ISSUES IN PERSPECTIVE

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The Supreme Court, Same-Sex Marriage and Religious Liberty

On Tuesday, 28 April 2015, the Supreme Court heard oral arguments on the same-sex marriage case, *Obergefell v. Hodges*. The Constitutional question being asked the Court is whether the US Constitution requires states to allow same-sex couples to marry. The Court will not hand down its decision until the end of June, but there is little question that this case will change the definition of marriage within the United States; I believe the decision will be a 5-4 decision that will legitimize same-sex marriage in the United States. I also believe that this decision, coupled with the other significant cultural developments dealing with same-sex marriage, will pose a significant threat to religious liberty in this nation.

- First, a few comments about the oral arguments before the court in late April. During the oral arguments, Justice Samuel Alito asked Obama administration Solicitor General Donald Verrilli whether a religiously affiliated college that opposed same-sex marriage could lose its tax-exempt status if the Court ruled in favor of same-sex marriage. Verrilli replied: "It is going to be an issue." I am glad that Solicitor General Verrilli was being honest, but his candor demonstrates the growing fear many have that reducing religious liberty in the US is the price we must pay to legitimize same-sex marriage. Theologian Albert Mohler correctly concludes that "Verrilli's answer put the nation's religious institutions, including Christian colleges, and seminaries, on notice." Chief Justice Roberts further asked about campus housing: "Would a religious school that has married housing be required to afford such housing to same-sex couples?" The Solicitor General did not answer "no." In effect, he said it was up to the states. But if a school cannot define its housing policies on the basis of religious beliefs, then it is denied the ability to operate on the basis of those beliefs. "The 'big three' issues for religious schools are the freedoms to maintain admission, hiring and student services on the basis of religious conviction . . . All three are now directly threatened. The Solicitor General admitted that these liberties will be 'accommodated' or not depending on how states define their laws. And the laws of the states would lose relevance the moment the federal government adopts its own law."

- Second, how serious is this threat to religious liberty, to the freedom of conscience? Four days before the oral arguments were heard before the Supreme Court, an administrative-law judge from Oregon proposed a $135,000 fine against Aaron and Melissa Klein, proprietors of Sweet Cakes bakery in Gresham, Oregon, for the "emotional distress" suffered by a lesbian couple for whom the Kleins, citing their Christian belief that marriage is between a man and a woman, had declined to bake a wedding cake in 2013. Although same-sex marriage was not legal at the time of the Klein's decision, they were found to have

violated the 2008 Oregon law forbidding discrimination in public accommodations on the basis of sexual orientation. There are similar situations throughout the US involving other bakers, florists and photographers, many of whom employ gay people in their business, but, because of their Christian beliefs, preclude their providing services to same-sex weddings. As Charlotte Allen recently reported, "Many states are treating those acts of conscience as ordinary bigotry and, by levying or threatening fines, forcing those small business owners into costly and potentially ruinous litigation." California Supreme Court Chief Justice, Ronald M. George, who wrote the 2008 decision legalizing same-sex marriages in California, wrote: "Affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other persons." That is simply not true! The threat to religious liberty, to freedom of conscience is genuine and deep. These small business owners who are Christians exemplify the genuine threat that does exist. The legitimizing of same-sex marriage, once thought unthinkable, became an issue of debate, and over the last few years became acceptable. Consequently, it will soon be the law of the land. Christians who have deep convictions that marriage is rooted in God's Creation Ordinance, not cultural accommodation, are now at risk.

- Third, the speed of cultural accommodation to same-sex marriage has been staggering. The legal aspect of this accommodation has largely been by judicial action. Albert Mohler extensively cites Judge Jeffrey S. Sutton, whose majority opinion for the Sixth Circuit Court of Appeals in late 2014 was a masterpiece of logic and a compelling argument or rule of law. There were six key arguments from Sutton's opinion that are germane to the legal dimension of same-sex marriage now being considered by the Supreme Court:

    1. Sutton clearly rejected the idea that a small number of judges should "make such a vital policy call for the thirty-million citizens" who reside in the sixth circuit and now for 330 million people nationwide.
    2. Sutton argued that the original intention of the framers of the Constitution's language would support the claim that the states have the right to define marriage as a union between a man and a woman. "Nobody in this case argues that the people who adopted the Fourteenth Amendment understood it to require the states to change the definition of marriage."
    3. Sutton masterfully insisted that "A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of states."
    4. Sutton argued that the biological basis of natural marriage, based on the complementarian nature of the male-female union, is a natural and lawful concern of the state. The state is within its proper domain in defining and limiting marriage to the uniquely procreative union of a man and a woman.
    5. Sutton also asked why marriage is still to be defined in terms of monogamy. "If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage."

6. Finally, Sutton eloquently pleaded that if society is really evolving on this issue, which he conceded it was, then the advocates of same-sex marriage should allow the democratic process to work.

- Finally, a thought about a relatively new legal principle being used in the legal debate about same-sex marriage—the doctrine of dignity. Supreme Court justice Kennedy invoked the term "dignity" five times during the oral arguments and other lawyers invoked it 16 times. It was also central to Solicitor General Verrilli's opening statement: "The opportunity to marry is integral to human dignity. Excluding gay and lesbian couples from marriage demeans the dignity of these couples." This concept was also central to Justice Kennedy's 1992 *Casey* decision: "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." In the 2003 *Lawrence v. Texas* case, Kennedy added that an individual's interest in dignity trumps the majority's interest in preserving traditional moral values. Justice Scalia immediately recognized the sweeping danger of Kennedy's new synthesis of dignity with liberty and equality: "This effectively decrees the end of all morals legislation," he argued, predicting the demise of "state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." Jeffrey Rosen, President and CEO of the National Constitution Center, argues that the greater challenge to the use of "human dignity" is that the Court itself has not provided a clear definition of "dignity." The court is certainly not anchoring dignity in humanity being created in the image of God or in the gracious provision of salvation God offers because He loves us, and or that as Creator, He considers humans of infinite value and worth. So, how does the Court define dignity? It is an elastic and elusive legal term that ends up having very little actual meaning. It is another piece of evidence that Western Civilization is one firmly anchored in mid-air. It is a civilization that has no framework for ethical or moral decision-making. God has provided the needed framework in His Word, but our civilization long ago abandoned that. Expect to see more moral and ethical confusion. It is indeed a sad state of affairs, a state of affairs that also poses lethal danger to religious liberty!

See Alert Mohler in www.albertmohler.com (28 and 30 April 2015); Charlotte Allen's op ed piece in the *Wall Street Journal* (1 May 2015); and Jeffery Rosen, "The Dangers of a Constitutional 'Right to Dignity,'" in www.theatlantic.com (30 April 2015).