



ARCHDIOCESE OF WASHINGTON

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The Conflict between Same-Sex Marriage and Religious Liberty

On February 4, 2010, the District of Columbia Board of Elections and Ethics denied a request for a referendum that would allow the people of our nation's capital to vote on the same-sex marriage law.

The people of Maine recently voted on whether to legalize same-sex marriage, but the people of the District of Columbia had a different experience: they were told they couldn't vote. Some individuals argued that allowing District residents to have a direct voice on the subject of marriage would be a violation of civil rights. In fact, denying the people their voice contradicts both the law and good sense. The lessons of Washington to date are well worth examining.

The D.C. Experience

In October 2009, the District of Columbia City Council introduced a bill to legalize marriage between same-sex couples. The Archdiocese of Washington, legal experts, other faith groups, and dozens of individuals opposed the Religious Freedom and Civil Marriage Equality Amendment Act for three main reasons: opposition to same-sex marriage, the lack of robust protection for religious liberties, and a belief that people should have the right to vote on an issue as serious as redefining marriage.

The archdiocese testified strongly against the bill and, when it became clear that the Council was determined to legalize same-sex marriage, advocated for vigorous guarantees for religious liberty. Meetings were held with council members, pastors spoke from the pulpit, and parishioners spoke out.

In the end, however, the Council passed legislation that, despite its title, offered only paltry protections for religious freedom that fell far short of what the law and simple prudence require. On December 18, 2009, District of Columbia Mayor Adrian Fenty signed the Religious Freedom and Civil Marriage Equality Amendment Act into law.

So what options are available to those who wish to uphold the meaning of marriage? A coalition of pastors of other faith communities, with the support of the archdiocese, chose an additional legal route. They filed two petitions with the District of Columbia Board of Elections and Ethics: first for a ballot initiative to affirmatively define marriage as between a man and a woman, and then for a referendum to overturn enactment of the same-sex marriage bill. Both petitions were denied on the grounds that they would "authorize discrimination" that is prohibited by District law. The decision on the ballot initiative was appealed to the District of Columbia Superior Court, which upheld the Board's ruling. Now that same court is considering the Board's recent denial of the referendum.

This petition for referendum raises a new issue: the new law's infringement of the constitutional right of religious liberty. Referendum proponents have argued that the people should be allowed to decide whether the Council properly balanced the established right to religious liberty against the purported right to same-sex marriage. The court must also determine whether the government can preclude its citizens from voting on issues that the Board of Elections alone—which currently consists of two people—deems to be human rights. These issues are narrow in their technical scope but broad in their implications for religion's place in the American public sphere and for what it means to govern justly and well.

The Prohibition of Referenda on Human Rights

A provision in District law requires the Board of Elections to deny any petitions for initiatives or referenda that would authorize discrimination prohibited by the District of Columbia Human Rights Act. In concept, this restriction seems well-intentioned: it seeks to protect minorities from the prejudices of the majority. However, while conceivably preventing abuse of the right of referendum, it also permits paternalism by a small group of government officials who believe they know better than their constituents what a human right is. Our country has always sought checks and balances to prevent the concentration of power in the hands of a few.

Furthermore, the restriction itself was imposed through a back-door route that pre-empted proper input from constituents.

The City established the right of initiative and referendum through an amendment to the D.C. Charter, the city's constitution. Amendments to the D.C. Charter have to be approved by a majority vote of the city's residents. Any later restriction on this right of referendum should therefore have also been submitted to District residents for a vote. That didn't happen. Instead, the 13-member City Council passed the restriction on its own as part of a set of provisions purportedly "implementing" the "purpose" of the right of referendum, even though nothing in the amendment itself implies such a restriction. Yet the broad and fundamental question of what is a human right—a matter that by its very nature pertains to every individual—commends itself so naturally to the public voice that little could be more germane to the purpose of the amendment than the question's authorization or prohibition.

The Archdiocese does not intend its support of District residents' right to referendum to be an objection to the concept of representative democracy or an endorsement of pure majority rule. The Church has a long record of serving the disenfranchised. Rather, our position promotes transparent and straightforward government by our elected representatives, who dishonor the dignity of the votes cast for them when they actively circumvent the will of their constituents.

The Weight of Religious Liberty

What is at issue here is a balance of competing interests. Although supporters of same-sex marriage have framed its legalization as a simple matter of equality and civil rights, the task of the City Council was to weigh the interest of persons of the same sex to be able to marry each other under civil law against the constitutionally protected interest of persons with deeply held religious beliefs

to be able to practice their religion freely. A Catholic caterer, for example, should not have to condone a same-sex union by catering the wedding or a marriage counselor should not be required to provide counseling to a same-sex couple if it violates his religious beliefs. Indeed, D.C.'s Human Rights Act, so often cited in support of same-sex marriage, prohibits discrimination on the basis of religion just as strictly as it prohibits discrimination on the basis of sexual orientation. Despite the obvious call to strike a balance, the same-sex marriage law contains no meaningful allowances for District organizations and individuals whose faith teaches that by its nature and purpose, marriage is reserved to a man and a woman.

The practice of one's religion can involve refraining from certain acts. Legalization of same-sex marriage in the District will inevitably present religious organizations and individuals with situations where they must, in conscience, choose to refrain from some acts that would condone same-sex marriage. Supporters of the new law have suggested that the conflict between religious liberty and same-sex marriage is best resolved by religious organizations and individuals abstaining from any activity that might place their rights in conflict with the law. However, this nation's founding principles and the weight of centuries of legal precedent condemn any law that would force religious individuals and organizations to withdraw from the public sphere in order to observe their faith.

By subjecting religious organizations and individuals to the threat of civil antidiscrimination lawsuits and other legal penalties for practicing their faith, the Act subordinates the right to religious liberty to the purported right to same-sex marriage. Where the two conflict, the Act compels religious liberty to cede. Therefore, the proposed referendum is not about authorizing discrimination prohibited under the Human Rights Act. It is about preserving a right that the Human Rights Act protects.

Where Do We Go From Here?

How this plays out has serious implications. Marriage is reserved to the union of one man and one woman because of their unique ability to create children and to give children a nurturing structure that benefits from the unique gifts of both a mother and a father.

By elevating the advancement of same-sex marriage over the preservation of religious liberty, the law calls into question religion's very place in society. And the city government's restriction of the right of referendum legitimizes partisan paternalism under the guise of righteousness.

If the Superior Court finds cause to overturn the ruling of the Board of Elections, our city's residents will have the chance to exercise their right to vote on an issue of fundamental importance to our society, just as the residents of Maine and many other states have done. The "yes" or "no" that a citizen casts in the ballot box does not capture his or her motives for choosing it. Supporting the referendum is not an act of animus against another, but instead a recognition of the sanctity and purpose of marriage and a demonstration of appreciation for our country's protections of our religious freedom. As this moves forward, may our minds be open to the needs of all and our hearts open to God's grace as He calls us to work with one another in building a just society.