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ILLINOIS STATE BAR ASSOCIATION

HUMAN RIGHTS

The newsletter of the Illinois State Bar Association's Section on Human Rights

A note from the editors

This edition focuses on matters concerning the upcoming arguments before the U.S. Supreme Court on marriage equality. We have presented some of the arguments from both positions.

Since our last edition, the U.S. Department of Justice reports have been issued. Also the voters of Ferguson actually got out and had their voices heard. We also know this will not end the nightmare of race discrimination in Ferguson, St. Louis County, Missouri, or the United States. Denying the problem as "theirs" and not "ours," is closing our eyes to our America.

I wish to thank the authors of this year's newsletter articles. I personally know it is not easy to write a short, readable, professional piece to help inform our readers. Without volunteer writers there is no newsletter, so thank you. ■

—Kathryn Eisenhart and
Robert Heuer, co-editors

From the Chair

By Peter LaSorsa

I want to start by acknowledging that 10 years ago sexual orientation was added to the Illinois Human Rights Act as a protected class. At that time, the opponents claimed it would open the floodgates to an overwhelming amount of litigation, which would hurt business in the state. As an employment attorney who concentrates in discrimination cases, I can tell you that hasn't happened. I don't have any solid numbers, but from my experience the number of discrimination claims based on sexual orientation are in line with other forms of discrimination. That is good for several reasons. First, by protecting another group of people, the good outweighed the alleged harm. Second, the fact that the numbers of cases didn't skyrocket says something about society's view of an individual's sexual orientation. The country and state have come a long way in that regard over the last 10 years, and that is called progress.

Another important issue needs to be addressed in this message from the Chair. The U.S. Justice Department just issued two reports on the mess in Ferguson. The reports were telling. The first report clearly establishes that the entire "Hands Up, Don't Shoot" message was fabricated and done to escalate an already bad situation. Mr. Brown NEVER had his hands in the air surrendering to the police officer who was alleged to have killed Brown in cold blood. The Justice Department report supports the conduct of Officer Wilson. He was justified in shooting and killing Mr. Brown, who had not only assaulted the police officer but tried to take his weapon. Even after having a weapon pointed at him, Brown charged the officer, thus receiving the fatal shots. As a result of doing his job, the officer had to resign and will probably never get a job in any police department in the country. ■

INSIDE

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In support of same-sex marriage or marriage equality

By Deidre Baumann

On April 28, 2015, the United States Supreme Court will hear argument stemming from a Sixth Circuit decision upholding bans on same-sex marriage and marriage recognition in four consolidated cases concerning bans in Kentucky, Michigan, Ohio, and Tennessee. The Court will address the following two questions:

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
2. Does the Fourteen Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

While the Supreme Court did not indicate it was deciding the constitutional standard of review applicable to same-sex marriage cases, in reaching the Fourteenth Amendment issues, the Court may decide whether to apply a rational basis standard or some heightened standard of scrutiny. In *United States v. Windsor*, 133 S.Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law, the Court held the statute invalid "for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage law sought to protect in personhood and dignity." This language arguably signals that the Court may adopt a rational basis test; moreover, it suggests that marriage rights are the sole creation of the States. Yet, the Court in *Windsor* recognized that the choice of whom one marries is a fundamental liberty interest, which would compel a heightened scrutiny. And, that the *Windso*r Court did not feel the need to address a higher standard of review may only mean that it was a relatively easy decision for the Court to invalidate DOMA.

The Court inevitably must conclude that a heightened standard of review is appropriate. Under both due process and equal protection analysis, the answer to both questions before the Court on *certiorari* must be "yes." The right to marry includes the right to marry the person of one's choice. The Tenth Circuit in *Kitchen v. Herbert*, 755 F.3d 1193, 1209-11 (10th Cir. 2014) (holding Utah statutes and state constitutional amendment banning same-sex marriage under the Fourteenth Amendment) primarily based its decision on substantive due process, locating the source of that right in Supreme Court decisions such as *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (recognizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home and bring up children"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (recognizing that "the right to marry is of fundamental importance for all individuals"); and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (in the context of an inmate's right to marry, "[such] marriages are expressions of emotional support and public commitment[,] . . . elements [that] are important and significant aspects of the marital relationship" even in situations in which procreation is not possible). The Tenth Circuit also found that the Utah laws violated equal protection, applying strict scrutiny because the classification impinged on a fundamental right. *Kitchen*, 755 F.3d 1222. The court rejected the state's purported compelling state interests, finding "an insufficient causal connection" between the prohibition on same-sex marriage and the state's "articulated goal," which included a purported interest in fostering biological reproduction, encouraging optimal child rearing, and maintaining gendered parenting styles. *Id*.

