Supreme Court Rulings

Part 1 of 1: Supreme Court Cases on Same-Sex Marriage: Where the Church Goes from Here

with Darrell L. Bock, Rollin Van Broekhoven, and Mark L. Bailey
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Welcome to the Table, which is a podcast ministry of Dallas Theological Seminary, especially centered in the Hendricks Center for Leadership and Cultural Engagement, and with me at the table today is Dr. Darrell Bock, who often chairs and hosts this broadcast or podcast, and he is functioning, today, as research professor of New Testament studies, as well as executive director for the center for cultural engagement. Also joining us at the table today is the Honorable Judge Rollin Van Broekhoven, retired federal court judge, who, for many years, has served on our Board of Incorporate Members and our, especially, our Board of Regents, with whom I've had the privilege of working now close to 15 years. And, judge, welcome to the Table with us. Tell us what else you're involved in, in these days.

Well, I think my principal interest has been working with a number of universities in China, primarily in Beijing, and in Guangdong Province in the south. And for the last 25 years, I've been teaching philosophy of law at the University of Oxford, for an Oxford graduate school program, and I've recently been admitted as an associate research fellow at the University of Oxford Center for Socio-Legal studies and visiting scholar at Wilson College. While much of the work will take place in Oxford, the bulk of the research and writing and teaching will be done in China.

That's a full load; I thought you were going to retire, but you will never retire from busy activity, I know.

Well, I lost my golf skills probably 30 years ago, and fishing, I've gotten wet too many times.

That's great. Well, we appreciate you more than you know, and we welcome you to The Table discussion today. Judge, this week, we saw two significant decisions handed down by the Supreme Court. What were they, and why are they considered such landmark cases?
R. Van Broekhoven: Well, there – this has been a busy week at the Supreme Court. The two cases, one is the United States v. Windsor, which is a state out of – a case out of New York, and the main issue there involved the question of the Defense of Marriage Act, which was passed in the mid-90s. The second case is Hollingsworth v. Perry, which came out of California, the Ninth Circuit Court of Appeals in California, and it resulted from a ballot initiative which attempted to define marriage as between one man and one woman.

Darrell Bock: And those who – of us who are not lawyers, the “v” stands for “versus,” correct?

Mark Bailey: Yes, right, right.

R. Van Broekhoven: Exactly.

Darrell Bock: Okay. Well, if you're a sports fan, we understand your terminology.

Mark Bailey: That's – so that works. That works. Well, these are obviously important cases, as it relates to marriage in our culture and, really, in our world. The decision was not unanimous by any means; it was a five-to-four decision, with five for and four against. The justices that opposed the decision – Darrell, both you and the judge can weigh in on this – they had both legal as well as moral issues. First, let's talk about the legal issues. Why did these justices dissent over legal issues, and what were they trying to say by their dissenting decision?

R. Van Broekhoven: Well, both cases involved questions of whether there was even jurisdiction in the Supreme Court to hear them. In the first case, the DOMA, or Defense of Marriage Act case, known also as the Windsor case, the court held that there was jurisdiction. The main dispute, largely, between the dissenters and the majority, dealt with the whole question of whether there was standing or whether the case was even properly before the Supreme Court.

Darrell Bock: And so the term “standing” means that whether the court – whether the – those who bring the legal action actually have the right to do so, is that correct?
R. Van Broekhoven: That's correct. And it relates to the article three of the U.S. Constitution, that requires for federal jurisdiction cases or controversies. And so the case has to be a particular dispute between two parties that can be adjudicated by the courts.

Darrell Bock: It might be helpful, in the start, to talk about what the decision was so we know what the dissent is against. So what was decided in the DOMA case, and what was the argument of the majority of those who voted – the five votes that were for making this move?

R. Van Broekhoven: Let me just make a few preliminary observations before I address the specific issue.

Darrell Bock: Okay.

R. Van Broekhoven: First is most of us in the public have our opinions of a particular court decision shaped by what's in the press, and, as you know, when the decisions were issued on Wednesday, the press had made up its mind what was decided in both of those cases almost immediately – there was online blogs, and it was obvious that there had not been time to really read them. So they were looking at some of the summaries that are done by the editors of the case. So I think, number one, we have to be very careful on what we buy from the instant analysis, which, really, is lacking.

Darrell Bock: Just as an example, I've got the decision here in front of me, and I think there're like four pages of summary – actually, it's more than that in this case – that are not the official opinion but are someone's synopsis of the basis of the decision, before you actually get to the decision itself that Supreme Court itself publishes. They publish the whole thing; they publish the synopsis at the start and then the decision that follows.

R. Van Broekhoven: That's correct. And lazy lawyers or lazy judges will look at the synopsis, especially when you've got an opinion that's 70-some pages long.

Darrell Bock: Right. And this one's 77 pages long, the DOMA one.
Right. The second thing I think it's important is, that while most disciplines are judged on the basis of the result, such as medical or engineering or so on, the law seems to be uniquely judged on the basis of the rationale. The conclusion is not necessarily the most important thing, but the reasoning to get to the conclusion. And so most of the reports that had been issued in blogs and in the press have addressed only the conclusion and haven't addressed the rationale.

You know, that's a really important point because I was – my son has just become a lawyer. He's working on some of his first cases. I was with him this last weekend in New York, and he was talking about writing cases where he's in the midst of appealing, and he was saying to me, “I know that the decision of the court at the next level is we're going to lose, but I'm writing for the appeals that are coming down the road. I'm laying out the logic so that when it gets to the final step, hopefully, I've already put, in the record, things I want them to pay attention to and be sure to draw their attention to down the road.”

