

Rhode Island Bar Journal

Rhode Island Bar Association Volume 62. Number 2. September/October 2013



**State or Federal Government
Regulation and (De)Criminalization
of Marijuana?**

***United States v. Windsor:*
Another Victory for Gay Rights**

**Cold War Cancer: Texas Instruments
and the Energy Employees
Compensation Program**



11



33

Articles

- 5 Pot or Not: State or Federal Government Regulation and (De)Criminalization of Marijuana?**
Katherine Godin, Esq.
- 13 United States v. Windsor: Another Victory for Gay Rights**
Jerry Elmer, Esq.
- 19 Lunch with Legends: Trailblazers, Trendsetters and Treasures of the Rhode Island Bar**
Matthew R. Plain, Esq. and Elizabeth R. Merritt, Esq.
- 23 Cold War Cancer: Texas Instruments and the Energy Employees Compensation Program**
Jenna Wims Hashway, Esq.

Features

- | | |
|---|---|
| 3 Lessons in Democracy and the Law | 28 Editor's Note |
| 4 Publish and Prosper in the Rhode Island Bar Journal | 33 Defense Counsel of Rhode Island Elects 2013-2014 Officers |
| 11 Free CLE Seminar –
<i>Foreclosure Prevention and Defense for Homeowners and Tenants</i> | 33 Rhode Island Paralegal Association Elects New Officers |
| 15 New Bar List Serve Gaining New Members Daily! Join Today! | 33 Lawyers on the Move |
| 20 Continuing Legal Education | 34 In Memoriam |
| 24 SOLACE – Helping Bar Members in Times of Need | 38 <i>Rhode Island Bar Journal</i> Issues & Articles Available Online |
| 25 Bar's LGBT Committee CLE Seminar – <i>Same Gender Marriage and the Demise of DOMA</i> | 39 Advertiser Index |
| 26 Use OAR Today and Pull Together as a Team! | |

Front Cover
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Lessons in Democracy and the Law



J. Robert Weisberger, Jr. Esq.
President
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Civic knowledge is not passed down through the gene pool, it must be taught.

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Whenever I hear the lyrics to *America the Beautiful* and particularly the last stanza of the second verse, "Thy liberty in law," I am always moved. The very foundation of our form of government is based on the concept of ordered liberty embedded in our Constitution and the Bill of Rights.

As I write this article, Egypt is in unrest. Its President Morsi has just been forced to step down by the military. Egypt is not only one of the most populous countries, it has one of the longest histories of any modern state, going back to the 10th millennium BC. By contrast, the United States is only 237 years old, and yet it has had numerous transitions of presidential power without incident (save the Civil War) including the much debated election that resulted in the United States Supreme Court case of **Bush v. Gore**. Regardless of one's politics, as citizens, we are uplifted by our country's respect for the rule of law, as evidenced by the peaceful transition of power in 2000.

Although the history of democracy can be traced back to ancient Athens in the 6th century BC, no system has so radically changed the world as has our own. Although it is not perfect, there is none better. However, many agree that our democracy is in decline and will continue to decline, if we do not educate our young people in how our system works.

I became passionate about the importance of teaching civics in the classroom several years ago when I heard Richard Dreyfuss, the actor, speak on the subject in Martha's Vineyard. He was beginning a pilot program, hoping to use the island as a test tube. He noted that a citizen's knowledge regarding how our government works is acquired through learning. Dreyfuss lamented that, unfortunately, our system of government is doomed to decay and destruction if we continue to fail to teach the next generation how our government works.

I asked Mr. Dreyfuss to deliver his message during our Bar's annual meeting in June 2009, where he made his case. Many of you heard him speak. Around the same time, I learned about *iCivics*, founded by retired U.S. Supreme Court Justice Sandra Day O'Connor in 2009. She

developed *iCivics* based on her concern over the steady decline of civics education in our schools. Her program consists of a website that provides free interactive games and teaching materials on the subject for all schools. Justice O'Connor noted, "Civic knowledge is not passed down through the gene pool, it must be taught." Her interesting teaching approach is based on the fact that today's children are accustomed to and enjoy technology. Therefore, she chose computers and games as the vehicles for *iCivics*.

In an interview she said:

Games, like civics, are about navigating a system – You learn rules, make choices, and have to engage with the world in which you are playing. Games are engaging for young people. Rather than learning a dry list of facts and figures about what the president does, a student can learn about executive power by being the president in a game, making choices about what policies to support, how to conduct diplomacy, and delegating power of executive agencies. If you said the phrase, 'delegating authority to an executive agency' to a seventh-grader, you can imagine the look you'd get. But when they are doing it in the context of a game, it becomes both real and compelling. (See Q&A: Supreme Court Justice Sandra Day O'Connor/Amplify www.amplify.com, May 10, 2013).

In Rhode Island, we only have grade span requirements for civics. There is no requirement for a civics class. Instead, the implementation of these requirements is on a piecemeal basis, district-by-district or even school-by-school. Individual teachers and administrators are responsible for how civics is taught. Most schools teach basic civics within an American History course in the 8th, 10th and 11th grades. It is broken down as: 8th Grade: American History 1620 – 1890; 10th Grade: American History 1500 – 1940; and 11th Grade: American History 1600 – present day.

So, what other programs and resources are there for teaching civics in Rhode Island? Our

Bar Association sponsors and volunteer members participate in Rhode Island Law Day every May, at which lawyers and judges team up to present lively discussions on the law and how it impacts students, schools, family and friends. For Law Day, in conjunction with the Rhode Island Judiciary and the Rhode Island Law Day Committee, our Bar develops unique classroom lessons focusing on issues including the illegal downloading of music, reasonable expectation of privacy in school, search and seizure on school property, and other topics of particular interest to students. It is wonderful to see how interested and interactive the students are when they are stimulated by relevant subject matter. Our Bar also offers lessons in the law and volunteer lawyers to schools during the year through our Lawyers in the Classroom program and to adults at non-profit organizations through our Speaker's Bureau.

In the last few years, I learned about an exciting civics education program, Generation Citizen. Founded in Providence, Rhode Island in 2008 by two Brown University students, Generation Citizen expanded dramatically beyond our borders into other states. Google it and see. It is doing wonderful work with our students. It has a very different, but effective, approach. Beginning with the premise that our democracy is at risk, but our young people can help save it if we

teach them how to participate, Generation Citizen argues that traditional civics is ineffective, because it is routine and boring. Their answer is to have the students first identify and then address existing, real world, local problems they have to solve as a group, providing more meaningful civics lessons through direct student participation.

I worked with some Providence high school students on such a project. At first, I could not understand how this approach could teach civics, but I then saw the genius behind the method. Addressing a much-needed cross-walk safety project on a road in front of their school, the students had to analyze the process to achieve the implementation of their goal. Was their road federal, state or municipal? What was the proper governmental authority to approach? Should they contact someone in the legislature or on the city council? What is their argument for the societal benefit to a cross walk with a speed bump? Involving discussion, research, trial and error, the project lasted an entire year, and, at the end, the students accomplished their goal. The project clearly stimulated their participation in government and the desire to learn more.

I suggest that we all consider the need for a better, more active civics education in this country starting in our own backyard. Your thoughts? ♦

RHODE ISLAND BAR JOURNAL

Editorial Statement

The Rhode Island Bar Journal is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We issue to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials represent the views of at least two-thirds of the Editorial Board, and they are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the Journal's editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation.
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

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Aspiring authors and pre-vious contributors are encouraged to **contact the *Rhode Island Bar Journal's* Editor Frederick Massie by telephone: (401) 421-5740 or email: fmassie@ribar.com.**

Pot or Not: State or Federal Government Regulation and (De)Criminalization of Marijuana?



Katherine Godin, Esq.

Katherine Godin, Inc.,
Warwick, RI

The federal government is undoubtedly allotted the ultimate say over the criminalization and regulation of marijuana. But now that public opinion and a growing number of states are at odds with federal law and policy regarding marijuana, can anything be done to resolve the tension?

With two states recently granting their citizens the right to use marijuana for recreational purposes,¹ at least sixteen states (and the District of Columbia) recognizing the right to use medical marijuana,² approximately 73% of Americans in favor of medical marijuana, and, according to one national poll, 56% of likely voters in the United States in 2012 favoring the legalization and regulation of marijuana for any use,³ will the United States government ever give up its power to prosecute anyone in possession of marijuana?

This brief overview: reviews the tension between the federal government and individual states regarding the use, cultivation and distribution of marijuana; addresses some of the pros and cons cited for decriminalization of marijuana; and offers some possible resolutions to this increasingly divisive issue.

Who has the final say?

Under the Tenth Amendment of the United States Constitution, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁴ The question of whether the federal government or individual states have the authority to regulate a particular issue is often a bone of contention. While there are many areas where both governments can assert concurrent authority, there is often a question regarding which authority has the ultimate say, especially when the two entities’ regulations conflict.

