National Gay and Lesbian
Task Force

Movement Analysis:

The Pathway to Victory, A Review of Supreme Court LGBT Cases

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The Pathway to Victory: A review of Supreme Court LGBT Cases

This summer the United States Supreme Court handed down its most sweeping LGBT rights case to date.[1] In striking down the Defense of Marriage Act's (DOMA) definitions of marriage and spouse, the Court found that DOMA instructs same-sex couples "that their marriage is less worthy than the marriages of others," and held that these restrictions on the federal recognition of marriage violate the U.S. Constitution.[2] This ruling highlights how the Court's treatment of LGBT people has monumentally shifted in just 27 years from when it first held that states could criminalize sodomy.[3] Inspired by the ruling in *United States v. Windsor*, I decided to take a look back at the five cases that created the historical path that led the Court to where we are today.

1. While all of the cases discussed can be broadly categorized as being part of the LGBT rights movement, the U.S. Supreme Court has yet to hear a case directly addressing transgender issues.
2. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).
3. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

Bowers v. Hardwick

The first major gay rights case to reach the Supreme Court was *Bowers v. Hardwick* in 1986. Michael Hardwick had been charged with violating a Georgia statute that criminalized sodomy (defined by the statute to include both oral and anal sex, regardless of the sexual orientation of the parties involved[4]) after he was caught having sex with another man.[5] The penalty for a single act was incarceration for up to twenty years.[6]

Hardwick challenged the law as a violation of privacy and his fundamental rights under the Fourteenth Amendment.[7] The Court held that Georgia's statute was constitutional, writing that "there is no such thing as a fundamental right to commit homosexual sodomy."[8] Laws against "homosexual conduct" have "ancient roots,"[9] the Court reasoned, and thus could not be "implicit in the concept of . . . liberty" or "deeply rooted in this Nation's history and tradition."[10] The Justices openly stated that there was "[n]o connection between family [and] marriage…on the one hand and homosexual activity on the other."[11] They did disclaim that they would not pass judgment on whether such laws were "wise or desirable"[12] and one justice argued that he thought the extreme prison sentence could violate the Eighth Amendment's provision against cruel and unusual punishment.[13] Nonetheless, the electorate's belief that homosexual activity is immoral was considered sufficient justification to pass Constitutional muster.[14]

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The dissenting Justices, which included former civil rights activist Thurgood Marshall, argued that the Court had an "obsessive focus on homosexual activity," given that the Georgia law punished all persons for sodomy, regardless of their gender.[15] Instead, the justices focused in on "the right to be left alone."[16] For the dissenters, this case was about the freedom to "independently define one's identity . . . and the

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4. Ga. Code Ann. § 16-6-2 (1984), *invalidated* by Powell v. State, 510 S.E.2d 18 (Ga. 1998) (holding that the sodomy statute violated the right to privacy guaranteed by Georgia Constitution's due process clause).
5. Bowers, 478 U.S. at 187-88.
6. § 16-6-2(b) ("A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . ."), *invalidated by Powell*, 510 S.E.2d 18.
7. *Bowers*, 478 U.S. at 187-89.
8. *Id.* at 196 (Burger, J., concurring).
9. *Id.* at 192 (majority opinion). In his concurrence, Chief Justice Burger discussed at length how homosexual sodomy was a capital crime in Ancient Rome and how some considered it a crime worse than rape and that just discussing it was a disgrace to human nature. *Id.* at 196-97 (Burger, J., concurring). He ultimately concluded that to find "the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." *Id.* at 197.
10. *Id.* at 193 (majority opinion).
11. *Id.* at 191.
12. *Id.* at 190.
13. *Id.* at 197-98 (Powell, J., concurring).
14. *Id.* at 196 (majority opinion) (rejecting Hardwick's argument that all sodomy laws were invalid because "majority sentiments about the morality of homosexuality should be declared inadequate.")
15. *Id.* at 200 (Blackmun, J., dissenting).
16. *Id.* at 199 (describing this right as the most comprehensive right and the right most valued by civilized men).

fact that individuals define themselves in a significant way through their intimate sexual relationships with others."[17]

For the dissenters, this case was about the freedom to "independently define one's identity and the fact that individuals define themselves in a significant way through their intimate sexual relationships with others."