That's true, and you have to do that in order to preserve the record in the lower courts.

Mm-hmm.

You know, they say ignorance of the law is no excuse, except for trial judges. And that's why we have the appellate court.

What – judge, what is the difference between what the press has reported with regard to what this says about marriage and same-sex unions and federal benefits, and what really did the court decide? What's the difference between the public perception of what they decided and what they really decided?

The public perception in both cases is that the Supreme Court has basically legitimized same-sex marriages and that bans against same-sex marriage which protect only marriage between men and women are unconstitutional. The problem is it's not really that clear. And first of all, in the Windsor case, which is the Defense of Marriage Act case, there are all sorts of complicated features. While you had a vote of five, including Justice Kennedy's, right, there were three separate opinions in the dissent.
So it – and the problem with the dissent was they didn't know what they were dissenting to, largely, because Justice Kennedy was all over the place. His opinion was pretty much a rambling opinion that didn't have a clear statement of what the issue was, what the rules were that were applicable to that issue, leading to the conclusion. So, essentially, what Kennedy was doing was inviting years of litigation over this issue of marriage.

In the case of the Proposition 8 situation in California, the Hollingsworth case, there, the entire argument was a legal argument about standing, about jurisdiction. There was nothing in that case that either legitimized or delegitimized same-sex marriage.

Darrell Bock: They just e-mailed it back to California, didn't they?

R. Van Broekhoven: That's essentially what they did.

Darrell Bock: Yeah.

R. Van Broekhoven: And what they – the interesting thing there is, since there is no judgment on the marriage issue and since they threw out the court of appeals decision, which sustained the district court's decision on the merits, the only decision that applies is the decision of the district court. And what the dissent said, in the Hollingsworth case, was all the government was trying to do or the parties were trying to do was provide for precedence in the – in other words, to elevate the precedence of a district court that would not be followed by any court, other than that district court.

Darrell Bock: So they tried to expand the scope of what was taking place in that courtroom, to apply to locales to which it normally wouldn't apply, is that what you're saying?

R. Van Broekhoven: Well, that's right. Essentially, what happens, the way the jurisdiction works, theoretically, courts in Southern California are not bound by the district court judgment – only the district court and its jurisdictional areas covered by the judgment. So you could have an attempt by a same-sex couple to get married in Los Angeles, for example, and the courts down there could refuse to grant the marriage simply because the ban was still in effect there. The ban was just overruled in the San Francisco district court.
Darrell Bock: Interesting. Let me come back to the DOMA case because it's the – in some ways, it's the more important of the two decisions –

R. Van Broekhoven: Correct.

Darrell Bock: – I think would be fair. So, in the DOMA case, here's the claim. This is what we heard in the press, and this is, certainly, I think the thrust of Kennedy's decision, if I get this right, and that is that what we had was, in effect, a federalism decision. Now I'm going to define the term for people who don't know what we're talking about: that certain powers and certain authority lies with the states; in particular, the right to define marriage lies with the states. The background of this, I think, is – and you can correct me because I'm not a lawyer, but the background is whatever power the constitution does not specify to the federal level automatically falls to the states, and marriage is one of those things. Do I have that first step right before we move ahead?

R. Van Broekhoven: Right. And under common law and when the country was established and under the tenth amendment, those kinds of questions apply or are decided only by the state. Now that gets a little blurred, but the definition and status of marriage and its validity of marriage is decided by the state.

Darrell Bock: And I think all the decisions, in one way or another, recognize that fundamental premise, that the right to define marriage, as it normally has been done historically here, is something that is a state responsibility. So that's the starting point. So we have certain states, in the last slightly over a decade, that have, I think the proper term is “legalized” same-sex marriage. They've permitted same-sex marriages, same-sex couples to get married and be recognized by these particular states. I think there are 12 of them right now. And DOMA was a law that said, at the federal level, not at the state level, but at the federal level, because the federal government wasn't recognizing same-sex marriages, benefits that applied to a same-sex couple were not going to be applied at the federal level. They were okay at the state level, but they weren't okay at the federal level.
And what judges in the majority ruled, I think, is that that was inconsistent – that created a two-tier marital state – a situation that was not reflective of equal protection under the law. And so their legal argument was – it's not a moral argument – their legal argument was, “That is inconsistent,” and that needed to be rectified. And so the decision was, because these states had recognized the same-sex – the right of same-sex couples to get married, these protections extended across the board, including at the level of federal taxes, estate, and wills, and that kind of thing. Now have I described the core of the decision correctly?

*R. Van Broekhoven:* I'm not sure it's that clear. And that's part of the problem with the DOMA case. Let me just give some very brief background into what led to the passage of the Defense of Marriage Act.

*Darrell Bock:* Okay.

*R. Van Broekhoven:* Hawaii – at the time it was passed, no state recognized same-sex marriage. Hawaii was considering it. And I think there had been a state court case in Hawaii that permitted same-sex, or would have permitted, same-sex marriage. Most of the other states were concerned that, under the constitutional Full Faith and Credit Clause, every state would have to recognize same-sex marriage that occurred in the state of Hawaii. And so, in order to protect an element of federalism, the Congress passed, by an overwhelming bipartisan majority, the Defense of Marriage Act, which dealt, primarily, with whether states had to follow Hawaii.

