EQUAL PROTECTION OR "SOCIAL TRADITION"

The Supreme Court's Test in the Marriage Cases

By Jamie Raskin

PEOPLE FOR THE AMERICAN WAY FOUNDATION

Tradition is often just the evidence of silence. –Judith Shklar

If we had a Supreme Court that cared as much for the liberty and equality of *people* as it cares for the liberty and equality of *corporations*, deciding the two cases taken up this Term on the future of marriage discrimination in America would be a piece of cake—wedding cake, to be exact.

The Constitution, logic, and precedent are all on the side of equal rights.

One case, *United States v. Windsor,*[1] deals with the constitutionality of Section 3 of "DOMA," the 1996 federal Defense of Marriage Act,

Thea Spyer and Edith Windsor

Edith Windsor, was forced to pay $363,000 in federal taxes on the estate she inherited after her wife (and partner of 40 years) died.

which provides that the word "marriage" in any federal law or regulation—including the Social Security Act, the Internal Revenue code, immigration law, and more than 1,000 others—shall apply only to the "legal union of one man and one woman as husband and wife."[2] This sweeping discrimination means that, although hundreds of thousands of gay and lesbian Americans have won and exercised the right to marry in nine states and the District of Columbia, the rights, benefits, and duties that they should receive as married people under federal law are categorically withheld from them. Under federal law, married couples who are gay are treated as legal strangers to one another and as unworthy of the rights enjoyed by other citizens.

This discrimination has dramatic consequences. The respondent in *Windsor,*[3] Edith Windsor, was forced to pay $363,000 in federal taxes on the estate she inherited after her wife (and romantic partner of 40 years) died, since DOMA prevents same-sex spouses from inheriting marital property on a tax-free basis, a benefit that heterosexual couples, of course, take for granted. Windsor won a clean victory in the United States Court of Appeal for the Second Circuit, which found that discrimination against gay people triggers Equal Protection "intermediate scrutiny" and that Congress could not demonstrate a valid, much less an important, interest for defining marriage at the federal level so as to exclude from its benefits thousands of actually married couples in the states.

The other case taken up by the Supreme Court in its momentous cert grant of December 7 of last year is *Hollingsworth v. Perry,*[4] which tests the constitutionality of California's infamous Proposition 8 ballot measure ("Prop Hate," as it is known on the West Coast), which revoked the marriage rights that gays and lesbians had enjoyed in the state under a landmark California Supreme Court decision. Proposition 8 was voided in a broad pro-marriage decision handed down by California United States District Court Judge Vaughn Walker, a decision that was reaffirmed on narrower grounds by the United States Court of Appeals for the Ninth Circuit, which essentially found that California may not take away from its gay citizens the marriage rights that it had previously granted.

1 Windsor v. United States, No. 12-307, 2012 WL 4009654 (2012).
2 Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. § 7 (1996).
3 Windsor v. United States, No. 12-307, 2012 WL 4009654 (2012).
4 Hollingsworth v. Perry, No.12-144, 2012 WL 3134429 (2012).

Both cases involve government refusing to recognize the equal rights of gay people in married couples. With DOMA, Congress denied the same equal rights and benefits to gay married people as it offers to straight married people, and with Proposition 8, California actually revoked the marriage rights of gay people and prohibited the legislature from ever restoring that right. The Proposition 8 proponents even sought to use the measure to annul gays' and lesbians' existing marriages without their consent. The discrimination in both cases is plain to see for anyone with open eyes.

The Question Understood by America's School Children— but Not by Some Supreme Court Justices

A third grader sent me a crayon drawing of two hearts with the scrawled caption "Why can't two people who love each other get married?"

This is the central question raised by both cases. It can be understood by America's elementary school children—and, in fact, it is understood *far better* by America's elementary school children than by the conservative Justices on the Court.

But the question has a perfectly logical constitutional answer: they *can* get married. Everything that we know about Due Process and Equal Protection—not just common sense—tells us that it violates the rights of gay and lesbian Americans when government denies them an equal opportunity to marry their partners and denies to them and their families all the benefits and rights of marriage.

Mildred and Richard Loving

The analysis begins with the right to marry, which the Supreme Court has declared to be fundamental. The right to marry the person you love is such a basic right and attribute of liberty under the Fourteenth Amendment Due Process Clause that it cannot be impaired for people who have had multiple divorces, people who left their last spouse in the midst of a serious illness, people who are not presently living up to their child support obligations or never paid at all, people living behind bars for having committed domestic violence, mass murderers on death row, or people who just met on a television show called *Who Wants to Marry a Millionaire*—that is, right now so long as none of these people is gay.

