

**Queer 3.0: LGBTQ Rights in the Internet Era**  
**FYS 6** **FALL 2023**

Lecture Notes (Prof. R. Buckmire)  
Monday November 13: "Gender, Sexuality and Law"

**READING:** Eskridge, William. "[Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive.](#)" 57 UCLA Law Review 1333. June 2010.

Important Supreme Court cases involving LGBTQ citizens

**Bowers v. Hardwick (1986)**

In a narrow 5-4 ruling the Supreme Court upheld Georgia's statute criminalizing oral and anal sex. It used a rational basis test after determining that the right to privacy did not extend to homosexual sodomy because the practice was not "deeply rooted in this Nation's history and tradition." The case arose after a police officer observed a consensual sex act between Michael Hardwick and another man in the bedroom of his home and charged Hardwick with violating the statute. Even though the local District Attorney declined to prosecute, Hardwick sued in federal court, arguing that as gay man he was at risk of future arrest if the statute remained in effect. Georgia lost at the federal (Eleventh) circuit level and appealed to the Supreme Court, which upheld the statute, with Chief Justice Burger writing a notably homophobic concurrence and both Justice Blackmun and Justice Stevens publishing sharply worded dissents of the majority opinion by Justice White (Stevens admitted later his dissent was written by openly lesbian Stanford Law Professor Pam Karlan). After his retirement, Justice Powell said he regretted voting in the majority but didn't think it was a very important case. Unbeknownst to him, one of his four law clerks at the time was gay. In 1998, the Georgia Supreme Court ruled the state's sodomy statute unconstitutional in *Powell v. State*.

**Romer v. Evans (1996)**

The Supreme Court invalidated a state constitutional amendment passed 53%-47% by voters in the November 1992 election which would have repealed (and prevented future enactment of) all state, municipal and local ordinances that prohibit discrimination on the basis of sexual orientation in Colorado. Every state court that considered Colorado's Amendment 2 found it to be unconstitutional so it never went into effect but a nationwide Boycott Colorado movement had long-lasting impacts on the state's economy. Colorado appealed to the U.S. Supreme Court in order to offer a chance for the highest court to weigh in. Referring to *Plessy v. Ferguson*, Justice Kennedy spoke for a 6-3 majority when he said that Colorado's Amendment 2 failed to meet even a rational basis test and that "a State cannot so deem a class of persons a stranger to its laws."

### **Lawrence v. Texas (2003)**

The Supreme Court explicitly overruled *Bowers v. Hardwick* in a 6-3 landmark gay right case authored by Justice Kennedy that struck down existing sodomy laws of 13 states. Five justices ruled that the Texas Homosexual Conduct law violated the Due Process Clause of the Constitution by targeting “nonprocreative sexual activity” and that Texas’s statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” Justice O’Connor, the only woman on the Court at the time concurred in the decision but argued that the Texas law violated the Equal Protection Clause because it only targeted male-male but not female-male sodomy. O’Connor opined that an anti-sodomy law that applied neutrally might be constitutional and that a law that limited marriage to heterosexual couples only might survive rational basis if it were designed to “preserv[e] the traditional institution of marriage” and not the state’s dislike of homosexuals.

### **Hollingsworth v. Perry (2013)**

The United Supreme Court effectively legalized same-sex marriage in California by declining to overturn a Ninth Circuit ruling that Proposition 8, a California initiative constitutional amendment passed by voters 52-48 in November 2008, was unconstitutional. In an usual grouping of five justices (Roberts, Scalia, Kagan, Ginsburg and Breyer) the Court ruled that the proponents of Proposition 8 lacked standing to appeal at the Supreme Court and at the federal circuit level, and vacated the decision, which left the original, lengthy ruling issued by U.S. District Court Judge Walker striking down Proposition 8 from 2010 in control. The effect was to legalize marriage equality in the Nation’s largest state immediately, but the legal question of what parties have standing (the right to go to court) when a state passes a ballot measure that the Attorney General and Governor refuse to defend remained unresolved.

### **United States v. Windsor (2013)**

In a landmark civil rights case, the United States Supreme Court ruled 5-4 that Section 3 of the Defense of Marriage Act (DOMA) violates the Due Process Clause of the U.S. Constitution “as a deprivation of the liberty of the person protected by the Fifth Amendment.” Section 3 defined for all “administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The majority ruling by Justice Kennedy said that the federal government could not treat state-sanctioned same-sex marriages differently from state-sanctioned opposite-sex marriages because such differentiation “demean[s] the couple, whose moral and sexual choices the Constitution protects.”

Other cases we will consider later this week (Friday): *303 Creative v Elenis (2023)*, *Bostock v. Clayton County (2020)*, *Masterpiece Cakeshop v. Colorado (2018)*, *Obergefell v Hodges (2015)*.