The second thing, while it was at it, it basically said that marriage for federal purposes, and there were some 1,100 statues that dealt with rights that were attended to marriage – immigration, taxation, social security, military benefits, all of those things that –

*Darrell Bock:* All the rights and privileges that attach there unto, that we say at the wedding, when we marry somebody.
That's right. So for federal purposes, those rights were defined under the Defense of Marriage Act. So when Windsor became well, back up. Windsor was in a same-sex relationship in New York with this other woman. And as the other woman got sick, they were afraid that New York would not pass a law permitting same-sex marriage that would deal with these tax issues. And so they dashed off to Canada, got married in Canada, and then came back immediately to New York, and, shortly thereafter, the one lady died. And so when it came time to file the taxes, Windsor tried to claim the right to reduce taxes, her estate taxes, as the spouse.

Okay, so those are the facts of the case, actually.

Those are the facts. The Internal Revenue Service denied that, saying that, under DOMA, she had to pay the full taxes. Now the catch, which makes the case interesting or one of the things, was she went ahead and paid the taxes and then put in a lawsuit to claim refund of those taxes. And that is the lawsuit that percolated up through the system, the courts, to the Supreme Court.

Now, what made it further interesting was the president – President Obama decided that the DOMA was unconstitutional and he was not going to defend it. But he continued to oppose paying the refund on the credit, so that created the standing issue in the Windsor case.

Okay, I've got the details now. Let me – so the curveball in this one is the fact that we don't have a couple that got married in a state that recognized a same-sex relationship; we have a couple that got married in another country.

Right.

And then tried to apply those standards, so the situation is not – the point you're making, trying to summarize here for people, point you're making is that the situation's not quite analogous to the actual argument within the decision, in some ways, in that the decision talks about what happens between states and the federal government, whereas the situation in the facts of the case is we're talking about someone who gets married in another country and tries to apply that within our own country. Is that one of the complications?
R. Van Broekhoven: That's it, although I think, by the time this happened, New York was recognizing same-sex marriage.

Darrell Bock: So that's another asterisk to put in the question.

R. Van Broekhoven: So that's just another wrinkle to the case.

Darrell Bock: Okay, got it. So I think it's important people understand exactly what's being decided here.

Mark Bailey: Judge, you mentioned that, with the difference of federal and states' rights, in that the states have the right to define, you know, marriage on their own, you also mention that the fear was, if Alaska recognized it, that would then start, as far as a precedence of other states having to join in with that. What's the threat now, in light of the loss of these two cases, from our perspective? And what the – what's the domino effect that you see could happen or may happen or will happen with other states, now that these decisions have been made?

R. Van Broekhoven: First of all, I do not think, as a legal matter, there is a domino effect. There may be a philosophical effect simply because the Supreme Court has ruled on these two cases. The Supreme Court, both the majority and the dissenting opinions, were clear to point out that the Full Faith and Credit claim issue had not been before the court and was not decided by the court.

Darrell Bock: Okay, Full Faith and Credit means what, since we're theologians and not lawyers?

R. Van Broekhoven: It basically means that if I'm married in New York to another man and I move to Virginia, then Virginia's got to recognize my marriage. And what DOMA said was, notwithstanding the constitution, Virginia does not have to recognize the marriage that's conducted between a same-sex couple in another state where it's legitimate there.

Mark Bailey: So while there is not a legal responsibility or a legal mandate for one state to recognize another state's view of marriage, at a philosophical and populous level, this could be a sweeping social pressure, as we've watched it over the last 20 years, that could just continue. Would that be fair?
R. Van Broekhoven: I think it's fair. I've got mixed feelings about a response to that because it very well may be, like in the case of Roe v. Wade in abortion, that there'll be a sufficient controversy over these decisions for a long time, that there may be very few states for the foreseeable future that are willing to change their constitution or their statutory scheme to open themselves up to same-sex marriage.

Darrell Bock: So the point you're making is this was a decision about a particular case with a particular set of circumstances and that all the justices at least claimed – this is an important distinction I'm making – all the justices claimed not to over-read this decision and – but the flip-side of it is that there is a push, if I can describe that – I'm going to use metaphors, probably not good in a legal discussion, but there's a push in a certain direction that comes out of this, that potentially can put certain pressure in future decisions and set precedence for future decisions that might open up the scope of what's being done here, even though everyone writing in this particular decision said, “Don't read it that way.”

R. Van Broekhoven: Yeah, everybody except Scalia.

Darrell Bock: Uh-huh.

R. Van Broekhoven: Scalia said, “I told you this was coming,” in the Lawrence v. Texas case that decriminalized homosexual activity.

Darrell Bock: Okay, so Scalia's one of the dissenters.

R. Van Broekhoven: He's one of the dissenters.

Darrell Bock: And one of the points of his dissent, first of all, said, “We shouldn't have decided this at all. There isn't a case for us to decide.” But moving beyond that, he said, “And I told you when these decisions were made earlier on, on other cases, that these decisions were going to come back and be reapplied in fresh ways,” even though at that time, when those decisions were made, we were told, “Oh, don't read it that way. We're not overreaching here.” Now he's saying, “They've done it. I told you they were going to do it, and it's going to happen again.” In fact, he used the figure of watching the shoe drop – waiting to watch the shoe drop, in the decision, to make the point as vividly as he could.
That's correct. Now, one of the things about Scalia – and Scalia's opinion, as I recall, or dissent ran about 30 pages or so. And what he did was, once he dealt with the standing question, was he tore the rationale of the majority opinion by Kennedy apart, said, “Kennedy talked for seven pages about this, and then he says it doesn't count.”

