AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **May 2015**
From: **A. Eric Johnston**
Re: **Sexual Liberties Threat to Religious Freedom**

The issue of gay marriage is not the end of an odd legal odyssey. The legal precedent accreting around gay rights will culminate in the destruction of the Judeo Christian culture. During the last part of the Twentieth Century, many conservative and Christian commentators began to worry about the secularization of the culture and the diminution of traditional values. To look at gay rights now as just another evidence of the change to the culture is a mistake. It is a turning point in the secularization of the culture.

The weapon used for this victory is "sex." It is not merely a prurient interest in sex, but sexual freedom as the legal basis for freeing us from cultural constraints, the right to engage in immorality as a protected constitutional right, without criticism. This right is now being used to destroy moral boundaries, including the family.

It all began innocently enough with the case of *Griswold v. Connecticut,* 381 U.S. 479 (1965). The U.S. Supreme Court struck down a state law prohibiting sale of contraceptives to married couples. For the first time, the court found a constitutional "right to privacy" protecting sexual rights. Then, in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), the court applied the rationale to unmarried persons.

While we may have been concerned with the Supreme Court's creating unenumerated protected constitutional rights, that is finding rights in the Constitution that heretofore had not ever been found, none were prescient in predicting this rationale would lead to the recognition of the right to abortion in *Roe v. Wade,* 410 U.S. 113 (1973). Then, in *Carey v. Population Services International,* 431 U.S. 678 (1977), using the same rationale, the court struck down a state law prohibiting sale of contraceptives to children, persons under 16 years of age.

Moving rapidly forward, these cases and their rationale were cited in *Lawrence v. Texas,* 539 U.S. 558 (2003), when the U.S. Supreme Court struck down a Texas criminal sodomy law. Then the U.S. Supreme Court, in *United States v. Windsor,* 570 U.S. ____ (2013), struck down the Federal Defense of Marriage Act (which recognized one man one woman marriage) relying on *Lawrence,* saying, "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'"

What began as simple recognition of a married couple's rights to contraceptives has resulted in a complete recognition of sexual freedom. Conventional wisdom is that in June 2015, in the case of *Obergefell v. Hodges,* the U.S. Supreme Court will strike down all state traditional one man one woman marriage laws. But that is not the final goal of this odyssey. And, while adoption, inheritance, spousal rights, and other laws will be rewritten, that is still not the end of the odyssey. The final destination is the required acceptance of all things perverse to the established moral order. This right of privacy or "sexual liberty" as the *Lawrence* court calls it, results in destruction of the family. It also results in destruction of religious freedom.

Our culture is based on the government, the family and the church. As with the three-legged stool, you remove one of those supports and the stool falls. What began as protected intimacy in the marital context has now resulted in the attack on the family, which as we will soon see, is an attack on the church. The government is being used to redefine the family. The redefinition of family requires the church to abandon its scriptural and historic condemnation of sodomy and other perverse forms of sexual activity.

While the same sex issue is important, we must not let it distract us from recognizing the final objective of this assault. The church, that is religion, must be removed as the righteous force for good. *Cf.* the nazification of the church in Germany. The most significant evidence of this now is the opposition to state statutes protecting religious freedom in the form of "religious freedom restoration laws." The most recent example of this is the attack on the State of Indiana for passing such a law.

It is obvious the opposition by the gay lobby to the passing of one of these laws is not merely for the purpose of permitting same sex marriage. That may happen anyway and without regard to religious freedom laws. The purpose of their opposition is to require everyone, even the church, to accept homosexuality, in all its forms and activities, and to condone it.

To understand this attack on religious freedom, we must go back to *Employment Division, etc. v. Smith*, 494 U.S. 872 (1990). The U.S. Supreme Court considered whether a law of general application (criminal penalty for illegal drug use, but used in an Indian religious ceremony) burdened the free exercise of religion clause and found it did not, unless coupled with another constitutional right. The "compelling interest test" sometime known as the "balancing test," was not upheld by the court. Prior to *Smith*, it was widely thought the compelling interest test applied to protect religious freedom.

