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## The Supreme Court's Same-Sex Marriage Ruling

An in-depth analysis of the decision's potential effects on churches and clergy now and in the future.

Richard Hammar [ posted 7/06/2015 ]



In a 5-4 ruling on June 26, 2015, the Supreme Court of the United States ruled that the right of same-sex couples to marry is part of the Fourteenth Amendment's guarantees of due process and equal protection of the laws, and therefore any state law that in any way limits this right is unconstitutional and void. The effect of the Court's decision was to invalidate laws and constitutional provisions in 13 states defining marriage solely as a union between one man and one woman.

This article will summarize the court's ruling and then assesses its impact on churches and ministers.

### The Supreme Court's decision

The Court concluded 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 may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. . . . State laws . . . are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."

The Court briefly addressed the issue of religious freedom as follows:

It must be emphasized that religions, and those who adhere to religious doctrines, *may continue to advocate* with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection *as they seek to teach* the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn,

those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex. (emphasis added)

### **The dissenting opinions**

Four Justices dissented from the Court's ruling. Some commented on the Court's narrow description of religious liberty as being limited to "advocating" and "teaching":

Chief Justice Roberts noted in his dissent: "The majority graciously suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage. The First Amendment guarantees, however, the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses."

Similarly, Justice Thomas observed: "The majority . . . makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for 'religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.' Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice."

### **The effects of the decision**

For many church leaders, the central issue is the effects of the Court's ruling on religious practices. In particular:

1. Will ministers be subject to civil liability for refusing to perform same-sex marriage ceremonies in violation of their religious beliefs?
2. Can a church be penalized or sued for refusing to host a same-sex marriage ceremony on its premises?
3. Are the tax exemptions of religious schools and churches opposed to same-sex marriage jeopardized by the Court's ruling?
4. Should churches that are theologically opposed to same-sex marriage say so explicitly in their bylaws or other governing documents?

These four questions are addressed below.

#### **(1) Will ministers be subject to civil or criminal liability for refusing to perform same-sex marriage ceremonies in violation of their religious beliefs?**

Many ministers who are opposed on religious grounds to same-sex marriages are voicing concern over their potential liability for not performing such marriages. Is this fear well-founded, or exaggerated? Consider the following:

*a. Prior Supreme Court rulings*

Several decisions of the United States Supreme Court strongly suggest that the First Amendment guaranty of religious freedom permits clergy to perform or not perform marriages consistently with their religious beliefs. Consider the following:

In one of the Supreme Court's earliest and most expansive interpretations of the First Amendment's guaranty of religious liberty, the Court observed:

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character--a matter over which the civil courts exercise no jurisdiction--a matter which concerns theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standard of morals required of them--becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it. *Watson v. Jones*, 80 U.S. 679, 733 (1871).

In a unanimous decision in 2012, the Supreme Court affirmed the so-called "ministerial exception" to employment discrimination laws. *E.E.O.C. v. Hosanna-Tabor Church and School*, 132 S.Ct. 694 (2012). The Court concluded:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

The ministerial exception, which is rooted in the First Amendment's religion clauses, prevents the civil courts from resolving employment discrimination disputes between churches and clergy. This will protect the decisions of churches and religious denominations regarding the selection, ordination, and discipline of clergy on the basis of sexual orientation or any other condition or status. And, it supports the exclusive autonomy of churches to resolve issues of discipline and doctrine which, at least indirectly, protects decisions by clergy regarding who they will, or will not, marry.

*b. Other grounds for not performing marriages have never been questioned*

Clergy routinely decline to perform some marriages based on their religious beliefs. To illustrate, some ministers refuse to perform some or all of the following marriages:

- Marriages between more than two persons (bigamy and polygamy).
- Marriages between a parent and child (incest).

