The Supreme Court, Same-Sex Marriage, and Religious Liberty

BY ALEXANDER CARPENTER, JASON HINES, MICHAEL PEABODY, AND JUAN O. PERLA

The following is adapted from a podcast posted to *Spectrum*'s website, www.spectrummagazine.org, on March 22, 2013. Alexander Carpenter moderated the panel.

Carpenter: *Three Seventh-day Adventist attorneys join us for a discussion of religious liberty, gay marriage, and the Supreme Court. Juan Perla has a background in human rights, and recently wrote "Disestablishing the Family: The Adventist Case for Legalizing Same-sex Civil Marriage" for* Spectrum*'s website (reprinted in this issue on page 69). Jason Hines is a frequent* Spectrum *columnist, and Michael Peabody runs the* ReligiousLiberty.TV *blog.*

There are two cases of interest before the Supreme Court. One comes from California and deals with Proposition 8, which rejected the constitutional right to same-sex marriage. The second comes from New York and challenges the federal Defense of Marriage Act (DOMA) that requires the federal government to deny benefits to gay and lesbian couples married in states that allow such unions. Why should Adventists care about the Supreme Court's opinion on gay marriage?

Peabody: There are a number of preliminary issues, of course, that the Supreme Court will be deciding, and one of them is whether or not the Republican party in the House of Representatives has the ability to step in for the executive branch when the executive branch declines to defend the Defense of Marriage Act (DOMA) that was signed in 1996 by President Clinton. A similar issue exists in California, where the governor of California is declining to defend Proposition 8, which amended the constitution to prohibit same-sex marriage. The question is whether or not a private organization that promoted Proposition 8 banning same-sex marriage can step in for the governor and defend Proposition 8 when the governor declines to do so. If the Supreme Court says that these parties do not have standing, then those two cases will likely disappear and go back down to the lower courts and ultimately have to be handled legislatively by the states, with regard to Proposition 8, or Congress will need to address how it's going to handle the Defense of Marriage Act.

But there's another issue. When Proposition 8 was passed, it actually reversed a Supreme Court decision in California that legalized same-sex marriage, and found that it was constitutional. The proposition advocates actually changed the constitution to prohibit same-sex marriage. So, that decision ultimately went back to the California Supreme Court, once the voters had voted in Proposition 8. Ken Starr, who was advocating in favor of Proposition 8, said that when voters in California make a decision, the right of a people is inalienable to vote, to change the constitution through the amendment process. The people are sovereign, and they can do very unwise things that tug at the equality principle. Essentially what Starr was saying was that the people of California, the voters, have an inalienable right to take away, potentially, an inalienable right from others. So, when you're looking at Proposition 8, you can look at it in terms of the basic same-sex issue, but you can also look at it in terms of what it means to have rights removed by vote. Do the people of California have a right to take away the rights of their neighbors? Are our rights really rights, or are they something that can be eliminated through the tyranny of a majority? Looking at the way the polls are going, Proposition 8 probably wouldn't pass today. What does that mean?

Another issue is what basis the Supreme Court will use to make a determination on same-sex marriage. If the Supreme Court makes a determination that Proposition 8 meets the lowest rational basis standard, which simply means that there was some kind of reason for it, and therefore it stands, then the rights can be limited and be taken away, based on a very low standard. However, if

the Supreme Court applies a compelling state interest standard to Proposition 8, that would require them to meet a much higher standard of proof before taking away that type of a right—because it wasn't essentially a property right, it was a due process issue—then it could also stand for other rights; there would need to be a compelling state interest. That's what we've been arguing for in a number of religious liberty cases as well, saying that when individuals have a religious accommodation that needs to be met, the state needs to demonstrate a compelling state interest in order to take away those kinds of rights.

Carpenter: *I'm glad you're highlighting the question of majority/minority rights. I think that helps us frame this within the historic Adventist perspective—as minority Sabbatarians, how do we relate to these issues?*

Perla: Michael did a great job in summarizing the issues of these two cases. I'll focus on the other side of the equation, which is the legislative process by which rights are conferred. The establishment clause in the First Amendment is a way of legislating a right that people have in the United States. It's also a limitation, primarily a limitation on the government, to intervene in the establishment of a religion. That's an important concept to put our minds around—what that means to us as Adventists, and why that matters to us, and what happens with the way that the government continues to treat the family.