Similarly, the Fourth Circuit in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), citing *Loving v. Virginia*, applied strict scrutiny to strike down Virginia's same-sex marriage prohibitions as infringing on a fundamental right. The court rejected each of the state's proffered interests, including maintaining control of the "definition of marriage," adhering to the "tradition of opposite-sex marriage," "protecting the institution of marriage," "encouraging responsible procreation," and "promoting the optimal child-rearing environment." *Id*. at 378. Moreover, the Seventh Circuit in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), grounded its decision striking down an Indiana statute and a Wisconsin state constitutional amendment banning prohibiting same-sex marriage on equal-protection analysis. The court proceeded from the premise that "[d]iscrimination by a state or federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect." *Id*. at 654. The court also found that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id*. at 656. Finally, the Ninth Circuit in *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682 (9th Cir. 2014) found that Idaho's and Nevada's statutes and constitutional amendments prohibiting same-sex marriage violated the Fourteenth Amendment, as classifications based upon sexual orientation are subject to heightened scrutiny.

Each of these cases strongly supports a heightened standard of scrutiny whether based upon due process or equal protection. While the Court in *Windsor* did not address the appropriate standard of review, the Court did not "reaffirm that same-sex marriage is an issue to be left to the voters at the state level," as has been suggested. Rather, the Court reaffirmed the principle that "[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons," that is, as the Court admonished in *Loving v. Virginia*,"states must exercise their authority without trampling constitutional guarantees." *Windsor*, 133 S.Ct. 2691. ■

Can Alabama roll with the rainbow tide?

By Heidi Ramos

After recently seeing the movie *Selma* this author left the theater wanting to believe that was Alabama nearly 50 years ago…not today's Alabama. Then on February 8, 2015, Alabama's Chief Justice, Roy Moore, issued an order directing the state's probate judges to ignore the federal courts' rulings that Alabama's ban on same-sex marriages is unconstitutional and I once again feel the sense of nausea I had leaving *Selma*. Alabama was set to be the 37th state to allow same-sex marriages, but Alabama's state officials did not "go gentle into that good night."[1]

The day after Justice Moore's order, the U.S. Supreme Court—in *Strange v. Searcy*—denied Alabama's motion to stay the district court's injunction. The court's ruling was just the most recent holdings in Alabama cases, *Searcy v. Strange* and *Strawser v. Strange*, challenging the state's constitutional ban on same-sex marriages.

Searcy v. Strange arose after Cari Searcy and Kimberly McKeand were legally married in California and later moved to Alabama. After McKeand gave birth to a child, Searcy attempted to adopt the child, but was denied the right to do so under Alabama law. In *Strawser*, James N. Strawser and John E. Humphrey are a male couple that were seeking to be legally married in Alabama.

The cases came before U.S. District Judge--and George W. Bush appointee—Callie V. Granade. On January 23, 2015, Granade issued her ruling finding that the prohibition on same-sex marriage was unconstitutional, but granting Alabama Attorney General, Luther Strange's, request to put her decision on hold while the state prepared its appeal. When Judge Granade refused to extended the two-week hold, Strange appealed to the 11th Circuit Court of Appeals and ultimately the U.S. Supreme Court. Strange argued that since the Supreme Court has agreed to rule

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on the same-sex marriage question later this year, a hold on going forward with same-sex marriages in Alabama would save the state much confusion.

In response to the Supreme Court's anticipated ruling, Alabama Supreme Court Chief Justice Roy Moore tendered a written order to the state's probate judges instructing them to refuse to issue same-sex marriage licenses. Moore is notorious for his previous removal from the office as Alabama Chief Justice for his failure to abide by a federal court order to remove a monument of the Ten Commandments from the Alabama Judicial Building. In Justice Moore's order he explained that the ruling does not apply to the state's probate judges for the following reasons: the ruling only applied to the Attorney General and not the probate judges; the Attorney General does not have dominion over the probate judges; the Attorney General cannot stand in for all state officials; the opinions of the federal court only have persuasive authority over the state courts but are not binding on them; some judges are going to follow the federal courts ruling while others are not and that will lead to confusion for the state; and the U.S. Supreme Court has not ruled on the constitutionality of Alabama's constitutional amendment or Section 30-1-9 of the Alabama Code. Justice Moore concluded his edict by setting out that Alabama's governor has the authority to enforce all the laws of the state by any legal means available. Moore's mandate came despite Judge Granade issuing a clarification on January 28, 2015, to her previous ruling, in response to statements made to the press that her ruling was only for the benefit of the persons involved in that particular case. The Order Clarifying the Judgment explained if the stay would lapse then "…ALA CONST. ART. I, Sect. 36.03 and ALA. CODE. Sect. 30-1-19 are unconstitutional…"

