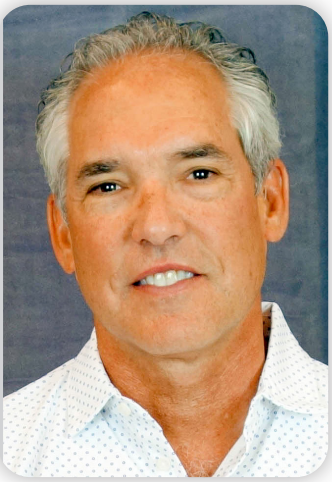
PRESIDENT'S MESSAGE



Looking Back at the History of LGBTQ Law in America

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In the first days of his presidency, President Joe Biden – by executive order – has reversed the ban against transgender members of the military. In addition, the U.S. has now had the first openly gay candidate for president and the first gay member of a president's cabinet. With those developments in mind, I thought we should review and appreciate how far our nation has progressed in recent years to provide rights to groups that once were hidden and repressed in society. The first national gay rights organization was founded in 1924 as the Society for Human Rights by Henry Gerber in Chicago. Before this time, there was not any mention of gays in our country or world other than in a negative context.

In early U.S. history, legal punishments for gay sexual acts often included heavy fines, prison sentences, or both, with some states, beginning with Illinois in 1827, denying other rights, such as suffrage, to anyone convicted of the crime of sodomy. President Eisenhower went as far as to signing an executive order in 1953 that banned homosexuals from working for the federal government, saying they were a security risk.

As of 1960, every state had an anti-sodomy law. In 1961, the American Law Institute's Model Penal Code advocated the repeal of these laws as they applied to private, adult, consensual behavior. The states did not even start to decriminalize homosexuality until 1961, when Illinois became the first state to repeal their laws.

The first U.S. Supreme Court case that ruled in favor of gay rights occurred in 1958 in the case of *One, Inc. v. Olsen*, 355 U.S. 371 (1958). The court ruled in favor of free speech for homosexuals. One Inc. began publishing the first pro-gay publication in the U.S. in 1953. The U.S. Post Office and the FBI believed the material was obscene and thus could not be mailed.

In 1970, Jack Baker and Michael McConnel became the first gay couple to apply for a marriage license, which was denied. The case was appealed to the U.S. Supreme Court, which dismissed the case for want of a substantial federal question, even though the appellants raised issues concerning due process and equal protection. 409 U.S. 810 (1972).

In 1986, the Supreme Court began again to express more conservative views when it held that the 14th Amendment does not prevent the states from criminalizing private consensual sex between people of the same sex. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In this 5-4 decision, the majority opinion reasoned that the Constitution did not confer a fundamental right to engage in homosexual activity.

In 1996, the Supreme Court started to recognize a different view that advanced the rights of all Americans. In *Romer v. Evans*, 517 U.S. 620 (1996) – in a 6-3 decision – the court ruled against Colorado Amendment 2, which would have prevented affirmative action based upon sexual orientation. Justice Anthony Kennedy held that if the equal protection of the laws means anything, then it must mean a desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.

However, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) – in a 5-4 decision – the court gave deference to the organization's teachings disapproving of homosexual behavior. In the decision, the court found that forcing the scouts to readmit Dale (a gay scout leader) would violate the scouts' First Amendment right to freedom of association.

In the case of *Lawrence v. Texas*, 539 U.S. 558 (2003), in a 5-4 decision, the court ruled that laws prohibiting private homosexual activity between consenting adults are unconstitutional. This case overturned *Bowers*, supra, for the reasoning that *Bowers* had been criticized in the U.S. and rejected by most other developed western countries. For this reason, Kennedy stated that there was a jurisprudential basis to think that it should be "an integral part of human freedom" for consenting

adults to choose to privately engage in sexual activity. Kennedy wrote: "The petitioners [Lawrence and Garner] 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."

In *United States v. Windsor*, 570 U.S. 744 (2013), the court decided to eliminate the portion of the Defense of Marriage Act (DOMA) of 1996 that defined marriage as a "legal union between one man and one woman as husband and wife." The case considered the situation of Edith Windsor and Thea Spyer, who were married in Canada before moving to New York, a state that recognized their marriage. After Spyer passed away, Windsor attempted to claim a tax exemption for surviving spouses—only to be blocked by DOMA. In a 5-4 vote, the Supreme Court ruled that DOMA violates due process and equal protection principles, and it ordered the U.S. to refund Windsor's taxes.

Then in *Obergefell v. Hodges*, 576 U.S. 644 (2015), a group of 14 same-sex couples and two men whose partners were deceased joined together and won one of the LGBTQ rights movement's biggest victories. In a 5-4 vote, the Supreme Court found for the petitioners, who argued that state officials violated the 14th Amendment's equal protection clause by prohibiting them from marrying or not recognizing marriages performed in other states. The court also extended them the benefits guaranteed to opposite-sex married couples. This decision had a profound cultural impact because it gave LGBTQ people a "common language" with straight people.

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In 2019, SCOTUS took on three new cases: *Altitude Express Inc. v. Zarda*, 590 U.S. __ (2020), *Bostock v. Clayton County*, 590 U.S. __(2020), *Georgia and R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, 590 U.S.__ (2020) regarding whether gay and transgender workers are protected from workplace discrimination. In a surprising 6-3 decision that came in June 2020, the court ruled that LGBTQ workers are protected under Title VII, which prevents discrimination on the basis of sex, and cannot be fired for their sexual orientation or gender identity.

With the addition of Justice Amy Coney Barrett to the Supreme Court, we will have to see whether some of these recent landmark decisions will be modified in the coming future. She is a textualist and an originalist, and her views may conflict with the court's prior decisions. Hopefully, we all wish to have these rights applied equally to all humans.