can a group--a church or religious charity, say--that opposes gay marriage keep its tax exemption if gay marriage becomes the law? "That," says Stern, "is the 18 trillion dollar question."

Twenty years ago it would have been inconceivable that a Christian or Jewish organization that opposed gay marriage might be treated as racist in the public square. Today? It's just not clear.

"In Massachusetts I'd be very worried," Stern says finally. The churches themselves might have a First Amendment defense if a state government or state courts tried to withdraw their exemption, he says, but "the parachurch institutions are very much at risk and may be put out of business because of the licensing issues, or for these other reasons--it's very unclear. None of us nonprofits can function

without [state] tax exemption. As a practical matter, any large charity needs that real estate tax exemption."

He blames religious conservatives for adopting the wrong political strategy on gay issues. "Live and let live," he tells me, is the only thing around the world that works. But I ask him point blank what he would say to people who dismiss the threat to free exercise of religion as evangelical hysteria. "It's not hysteria, this is very real," he tells me, "Boston Catholic Charities shows that."

Fundamentally, Stern sees this as a "religious war" between people for whom an egalitarian secular ethic is the only rational option and people who can make room for an ethic based on faith in a God who commands. There are very few signs of a willingness to compromise on either side, he notes.

"You look around the world and even the right to preach is in doubt," he tells me. "In the United States we are not foreseeably in that position. Fundamentally speech is still safe in the United States. Beyond speech, nothing is safe."

The Health Care Law Expert

Robin Wilson is an expert in both family law and health care law. So when Anthony Picarello approached her about thinking through the impact gay marriage may have on religious institutions, she had a ready model at hand: the struggles over conscience exemptions in the health care field after *Roe v. Wade* elevated abortion to a constitutional right.

Wilson predicts "a concerted effort to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others. Although *Roe* and *Griswold* established only the right to noninterference by the state in a woman's abortion and contraceptive decisions, family planning advocates have worked strenuously to force *individual institutions* to provide controversial services, and to force *individual health care providers* to participate in them."

"This litigation after *Roe*," she says, "provides a convincing prediction about the trajectory that litigation after *Goodridge* will take" (*Goodridge* being the Massachusetts supreme court decision that legalized gay marriage). The post-*Roe* litigation also provides fair warning about the limits of First Amendment protection. The lever used to force hospitals and doctors to perform abortions and sterilizations was the receipt of any public money. "Given the status of most churches as state nonprofits and federally tax-exempt organizations, it is likely that public support arguments will be advanced to compel churches to participate in same-sex marriage. Thus, churches in Massachusetts (and perhaps soon other states) may have much to worry about," Wilson writes. "Churches that oppose same-sex marriage today may perceive a credible, palpable threat to their tax-exempt status, the benefits of which are substantial."

This threat is credible, she explains, because to be recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code, an organization must have purposes and activities that do not violate fundamental "public policy," a concept that neither the Supreme Court nor the IRS has fully defined.

The case that worries Wilson in this regard is one that Chai Feldblum mentioned: *Bob Jones University v. United States*, in which the IRS revoked the federal tax exemption of Bob Jones University because the school prohibited interracial marriage and dating among its students. The Court easily dismissed Bob Jones's claim that its prohibition on interracial dating was religiously grounded and therefore protected by the First Amendment. The denial of tax benefits, the Court asserted, would not prevent the school "from observing their religious tenets."

Equally, the First Amendment did not prevent religious hospitals from being punished for refusing to perform abortions, once abortion became a constitutional right. It was Congress and state legislatures that stepped in to provide generous statutory religious exemptions. Once gay marriage is legal, it too will probably become fundamental public policy. To protect the tax-exempt status of religious groups that oppose gay marriage will thus likely require legislative intervention to create religious exemptions at either the state or federal level or both, says Wilson. She means the same kind of religious exemption that, to date, no politician in Massachusetts besides the outgoing governor is willing to support.

The Legal Eagle

Jonathan Turley, the George Washington professor who is a First Amendment specialist, also sees a serious risk ahead. Turley has no problem with gay marriage. But the gay marriage debate, he notes, exposes "long ignored weaknesses in doctrines relating to free speech, free exercise, and the right to association."

Before 1970 the law was "viewpoint neutral" with regard to the tax exempt status of all charitable, religious, and public interest organizations under section 501(c)(3), he says. The tax exemption was viewed not as a public subsidy, but as a means of encouraging private donations and charitable conduct in general. In 1971, the IRS issued a decision redefining the tax exemption as a public endorsement or subsidy. This meant that the IRS would strip an organization of its exempt status if its purposes, although legal, were "contrary to public policy." The goal at the time was to use legal pressure to end private racial discrimination. But why stop there?

Right now, Turley notes, there is no clear federal public policy against discrimination on the basis of sexual orientation. But such a policy is imminent, he believes, most likely within the decade. Once that occurs, he agrees with Robin Wilson: "Any organization that engaged in such discrimination as a matter of faith would be in a position similar to Bob Jones University."

It's not that hard to imagine: Pass an antidiscrimination law at the federal level, which polls suggest the majority of Americans already support; look for a 5-or 10-point swing in public opinion on gay marriage; then add a new IRS commissioner (not directly accountable to the voters) who wants to make his or her progressive mark, and religious groups would wake up to find themselves playing in a whole new ballgame.

