

LIFE AFTER SAME-SEX MARRIAGE RULING

A look at the legal ramifications following Supreme Court's decision to redefine marriage

By Lonnie Wilkey
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BRENTWOOD — Less than three weeks after the United States Supreme Court redefined the traditional, biblical definition of marriage, the full ramifications from the decision are yet to be seen.

The court's ruling that state prohibitions against same-sex marriages are unconstitutional dramatically signals that the culture and the law are changing, said Jim Guenther, attorney for both the Tennessee Baptist Convention and the Southern Baptist Convention.

"While churches are not of this world, they minister in this world. This decision both reflects and contributes to these changes. It will have an indirect but significant effect on churches. There will at least be a ripple effect from this decision — some think a tsunami — that will reach many corners of the law," he observed.

Generally, however, most legal experts have opined that churches and ministers will be protected under the same Constitution that now allows for same-sex marriage.

Baptist ministers will not be required to conduct same-sex marriage ceremonies and churches will not be required to allow its facilities to be used for same-sex marriages, Guenther said.

"A Baptist minister and a Baptist church also enjoy constitutional rights," observed Guenther. "Among those rights is the right to freely practice their religion," he said.

Guenther noted that if a "minister's religious beliefs prevent his participating in a marriage ceremony, for whatever reason, he is free not to participate.

"A Baptist church likewise is free to deny the use of its facilities to anyone for whatever religiously motivated reason the church might have. These are rights guaranteed by the First Amendment," he stressed.

David Fowler, president of the Family Action Council of Tennessee and a former Tennessee state senator for 12 years, agreed.

"I personally do not believe that any pastor is under any immediate threat of being forced to perform a same-sex wedding," Fowler observed.

"Pastors are individuals with a First Amendment religious liberty right and there are many ministers and rabbis who, today, do not perform the marriages of all folks who are lawfully entitled to be married," he continued.

"And, if anyone did sue a pastor over a denial, we have a state Religious Freedom Protection Act on the books that he could rely on to defend the lawsuit. The pastor might lose, but he is not without a statutory defense," Fowler said.

David Smolin, a constitutional law professor at Samford University's Cumberland School of Law, also does not believe pastors will face legal repercussions for performing only heterosexual weddings.

He told Baptist Press that standard interpretations of the Constitution and federal statutes establish a "zone of autonomy" around clergy that should protect their ability to perform state-recognized weddings without compromising their religious convictions.

EFFECTS ON LAITY IN GOVERNMENT POSITIONS

That same protection, however, may not be available for Baptists who are government officials, such as magistrates and justices of the peace, who perform wedding ceremonies.

Government officials with religious convictions against gay marriage could face significant challenges, Smolin said.

If public officials “are in a position of usually solemnizing marriages for all takers who come to them that are eligible under state law,” Smolin said, then refusing to marry a same-sex couple “might be a violation of their duties and subject them, and the state, to a discrimination lawsuit.”

Among those particularly at risk of being forced to violate their religious convictions are Christians who work for government offices that issue marriage licenses, Smolin said.

Jack Graham, pastor of Prestonwood Baptist Church in Plano, Texas, and a former SBC president, said at a press conference June 17 in Columbus, Ohio, that a justice of the peace in Dallas had already called him seeking advice on what to do if same-sex marriage was legalized.

Graham expressed hope that public officials would be permitted to recuse themselves from performing weddings that violate their religious convictions, adding that Christian government workers must be prepared to stand for Christ regardless of the consequences.

“As a believer, if you are called upon ... you must obey God and not man, if it means giving up your role or facing penalties,” said Graham, who, along with the other living SBC presidents elected since 1980, released a statement affirming the biblical definition of marriage as only between one man and one woman.

Christiana Holcomb, litigation counsel for Alliance Defending Freedom, told Baptist Press it’s possible that both clergy and government officials could maintain the right to perform weddings according to their religious convictions, though she stressed that the particulars of the Supreme Court’s opinion need to be studied.

Protections of religious liberty vary from state to state, she said, and states with Religious Freedom Restoration Acts protect freedom of conscience to a significant degree.

“Government officials do not forfeit all of their religious liberty protections simply by being employed by the state,” Holcomb said. “... They have the freedom guaranteed to them by the First Amendment and hopefully state laws” to “only perform weddings that accord with their convictions.”

Guenther observed that the Supreme Court’s decision does indicate that “individuals who hold religiously-rooted beliefs regarding the wrongfulness of same-sex marriages may find themselves in situations which in time will cause a conflict between those beliefs and some statutory duty which will come to exist.”