And the one thing that you get from the Kennedy decision is that he says, for federal purposes, the Defense of Marriage Act and all the statutes that cover immigration, certain tax laws, military benefits, and he goes down through a series of them, are still covered by DOMA. And so that doesn't make any sense because he appears to be opening up the door to legitimizing same-sex marriage, and yet he says there are all these other exceptions, and he essentially is inviting states to join this evolution in thinking of marriage in such a way that these other questions, which I think have budgetary implications for the United States and immigration issues, are still matters of federal interest and authority.

It may be good here to transition – we're going to run out of time – to this kind of a question: you know, the law is actually, in some cases – I'm going to say it this way and I'm speaking, again, as a layman – poorly situated to decide certain things. And that's why, in the past, generally speaking, the law has been hesitant, has exercised some restraint, in walking into certain areas, except where it has to. I want to read the section of the decision by Kennedy where he discusses how we got to same-sex marriage because I think it's actually revealing. If people have the decision, it's on page 13 of his decision; it opens up section 3. This is what he says: “When at first Windsor and Spyer longed to marry, neither New York nor any other state granted them that right.” That's the point we were making earlier; they had to go to Canada to get married.

“After waiting some years, in 2007, they travelled to Ontario to be married there. It seems fair to conclude that until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and a woman in lawful marriage.” In other words, for centuries, marriage was conceived as being between a man and a woman – he's acknowledging that. “For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.” He's making the same remark there.
Now, here's where the transition comes: “That belief, for many who have long held it, became even more urgent and more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly, some states concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen, in New York and certain other states, as an unjust exclusion.” That actually is, if I can say it that way, the moral question, and law struggles with these areas, doesn't it? That's my question.

R. Van Broekhoven: The answer is yes. And the problem with these decisions, like in the Roe v. Wade case, you had half a dozen decisions. So you really – or opinions. So you really don't know what the case stands for, and that's part of the problem with Justice Kennedy's opinion here; it's hard to know what the case stands, although if you look at this – at the DOMA case and his Lawrence v. Texas case, he essentially seems hostile to any moral implications and judgments on same-sex activity, on homosexual activity.

Darrell Bock: And Scalia dissents, in part, because he says, actually, the courts not only have a right, but to some degree, he seems to imply – Scalia does – a responsibility to exercise the law in such a way that moral restraint is properly applied, in some sense, that the court has every right to do that, whereas Kennedy seems to be denying that or at least opening up the possibility of thinking about that in a different way.

Mark Bailey: I think, Darrell, and what you read, it's very enlightening. The definition of marriage is placed on the table. Basically, the idea of we've become more enlightened of recent days, and, therefore, in many ways, in light of human civilization, and homosexuality or same-sex attraction and connection is not unique to our generation, but the difference is the public perception that this is okay; it's normal. In fact, it's a part of the enlightenment of humanity that is continuing to grow and basically away from a provincial moral stand.
Darrell Bock: Yeah, and I think the other issue that's very transparent in all of this, that's important and is really setting the sights for what we hope, ultimately, to talk about in the podcast, is this: that 25 years ago, you would have never gotten this decision, but we have had enough of a shift in what has happened, culturally, in terms of the popular perception, that now the space has been created in our body politic for this kind of a decision to come through. And so, in some senses, we view the court as initiating something, when in fact, the court is actually reacting to something that's going on in larger – in the larger community. And I'm going to ask the judge if he thinks, from a sociological standpoint, that's a fair observation, that that's what's happened, that the laws, in one sense, haven't really changed significantly, but the way in which we're reading the laws is changing because our culture has shifted, in terms of what it will accept or tolerate or how it views the way those laws should be applied. Or is shifting.

R. Van Broekhoven: You know, you raise an interesting question; about 30 years ago, I gave a talk at an American Bar Association convention, and one of my observations was that the number of dissenting and concurring opinions, in other multiple opinions in a decision, had increased rather significantly and that the Supreme Court seemed to be drifting from one ad-hoc accommodation to another and that that was percolating down through the entire federal court system, indeed the whole court system.

And the argument that I made, and I still think it's valid, is the judges were not differing so much as to what the law was or what – which law applied and how it was interpreted, whether you're talking about precedent or a statute, as much as, at the very foundations of law, there was no consensus as to the basic foundations of law. And so when you get into the moral questions, if there is no consensus on a connection between morality and law and there's no understanding, epistemologically, about how we understand morals, you're going to have the chaos and the make-believe that has developed here.

And one of the things that Kennedy wrote in the DOMA case was it was clear that he intended to come to this result. And the case is rambling, as he tried to scramble for some rationale, to come to that result, which also included casting doubt on a moral position that had been understood for thousands of years.
**Darrell Bock:** Yeah, that's the amazing part of the decision as far as I – when I read it. I sit there and I see him castigate those who feel otherwise, and, basically, he accuses them – and Scalia brings this out – basically, he accuses them of a malice, when, in fact, there's a core legal argument and there's a core moral argument that's being put forward, that at least deserves the respect of being on the table, especially since it's had centuries of human support behind it, not to mention multiple societal support behind it.

**Mark Bailey:** Well, that raises some of the implicational questions because, in spite of and in light of the decisions, the public reads this, as we see in the press and we see in the popular response, as a sanctioning. They don't view it as a legal right, in one sense; on the other hand, it's more than a legal right – it now becomes right for us to practice this way because the court said it was. And so judicial activism, whether it was intended or not, has functioned, for the press and for the populace, of putting a stamp of approval on same-sex relationships.

