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Same Sex Marriage, Sexual Conduct and Gender Identity— Legal Implications for Churches

April 24, 2014 – ECFA.org

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Today's Presenter



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1. Gay Marriage

The Supreme Court's Same-Sex Marriage Rulings



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The DOMA Decision



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The DOMA Decision

- DOMA 1996
- Section 3 definition of marriage for purposes of federal laws and regulations
- 1,136 provisions
- Supreme Court: section 3 invalid:
 1. Interferes with states' plenary authority to define marriage;

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The DOMA Decision

2. 5th Amendment due process—IN 17 STATES WHERE SAME-SEX MARRIAGE LEGAL, CREATES APPROVED AND DISAPPROVED MARRIAGE UNDER FEDERAL LAWS
 - DID NOT issue a sweeping endorsement of same-sex marriage in all 50 states

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Examples of the 1,136 Provisions

1. 403(b) beneficiaries
2. Social Security benefits for spouses
3. Social Security survivors benefits for spouses
4. Tax-free status of employer-provided health care for spouses and dependents
5. Pretax SRA contributions to cafeteria plans for spouses

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Examples of the 1,136 Provisions

6. FSAs and HSAs for spouses' expenses
7. EIC and CTC sometimes higher for married couples
8. Sales of principal residences
9. Joint tax returns
10. Estate taxes—transfers at death exempt from tax

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The “Prop 8” Ruling



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The “Prop 8” Ruling

- 2008 California Supreme Court ruling
- Prop 8
- Prop 8 challenged in federal district court in San Francisco
- Court – Prop 8 violated due process and equal protection clauses of 14th Amendment to US Constitution
- Significance
- Religious liberty language

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The “Prop 8” Ruling

“Affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”

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The “Prop 8” Ruling

- Appeal to 9th Circuit Court of Appeals
- Governor and legislators refused to defend
- 9th circuit affirms the district court ruling
- Prop 8 proponents appeal to US Supreme Court

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The “Prop 8” Ruling

- Supreme Court:
 - ✓ Dismisses appeal – on a technicality
 - ✓ Only governor and legislature had “standing” to defend Prop 8, and they refused to do so
 - ✓ Appeals court’s ruling vacated (lack of standing)
 - ✓ Left district court ruling intact
 - ✓ Avoided ruling on a constitutional right

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Current Status of Same-Sex Marriage



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Questions

1. Will ministers be legally required to perform same-sex marriages?
2. Will churches be required to host same-sex marriages on church property?

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Current Status

Many ministers refuse to perform some or all of the following marriages on religious grounds:

1. Marriages between more than two persons (bigamy, polygamy, polyandry).
2. Marriages between a parent and child (incest).
3. Marriages between siblings (incest).
4. Marriages between first cousins (though allowed in 21 states).

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Current Status

5. Marriages in which one or both spouses is under age.
6. Marriages in which one or both spouses was previously married and divorced.
7. Marriages in which one or both spouses is not a member of the pastor's faith.
8. Marriages in which the pastor believes one or both spouses, while of legal age, is too spiritually immature.

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238-Year History



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Conclusions

- Same-sex marriages are recognized as legally valid in 17 states and the District of Columbia, either by statute or court ruling.
- CA, CT, DE, HI, IL, IA, ME, MA, MD, MN, NH, NJ, NM, NY, RI, VT, WA
- Court rulings on appeal (MI, OK, TX, UT, VA)
- In each of these states there is an explicit and unequivocal recognition of the right of clergy to marry, or not marry, any couple on the basis of their religious beliefs.

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Examples of Court Rulings and Statutes



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California

“Affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.”

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Connecticut

Religious autonomy is not threatened by recognizing the right of same sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations. Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same sex marriage.

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Massachusetts

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

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Maryland (statute)

An official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony may not be required to solemnize or officiate any particular marriage or religious rite of any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights. Each religious organization, association, or society has exclusive control over its own theological doctrine, policy teachings, and beliefs regarding who may marry within that faith. An official of a religious order or body authorized to join individuals in marriage under § 2-406(a)(2)(i) of the Family Law Article and who fails or refuses to join individuals in marriage is not subject to any fine or other penalty for the failure or refusal.

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Minnesota (statute)

Each religious organization, association, or society has exclusive control over its own theological doctrine, policy, teachings, and beliefs regarding who may marry within that faith. A licensed or ordained member of the clergy or other person authorized by section 517.04 to solemnize a civil marriage is not subject to any fine, penalty, or civil liability for failing or refusing to solemnize a civil marriage for any reason.