OTHER QUESTIONS

Guenther addressed other questions that churches are now asking.



Is a church required to admit into membership a practicing homosexual or one who is in a same-sex marriage?

No. The First Amendment clearly gives the church the right to choose its members on any basis the church deems appropriate. This is a fundamental right of association and free exercise of religion.

Any suit brought against a church by one rejected for membership, or expelled from membership, because of one's status in a same-sex marriage or homosexual lifestyle would be dismissed because the courts must defer to churches on these issues. It would violate both the free exercise and the establishment clauses of the first amendment for a court to undertake to settle such disputes.



Should a church amend its governing documents to specify its religious beliefs regarding marriage and homosexuality?

Not necessarily, but a church may wish to do that. The strength of the First Amendment's right to freely exercise religion and to be free from state entanglement is at its greatest when it comes to the church's faith and practice, its choice of its ministers and its members, in what may be preached from the pulpit, and in its religious activities.

Government cannot declare a church's beliefs and polity to be different from those the church declares them to be — absent fraud.

In order for the church's position on key issues of faith and practice to be understood and available to be widely known, a church may wish to declare its doctrine in its governing documents. This might be done by including a statement in the church's bylaws that the church has adopted the 2000 Baptist Faith and Message. The Baptist Faith and Message's article on the family defines marriage as the uniting of one man and one woman and declares that relationship to be the channel of sexual expression according to biblical standards.



If a church wants to speak to this issue in its governing documents it might amend its bylaws to include something like:

“The Church, in its autonomy, shall determine criteria for church membership and the process for admission and expulsion of members. Church membership shall not be available to those whose lifestyle is in conflict with the Church's statement of faith, the Baptist Faith and Message 2000; this shall include membership ineligibility for one in a same-sex marriage, and those living in a homosexual or transgendered lifestyle. Further the Church and its ministers shall only recognize, participate in, conduct, or allow Church facilities to be utilized for, marriage ceremonies and other functions which are related to marriages deemed to be scriptural. This shall prohibit the use of Church facilities for same-sex marriage ceremonies and related functions and shall bar the Church's ministers from conducting or otherwise participating in same sex marriage ceremonies and related functions.”

If a church has a personnel manual, membership policy, or a facilities utilization policy, it might want to speak to these issues in those documents as well. There is no “magic” wording required. The church would merely declare its policies concisely and clearly.

For example, a facilities utilization policy might speak to the use of the church's facilities being exclusively for the furtherance of the church's religious purposes and consistent with the church's religious beliefs. Or, if the church wants to speak directly to the use of its facilities in connection with a same-sex marriage it could do so in the policy statement.

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But it is important to understand that a church whose governing instruments and policy statements are silent on these issues has not, by its silence, lost its first amendment rights.

My church currently does not have a constitution and bylaws or governing documents. Do we need those? If your church is incorporated, it must have a charter (articles of incorporation) filed with the Secretary of State, and it must have bylaws. Some incorporated churches have both bylaws and a “constitution.” In the vocabulary of the law, the Constitution is part of the bylaws. If the church is not incorporated, it should have governing documents, normally called a constitution and bylaws.



Will a church be required to employ a person in a same-sex marriage?

A church may discriminate in any manner it chooses when it comes to the employment of ministers. Employment nondiscrimination laws do not apply to the relationship between a minister and the church. And, those who are “ministers” are not limited to those employees who are ordained. Any employee whose work involves the propagation of the gospel, who is held out by the church and who holds himself out as one whose role is distinct from that of some other employees, who has special training, and whose employment duties involve minister-like functions, may well be a “minister” under the ministerial exception rule in constitutional law. This ministerial exception is a powerful legal right when dealing with ministers, but a church would probably not succeed in trying to classify all of its employees (such as clerical or maintenance employees) as ministers.

When it comes to the employment of persons in non-ministerial positions, churches may still discriminate on the basis of religion in every position of employment. While federal and state law generally prohibits employers from discriminating on the basis of religion, churches are exempt from those provisions in the law. This permissible religious discrimination by the church may relate to one’s beliefs, that is, whether one’s beliefs meet the church’s standards for employment, and it may relate to one’s conduct, that is, whether one conducts himself in a manner consistent with the church’s religious expectations of its employees.

Under federal law, any church which has at least 15 employees must not discriminate in employment on the basis of race, color, national origin, age, disability, genetic information, or sex in the employment of persons who do not fall into the “minister” category.