I was born the same year that *Bowers* was decided and it shocks me to read the archaic language used to describe LGB persons. For instance, Hardwick was repeatedly termed a "practicing homosexual," whatever that is.[18] Until 1961, every state outlawed sodomy[19] and at the time of *Bowers*, 24 states and the District of Columbia continued to impose criminal penalties for sodomy performed in private between consenting adults.[20] The case presented other contentious issues. The legality of how the arresting officer entered Hardwick's home and his reasons for being there are suspect, which is why Hardwick's criminal charges were thrown out by the district attorney.[21] The decision was closely split 5-4, and Justice Powell later stated that he erred in joining the majority, but at the time he did not realize the impact the case would have.[22]

Romer v. Evans

It wasn't until a decade later that LGB advocates saw their first victory at the Supreme Court in *Romer v. Evans*. The Colorado cities of Aspen, Boulder and Denver had all passed ordinances that banned sexual orientation discrimination in many transactions and activities, including housing, employment, and public accommodations.[23] In response, anti-LGBT groups brought and successfully passed a statewide referendum called Amendment 2 repealing these ordinances and prohibiting all levels of government from banning discrimination based on their sexual orientation.[24]

Writing for the majority, Justice Kennedy... held that "we find nothing special in the protections withheld. These are protections taken for granted by most people either because they already have them or do not need them.

In the Supreme Court, Colorado argued that all Amendment 2 did was prevent gays and lesbians from getting "special rights."[25] Writing for the majority, Justice Kennedy disagreed and held that "[w]e find nothing special in the protections [withheld]. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion

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17. *Id.* at 205.
18. *Id.* at 188 (majority opinion).
19. *Id.* at 193. Illinois was the first state to decriminalize private consensual adult sexual conduct by adopting the American Law Institute's Model Penal Code. *Id.* n.7.
20. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 524 n.9 (1986) (listing the relevant statutes for those states).
21. Carlos A. Ball, From the Closet to the Courtroom: Five LGBT Rights Lawsuits That Have Changed Our Nation, 10 (Beacon Press 2011).
22. Linda Greenhouse, *The Legacy of Lewis F. Powell Jr.*, N.Y. Times, Dec. 4, 2002, *available at* http://www.nytimes.com/2002/12/04/politics/04SCOT.html.
23. Romer v. Evans, 517 U.S. 620, 623-24 (1996).
24. *Id.*
25. *Id.* at 626.

from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[26]

The Court further explained that this state constitutional amendment bore no purpose other than to burden LGB persons.[27] The U.S. Constitution does not permit "laws of this sort . . . [they] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. If . . . 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[28]

Romer marked a change in the tide for the LGBT movement. The decision enabled cities and counties to pass sexual orientation nondiscrimination ordinances without fear that a statewide initiative would later take away these protections. It laid the constitutional foundations for why laws that are rooted in animus were constitutionally suspect, which the Court would later cite as it struck down Section 3 of DOMA.

Since *Romer*, there has been significant success at passing LGBT-inclusive non-discrimination laws at the state and local level. Today, over 45% of the U.S. population lives in a jurisdiction that has explicitly transgender-inclusive non-discrimination laws on the books.[29] These laws have a huge impact on the daily lives of LGBT people and their families—they open up access to employment, housing, health care, and access to public facilities free from discrimination on the basis of sexual orientation or gender identity.

Lawrence v. Texas

The next major gay rights case was *Lawrence v. Texas* in 2003. This involved a Texas anti-sodomy statute, although unlike the law in Georgia, this one only banned sex between members of the same sex (statutorily defined as "deviate sexual intercourse").[30] Police entered John Lawrence's apartment where they witnessed him engaging in a sexual act with another man.[31] Both men were arrested, charged, and convicted.[32] As in *Romer*, Justice Kennedy, writing for the majority, struck down the law and explicitly overruled *Bowers*.[33] He wrote, "When 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[34]

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26. *Id.* at 631.
27. *Id.* at 632.
28. *Id.* at 634 (emphasis in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
29. National Gay and Lesbian Task Force, Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws (2012), *available at* http://www.thetaskforce.org/downloads/reports/fact_sheets/ all_jurisdictions_w_pop_6_12.pdf.
30. Tex. Penal Code Ann. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."), *invalidated by* Lawrence v. Texas, 539 U.S. 558 (2003).
31. *Lawrence*, 539 U.S. at 562-63.
32. *Id.* at 563.
33. *Id.* at 578 ("Bowers was not correct when it was decided, and it is not correct today.").
34. *Id.* at 567.

