Banned in Boston

The Coming Conflict Between Same-Sex "Marriage" and Religious Liberty

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BANNED IN BOSTON - THE COMING CONFLICT BETWEEN SAME-SEX "MARRIAGE" AND RELIGIOUS LIBERTY
BY MAGGIE GALLAGHER
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The Coming Conflict Between Same-Sex "Marriage" and Religious Liberty

BY MAGGIE GALLAGHER

Catholic Charities of Boston, one of the nation's oldest adoption agencies, made the shocking announcement on March 10, 2006 that it was getting out of the adoption business. Marylou Sudders, president of the Massachusetts Society for the Prevention of Cruelty to Children, said simply, "This is a tragedy for kids."

How did this tragedy happen?

It's a complicated story. Massachusetts law prohibited "orientation discrimination" over a decade ago. Then in November 2003, the Massachusetts Supreme Judicial Court ordered gay marriage. The majority ruled that only animus against gay people could explain why anyone would want to treat opposite-sex and same-sex couples differently. That same year, a Vatican statement made clear that placing children with same-sex couples violates Catholic teaching.

Sean Cardinal O'Malley made it clear that under his tenure Boston Catholic Charities would not do so.

Seven members of the Boston Catholic Charities board (about one-sixth of the membership) resigned in protest. Joe Solmonese, president of the Human Rights Campaign, which lobbies for lesbian, gay, bisexual, and transgender equal rights, issued a thundering denunciation of the Catholic hierarchy: "What these bishops are doing is shameful, wrong, and has nothing to do whatsoever with faith."

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To operate in Massachusetts, an adoption agency must be licensed by the state. And to get a license, an agency must pledge to obey state laws barring discrimination—including the decade-old ban on orientation discrimination. With the legalization of gay marriage in the state, discrimination against same-sex couples would be outlawed, too.

Cardinal O'Malley asked for a religious exemption, but Governor Romney reluctantly responded that he lacked legal authority to grant one. So the church turned to the state legislature, requesting a conscience exemption that would allow Catholic Charities to continue to help kids.

To date, not a single other Massachusetts political leader appears willing to consider even the idea. Lieutenant Governor Kerry Healey, the new *Republican* candidate for governor said: "I believe that any institution that wants to provide services that are regulated by the state has to abide by the laws of the state, and our antidiscrimination laws are some of our most important."

From there, it was only a short step to the headline "State Putting Church Out of Adoption Business," as an op ed by John Garvey, dean of Boston College Law School put it. It's worth underscoring that Catholic Charities' problem with the state didn't hinge on its receipt of public money. Ron Madnick, president of the Massachusetts chapter of Americans United for Separation of Church and State, agreed with Garvey's assessment: "Even if Catholic Charities ceased receiving tax support and gave up its role as a state contractor, it still could not refuse to place children with same-sex couples."

Thus, unexpectedly, a mere two years after the introduction of gay marriage in America, a number of latent concerns about the impact of this innovation on religious freedom ceased to be theoretical. How could Adam and Steve's marriage possibly hurt anyone else? When religious-right leaders prophesy negative consequences from gay marriage, they are often seen as overwrought. The First Amendment, we are told, will protect religious groups from persecution for their views about marriage.

So who is right? Is the fate of Catholic Charities of Boston an aberration or a sign of things to come?

I put the question to Anthony Picarello, general counsel of the Becket Fund for Religious Liberty. Just how serious are the coming conflicts over religious liberty stemming from gay marriage? "The impact will be severe and pervasive," Picarello says flatly. "This is going to affect every aspect of church-state relations … because marriage affects just about every area of the law."

