Supreme Court Decisions

Part 2 of 2: The Obergefell v. Hodges Decision and Same-Sex Marriage
with
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Dr. Darrell Bock

Now this is interesting, because you've actually walked in the area, that I do want to walk into. And I took off my theologians hat and now I'm putting it back on. And make some observations about what I think is going on here.

I think that what we're seeing at the core of this decision, and this is not a legal observation. This is just an observation about the dynamics of what's taking place. Is that we have become an increasingly secularized culture. And we are evaluating our – and make our moral decisions in increasingly secularized room, if I can describe it that way.

When you take issues of transience and pull that dimension out of the moral equation. What inevitably is going to fill the space of that room is a pursuit of liberty. Liberty is a very high value in our culture. It's lifted up essential. You know life, liberty, and et cetera. You know those kinds of phrases. And so once you take – taking a look from a moral perspective at these decisions, you've almost inevitably set it up to go in the direction that it's now going, because you don't have any transient basis to make these judgments around, which to me shows the importance of thinking either theologically or in terms of natural law. Some type of having some type of transcendent ethic to apply to these discussions where everyone does what's right in their own eyes and what ends up trumping is, "Well, everyone gets to make their choice, end of discussion." Is that fair?

Hon. Van Broekhoven
Yeah.

Jeff Mateer
Very fair.

Hon. Van Broekhoven
I think that's fair absolutely.

Dr. Darrell Bock
And I –

Hon. Van Broekhoven
It's one of the questions that I've raised repeatedly, does society have the right to pass moral judgments or judgments on matter of morality? And if so does it have the right of law to enforce it. And you know it seems to me that society has passed judgments, moral judgments regarding sex here. It's not just simply the same-sex coupling, there is the whole idea that adultery is wrong. And so the question is how do you keep pushing forward on what is the basis for the moral judgment that is being passed by society?
And I don't think any basis is being judged essentially what happens Justice Kennedy has announced himself as the arbiter of these competing moral judgments.

**Dr. Darrell Bock**

Yeah, and he – and of course the dissent emphasized the fact that we have a process by which we can work through this as a society. And it's a very democratic process in which the people speak and the people vote. But when the referendum case from California was reversed and I don't remember the name of that case. But when that happened which kind of started this sequence that we have been in, Referendum 8 if I remember correctly.

**Jeff Mateer**

Eight.

**Dr. Darrell Bock**

In which the State of California voted to outlaw same-sex marriage. And then that was overturned. What happened is we –

**Hon. Van Broekhoven**

Just a minute. You got to make clear where it was overturned.

**Dr. Darrell Bock**

Okay.

**Hon. Van Broekhoven**

It was overturned in the district court, sustained by the U.S. Court of Appeals in the 9th Circuit. It got to the Supreme Court and the Supreme Court punted on it. The Supreme Court didn't decide anything, which meant the decision out of the 9th Circuit was the one that stood, which outlawed the – or which overturned the vote of the people in California.

**Dr. Darrell Bock**

Okay. So the point here is that the – really who gets to determine when the moral standards of a community are going – what they are and how they're going to be legislated and overseen. And the dissent said that process should lie with the people.

**Hon. Van Broekhoven**

That's right.

**Dr. Darrell Bock**

Okay. And the dissent said pretty strongly in a variety of ways that the justices who voted for this case, and who then became the majority, basically took upon themselves a right that judges don't have. And that should belong with the people.
And should belong with the people in the states.

Yes. Fair enough in each state. And so that's the legal part of the complaint that's going on here in terms of the way the decision is made. Again my own observation is that what we are seeing is the movement of – we're seeing two features operating together. This absolute commitment to liberty without a context for having moral discussions. Not only who gets to decide, but then how do you have that discussion, debate what factors play into it. And we almost have walled off the moral elements off to the side as a part of this discussion, which I think is unfortunate for our larger public square discussion.

I would just correct you on one part, Darrell. What we've walled off are religiously motivated moral discussions from the discussion. Because you know you can argue that equality is a moral determination. You can argue that the unity, which is unique in marriage is a moral discussion and simply wall off any religiously based discussion of the morality of those questions.

That's true, but you also can approach it from a natural law transcendent point in terms of arguing from design and generic kinds of ways that may or may not appeal to religion as well. And we've also – we've also walled off those conversations pretty much too.