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Do churches that are opposed
doctrinally to same-sex
marriages need to amend their
bylaws?



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In Most Cases – Not Necessary

1. No court in 238 years has found a minister liable for refusing to perform a marriage contrary to his or her religious beliefs (think incest, bigamy, etc.).
2. Many church bylaws already contain doctrinal statements that are broad enough to bar same-sex marriage.
3. Don't look to isolated cases in Europe—there is no First Amendment protection.
4. Existing Supreme Court precedent and clergy autonomy.

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In Most Cases – Not Necessary

5. Not appropriate in bylaws.
6. Why single out same-sex marriage amidst all the other marriages that many clergy will not perform due to theological considerations.
7. A clause in a church's bylaws will not matter:
 - Would be ignored by an activist/secularist court
 - Church could prove doctrinal position without such a clause
8. cf. policy manual

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2. Use of Churches for Same-Sex Marriages



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Use of Churches

- Discrimination by places of “public accommodation” under federal, state, and local laws.
- Some include “sexual orientation”
- Are churches places of public accommodation
- No cases, but 2 conclusions seem likely:

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Use of Churches

1. Churches that do NOT rent their facilities to outsiders for marriages and other events face no civil liability for not allowing their facilities to be used to host a same-sex marriage, reception, etc. in violation of its religious beliefs.
2. Churches that DO rent their facilities to outsiders for marriages and other events MAY face civil liability for not allowing their facilities to be used to host a same-sex marriage, reception, etc. even if same-sex marriages violate a church's religious beliefs.

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Minnesota (statute)

Except for secular business activities engaged in by a religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized, no religious association, religious corporation, or religious society shall be required to provide goods or services at the solemnization or celebration of any civil marriage or be subject to civil liability or any action by the state that penalizes, fines, or withholds any benefit to the religious association, religious corporation, or religious society under the laws of this state, including, but not limited to, laws regarding tax exempt status, for failing or refusing to provide goods or services at the solemnization or celebration of any civil marriage, if providing such goods or services would cause the religious association, religious corporation, or religious society to violate their sincerely held religious beliefs.

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3. Gay Adoption



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4. Employment Discrimination Based on Sexual Orientation



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Employment Discrimination

1. Volunteer v. employee
2. Laws banning employment discrimination based on sexual orientation
3. Federal
 - Title VII sex discrimination ban does not include orientation in private employment
 - EEOC (2012) – Title VII sex discr. includes orientation – in federal employment
 - Employment Nondiscrimination Act (ENDA, not enacted; broad religious exemption)

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Employment Discrimination

4. STATE laws

- 21 states and DC prohibit or restrict discrimination in employment decisions on the basis of sexual orientation
- Some include housing and public accommodations
- Some states also ban gender identity discr.
- Cities

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Employment Discrimination

- Churches are exempt from state nondiscrimination laws in many states – some don't apply to religious organizations, and others require a minimum number of employees
- ALL state laws have broad exemption for religious organizations

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Ministerial Exception



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Ministerial Exception

- “This case involves the fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church.”
Simpson v. Wells Lamont Corporation, 494 F.2d 490 (5th Cir. 1974).
- Recognized by US Supreme Court in 2012
(Hosanna Tabor).

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Ministerial Exception

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“We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.”

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5. “Religious” Marriages



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Why?

- One or both spouses is an undocumented alien.
- Compliance with one or more of the civil law requirements is not possible. For example, a couple failed to obtain a license within the time prescribed by law, or one of the spouses is underage.
- A pastor is asked to perform a marriage in another state in which nonresident pastors are not authorized to perform marriages.
- A divorced spouse will lose alimony from her former husband if she remarries.

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Why?

- A divorced spouse will lose insurance or other benefits in the event of remarriage.
- A couple believes that their Social Security retirement benefits will be higher if they are not legally married.
- A couple regards the civil law requirements for marriage as an unnecessary nuisance, or even an unwarranted government intrusion into an essentially religious ceremony.

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Legal and Tax Consequences

1. Pastors may be subject to criminal penalties (typically a misdemeanor involving a fine or short prison sentence) under state law for performing a marriage that does not comply with state law. It is imperative for pastors to understand the possible application of such penalties before performing a religious marriage.
2. A religious marriage that does not comply with civil law requirements may preclude one spouse from suing for money damages based on “loss of consortium” for injuries sustained by the other.

