

Dow Jones Reprints: This copy is for your personal, non-commercial use only. To order presentation-ready copies for distribution to your colleagues, clients or customers, use the Order Reprints tool at the bottom of any article or visit [www.djreprints.com](http://www.djreprints.com)

See a sample reprint in PDF format.

Order a reprint of this article now

**THE WALL STREET JOURNAL.**

WSJ.com

OPINION | JUNE 30, 2011

## An Amen for Albany

*New York lawmakers drafted appropriate protections so religious organizations won't be charged with bias for declining to assist in same-sex marriages.*

By WALTER OLSON

For those of us who support same-sex marriage and also consider ourselves to be right of center, there were special reasons to take satisfaction in last Friday's vote in Albany. New York expanded its marriage law not under court order but after deliberation by elected lawmakers with the signature of an elected governor. Of the key group of affluent New Yorkers said to have pushed the campaign for the bill, many self-identify as conservative or libertarian. A GOP-run state Senate gave the measure its approval.

Ground shifts could be felt among the conservative commentariat as well. At National Review, Michael Potemra wryly observed that the world did not seem to be coming to an end, provoking a reader reaction that went on for days. Author David Frum, once a forceful opponent, published a column headlined "I was wrong about same-sex marriage"—wrong in particular to predict that it would destabilize the family generally, an outcome not seen in the five (now six) states and 10 countries to have adopted the change.

To their credit, New York lawmakers devoted much attention to the drafting of exemptions to protect churches and religious organizations from being charged with bias for declining to assist in same-sex marriages. Exemptions of this sort are sometimes dismissed as a mere sop to placate opponents. But in fact they're worth supporting in their own right—and an important recognition that pluralism and liberty can and should advance together as allies.



Getty Images/Rubberball

Critics have charged that same-sex marriage will constrict the free workings of religious institutions and violate the conscience of individuals who act on religious scruples. Many of the examples they give are by now familiar. Catholic Charities pulled out of its Massachusetts adoption program rather than place children with gay couples, and it continues to fight similar battles in Illinois and elsewhere. Medical professionals face legal complaints for declining to provide assisted-reproduction services to clients in same-sex relationships. The New Mexico Human Rights Commission fined a wedding photographer who refused on religious grounds to work a ceremony for two women. The New Jersey Division of Civil Rights ruled that by routinely renting out a pavilion a Methodist group had turned it into a public accommodation and therefore could not refuse it to a lesbian couple for a civil-union ceremony.

**Gay Marriage: Two Views From the Right**

Observe, however, that it isn't the legal status of same-sex

### New York's GOP Lets Down the Base

By Maggie Gallagher

Voters don't like politicians who flip flop—especially under pressure from Democrats.

marriage that keeps generating these troublesome cases; it's plain old discrimination law. Thus New York's highest court ordered Yeshiva University, an Orthodox Jewish institution, to let same-sex couples into its married-student housing. But that

ruling happened a decade ago and had nothing to do with last week's vote in Albany. In the case of the wedding photographer ordered not to act on her scruples, New Mexico didn't then and doesn't now recognize same-sex marriage. While some of these rulings are to be deplored as infringements on individual liberty, they're not consequences of the state of marriage law itself.

It's much the same with many of the battles arising from churches' involvement in publicly funded social services. It was the state's hard line on applying antidiscrimination law to placements that led Catholic Charities to quit Massachusetts adoptions. But not all states with same-sex marriage take such a hard line, while other states do take a hard line even though they lack same-sex marriage.

Why shouldn't social-service institutions that accept public money have to serve all clients equally? That's a view held by many people I respect. And yet the record with such institutions suggests things can be more complicated than that: Purism on the equality front sometimes comes at the expense of clients in need.

Consider one of the salient modern controversies over religion in social services, the decades-long lawsuit *Wilder v. Bernstein*. New York City had long leaned heavily on institutions affiliated with major religious groups to provide foster placements for "their" kids—Catholic agencies making arrangements for Catholic kids and so forth. Lawyers from the ACLU sued, saying this perpetuated religious discrimination. In particular, they argued, it was unfair that Catholic and Jewish kids got the assistance of relatively strong agencies backed by long histories of community philanthropy and volunteering, while other kids, notably black Protestants, were left with whatever foster arrangements the city could cobble together.

In a settlement, the city agreed to scrap the system and cut back religious matching in favor of something more like a first-come-first-served method of assignment, turning the agencies into something closer to interchangeable outposts of a single foster system. Problem solved? No. Outcomes went from unacceptable to even worse as the new rules demoralized and drove away volunteers at the high-performing religious agencies without turning around the others. The city's foster-care system proceeded to lurch from crisis to crisis through 26 grueling years of litigation.

Whatever else we may disagree on, can we at least agree on trying not to repeat that sort of experience in an area as important as adoption? Messy though they can be in theory, religious exemptions have a crucial advantage in practice. As scholar Douglas Laycock of the University of Virginia has put it, they "allow both sides to live their own values."

To that I say, Amen.

*Mr. Olson is a senior fellow at the Cato Institute and author most recently of "Schools for Misrule: Legal Academia and an Overlawyered America" (Encounter, 2011).*

Copyright 2011 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit [www.djreprints.com](http://www.djreprints.com)