- Marriages between siblings (incest).
- Marriages between first cousins (even though now allowed in at least 21 states).
- Marriages in which one or both spouses is under age.
- Marriages in which one or both spouses was previously married and divorced.
- Marriages in which one or both spouses is not a member of the pastor's faith (i.e., " Do not be yoked together with unbelievers. For what do righteousness and wickedness have in common? Or what fellowship can light have with darkness?") *2 Corinthians 6:14 (NIV)*.
- Marriages in which the pastor believes one or more both spouses, while of legal age, are too spiritually immature to enter into so important a relationship.

In the 238-year history of this country, no minister has ever been sued, much less found liable, for refusing to perform a marriage on these or similar grounds. A minister's refusal to marry a same-sex couple in contravention of his or her religious beliefs should be viewed in the same light. If clergy can be found liable for refusing to perform same-sex marriages on religious grounds, then they are exposed to liability for refusing to perform any marriages as a result of their religious beliefs, including those described above.

*c. State laws recognizing same-sex marriages contain broad clergy exemptions*

Prior to the Supreme Court's recent decision validating same-sex marriages, such marriages were deemed lawful in 37 states by statute or court ruling. According to Chief Justice John Roberts' dissenting opinion in the same-sex marriage case: "Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice." Consider three typical examples of such accommodations:

The Maryland legislature passed the "Civil Marriage Protection Act" in 2012, legalizing same-sex marriage. The Act contains the following provision:

An official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony may not be required to solemnize or officiate any particular marriage or religious rite of any marriage in violation of the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and by the Maryland Constitution and Maryland Declaration of Rights. Each religious organization, association, or society has exclusive control over its own theological doctrine, policy teachings, and beliefs regarding who may marry within that faith. An official of a religious order or body authorized to join individuals in marriage . . . and who fails or refuses to join individuals in marriage is not subject to any fine or other penalty for the failure or refusal.

A Minnesota statute legalizing same-sex marriage provides:

Each religious organization, association, or society has exclusive control over its own theological doctrine, policy, teachings, and beliefs regarding who may marry within that faith. A licensed or ordained member of the clergy or other person authorized . . . to solemnize a civil marriage is not

subject to any fine, penalty, or civil liability for failing or refusing to solemnize a civil marriage for any reason.

In 2011 the New York legislature enacted the Marriage Equality Act which recognizes same-sex marriages. The Act contains the following section: "A refusal by a clergyman or minister . . . to solemnize any marriage under this subdivision shall not create a civil claim or cause of action or result in any state or local government action to penalize, withhold benefits or discriminate against such clergyman or minister." *N.Y. Domestic Rel. Law § 11*.

Unfortunately, the Supreme Court's weak recognition of religious liberty did not include a similar provision. But, the fact that all state legislatures did so is strong evidence of the constitutionally protected authority of clergy to choose who they will, or will not, marry based on their religious beliefs.

#### *d. Justice Thomas' dissenting opinion*

Justice Thomas, in his dissenting opinion, made the following observation: "Concerns about threats to religious liberty in this context are not unfounded. During the hey-day of antimiscegenation laws in this country, for instance, Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies. *Va. Code Ann. §20-60 (1960)*."

These penalties were never reviewed or affirmed by the United States Supreme Court or any other federal court, and so they provide little if any precedential support for imposing criminal penalties or civil liability on clergy who refuse to perform same-sex marriages.

#### *e. Conclusion*

In conclusion, ministers should not be concerned about personal liability, either criminal or civil, for refusing to perform any marriage, including a same-sex marriage, in violation of their religious beliefs. Yes, same-sex couples now have a constitutional right to marry, but the same Constitution also protects the free exercise of religion, and perhaps the most fundamental expression of this right is the unfettered freedom of ministers to perform the sacerdotal functions of their faith, including marriage, consistently with their religious convictions.

#### **(2) Can a church be penalized or sued for refusing to host a same-sex marriage ceremony on its premises?**

The answer to this question is complicated by two factors. First, the courts have yet to address the issue, and so all we can do is speculate. And second, any answer will depend on the wording, application, and exemptions in a veritable patchwork quilt of hundreds of local, state, and federal laws forbidding discrimination by places of "public accommodation." This makes it impossible to generalize.