For a very long time, the government has been able to regulate family life in and of itself, because it's a family. But if we draw a comparison to the way that the government treats churches or religions, the government says, "We're not going to regulate churches as churches, or religions as religions; we're going to instead allow people to organize themselves in groups, in communities, that best fit their model of what is a right religious and church environment." The government will intervene to prevent harmful conduct within that context. That's an important distinction that comes out of the First Amendment establishment clause and the free exercise clause. If we accept for a moment the analogy that I make in my article for *Spectrum* that families are like churches—they're essentially small churches—then we begin to wonder why we think that the government should be able to regulate families as families, instead of allowing people to organize themselves into the small groups that best fit


Justices of the Supreme Court.

their sense of what the right model of organization is, what the right model of family and child raising is, and then allow the government to intervene to prevent harmful conduct within those organizations. I think that's an important issue that doesn't get discussed very often in the debate of same-sex marriage, because it's focused on what the reality is under the law.

There is no amendment in the Constitution that says Congress shall not write laws that interfere with the establishment of a family; there is no such disestablishment. But that doesn't mean that we can't conceive a world in which we could allow families to do that, in which we could trust ourselves and organize ourselves into social familial units that meet our sense of conscience and morality. That's another side of this. Cases dealing with the same-sex marriage issue actually open up the discussion for us to think about how we organize ourselves in a society, and to say, "Well, you know what, this is already happening." We would be blind if we didn't know that there are different models of the family already operating in society, whether they're recognized or acknowledged as legitimate family structures by the government, they exist.

Why should Adventists care about the Supreme Court's opinion on gay marriage?

—A. Carpenter

Examples include single-parent homes, or arrangements in which divorced parents share custody of the children, and these children end up having four parents, if you will, their biological parents and their stepparents if all four parents are still around. Some have no parents, and are raised by aunts and uncles, or by grandparents. We already have family structures in which same-sex couples are raising children. Now it's a matter of whether the government is going to say we're not going to recognize these family structures as worthy of getting a family license, or a marital license, granting them the same rights as other family structures have, which would basically amount to the establishment of the heterosexual marriage as the only familial structure that the government recognizes, or at least recognizes above all else. Or, do we use the opportunity to begin expanding the definition of what is considered a family, and what we are willing to allow people to do for themselves? That's the issue that I wanted to bring into the conversation, because I think that it has been missing in a lot of the debate within the church, as well as broader society.

Carpenter: *Jason, you've been writing on this online and you're working on a PhD in religious liberty. How interested are you in the Supreme Court cases, and why should Adventists care about it almost as much as you?*

Hines: Of course I'm very interested in it, and to add to what Michael and Juan have already said, I think there is a counterintuitive notion of the free exercise of religion that has to be addressed here, a reason why Adventists should be wary about the arguments that we make in the public square in relation to marriage. The First Amendment of the Constitution guarantees the free exercise of religion. Along with the establishment clause, it creates what many scholars have called a tension around the idea of religion as a right. The counterintuitive notion is the idea that if churches—and much of the support of Proposition 8 was promulgated by churches, including members of the Adventist Church, and this is a religious liberty issue because of that connection—if churches are going to argue that the government should support their idea of what a marriage is, it opens the door to the government to now regulate churches in a way that would be unprecedented.

Once you allow a government to step in and legislate your particular definition, it leaves you with very little in the way of protection when the government now wants to step in and define other religious issues. Let me tie that to something else. I am a firm believer that we have two types of marriage in America: civil marriage and religious marriage. The problem is that many churches don't agree with me about that. Their own ideology says that marriage is one thing, and they want the government to step in for what that one thing is. That's all well and good until the government wants to step in and define something else, in which you now have a definition that is different from the majority. For example, the Adventist Church does not greatly differ on how it defines marriage, but it has great difference about how it would define a term like the Sabbath. So, we have to be very, very careful when we say that we want the government to help us regulate our own particular doctrinal beliefs, because then we leave ourselves no standing when the government says, "Well, not only do we want to regulate *this* doctrinal belief, but we also want to regulate *that* doctrinal belief." I find it hard to believe that we would come to the argument and say, "Define this for us, but don't define that," or at least it's an argument that wouldn't make sense to anyone, anywhere. From my perspective, this is one of the reasons why Adventists need to pay particular importance to this decision; it helps us to expand our notion of free exercise, not restrict it.