The decision that first established the fundamental character of the right to marry is the celebrated *Loving v. Virginia*,[5] which struck down the criminal convictions and sentences of Virginians Mildred and Richard Loving for the act of getting married. Mildred was African-American and Native American, and

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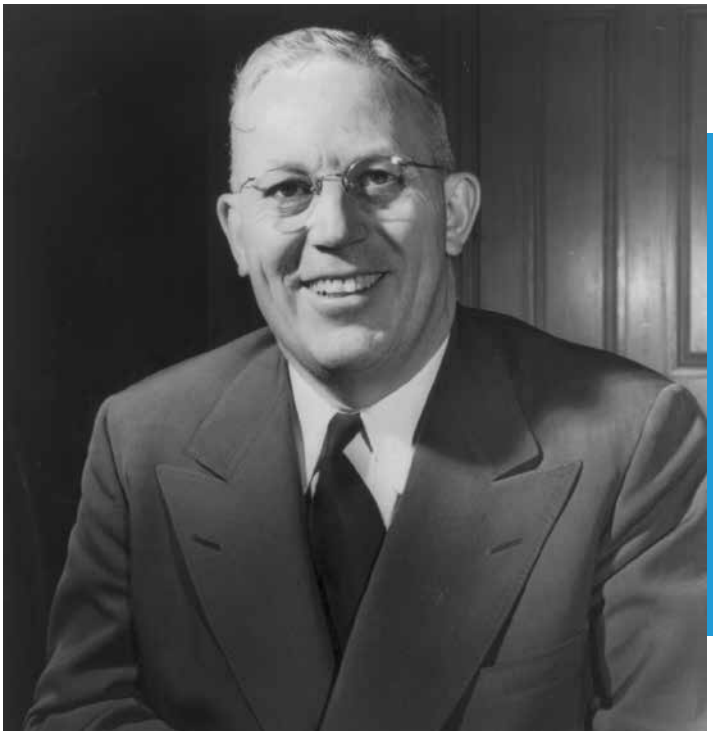
Richard was white; they had married in the District of Columbia before returning to the Old Dominion. The Lovings were arrested at home and prosecuted under Virginia's Racial Integrity Act of 1924, which made it a crime punishable by a year in prison for a white person to marry a "colored" person and vice versa.

For a unanimous Court, Chief Justice Earl Warren struck the law down, holding that, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival . . ."[6] The anti-miscegenation law violated both Due Process and Equal Protection by stripping citizens of their right to marry the person of their choice and enshrining "White Supremacy" as the gateway principle of the marriage institution.

5 Loving v. Virginia, 388 U.S. 1 (1967).
6 Id. at 12.



Chief Justice Earl Warren

According to Warren, the fundamental right of two people to choose to marry could not be nullified because of the state's desire to uphold a single kind of officially approved union or because of its desire to denigrate a whole class of people based on their presumed inferiority. Chief Justice Warren wrote:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry, or not marry a person of another race resides with the individual and cannot be infringed by the State.[7]

If a state conducted a lottery today and randomly stripped five percent of the population of its right to wed, everyone would agree that this policy violates the fundamental right of citizens to marry. There would be no rational—much less compelling—interest for doing it. But if a state denies the right to marry to all of its gay and lesbian citizens, as most still do, it is equally irrational and equally violative of marriage rights under Due Process and Equal Protection. Indeed, marriage discrimination against the gay community not only carves up the laws to target a whole class of citizens for second-class treatment, denying them more than a thousand rights, benefits, and privileges that accompany marriage, but sends a discriminatory, stigmatizing message about gay people generally.

The Supreme Court has been emphatic that legislation and enactments motivated by anti-gay animus, however camouflaged, cannot withstand even the lowest level of Equal Protection scrutiny.

Some conservatives think that they win the argument over marriage discrimination by pointing out that classifications based on sexual orientation do not trigger the same heightened scrutiny under the Equal Protection Clause as racial classifications do. But they miss two essential points. The first is that burdens placed on the right to marry *do* trigger strict scrutiny, meaning that the government in such cases must demonstrate that its imposition on marriage rights serves a compelling purpose and does so using the least restrictive means available. Second, and even more importantly, the Supreme Court has been emphatic that legislation and enactments motivated by anti-gay animus, however camouflaged, cannot withstand even the lowest level of Equal Protection scrutiny, the mere "rational basis" test that applies to ordinary legislation. Thus, even using rational basis scrutiny, it is simply not a rational purpose of a law to harm gay people, to denigrate their equality, or to isolate them from everyone else.

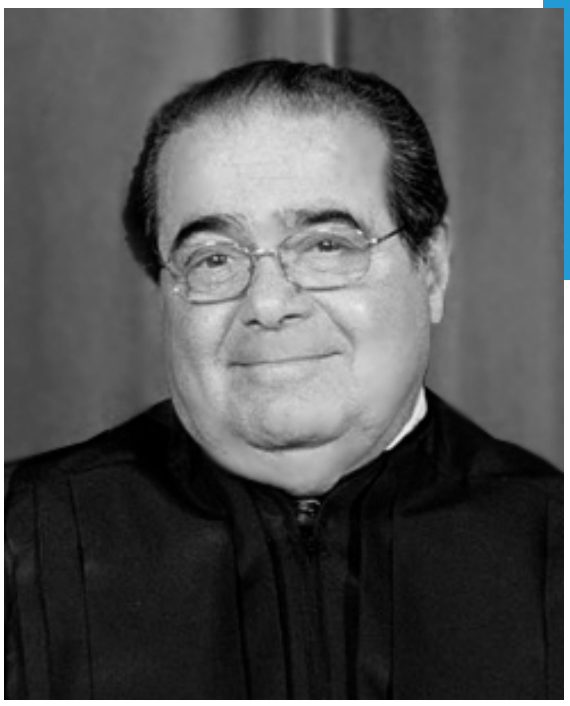
The key case establishing this principle was *Romer v. Evans*,[8] a pivotal 6-3 decision in which Justice Kennedy emerged as a major voice on the Court, rejecting anti-gay discrimination. Writing for the majority, Justice Kennedy struck down a Colorado constitutional amendment that made it impossible for gay and lesbian people to achieve civil rights protection in any branch or department of state,

