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

To: **SLI Supporters**
Date: **July 2013**
From: **A. Eric Johnston**
Re: **U.S. Supreme Court Finds Federal Law Against Same Sex Marriage Unconstitutional**

The U.S. Supreme Court decided two cases: a California law which permitted only heterosexual marriage and the Defense of Marriage Act ("DOMA") which forbad same sex benefits under all federal laws. In the former, the Supreme Court did not reach a substantive decision, but indirectly let same sex rights in California stand, while in the latter, directly decimated traditional heterosexual marriage in the United States.

The laws related to homosexual rights have swiftly changed. It was only in 1986 that the Supreme Court decided the case of *Bowers v. Hardwick* stating that there are no fundamental rights for homosexuals to engage in sodomy and discussed at length the importance of family relationships, marriage and procreation, "deeply rooted in this nation's history and tradition." While the court then laughed at the concept that same sex relationships were "implicit in the concept of ordered liberty," it now reverses America's 237 year protection of marriage.

The problem actually began in 2003 when Justice Kennedy wrote the majority five-four opinion in *Lawrence v. Texas,* finding unconstitutional Texas criminal law against sodomy. Using the same rationale of equal protection under the law, Justice Kennedy wrote the opinion in *United States v. Windsor,* finding DOMA unconstitutional.

Hollingsworth v. Perry, involved Proposition 8 which established heterosexual marriage only in California. The California Supreme Court had first determined that same sex marriage was permitted. However, "we the people" of California voted to have only heterosexual marriage. A federal lawsuit found Proposition 8 unconstitutional, thereby permitting same sex marriage. The state refused to appeal, but concerned citizens did. The U.S. Supreme Court declared those citizens did not have "standing," that is, an injury giving them the right to make a claim. The court sent the case back to the trial court where the judgment will stand permitting same sex marriage. This was a complete cop out by the court.

In *United States v. Windsor,* the court went out of its way to find that in fact standing did exist so that it could take that opportunity to strike down DOMA. The parties bringing the appeal were legislators, who had no actual injury. Yet, the court thought the case important enough to decide it anyway.

In both cases, the goal of the court was to legalize same sex marriage. Similarly, in both cases, the elected leadership of California and the Obama Administration failed in their responsibilities to defend laws passed by legitimate legislative processes. As Justice Scalia dissented in *Windsor,* the case is about "we the people." The authority of the people to make decisions concerning the standards by which we live must be respected. We as a people govern ourselves. But, this is not important to the Supreme Court, who determines "what the law is" without regard to any other branch of government, or the will of the people.

The basis for Kennedy's opinion in *Windsor* was that historically states determine marriage rights and Congress passing DOMA interfered with that right. In *Windsor,* the State of New York permitted same sex marriage, but the lesbian partner who died could not pass on a spousal tax benefit. The court determined this to be improper and that New York's same sex marriage laws must be respected. DOMA was an unconstitutional inference with the state's right.

So, where does that leave us when Alabama has a prohibition against same sex marriage in its constitution? The likelihood is that gay activists will be initiating lawsuits in several states claiming the states' laws are unconstitutional and that notwithstanding *Windsor's* reliance on the rights of states for self determination, that under the Equal Protection Clause, just like in *Lawrence v. Texas,* gay rights must be respected and any legislative enactments otherwise will not stand.

If you don't believe me, consider two of Justice Kennedy's statements: "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the state, and it can form 'but one element in a personal bond that is more enduring.'" In recognizing New York's same sex marriage enactment, Kennedy felt that it "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." You will see similar words again, when state laws are struck down in order to avoid, again in the words of Kennedy, deeming "otherwise valid marriages are unworthy" placing "same-sex couples in an unstable position of being in a second-tier marriage," and "humiliates tens of thousands of children who are being raised by same-sex couples."

The court decisions will begin to erode protection of children from homosexual relationships, rewrite many of our domestic relations laws, change insurance company obligations to insureds, and will destabilize the institution of marriage, one of the pillars of our society. The decisions will also give activists the ability to reach through constitutional protections to the church itself. The day may come when condemnation of homosexuals, even from the pulpit, will be prohibited. Our work lies before us.

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