Last December, the Becket Fund brought together ten religious liberty scholars to look at the question of the impact of gay marriage on the freedom of religious organizations. These are not necessarily scholars who oppose gay marriage. Chai Feld-

blum, for example, is a Georgetown law professor who refers to herself as "part of an inner group of public-intellectual movement leaders committed to advancing LGBT [lesbian, gay, bisexual, transsexual] equality in this country." Marc Stern is the general counsel for the center-left American Jewish Congress. Robin Wilson of the University of Maryland law school is undecided on gay marriage. Jonathan Turley of George Washington law school has supported legalizing not only gay marriage but also polygamy.

Generally speaking the scholars most opposed to gay marriage were somewhat less likely than others to foresee large conflicts ahead—perhaps because they tended to find it "inconceivable," as Doug Kmiec of Pepperdine law school put it, that "a successful analogy will be drawn in the public mind between irrational, and morally repugnant, racial discrimination and the rational, and at least morally debatable, differentiation of traditional and same-sex marriage."

By contrast, the scholars who favor gay marriage found it relatively easy to foresee looming legal pressures on faith-based organizations opposed to gay marriage, perhaps because many of these scholars live in social and intellectual circles where the shift Kmiec regards as inconceivable has already happened.

The (Gay) Public Intellectual

I ask Prof. Feldblum, a major homosexual rights advocate, why she decided to make time for a conference on the impact of same-sex marriage on religious liberty.

She'd been thinking through the moral implications of nondiscrimination rules in the law, a lonely undertaking for a gay rights advocate, she told me. "Gay rights supporters often try to present these laws as purely neutral and having no moral implications. But not all discrimination is bad," Feldblum points out. In employment law, for instance, "we allow discrimination against people who sexually abuse children, and we don't say 'the only question is can they type' even if they can type really quickly."

"Unlike some of my compatriots in the gay rights movement," says Feldblum, "I think we advance the cause of gay equality if we make clear there are moral assessments that underlie antidiscrimination laws."

But there was a second reason Feldblum made time for this conference. She was raised an Orthodox Jew. She wanted to demonstrate respect for religious people and their concerns, to show that the gay community is not monolithic in this regard.

"It seemed to me the height of disingenuousness, absurdity, and indeed disrespect to tell someone it is okay to 'be' gay, but not necessarily okay to engage in gay sex. What do they think being gay means?" she writes in her Becket paper. "I have the same reaction to courts and legislatures that blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious means?"

To Feldblum the emerging conflicts between free exercise of religion and sexual liberty are real: "When we pass a law that says you may not discriminate on the basis of sexual orientation, we are burdening those who have an alternative moral assessment of gay men and lesbians … You have to stop, think, and justify the burden each time," says Feldblum. And yet when push comes to shove, when religious liberty and sexual liberty conflict, she admits, "I'm having a hard time coming up with any case in which religious liberty should win."

She pauses over cases like the one at Tufts University, one of many current legal battles in which a Christian group is fighting for the right to limit its leaders to people who subscribe to its particular vision of Christianity. She's uncertain about Catholic Charities of Boston, too: "I do not know the details of that case," she told me. "I do believe a state should be permitted to withhold tax exempt status, as in the Bob Jones case, from a group that is clearly contrary to the state's policy. But to go further and say to a group that it is not permitted to engage in a particular type of work, such as adoptions, unless it also does adoptions for gay couples, that's a heavier hand from the state. And I would hope we could have a dialogue about this and not just accusations of bad faith from either side."

But the bottom line for Feldblum is: "Sexual liberty should win in most cases. There can be a conflict between religious liberty and sexual liberty, but in almost all cases the sexual liberty should win because that's the only way that the dignity of gay people can be affirmed in any realistic manner."

The Litigator

As general counsel for the American Jewish Congress, Marc Stern knows religious liberty law from the inside out. "Chai is among the most reasonable [gay rights advocates]," he tells me. "If she's having trouble coming up with cases in which religious liberty should win, we're in trouble."