Carpenter: *Let's have a little free-for-all. What questions do you have from each other's ideas?*

Peabody: I think Juan's idea about disestablishing marriage is very intriguing. The whole point of these cases is that the same-sex couples want to participate in marriage as it exists; they simply want it to be widened. There is a secular understanding that marriage does provide stability to society. Atheists get married just as much as religious people, and there are family courts to protect the interests of children in divorce or alimony systems, there are state-funded family counseling centers, there are domestic-abuse prevention programs, etc., designed to promote that stability in society. I don't think disestablishing marriage would achieve those goals. I'm not sure that's what same-sex marriage advocates would push for.

On the issue of the church, there's an interest also within the church that churches should be allowed to self-govern and to determine who they marry, and who they do

not, and what marriages they recognize within their walls and what marriages they don't recognize. So, there are a lot of free exercise and free speech considerations that also need to be brought forward to protect the rights of churches, in places where same-sex marriage has been approved, or if it happens nationwide.

Hines: I would probably prefer to hear Juan about this, but what I took from Juan's article in *Spectrum* is being somewhat missed by Michael's critique, which is a worthwhile critique. I think he's absolutely right about the idea that what most marriage advocates in the LGBT community are looking for is not necessarily a disestablishment of marriage or a disestablishment of the family. However, I didn't think that was what Juan was talking about, either. I thought really what he was saying was that disestablishing the idea of a heterosexual normative definition of family, meaning that the types of family that fit into the idea of husband, wife, two and a half kids and a dog—that type of family—is what we want to disestablish as the definition of a family, much in the same way that we have disestablished any particular religion. That means we don't work from a foundation that only finds as religious points that are based on the omnipotence of Christ. We give credit to all different types of religions.

I thought what Juan was saying was not to just disestablish or get rid of the notion of a family, but to say that a family that is protected by law and by the society is a family of whatever kind of definition we would say, or the people decide, is a family. So, if a family is two men in a gay relationship and their kids, that's a family. If a family is two people who are divorced, their new spouses, and their mixed kids, we'll combine all that into a family if they so desire. So, the idea of the disestablishment of family is not to get rid of the notion of what a family is, but rather to expand the notion of a family beyond what DOMA did. DOMA said that marriage is one man, one woman, and therefore all these familial protections under

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DOMA are based on that particular foundation. So I guess the question to Juan is, which one of us is right?

Peabody: To clarify, what I was picturing when you said "disestablishment of family" is the concept that the government will not intervene in the church to make ecclesiastical decisions, whereas in the family, the government intervenes all the time in terms of division of property, in terms of divorce, and other such issues. Would the state stay out of those aspects of marriage, or would they remain involved?

Perla: Jason, I think you've definitely taken away the core of what I was trying to raise in the article, so you're right. Michael, I think you understand the article as well, but you raise some interesting questions that come out of the idea of disestablishing the family.

Let's look at how disestablishment worked in religion. When the framers of the Constitution decided to let churches be churches, and act as churches on their own, with minimal intervention in the internal affairs of the church from the government, it was a risky undertaking. What would happen? Would we have immoral people coming up with wild notions of what a religion was, and creating and inventing religious doctrines and dogmas that might be counterproductive for society? All those risks were there. But, somehow, when we leave it up to people to figure it out for themselves, for the most part people figure it out, and churches, a diversity of churches, have emerged. For the most part we've stood by the idea that we are trusting individuals to organize themselves, and to set rules for themselves, in a way that governs their religious life. The government still intervenes for these sorts of things. When there is abuse of children or other individuals within a religious community, the government intervenes to prevent the harm from continuing. It's not that there is no longer a role for government, it's just that the role is different. The regulatory or the legislative role of the government is not to decide what is and is not a family. However, there are situations in which the government can set an outer boundary for what it will recognize as a religious institution for purposes of treating it that way under the law, but it's very open. That's what we would look to as guidance in the disestablishment of the family; how it worked with religious disestablishment.