Religious bodies may be as simple as the small, independent congregations that exist all over America, but often they are large and complex institutions with extensive property and multiple missions, notably saving souls. Even a slight risk of anything so damaging as the loss of tax-exempt status will persuade many such groups to at least mute their marriage theology in the interest of preserving the rest of their activities. Such a self-imposed muting on the part of faith communities would change our culture of marriage, and our understanding of the free exercise of religion, without necessarily creating visible martyrs.

The Consensus Broker

Charles Haynes, a senior scholar at the Freedom Forum's influential First Amendment Center, specializes in helping groups in conflict find common ground on First Amendment issues. For example, he recently got the Christian Educators Association International and the Gay, Lesbian and Straight Education Networks (GLSEN) to agree to what he calls "consensus guidelines" for public schools dealing with orientation issues. I went to him for an outside opinion from a First Amendment

expert who had not attended the Becket Fund conference. Like every other expert I interviewed, Haynes told me he wasn't concerned that clergy will be forced to marry same sex couples. What about the other potential conflicts? Are they real? "There are already tensions," he tells me. "I think there is a kind of collision course here that is inevitable."

For a man in the conciliation business, Haynes doesn't sound optimistic. "I think it's a serious question that will grow more difficult. I think we will have more and more tension between efforts by the state to protect gay rights and the need to protect religious freedom. This will have an impact on religious individuals as well as perhaps religious organizations in areas such as housing, the workplace, hiring."

I ask him whether his concerns are shared by the wide spectrum of religious and civil rights groups he deals with. "Everyone's talking about it, thinking about it," Haynes tells me. "There are a lot of different ideas about where we are going to end up, but everyone thinks it is the battle of our times."

The Marriage Line

How much of the coming threat to religious liberty actually stems from same-sex marriage? These experts' comments make clear that it is not only gay marriage, but also the set of ideas that leads to gay marriage--the insistence on one specific vision of gay rights--that has placed church and state on a collision course. Once sexual orientation is conceptualized as a protected status on a par with race, traditional religions that condemn homosexual conduct will face increasing legal pressures regardless of what courts and Congress do about marriage itself.

Nevertheless, marriage is a particularly potent legal "bright line." Support for marriage is firmly established in our legal tradition and in our public policy. After it became apparent that no religious exemption would be available for Catholic Charities in Massachusetts, the church looked hard for legal avenues to continue helping kids without violating Catholic principles. If the stumbling block had been Catholic Charities' unwillingness to place children with single people--or with gay singles--marriage might have provided a legal "safe harbor": Catholic Charities might have been able to specialize in placing children with married couples and thus avoid collision with state laws banning orientation discrimination. After *Goodridge*, however, "marriage" includes gay marriage, so no such haven would have been available in Massachusetts.

Precisely because support for marriage is public policy, once marriage includes gay couples, groups who oppose gay marriage are likely to be judged in violation of public policy, triggering a host of negative consequences, including the loss of tax-exempt status. Because marriage is not a private act, but a protected public status, the legalization of gay marriage sends a strong signal that orientation is now on a par with race in the nondiscrimination game. And when we get gay marriage because courts have declared it a constitutional right, the signal is stronger still.

The method and the mechanism for achieving protected status may be different for orientation and for race. Even the Massachusetts supreme court, for example, declined to rule explicitly that orientation is a protected class, subject to strict scrutiny. But in Massachusetts, the end result may be similar. If state courts declare gay marriage a constitutional right, they are likely to see support for gay marriage as state public policy.

On the cultural level, the declaration by a court that only animus explains why anyone would treat two men differently from a husband and wife represents an unfolding civil rights logic that has real consequences. As *Boston Globe* columnist Ellen Goodman put it, "But if you give one church

permission to discriminate against gays, what's next? Permission to discriminate against blacks or Jews who want to adopt?"

End Game

On April 15, the *Boston Globe* ran a story about three other Catholic adoption agencies, in Worcester, Fall River, and Springfield, that do not do gay adoptions. The story noted that, for now, these agencies will not be punished for their refusal. Constantia Papanikolaou, general counsel for the state Department of Early Education and Care, said her agency is holding off taking any action because the governor has proposed legislation that would provide a religious exemption for adoption agencies. "We're going to wait and see how the legislation plays out," Papanikolaou said.

The reprieve is likely to be short-lived. Observers universally say the religious exemption has no chance of passage, and in a few months, Mitt Romney will no longer be governor. What then? The *Boston Globe* story provides a clue: "Gary Buseck, legal director of the Gay & Lesbian Advocates & Defenders in Boston, said his group realizes that Massachusetts will have a new governor next year, and it expects that he or she will aggressively enforce the state's antidiscrimination laws."

Marc Stern is looking more and more like a reluctant prophet: "It's going to be a train wreck," he told me in the offices of the American Jewish Congress high above Manhattan. "A very dangerous train wreck. I don't see anyone trying to stem the train wreck, or slow down the trains. Both sides are really looking for Armageddon, and they frankly both want to win. I prefer to avoid Armageddon, if possible."

Maggie Gallagher is president of the Institute for Marriage and Public Policy (marriagedebate.com) and coauthor of *The Case for Marriage*.

© Copyright 2008, News Corporation, Weekly Standard, All Rights Reserved.