Tenth Amendment case law addressing this tension has covered such varying topics as: minimum wage and overtime standards for state employees;⁵ recognition of same-sex marriages by various governmental agencies;⁶ and reimbursement requirements for undocumented immigrants.⁷

One of the most frequently cited sources of the federal government’s power to regulate and criminalize behavior is under the Commerce Clause, found in article I, section 8 of the United States Constitution.⁸ Under the Commerce Clause, “Congress is empowered to regulate and protect the instrumentalities of interstate

commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”⁹

The United States government has used its authority under the Commerce Clause to regulate and criminalize drug use under the Controlled Substances Act¹⁰ (CSA). Since 1970, the CSA has divided controlled substances into five “schedules” of drugs, Schedules I, II, III, IV and V, with each schedule representing a different level of usefulness and/or dangerousness of each drug.¹¹ For example, a Schedule I drug is a drug that has a “high potential for abuse,” has “no currently accepted medical use in treatment in the United States,” and is unsafe to use under medical supervision.¹² In contrast, a Schedule V drug is one that has “a low potential for abuse” compared to the higher scheduled drugs, has “a currently accepted medical use in treatment in the United States,” and, if abused, will only lead to “limited physical dependence or psychological dependence” compared to the higher scheduled drugs.¹³

Since 1970, marijuana is classified as a Schedule I drug under the CSA, the same as ecstasy, LSD and heroin.¹⁴ Therefore, the federal government views marijuana as having a high potential for abuse, no accepted medical use, and finds it unsafe to use, even under medical supervision.

This idea of marijuana’s supposed dangerousness can be found in federal law since the 1930s, most dramatically pronounced in testimony before the House Ways and Means Committee on the proposed Marihuana Tax Act of 1937.¹⁵ During the hearing, Harry J. Anslinger, the country’s first drug czar, claimed that while opium “has all the good of Dr. Jekyll and all the evil of Mr. Hyde,” marijuana “is entirely the monster Hyde, the harmful effect of which cannot be measured.”¹⁶ He cited marijuana as the cause of seven men committing a string of thirty-eight robberies; another man robbing a hotel clerk before killing him; two men killing a policeman; a fifteen-year-old going insane from the drug; and an ax murderer allegedly killing his mother, father, three siblings and wounding a dog after smoking marijuana.¹⁷

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While recent arguments against marijuana have certainly been based upon more sound and concrete rationale than the histrionics used by Anslinger in the 1930s, even recent anti-marijuana arguments are in stark contrast with the ever-increasing amount of research demonstrating the positive effects of marijuana for those with ailing medical conditions and its minimal negative effects on the average user.¹⁸ Some scientifically established benefits include: 1) reducing nausea, vomiting and pain, and improving appetite and sleep in cancer patients undergoing chemotherapy; 2) treating and preventing glaucoma; 3) preventing epileptic seizures; 4) preventing cancer cells from spreading; 5) reducing anxiety (when used in small doses); 6) slowing the progression of Alzheimer's; 7) easing the pain felt from muscle contractions in MS patients; 8) relieving the painful side-effects from Hepatitis-C treatment; 9) helping treat Crohn's disease and ulcerative colitis; and 10) relieving arthritis pain.¹⁹

While medical marijuana advocates worked for decades to change the federal government's policy towards marijuana, states have taken the matter into their own hands. Although most states still criminalize recreational marijuana use and distribution, an increasing number of states have been legalizing medical marijuana use and cultivation since the mid-1990s.

For example, in 1996, California voters passed the state's Compassionate Use Act, which allowed "seriously ill" residents to possess and use marijuana for medical purposes.²⁰ It also allowed for primary caregivers (those who grow marijuana and provide it to patients unable to cultivate the marijuana themselves) exemption from criminal prosecution for possession and distribution of marijuana for medical purposes.²¹

Unfortunately, state medical marijuana laws such as California's have not stopped the federal government from arresting and prosecuting medical marijuana patients and caregivers. In 2002, the federal Drug Enforcement Administration (DEA), along with local law enforcement, raided the home of Diane Monson, a California resident and valid medical marijuana patient.²² While local law enforcement concluded that Ms. Monson was in compliance with state law, the DEA seized and destroyed all of her medicine.²³

Ms. Monson and another patient,

Angel Raich, filed for injunctive relief and declaratory judgment in United States District Court against the federal government to prohibit the government from arresting and/or prosecuting them for possession of a controlled substance (i.e., marijuana).²⁴ They argued that the United States should not be able to criminalize their medical marijuana possession or cultivation under the Commerce Clause because their activity did not affect interstate commerce.²⁵

The Court rejected the plaintiffs' arguments, finding that Congress had the authority to criminalize medical marijuana, even if the individual is cultivating the plant entirely for home consumption. The **Raich** Court did so without determining whether individual medical marijuana growers substantially affect interstate commerce. Instead, it upheld Congress' authority by determining that there was a "rational basis" for the regulation.²⁶

Is the Federal government's stance on medical marijuana cost-effective?

Since 1970, the United States has spent approximately \$1 trillion and arrested approximately 17 million marijuana users in President Nixon's declared "War on Drugs."²⁷ In recent years, the federal government has reconsidered the priority previously given to prosecuting marijuana offenses. In fact, in October 2009, Attorney General Eric Holder, through Deputy Attorney General David W. Ogden, sent a memorandum (the Ogden memo) to United States Attorneys in states that had enacted medical marijuana laws.²⁸ The Ogden memo notes that while marijuana is still viewed by the federal government as a "dangerous drug," the Department of Justice is "committed to making efficient and rational use of its limited investigative and prosecutorial resources."²⁹ Therefore, Ogden concludes, United States Attorneys should still prioritize prosecuting significant drug traffickers, while lowering their priorities on prosecuting "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."³⁰

Despite the 2009 Ogden memo, as well as the continuing number of states approving medical marijuana use and cultivation, the federal government has made it clear it will not tolerate even well-regulated medical marijuana programs.

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two most liberal states on medical marijuana use thus far, have been targeted especially hard by federal law enforcement.³¹ In January 2012, the federal government sent letters to almost two-dozen medical marijuana businesses in Colorado giving them forty-five days to shut down or be criminally charged.³² This was done, despite the fact that Colorado's medical marijuana program is known to be the most highly regulated in the country.³³

What is Rhode Island's stance on marijuana?

As of April 1, 2013, possession of an ounce (28 grams) or less of marijuana is a fine-only offense in Rhode Island,³⁴ making our state one of over a dozen to recently decriminalize possession of small amounts of the substance.³⁵ This is in addition to our already-existing medical marijuana law, which first went into effect in January of 2006.³⁶

Since 2006, our medical marijuana law has experienced some bumps in the road, especially with regard to the establishment of marijuana dispensaries. For several years, those who applied for approval from the Rhode Island Health Department were denied. In September 2011, the Health Department approved three dispensaries, but Governor Chafee refused to issue the licenses, citing a concern that the federal government would prosecute owners and employees of the dispensaries.³⁷

Last winter, the Governor endorsed bills introduced in the General Assembly to scale back the size of the dispensaries, promising to license the dispensaries under the amended law.³⁸ The amendment did pass, going into effect on June 14, 2012,³⁹ and the dispensaries are projected to open this year.⁴⁰

While the Governor ended up changing his stance, the United States Attorney's Office for the District of Rhode Island issued a statement on March 5, 2012, noting that the Department of Justice's policies regarding the prosecution of those cultivating and/or distributing marijuana, even for medical use, had not changed since the announcement of the state's proposed legislation.⁴¹ Therefore, the federal government may still prosecute anyone involved with the dispensaries once they open.

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What is the solution?

The federal government is undoubtedly allotted the ultimate say over the criminalization and regulation of marijuana. But now that public opinion and a growing number of states are at odds with federal law and policy regarding marijuana, can anything be done to resolve the tension?

In October 2012, a number of those in favor of medical marijuana argued in front of the United States Court of Appeals in the District of Columbia, asking that the Court order the DEA to at least reconsider rescheduling marijuana under the CSA.⁴² The case was prompted after the DEA once again rejected a petition (filed ten years ago) to consider changing marijuana from its current Schedule I designation.⁴³ Certainly, a reclassification of the drug to a lower schedule under the CSA would loosen the federal government's regulations. But would that be enough?

Perhaps if more states continue to decriminalize and regulate marijuana in a safe, controlled manner, and more research is able to document the *real* risks and benefits from using the drug, then the federal government will feel less need to combat its presence in the United States.

Another policy change from the United States Attorney General could help reduce the amount of federal funds used to combat legitimate medical marijuana users and cultivators. However, as we have seen from the Obama Administration's actions following the release of the Ogden memo in 2009, a policy change is no guarantee. Indeed, since the memo was issued, the Obama Administration has instituted a crackdown on marijuana dispensaries that far exceeds anything done under the Bush Administration.⁴⁴ So what was the point of the memo?

What is a more concrete, yet perhaps less likely solution is to change federal law regarding marijuana. Until that happens, citizens in states that decriminalize marijuana for any purpose will remain in a haze as to whether they will be arrested and prosecuted for possessing, manufacturing or distributing the Schedule I narcotic.

