

ISSUES IN PERSPECTIVE

Dr. James P. Eckman, President Emeritus
Grace University, Omaha, Nebraska
18 October 2014

Same-Sex Marriage: A Stunning Cultural and Legal Accommodation

On Monday, 6 October 2014, the US Supreme Court let stand appeals court rulings permitting same-sex marriage in five states—Indiana, Oklahoma, Utah, Virginia and Wisconsin. Such decisions by the Court are done without explanation, as was this decision. But the silence of the Court here is deafening, for it sends a decisive signal that the accommodation to same-sex marriage is virtually complete within American culture and law. This action by the Court increased the number of states permitting same-sex marriage to 24. This will expand quickly to others. Monday's order from the Court let stand decisions from three federal appeals courts striking down bans on same-sex marriage in the states listed above. But these three courts have jurisdiction over six additional states that ban same-sex marriage—Colorado, Kansas, North Carolina, South Carolina, West Virginia and Wyoming—which will result in bans in those states being struck down as well. This will bring to 30 the states that permit same-sex marriage. Other appeals courts will certainly follow, most certainly the Ninth Circuit in San Francisco, which has jurisdiction over nine states. Assuming the Ninth Circuit will follow suit, this will bring the total to 35 states that permit same-sex marriage.

Let me explain something here about the Supreme Court's action on Monday, 6 October 2014. The Supreme Court is under no obligation to hear cases, for it has discretion over its own jurisdiction in legal matters. Those who lose a case in a lower court may petition the Supreme Court for a review of the case (called a *writ of certiorari*), which is what the Court decided on Monday: it refused to grant a review of these cases. When such a review is denied, the judgment of the lower court becomes final. As Garrett Epps argues in *The Atlantic*, "In every one of the marriage cases [in the petition for a review], a federal court held that the parties before it are entitled to recognition of their marriages, or entitled to be legally married in their state or residence. Laws and state constitutional provisions limiting marriage to 'one man and one woman' are void. In each case, either the court of appeals or the Supreme Court had 'stayed the mandate' pending Supreme Court review." It is virtually unthinkable that the Supreme Court will overturn this in any future cases dealing with same-sex marriage. In other words, the accommodation to same-sex marriage is now complete. Based on what the Supreme Court just did, the Constitution has now been interpreted as providing the right of same-sex marriage in the United States. Theologian Albert Mohler is correct when he concludes that "The remaining federal courts were put on notice that same-sex marriage is now the expectation of the Supreme Court and that no appeal on the question is likely to be successful, or even heard."

The accommodation of culture and law to same-sex marriage is nothing short of staggering—and really unprecedented. First legalized in the Netherlands in 2001, same-sex marriages have spread

to 19 countries and, as mentioned above, will soon be legal in 35 states! How has this cultural and legal accommodation happened so quickly? How is it that what was once unthinkable, became debatable and is now acceptable? There are many ways to approach such questions, but most certainly the accommodation of American culture and law to Postmodern autonomy is a major factor explaining this accommodation to same-sex marriage. In terms of law, the 2003 *Lawrence v. Texas* decision written by Justice Anthony Kennedy was decisive. In that decision, Kennedy wrote that “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” In other words, liberty is absolute autonomy: I alone determine what is valuable, worthwhile and meaningful. There is nothing outside of me that defines things of worth and value. In 2003, Justice Antonin Scalia fully understood the implication of what Justice Kennedy was saying: “This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as a formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples?” What Scalia foresaw in 2003 has occurred in 2014!

Two major conclusions are obvious:

1. In this accommodation to same-sex marriage, American culture and law are on a collision course with religious groups who disagree with same-sex marriage on theological grounds. In the name of religious liberty, such groups will seek exemption from the application of this ruling. Religious liberty is a sacred right detailed in the First Amendment and one which is at the heart of the American experiment in human liberty. But with the acceptance of Postmodern autonomy as the new basis for culture and law, it is at least somewhat doubtful that religious liberty will be preserved. In some ways, the threat to religious liberty and freedom of conscience has never been more real.
2. American culture and law have completely abandoned any recognition of God’s Creation Ordinance in Genesis 2:18-25. In that central text, God makes clear that marriage is monogamous, heterosexual and a “one-flesh” union between a man and a woman. [Each time Jesus and Paul in the New Testament discuss marriage and sexuality, they reference this Creation Ordinance, for it transcends all time and all cultures.] There is no lack of clarity in this text, but throughout history human beings have chosen to ignore it and God has simply “given them over” to the natural consequences of this choice (see Romans 1:18-32). As God’s clear teaching on marriage and sexuality are opposed, other vices follow in terms of human sin; the downward spiral of self-destructive behavior follows. The United States is quite naïve and actually quite arrogant if it thinks that America alone will be the exception.

See Richard Wolf in www.usatoday.com (7 October 2014); Albert Mohler in www.albertmohler.com (6 October 2014); Garrett Epps in www.theatlantic.com (7 October 2014); and Adam Liptak in www.nytimes.com (7 October 2014).