The majority in Lawrence struck down the law based on privacy protections in the Constitution. However, Justice Sandra Day O'Connor concurred in the judgment but separately argued that the Texas law should be struck down as a violation of the Equal Protection Clause of the Constitution as the law only applied to same-sex sodomy because it targeted the LGB community out of animus.[35]

Lawrence invalidated anti-sodomy laws across the country, making "gay sex" legal nationwide for the first time. Perhaps more importantly (because these laws were rarely enforced) the decision granted legal legitimacy to same-sex couples and provided guidance for lower courts grappling with these issues. It was revealed years later that John Lawrence was not actually having sex on the night that he was arrested, but that officers had arrested him because other men and gay paraphernalia were present in his apartment.[36] Civil rights attorneys saw their arrest as the perfect opportunity to challenge the antiquated Texas sodomy law.

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United States v. Windsor

Edith Windsor and Thea Spyer were together for nearly 40 years and had married in Canada, which was recognized under New York State law.[37] But due to the Defense of Marriage Act's exclusionary legal definitions of "marriage" and "spouse," they were barred from receiving federal benefits.[38] Therefore, when Windsor inherited her wife's estate she did not qualify for the federal estate tax exemption for surviving spouses.[39] She paid the $363,053 tax bill and then sued the federal government for a tax refund on the grounds that DOMA violates constitutional principles of due process and equal protection.[40]

Justice Kennedy, again writing for the majority, explained in his opinion that Congress's "unusual deviation" into domestic relations, an area of law almost exclusively governed by states, was strong evidence that DOMA was motivated by an improper animus or purpose.[41] To buttress this point, Kennedy referenced a Congressional Report concluding that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[42]

The majority opinion discusses in great detail the consequences of having "DOMA write[] inequality into the entire United States Code."[43] By creating second-tier marriages that are "unworthy of federal recognition," the government makes same-sex couples suffer from diminished stability and predictability

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35. *Id.* at 579-80 (O'Connor, J., concurring).
36. David Oshinsky, *Strange Justice: The Story of Lawrence v. Texas, by Dale Carpenter*, N.Y. TIMES, Mar. 16, 2012, *available at* http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html?pagewanted=all&_r=0.
37. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).
38. *Id.*
39. *Id.*
40. *Id.* at 2683.
41. *Id.* at 2693.
42. *Id.* (quoting H.R. Rep. No. 104–664, at 16 (1996) (footnote omitted)).
43. *Windsor*, 133 S. Ct. at 2694.

in their lives and to be financially harmed in numerous ways (social security, taxes, and veterans' benefits, to name a few).[44] DOMA leaves their children humiliated as they struggle "to understand the integrity and closeness of their own family and its concord with other families in their communities and in their daily lives."[45] Kennedy also points out that DOMA allows same-sex couples to evade certain responsibilities of marriage, such as reporting a spouse's income for federal financial aid eligibility or preventing the spouses of Senators from accepting high-value gifts.[46] Ultimately, because the Fifth Amendment's guarantee of due process "withdraws from Government the power to degrade or demean in the way this law does," DOMA's definitions of marriage and spouse were struck down.[47]

By creating second-tier marriages that are "unworthy of federal recognition," the government makes same-sex couples suffer from diminished stability and predictability in their lives and to be financially harmed in numerous ways.

Three separate dissents were written. In his opinion, Chief Justice Roberts expressed skepticism that DOMA was motivated by a desire to harm same-sex couples.[48] Without more convincing evidence that the Act furthered no legitimate government interest he "would not tar the political branches with the brush of bigotry."[49] Roberts also underscored how the majority's view did not decide whether state governments can exclude same-sex couples from the institution of marriage.[50] Justice Scalia's dissent took issue with the majority's characterization of DOMA supporters as "unhinged members of a wild-eyed lynch mob"[51] and "enemies of the human race."[52] He argues that DOMA prudentially (and mundanely, he notes) creates stability by establishing a single definition of marriage for the federal government to uniformly apply.[53] Similarly to Roberts' opinion, Scalia warns that the majority's reasoning will inevitably be used to find state laws that deny same-sex couples marital status unconstitutional.[54]

The significance of the *Windsor* decision cannot be overstated. For same-sex couples residing in a state that recognizes their marriage, the full spectrum of federal benefits will now be available to them. Moreover, certain federal benefits will potentially be accessible to same-sex couples who travel to another state to get married. And, perhaps most importantly, LGB individuals will no longer be robbed of the dignity that comes with a national government's refusal to recognize their relationships.

