

# **FIVE**

## **RAISING A HOLY RUCKUS: HOW RELIGION TRUMPS OUR CLASSICAL-LIBERAL HERITAGE IN THE DEBATE OVER GAY MARRIAGE**

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This essay seeks to explore the triangular relationship between religion, Classical Liberalism, and the controversial issue of gay marriage<sup>1</sup> in America today. It posits that, to the extent religion and religious beliefs drive opposition to gay marriage, that opposition is inconsistent with America's political heritage of Classical Liberalism and particularly its mainstay principle of individual rights and autonomy.

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## **I. INTRODUCTION**

Most of us would readily agree that there exists a significant *personal* dimension to the practice of religion. It may bring to mind images of quiet, priest-like contemplation or monkish meditation. But little separates that narrow exercise of religion from mere philosophy or one's personal code of ethics, except that the practitioner is probably engaged in such pursuits as a member of a religious denomination or organization. Indeed, religion's status in our society – its protection under the law and the power and influence it wields culturally – primarily derives from its larger, collective, *organized* reality. This broader plane of perspective is, in other words, religion with a capital "R." It is to be distinguished from the *spiritual* connotation associated with religion at the personal level.

An individual may be guided by a personal code of ethics every bit as elaborate and valid as the tenets of her neighbor's formal religion, but should she act on that code in ways that strike much of the organized religious community as immoral or unpatriotic, unfavorable consequences may ensue. While such actions may ultimately find some measure of protection in the law – as "free speech," for example – that protection does little to mitigate the stigma and ostracization that inevitably results from the unpopular conduct (Frazier 2004; Abbott 2005). The Jehovah's Witness adherent who refuses to salute the flag or recite the pledge of allegiance, on the other hand, is relatively immune from society's criticism,<sup>2</sup> unlike the nonreligious person who, for personal reasons, attempts the same thing. That individual, in contrast, may well be written off, harassed, or otherwise ostracized as an eccentric, a crank, or a potentially dangerous subversive.<sup>3</sup>

It is also true that a specific, legally-mandated accommodation made in the workplace for some recognized and accepted religious practice or belief may be far less justified than the emergency leave needed by another worker, to whom no accommodation legally is required.

The basis of the distinction is not utilitarian (*i.e.*, the greatest good for the greatest number), or even ethics-based; rather, it is tied to membership in, or at least identification with, the larger, recognized “religious” collective.

Religious organizations and their often-grand edifices also have acquired a certain privileged status through federal legislation known as the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).<sup>4</sup> Under this law, a municipality’s otherwise sound and rational denial of a development proposal – based, for example, on impacts to adjoining neighborhoods, parking issues or traffic generation – can be set aside, as a “substantial burden” on the exercise of religion.

All of this is not to suggest that an individual’s *freedom* of religion is anything less than one of the constitutional pillars upon which our nation was founded, and a requisite of individual autonomy. Rather, it is to point out that religion with a capital “R,” directly or indirectly, is afforded a special status in our history, in contemporary society, and under our law. It is, therefore, in a unique position to influence our political system and socio-political values. Consequently, there exists at least a potential tension between the tenets of our political heritage – Classical Liberalism – and those influences that religion may bring to bear on our system and its values. This potential tension is made even more evident when religion turns its focus from the supernatural to the political; when, rather than “[r]ender . . . unto Caesar the things which be Caesar’s,” (Luke 4:25 King James Version) it seeks to occupy Caesar’s throne, or at least sit as one of his closest advisors. In the case of the debate over gay marriage in America, that tension is very much the reality.

## **II. RELIGIOSITY IN AMERICA**

The United States is one of the most traditional, and *religious*, societies in the world, with only 19 of 75 nations (all 19 being poor or developing countries) rating higher on one recent religiosity scale (Baker 2004). Coupled with that is a very high degree of moral *absolutism*, which locates the source of moral values and judgment in God, religion and society (Baker 2004, 12). Only 17 of 79 nations surveyed (again, all 17 being low-income and developing) had a higher proportion of absolutists than the United States, at approximately 50%. In contrast, more than 70 percent of the citizens of Denmark, Japan, the Netherlands and Sweden are moral *relativists*, finding their source of moral values and judgment in the self (p. 12). With respect to attitudes about homosexuality in general, America's religiosity and moral absolutism appear to produce an anomalously low level of acceptance in comparison to almost every other industrialized society. Barely 51 percent of Americans agree that homosexuality should be accepted, compared to 64 percent of Japanese, 69 percent of Canadians, 74 percent of the British, and 83 percent of Germans and Czechs (Lampman 2003).

