

Marriage and the Separation of Church and State
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Abstract

"Separation of church and state" has become a fighting phrase, largely because of disagreement about how far to carry the concept. But nearly all Americans agree on the institutional separation of church and state. Yet with respect marriage, we do not maintain even institutional separation. Marriage combines religious and legal institutions; it is our most fundamental breach of separation of church and state.

Marriage is both a religious institution and a legal institution. It is jointly administered by the state and religious organizations. The state has delegated to clergy the power to solemnize legal marriages; most Protestant churches have de facto delegated to the state the power to dissolve religious marriages. Catholics and Orthodox Jews persist in refusing to give religious effect to secular divorce, thus showing that separation of the two statuses is possible if we have the will. But most Americans never distinguish religious marriage from legal marriage; the two institutions are entirely combined in our patterns of thought.

This combination of religious and secular institutions has been a problem in debate over divorce law. It is even more problematic in the debate over same-sex marriage. Americans who think of marriage as principally a religious institution oppose same-sex marriage by large margins. Americans who think of marriage as principally a legal institution support same-sex marriage by modest majorities. Much of the first group finds it unthinkable for government to fundamentally change a religious institution; much of the second group finds it unthinkable for government to discriminate with respect to a long list of legal rights available only to married couples.

We can never resolve the debate over same-sex marriage until we separate legal marriage from religious marriage. The state should administer legal marriage, and the rules of legal marriage should be made through the political process. Religious organizations should administer religious marriages, and each religious tradition should make its own rules. Couples would choose to be religiously married, legally married, or both, or neither.

Probably we need a sharper verbal distinction than legal marriage and religious marriage. The word "marriage" could appropriately be reserved for the religious relationship, and the legal relationship could be called "civil union" for gays and straights alike.