7 Id.

8 517 U.S. 620 (1996).

county, or local government without first amending the state constitution. He could find no logic or rationale for this sweeping amendment outside of bigotry toward the gay community: "the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests," he wrote, concluding that: "It is not within our constitutional tradition to enact laws of this sort."[9] This statement is correct as an aspiration but a bit off as a statement of fact. Putting it differently, we might say that it has often been within our political tradition to enact laws of this sort—alas, that is what the Black Codes, the Jim Crow era, and laws denying women the right to vote and to enter the professions were all about—but it is definitely within our finest constitutional traditions to *strike such laws down* as a violation of Equal Protection.

Thus, whether you choose to look at marriage discrimination as an attack on a fundamental right that all citizens must enjoy—the right to marry—or as a discriminatory classification inspired by animosity toward the gay and lesbian community—or both, the Court should have an easy time striking it down. There is no rational basis for denying gay citizens the right to marry, which is why defenders of the practice have been forced to rally around one final and familiar last-ditch argument: "tradition" or "traditional morality."



Associate Justice, Antonin Scalia

9 Id. at 633.

The Time-Honored "Tradition" of Discrimination

Defenders of marriage discrimination argue that their policy is justified by "tradition," which is to say a long history of excluding gay people from participating in the marriage institution. But a "tradition" of discrimination is still discrimination, and the long-time assertion of an invalid interest based on animosity, fear, or ignorance does not make the interest more valid over time, especially as the people who are the objects of discrimination begin to demand equal rights for themselves and their families and debunk the stereotypes held against them.

Ironically, it was Justice Scalia who gave the game away by chastising Justice O'Connor for voting in *Lawrence v. Texas*[10] to strike down anti-sodomy laws while signaling her view that "preserving the traditional institution of marriage" might still be a legitimate state interest. Justice Scalia essentially faulted O'Connor for agreeing in *Lawrence* that people's rights cannot be nullified just because other people disapprove of them. Scalia perceived that this is a fatal concession when it comes to marriage discrimination. He remarked sharply in his dissenting opinion that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."[11] How true an insight that is: if you can't brand gay people as criminals without violating Equal Protection, you can't deny them equal rights either.

"'Preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."

–Associate Justice Antonin Scalia
Lawrence v. Texas, 2003

But Justice Scalia advances the most sophisticated-seeming argument for basing constitutional rights on discriminatory social traditions. He argues that the meaning of "liberty" under Fourteenth Amendment Due Process should be defined with reference to social traditions as they were embodied in state laws that prevailed at the time the Fourteenth Amendment was

10 539 U.S. 558 (2003).
11 Id. at 601.

passed (1868). Since no state actually permitted gay people to marry in 1868, there is no way that the Due Process right to liberty in intimate decision making or the right to equal treatment under Equal Protection could include the right of gay people to marry. Any expansion of Due Process liberty beyond the social traditions that existed when Due Process came into the Constitution is considered by conservatives like Scalia to be naked "judicial activism" and "judicial legislation."

Whatever the surface appeal to this argument, Justice Scalia's tradition-bound interpretation of liberty undermines the whole idea of constitutional freedom in the Bill of Rights. The rights we have inscribed in the Constitution are not there to codify and freeze repressive social traditions, like Jim Crow, sex discrimination or anti-gay laws, but to overthrow them. The genius of the Bill of Rights is its articulation of broad principles like "liberty," "equal protection," and "due process," which are capacious enough and muscular enough to invalidate any and all laws seeking to institutionalize prejudice and bias. Our constitutional democratic republic has adopted rights in order to destabilize discriminatory social traditions and to arm the people against them.

It does not take much imagination to see how the sanctification of "tradition" in the definition of constitutional freedom and equality would have thwarted nearly every major advance in civil rights and liberties that has taken place in Supreme Court decision making. When the Court finally rejected school segregation in *Brown v. Board of Education,*[12] it overthrew the Jim Crow tradition that was deeply entrenched in large parts of the country. Of course, when the Equal Protection Clause entered the Constitution in 1868, segregation was not only a pervasive policy in the states, but a policy commitment in Congress, which segregated the public schools in the District of Columbia and even the spectator galleries in the U.S. Senate and House of Representatives.

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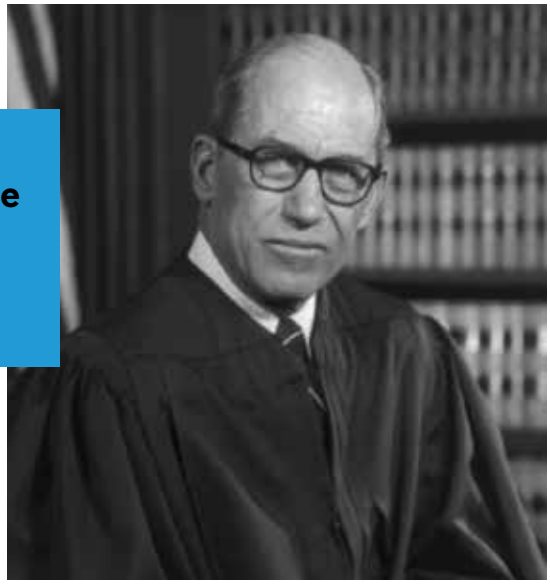
12 347 U.S. 483 (1954).