So that then raises the question, and let's flip the page and say, "What's the right response for believers? What's the right response for churches, for Christians? In holding a biblical view of marriage, how do we respond other than simply criticizing the decision? What – you know, how do we engage the culture so that we have a hearing, without joining the tolerance, that their opinion is just as valid as ours, and so everybody's got a right to their own view of morality?"

**Darrell Bock:** Well, I think you have to do two things at once: on the one hand, you have to continue to make the case for why you think marriage between a man and a woman is moral, and when I say "moral," I mean, not just for theological reasons, but I would say for core human reasons, if I can make that distinction. Now that'll be a difficult distinction for people who are theological, who say God's involved in everything. But here's the point that I'm trying to make: there are certain things about human life and human flourishing and raising of children, et cetera, all those kinds of things, that are about how humans relate to one another and what's best for humanity as a whole. So we have to continue to make and attempt to make the case at that level.

When we can make that case at a core appeal of – at a human level, we make that case to the person who even says, "There are no – there's no theological justification you can put before me that I'll pay attention to because I'm not accepting of theological arguments." You can at least attempt to do that.
At a second level, you make a theological argument about why this is important theologically. And so that's one part of it, but the other half of it, and this is where the difficulty is – this is where I think the church is struggling – is the church has a commitment to mission. Our goal is not merely to win the moral argument on marriage; our goal is to appeal to people that a life walked with God is the best kind of life a person can live and that God has made that available to them, and that their relationship with God is the most important decision they can make, and to encourage people to think through their relationship to God.

To the extent that we push people away or are perceived as pushing people away, in winning the marriage argument, we run into the problem we have with our mission. And so one way that some people have tried to solve that is to say – is to pretend that the marriage discussion isn't there and just make it go away; “Don't let me talk about this, or if do, to simply accommodate to the culture so that I can do the mission.” I don't think that works. So Christianity's always been countercultural. It has always had an element within it that says, when you come into a relationship with God, your life changes and you live differently than you lived before. And so there's this countercultural element that's a part of what we communicate.

So how do you do that? Well, I think the first principle that you have is that you've got to model what solid marriages look like, as best you can, as a community. That's the first place to start: to actually reflect what marriage could be, to show how it does reflect flourishing, to show how a child who grows up with a father and a mother is well rounded in how to relate to the genders, just to put it in the most basic kind of sense, and that when you – when parents are both of one sex, you've actually deprived the child of exposure to half of humanity, or, at least, you risk that. So those are the ways that you do it. It will be countercultural. It will be unpopular. You have to expect that, but you do it as directly, as gently, as sincerely, but as clearly, as you can. And I think that that's kind of the principles of how I would see this working out, but it's not easy.
And it seems to me that, years ago, Charles Malik, who at that time was the President of the United Nations General Assembly, said that, if you win the hearts of people to the gospel but lose the minds, you've lost the world. And I'm not sure whether we're in the process, from a missional standpoint, of winning hearts, but we've simply lost the minds, and we haven't been able to think Christianly about – or have the church teach Christianly about how to think about marriage. So marriage and abortion and gay rights and these kinds of things become less important than what we do with a coffee cup that's Styrofoam or global warming or saving the planet, these kinds of things. And so the situation of whether a man and woman can get married is less problematic than how many flies there are under the sneeze bar at the local restaurant.

A point well made. I think that the interesting thing about this – I was talking to the judge about this yesterday on the phone when we were talking about doing the podcast – I think the interesting thing is to look at what the homosexual community has done to penetrate the culture, and the way they've done it is they have framed an argument in a way that has ended up resonating with people, and they have used media, movies, television, stories, et cetera, in a way that had – that produced the possibility of seeing a different kind of world, if I can say it that way.

So we've got shows in which we saw same-sex couples operating. Now, granted, it was a Mr. Clean version of these things; the problems that come with it weren't addressed at all, but what it did is it put in people's imagination, “You know, people can live that way and they can function that way.” They modeled it. They painted it. They showed it. Okay, so the point that I'm making, in response, is to say we – and it may or may not be successful, but what the responsibility is we need to do the same thing for marriage, for marriage that we believe in. We need to show it, portray it, reflect it in real life, as it really is, in a way that it – that impacts the imagination of people and says, “That's a better way to live.”

And they may or may not see it, but that's our responsibility. Our responsibility, in the end, is to be faithful to what we are morally committed to and to think about that and to think about how we articulate it.
Mark Bailey: Not long ago, because I serve as president of the seminary, a Roman Catholic priest came to visit – Dr. Paige Patterson at Southwestern Seminary and me here at Dallas – and he's working in the area of public policy, and he showed studies, the longitudinal studies, within the culture of what the effects are, on the family, on the child, on the education, the success of the child, and he would use traditional marriage, you know, single-parent, same-sex parent, no parent, et cetera, and the facts are astounding in terms of the social implications. So I think one of the things that we have been wont to do is really do our homework, as the judge was mentioning, at the mind level, and say, “Here’s, really, what the facts are,” and we're hesitant to put those out there, lest we be, you know, viewed as intolerant.

I think at the practical level, Darrell, as you mentioned, we have failed as a church to live out biblical principles of marriage and family, so that the world doesn't see the testimony that it ought to see.

Darrell Bock: Our divorce rate is equal to what's going on in the world.

Mark Bailey: Exactly. And, you know, and drug use, alcoholism, et cetera, there's really very little statistical difference between the church and the world. So then the question begs – the question that is begging to be asked is, “What difference does Christ make anyway?”