It is thus not surprising that a significant moral and religious dimension to American attitudes about the narrower issue of gay marriage manifests itself in poll results, typically in the form of strong opposition to extending marriage rights to homosexuals. Neither is it surprising that the greater the level of religiosity, the stronger the opposition to gay marriage. According to an October, 2003 survey by the Pew Research Center and the Pew Forum on Religion and Public Life, while 59 percent of the general survey population opposed gay marriage, opposition rose to a full 80 percent among those who call themselves highly religious (Lapman 2003). A CBS News poll, in December, 2003, found very similar sentiments. Three in four people who said religion was extremely important in their lives would favor a constitutional amendment

prohibiting same-sex marriage, but those who said religion was only somewhat or not important to them were much more accepting of such unions (CBS 2004).<sup>5</sup> As might be expected, according to the Pew survey, 80 percent of evangelical Protestants oppose gay marriage, while only 54 percent of mainline Protestants do. (That only 55 percent of Catholics oppose gay marriage is somewhat surprisingly, given the well-publicized, official position of the Vatican.)

What underlies this religion-driven opposition to homosexuality in general and gay marriage in particular? Clearly, it is the religious value-system itself. Pope John Paul II, in his last book, referred to homosexual unions as “grave violations of God’s law,” implying such unions were part of an “ideology of evil” (Pope John Paul II 2005).<sup>6</sup> The Pew survey found that 55 percent of all Americans consider homosexual practice a “sin.” The most common reasons offered for opposing gay marriage included the belief that it is “morally wrong or inconsistent with the Bible” (28%) or against the respondent’s religious beliefs (17%), or that marriage is between a man and a woman (16%). The CBS poll found that 72 percent of those surveyed, on both sides of the issue, saw the main motivation behind those who oppose same-sex marriage as being a belief that homosexuality is wrong. According to author George Chauncey, almost three-quarters of evangelicals who are deeply involved in their churches and religious life believe that homosexuals can change, and 93 percent of them believe homosexuality is an immoral choice (Chauncey 2004).

What might be characterized as a religiously inculcated “abomination syndrome,”<sup>7</sup> then, seems to be the primary reason so many Americans are reluctant to embrace, or even tolerate, the idea of gay marriage. This reality, when combined with the strength, influence, and organizational skills of religious conservatives, and the fact that politicians rarely ignore polls, has led to a religious rush to political judgment. That lack of a balanced, deliberative, objective

treatment of the issue (a description many would apply to religion across a broader range of issues) can be seen in the fact that, within seven months of the Massachusetts court decision legalizing gay marriage, almost a quarter of the states passed amendments to their constitutions to ban such marriages (Broder 2004).

### **III. CLASSICAL LIBERALISM AND GAY MARRIAGE**

Does this strong opposition to gay marriage mesh with America's heritage of Classical Liberalism? Is it at all consistent with Lockean notions of individual autonomy, private property, and limited government? In almost any description of Classical Liberalism, one will most likely encounter those three concepts: individual autonomy, the importance of private property to individual liberty, and limited government, accompanied by the idea that governmental authority derives from the consent of the governed (Sturgis 1994). This handful of words also defines the essence of American political life and its values.<sup>8</sup> Moreover, the ideas these words express are all evident in the U.S. Constitution and its Amendments. Its guarantees of free speech, freedom of religion, and freedom from compelled self-incrimination and unreasonable searches enhance individual autonomy, as do many other provisions. The Fifth Amendment's limitation on the government's ability to take private property underscores the importance of private property to individual liberty interests. The checks and balances that the Constitution structures into our republican system of government speaks to a limited government, protecting individuals from others (including the tyranny of the majority) and from government itself. Even its first few words – eloquent references to forming a more perfect union, providing for the common defense, and promoting the general welfare – all seem closely connected to the Classical-Liberal idea of a “consent of the governed.”

How, though, and in what direction, do these principles of Classical Liberalism, so evident in our national heritage, contribute to the gay marriage debate? Setting aside religious tradition, would extending to homosexuals all of the rights and privileges and obligations of marriage be consistent with our Classical-Liberal heritage? The answer clearly is “yes.” Conversely phrased, is denying same-sex couples access to the institution of marriage consistent with those long-standing principles? Equally clearly, it is not.