There's no reason why the government couldn't continue to intervene. This comes up in general debates about the slippery slope of moving away from defining marriage as a relationship between one man and one woman. "What if you want to marry your dog, what if you want to marry an older, fifty-year-old man with a thirteen-year-old girl, or the other way around?" Wild speculations come up, and the issue is that in those cases, there's something else operating: the issue of consent. Do people consent to getting into those relationships, or is there a disparity in the status of the individuals that makes us question whether or not someone is freely entering into those relationships?

But we trust people—we trust people to organize themselves in communities, to raise children in those communities, and we give them the benefit of the doubt. We can deal with the family by looking at how we've dealt with religious disestablishment.

Peabody: Exactly. In societies as they exist now, all those relationships are in place, and they're not illegal, as long as it's a consenting relationship, so I don't feel that this changes anything.

Perla: Absolutely. What it does, is change the extent that the government is deciding that the only structure worthy of being recognized under the law as a family is the structure that comes out of a heterosexual marriage. To the extent that the government is doing that, it is propping up that relationship, that model of a relationship, as *the* established model of a family.

Hines: This is something of the issue in the DOMA case, in *United States v. Windsor*, where you have this idea that a familial relationship would give you a certain outcome if it were heterosexual, but it is not, and therefore the government creates this difference by putting forth that definition. That issue is almost exactly the reason why I think Section 3 of DOMA is going to be deemed unconstitutional, because you have an existing relationship: a lesbian couple that is married in New York, according to the laws of New York. Of course the federal government doesn't do marriage, but the couple is being treated differently as it pertains potentially to a tax issue because the government is not recognizing their marriage as a marriage, even though it is as much of a marriage as it can be, and is legal. This is an example of the government establishing some

kind of norm for what a family is, and the idea of the disestablishment of a family would take that type of distinction away.

Peabody: If DOMA is overturned, then the federal government won't have that definition anymore, and essentially what Juan is talking about would become the federal rule, wouldn't it?

Hines: I think that's right. Michael, you made a good point that if we remove the barriers, then we don't have to necessarily establish an affirmative disestablishment of the family, in the way that we have an affirmative disestablishment of religion, but I don't know that Juan was ever talking about doing it affirmatively. However, I think you can accomplish the same goals by removing the discrimination, just like you could by asserting the idea that we're disestablishing the family. But, I want to bring it back to the DOMA section of the gay marriage case, because I think it is an exact example of the type of thing that Juan is talking about. There's something the government has propped up that says, "This is what a marriage is," and if we're going to "disestablish the family"—that's a really provocative way to say it—what would happen if gay marriage were allowed? We'd have to respect a broader notion of what a family is.

Perla: Right. My argument is a bit provocative and needs to be to get people thinking about the issue in a different way. It doesn't have to be an all-or-nothing issue; it doesn't have to be only heterosexual couples that can get married, and therefore, other same-sex couples or other relationships feel left out, and it doesn't have to be also just heterosexual couples and same-sex couples. Because they're being recognized legally by the government, the risk for then asking churches or religious schools, "Why are you treating people differently? Why are you treating gay couples differently when they're both equally recognized by the law?" becomes a little bit trickier to explain away. Keeping in mind that we now have interracial marriages, it seems a little more difficult to justify a church saying, "Well, we're not going to deal with this, just because we don't like it." Certainly, they still could.

But if we just say, "The government doesn't get to define what is a marriage, or what is a family; we as individuals can trust ourselves to define that for ourselves within a religious community, within our familial relationships." Then, the issue of freedom of conscience begins to operate more obviously in this situation than when we don't talk about disestablishing the family. We're still asking the government to play a role in endorsing one, or two, or whatever number of models of the family are involved. That's where the issue of freedom of conscience really gets triggered because we're saying we trust each other, and our conscience to do the right thing—in religion and in the family. Where we begin to push the boundaries into something harmful, then there is a role for the state to intervene.