ENDNOTES

¹ Laura L. Myers, Marijuana goes legal in Washington state amid mixed messages, *REUTERS*, December 6, 2012, available at <http://www.reuters.com/article/2012/12/06/us-usa-marijuana-washington-idUSBRE8B506L20121206>.

continued on page 29



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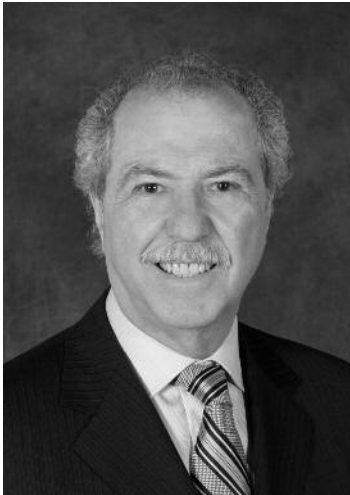
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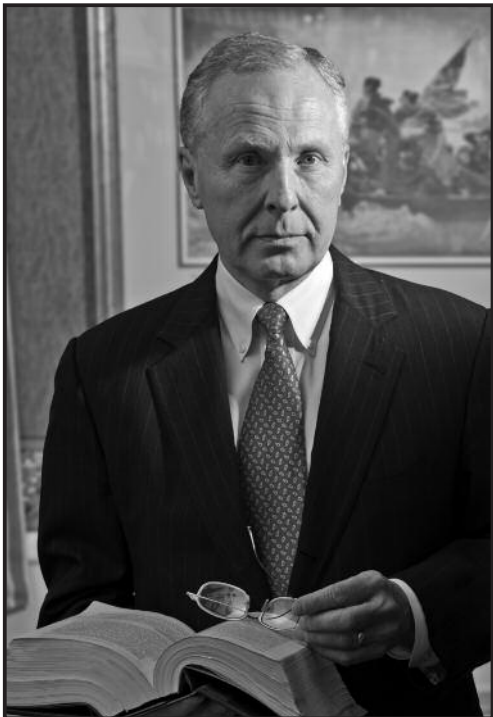
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United States v. Windsor: Another Victory for Gay Rights



Jerry Elmer, Esq.
Conservation Law Foundation

Two cases with virtually identical facts, asserting identical constitutional challenges to two laws that harm lesbian and gay people with opposite results from the same Court on the same day!

On June 26, 2013, the U. S. Supreme Court handed down two opinions pertaining to same-gender marriages. In **Hollingsworth v. Perry**, No. 12-144, the Court considered a challenge to the constitutionality of California's Proposition 8, which had overturned a state Supreme Court ruling legalizing same-gender marriages. The Supreme Court found the challenge non-justiciable. In **United States v. Windsor**, No. 12-307, the Court struck down the federal Defense of Marriage Act (DOMA).

This article proceeds in three parts. Part I considers the Court's inconsistent approach to issues of justiciability in the two cases. Part II considers the basis of the Court's ruling on the merits in **Windsor**. Part III looks at Justice Scalia's dissent and the possible implications for future gay rights litigation.

Part I: Justiciability and Standing

The Court's two opinions, taken together, are incoherent on the question of standing. This is precisely the type of incoherence that drives Critical Legal Studies (CLS) scholars wild. The CLS movement loves to argue that cases and precedents "are bereft of any set of determinate legal principles, giving judges a huge amount of discretion 'to ignore constitutional provisions, statutes, precedents, evidence, and...legal arguments' to come to whatever outcome they desire."¹

In **Hollingsworth**, the Supreme Court ruled that neither it nor the Ninth Circuit Court of Appeals had Article III jurisdiction, because there was no case or controversy.² Respondents in the high court, plaintiffs in the District Court, were "two same-sex couples who wish to marry [and had] filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment..."³ Plaintiffs won in the District Court⁴ and the California elected officials who had been named as nominal defendants – the Governor and Attorney General – declined to appeal. The proponents of Article 8 sought to intervene to defend the constitutionality of their ballot initiative. The Ninth Circuit, sensing trouble, certified a question to the Supreme Court of

California about the matter of standing. The certified question was specifically whether Proposition 8 proponents have standing to litigate the validity of Proposition 8 *under the California Constitution* or "otherwise under California law" a question on which the California Supreme Court has final say.

The California Supreme Court ruled unanimously that the Proposition 8 proponents do have standing under California law to prosecute precisely the appeal that they were prosecuting.⁵ That was good enough for the Ninth Circuit, as it should have been.

But, it was not good enough for the U.S. Supreme Court. Taking a narrow, crabbed, view of standing, the majority held that the Proposition 8 proponents lacked standing. Thus, there was no case or controversy, and no Article III jurisdiction.

The short of it was that, in **Hollingsworth**, the gay-rights advocates who had filed the lawsuit could not appeal the favorable District Court ruling because they had won in the District Court. Thus, they were no longer aggrieved.

In **Windsor**, the Supreme Court came to the opposite conclusion on a substantially identical set of facts. In **Windsor**, exactly as in **Hollingsworth**, the Respondent in the High Court, the plaintiff in the District Court, was in a same-sex marriage. In **Windsor**, exactly as in **Hollingsworth**, the plaintiff was disadvantaged by a law that discriminated against lesbian and gay people. In **Windsor**, exactly as in **Hollingsworth**, the plaintiff filed suit in federal court challenging the offending law under the Due Process and Equal Protection clauses of the Fourteenth Amendment. In **Windsor**, exactly as in **Hollingsworth**, the plaintiff won in the District Court,⁶ and the nominal defendant – the Federal Government – was pleased with and fully supported the outcome.

Nevertheless, in **Windsor**, the Supreme Court came to the opposite conclusion as it had in **Hollingsworth**. In **Windsor**, the Court found a live controversy and, therefore, jurisdiction.

How did the Court rationalize away its result in **Windsor**? First, by arguing that there are "prudential" concerns (translation: there may



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not be jurisdiction, but we want to do this anyway): "Were this Court to hold that prudential rules require it to dismiss the case...extensive litigation would ensue. The district courts in 94 districts... would be without precedential guidance.... in cases involving the whole of DOMA's sweep..."⁷

Of course, exactly the same was true in **Hollingsworth**. The Court's failure to rule in **Hollingsworth** means that the district courts in 94 districts are without precedential guidance in cases that seek to undo statewide voter bans on same-gender marriage (or other discriminatory statutes) based on the due process and equal protection clauses of the Fourteenth Amendment.

Second, the Supreme Court rationalized away its result in **Windsor** by saying that "the attorneys for BLAG [the Bipartisan Legal Advisory Group, a group of Congressmen that had intervened to support DOMA] present a substantial argument for the constitutionality of...DOMA. BLAG's sharp adversarial presentation of the issues satisfied [our] concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree."⁸

Exactly the same was true in **Hollingsworth**. The proponents of Proposition 8 presented substantial arguments for the constitutionality of the measure; and they made a sharp adversarial presentation. And, into the bargain, the California Supreme Court had held that, under California state law, those proponents had standing to make that sharp adversarial presentation to the Court.

Two cases with virtually identical facts, asserting identical constitutional challenges to two laws that harm lesbian and gay people with opposite results from the same Court on the same day! No one need wonder why the Critical Legal Studies scholars argue that the law is incoherent.

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Part II: The Basis of the Ruling in Windsor

Windsor was primarily about equal protection and equal rights. Yet the Court's opinion was not based on equal protection jurisprudence.

Broadly speaking, the Supreme Court's equal-protection jurisprudence involves a basic bifurcation. Laws that do not implicate a suspect class (such as race) or a fundamental liberty interest (such as marriage) are reviewed very deferentially.

They must only demonstrate a rational relationship to a legitimate government interest. Under such a deferential test, virtually any statute can be upheld.⁹ Cases that do implicate a suspect class or fundamental liberty interest are subject to heightened scrutiny. In fact, so-called heightened scrutiny is often just a euphemism for impermissible, as Professor Gerald Gunther noted in a 1972 law review article in which he referred to “scrutiny that [is] ‘strict’ in theory [but] fatal in fact...”¹⁰ For years, virtually any law subjected to strict scrutiny was struck down. In *Windsor*, all the briefs (on both sides) recognized (correctly) that the case was about equal protection.