Like Anthony Picarello, he sees the coming conflicts as pervasive. The problem is not that clergy will be forced to perform gay marriages or prevented from preaching their beliefs. Look past those big red herrings: "No one seriously believes that clergy will be forced, or even asked, to perform marriages that are anathema to them. Same-sex marriage would, however, work a sea change in American law. That change will reverberate across the legal and religious landscape in some ways that are today unpredictable," he writes in his Becket Fund paper.

Consider education. Same-sex marriage will affect religious educational institutions, he argues, in at least four ways: admissions, employment, housing, and regulation of clubs. One of Stern's big worries right now is a case in California where a private Christian high school expelled two girls who (the school says) announced they were in a lesbian relationship. Stern is not optimistic. And if the high school loses, he tells me, "then religious schools are out of business." Or at least the government will force religious schools to tolerate both conduct and proclamations by students they believe to be sinful.

Stern agrees with Feldblum that public accommodation laws can and should force truly commercial enterprises to serve all comers. But, he asks, what of other places, such as religious camps, retreats, and homeless shelters? Will they be considered by courts to be places of public accommodation, too? Could a religious summer camp operated in strict conformity with religious principles refuse to accept children coming from same-sex marriages?

What of a church-affiliated community center, with a gym and a Little League, that offers family programs? Must a religious-affiliated provider offer marriage counseling to same-sex couples designed to preserve their relationships?

"Future conflict with the law in regard to licensing is certain with regard to psychological clinics, social workers, marital counselors, and the like," Stern wrote last December—well before the Boston Catholic Charities story broke. (But not even Marc Stern thought about adoption licenses. "Government is so pervasive, it's hard to know where the next battle will be," he tells me. "I thought I had a comprehensive catalog, but the adoption license issue didn't occur to me.")

Will speech against gay marriage be allowed to continue unfettered? "Under the American regime of freedom of speech, the answer ought to be easy," according to Stern. But it is not entirely certain, he writes, "because sexual-harassment-in-the-workplace principles will likely migrate to suppress any expression of anti-same-sex-marriage views." Stern suggests how that might work.

In the corporate world, the expression of opposition to gay marriage will be suppressed not by gay ideologues but by corporate lawyers, who will draw the lines least likely to entangle the company in litigation. Stern likens this to "a paroxysm of prophylaxis—banning 'Jesus saves' because someone might take offense."

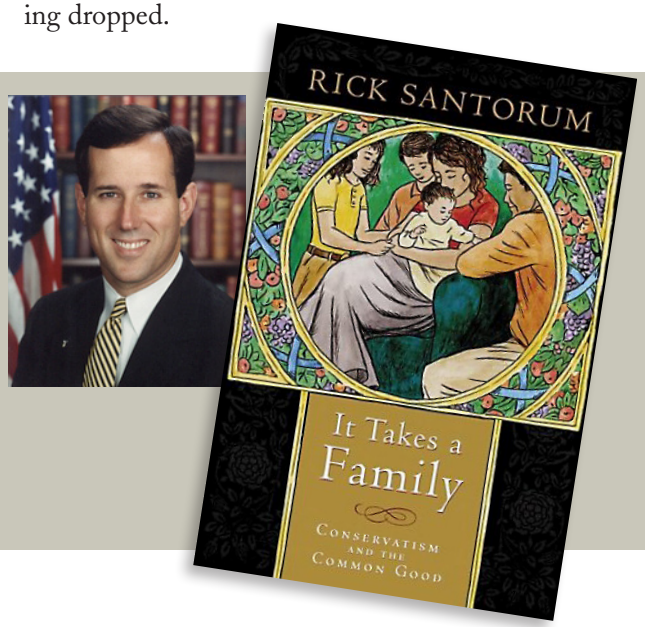
Or consider a recent case at William Paterson University, a state school in New Jersey. A senior faculty member sent out a mass email inviting people to attend movies with a gay theme. A student em-

ployee, a 63-year-old Muslim named Jihad Daniel, replied to the professor in a private email asking not to receive such messages: "These are perversions. The absence of God in higher education brings on confusion. That is why in these classes the Creator of the heavens and the earth is never mentioned." The result: Daniel received a letter of reprimand for using the "derogatory and demeaning" word "perversions" in violation of state discrimination and harassment regulations.

