AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **SLI Supporters**
Date: **July 2015**
From: **A. Eric Johnston**
Re: **The U.S. Supreme Court Decides the Definition of Marriage**

The long awaited opinion of the U.S. Supreme Court on whether same sex marriage is legal in the United States was handed down on June 26, 2015. The Court held same sex marriage is a protected right under the Constitution, is legal in all states, and every state must give full faith and credit to same sex marriages from other states. The decision was based on the case of *Obergefell v. Hodges* (along with three others). Until now there had been no uniform law on whether same sex marriage is legal in all 50 states.

As expected, Justice Anthony Kennedy wrote the opinion of the Court and was joined by the four liberal Justices, Ginsburg, Breyer, Sotomayor and Kagan. The opinion was based on the finding of an unenumerated (unnamed) fundamental right in the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. A person has a liberty/privacy right to be married and the state could not regulate it by prohibiting the nature of the marriage. Fortunately the Court did not create a broader right or class of protected persons, which could have done more damage to the nation's social fabric.

Kennedy did not review the religious history of marriage. He relied on the evolution of marriage from the mid twentieth century from one man and one woman to recognizing same sex marriage. His view of history was selective, but even then, erroneous. As late as 1986 in the case of *Bowers v. Hardwick,* the U.S. Supreme Court upheld a Texas anti-sodomy law. It was not until 1996 in the case of *Romer v. Evans,* that the Court even suggested same sex persons may have special rights. While finding a constitutional right to marry, the Court did not require usual proof of the long deep rooted history of the claim in order to support its argument for such an unenumerated fundamental right.

Kennedy focused on two cases in support of his opinion. *Loving v. Virginia* held unconstitutional a law that prevented interracial unions and in *Turner v. Safley,* the Court held that prison inmates had a right to marry. As one of the dissenters observed, these did not affect the institution of traditional marriage. In truth, the majority based its opinion on the cases protecting sexual activity beginning with *Griswold v. Connecticut.*[1] In other words, the institution of marriage did not decide the case – one's sexual preference did.

For the two issues presented in these cases, the Court held first: "The Court now holds that same-sex couples may exercise the fundamental right to marry." Second: ". . . The Constitution requires states to recognize same-sex marriage validly performed out of state." The conclusion is that same sex marriage must be recognized by all states.

The four dissenters filed separate opinions. Chief Justice Roberts reprimanded the majority for a shallow, virtually non-existent application of the Due Process and Equal Protection Clauses. He observed ". . . This Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us." He called the finding of the majority irrational. He said it is simply "an act of will, not legal jurisprudence" and "Just who do we think we are?"

In seeking to determine what marriage is, Roberts said, "For all those millennia, across all those civilizations, 'marriage' referred to only one relationship: the union of a man and a woman . . . . The universal definition of marriage as the union of a man and a woman is no historical coincidence."

While Justice Kennedy in his 2013 *Windsor* opinion relied heavily on the right of states to regulate marriage (in order to strike down the Federal Defense of Marriage Act)[2], he did not re-visit it in the majority opinion. Roberts pointed this out saying, "The Constitution itself says nothing about marriage, and the framers thereby entrusted the states with '[t]he whole subject of the domestic relations of husband and wife.'" This omission by Kennedy is a crass and unscholarly method of adjudication.

In dissecting the majority's opinion, Roberts observed the majority committed its greatest error by implementing the dangerous judicial doctrine of "substantive due process." Due process of law normally

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[1] See, SLI Educational Update of May 2015, Sexual Liberties Threat to Religious Freedom.

[2] See, SLI Educational Update of July 2013, U.S. Supreme Court Finds Federal Law Against Same Sex Marriage Unconstitutional.

applies to the procedures taken to be sure someone is not deprived of life, liberty or property without proper legal processes. He noted the Court made its biggest mistake in *Dred Scott v. Samford* (1857), holding a black person was not a citizen within the meaning of the Constitution which holding "was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox . . . ." There was a period of time where the U.S. Supreme Court regularly applied this erroneous judicial doctrine, but in recent years had abandoned it, until now. Roberts said, "The truth is that today's decision rests on nothing more than the majority's own conviction that same-sex couples should be allowed to marry because they want to . . . ." That is the meaning of substance due process. It gives the Court the unrestrained ability to determine what should be done by acting as a super-legislature. Roberts noted the celebration of new same sex benefits but concluded his dissent: "But do not celebrate the Constitution. It had nothing to do with it."

Justice Scalia dissented saying, "I write separately to call attention to this Court's threat to American democracy." He said, "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast is a majority of nine lawyers on the Supreme Court." He discussed that the issue of same sex marriage was the subject of vigorous public debate in recent years. Eleven states, directly or through their representatives, chose to expand the traditional definition of marriage, while many more decided not to. He noted this is "exactly how our system of government is supposed to work."

Scalia reminded the majority that in the *Windsor* decision, it was noted that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states." He said, "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so." Consequently, he wondered why this case was decided by the Court. To reiterate that, he observed, "The five Justices who composed today's majority are entirely comfortable concluding that every state violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts permitting same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of the ratification, and almost everyone else in the time since."