And if there is no difference, we've lost a step of influence, obviously, within the culture. And so making the case sociologically, making the case for marriage biblically, making the case for it practically, and then the missional, as you mentioned, how do we put that out there? The book, After the Ball, that the homosexual community used as a philosophy, as you mentioned, it's media, it's education, it's business, it's – you know, even, now, sports. The agenda for how to infiltrate with the philosophy, we don't strategize that well of how to get the gospel.
Well, you know, what's interesting is, you know, a few months ago, we went through this incident with Jason Collins, the NBA player who came out and declared that he was openly gay. And then Chris Broussard, who was a reporter for ESPN, who is a believing Christian, made the point that he didn't believe in the moral rightness of what it was that Jason was claiming. Well, Jason – just it shows you where we are culturally – Jason was, you know, lifted up as a hero for being so avant-garde, revolutionary, having the nerve to do this, this kind of thing. I'm sitting here, saying, “He's 20 years late. I remember when Billie Jean King did this years ago and Martina Navratilova did this years ago.” This is not news, but it becomes news.

It's a new sport.

It's a new sport, and we're on the male side now, so things have changed. On the other hand, Chris Broussard, who simply expressed where he was morally, got blackballed, almost to the point of losing his job at ESPN. I don't think he did – well, he didn't; I saw him last night on the NBA draft – but he was under a lot of pressure. So that shows you kind of what we're up against. You know, the other thing, a comment I want to make is just that the Catholics, when they think about this, they tend to think about this more from a moral standpoint, going back to the judge's point about the mind. And they have a phrase that they commonly use in these discussions, when they're in the public square, that I think Protestants can reflect on as well, and it is the phrase “the common good,” wrestling with the idea of the common good. What is the common good? This is a good that is good because it should be shared; it should be shared between all humans. Don't worry about what your religious beliefs are, what your religious stripe are; this is commonly for the good, if you want to say it that way.
I think we don't do enough thinking about that. I don't think we've done enough thinking about defining what the intrinsic human value is of marriage. Some people will say, “Well, it's to have a family.” Okay, that's true, but we also have marriages in which we have people who are childless. So does that then vacate the value of marriage because a person doesn't have a child and doesn't have a family? What do we have to say about the value of marriage and the nature of marriage that is intrinsic to the marriage relationship? What about the complementarity that is represented and pictured, even in the way we're designed, that is a part of that? Those kinds of things. I just think that there's more to do here, and what we tend to do is to complain about the way the culture is reacting, and there are reasons to do that, but the second half of the equation is we've got to do a better job of articulating why it is we think something is moral and to make the case for why certain relationships are humanly honoring and other relationships may not be.

**R. Van Broekhoven:**

Jim Wallis just wrote a book a couple months – or just published a book a couple months ago that deals with – I think the title was “On Whose Side Is God?” or “Is God On Our Side?” And his entire book stresses the social theological discussion in Catholic circles, on common good. And it seems to me that that is an area that we can look at, not simply for pragmatic reasons, but simply the principled reasons that have – that are consistent with biblical teaching.

**Darrell Bock:**

And that's the point you're making about the mind, that we can't just simply tug at the heart strings and try and make the case and even draw people to the idea that salvation, when it's received, is a wonderful idea and worth embracing, but there needs to be some substance there that explains why a walk with God and the experience with God creates a holistic human experience in which we – the way I like to say it is, we live the way we're designed to live. You know, we become functional rather than dysfunctional. And I think that becomes an important part of this kind of a conversation, and it may – and it will be a conversation because, with all the dissenting opinions even when we see a Supreme Court case, we've got lots of – we got a lot of people at the table, and they have a lot of different ideas about the way this works. This is, you know, this is something you're going to hammer through – it's going to be like clearing jungle in the Amazon.
Mark Bailey: Which I do think gives us an opportunity, since it's being talked about at the water cooler. It's being talked about, you know, in the media. We have an opportunity to say, “Why is a biblical view of marriage right? What's the,” as you said, “the value at every level, from relationship to responsibility to procreation to pleasure, the biblical values that God obviously has in mind for why he says what's right and what's wrong?” And I think, at times, we've been so on the “right and wrong” aspect that we've not really thought through, “This is best.” You know, any prohibition of God is because he knows that's best for the way we live. And not because it's to hinder us, to limit us, and so the tolerance or intolerance, we ought to ask, “What's the tolerance and the intolerance of God? And why is that so beneficial to understand because it's the best way to live for all the reasons, you know, of human existence and not only that it glorifies God, but it also is best for humanity?”

Darrell Bock: Yeah, I like to say it this way, at a principle level, and that is: “Is something true because it is in the Bible, or is in the Bible because it's true?” And if it's in the Bible because it's true, the real task of a good theology is to work and to explain why it's true, and, thus, it shows up in the Bible. And I think what we've tended to do, in the church, is we've said, “Well, the Bible says it, so that's the end of it,” and there's a – you know, if you're theologically inclined, that's a good way to do it, provided you can agree on what it is the Bible is saying, which is a whole other level of conversation.

But the other half of it is is – and I think this is where we have an incumbent responsibility to communicate to people the reason this is in the Bible is not because it's between two parts of a leather cover. You know, the reason this is in the Bible is because it states something fundamentally about the human condition, that we think is the best reflection of what human life is about. And then we have to make that case, and that case has to be more than simply saying, “Because,” and stopping there. We've got to fill in the blank on the other end of the “because” and lay that out. And I'm not sure we have done that as well we can.
Mark Bailey: I think that's a point well taken. One of the privileges we have at Dallas Seminary is the international student body that God assembles here and to whom we have the privilege of ministering. And as they come to our country from other countries where Christianity is, by far, a distinct minority and where Christianity has not been as widely spoken and accepted as it has been in earlier history, in the United States, and we see it waning. But in one sense, it's been very instructive because they've sort of said, “Welcome to our world.” And my – I have a phrase that I've started using more recently and it's “Welcome back to the first century,” as we watch what happens in the world. And if Christianity could flourish as a new message, obviously, because of the messiah Jesus, if it could flourish and grow and expand as rapidly as it did in biblical times, in the first century, there's no reason for the gospel not to be as powerful and as transforming, even in our lifetime – just because our country doesn't get it doesn't mean that they can't.