Interestingly, Stern points out, a single "derogatory or demeaning" remark, not seeking sexual gratification or threatening a person's job security, does not constitute harassment under ordinary federal and state sexual harassment law originally intended to protect women in the workplace. Moreover, Stern says, "our entire free speech regime depends on the principle that no adult has a right to expect the law will protect him from being exposed to disagreeable speech."

Except, apparently in New Jersey, where a state attorney general's opinion concluded, "[C]learly speech which violates a nondiscrimination policy is not protected." "This was so 'clear' to the writer," notes Stern, "that she cited not a single case or law review article in support." Ultimately, the school withdrew its reprimand from Daniel's employment file after receiving negative publicity and the threat of a lawsuit from the Foundation for Individual Rights in Education (FIRE).

Sexual harassment law as an instrument for suppressing religious speech? A few days after I interviewed Stern, an Alliance Defense Fund press release dropped into my mail box: "OSU Librarian Slapped with 'Sexual Harassment' Charge for Recommending Conservative Books for Freshmen." One of the books the Ohio State librarian (a pacifist Quaker who drives a horse and buggy to work) recommended was *It Takes a Family* by Senator Rick Santorum. Three professors alleged that the mere appearance of such a book on a freshman reading list made them feel "unsafe." The faculty voted to pursue the sexual harassment allegation, and the process quickly resulted in the charge being dropped.



In the end the investigation of the librarian was more of a nuisance—you might call it harassment—than anything else. But the imbalance in terms of free speech remains clear: People who favor gay rights face no penalty for speaking their views, but can inflict a risk of litigation, investigation, and formal and informal career penalties on others whose views they dislike. Meanwhile, people who think gay marriage is wrong cannot know for sure where the line is now or where it will be redrawn in the near future. "Soft" coercion produces no martyrs to disturb anyone's conscience, yet it is highly effective in chilling the speech of ordinary people.

Finally, I ask Stern the big question on everyone's mind. Religious groups that take government

funding will almost certainly be required to play by the nondiscrimination rules, but what about groups that, while receiving no government grants, are tax-exempt? Can a group—a church or religious charity, say—that opposes gay marriage keep its tax exemption if gay marriage becomes the law? "That," says Stern, "is the 18 trillion dollar question."

Twenty years ago it would have been inconceivable that a Christian or Jewish organization that opposed gay marriage might be treated as racist in the public square. Today? It's just not clear.

"In Massachusetts I'd be very worried," Stern says finally. The churches themselves might have a First Amendment defense if the state tried to withdraw their exemption, he says, but "parachurch institutions are very much at risk and may be put out of business because of the licensing issues, or for these other reasons—it's very unclear. None of us nonprofits can function without [state] tax exemption. As a practical matter, any large charity needs that real estate tax exemption."

He blames religious conservatives for adopting the wrong political strategy on gay issues. "Live and let live," he tells me, is the only thing around the world that works. But I ask him point blank what he would say to people who dismiss the threat to free exercise of religion as evangelical hysteria. "It's not hysteria, this is very real," he tells me, "Boston Catholic Charities shows that."

Fundamentally, Stern sees this as a "religious war" between people for whom an egalitarian secular ethic is the only rational option and people who can make room for an ethic based on faith in a God who commands. There are very few signs of a willingness to compromise on either side, he notes.

"You look around the world and even the right to preach is in doubt," he tells me. "In the United States we are not foreseeably in that position. Fundamentally speech is still safe in the United States. Beyond speech, nothing is safe."