Fallout from the Decision

Obviously, every state must now permit same sex marriage. This means those states, such as Alabama, which have upheld their marriage laws, must now submit under the Supremacy Clause of the U.S. Constitution to this Court opinion. There will be nothing further the State of Alabama, as well as other states, can do to reinstate, resurrect or renew one man one woman marriage. A subsequent U.S. Supreme Court opinion or U. S. Constitutional Amendment are the only remedies.

Chief Justice Roberts observed this case will open the door for other forms of marriage. Polygamy will be the most likely one. The reasoning of this case will fully support the arguments for polygamists. A case has already been filed in Utah. If you think about, polygamy seems more reasonable than sodomy, both naturally and legally.

One of the basis for the majority's opinion was to safeguard children and families and thus extend related rights of childrearing, adoption, *etcetera.*, i.e., the state's "constellation of benefits." This suggests the next step will be the right of same sex partners to adopt children. Naturally, other rights related to the family such as inheritance laws, divorce, child support and custody, and other issues related to the family will need to be changed. For all states, this will mean either rewriting statutes by legislatures or permitting courts to construe them to apply to the new laws.

Alabama probate judges cannot be required to issue same sex marriage licenses. The statute says "may," so there is relief there. But, those same judges can be required to perform same sex adoptions, adjudicate inheritance cases of same sex spouses, and do the other routine duties of the probate courts. Circuit judges will also be required to adjudicate same sex issues, such as, divorce, child custody, spousal rights, *etcetera.*

Religious Freedom[3]

Perhaps, the biggest fear that we have is the net effect on religious freedom. Justice Kennedy stated that "those that adhere to religious doctrines may continue to advocate with utmost, sincere conviction, that by divine precepts, same sex marriage should not be condoned. The First Amendment insures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so essential to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered."

[3] See, SLI Educational Update of April 2014, Religious Liberty in Peril: Obamacare and Gay Rights.

Notwithstanding this comment, Justice Thomas dissented, saying, "The majority's decision threatens the religious liberty our nation has long sought to protect." Also, "In our society, marriage is not simply a governmental institution; it is a religious institution as well . . . Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples." Then, "The majority appears unmoved by that inevitability. It makes only a weak gesture towards religious liberty in a single paragraph . . . even that gesture indicates a misunderstanding of religious liberty in our nation's tradition. Religious liberty is about more than just a protection for 'religious organizations and persons' . . . 'as they seek to teach the principles that are so fulfilling and so central to their lives and faiths. Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.'"

What concerned Justice Thomas is that this constitutional mandate by the Court will have a far more dangerous impact on religious liberty, than legislative efforts might have had. In support of this statement, Justice Thomas explained that in the "hey-day of anti-miscegenation laws . . . Virginia imposed criminal penalties on ministers who performed marriage in violation of those laws, though their religions would have permitted them to perform such ceremonies." In other words, laws that did not permit interracial marriage would have penalized ministers who participated in them, notwithstanding they had the religious freedom to do so.

In 1983, the U.S. Supreme Court in *Bob Jones University v. U.S.*, denied tax-exempt status to Bob Jones University. This was a religious college which had policies against interracial dating. Because the U.S. public policy demanded removal of racial discrimination, this overrode the claimed religious rights of the school. Whether Bob Jones University was right or wrong in its racial policies, the possible precedent exists for government policies to override religious rights and therefore activities.

Churches are not required to seek tax exempt status from the IRS. They are automatically accorded that status by a federal statute. That statute can be changed. Similarly, other religious tax exempt organizations are given tax exempt status by federal statutes. Those can be changed. All of this depends on the views of the federal government.

Both public and private employees must accommodate for religious beliefs under present federal law. If a person works for an employer, public or private, with 15 or more employees and he or she is required to do something which violates a religious belief, the employer can be forced to accommodate that belief. While state employees are protected by this law, judges are not. It will be interesting to see how the EEOC and federal courts apply this law. For details on this contact us, or refer aggrieved persons to us for referrals for legal assistance.

Conclusion

There is an expectation there will be a special session of the Alabama Legislature in August. It is absolutely mandatory the Governor include in his call for the session that the Legislature address the issues that will flow from this Court opinion. It is too early to tell what all may need to be addressed and some things may be held over for the next regular session in 2016. It may be necessary for a commission to be appointed to study the Alabama Code to see what needs to be changed. Governor Bentley has said he is consulting with lawyers on the religious rights issue.

What immediately must be done are state statutes passed to protect private and public employees from being required to participate in providing same sex products or services in violation of their sincerely held religious beliefs. Christian child placing agencies must not be denied licenses for refusing to place children in same sex families. We advocated laws for these purposes in the 2015 regular session, but our pleas were ignored. It is now mandatory that action be taken to protect religious freedom. Relying on the Free Exercise of Religion Clause of the First Amendment and the Alabama Religious Freedom Amendment, individuals' religious freedom must be protected. The gay agenda seeks not only to have same sex marriage, but to require everyone to accept it at every level. These will be some of the most important battles we face. It is a sad day in America for this decision.

What is also sad is that less than two percent of the population has brought this tragedy to reality. Good men and women, and the church, have failed to stand up for proper values. We have abdicated the throne of righteousness. While the church and its people pursue compassion and love, it must also demand righteousness and integrity in the public square.