Dissenting from the High Court's refusal to issue a hold were Justices Thomas and Scalia. Justice Thomas, writing for the dissent, was clear that he believed the court's ruling was disrespectful to the state of Alabama. At one point of the dissent the author set out that:

> Today's decision represents yet another example of this Court's increasingly cavalier attitude toward the States.

The dissent also set forth an argument why the Court should have continued the hold on same-sex marriages in Alabama until the Supreme Court's decision on the issue (due in June). Justice Thomas did concede that the High Court's ruling: "…may well be seen as a signal of the Court's intended resolution of that question."

Same-sex couples attempting to marry on February 9th were met with difficulties in many of the state's 67 counties. Some counties refused to issue licenses to same-sex couples, while others closed their marriage departments altogether. Presumably most of the barriers that arose were in response to the Chief Justice's order…an order that flies in the face of most recent federal courts holdings. The obvious exception to the trend is the Sixth Circuit; and the U.S. Supreme Court has agreed to hear their cases in April. But even before now, the Supreme Court invalidated the Defense of Marriage Act in 2013 and denied review of similar same-sex cases in the Fourth, Seventh, and Tenth Circuits.

On February 12, 2015, U.S. District Court Judge Callie V. Granade ordered that Alabama's probate judges were enjoined from refusing to issue licenses. As of February 13th, all but 20 of the state's 67 counties were issuing marriage licenses to same-sex couples. Some judges explained that their hesitancy only arose out of the confusion of the situation.

I am a proponent of states' rights and was always proud of Illinois for not allowing concealed carry within its borders. But we had to go the way of the other 49 states thanks to the 7th Circuit Court of Appeals 2013 ruling in *Moore v. Madigan*. The federal courts have found that not only owning a gun, but having a concealed gun on your person, is a fundamental right. How much more fundamental is the right to marry the person of your choosing? ■

1. Dylan Thomas

Why the U.S. Supreme Court should rule states, not courts, should determine if same-sex marriage is a right within individual states

By Kathryn E. Eisenhart

Same-sex marriage is not a fundament right under the Constitution nor is it deeply rooted in our nation's history and traditions. The Bill of Rights enumerates those rights our Founding Fathers thought should not be left to popular majorities or government officials, including courts, to determine. In the past, the Supreme Court has ruled that some rights, not listed in the Bill of Rights are still "fundamental." In order to be considered "fundamental," "the right must be deeply rooted in our Nation's history and tradition . . . so they are implicit in the concept of ordered liberty." *Glucksberg*. Same-sex marriage does not fall into either category of fundamental right. The fundamental right to marry is traditionally and historically, in the United States and globally, between a man and a woman. The limitation to heterosexual couples is itself both historical and traditional. In the United States, no other type of marriage was considered possible, for instance polygamy. If a right is not fundamental, then the democratic process is the proper venue to address new social questions.

U.S. v. Windsor reaffirmed that same-sex marriage is an issue to be left to the voters at the state level. "[T]he definition of marriage is the foundation of the state's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and enforcement of marital responsibilities." *Id.* at 2691. The Defense of Marriage Act was an unusual deviation from the tradition of recognizing and accepting the state definition of marriage. Under the analysis in *Windsor* it is a state's choice and that of the state's voters to decide to extend or not to extend marriage to same-sex couples. Such decisions should be respected by both the federal executive, legislative and judicial branches. Just because a state chooses not to extend marriage to same-sex couples does not make it either irrational or based upon hatred. The voters in several states have extended the right to marry to same-sex couples. That is as it should be. We the people determine, not the federal courts. If the U.S. Supreme Court determines that the federal courts have the last word on whether same-sex couples have the right to marry in any given state, then it is overruling the 2013 decision in *Windsor*. It can't be ok for the Court to extend the right, which is not fundamental, in every state, but deny the President and Congress the same authority. ■

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