In response to *Smith*, Congress passed the Religious Freedom Restoration Act in 1993. Then, in *City of Boerne v. Flores*, 521 U.S. 507 (1997) the U. S. Supreme Court held the effort by Congress to reinstitute a compelling interest test unconstitutional as to the states, but upheld it as to the federal government. Consequently, it was necessary for the individual states to pass religious freedom restoration laws, which some did, including the State of Alabama in 1999. Occasionally, there are errant U.S. Supreme Court opinions that leave us wondering how that happened. The *Smith* opinion was written by conservative Justice Antonin Scalia. Nevertheless, recognizing the need to clarify the test for determining religious freedom threatened by government action, state religious freedom restoration laws were passed and are being passed, but without any hint or suggestion as being discriminatory. All of this predated the same sex issue.

The compelling interest test is a judicial test to determine whether a law improperly burdens religion. It states that if the government would pass a law that burdens a person's freedom of religion, even a law of general applicability, then the government must (1) prove that it has a compelling interest in doing so, but (2) furthers that interest with the least restrictive means. In other words, the government must have the highest form of need to pass a law and then do it in the least restrictive or burdensome way. This provides significant protection to religious freedom.

As anyone can see, and as history proves, the religious freedom restoration laws were and are meant to protect persons of faith from overreaching government action. Since the 1960s, there has been an increase in governmental regulation, particularly impacting constitutional rights and specifically religious freedom. Issues of religious rights in the public square have resulted in numerous court opinions, even to the extent that during the 1970s and 1980s, the Free Exercise Clause virtually did not exist. Everything was an establishment of religion. Through court cases in the 1980s and into the 1990s, religious freedom was strengthened, and this was in large part due to the religious freedom restoration laws.

Religious freedom restoration laws were not meant to single out any particular group, belief or activity. Certainly, these laws were not passed to infringe upon any individual rights of persons, including homosexuals. Since *Lawrence*, homosexual rights, as such, have been recognized to a significant extent and it is likely that in June 2015, homosexuals will be accorded even greater constitutional liberties and protections. At the same time, this change should not imperil religious freedom for those who believe that homosexuality is a sin. That has been and is the firm belief of Christians. Sodomy or homosexual rights have never been recognized by any code of law or any culture as being legal or acceptable. What homosexuals are requiring at this time is that their "right" be accorded not only constitutional recognition, but to the extent that everyone must accept it, regardless of their own religious beliefs. This is an infringement on the free exercise of religion.

The Religious Freedom Restoration Act, upheld as to federal government in the *City of Boerne* case, demonstrated its importance recently in the case of *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014). The federal Affordable Care Act required employers to provide abortifacients to their employees. As a Christian run business, the Hobby Lobby stores objected because it violated their religious based sanctity of life beliefs. The Obama Administration sought to enforce the provision of abortifacients, but the U.S. Supreme Court, relying on the Religious Freedom Restoration Act, protected the religious rights of the Hobby Lobby stores.

Similarly, if homosexual rights are afforded full protection under the law, individuals who have sincerely held religious beliefs that homosexual acts are sin, should not be forced to acquiesce to the legalization of perverse sexual practices. They have a right to hold their religious beliefs and not be required to provide products or services to homosexuals, such as bake wedding cakes. Pastors', counselors', and others' religious speech and activities must be protected.

Obviously, this is creating a legal and moral upheaval in our culture. The legalization of homosexuality and all its attributes upends the moral order. Even so, those who hold sincerely held religious beliefs must be protected. But, that is the problem and the gay activists object to it, as they objected to Indiana's law, as well as to any other efforts that may be made to protect religious liberty. On the other hand, protecting religious liberty protects the culture, the family and the church. If we do not protect those religious rights, then our culture is destroyed simply because of sex.