Darrell Bock: No, that's right. And you bring up other countries, and there's a – there was a terrific article done long before all these Supreme Court decisions, by John Dickson. Now John Dickson runs the Centre for Public Christianity in Australia – it's headquartered in Sydney, Australia. He's a wonderful believer. And he and I have interacted on a variety of – in fact, I go over there just about every other summer to do stuff with him, and he did an interview for Christianity Today at the beginning of 2012, in which he was asked this question. I'm going to go ahead and just read this because I think it's so well said and so crisp in terms of how he's doing it. He says, “What advice do you have for church leaders in America about how to engage the broader culture effectively?” And we're talking about a culture that's shifting. “I think the very first thing to do is to do adopt a stance of mission instead of admonition towards the world. Here's an example: in the Australian context, there are church leaders who remember the glory days, when about 20 percent of the nation went to church.” It's now down to about two percent.

“They look at Australia – at how Australia secularized today and the stance towards the world is basically admonition – the way you talk to a backsliding Christian, 'How dare you slide away? How dare you legislate against Christian morality?’ I call that the 'admonition paradigm.' ” “What's wrong with this approach?” the magazine asked. He responded, “I reckon that's how you kill your mission. Because if you speak with a sense of entitlement, you won't be flexible. You won't be humble. You won't take hits or – and just hear it. You'll want to strike back and people will think you're arrogant, quite rightly, probably.”
So the magazine asked again, “What do you recommend instead?”
Answer: “When you move out of admonition into mission, you realize Australia's no longer Jerusalem. It's Athens. Then you instantly adopt a humbler approach to non-Christians. You don't expect them to live like Christian – to live Christian lives, if they don't confess Christ. You don't expect Parliament to pass Christian-specific laws. But as a leader, you try to persuade the nation with winsomeness, with gentleness, with respect, as Peter says in 1 Peter 3:15.”

I think, in terms of a general approach, that – that's healthy. You're going to challenge people, but you're going to do it wisely. When I look at Mars Hill, I often talk about – see the speech in Act 17 as being subversive. And what I mean by that is he starts off by appealing to the very idols that they worship, that Paul hates. We know Paul hates it because, before we get to the speech, it says he was “provoked in his spirit.” Okay, so we know he's not happy with the idols that he's looking at, but he starts there, and he says, “I'm going to tell you about this unknown God that you're trying to reach.” And then he subversively, in the midst of it, undercuts the very idolatry that put the statue there to begin with and, at the same time, appeal – begins to appeals to them about what an accountable walk with the living God is all about.

He never gets through the speech; he gets interrupted before he gets to the end. That probably will happen. Okay, we won't get to the end of the speech, but at least we'll be in the conversation, and we'll be in the conversation trying to make the case for what we represent, merely than, if I can say it, shaking a finger at someone and saying, “You shouldn't be doing that.” It's got to be more than that; there's got to be more substance there than that.

**Mark Bailey:** Yeah, the irony of that Acts 17, Darrell, you and I've talked about it and Darrell's written on it, probably as well as any. But you've got Stoics on the one side, and you've got the Epicureans on the other – those are mutually exclusive philosophies that were tolerated within the culture. And he comes with Jesus in the resurrection, which doesn't – he doesn't hedge on the truth at all, but the wisdom with which he puts it in front of them, in essence, contradicts both extremes by the presentation of the gospel, but he doesn't do it in, “You're all wrong, you're all wrong,” but appeals, in one sense, to the very things that those philosophies wanted to have but couldn't have.

**Darrell Bock:** He's appealing to the common good at some level. And aspirations.
Mark Bailey: Exactly. And, at the same time, not hedging that he will judge the living and the dead – there is accountability coming – and so the gospel is clearly presented. In fact, the theological – the theology that's reflected in that, without ever quoting a passage of scripture, is just phenomenal and, I think, instructive to us.

Darrell Bock: Yeah, he quotes Greek poets.

Mark Bailey: Yes, exactly.

Darrell Bock: I mean, he knows the culture well enough to cite some of their people that reflect the aspirations that he thinks the gospel – the best aspirations of the culture that he thinks the gospel is moving them towards, if they'll embrace it. He gets to resurrection, and that's a curveball. They don't know what to do with it. And they either – on one hand, they reject it, and, in some cases, they misunderstand it, since some of them thought he was talking about another deity.

So that means, sometimes, some of these concepts are going to take a while and some re-articulation again and again and again before people will, perhaps, pause and reconsider. And that's really what you're trying to do – you're trying to help people to think differently than the way they've been raised to think and the way their culture is pulling them to think. And that's why Christianity's countercultural at the same time. So it's an engagement; it's engagement towards mission. There's a moral statement, but you can't have the moral statement without the moral realities in your own community. And you can't have the moral statement without explaining the rationale for why it's moral to people. And we've got to be able to do both.

R. Van Broekhoven: Well, in that Acts 17 passage, you know, it's interesting; Paul was doing what all tourists do – just looking around the town.

And here's a bunch of people that don't have anything to do but be curious about what the latest news or what the latest ideas are.