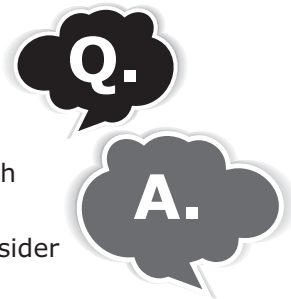
Writing for the United States, Solicitor General Donald B. Verrilli, Jr., summed up his argument this way: “Section 3 of DOMA violates the fundamental constitutional guarantee of equal protection.”¹¹ The United States argued that the Court should apply heightened scrutiny to DOMA. Verrilli’s brief then walked through each of the four major indicia that the Court has used to determine when heightened scrutiny applies. “First, gay and lesbian people have been subject to a significant history of discrimination in this country.... Second, sexual orientation, unlike disability or age, generally bears no relation to ability to participate in or contribute to society.... Third, discrimination against gay and lesbian people is based on immutable or distinguishing characteristic.... Fourth, gay and lesbian people are a minority group with limited political power.”¹² The United States only erred later in its brief when it stated, incorrectly, that if the Court applied the rational relationship test DOMA would survive.¹³

Edith Windsor did not make that latter mistake. Her brief recognized the basic bifurcation of equal protection taxonomy, and argued that DOMA fails under either standard: “The federal government’s decision to treat [same-gender couples] differently, based solely on their sexual orientation, triggers, and fails, heightened scrutiny. But even under rationality review, DOMA is unconstitutional.”¹⁴

The other side also recognized correctly what the case was about. In support of DOMA, BLAG stated: “In considering DOMA’s constitutionality, the Court should apply rational basis review as it previously has done when considering classifications on the basis of sexual ori-

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entation.”¹⁵ Perhaps BLAG’s strongest argument was when it urged that the Court should not now create “the first new suspect or quasi-suspect class in forty years.”¹⁶

So, Edith Windsor understood that this case was about equal protection. The United States understood that the case was about equal protection. Even BLAG understood that the case was about equal protection. But the Supreme Court apparently did not. In point of fact, although the Supreme Court ruled clearly that DOMA is unconstitutional, no matter how often one reads the opinion, the Court’s reasoning is, at best, vague and unclear.

Justice Kennedy’s opinion for the Court did not acknowledge the basic taxonomy of equal protection cases and jurisprudence. It did not tell us where governmental classifications based on sexual orientation fit into that taxonomy. It cited, in passing, a couple of equal protection cases,¹⁷ but nowhere does Justice Kennedy’s opinion state that the decision is grounded, however vaguely, in equal protection jurisprudence.

Likewise, Justice Kennedy’s opinion cites a couple of substantive due process cases,¹⁸ but nowhere does the opinion state that the decision is grounded, however vaguely, in substantive due process. In his (scathing) dissent, Justice Scalia put the matter piquantly, but not unfairly: “The majority never utters the dread words ‘substantive due process,’ perhaps sensing the disrepute into which that doctrine has fallen, but that is what [its] statements mean.”¹⁹

In fact, the closest the majority decision comes to stating a doctrinal basis for its ruling is federalism: “By history and tradition the definition and regulation of marriage...has been treated as being within the authority and realm of the separate States.”²⁰ Justice Kennedy supported this proposition by citing the fact that “[m]arriage laws vary in some respect from State to State.”²¹ For instance, the minimum age to marry is 16 in Vermont, but only 13 in neighboring New Hampshire. Most states prohibit first cousins from marrying, but Iowa does not.²² The short of it is that *Windsor* was decided not on equal protection grounds, but on the grounds that states have the right to define who may marry.

The obvious problem with this is that, by saying that every state has the right to decide who may (and who may not)

marry, the Court left the door open for states to prohibit marriage equality as, in fact, 30 states do today. Chief Justice John Roberts, who is no fool, not only recognized this obvious fact, but jumped all over it, emphasizing the point in his dissent. "It is undeniable that [the Court's] judgment is based on federalism[.]"²³ Roberts said; the Court has found no cognizable equal protection violation. Indeed, Roberts gloats, "the majority goes out of its way to make this explicit..."²³

Sadly, Roberts is completely correct. To the extent that the Court's opinion in **Windsor** has a doctrinal basis, it is federalism, not equal protection. There is little in the decision that will help with future litigation seeking to overturn state bans on marriage equality.

I am aware of the counter-argument to my position. What is important here is not *how* the Court reached its conclusion. It is the real-world result. DOMA was struck down. Remember that, in **Katzenbach v. McClung**,²⁴ the Civil Rights Act of 1964 was upheld based on the commerce clause, not equal protection, but the real-world result was what mattered. The Civil Rights Act of 1964 remained on the books and was not struck down. (In **Katzenbach**, Justice Goldberg filed a wonderful concurrence that said, in effect, "Hey, guys, the Civil Rights Act is about equal rights, not commerce."²⁵) Remember that, in **National Federation of Independent Business v. Sebelius**,²⁶ the Affordable Care Act (a.k.a. Obamacare) was upheld based on the power to tax, not based on the commerce clause, but the real-world result is what mattered. The Affordable Care Act remained on the books and was not struck down.

The Affordable Care Act decision, however, is instructive. The Court mustered a five-justice majority to uphold the Act by means of the four liberal justices, Ginsburg, Breyer, Sotomayor, and Kagan, voting correctly that the statute is constitutional under the commerce clause because there is a national market pertaining to medical care and pharmaceuticals. They were joined by Roberts, who said that the commerce clause does *not* apply, but that the statute could be upheld based on Congress's power, under Article I, Section 8, clause 1, to "lay and collect taxes": "The Affordable Care Act's

continued on page 32

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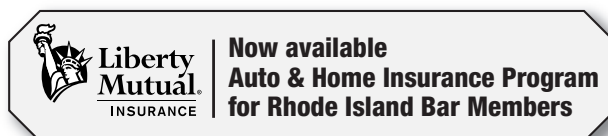
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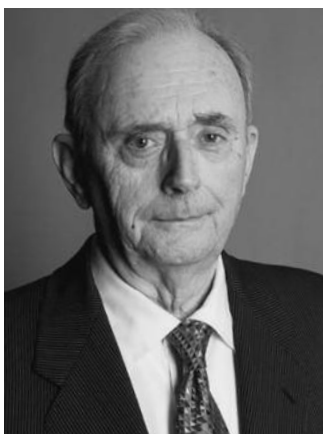
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Vincent J. Chisholm was born in Providence in June of 1929, just a few months before the stock market crash and the commencement of the Great Depression. Though he was invited to leave LaSalle Academy during his sophomore year, and spent only one subsequent year at Mt. Pleasant High School, industrious, then seventeen-year-old Chisholm joined the Air Force in 1946. After serving in Alaska and the Aleutian Islands, he returned to Rhode Island to attend the University of Rhode Island, where he began studying accounting. After two years, he left URI to pursue a law degree from Boston University. He graduated from BU in 1954, “broke but [with-out]...any bills[,]” completed a six-month clerkship with the East Side firm, Zietz & Sonkin, and gained admission to the Rhode Island Bar the same year. He practiced with notables like Eddie Friedman, Congressman Fernand St. Germain, and Leonard Decof, and recounts John Keenan, Joe Kelly, and John Dolan as erstwhile, skilled opponents. He currently serves of counsel at Chisholm Chisholm & Kilpatrick, where he practices with his son, Robert. He received one of the Rhode Island Bar Association’s most prestigious honors, the Ralph P. Semonoff Award for Professionalism in 2008. In support of his nomination for this accolade, a fellow lawyer wrote: “He achieved extraordinary results in these very difficult cases, due, in large part, to his considerable legal skills, his high level of preparation, his perseverance and, perhaps most significantly, his charm and integrity.” Excerpts from our conversation with this 59-year bar veteran follow.

What skills or qualities of yours would you attribute to your success and long-standing career as an attorney? When I first started practicing with Eddie Friedman, he was a big, tall handsome fellow with a bellowing voice, so I started to behave in the same fashion. But I soon realized that was not the right way to go. When I calmed down, I did much better. So I try to be patient, and I try to look at the clients attentively, without any distraction, and I think that helps. When they see you’re looking right at them, not thinking of anything else but them, that counts a lot.

What is the best advice that you’ve ever received? Judge Conlon, who used to be in the Supreme Court, told me one day, “You want to be a successful lawyer?” I said, “Sure.” He says,

“If you get a good case, try it, don’t settle it.” I don’t entirely agree with that, but it can help.



Vincent J. Chisholm

What has been one of the biggest challenges or obstacles over the course of your legal career?

What was kind of difficult for me was doing a lot of medical research, but I had some help. We didn’t have any medical school in Rhode Island, and Brown didn’t have their science building over there. As a result, I’d go up to Boston to the Harvard Medical School and study up there. And it paid off. It was a lot of work, but I found medical malpractice exciting, but very, very difficult. What helped me in addition was my wife was a registered nurse, and, in that capacity, she also did some medical research for grants and stuff like that. That helped me a great deal. But I think that was the toughest thing, to analyze these cases to see what they had and what they didn’t have.

What challenges do you foresee for newer members of the Bar? Apart from the overwhelming expense of becoming a lawyer?

It seems to me at the present time the prospects are not that promising. I expect when we get over this recession and business picks up more, it will be better.

What advice would you give to newer members of the Bar?

Number one, behave. Dress well, it’s important. And instead of standing around, if you don’t have a client with you, go in the courtroom and listen to what the judges are saying, whatever the issue may be. You never know how much you can learn just by keeping your ears open and paying attention. Also, if you give your client your absolute, undivided attention, they have confidence that you’re really interested in doing the right job. And, obviously, be courteous with them.

Would you do it all again? Overall, I have and had a pretty good life.

Attorney Chisholm has both a good life and a distinguished career. His work ethic and attentiveness to his clients are things that we should all strive to emulate.

