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### April 13, 2013: Cherry Picking Religious Liberty

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Title: Cherry Picking Religious Liberty

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4/13/2013 – – Catholic judges routinely grant civil divorces, even between two Catholic partners who had been married in the Church. Does it not seem that this is a direct challenge to the religious liberty of the judge? After all, the State is requiring the judge to undo the work of the Church in rather direct contradiction to the teachings of the Church.

This thought comes to mind because, increasingly, I have been thinking that Catholic opponents of gay marriage, who are insisting on religious exemptions from nondiscrimination laws with regard to gay married couples, are being awfully inconsistent. As a matter of law, there is nothing surprising and unusual in such inconsistency. The United States Supreme Court has reminded us that the government is not to try to enforce a theological consistency on the claimant for religious liberty. Nevertheless, the presence of inconsistency in this area could have a political implication as well as suggesting that religious liberty may not be as at stake as claimants for exemption have suggested.

It was an April 8 column by Ruth Ann Dailey in the Pittsburgh Post-Gazette that started me down this road. Dailey has been suggesting for quite some time that the way out of the gay marriage problem is for the government to provide for civil unions for everybody. Marriage, on the other hand, would be the exclusive prerogative of religious bodies.

I admire Dailey's effort. I'm not sure Church authorities would be very happy if their religious rituals had no secular effect, which is what Dailey's proposal suggests to me. In other words, after I married in the Church, I would still have to go to the civil authorities for civil union – – perhaps I would only have to file a form. The churches have benefited from being granted secular authority to marry people in the eyes of the state. They would lose this authority if I understand Dailey's proposal correctly.

I'm not sure that Dailey's proposal solves the problem that she is dealing with. If the government granted civil union status to everybody, including gay couples, would Catholic charities then allow the gay couple to adopt?

But on another level, Dailey is suggesting that in the eyes of Catholics, gay couples cannot marry and this is the reason that some Catholics do not wish to cooperate in any way with gay marriage. But if that is the case, then how can such a Catholic cooperate in my marriage – – that of a once divorced Jew? Indeed, how can the Catholic cooperate with the nonmarried heterosexual couple who live together? I am referring to the well reported Washington state florist who refused to provide flowers for a same-sex wedding and is now being sued by the state of Washington. How come the florist would provide flowers at my wedding? And indeed how can the Catholic judge divorce a Church-married Catholic couple?

I belong to a small group of law professors who urge state legislatures to recognize gay marriage laws, but to provide religious exemptions. I joined this group out of a mix of pragmatic and principled grounds. The pragmatic ground is that religious exemptions promote acceptance of gay marriage. But I am no longer so sure of the ground principle. I'm no longer certain just why religious believers cannot cooperate with gay marriage when they can cooperate with other instances of apparent but religiously inauthentic marriages.