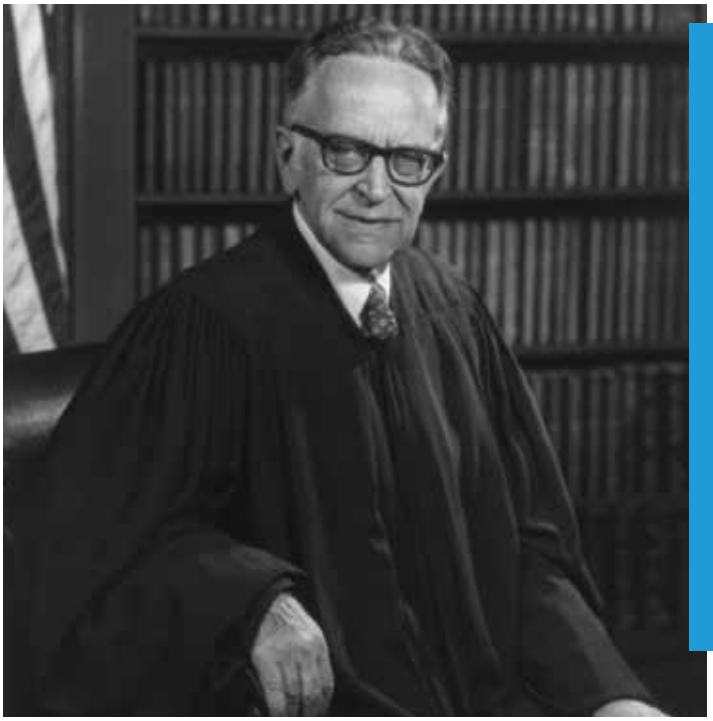
Moreover, the Supreme Court in *Brown* had to reverse *Plessy v. Ferguson,*[13] its own five-decade old precedent upholding the tradition-soaked legal regime of "separate but equal." *Plessy* was a decision which—Scalia-style—upheld the "reasonableness" of a challenged practice under the Fourteenth Amendment because it successfully assimilated and codified the "customs, usages, and traditions of the people." Thus, segregation of the train cars in Louisiana was deemed reasonable and constitutional precisely because it reproduced and reinforced the social traditions of racial apartheid in Louisiana. Under this circular theory, the practice of discrimination became its own justification. The *Plessy* Court further constitutionalized the tradition of Jim Crow, ruling that the practice of official racial segregation did not mark African-Americans as inferior. Such an interpretation existed "solely because the colored race chooses to put that construction on it."[14]

It is no surprise that the remarkable progress made by gay people in the jurisprudence of the Supreme Court over the last two decades has also always been *against* the conservative bloc's determination to elevate "traditional morality" over individual freedom. In the infamous *Bowers v. Hardwick,*[15] a five-justice conservative bloc upheld a Georgia state law criminalizing sodomy at least as it applied to gay people, rejecting their claim that Due Process liberty gives them an equal sphere of sexual privacy free from state control. Writing for the majority, Justice Byron

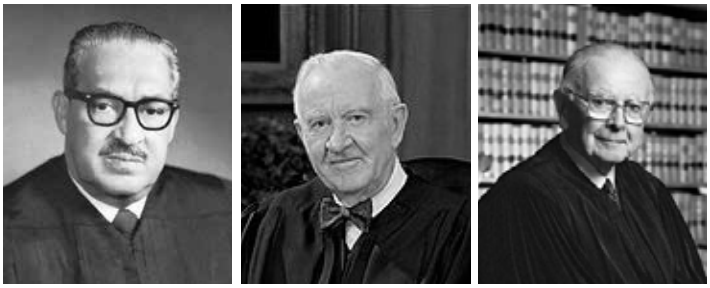


Justice Byron White

13 163 U.S. 537 (1896).
14 Id. at 551.
15 478 U.S. 186 (1986).



Justice Harry Blackmun



Justices Thurgood Marshall, Justice William Brennan and Justice John Paul Stevens

White argued that the Due Process right to privacy—first identified in 1965 in *Griswold v. Connecticut,*[16] which struck down a ban on access to contraceptives as applied to married people—was irrelevant to gay people. The real issue, he said, was whether the Constitution conferred "a fundamental right upon homosexuals to engage in sodomy."

To determine whether such a "right to sodomy" exists, White performed an inventory of state sodomy laws throughout American history, finding them pervasive at the time of the nation's founding and present in all 50 states in 1961. He concluded that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[17] For how could Georgia's criminal law threatening Michael Hardwick with 20 years in prison for having sex be deemed unconstitutional when a majority of other states maintained similar laws? The fact that these laws were based on no social interest greater than the desire to impose some people's moral judgments on others did not move White: "The law," Justice White said, "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[18] Hold this thought because the fallacy that it embodies is precisely what is falling in the modern age of civil liberties and privacy jurisprudence.