DOMA is a perfect example of that. Consider this from a religious perspective to see exactly what the establishment clause is getting at. For example, if the federal government decides one day that only religions that recognize the Trinity as the truth will be recognized as a church under the federal government for tax-exempt purposes, but any church organized under state laws that doesn't believe in the Trinity won't receive the same treatment, that would be a violation of the establishment clause, because the government can't establish a definition of religion or church, and can't intervene in the state's ability to define that for themselves. The issue becomes if the states can define marriage one way or another. For example, in California, if people decide that they don't want marriage to mean more than one man and one woman, does the federal government now get to intervene by telling the state it can't do that? That's where other parts of the Constitution begin to operate, which is what is happening in the California case on Prop 8, issues such as equal protection, and substantive due process.

Are our rights really rights, or are they something that can be eliminated through the tyranny of a majority?

—M. Peabody

Carpenter: *Michael, what key ideas should Adventists pay attention to in the overall arguments? Are there phrases or concepts that could really impact the future of religious liberty?*

Peabody: I think that any oral argument at the Supreme Court level is really just the judges trying to argue for their position in front of the other judges. They've all viewed the briefs, they've investigated these things, so what the judges say may be an indication of how they're going to rule, or it may not be. Key phrases include "rational basis test," "compelling interest," and "substantive due process," which you should watch for. These are the issues that will affect us directly, a lot more directly than the idea that same-sex marriage can be legalized. The surrounding issues on this case in terms of expansion or contraction of rights and whether voters can make these kinds of decisions are humongous, and that's really what we need to be paying attention to.

Hines: I absolutely agree. The question of legality for gay marriage is not as huge a question for the Adventist Church. In every place where they legalize gay marriage or gay civil unions, they've been very cognizant of the free exercise of religion, and making sure they protect the churches that will always have the right to, hopefully, make the decision for themselves about which marriages they will perform and admit and which marriages they won't. However, you are going to hear things about rational basis, levels of scrutiny, and things like that.

Perla: Right. Other language that the Supreme Court justices may be using to describe a suspect class may be something to listen to. That may be an indication of how they're thinking about what level of scrutiny and what level of review they should use when dealing with same-sex couples. That issue came up back in the California Supreme Court decision when San Francisco began issuing marriage licenses. The good thing about it is that the US Supreme Court actually has some jurisprudence, some case law that it can look to for guidance.

Also, from a general citizenship perspective, I think Adventists should care about these things. It's not just about what's happening in this case that impacts each of us directly, but, like the General Conference's church-state relations declaration states, what is it about these cases that "impinge on the legitimate rights of others"? As a duty, we've told ourselves in this declaration that we are going to stand up for the legitimate rights of others, even if it represents a personal or corporate loss to the church, and to us as Christians. So, there's more to this than just "How is this going to affect my religious liberty?" It's also about how we put our freedom of conscience values on the line to make sure that other people's freedom of conscience is respected, even when it may represent a loss to us.

Carpenter: *Are all of you convinced that a pro-gay ruling would be a loss for Adventism, a neutral event, or a gain for our ideas of freedom of conscience?*

Peabody: It really depends on how the court writes its decision. It could be a gain for religious freedom, or it could be a loss for religious freedom, just depending on how it's worded.

Hines: I agree with Michael. If there is language in the opinion that gives the impression of the government's ability to intrude on religious groups, or on minority groups in general, then although this would be a great thing, in the midst of a decision that supports marriage equality, it's going to be a little troubling.

Perla: To add to that, our understanding of whether or not this opinion is a loss or a gain is subjective, and will be context specific. Whenever that decision comes down, we may think to ourselves as Seventh-day Adventists, "This is a loss, this is a gain." But this may not be the same way that two or three, or even one generation of Adventists later may consider that opinion. It may be that in a generation or two, Adventists will look at that opinion and say, "That was a gain," or the other way around. So, it's context specific for ourselves whether it's going to be a gain or a loss. But from my perspective, I figure that expanding freedom for my neighbor can only be a gain for me, and can only be an addition to the welfare and wellbeing of society. I think that we can feel very comfortable as Adventists to be part of a process that expands liberty and freedom of conscience to other people who we may not always feel like we can relate to because down the line, that may change. We can feel proud and excited to be in a country where liberties and freedoms are expanded, and not the other way around.