Okay, well let me go to the third one. I think the third one is interesting. "A third basis for protecting the right to marry is that it safeguards children and families that draw meaning from related rights of childbearing – or child rearing, procreation, and education." And what strikes me in reading this is an inherent issue wrapped up in same-sex marriage. Now normally this gets discussed with reference to procreation with the simple observation of two people of the same-sex cannot produce a child. Okay, now hopefully we will never get a Supreme Court decision on that question. That's a pretty straightforward observation that if you have two men or two women you're not going to get a child. So that's one way.
And this is one of the natural law arguments related to marriage involving people of two different sexes. The only way you can produce a child and have a family, which is part of the point of what a marriage is to have two people of different sex to do this. But here's a second part of this that I think is hidden in this that's related as third premise and it raises a question for me. And this is not a legal observation. This is a practical observation. And that's this, in the midst of child rearing who – how are the two genders in our creation represented? If I have a same sex marriage and I'm raising a child how does that child come to understand what the engagement is between a male and a female in our larger world when both parents are either male or both parents are female? Now here's the joker card in this argument. So couldn't one argue that same-sex marriage is discriminatory with reference to the child and the way they're raised.

So my question is whether the third premise that he's put forward even stands. That there's a counter argument that could be made about what's best for procreation. We know that one is out. That one doesn't count. Child rearing, well, that depends on how you view the child rearing. And of course education is nothing but an extension of that.

So I have questions about this third premise not just on – not just on the fact that there isn't even a legal argument made, but just that the practical level of what's being claimed.

Jeff Mateer Yeah, and I think you're nailing it, because I think what was – and I was at the argument. And basically what Kennedy is trying to counter is the states. The states were arguing, look, states have historically and the states have an interest in protecting children. And the states believe that in order to protect children the best place for a child is to be raised by one man and one woman.

Dr. Darrell Bock And there's all kinds of research that supports that.

Jeff Mateer Well, Mark Regnerus said at University of Texas that there's lots of research. The best place and therefore shouldn't the state then be allowed in its laws to promote that type of relationship. So Kennedy kind of what he does is he doesn't like that argument to he takes it and then he takes it, wow. It would be better than at least to have a family. You're going to discriminate against. But I think what you're saying exactly right. It's an issue that's again protecting children something states do. The law is there to promote that. That's the rational basis for the law.
So he takes that argument and he kind of turns it on its head and, "No, no, no, this is how we protect children."

**Dr. Darrell Bock** Interesting.

**Jeff Mateer** Well, isn't that a reason that this should have been debated in the legislatures. That's where you deal with this. You have – and let the legislature decide. And I think that's the problem, because this is sort of to me – this is the part of the opinion that most reads like Rowe versus Wade. We're basically Rowe versus Wade eventually gets the science wrong. We know that today that the science of – that was mentioned by Blackman in Rowe versus Wade is now – we all know is wrong for the justification of abortion.

Here I think we're going to be able to look back and say what Kennedy is saying here is just flat wrong. The social science versus other science but social science it wrong.

**Dr. Darrell Bock** Rollin, do you have anything you want to weigh in on this?

**Hon. Van Broekhoven** I agree with both of you completely on that. There is one thing that I would say going back to the question of natural law. The whole concept of natural law has evolved considerably over the past 2,500 years. And was really in disrepute for much of the last century. Until John Finnis from Oxford came along and started writing. But even if you look at John Finnis's book in 1979, I believe it is, and what John Finnis has arguing and saying today is that what the natural law argument does is it provides the framework in which respectful, dignified discussion can take place. It's not a hammer that says biblical law applies. It's not a hammer that you can determine what's right on the basis of reason. It simply provides a framework in which these issues can be discussed.

And if that is true, and I have long had some problems with some of the natural laws there, because within catholic circles I don't think that it made sufficient account for the effect of the fall. But being that what it is it does seem to me that what Jeff is saying these discussions take place at the state level rather than decided by nine justices of the U.S. Supreme Court.
The Table Podcast  

**Dr. Darrell Bock**  
Yeah, I think the hidden issue, and I think this is coming out clearly in the broadcast as a whole. The hidden issue in all this is that we tend to think these are decisions and government ought to make them. But at least the way a lot of people will view it. Government has got to settle this in order for this to work. But the problem is that the government itself is a broad term. And so at what level of government is this going to work? And who should maintain – so there is this states and federal rights in the way those areas have traditionally been handled that's wrapped up in these discussions. It kind of gets lost in the larger debate. But it's actually been part of the way our society has functioned and the federal government is taking more and more territory all the time if I can say it that way. And in the process the states are losing some level of ground in terms of how these issues traditionally been handled.