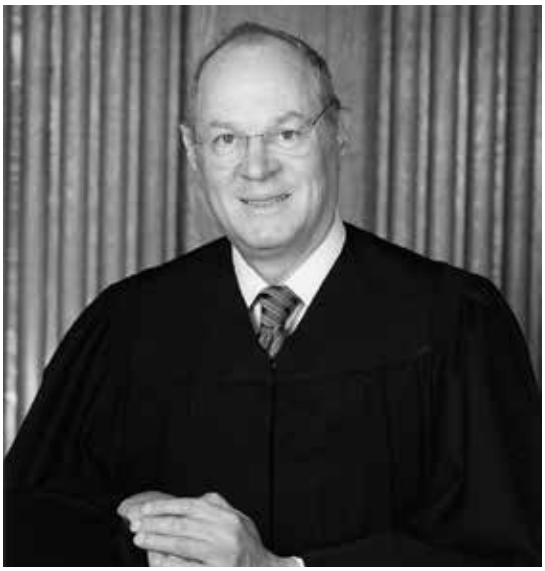
Castigating the majority for its "almost obsessive" focus on the details of gay sex, Justice Blackmun insisted that the case was not about a Due Process liberty to practice sodomy but about "the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone."

Chief Justice Burger's concurrence added to the majoritarian traditions of demonizing gay sex by the homophobic judgments of major religions, a factor totally outside the interpretation of the Constitution but clearly not outside his private moral feelings: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right," he concluded, "would be to cast aside millennia of moral teaching."[19]

To his everlasting glory, Justice Harry Blackmun filed a stinging and prescient dissent in *Bowers*, joined by Justices Thurgood Marshall, William Brennan, and John Paul Stevens. Castigating the majority for its "almost obsessive" focus on the details of gay sex, Justice Blackmun insisted that the case was not about a Due Process liberty to practice sodomy but about "the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone."[20] Surely the right to privacy in sexual,

16 381 U.S. 479 (1965).
17 Bowers v. Hardwick, 478 U.S. 186, 192-194 (1986).
18 Id. at 196.
19 Id. at 197.
20 Id. at 199.

procreative, and family decision making, identified in cases like *Griswold v. Connecticut*[21] and *Roe v. Wade*[22], created a zone of sexual privacy sufficient to protect gay people too.



Justice Anthony Kennedy

But Justice Stevens' lucid dissenting opinion in *Bowers* offered the breakthrough intellectual insight for the whole field, definitively refuting Justice White's argument that all law is based on morality and the anti-sodomy law is just one more example. Grabbing the bull by the horns, he declared that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[23] Stevens articulated the Due Process liberty principle that parallels John Stuart Mill's "harm principle," which posited that liberty requires that adult persons should be free to engage in any private conduct that harms no one else. He argued that it is not a rational public purpose to criminalize private gay sex simply because other people disapprove of it. Some laws involve moral disapproval because they seek to prevent underlying empirical harms; this is the case with laws against murder, rape, and embezzlement, for example.

But then there are laws involving moral disapproval that address no empirical harms at all but simply seek to impose a moral or religious value judgment. Laws against sodomy—gay and straight—are an important example of those that target not social harms but harmless activity that gives moral or religious offense to others. Justice Stevens blew the whistle on the criminalization of harmless and victimless sexual conduct.

The Court's majority finally came around to these essential liberal understandings in *Lawrence v. Texas,*[24] a ringing 6-3 decision which reversed *Bowers* and elevated the principle of individual freedom in the sphere of consensual intimate conduct over the hallowed traditions of self-proclaimed moral majorities legislating social control over gay people.

21 Griswold v. Connecticut, 381 U.S. 479 (1965).
22 410 U.S. 113 (1973).
23 See Bowers at 216.
24 539 U.S. 558 (2003).

Striking down a Texas statute criminalizing gay sex, Justice Kennedy declared for the majority that the gay petitioners in the case "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[25]

Justice Kennedy was very specific about what the decision meant. Due Process liberty comprehends the freedom of the gay petitioners in the case to pursue their intimate and romantic associations. As he wrote:

> Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." (citation omitted) The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Significantly for the upcoming marriage cases, Justice Kennedy observed that the unfolding of constitutional liberty under the Fifth and Fourteenth Amendments cannot be shackled by the traditionalist grip of discriminatory laws. He stated that:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.*[26] (emphasis added)

25 Id. at 578.
26 Id. at 579.

Justice O'Connor's concurring opinion relied on an Equal Protection instead of Due Process analysis to invalidate the Texas statute, but she too focused on the essential invalidity of legislation that criminalizes consensual sexual conduct based on nothing more than the society's moral disapproval of the people who engage in it. O'Connor wrote: "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (citation omitted).

As we have seen, Justice Scalia, who is nobody's fool, understood the watershed character of this decision, which determined that neither homophobia nor the long tradition of legislating homophobia can justify denying gay people fundamental rights that all citizens may expect. A bit unhinged by the decision,

They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

–Associate Justice Anthony Kennedy
Lawrence v. Texas, 2003

he denounced the majority opinion in *Lawrence* as "the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."[27]

In fact, Justice Scalia should be aware that, under the First Amendment, obsessed homophobic citizens can continue to freely register their "moral opprobrium" towards "homosexual conduct," just as gay people can register their "moral opprobrium" toward right-wing homophobes in black robes. But self-proclaimed moral majorities can no more turn their outrage over same-sex marriage into discriminatory *laws* than they can turn their moral outrage over interracial marriage, interfaith marriages or second marriages into laws banning those offending practices.