Carpenter: *With that idea that we may not even know what this means ten years from now, it's time to put your name to a prediction.*

We come out of a prophetic tradition here in Adventism, so here's your chance. What will happen in June 2013?

Peabody: Tough question. I like what A. T. Jones said: the question isn't who's right; the question is, what are the rights? My gut feeling is that the Supreme Court is probably going to refer the issue back to the states, on the grounds that the parties before it don't have standing. That will then allow the process to take place at the ballot and initiative level, and the Court won't make a determination that will affect same-sex marriage nationwide. But that's my gut feeling, and I could be wrong.

Hines: It's getting harder and harder for me to see how there isn't a double win on both these cases, for the reasons that I touched on earlier. I think it's going to be hard for the court to say that the federal government can distinguish the federal benefits that it gives to two different legally prescribed marriages—that's the DOMA case. And, I just find it hard to believe that a gay couple legally married in New York and a heterosexual couple legally married in New York have different marriage benefits from the federal government. I'm not sure how you get around that, based on the principles of equality that are scattered throughout the Constitution. In the same way in the Prop 8 case, it's difficult for them to say, at least for California, that Proposition 8 should be upheld to overturn the decisions of the lower courts there, because they fell into a procedural problem. The right has been extended, and then the voters took it away. At the lower court, the supporters of Prop 8 did what I think could only be described as a horrible job of trying to explain the reasons why you can take a right away, at least in this particular context.

I think the court is going to strike Section 3 of DOMA in *United States v. Windsor*, and then be, for lack of a better term, judicious, with the Proposition 8 decision. They will either restrict it to just California or the "eight-state solution," where it would only affect California and the other states that have given either gay marriage

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or civil unions to the gay community that lives in those states. I don't think that the court is going to do a broad sweep, and legalize gay marriage everywhere, although I will say that I would prefer that, but don't think that they will go that far. I think that they are going to be judicious and measured in the decision, as far as Proposition 8 goes.

Perla: I agree on DOMA and Section 3. It's very hard to defend that at this point, with states legislatively redefining marriage within their time and space. So, I think it's hard for the court not to turn around and look at that. The issue of standing is important, and the court has the opportunity here to punt this issue back to the legislatures at the state level, and could even punt back to Congress on the issue of DOMA. But I can't imagine the court doing that, at least not given the players that are on the court. I think that there are four justices on the court that everyone feels pretty good about ruling in favor of granting same-sex couples the same marital rights as heterosexual couples. That leaves a few swing votes, particularly Justice Kennedy, who was the author of the *Lawrence v. Texas* opinion that struck down antisodomy laws. Then, we see Chief Justice Roberts, who has shown that he cares about the legitimacy of the institution of the court and his own legacy, and trying to be on the right side of history on these big issues. So I think there is going to be some internal discussion about whether or not the court should hear the merits of these cases, and I think that they are going to go for it.

On Prop 8, I anticipate that they will either go for the eight-state solution that Jason just described, or make a general, sweeping fifty-state solution, in which they say, "You know, we can't continue to treat people this way, and the time has come and gone for when we could exclude people from civil institutions on the basis of a subjective classification." Look out for the issue of gender discrimination that is a part of this Prop 8 case. A lot of people don't talk about it, but I think it is important, and it may speak to some of the more conservative members of the court from a legal perspective, that it doesn't have to be about sexual orientation; you can decide the same-sex marriage issue also just based on gender. If that argument appeals to one of the members of the court, you might see that push the court over into a fifty-state solution. I think Justice Thomas is a wild card; we shouldn't put him solidly in the anti-gay marriage category, given his own marital experience of being in an interracial marriage, and having been nineteen years old when *Loving v. Virginia* came down, which struck down antimiscegenation laws. His dissent in the Lawrence case shows that he seems to think it's silly for the states to be preoccupied with treating homosexual couples in a particular way. Whether or not he's willing to use his authority and power as a member of the court to advance the cause of freedom for this particular group of people is still open to debate, but we should watch for that. There's a chance he might be a supporter in the end.

Carpenter: *Thank you for your discussion.* ■

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