Sexual orientation discrimination is not prohibited under federal law. A church should take care to know its duties under state or local laws. For example, more than 200 cities in the nation do explicitly prohibit sexual orientation discrimination in employment. But, most of these ordinances do not apply to religious organizations.

“Sex” in nondiscrimination laws was originally understood to mean an employer could not treat persons differently according to whether they were male or female. However, “sex” nondiscrimination has morphed toward including the prohibition of discrimination on the basis of characteristics associated with one’s sex. For example, it is illegal to discriminate against a man because he is effeminate or otherwise acts in a manner inconsistent with the stereotypical characteristics of maleness, and, as another example, it is illegal to discriminate against one because he or she is transgendered.

The Equal Employment Opportunity Commission, the federal agency which enforces federal employment nondiscrimination laws, takes the position that it is illegal sex discrimination for an employer to discriminate against a person because that person is in a same-sex marriage or because that person announces his or her intention to marry one of the same-sex.

The result of these developments is that an employee or prospective employee who suffers some religiously-motivated adverse employment action by the church may claim the action was impermissible sex discrimination, when the church believed it was engaging in permissible religious discrimination.

So, churches which employ at least 15 persons need to take care and seek legal counsel when dealing with non-ministerial employees and prospective employees in circumstances which may be alleged to be sex discrimination.



May a church support or oppose a candidate for public office as part of its opposition to same-sex marriage?

No, not if the church wants to obey the conditions of its 501(c)(3) tax exempt status. A condition of the exemption is that the church will not participate or intervene in political campaigns on behalf of or in opposition to any candidate for public office. This is an absolute prohibition. For some, that sounds like an infringement of the church's first amendment right. But the courts say it is not; a church may not at the same time enjoy the benefits of federal tax exemption and participate in elections. The church may speak to biblically based positions on issues such as abortion, same-sex marriage, and homosexuality, without reference to any political candidate. The church must not link a candidate to the church's position on these issues.

A Tennessee pastor sent an e-mail to the Baptist and Reflector asking about church-owned cemeteries, expressing the concern that "same-sex couples are going to demand to be buried side-by-side in church cemeteries with single headstones and who knows what engraved on the headstone."

Guenther said churches might want to consider "contracts" on plots in their cemeteries and give special attention to wording regarding "spouse" or "wife" or "husband" or "marriage."

"The wonderment on cemetery policy is simply one of not telling how many issues will arise — many of which nobody has anticipated," Guenther noted.

B&R — This article includes reporting from David Roach for Baptist Press.

WHAT THE RULING DID, DIDN'T DO

By Jim Guenther, attorney, Tennessee Baptist Convention

There needs to be some clarity about exactly what the Supreme Court's decision did and did not do. The decision was about a civil right, the right of same sex couples to be licensed by the states to marry. It was an interpretation of the 14th Amendment, a citizen's right to equal protection under the law when it comes to marriage. It was not about religious liberty. It was not about the First Amendment and a citizen's right to exercise his or her religious beliefs and it was not about the prohibition against government establishing religion. So the decision did nothing to diminish religious freedom.

What the decision did do is to declare a new right to marry. That decision is simply part and parcel of a cultural shift already being reflected in the law, a shift to give Lesbian Gay Bigender Transexual (LGBT) persons rights against discrimination. That shift in the law has been and continues to be manifested in state and local government actions to add LGBT protection in employment, housing, and public accommodation discrimination laws. The shift is also manifested in interpretations of present laws, especially sex discrimination laws, which move the prohibition

against sex discrimination closer to a prohibition against gender and sexual orientation discrimination, a subtle but significant development. The Supreme Court's marriage decision is a very significant piece, but still only a piece, of these changes.

This cultural shift and its manifestation in the law, significantly including this new right to marry, create new rights which will inevitably come into conflict with religious liberty rights. It will be in those cases where the religious liberty rights of those who oppose gay marriage and who hold traditional religious beliefs about sex outside the traditional marriage relationship between two people of different sexes, and who believe one's sex is dictated at birth, will be tested. It will be in those cases where the contours and perimeters of the First Amendment will be determined.

So religious liberty will be at issue both in the courthouses as rights and duties are interpreted, and in the houses of the legislative bodies, federal, state and local, as laws and ordinances with their rights, duties, and exemptions are hammered out. In these conflicts one should expect first amendment rights to remain healthy and robust. **B&R**

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