The Health Care Law Expert

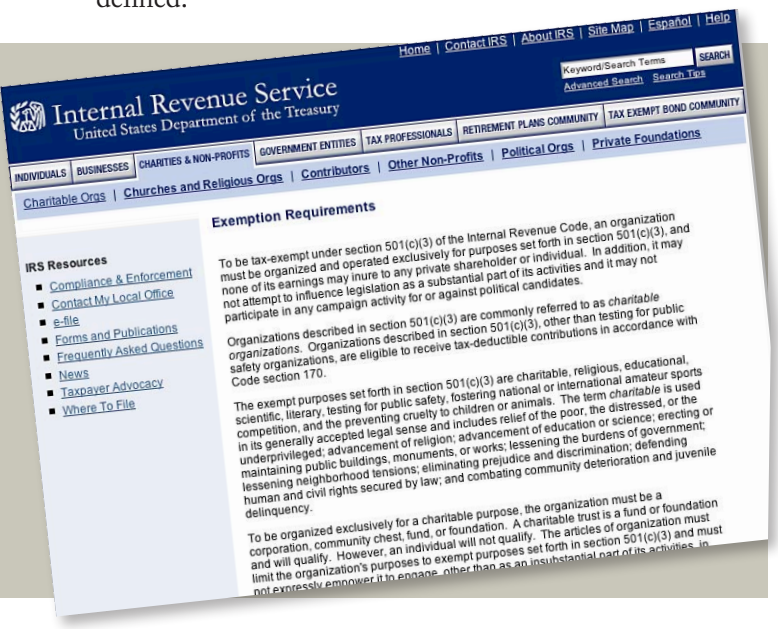
Robin Wilson is an expert in both family law and health care law. So she had a ready model at hand for thinking through the implications of same-sex marriage and religious liberty: the struggles over conscience exemptions in the health care field after Roe v. Wade elevated abortion to a constitutional right.

Wilson predicts "a concerted effort to take same-sex marriage from a negative right to be free of state interference to a positive entitlement to assistance by others. Although Roe and Griswold established only the right to noninterference by the state in a woman's abortion and contraceptive decisions, family planning advocates have worked strenuously to force individual institutions to provide controversial services, and to force individual health care providers to participate in them."

"This litigation after Roe," she says, "provides a convincing prediction about the trajectory that litigation after Goodridge will take" (Goodridge being the Massachusetts supreme court decision that

legalized gay marriage). The post-Roe litigation also provides fair warning about the limits of First Amendment protection. The lever used to force hospitals and doctors to perform abortions and sterilizations was the receipt of any public money. "Given the status of most churches as state nonprofits and federally tax-exempt organizations, it is likely that public support arguments will be advanced to compel churches to participate in same-sex marriage. Thus, churches in Massachusetts (and perhaps soon other states) may have much to worry about," Wilson writes. "Churches that oppose same-sex marriage today may perceive a credible, palpable threat to their tax-exempt status, the benefits of which are substantial."

This threat is credible, she explains, because to be recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code, an organization must have purposes and activities that do not violate fundamental "public policy," a concept that neither the Supreme Court nor the IRS has fully defined.



The case that worries Wilson in this regard is one that Chai Feldblum mentioned: *Bob Jones University* v. *United States*, in which the IRS revoked the federal tax exemption of Bob Jones University because the school prohibited interracial marriage and dating among its students. The Court easily dismissed Bob Jones's claim that its prohibition on interracial dating was religiously grounded and therefore protected by the First Amendment. The denial of tax benefits, the Court asserted, would not prevent the school "from observing their religious tenets."

Equally, the First Amendment did not prevent religious hospitals from being punished for refusing to perform abortions, once abortion became a constitutional right. It was Congress and state legislatures that stepped in to provide generous statutory religious exemptions. Once gay marriage is legal, it too will probably become fundamental public policy. To protect the tax-exempt status of religious groups that oppose gay marriage will thus likely require legislative intervention to create religious exemptions at either the state or federal level or both, says Wilson. She means the same kind of religious exemption that, to date, no politician in Massachusetts besides the outgoing governor is willing to support.