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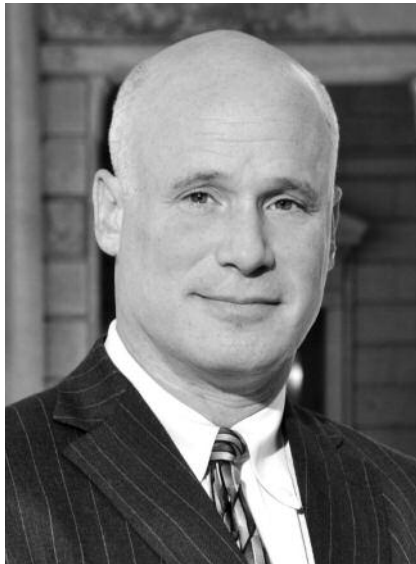
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Cold War Cancer: Texas Instruments and the Energy Employees Compensation Program



Jenna Wims Hashway, Esq.
Judicial Law Clerk to Chief
Justice Paul A. Suttell,
Rhode Island Supreme Court

*From 1952
through 1965,
Metals & Controls
Corp and its
successor, Texas
Instruments in
Attleboro,
Massachusetts pro-
duced enriched
uranium fuel ele-
ments under gov-
ernment contract
for the Air Force,
the U.S. Naval
Reactors Program,
and others...*

Like many other veterans of World War II, Lou Wims returned to his home in Rhode Island determined to get a good job, start a family and enjoy the benefits of life in peacetime. In 1946, Metals & Controls Corp. (M&C), a manufacturing firm in Attleboro, MA, offered the opportunity for Lou to leave textile mill work behind and become a part of a new growth industry. Metals & Controls fabricated clad metal products for use in the electrical and jewelry industries.¹ M&C also produced nuclear fuel elements and components for the U.S. Navy and other customers.²

After the first atomic bomb was detonated over Hiroshima, ushering in the nuclear age, the defense industry, and its contractors such as M&C, expanded to include nuclear technology. A technology that, while still in its infancy, would dominate world politics and play a key role in the new kind of war looming over the horizon, the Cold War. Lou, and thousands like him, left one war behind, only to fight the homefront battle of supplying nuclear elements to fuel the arms race. Decades would pass before the casualties of this effort were appreciated or counted.

Lou Wims worked at M&C until it was acquired by Texas Instruments (TI) in 1959.³ He was thereafter employed by Texas Instruments until his retirement in 1985, trading in his blue collar for a white one as he rose from a plumber's helper to the plant and facilities manager, responsible for the entire Attleboro facility.

In its heyday, the Attleboro operation spanned twenty-three buildings and employed as many as 6,000 people.⁴ TI employees worked and played together in softball leagues, baseball leagues, golf tournaments and outings, all of which were covered by *The Attlegram*, the company's weekly newspaper. Annual Kiddies Day events were held with carnival rides on the company grounds or, in later years, at Rocky Point or Lincoln Park. For many, working at TI was a family affair, with husbands, wives, brothers and sisters all employed at the Attleboro site.⁵ Lou's wife, Ella, worked for a short time at M&C (where he coached her softball team), and three of their five children worked at TI for

varying lengths of time.

Although later known for its production of electronic calculators, from 1952 to 1981 TI conducted uranium operations on the Attleboro site.⁶ Initially, M&C fabricated enriched uranium foils. From 1952 through 1965, M&C and its successor, TI, produced enriched uranium fuel elements under government contract for the Air Force, the U.S. Naval Reactors Program, and others, including some commercial customers.⁷ From 1965 through 1981, TI fabricated fuel for the High Flux Isotope Reactor at Oak Ridge National Laboratory and other government-owned reactors.⁸ In fact, the Attleboro facility was "the first non-governmental facility allowed to fabricate fuel for nuclear reactors."⁹ Most waste material from these projects, including scrap metal, was processed onsite and then shipped to U.S. government sites for disposal.¹⁰ However, some contaminated materials were burned at the Attleboro facility and some were buried on site.¹¹ TI may also have dumped some contaminated materials at a private landfill on the Attleboro-Norton line. In November, 2012, TI entered a consent agreement, paying \$15 million dollars to the U.S. Army Corps. of Engineers to settle a lawsuit claiming that TI disposed of radioactive uranium at that landfill.¹² Remediation of radioactive contamination at TI's Attleboro site began in 1981 and was not completed until 1997.¹³

Lou was diagnosed with lung cancer in 1997 and died eleven months later. TI sold off the last remaining portion of what was once one of the region's "biggest and best-known manufacturing operations" in 2006.¹⁴ Left behind in Attleboro and nearby communities were many retirees and former employees, with a number developing cancer of one type or another.¹⁵

Word spread slowly among former co-workers that there was a federal program to compensate TI employees with cancer, the Energy Employees Occupational Illness Compensation Program (EEOICP).¹⁶ Although the program had been in effect since 2001, with \$26.2 million in compensation relating to the Attleboro site paid as of January 2013, only a small percentage of those eligible were even aware of the program.¹⁷

Although TI stated that it was cooperating with government officials, a TI executive admitted that “very few former employees use the resources we have provided.”¹⁸ That changed on February 6, 2013 when U.S. Rep. Joseph Kennedy III learned about reports of higher cancer rates among former TI employees and the relative lack of communication regarding the availability of the compensation program.¹⁹ Kennedy questioned TI CEO Richard Templeton during a hearing on Capitol Hill, and elicited his agreement to re-examine the communication effort to see “if there’s more that could be done.”²⁰

On February 19, 2013, almost fifteen years after he died, a letter addressed to Lou Wims arrived at his home in Pawtucket (still occupied by a family member) informing him: “Our records indicate that you worked for Metals and Controls Corp, and/or Texas Instruments Incorporated in Attleboro, Massachusetts between 1952 and 1967. It is possible that you may be eligible for benefits pursuant to the Energy Employees Occupational Illness Compensation Program Act.”²¹ The letter provided a toll-free number and a website address for the Department

of Labor’s New York Resource Center designated to handle all of the claims related to the Attleboro property.²²

Lou Wims was my father, and prior to the arrival of this letter, I had no idea that TI was an “an atomic weapons employer,”²³ that the site was contaminated for decades, or that my dad’s cancer might have been caused by exposure to radiation. Although I was familiar with the use of compensation funds as an alternative to the tort system, I had never heard of the EEOICP. I wasn’t alone.

That week, letters arrived at the homes of at least 2,200 former TI employees.²⁴ When I spoke with the New York Resource Center later that week, I learned their phone had been ringing off the hook. Although the claim forms are relatively simple, it is inevitable that, as word spreads, more former TI employees will turn to attorneys for assistance. This article provides a brief overview of the program and a guide to attorneys who undertake to assist claimants.

The Energy Employee Occupational Illness Compensation Program Act

In 2000, Congress passed the EEIOC-

PA, finding that

“Since the inception of the nuclear weapons program and for several decades afterwards, a large number of nuclear weapons workers at sites of the Department of Energy, and at sites of vendors who supplied the Cold War Effort were put at risk without their knowledge and consent for reasons that, documents reveal, were driven by fears of adverse publicity, liability, and employee demands for hazardous duty pay.”²⁵

Congress noted that recently discovered records documented “unmonitored exposures to radiation” at sites nationwide that the Department of Energy (DOE) self-regulated and that “[n]o other hazardous Federal activity has been permitted to be carried out under such sweeping powers of self-regulation.”²⁶ Further, Congress found that “State workers’ compensation programs do not provide a uniform means of ensuring adequate compensation for the types of occupational illnesses and diseases that relate to the employees at those sites,” and thus, “[t]o ensure fairness and equity,” Congress directed that a fund be established “on the books of

SOLACE

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SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer

email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar’s website at www.ribar.com, login to

the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar’s SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcDonald@ribar.com or 401.421.5740.

the Treasury” to compensate covered employees, or their survivors.²⁷

The program, administered by the Department of Labor, offers compensation under two provisions: Part B and Part E. Under Part B, current and former workers employed by the DOE or its contractors or subcontractors, beryllium vendors or atomic weapons employers are eligible if they have been diagnosed with: any cancer that is “at least as likely as not caused by radiation exposure,” chronic beryllium disease, beryllium sensitivity and, at specific sites, chronic silicosis.²⁸ Eligible workers, or their survivors,²⁹ may receive a lump sum payment of \$150,000, medical care for covered conditions or medical monitoring for beryllium sensitivity.³⁰

Under Part E, compensation is available to current and former workers at DOE contractors or subcontractors who have acquired “any occupational illness at least as likely as not caused by exposure to a toxic substance.”³¹ Compensation, up to a maximum of \$250,000, is based on permanent impairment, years of qualifying wage loss, medical care for covered conditions and compensation to a much more limited class of survivors if the employees’ death was contributed to or caused by the covered illness.³²

There is an important exception to the “at least as likely as not” causation standard under Part B. In 2004, recognizing that, for a certain class of employees, it “is not feasible to estimate with sufficient accuracy the radiation dose that the class received,” and that “there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class,” Congress designated a “Special Exposure Cohort” (“SEC”) for employees at certain facilities.³³ Once a facility has been designated as part of the SEC, *employees of those facilities who have worked for a specified period of time and contracted any of 22 specified cancers are relieved of the need to establish causation* [emphasis added].³⁴