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44. *Id.*
45. *Id.*
46. *Id.* at 2695.
47. *Id.*
48. *Id.* at 2696 (Roberts, J., dissenting).
49. *Id.*
50. *Id.*
51. *Id.* at 2708 (Scalia, J., dissenting).
52. *Id.* at 2709.
53. *Id.* at 2707.
54. *Id.* at 2709-10 ("How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.").

Hollingsworth v. Perry

The significance of the Windsor decision cannot be overstated. For same-sex couples residing in a state that recognizes their marriage, the full spectrum of federal benefits will now be available to them.

Released on the same day as the *Windsor* opinion, the *Hollingsworth v. Perry* decision essentially marked the end of Proposition 8's five-year journey. In 2008, the California Supreme Court ruled same-sex couples could not be excluded from marriage.[55] Later that year, California voters approved the constitutional amendment Proposition 8, which limited marriage to between a man and a woman.[56] The ballot initiative was thrown out in federal court, at which point California state officials stopped defending the law.[57] Supporters of Proposition 8 then intervened and appealed the decision all the way to the U.S. Supreme Court.

The Court decided *Hollingsworth* purely on procedural grounds. The majority wrote that Proposition 8 proponents lacked standing, a constitutional requirement, to defend the law in federal court.[58] This meant that their appeals were invalid and that Proposition 8 was invalid based on the federal district court's decision.[59]

On the heels of this term's judicial victories, LGBT legal advocates continue to speculate about what's to come down the road. Some believe that Section 2 of DOMA, which allows states to ignore marriages granted in other states, will be the next challenge to work its way up to the Supreme Court. Others think the next big case will come from a same-sex couple challenging a state law limiting marriage to different-sex couples. One such challenge has already been decided in federal court since the *Windsor* ruling. A federal district court ruled that an Ohio constitutional amendment limiting marriage to "between one man and one woman" likely violates the United States Constitution's guarantee that no state law can deny a person the equal protection of the laws.[60] Citing *Windsor* and others, Justice Timothy Black argued that the only purpose of the Ohio constitutional amendment was to "make gay citizens unequal under the law"[61] and expressed that "[i]t is beyond cavil that it is constitutionally prohibited to single out and disadvantage an unpopular group."[62]

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55. *In re* Marriage Cases, 43 Cal. 4th 757, 857 (2008). ("[W]e determine that the language . . . limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples.").

56. C.A. Const. art I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."), *invalidated by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010).

57. *See Perry*, 704 F. Supp. 2d at 997 ("Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest.").

58. Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013) ("Because we find that petitioners do not have standing, we have no authority to decide this case on the merits, and neither did the Ninth Circuit.").

59. See *id.* at 2668.

60. Obergefell v, Kasich, No. 1:13–cv–501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013).

61. *Id.* at *6.

62. *Id.*

The other major question is when will the Supreme Court hear a case directly involving transgender rights and what specific issue will it address. In 1994, a case on cruel and unusual punishment in prisons, where the petitioner Dee Farmer was a transgender female, did reach the Court.[63] Farmer had been repeatedly raped after being placed in the general male prison population.[64] A nearly unanimous Court held that prison officials could be liable for being deliberately indifferent to an inmate's sexual assault if they know that an inmate faces a substantial risk of serious harm and fail to take reasonable measures to abate that risk.[65]

The Prison Rape Elimination Act of 2003 called for the creation of national standards that would reduce the incidence of prison rape across the United States.[66] Those standards make clear that anatomical sex may not be the only factor used to determine a prisoner's housing classification.[67] They state that "[i]n deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, an agency may not simply assign the inmate to a facility based on genital status. Rather, the agency must consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems, giving serious consideration to the inmate's own views regarding his or her own safety."[68] Anecdotally, these standards are not always followed, which could give rise to another case involving cruel and unusual punishment in prisons.

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63. Farmer v. Brennan, 511 U.S. 825 (1994).

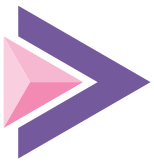
64. *Id.* at 830-31.

65. *Id.* at 825.

66. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609. The Act called for data collection and research on prison rape that would allow the attorney general to "publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape." *Id.* § 15607(a)(1).

67. *Id.*

68. *Id.*



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