A church must determine:

- if it is a place of "public accommodation" under applicable local, state, or federal laws;

- if so, is an exemption available for churches;
- if a church exemption exists, have all the conditions for the exemption been satisfied; and
- the constitutional protections available to churches based on applicable judicial precedent.

The answers to these questions will vary from jurisdiction to jurisdiction. It is likely that the courts will conclude that the greatest constitutional protection applies to churches that allow their premises to be used for weddings *only by members*. However, any constitutional protection likely will be diminished or eliminated in the case of churches that rent their facilities to the general public as a revenue-raising activity. Church leaders should carefully consider the potential downside of entering the commercial marketplace in order to raise needed funds.

Many examples could be cited of laws that treat churches that enter the commercial marketplace to engage in revenue-generating activities less favorably than churches that do not do so. For example, state laws that exempt church property from taxation typically deny the exemption to churches that rent their property for commercial gain, and a church's exemption from federal income taxation can be lost if it engages in more than insubstantial unrelated income-generating activities.

What about churches that allow community groups to use their facilities at no cost or for a nominal fee designed to cover expenses? Unfortunately, there are no definitive answers since no court has addressed this question. But, the courts likely would regard such churches as closer to those that allow marriages for members only. The key consideration is that they have not intentionally entered the commercial marketplace to generate revenue.

**(3) Are the tax exemptions of religious schools and churches opposed to same-sex marriage jeopardized by the Court's ruling?**

Possibly. In 1983, the Supreme Court ruled that the IRS had properly revoked the tax-exempt status of Bob Jones University on the basis of its racially discriminatory practices, even though the University based its practices on its interpretation of the Bible clearly articulated in its governing documents.

The Supreme Court's ruling in the Bob Jones University case suggests that doctrinal provisions in the governing documents of religious schools that are viewed by the IRS or the courts as incompatible with the fundamental right of same-sex couples to marry may not be enough to fend off IRS challenges to tax-exempt status.

During the oral arguments before the Supreme Court prior to the same-sex marriage ruling, the following exchange occurred between Justice Alito and Solicitor General Verrilli (who was asking the Court to recognize same-sex marriage as a constitutional right):

Justice Alito:

Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?

Solicitor General Verrilli:

You know, I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I don't deny that. I don't deny that, Justice Alito. It is –it is going to be an issue.

This same logic could apply to *churches* based on the Supreme Court's recognition of same-sex marriage as a fundamental right enshrined in the Constitution. At least one law school professor opined recently that churches that engage in any discriminatory practices involving sex, sexual identity, or sexual orientation should be denied tax-exempt status. This would include the Roman Catholic Church, based on its refusal to ordain female priests, and any church that discriminates against persons based on sexual orientation or sexual identity. Like Bob Jones University, they would be free to continue their discriminatory practices, but at the cost of losing the privilege of tax-exempt status. Chief Justice Roberts addressed this issue in his dissenting opinion:

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

What would happen if the IRS revoked a church's tax-exempt status? What would be the consequences? Loss of a church's exempt status would have a variety of negative consequences, including some or all of the following:

- The church's net income would be subject to federal income taxation.
- The church's net income would be subject to income taxation in many states.
- Donors no longer could deduct charitable contributions they make to the church.
- The church would be ineligible to establish or maintain 403(b) tax-sheltered annuities.
- The church could lose its property tax exemption under state law.
- The church could lose its sales tax exemption under state law.
- The church could lose its exemption from unemployment tax under state and federal law.
- The church's status under local zoning law may be affected.
- The church could lose its preferential mailing rates.
- The church could lose its exemption from registration of securities under state law.
- Nondiscrimination rules pertaining to various fringe benefits (including an employer's payment of medical insurance premiums) would apply.
- In some cases a minister's housing allowance may be affected.
- In some cases the exempt status of ministers who opted out of Social Security may be affected.
- The significant protections available to a church under the Church Audit Procedures Act would not apply.
- The exemption of the church under the state charitable solicitation law may be affected.

- The exemption of the church from the ban on religious discrimination under various federal and state employment discrimination laws may be affected.
- The exemption of the church from the public accommodation provisions of the Americans with Disabilities Act may be affected.