In 2010, the Texas Instruments Attleboro facility was added to the SEC.³⁵ Because there was no documentation that radiation was limited to any particular buildings on the Attleboro site, the National Institute of Occupational Safety and Health (NIOSH) determined that “workers could have been exposed to radioactive materials in any part of the M&C site.”³⁶ All M&C/TI employees who worked at least 250 work days on

Bar’s LGBT Committee CLE Seminar – *Same Gender Marriage and the Demise of DOMA*

At the first meeting of the Rhode Island Bar Association’s Lesbian Gay Bisexual and Transgender (LGBT) Committee there will be a free, 2.0 credit, CLE seminar, *Same Gender Marriage and the Demise of DOMA: What it will mean for your clients in marriage, divorce, financial planning and tax matters*, on Tuesday, September 17th, from 3:00 to 5:00 pm, at the Rhode Island Bar Association, on 115 Cedar Street, in Providence. Thirteen states, including Rhode Island and the District of Columbia, allow same-sex couples to marry, yet more than 30 states in this country prohibit recognition of those marriages. With the U.S. Supreme Court’s recent landmark decision in *Windsor v. U.S.*, marriages of same-sex couples will now be recognized by the federal government for purposes of federal protections. But, that may depend on the state in which the couples reside. This CLE updates the current state of LGBT rights across the country and in Rhode Island, providing practical advice in emerging areas of LGBT law, such as parentage and divorce for same-sex couples. Upon completion of the program, participants will have a broad knowledge of specific legal protections and challenges facing LGBT clients, as well as specific tools on how to advise and represent LGBT clients. Topic areas include issues facing same-sex couples in marriage, divorce, parentage, taxation, and estate planning. This free, 2.0 credit, LGBT Committee CLE is open to all Bar members. However, as space is limited, reservations are required. To reserve your space, please contact Barbara Margolis by email: BMargolis@courts.ri.gov or telephone: (401) 222-3270.

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OAR TERMS OF USE Since everyone's time is a limited and precious commodity, all Bar members contacting OAR volunteers must formulate their questions concisely prior to contact, ensuring initial contact takes no longer than 3 to 5 minutes unless mutually-agreed upon by both parties. OAR is *not* a forum for Bar members to engage other Bar members as unofficial co-counsel in an on-going case. And, as the Rhode Island Bar Association does not and cannot certify attorney expertise in a given practice area, the Bar does not verify any information or advice provided by OAR volunteers.

the site between 1952 and 1967 are included in the SEC.³⁷ Workers like Lou Wims would only need to prove their term of employment, as well as their diagnosis with one of the designated cancers. The claim forms themselves are simple, but the passage of so many years may mean that medical records have been destroyed, and employment documentation may be hard to come by; therefore, it's likely that some claimants will seek the assistance of counsel.

The Lawyer's Role

The EEIOCPA limits the fee an attorney may charge for assisting a claimant, due to the simple nature of the claim process. An attorney may charge "two percent for the filing of an initial claim for payment of lump-sum compensation" (typically, \$3,000); "and...10 percent with respect to objections to a recommended decision denying payment of lump-sum compensation."³⁸ Although these fees are modest, they are fair, given the scope of work; moreover, attorneys should consider taking on the task, if requested, as a public service. Potential claimants within the SEC are elderly, and those outside of the SEC, but still eligible under Part B or Part E may be debilitated or unsophisticated.

There are only two forms necessary to submit a claim: either EE-1 for worker claims or EE-2 for survivor claims, and EE-3, which documents employment history.³⁹ The New York Resource Center, which handles all claims for the New England states, will then advise of any supplemental documentation needed like birth and death certificates, medical records and verification of employment.

Recognizing the availability of the EEIOCPA and familiarity with its requirements are keys to providing good counsel to clients, whether or not those clients choose to have their attorney process the claim. Despite the large number of TI retirees and former employees living in the region, many who may be eligible for lump-sum compensation are unaware of the program. In fact, claims forms sent out by the New York Resource Center include a referral slip that seeks contact information for other former employees and survivors who might not know about the program.⁴⁰

continued on page 37

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Editor's Note: The name of Richard D. Raspallo, Esq. did not appear in the caption for the Rhode Island Law Day photograph on page 18 of the North Smithfield High School classroom presentation with Attorney William J. Connell and Superior Court Associate Justice William J. McAtee or on the list of participating Rhode Island Law Day volunteer attorneys in the *Rhode Island Bar Journal's* July/August 2013 issue. The Rhode Island Bar Association appreciates and applauds Attorney Raspallo's voluntary participation in the classroom program, as we do all those from the Bar and Bench who make this annual event a success.

Do you or your family need help with any personal challenges? **We provide free, confidential assistance to Bar members and their families.**

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Lawyers Helping Lawyers Committee Members Protect Your Privacy

Pot or Not

continued from page 9

2 Marijuana and Medical Marijuana, *THE NEW YORK TIMES*, *TIMES TOPICS*, available at <http://topics.nytimes.com/top/reference/timestopics/subjects/m/marijuana/index.html> (last modified on November 30, 2012).

3 56% Favor Legalizing, Regulating Marijuana, *RASMUSSEN REPORTS*, May 17, 2012, available at http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/may_2012/56_favor_legalizing_regulating_marijuana.

4 U.S. Const. Amend. X.

5 See *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).

6 See *Massachusetts v. United States Dept. of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).

7 See *Chiles v. United States*, 69 F.3d 1094 (1995).

8 U.S. Const. Art. I, § 8, cl. 3.

9 *United States v. Lopez*, 514 U.S. 549, 558 (1995).

10 21 U.S.C. § 801 *et seq.*

11 21 U.S.C. § 812.

12 21 U.S.C. § 812(b)(1).

13 21 U.S.C. § 812(b)(5).

14 21 U.S.C. § 812, Schedule I.

15 *Greg Campbell, POT, INC.* 50-51 (2012).

16 *Id.* at 51.

17 *Id.* at 51-52.

18 A frequently used argument against marijuana is the allegation that it is a "gateway drug" to more dangerous substances. However, research has shown that even though many hard drug users have used marijuana in the past, trying or using marijuana does not cause the person to try or use harder drugs. *Campbell, supra*, at 110-12. Another argument is that marijuana causes lung cancer, yet the effect of marijuana on a person's lungs seems to be less damaging than tobacco, may actually increase lung capacity if used in moderate doses, and may even help to fight cancer by attacking cancer cells while leaving healthy cells alone. *Id.* at 112; Randy Astaiza, All The Reasons Pot Is Good For You, *BUSINESS INSIDER*, November 8, 2012, available at <http://www.businessinsider.com/health-benefits-of-medical-marijuana-2012-11?op=1>; Jennifer L. Huget, Moderate marijuana use not linked to lung damage, *THE WASHINGTON POST*, January 10, 2012, available at http://www.washingtonpost.com/blogs/the-checkup/post/moderate-marijuana-use-not-linked-to-lung-damage/2010/12/20/GIQAjm3roP_blog.html. And while many cite the argument that marijuana can be addictive, science demonstrates that marijuana is less likely to create dependence and withdrawal than nicotine, alcohol and caffeine, all of which are legal in America. *Campbell, supra*, at 113. Notably, there are still no reported deaths caused by overdosing on marijuana. *Id.* at 116. In fact, one study found that a person would have to ingest 1,500 pounds of marijuana in fifteen minutes in order to overdose on the drug. *Id.* at 116-17.

19 Astaiza, *supra*.

20 Cal. Health & Safety Code Ann. § 11362.5 (West Supp.2005); see *Gonzales v. Raich*, 545 U.S. 1, 5-6 (2005).

21 *Id.*

22 *Raich*, 545 U.S. at 6-7.

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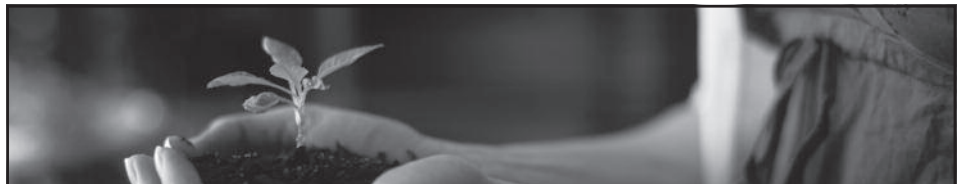
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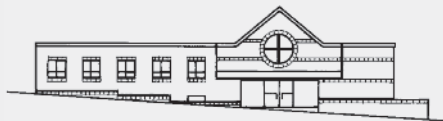
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23 *Id.* at 7.
 24 *Id.*
 25 *Id.* at 19-20.
 26 *Id.* at 20-22.
 27 *Campbell, supra*, at 42.
 28 See David W. Ogden, Deputy Attorney General, Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (October 19, 2009), available at <http://blogs.justice.gov/main/archives/192>.
 29 *Id.* at 1.
 30 *Id.* at 1-2.
 31 See Press Release, The United States Attorney's Office, Central District of California, Federal Authorities Take Enforcement Actions Against Commercial Marijuana Stores In Orange County Cities Of Anaheim And La Habra, (August 21, 2012), available at <http://www.justice.gov/usao/cac/Pressroom/2012/111.html>; Kristen Wyatt, Extensive Colo. pot rules don't prevent crackdown, THE DENVER POST, January 12, 2012, available at http://www.denverpost.com/news/marijuana/ci_19729182 (last modified on January 13, 2012).
 32 Wyatt, *supra*.
 33 *Id.*
 34 See S 2253 (R.I. 2012) and H 7092 (R.I. 2012).
 35 See AK ST § 11.71.040; Cal. Health & Safety Code § 11357; CO ST § 18-18-406; C.G.S.A. § 21a-279a; 22 M.R.S.A. § 2383; M.G.L.A. c. 94C, § 32L; M.S.A. § 152.027; Miss. Code Ann. § 41-29-139; Neb. Rev. St. § 28-416; N.R.S. § 453-336; N.Y. Penal § 221.05; N.C.G.S.A. § 90-95(d)(4); OH ST § 2925.11; OR ST § 475.864.
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United States v. Windsor