The Legal Eagle

Jonathan Turley, the George Washington professor who is a First Amendment specialist, also sees a serious risk ahead. Turley has no problem with gay marriage. But the gay marriage debate, he notes, exposes "long ignored weaknesses in doctrines relating to free speech, free exercise, and the right to association."

Before 1970 the law was "viewpoint neutral" with regard to the tax exempt status of all charitable,

religious, and public interest organizations under section 501(c)(3), he says. The tax exemption was viewed not as a public subsidy, but as a means of encouraging private donations and charitable conduct in general. In 1971, the IRS issued a decision redefining the tax exemption as a public endorsement or subsidy. This meant that the IRS would strip an organization of its exempt status if its purposes, although legal, were "contrary to public policy." The goal at the time was to use legal pressure to end private racial discrimination. But why stop there?

Right now, Turley notes, there is no clear federal public policy against discrimination on the basis of sexual orientation. But once that occurs, he agrees with Robin Wilson: "Any organization that engaged in such discrimination as a matter of faith would be in a position similar to Bob Jones University."

It's not that hard to imagine: Pass an antidiscrimination law at the federal level, which polls suggest the majority of Americans already support; look for a 5-or 10-point swing in public opinion on gay marriage; then add a new IRS commissioner (not directly accountable to the voters) who wants to make his or her progressive mark, and religious groups would wake up to find themselves playing in a whole new ballgame.

The Marriage Line

How much of the coming threat to religious liberty actually stems from same-sex marriage? These experts' comments make clear that it is not only gay marriage, but also the set of ideas that leads to gay marriage—the insistence on one specific vision of gay rights—that has placed church and state on a collision course. Once sexual orientation is conceptualized as a protected status on a par with race, traditional religions that condemn homosexual conduct will face increasing legal pressures regardless of what courts and Congress do about marriage itself.

Nevertheless, marriage is a particularly potent legal "bright line." Support for marriage is firmly established in our legal tradition and in our public policy. Precisely because support for marriage is public policy, once marriage includes gay couples, groups who oppose gay marriage are likely to be judged in

violation of public policy, triggering a host of negative consequences including the loss of tax-exempt status. Because marriage is not a private act, but a protected public status, the legalization of gay marriage sends a strong signal that orientation is now on a par with race in the nondiscrimination game.

If state courts declare gay marriage a constitutional right, they are likely to see support for gay marriage as state public policy.

End Game

On April 15, the *Boston Globe* ran a story about three other Catholic adoption agencies, in Worcester, Fall River, and Springfield, that do not do gay adoptions. For now, these agencies will not be punished for their refusal. State officials said they would hold off taking any action because the governor has proposed legislation that would provide a religious exemption. "We're going to wait and see how the legislation plays out," Papanikolaou said.


The Boston Globe

Officials take "Wait and See" approach on Adoption Agencies.

The reprieve is likely to be short-lived. Observers universally say the religious exemption has no chance of passage, and in a few months, Mitt Romney will no longer be governor. What then? The *Boston Globe* story provides a clue: "Gary Buseck, legal director of the Gay & Lesbian Advocates & Defenders in Boston, said his group realizes that Massachusetts will have a new governor next year, and it expects that he or she will aggressively enforce the state's antidiscrimination laws."

Marc Stern is looking more and more like a reluctant prophet: "It's going to be a train wreck," he told me in the offices of the American Jewish Congress high above Manhattan. "A very dangerous train wreck. I don't see anyone trying to stem the train wreck, or slow down the trains. Both sides are really looking for Armageddon, and they frankly both want to win. I prefer to avoid Armageddon, if possible."

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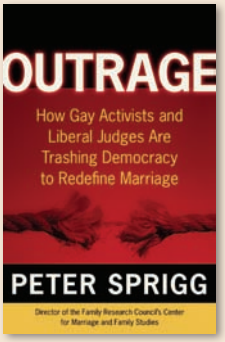

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