

ISSUES IN PERSPECTIVE

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Same-Sex Marriage and Religious Liberty: The Supreme Court Decision

At the end of June, the Supreme Court of the United States predictably ruled in favor of same-sex marriage in a 5-4 vote, with the majority opinion written by Justice Anthony M. Kennedy. The ruling overturned all state prohibitions or regulations against same-sex marriage, in effect making same-sex marriage equal in the eyes of the law as monogamous, heterosexual marriage. This decision comes exactly two years after Kennedy's majority opinion in *US v. Windsor*, which struck down a federal law denying benefits to married same-sex couples, and exactly 12 years after his opinion in *Lawrence v. Texas*, which struck down sodomy laws in the states. Justice Kennedy based this most recent decision on the 14th Amendment and its "equal protection" and "due process" clauses. Kennedy wrote that "The nature of injustice is that we may not always see it in our own times. The generation that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." Justice Kennedy declared that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex cannot be deprived of that right and that liberty." But marriage is nowhere to be found in the Constitution. As the Chief Justice asserted in his dissent, the majority opinion did not really make any serious constitutional argument at all. It was, as the Chief Justice insisted, an argument based in philosophy rather than in law. Justice Antonin Scalia responded to the majority opinion, writing that "They have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since." Chief Justice John Roberts wrote the primary dissent and argued that this decision was "an act of will, not legal judgment. The court invalidates the marriage laws of more than half the states and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?" Indeed!!!!

In the remaining parts of this *Perspective*, I seek to examine the profound implications of this momentous decision. But, let me begin with one observation. This decision makes perfect sense to a civilization now anchored firmly in mid-air. American civilization has no basis for ethical standards or personal morality other than radical, individual autonomy. Such radical autonomy translates into a rejection of any law, any regulation or any standard that inhibits this autonomy. Hence, it is perfectly understandable that 5,000 years of heterosexual marriage be overturned. This Postmodern autonomy exclaims: "How dare the state argue that I cannot marry someone of the same sex? How dare the state create boundaries of any type when it comes to marriage? [May I also add, how God dare tell me what to do in this area of my

life!!!?] I am free to marry whomever I want!” Given the nature of Postmodern, Postchristian autonomy, this ruling makes perfect sense. Several additional thoughts:

- First of all, the shift on same-sex marriage in American civilization has been swift and broad. For that reason, the Supreme Court was merely accommodating to a cultural shift already in the making. Ben Leubsdorf and Colleen McCain Nelson of the *Wall Street Journal* have observed that voters in more than two dozen states approved constitutional bans on same-sex marriage during the first decade of the 2000s. In 2008, the presidential nominees of both major parties publicly opposed gay marriage. What has changed? Gays, lesbians and bisexuals “came out of the closet” in the last decade in force. In a recent poll, 77% of Americans said they personally know or work with someone who is gay or lesbian, up from 62% in 2004. The gay/lesbian lifestyle now has a face to it for many Americans. Further, the media (e.g., *Will and Grace*, *Modern Family*) have presented gay relationships in a positive light. Finally, that President Obama so enthusiastically embraced same-sex marriage and ordered his Attorney General to no longer defend the Defense of Marriage Act gave the final push to culture’s accommodation to same-sex marriage. In short, such accommodation has no precedent in American history. It is staggering!
- Second, the court’s ruling will affect religious liberty in America. Theologian Albert Mohler writes that “religious liberty is under direct threat . . . Already, religious liberty is threatened by a new moral regime that exalts erotic liberty and personal autonomy and openly argues that religious liberties must give way to the new morality, its redefinition of marriage, and its demand for coercive moral, cultural, and legal sovereignty.” This claim is buttressed by an exchange during the public arguments over same-sex marriage in the Supreme Court between Solicitor-General Donald Verrilli and Justices Roberts and Samuel Alito. Justice Roberts asked if, given the legitimacy of same-sex marriage, whether religious schools offering married housing to its students would be forced to offer such housing to same-sex couples. Verrilli responded that this would depend on future anti-discrimination laws. More poignantly, Justice Alito asked if a college opposed to same-sex marriage might lose its tax-exempt status. Verrilli responded that “It is going to be an issue.” This question raised by Alito is of significant concern for religious schools, colleges and universities. Such institutions are now petitioning Congress for protection. They fear that the IRS could revoke their tax-exempt status as a violation of a “fundamental national public policy,” which is based on a 1983 Supreme Court decision that permitted the IRS to do so for schools that prohibited interracial relationships. Further, the *New York Times* reported on 28 June 2015 that the next big battle for gay rights leaders is obtaining federal, state and local legal protections in employment, housing, commerce and other arenas, just like those barring discrimination based on race, religion, sex and national origin. The goal is a broad federal shield that would give sexual orientation and gender identity protected status under the Civil Rights Acts of 1964, especially Title VII of that law. It seems reasonable to conclude that there will be countless lawsuits over the next decade and it is beyond credulity to not see churches and faith-based schools, colleges and universities affected by these decisions. Religious liberty is indeed in potential jeopardy.

- Theologian Albert Mohler argues that “The Chief Justice also pointed to another very telling aspect of the majority opinion. The Kennedy opinion opens wide a door that basically invites looming demands for the legalization of polygamy and polyamory. As Chief Justice Roberts observed: ‘It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.’ Striking, indeed. What is perhaps even more striking is that the majority did not even appear concerned about the extension of its logic to polygamy.”

One final point from Mohler: “The threat to religious liberty represented by this decision is clear, present, and inevitable. Assurances to the contrary, the majority in this decision has placed every religious institution in legal jeopardy if that institution intends to uphold its theological convictions limiting marriage to the union of a man and a woman. This threat is extended to every religious citizen or congregation that would uphold the convictions held by believers for millennia. Justice Clarence Thomas warned in his dissent of ‘ruinous consequences for religious liberty.’ One of the most dangerous dimensions of this decision is evident in what can only be described as the majority’s vilification of those who hold to a traditional view of marriage as exclusively the union of a man and a woman. Justice Samuel Alito stated bluntly that the decision ‘will be used to vilify Americans who are unwilling to assent to the new orthodoxy.’ According to the argument offered by the majority, any opposition to same-sex marriage is rooted in moral animus against homosexuals. In offering this argument the majority slanders any defender of traditional marriage and openly rejects and vilifies those who, on the grounds of theological conviction, cannot affirm same-sex marriage.”

In many ways, the culture war is over and we have lost. For the most part, genuine, biblical Christianity no longer has any impact on American culture, its values, its morals or its ethical standards. But the Gospel still has the power to transform lives and to transform culture. We who love Jesus Christ must stand for the Gospel and represent the Lord well. This might involve persecution, hostility and vilification. But that has often been the norm throughout history. The Lord will give us the strength and the fortitude to represent Him well. May we do so in dependence on the one who said, “I will build my church and the gates of Hades shall not prevail against it.”

See www.albertmohler.com (18 May and 27 June 2015); Ben Leubsdorf and Colleen McCain Nelson in the *Wall Street Journal* (27-28 June 2015); and Laurie Goodstein and Adam Liptak in the *New York Times* (25 June 2015).