continued from page 17

requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”²⁷

Notably, in the Affordable Care Act decision, the bloc of four liberal justices concurred *in the judgment*, but dissented strongly, and eloquently, on Chief Justice Roberts’s wrong-headed interpretation of the commerce clause. That bloc of four Justices should have done something similar in *Windsor*. They should have allowed Justice Kennedy to write the opinion for the Court (which he did anyway). Kennedy would have written the same banal opinion that he did write, grounding the ruling on federalism, and saying little about equal protection. The four liberals should have *concurred in the judgment* (that is, striking down DOMA) and, as they did in *Sebelius*, they should have dissented in part, explaining, correctly, that marriage equality is not primarily about federalism but equal rights. Because that is the fact of the matter. Marriage equality is not primarily about federalism. It is about equal rights.

Part III: Justice Scalia’s Dissent

Let me start by being very clear. In *Windsor*, Justice Scalia was wrong saying there was no standing once *Windsor* had won in the trial court. He was wrong on the merits. He would have reversed, since he finds DOMA perfectly acceptable. And, into the bargain, he could not stop himself from making a bunch of gratuitous, rude, snarky comments about his colleagues: “The majority’s discussion of the requirements of Article III bears no resemblance to our jurisprudence.”²⁸ “It takes real cheek for today’s majority to say...”²⁹ “I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.”³⁰ And, my personal favorite: “[T]he real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is...”³¹ It is not only people who deplore Scalia’s reactionary views who will be unhappy with this dissent. Anyone who likes civility and ordinary good manners will feel that way.

Nevertheless, to his credit, Justice Scalia, unlike the liberal justices Ginsburg, Breyer and Kagan, took a coherent, internally consistent position on standing in the two cases. Scalia voted with the majority in **Hollingsworth** that there was no standing; and he argued in dissent in **Windsor** that there was no standing. That is, he was consistently wrong in both cases. In addition, Justice Scalia was generally correct when he criticized the doctrinal incoherence of the majority opinion:

There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of the States to define domestic relations – initially fooling many readers, I am sure into thinking that this is a federalism opinion. * * * Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. * * * The sum of all the Court's non-specific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism playing a role)...³²

As I suggest, above, this analysis, although harsh, is also generally correct. However, what is most intriguing about Justice Scalia's dissent is his take on what lies ahead for gay-rights litigation in general. As is clear from the preceding section, my own view is that the Court's timid reliance on federalism provides scant precedential help for future lawsuits challenging anti-gay discrimination on equal protection grounds. In my defense, I can say that no less a personage than Chief Justice Roberts apparently agrees with me. Justice Scalia strongly disagrees. He believes that, starting immediately, all those challenging state laws restricting marriage equality "will lead with this Court's declaration that there is 'no legitimate purpose' served by such a law, and will claim that the traditional definition [of marriage] has 'the purpose and effect to disparage and injure' the 'personhood

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l to r: DCRI board member Kevin J. Flannery, Hon. Patricia K. Asquith, Cacie Asquith, and DCRI president Faith A. LaSalle.

The Defense Counsel of Rhode Island (DCRI) is the state association of attorneys defending the interests of businesses and individuals in civil litigation. At their Annual Meeting, DCRI honored Harry W. Asquith, Jr., Esq. for a lifetime of outstanding service to the Rhode Island bar. Incoming president Faith A. LaSalle presented an inscribed crystal memento to Hon. Patricia K. Asquith and Cacie Asquith. Ms. LaSalle also recognized and thanked outgoing president Howard A. Merten for two successful terms as the association's president. The new DCRI 2013-2014 Officers are: President Faith A. LaSalle, Esq.; President-Elect John F. Kelleher, Esq.; Vice President Lauren D. Wilkins, Esq.; Secretary Rebecca McSweeney, Esq.; Treasurer Amy Beretta, Esq. of the Law Offices of Amy Beretta.

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In Memoriam

Robert K. Argentieri, Esq.

Robert K. Argentieri, 92, of Merritt Road, a lawyer for 45 years before retiring in 1992, passed away on June 24, 2013. He was the husband of the late Phyllis Lewis Argentieri. They were married for 54 years. Born in Providence, a son of the late Joseph and Elinor Brodeur Argentieri, he lived in East Providence for 61 years. Mr. Argentieri was a graduate of Classical High School and Rhode Island State College (URI). He was a member of The National Honors Society, Phi Kappa Phi and included in the Who's Who In American Universities and Colleges. Robert was awarded a scholarship to and graduated from Harvard University Law School. He served as Assistant Legal Counsel to the Unemployment Compensation Board and as General Counsel, later leaving for private practice in Providence. He taught Business Law and Accounting at Providence College as a special lecturer. During World War II he served in the Office of Price Administration. Mr. Argentieri was a life communicant of the Cathedral of SS. Peter and Paul, Providence where he was a member of the Pelouquin Chorale. He was a communicant and Trustee of Our Lady of Loreto Church, and a communicant of St. Martha Church. He wintered in Boca Raton, FL, where he was a member of Our Lady of Lourdes Church and a hospice volunteer. He is survived by two sons; Paul L. Argentieri of San Diego, CA and Steven L. Argentieri and his wife Janice of East Providence, and a daughter; Jane C. Argentieri of Exeter and Englewood, FL.

Lola A. Asti, Esq.

Lola A. Asti passed away on June 28, 2013.

Gerald A. Coli, Esq.

Gerald A. Coli, of Kingston, passed away, on July 9, 2013. He was the devoted husband of the late Lydia J.

Rossi Coli and proud father of Jessica Easton and her husband Nicholas F. Easton and Gerald T. Coli and his wife Amy Linnell. He was a graduate of La Salle Academy, Providence College and Suffolk University School of Law.

Robert J. Ferranty, Esq.

Robert J. Ferranty of Barrington passed away on July 17, 2013. He was born in Providence, the son of the late A. Robert and Edith Johnson Ferranty. He resided in Barrington since 1950. He was a graduate of Brown University and Boston University School of Law where he was elected a senior editor of the Boston University Law Review. He was admitted to the Rhode Island Bar in 1963 and to the Federal District Court Bar. Mr. Ferranty was retired senior vice president and director of the Providence Energy Corp. and the Providence Gas Company. He was active in the gas industry affairs in New England serving as a New England Gas Association director, second vice chairman, first vice chairman and chairman of that organization. He was a member of the Gas Distribution Executives executive committee and served as chairman for two years. He was a past president of the Guild of Gas Managers and past chairman of the Algonquin Gas Transmission Co. customer group. He served on the Town of Barrington's Charter Review Commission and the Public Safety Committee. He was a member of the Committee on Appropriations for 21 years and served as chairman twice. He was a former member of the RI Country Club, the Turks Head Club, Coral Ridge Yacht Club in Ft. Lauderdale and the Cove Haven Yacht Club and was a Korean War Veteran. After retiring from the Providence Gas Company, Bob spent many years upon his yacht, the *Sabrina*, enjoying time in Ft. Lauderdale, Newport and Block Island.

and dignity' of same sex couples, see *ante*, at 25, 26."³³ Scalia confidently asserts:

[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the "personhood and dignity" which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that 'personhood and dignity' in the first place. *Ante*, at 26.... [I]t is just a matter of listening and waiting for the other shoe.³⁴

Indeed, so certain is Justice Scalia of the inevitability of this outcome that he uses the redlining function on his word processor to show how a few simple red-lined edits in the majority's opinion can suffice to strike down state laws restricting marriage to one man and one woman.³⁵ What can one say about Justice Scalia's confident prediction? One can certainly *hope* that he is correct. But is he?

Ten years (to the day!) before *Windsor* and *Hollingsworth* came down, the Supreme Court decided its landmark case in *Lawrence v. Texas*,³⁶ striking down state sodomy laws and expressly overruling *Bowers v. Hardwick*.³⁷ In his (similarly scathing) dissent in *Lawrence*, Justice Scalia predicted the likely consequence that case would have for marriage equality:

If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante*, at 2484; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante*, at 2478; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid*. Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.³⁸

Writing in the *Rhode Island Bar Journal*, I previously ridiculed Scalia's prognostication. The idea that *Lawrence*

would someday have an impact on marriage equality was, I said, a “novel idea ...lost on the parties on both sides, all the other scores of *amici*, and all of the [other] Supreme Court Justices.”³⁹ We now know that Justice Scalia was right and I was wrong. Ten years after *Lawrence*, the majority opinion in *Windsor* cites to *Lawrence* in the course of striking down DOMA.