Darrell Bock: That's right. It was the People magazine of its own time.
And so it seems to me that several things that that passage teaches us is, number one, we've got to see what Paul saw. We've got to see our culture. We've got to see where people are coming from. We have to understand it. But more than that, even before we act, we have to feel what Paul felt. Your reference, Darrell, to Paul being provoked within him, I could argue that he wasn't just provoked about the idols he was seeing around – if you've been Florence, Italy, you see all the tourists taking pictures of all the statues of David all over town. And they don't look at the real thing, and what upset Paul, as I understand, the word “provoked” includes both a sense of anger –

Darrell Bock: Yes, absolutely, he was ticked off.

R. Van Broekhoven: – and also the same sense of compassion. “Here are these poor people that don't know the gospel; they're worshipping just anything.”

Darrell Bock: That's right. That's right.

R. Van Broekhoven: And I think that it's too easy for us to see cases from the Supreme Court or what's happening in the culture or what the executive or legislative branch is doing, and we may get angry about it, but we're not provoked in such a way to reach out in compassion. “These people are lost. They need the gospel. How do I present the gospel to people who don't know who they're worshipping and may have this great sense of their literary past?”

Darrell Bock: And they may be very, very hostile to the initial outreach of the hand, but that doesn't mean that you don't turn the cheek. And that doesn't mean that you don't pray for them. And that doesn't mean that you don't, you know, love someone who's on the other side of the cultural war. “Love your enemy” – I think Jesus did say that. And so what you're trying to do is to be as faithfully representative as possible, and I think, you know, it's a third dimension, a third element that you're mentioning here, judge, and that is the way in which we respond to the culture is not just with, again, a shake of the finger or not even with the presenting of arguments – it's not just that – but with a real sense of what this reflects is the deep need of our culture for God.
Mark Bailey: What I love about the end of that passage, that's instructive to me, is that you have Damaris, a lady who responds. You have others who say, “We'd like to talk to you further about this.” There's a delayed conversation that, too often, we're not willing to take and not willing to engage. But then you have Dionysius, and what I love about him is he was so known for being one of these philosophers that hung out, judge, as you said, just waiting for the latest word – excuse me – who hung out, waiting for the latest word, “here is the Areopagite.” You know, he is so known for hanging around Mars Hill that he's sort of called a “Mars Hill-ite.” He's an Areopagite. He's been there for a long time, discussing all of these things, in between all of these philosophers, and now he gets this, you know, missionary, tent-making theologian on the scene, but he is one who comes to faith that day. And that God is continually working to bring conviction, and we ought to have the conviction of the scripture, we ought to have the compassion for the person. We do preach and teach the whole counsel of God, and that will touch on cultural ills and cultural sins, but it will also touch personal sins and personal ills.

Darrell Bock: And we're all included in that. The other important thing, I think, in this, that we haven't mentioned, that's important, is that, when we talk about failings, it's not a case of, “I've got my act together, and you're a mess.” It's the whole idea of we all need the same thing. We're all in the same boat. We all have the same need for God, and we need to give room to let God speak. I – you know, sometimes, Christians are called “arrogant,” but, in fact, the core of faith is about the most humble thing you can do because what you do is you submit to the living God and say, “The way You view life and the way You designed life is far better than the way I design it when I design it for myself.” That's fundamentally humble. And if we could communicate some of that humility in the midst of what we do, I've learned that the way I used to live was a mess, and I've learned that the way I live, sometimes, is a mess, and I get that because there is a God who cares enough about me to correct and discipline me. That's an important part of the tone of what we're talking about as well.

Mark Bailey: Yeah, if we have room to boast, it's in our weakness that has driven us to the cross.

Darrell Bock: That's right.
Mark Bailey: And I think the importance, as we close, is that why marriage is so important is because of the imagery that God has intended marriage to be between him and his people, between Christ and the church, and as Paul finishes Ephesians 5, getting all the way through, “Great is this mystery, but I'm talking about the church.” And so the husband-wife relationships, the parent-child relationships, are all critical, but the reason they're critical is because God has chosen those as mirrors and metaphors to also explain the kind of relationship he wants to have with us.

Darrell Bock: And that relationship pictures a harmony between various persons, if I can say it that way, who work together and are able to accomplish a great deal because of that. And that's part of the human flourishing part that's at the core of marriage. And it – like I say, I just think we haven't developed, you know – maybe we need a course, Mark. Maybe we need a course here at the seminary on “marriology.” And I'm not talking about Mary, the mother of God; I'm talking about, you know, the theology of marriage.

Mark Bailey: “Marriage-ology.”

Darrell Bock: Yes, “marriage-ology.” And have it be – you know, and really think about why it is that we think such an institution is so crucially important and that it be defined carefully and not casually.

Mark Bailey: Judge, thank you.

R. Van Broekhoven: It seems to me what we have here is really a good opening to some pre-evangelism. These kinds of discussions, taking place with friends who don't care what's going on or who care deeply but don't know what to do about it but are not believers, are certainly open for discussions for us to engage in a dialogue that is really pre-evangelistic.

Darrell Bock: That's right. And which means it's going to not only be telling, but it's going to be some listening as well that we're going to have to do.

R. Van Broekhoven: Exactly.
Mark Bailey: Judge, thank you for spending the time with us, all the way from Manassas, Virginia, and your study there. Thank you for what you bring to the table. Darrell, thank you for all that you do and, likewise, and may God help us model, as well as mentor, from a biblical perspective, and by that, then have mission opportunities in our culture.