Clearly, any activity that jeopardizes a church's exemption from federal income taxation is something that must be taken seriously.

**(4) Should churches that are theologically opposed to same-sex marriage say so explicitly in their bylaws or other governing documents?**

Many who are opposed to same-sex marriage are imploring churches to amend their bylaws or other governing document to insert a provision defining marriage as exclusively a union between one man and one woman. While such an amendment is not inappropriate, it may be unnecessary, redundant, or ineffective for the following reasons:

First, many church governing documents already contain provisions that provide a theological basis for the church's definition of marriage.

Second, bylaws are adopted "to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing among the members. Bylaws are self-imposed rules, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way. Until repealed, bylaws are the continuing rule for the government of the corporation and its officers." *Schraft v. Leis*, 686 P.2d 865 (Kan. 1984).

This definition suggests that matters not related to the internal governance and administration of a church are more appropriately addressed elsewhere, such as in resolutions or policies.

One of the reasons for addressing some items in resolutions and policies is that they can be amended more easily than waiting for the next annual business meeting to amend the bylaws.

Examples of items that are not directly related to internal governance and administration, and that often are addressed in resolutions and policies, include:

- Personnel policies for church employees, addressing such items as compensation, benefits, religious preferences, discipline and terminations, sexual harassment, and employment standards. These matters are best addressed in a written policy.
- Rules for the selection and supervision of volunteers who will work with minors are best addressed in a written policy.
- A marriage policy defining marriage as a union between one man and one woman.

Third, and most importantly, a bylaw amendment adding a marriage policy to a church's bylaws is no guaranty of protection since it might be ignored by an activist court. As noted previously, the Supreme Court ruled in 1983 that the IRS had properly revoked the tax-exempt status of Bob Jones University on the basis of its racially discriminatory practices, even though the University



based its practices on biblical grounds that were clearly referenced in its governing documents. This suggests that bylaw amendments are no guaranty of protection.

The bottom line is that including a statement in a church's bylaws defining marriage may be of some help should the church's tax exemptions be challenged, or if the church is sued for violating a public accommodations law due to its refusal to host same-sex marriages, but it is no guaranty of protection.

### **The First Amendment Defense Act (S.1598)**

Shortly after the Supreme Court issued its same-sex marriage ruling, the First Amendment Defense Act (S/1598) was introduced in the United States Senate. The bill provides:

Notwithstanding any other provision of law, the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or that sexual relations are properly reserved to such a marriage.

“Discriminatory action” means any action taken by the Federal Government to—

- alter in any way the Federal tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, or revoke an exemption from taxation under the Internal Revenue Code;
- disallow a deduction for Federal tax purposes of any charitable contribution made to or by such person;
- withhold, reduce, exclude, terminate, or otherwise deny any Federal grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, or other similar position or status from or to such person;
- withhold, reduce, exclude, terminate, or otherwise deny any benefit under a Federal benefit program from or to such person; or
- otherwise discriminate against such person.

### **Opening the door for other nontraditional marriages?**

Chief Justice Roberts, in his dissenting opinion, noted that the Court's ruling will open the door to a variety of other marriages heretofore rejected by most religions and cultures throughout human history:

One immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep

roots in some cultures around the world. If the majority is willing to take the big leap, it is hard to see how it can say no to the shorter one.

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. If "there is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise "suffer the stigma of knowing their families are somehow lesser," why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry "serves to disrespect and subordinate" gay and lesbian couples, why wouldn't the same "imposition of this disability," serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?

I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But if there are, petitioners have not pointed to any. When asked about a plural marital union at oral argument, petitioners asserted that a State "doesn't have such an institution." But that is exactly the point: the States at issue here do not have an institution of same-sex marriage, either.

## **Conclusion**

As is often the case with high profile cases, there are numerous collateral issues that will need to be resolved by future litigation. This makes it important to stay up to date with legislative and judicial developments. I will be monitoring these developments, and will be providing additional clarification when warranted.