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CENTER FOR LAW AND RELIGION FORUM

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Law, Religious Change, and Same-sex Marriage

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We often talk about law and religion as though law is dynamic and religion is static. Religious believers are inclined to see their faith in terms of eternal and unchangeable truths. Non-believers have nothing invested in seeing religion in eternal or unchanging terms, but they often lack the interest and sophistication to understand how the mechanisms of religious change actually work. Hence, we get narratives in which law regulates religious believers or in which law accommodates religious believers and the like. Religion is taken as given, and we make deliberate choices about law.

In [my own research](#) one of the questions that has interested me is the way in which the law can drive religious change. Religious traditions are in a constant process of self-interpretation and adaptation to the world around them. The law is often an important part of that world and can drive religious change.

In [an admirably irenic column in Sunday's NYT](#), William Eskridge touches on this issue, highlighting the way in which a number of mainline Protestant religions have reinterpreted their theology to bless same-sex unions, suggesting that religion is not necessarily the implacable foe of LGBT rights. The Supreme Court will hear oral arguments on same-sex marriage on Tuesday, and if, as I think is very likely, the justices find a constitutional right to same-sex marriage, what will be the effect on religious beliefs?

Eskridge uses the example of race, pointing toward the way in which racist theologies were deployed to justify slavery and segregation. He gets some of the historical details wrong, but his basic point is valid. He then draws the analogy to teachings against miscegenation and religious theologies condemning inter-racial marriage. Such theologies have all but disappeared from American Christianity or been shunted to the margins. (My focus here is on Christianity simply because I feel more confident that I understand it.) The implication of Eskridge's argument is that conservative religious opposition to same-sex marriage might similarly be abandoned.

I think that the analogy to inter-racial marriage is inapt, but it does reveal something of the dynamic that I think will occur in a world where same-sex marriage is constitutionally required. I start with the premise that anti-miscegenation theologies were motivated mainly by racial animus. They were not deeply rooted in Christian theologies about marriage. Jettisoning them actually did not require much reinterpretation of theologies of marriage.

Same-sex marriage is different. Christian theologies of marriage that place heterosexual union at the center of marriage are not motivated by animus towards homosexuality in the same way that anti-miscegenation theologies were motivated by racial animus. This is not to deny the existence of a great deal of animus

towards homosexuality and theologies that justify that animus. My point is simply that defining marriage as a sanctified heterosexual union is not the main place where this animus manifests itself. Christian theologians did not set out to construct heterosexual theologies of marriage in order to exclude gays and lesbians from marriage. In contrast, Christian theologians did construct justifications for prohibitions on mixed race marriages because they were motivated by animus toward blacks.

Accordingly, I suspect that theologies justifying traditional marriage will prove far more resilient than have theologies justifying segregation or condemning mixed-race marriages. I expect that a number of religious traditions will come to bless same-sex marriage, especially because American Protestantism has tended towards individualism with little emphasis on sacramental theology, which means that theologies of marriage – as opposed to theologies of individual salvation – tend to be less central and therefore more easily changed. Still, I don't think that anything like the widespread collapse of racist theologies of marriage will happen.

What will happen, I suspect, is that religious communities that maintain theological opposition to same-sex marriage will feel enormous pressure to demonstrate that their theologies are not rooted in animus towards homosexuality. Rather than blessing same-sex unions, however, what I suspect will happen is that these traditions will jettison or reinterpret those aspects of their theology and practices that are deeply rooted in animus towards homosexuality. And that, I think, will be all for the best.

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