27 Id. at 602.

But Justice Scalia was right in his dissenting opinion about one thing, which is the way that the dismantling of "tradition" and "moral disapproval" as valid interests for sodomy laws inescapably clears the way for gay people to get married. For the thin rationale upholding marriage discrimination today is the exact same rationale discredited for prosecuting gay people who have sex: that other people strongly disapprove of gay relationships and have pervasively enacted laws codifying their disapproval.

Consider carefully what Justice Scalia wrote in his dissenting opinion in *Lawrence*. If you strip this passage of its bitter sarcasm, you will find a powerful argument for why the right to marry cannot be denied to gay citizens today:

> At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[28] Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to *marriage,* procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[29] Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, 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," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the

28 Id. at 578.
29 Id. at 574.

Plantifs in Romer v. Evans

> 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.

Justice Scalia was, in his bitterly misanthropic and homophobic way, absolutely right. *Romer v. Evans*, *Lawrence v. Texas*, *Loving v. Virginia* all point to one irresistible logical conclusion: under the existing precedents of the Supreme Court, the right to marry belongs to everyone, straight people and gay people alike.

But What Will This Conservative Court Do?

The world of logical analysis under the rule of law is, alas, not the world of the Roberts Court. At almost every turn, short-term political considerations and long-term ideological agendas threaten to trump straightforward logical reasoning on this Court.

To begin with, there are three Justices—Scalia himself, Clarence Thomas, and Samuel Alito—who are very likely to read the liberties of gay people in pinched and hostile fashion, squinting at them through the repressive social traditions of the past, in order to placate what they imagine to be the wounded feelings of the shrinking conservative population. They will also look for any way to develop an argument to cut off merits consideration of marriage discrimination if they are in fear of losing on the big question.

Of course, Chief Justice John Roberts leans to the Right too, but he has a somewhat more modern sensibility than his hard-Right allies on the Court. He has displayed a Chief Justice John Marshall-style concern for the legitimacy and credibility of the Court and seems desperately not to want the institution to be seen as a purely political and partisan operation. Thus, Roberts could surprise us with a vote at least in the DOMA case, but in general, the smart money says that Roberts will align with the other conservatives.

Meantime, the four moderate-to-liberal Justices—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—are likely to be persuaded by the inexorable logic of constitutional liberty and equality and the plain irrationality of anti-gay prejudice to vote against the discriminatory provision in DOMA and for marriage rights, both in California and across the country. They may be a bit nervous now about the constant patter of "too far, too fast" being heard in academia and on editorial pages, but they are all smart enough to realize that it is not the role of the Court to test public opinion, much less follow it, but rather to vindicate the rights of the people under the rule of law.

This likely lineup leaves the swing vote, as is so often the case, to Justice Anthony Kennedy, the intellectual hero of both *Romer v. Evans* and *Lawrence v. Texas*, the decisions that now set the table for a big victory for equal rights under Equal Protection and Due Process in these cases.

What will Justice Kennedy do? It is hard to know. The decisions he wrote knocking down anti-gay enactments in Colorado and Texas are stirring pieces of constitutional analysis that properly treat the Constitution as a charter of essential human freedoms. He definitely seems to have found his voice in recognizing the unfolding and dynamic character of freedom in a constitutional democracy: "As the Constitution endures," he wrote, "persons in every generation can invoke its principles in their own search for greater freedom."[30]

On the other hand, it must be remembered that Justice Kennedy generally tilts to the Right and has joined the conservative faction in delivering some major politically inflected decisions, like *Citizens United*,[31] *Bush v. Gore*,[32] *Shaw v. Reno*,[33] and the ruling that the

30 Lawrence at 579.

31 558 U.S. 310 (2010).

32 531 U.S. 98 (2000).

33 509 U.S. 630 (1993).

individual health insurance mandate in the Affordable Care Act was outside the Commerce Clause powers of Congress, among many others.

The marriage cases that will be argued before the Court in March would be simple to decide for a Court determined to wipe out the messy details of unconstitutional discrimination. But the cases offer a nervous Justice or a hesitating Court lots of detouring pathways to avoid the basic issues in the case. The essential escape route stems, ironically, from the fact that government officials, like the attorney general of the United States and the attorney general of California, are now simply refusing to defend marriage discrimination. This unofficial boycott by public officials creates complex "standing" issues relating to the various parties who have stepped forward to take their place.

Hollingsworth v. Perry

Proposition 8 was the California state constitutional amendment passed by voters in November 2008 to reverse the California Supreme Court decision earlier that year striking down marriage discrimination and giving tens of thousands of gay couples the right to wed. When attorneys David Boies and former U.S. Solicitor General Theodore Olson, former adversaries in *Bush v. Gore*, teamed up to bring suit against Proposition 8 on behalf of two same-sex couples, state Attorney General Jerry Brown refused to defend Proposition 8, agreeing with the plaintiffs that it violates the Fourteenth Amendment. Governor Arnold Schwarzenegger took essentially the same position. When Brown was elected governor in November 2010, the new Attorney General, Kamala Harris, and Governor Brown himself both again refused to defend the measure in court. United States District Court Judge Vaughn Walker allowed the official proponent of Proposition 8, ProtectMarriage.com, to intervene as a defendant in place of the acquiescing state officials.