**Hon. Van Broekhoven**  
But it's rather interesting is going back to the King V. Burwell case. You know what the Supreme Court did not do in that case was give deference not decisions of the IRS. IRS made the determination as to which subsidies were available. And so essentially what happened the Supreme Court decided that case not on the basis of deference to other agency or body of government which is often the case, but rather a sua sponte on their own, in their own rights. And I think that's what's going on a lot here.

There's no deference given to the 13 states that adhere to the definition of marriage, nor is there any deference to the fact that the bulk of the states which now recognize marriage do so on the basis of court rulings not on the basis of the decisions of the people.

**Dr. Darrell Bock**  
Yeah, it's interesting. Now you did a little Latin thing on us there, that I'm going to have to have you explain to people or else most people aren't going to follow what it is you were saying. And I don't even remember the exact phrase. Swee bontis or something like that.

**Hon. Van Broekhoven**  
Yeah, sua sponte. Basically what it means they take it on themselves and make the decision without any basis coming up through the appellate process or reference or deference to other agencies to decide that particular area. And judges and justices should be reluctant to simply decide things on their own that haven't trickled up through the appellate system.
Okay, well, our time is just about getting away from us here as we work through these two cases. And I think the lesson that we have that we've seen is the court in two cases has taken upon itself a significant authority. And the thing that these two cases share is they've taken on to themselves an authority that generally speaking in the past has been left to the legislative process more directly. And so that's one of the complaints that we're dealing with.

There actually is a whole dimension of this that we haven't discussed at all, but we're out of time. So we're not going to have time to do it now. So I'm going to have to invite you all back down the road. And that is what are the implications of this? What does this mean for the first amendment versus the 14th amendment or religious liberty on one hand and these extension of right of on the others. And the two are headed on a pretty good collision course in terms of what it means for pastors and churches and for same-sex couples for that matter. It works on both sides. And so I would love some point to have you back to have that focused discussion on that question, which probably does deserve a whole 50 minutes like we're giving to this. Because that's a very complex question and no one really knows where that's going. In fact in a shorthand kind of way I'll ask you this question and that is how open is the question of what happens between the first and 14th amendment as a result of this decision, Jeff?

Well, I think that is the issue. I mean after Obergefell, you know Obergefell did not overrule the first amendment. The first amendment still exists. And so you're going to have a clash. And we're going to see it over the next months. We're already seeing it at Liberty Institute. A clash between this newly created right, this newly created right to same-sex marriage with the first amendment. It's going to play over months, years maybe a decade. I'm hopeful in light of this Supreme Court's past record on religious liberty that it will continue to protect religious liberty.

Well, in fact the fact that both decisions pro and con made an effort to talk about religious liberty in the midst of making this decision seems to me that they're laying a path for being able to go there should this happen with an awareness that something has got to be sorted out. The trouble is no one knows what exactly that's going to be.
Jeff Mateer: Right, I think the silver lining of the Obergefell case is at least Justice Kennedy mentions religious liberty. At least he mentioned it, which means nine judges signed onto recognizing that there are religious liberty protections. The question is what this scope an extent to protect.

Dr. Darrell Bock: What does it look like, yeah. Rollin, any observations?

Hon. Van Broekhoven: Yeah, the problem with Justice Kennedy giving kind of short thrift to the religious belief first amendment issue is if you look at his earlier decisions he talks about adamance it is born in religious ideology and so you know where is that going? My sense is that this is not simply a first amendment issue, it was rather interesting how Justice Kennedy issued Alexis de Tocqueville’s Democracy in America, and then raises the whole question as to where we are as a civil society, which includes all the institutions of civil society. Both churches, religious organizations, institutions, hospitals, academic institutions, local clubs. It affects everything in society. And to the extent that the first amendment includes within it the sense of a freedom of conscience. I think we've got problems.

Dr. Darrell Bock: Yeah, we're getting ready to hold a forum here on campus for pastors discussing this particular dimension of the question, the implications of what this decision means for churches and how they should react to a variety of potential scenarios that emerged from the results of the decision et cetera, and the possibilities for what's going on. I mean we've heard about photographers and cake makers and florists and that kind of thing. But literally marriage and family is so fundamental to our society, it touches everything. And in the midst of touching everything the multiple scenarios that exist are almost endless. And so I think we have just – we're in the beginning of what is going to be, as Jeff said, a long involved discussion, which only means that there'll be plenty of opportunity to invite you all back to discuss more of this down the road when we have time.

So I appreciate you taking the time to walk us through these decisions very carefully in terms of what's going on legally. I think it's important that people understand how our national institutions work and what's going on within them. And so I think there's been value to this discussion. And we really do appreciate you being a part of our table broadcast where we discuss issues of God and culture and we hope you'll be back with us again soon.