With respect to the Classical-Liberal importance of private property to individual liberty, marriage bestows innumerable tangible benefits on those holding such status (a status, of course, denied to homosexuals everywhere in the United States, until the 2003 Massachusetts decision<sup>9</sup>). It has been estimated that, under federal law alone, civil marriage is the “gateway” to 1,138 benefits, rights, and obligations, with state law providing many more (Rauch 2004). Many of those benefits are either property interests, in the legal sense, or at least sound in property.<sup>10</sup> The groundbreaking opinion in *Goodridge v. Department of Public Health*,<sup>11</sup> in which the Massachusetts Supreme Judicial Court declared the denial of marriage licenses to same-sex couples an equal protection violation, recites a long list of property benefits afforded by marriage. Among others, these include joint income tax filing, tenancy by the entirety (a form of property ownership that allows for the automatic descent of property, without probate, to the surviving spouse), automatic rights to inherit property from a deceased spouse who does not leave a will, the right to share the medical policy of one’s spouse, entitlement to wages owed to a deceased employee, continued health-care coverage for the spouse of one who is laid off or dies, access to veterans’ spousal benefits, and the right to bring certain legal actions, such as for wrongful death of a spouse, or for punitive damages resulting from tortuous acts.<sup>12</sup> John Locke’s “life, liberty, and estate” (Locke 1690) became Thomas Jefferson’s “Life, Liberty, and the

Pursuit of Happiness” (Jefferson 1776). In a free-market democracy, “estate,” or private property, is seen as contributing to personal security, and personal security (in a financial or material sense) certainly can be associated with enhanced personal liberty and “happiness.” The institution of marriage is the sole edifice in which so many property rights reside.<sup>13</sup> For government, then, to affirmatively deny entry to that institution to same-sex couples, based on what amounts to religious tradition,<sup>14</sup> is to ignore its Classical-Liberal moorings and abdicate its Classical-Liberal responsibility to protect private property as an essential element of individual liberty. Surely, a governmental *raison d’être* of protecting individual property rights is sufficiently expansive to implicate an ethical obligation to ensure an equal and fair and open opportunity to attain such property rights in the first place.

Limited government is another core tenet of Classical Liberalism. At first glance, State recognition of gay marriages might seem to represent a governmental expansion of sorts, but in reality it would constitute an affirmation of *limited* government. Government has, in the past, intruded into many of the most private of personal, sexual, and marital decisions, often by proscribing certain conduct or relationships. Supreme Court “right of privacy” decisions, such as *Pierce v. Society of Sisters*<sup>15</sup> (child-rearing), *Skinner v. Oklahoma*<sup>16</sup> (procreation), *Prince v. Massachusetts*<sup>17</sup> (family relationships), *Griswold v. Connecticut*<sup>18</sup> (contraception), *Loving v. Virginia*<sup>19</sup> (interracial marriage), *Roe v. Wade*<sup>20</sup> (abortion), and *Lawrence v. Texas*<sup>21</sup> (homosexual conduct), effectively “removed” government from many private matters, or at least restricted its role, consistent with the Classical-Liberal principle of limited government. American society has reached a broad consensus on an objective, *secular* basis, and without resort to *religious* considerations, that certain intimate, adult relationships, such as those involving polygamy (von Streunsee 2004) or children, are harmful to that society and its

members. With the exception of such harmful relationships, it seems that *not* regulating who may enjoy the privileges and social status of marriage, to the intrusive degree of considering their sexual orientation, would be a “classic” Classical-Liberal exercise in limited and restrained government.