In August of 2010, Judge Walker issued a powerful and meticulously detailed decision in favor of the plaintiffs and brought heightened scrutiny to bear on laws disfavoring the gay community. He ruled that there is no rational basis, much less a compelling interest, for denying marriage rights to the gay population and, echoing the language of Justice Kennedy from *Romer* and *Lawrence*, found that Proposition 8 simply imposed animus and discrimination through law, violating both Due Process and Equal Protection. Judgment was stayed pending appeal.

On February 7, 2012, a divided three-judge panel of the Ninth Circuit upheld this result, but significantly narrowed the grounds of decision, with U.S. Circuit Judge Stephen Reinhardt focusing on the fact that California had deliberately revoked the existing right to marry for gay people and that the clock cannot be turned backwards in that way to selectively disadvantage a specific part of the population. Reinhardt wrote that, "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[34] He too provided a distinct echo of Justice Kennedy, writing that, "The Constitution simply does not allow for laws of this sort."[35] It was not necessary to deal with the total problem of marriage discrimination as Judge Walker had done at the District Court level, because a much narrower ground was available here, Judge Reinhardt explained. Proposition 8 "singles out same-sex couples for unequal treatment by taking away from them alone the right to marry,"[36] which is a "distinct constitutional violation" forbidden by the logic of *Romer v. Evans*.[37] He described this approach as "the narrowest ground" for deciding the case and therefore the appropriate one.

Justice Scalia was, in his bitterly misanthropic and homophobic way, absolutely right. *Romer v. Evans*, *Lawrence v. Texas*, *Loving v. Virginia* all point to one irresistible logical conclusion: under the existing precedents of the Supreme Court, the right to marry belongs to everyone, straight people and gay people alike.

34 Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012).
35 Id. at 1064.
36 Id. at 1076.
37 517 U.S. 620 (1996).

When the Supreme Court accepted the case by granting a writ of *certiorari* on December 7, 2012, it asked the parties not only to brief the question of whether Proposition 8 is constitutional but to brief the question of whether its proponents have Article III standing to defend it. The Court has questioned in the past whether sponsors of ballot initiatives have such standing without resolving the issue.[38] If the Court were to find they don't, it would nullify the Ninth Circuit's decision and arguably reinstate the broader decision against Proposition 8 rendered by Judge Walker. However, the scope of his order in that case would then be in question, with Proposition 8 proponents likely arguing it applies only to the parties in the case and marriage proponents contending that it is binding statewide.

United States v. Windsor

With its vivid facts showing a severe "gay marriage penalty" imposed by DOMA, *Windsor* presents a straight-up case of anti-gay discrimination.

But the quirky procedural history of the parties and lawyers in the litigation creates an opportunity to dodge the merits here too. Attorney General Eric Holder announced in February of 2011 that the Department of Justice would no longer appear in court to defend DOMA's Section 3, which it considers unconstitutional (although the Obama administration has said that it will continue to enforce the law until it is struck down or repealed). In response, conservative lawyer Paul Clement filed a motion for intervention in the case on behalf of the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives, a standing body in the House composed of the House leadership—the Speaker, the majority and minority leaders, the majority and minority whips—which oversees the work of the House Office of General Counsel. The BLAG intervened "for the limited purpose of defending the constitutionality of Section III." When Windsor moved for summary judgment, BLAG filed a brief in opposition and continued to participate in the litigation, with the Department of Justice filing a notice of appeal in the Second Circuit on behalf of BLAG's right to defend DOMA. When the Second Circuit ruled in Windsor's favor, the Department of Justice—which technically lost the case but got the result it wanted—petitioned for *certiorari*, asking the Court to expand the Second Circuit's ruling nationwide so the U.S. government would no longer have to enforce a law it believes is unconstitutional. In January 2013, the House of Representatives specifically authorized BLAG to defend DOMA and related laws, stating that "the Bipartisan Legal Advisory Group continues to speak for, and articulate the institutional position of, the House in all litigation matters in which it appears."

"Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."

–Judge Stephen Reinhardt

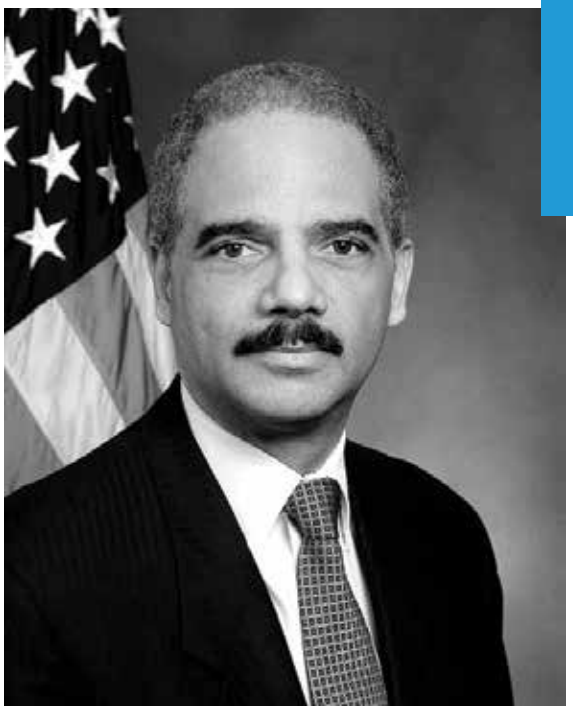
PROPOSITION 8 PROTEST
Karin Hildebrand Lau / Shutterstock.com

On December 7, 2012, when it granted *certiorari*, the Supreme Court asked the parties not only to address whether Section 3 of DOMA violates Equal Protection but to answer two threshold procedural issues: (1) whether the United States' and Department of Justice's agreement with the Second Circuit decision in *Windsor* deprived the Supreme Court of jurisdiction in the case, and (2) "whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case." Under Article III's "case or controversy" requirement, parties to litigation must have "standing," which means a direct and particularized interest in the outcome of the litigation.