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Legal and Tax Consequences

3. In general, your tax filing status depends on whether you are considered unmarried or married. State law governs whether you are married. An unmarried couple may not file a joint tax return as a married couple. Each files an individual tax return.

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Legal and Tax Consequences

4. If a couple is "considered married" for the whole year they can file a joint return, or separate returns. A couple is "considered married" for the whole year if on the last day of the tax year they were living together in a common law marriage recognized in the state where they live or in the state where the common law marriage began. Only nine states currently recognize common law marriages, and in many of these states only some common law marriages are recognized.

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Legal and Tax Consequences

5. An unmarried person may be able to file as head of household if certain conditions are met
6. An unmarried couple cannot claim each other as an exemption on their individual tax returns.
7. An unmarried couple cannot claim each other as a dependent on their individual tax returns, unless certain conditions are met.
8. Unmarried persons cannot combine tax deductions, and cannot claim expenses paid by their partner.

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Legal and Tax Consequences

9. The phaseout for an IRA deduction begins at a lower amount of income for unmarried persons than for married persons.
10. Married spouses generally avoid estate taxes upon the death of the first spouse. This is not necessarily the case with unmarried partners.
11. Married spouses generally can transfer property back and forth without gift taxes due to the unlimited marital deduction. This is not the case with unmarried partners.

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Legal and Tax Consequences

12. An unmarried partner generally cannot receive death benefits payable as a result of the death of the other partner. There is an exception for couples who have a “common law marriage” recognized under state law. However, these marriages are recognized in only nine states, and conditions apply.

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Legal and Tax Consequences

13. Unmarried partners can execute wills (or other legally enforceable instruments) that leave some or all of their estate to a surviving partner. However, without a will, a deceased partner's estate that is not otherwise disposed of will be distributed according to the law of intestacy. Unmarried partners have no rights under intestacy laws. A few states have passed laws that permit domestic partners to receive a share of a deceased partner's estate.

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Legal and Tax Consequences

14. If an unmarried couple ends their relationship, there generally is no right of alimony or support from one former partner to the other. A few states have enacted legislation that in some circumstances permits the provision of support (sometimes called “palimony”) from one former partner to the other. Conditions apply.

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Analysis

- Theological implications
- What is the purpose for the religious marriage?
- Are the couple apprised of the legal and tax consequences?
- Potential liability of the pastor for violating state law

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Q & A Time!

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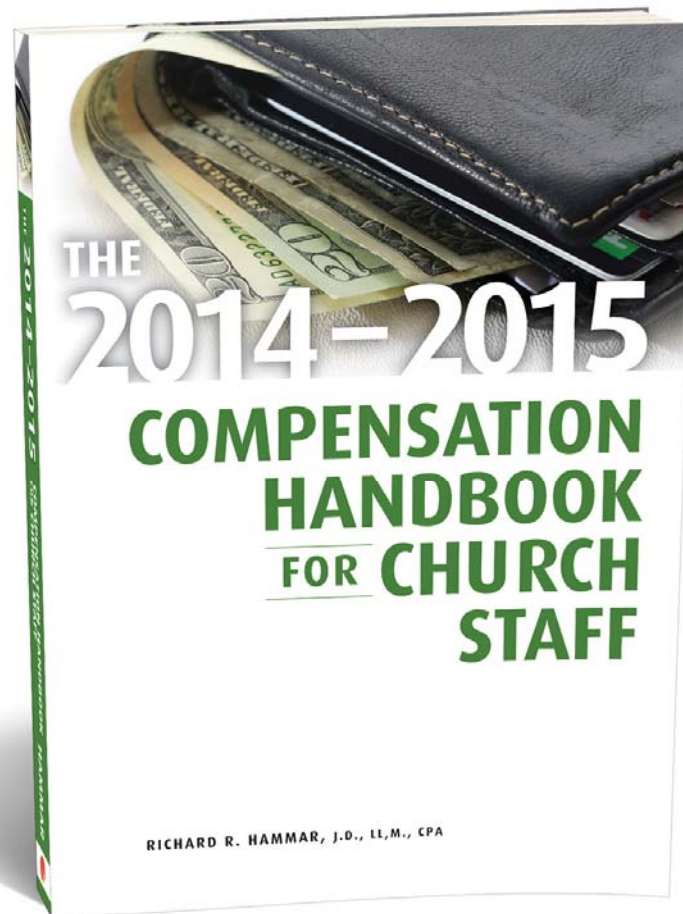
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