As important as the concepts of private property and limited government are to our political heritage, they are but mechanisms to ensure individual autonomy, the *sine qua non*<sup>22</sup> of Classical Liberalism. Individual autonomy is what allows one to be fully engaged in Jefferson’s “pursuit of happiness,” and marriage, for most people, is an “indispensable element of the pursuit of happiness” (Rauch 2004, 166). The court in *Goodridge* described the decision whether and whom to marry as “among life’s momentous acts of self-definition,”<sup>23</sup> and the rights implicated in the case as being “at the core of individual privacy and autonomy.”<sup>24</sup> To exclude homosexuals from this vehicle to personal happiness, social acceptance, and status, is to deny that person an important element of individual autonomy, contrary to the predominant principle of Classical Liberalism. Without the right to marry (marriage being an *expectation* (Rauch 2004, 59) in our society), one is “excluded from the full range of human experience...”<sup>25</sup> As one gay (and conservative) commentator has so poignantly asked: “Would any heterosexual in America believe he had a right to pursue happiness if he could not marry the person he loved?” (Sullivan 2000). The writer could have just as easily posed the question whether any heterosexual in America would believe he enjoyed even a fraction of the full measure of individual autonomy that is this nation’s heritage, if he could not even marry the person he loved. The second-class status accorded gays and lesbians, insofar as it is the result of a deprivation of the individual autonomy taken for granted by heterosexuals, is not only inconsistent with Classical Liberalism, but should give offense to the “better angels of our nature.” (Lincoln 1861).

#### **IV. CONCLUSION**

Inarguably, religion plays a major role in shaping our society's attitudes toward gay marriage. It serves as an obstacle, a "cultural defense,"<sup>26</sup> to what should be not only a natural progression toward equal marriage rights for homosexuals, but also a re-anchoring of values to the principles of Classical Liberalism. Even so, with continuing refinements to our notion of equality, and advances in scientific knowledge of evolution of the species and human sexuality, it seems inevitable that the role of religion will diminish, or at least adjust, over time.<sup>27</sup> It is easy to forget that most of the world's major religions have been exposed to scientific knowledge for only a very brief time. It also seems quite likely that, as that exposure to science continues and as our views of human rights evolve, religion will reshape itself toward the personal and spiritual and away from the dogmatic, especially on issues such as gay and lesbian rights. Perhaps, consequentially, we will experience a reinvigoration of the Classical-Liberal principles on which our society and government were founded – principles that, at their core, are secular. Each of these dynamics, to differing degrees, should contribute to a lessening of those forms of discrimination that find their source in religion. The only question, really, is whether the process will take two years or twenty years or two hundred years. Whatever the duration of this evolution, the present-day obstacles that have been, and are continuing to be, erected (such as the federal Defense of Marriage Act ("DOMA")<sup>28</sup> and state constitutional amendments banning gay marriage) will inevitably fall. If the change occurs only over a very long time, it will most likely unfold simply as part of humanity's fitful march of progress. If, on the other hand, it happens in the relative short-term in spite of the polls, it may well be due to a judiciary envisioned by our Founding Fathers<sup>29</sup> – one that pushes a reluctant nation both forward, toward the future, and back, toward the ideals of its Constitution.

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### ENDNOTES

<sup>1</sup> For purposes of this essay, the term “gay marriage” means the traditional, State-recognized, contractual relationship between two people (with all of the consequent rights and obligations), but extended to those of the same sex. A “civil union,” to the extent it falls short of an essential equivalency to marriage, with respect to rights, obligations, and societal status, would not be included. In order to accommodate homosexuals in the institution of marriage, the Massachusetts Supreme Judicial Court, in the seminal case of *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969, construed civil marriage to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”

<sup>2</sup> The relative immunity from societal criticism enjoyed today can be contrasted to the situation 60 years ago. See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=319&page=624> (accessed 3 April 2006).

<sup>3</sup> See, e.g., Frazier 2004 and Abbot 2005, *supra*, in which a member of the Estes Park, Colorado Board of Trustees was ultimately tossed from office in a recall election for failing to stand and recite the Pledge of Allegiance, due to personal and ethical qualms.

<sup>4</sup> *Religious Land Use and Institutionalized Persons Act*. 2000. U.S. Code. Ch. 21C. sec. 2000cc. [http://caselaw.lp.findlaw.com/cascode/uscodes/42/chapters/21c/sections/section\\_2000cc.html](http://caselaw.lp.findlaw.com/cascode/uscodes/42/chapters/21c/sections/section_2000cc.html) (accessed 3 April 2006).

<sup>5</sup> A description of the survey, and its results, are available online at: <http://www.cbsnews.com/stories/2004/03/15/opinion/polls/printable606453.shtml> (accessed 3 April 2006).

<sup>6</sup> Pope John Paul II, *Memory and Identity: Conversations at the Dawn of a Millennium* (New York: Rizzoli, 2005), 11; see also “Pope calls gay marriage part of ‘ideology of evil,’” *The Sydney Morning Herald*, 23 February 2005, <http://www.smh.com.au/news/World/Gay-marriage-part-of-ideology-of-evil-Pope/2005/02/23/1109046970933.html> (accessed 3 April 2006).