38 Arizonans for Official English v. Arizona, 520 U.S. 43, 64-67 (1997).

The Court has raised serious issues relating to standing, and plausible arguments can be mobilized on both sides. Conservatives are adept at playing with standing doctrine, which has often been used to drive environmental, church-state separation, and civil rights and civil liberties plaintiffs out of court. In any event, the pliable standing doctrine may offer a way out for a Court that cannot move one way or another on equal marriage rights for gay people or would prefer to see marriage discrimination ride off slowly into the sunset rather than give it the guillotine once and for all.

If the Court deems it cannot hear the case because the party asking for review (the U.S.) actually agrees with the opinion being challenged or because BLAG lacks Article III standing, that would presumably leave the decision below in favor of Edith Windsor and create a precedent in the Second Circuit at least against DOMA. For, if the government refuses to defend a clearly unconstitutional statute and the Court rules that no one has standing to defend it in the government's place, it would be unthinkable to take the position that such a statute, and the discrimination it imposes, must simply remain the law forever because no one with standing is willing to defend it. A constitutional injury must have a remedy.



Attorney General Eric Holder

Public Opinion or the Rule of Law: A Big Test for the Supreme Court

Overhanging the Court's treatment of these cases is the question of whether the Court should "get ahead" of public opinion on the marriage issue. This is a burning obsession with many academics who seem convinced that the Court should mirror or track public opinion.

Public opinion polls actually show a majority of Americans in favor of marriage equality today; and the 2012 elections saw four decisive victories for same-sex marriage at the polls when voters in Maryland, Maine, Minnesota, and Washington voted to stop discriminating. But that still means that a total of only nine states and the District of Columbia permit same-sex couples to marry while 41 states still do not. Fully 30 states have taken pains to write the "one man and one woman" standard explicitly into their constitutions.

Many people, including some marriage equality supporters, argue that the Court should not be asked to "get ahead" of the people and the states on this question. They fear that the Court could create a backlash by striking down marriage discrimination, and they cite to a booming academic literature questioning the wisdom of landmark cases like *Brown v. Board of Education* and *Roe v. Wade*, where the Court took on powerful social commitments by opposing racial segregation and abortion prohibition instead of waiting patiently for attitudes and values to change. Critics of these landmark equality and liberty decisions argue that they caused great social divisions, like "massive resistance" in the South and the pro-life movement's campaign against abortion rights.

Attorney General Eric Holder announced in February of 2011 that the Department of Justice would no longer appear in court to defend DOMA's Section 3, which it considers unconstitutional (although the Obama administration has said that it will continue to enforce the law until it is struck down or repealed).

But this whole line of attack fundamentally

misunderstands why we have a Supreme Court and a judiciary. The major purpose of judicial review is to uphold individual liberty and rights against official injustice. The Court proceeds by interpreting the meaning of the Constitution and Bill of Rights, not by reading public opinion polls or adding up state laws. Judicial review is rendered meaningless if the Court's reading of the rights of the people is dictated by a commitment to ratifying existing public policies and public opinion. It should make no difference to the Court's decision whether 52 percent of Americans now reject marriage discrimination or 52 percent still support it, as was the case a year ago. Constitutional rights cannot hinge on the margin of error in public opinion polls!

Even if we ask the Court to anticipate the public response to its decisions, it seems strange to blame *Brown v. Board* for racism or *Roe v. Wade* for people who want to deny reproductive rights to women. These repressive impulses were there long before these decisions were handed down and it is no surprise that they were there afterwards. The only real question is what role the Court will play in the historical process of vindicating the rights of the people. Will it stand in the doorway as it did in *Plessy v. Ferguson*, endorsing Jim Crow, or will it proclaim the equal rights of citizens, as it did in *Brown*? Will it constitutionalize discriminatory "traditions," as it did in *Bowers v. Hardwick*, or will it defend the rights and liberties of the people, as it did in *Lawrence v. Texas*?

The real question is whether Justice Kennedy will follow the powerful logic of his prior opinions and help render one of the landmark decisions in Supreme Court history.

The moderate-liberal faction on the Court today has a sufficiently strong connection to the modern civil rights tradition that it can be expected not to shy away from its historic task in these cases. The hard-Right conservative faction is in full-swing reaction against this tradition and will doubtless work to uphold marriage discrimination. The real question is whether Justice Kennedy will follow the powerful logic of his prior opinions and help render one of the landmark decisions in Supreme Court history. If he does, DOMA's Section 3 will fail and discriminatory state laws across America will fall too. It is also possible that Proposition 8 will be reversed just on the narrow basis that California had not demonstrated a legitimate reason to take away what it has already given to gay couples—that is, equal rights. In any event, the direction of the march of freedom in our constitutional democracy is clear. The question is no longer if gay and lesbian citizens will achieve full equality under law, but when.

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