Will it happen again? Will the Court’s new ruling in *Windsor*, striking down DOMA, lead to future, federal or state court, decisions striking down state laws restricting marriage to one man and one woman? One can only hope that, in this respect, Justice Scalia’s most feared prognostications again come true. From Justice Scalia’s mouth to God’s ear!

ENDNOTES

1 *Judith Lihosit*, Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training, 101 *LAW LIB. J.* 157, 166 (2009) (citing Steven M. Barkan, Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies, 79 *LAW LIBR. J.* 617, 626 (1987) (quoting David Kairys, Legal Reasoning, in *The Politics of Law: A Progressive Critique* 11, 13 (David Kairys ed., 1982)).

2 *Hollingsworth*, Slip Op. at 17.

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4 *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010).

5 *Perry v. Brown*, 52 Cal.4th 1116 (2011).

6 *Windsor v. New York*, 833 F. Supp.2d 394 (S.D.N.Y. 2012).

7 *Windsor* Slip Op. at 11.

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9 *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

10 *Gerald Gunther*, The Supreme Court 1971 Term: A Model for a New Equal Protection, 86 *HARV. L. REV.* 1, 8 (1972).

11 *Brief for the United States on the Merit Question*, at 12.

12 *Id.* at 12-13.

13 *Id.* at 51 (“The Government does not challenge the Constitutionality of DOMA Section 3 under deferential rational-basis review....”)

14 *Windsor* Brief on the Merits, at 17.

15 *BLAG* Brief on the Merits, at 20.

16 *Id.* at 50.

17 *Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (parenthetical), Slip Op. at 20; *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado constitutional amendment banning laws protecting lesbian and gay people); Slip Op. at 19.

18 *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating sodomy laws on substantive due process grounds), Slip Op. at 19, 23; *Bolling v. Sharp*, 347 U.S. 497 (1954) (holding public school segregation in Washington, D.C. unconstitutional on substantive due process grounds).

19 Slip Op. (Scalia, dissenting) at 17.

20 Slip Op. at 14.

21 *Id.* at 18.

22 *Id.*

23 Slip Op., *Roberts C.J.*, dissenting, at 2.

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- 24 379 U.S. 294 (1964).
- 25 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, concurring) (and applicable also to *Katzbach v. McClung*).
- 26 132 S. Ct. 2566 (2012).
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- 28 *Slip Op. (Scalia, dissenting)* at 7.
- 29 *Id.* at 22.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.* at 15, 16-17, 18.
- 33 *Id.* at 24.
- 34 *Id.*
- 35 *Id.* at 23
- 36 539 U.S. 558 (2003).
- 37 478 U.S. 186 (1986).
- 38 *Lawrence v. Texas*, 539 U.S. at 604-605 (Scalia, J., dissenting).
- 39 *Jerry Elmer, Lawrence v. Texas: A Victory of Gay Rights*, 52 R.I. BAR J. 5 (2003). ♦

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continued from page 27

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ENDNOTES

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² *Id.*

³ *Id.*

⁴ *Neil Downing*, Texas Instruments to Sell Attleboro Unit for \$3 Billion, *PROVIDENCE JOURNAL*, January 10, 2006; *Rick Foster*, A Cruel Legacy, *SUN CHRONICLE*, February 3, 2013.

⁵ *See Foster*, *supra* note 4.

⁶ *Memorandum from L. Joseph Callan*, Executive Director for Operations, U.S. Nuclear Regulatory Commission to the Commissioners (Mar. 3, 1997) (on file with author).

⁷ *Id.*

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8 *Id.*

9 Rick Foster, Our Nuclear Legacy, *SUN CHRONICLE*, October 10, 2010.

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11 *Id.*; Report #078-154-A at 4, 15, U.S. Nuclear Regulatory Commission Office of Inspection and Enforcement (on file with author).

12 Rick Foster, Texas Instruments to pay feds \$15 million for Shpack cleanup, *SUN CHRONICLE*, November 28, 2012; Callan Memorandum, *supra* note 6. Texas Instruments agreed to reimburse the federal government for a portion of the \$70 million dollar cleanup. The company did not acknowledge liability. A survey of the site found that ashes from zirconium chips contained uranium, as well as a sign identified as coming from Texas Instruments.

13 Callan Memorandum, *supra* note 6.

14 Downing, *supra* note 4.

15 Foster, *supra* note 4. One former employee with cancer tracked down 177 former employees with cancer.

16 *Id.* In addition to the TI/M&C site, there are 19 other EEOICPA sites in the Commonwealth of Massachusetts.

17 *Id.*

18 *Id.*

19 Rick Foster, Kennedy questions TI president about cancer cases, *SUN CHRONICLE*, February 7, 2013.

20 *Id.*

21 Letter from Mary Ann Johnson, Ethics and Employee Relations, Texas Instruments, Inc. to Louis V. Wims (February 19, 2013) (on file with author).

22 *Id.*

23 Foster, *supra* note 4.

24 Rick Foster, Former TI workers starting to

get letters about cancer help, *SUN CHRONICLE*, March 1, 2013.

25 42 U.S.C.A. § 7384(a)(2) (West 2003).

26 42 U.S.C.A. § 7384(a)(3) (West 2003).

27 42 U.S.C.A. § 7384(a)(7), (8) (West 2003).

28 New York Resource Center Fact Sheet (on file with author).

29 *Id.* Eligible survivors are designated by statute and include spouses, children, parents, grandchildren and grandparents.

30 *Id.*

31 *Id.*

32 *Id.* Under Part E, eligible survivors are more narrowly defined as spouses, as well as dependent children who, at the time of the employee's death were either under age 18, under age 23 and a full-time student, or any age "if incapable of self-support."

33 48 U.S.C.A. § 7384q(b)(1)(2) (Supp. 2012).

34 U.S. Department of Labor, Special Exposure Cohort Employees, <http://www.dol.gov/owcp/energy/regis/compliance/law/SEC-Employees.htm> (last visited April 3, 2013).

35 Foster, *supra* note 4.

36 *Id.*

37 *Supra* note 34.

38 42 U.S.C.A. § 7385g(a)(1)-(2) (West 2003).

39 Forms are available in pdf format at this link: <http://www.dol.gov/owcp/energy/>; alternatively, one can begin the claims process with a phone interview by calling the New York Energy Compensation Resource Center at 1-800-941-3943.

40 Department of Labor referral sheet (on file with author).

41 42 U.S.C.A. § 7385e(1)-(2) (West 2003); See U.S.C.A. § 3803(c)(2)(C) (West 2003) for a complete list of these programs.

42 See 11 U.S.C. § 541 (2006). ♦



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Advertiser Index

ABA Retirement	9
Ajootian, Charles – 1031 Exchange Services	37
Aon Liability Insurance	18
Balsofiore & Company, Ltd. – Forensic Accounting, Litigation Support	14
Boezi, Henry – Trademark/Copyright	36
Briden, James – Immigration Law	39
Coia & Lepore, Ltd. – Workers' Comp.	32
Coia & Lepore, Ltd. – Mediation	32
CT Attorneys – Messier Massad & Burdick LLC	6
Delisi & Ghee, Inc. – Business Appraisal	31
Dennis, Stephen – Workers' Compensation	14
Dumas, David – Heirs/Genealogy	38
Forte, Michael – Olenn & Penza, LLP	28
Gregory, Richard – Attorney & Counselor at Law	12
Humphrey, Richard – Law Offices	29
Marasco & Nesselbush – Social Security Disability/Medical Malpractice	35
Mathieu, Joan – Immigration Lawyer	31
Mediation – Howe & Garside	36
Mediation & Arbitration – Joseph Keough	16
Mignanelli & Associates, LTD. – Estate Litigation	10
Morowitz, David – Law Firm	22
Ocean State Weather – Consulting & Witness	9
Office Space – Warwick	35
Office Space – Providence	6
Office Space – Providence	30
PellCorp Investigative Group, LLC	8
Pelczarski, Karen – Mediations & Appeals	7
Pfieffer, Mark – Alternate Dispute Resolution	15
Piccerelli, Gilstein & Co. – Business Valuation	27
Revens, Revens & St. Pierre – Bankruptcy	27
Revens, Revens & St. Pierre – Workers' Compensation	25
Rhode Island Private Detectives LLC	17
RISCPA – Fall Networking Event	30
R. J. Gallagher – Disability Insurance	7
Ross, Roger – Title Clearing	35
Sciarretta, Edmund – Florida Legal Assistance	8
Soss, Marc – Florida Estates/Probate/ Documents	17
Souza, Maureen – Legal Writing & Research	36
StrategicPoint – Investment Advisory Services	12
Stewart Title Guarantee Company	29
Vehicle Value Appraisals – Green Hill	39
Wickford Appliance	16
Workers' Compensation – Lawrence Signore	37
YKSM – CPAs/Business Consultants	38
Zoning Handbook – Roland F. Chase	39

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