<sup>7</sup> The oft-quoted Biblical passage is Leviticus 18:22: “Thou shalt not lie with a man as with a woman. It is abomination.”

<sup>8</sup> While “limited government” might not immediately come to mind as an accurate description of the Federal government, given its presence in everything from educational standards to agricultural subsidies, it is, in fact, rather small compared to many Western democracies, particularly when it comes to “intrusions” into individual autonomy. The concept of free speech, for example, is significantly more limited in Britain, France, and Germany, than in the United States.

<sup>9</sup> While lower courts in several states have found prohibitions on same-sex marriage to be unconstitutional, and legislative and citizen efforts continue across the country (both for and

against gay rights), the citizens of the state of Washington are awaiting, as of this writing, a decision from their Supreme Court that could potentially make Washington only the second state to see its highest court strike down a gay-marriage ban. See Kavan Peterson, "Washington gay marriage ruling looms," *Stateline.org*, 7 March 2006, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695> (accessed 3 April 2006).

<sup>10</sup> For a compact summary of many of these benefits, see "Marriage Rights and Benefits," [http://family.findlaw.com/marriage/marriage-basics/legal-marriage-benefits\(1\).html](http://family.findlaw.com/marriage/marriage-basics/legal-marriage-benefits(1).html) (accessed 3 April 2006).

<sup>11</sup> 440 Mass. 309, 798 N.E.2d 941 (2003).

<sup>12</sup> 798 N.E.2d 941, 955-956.

<sup>13</sup> While some commentators argue that many of those same rights and benefits can be secured by other means – for example, by the use of various powers of attorney, revocable trusts, joint adoption, and joint ownership of real property – the vast majority of them cannot. Moreover, as to those that can be accomplished by other means, the cost of doing so is astronomical in comparison to that of a marriage license. See Rauch, 58.

<sup>14</sup> The opinion in the *Goodridge* case (at 961-966) effectively discredits the State's proffered *secular* arguments for denying marriage rights to homosexuals, including (1) providing a "favorable setting for procreation;" (2) ensuring the optimal setting for child-rearing, defined by the defendant as "a two-parent family with one parent of each sex;" and (3) preserving scarce State and private financial resources. The Court, in footnote 29 of the opinion, also stresses that its concern is "whether historical, cultural, *religious*, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry." (Emphasis added.)

<sup>15</sup> 268 U.S. 510 (1925).

<sup>16</sup> 316 U.S. 535 (1942).

<sup>17</sup> 321 U.S. 158 (1944).

<sup>18</sup> 381 U.S. 479 (1965).

<sup>19</sup> 388 U.S. 1 (1967).

<sup>20</sup> 410 U.S. 113 (1973).

<sup>21</sup> 539 U.S. 558 (2003).

<sup>22</sup> Literally, "without which not;" something absolutely indispensable or essential. *Webster's Universal Encyclopedic Dictionary* (New York: Barnes & Noble Books, 2002).

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<sup>23</sup> 798 N.E.2d 941, 955.

<sup>24</sup> 798 N.E.2d 941, 957.

<sup>25</sup> 798 N.E.2d 941, 957.

<sup>26</sup> In secularization theory, “cultural defense” constitutes a major social role that religion can play to, in effect, “stave off” the undermining effects of modernity on religion.

<sup>27</sup> This is secularization theory, in which modernity produces secularization, characterized by a decline in religious participation, beliefs, authority, and influence. The theory increasingly has its detractors, though. See, e.g., Brendan Maguire and Georgie Ann Weatherby, “The secularization of religion and television commercials,” *Sociology of Religion* (Summer, 1998), [http://www.findarticles.com/p/articles/mi\\_m0SOR/is\\_n2\\_v59/ai\\_20913877](http://www.findarticles.com/p/articles/mi_m0SOR/is_n2_v59/ai_20913877) (accessed 3 April 2006).

<sup>28</sup> Pub. L. 104-199, Sec. 1; 110 Stat.2419 (September 21, 1996).

<sup>29</sup> Alexander Hamilton, in *The Federalist No. 78*, might as well have had the role of religion in the contemporary debates over gay marriage in mind, when he said: “[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions . . . . [I]t is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.”