Sexual Orientation and the Law

OLLI at Vanderbilt

Spring Term 2017

"Gay Then, Gay Now"

An Overview

- Classical era roots: the *Lex Scantinia* (2nd century BCE); Theodosius (4th century CE)
- Medieval Times: Goths, Visigoths and the Role of Ecclesiastical Law
- XVIth Century England: A new felony
- Colonial America
- 19th and 20th century US laws: criminalization and disabilities
- Changes in the courts and at the ballot box
- What's happening around the globe

Period of Roman Expansion and Domination

- One early statute – origins not totally clear – the *Lex Scantinia*. This protected minor males of noble families (*ingenui*) from being used for sexual gratification by older males. It was thus one form of *stuprum* (criminal fornication). Prosecutions relatively rare. Probably enacted 149 B.C.E.
- Early Christian writings: No legal force within the Roman state, but increasingly influential as the sect grew (see handouts from Week 3)

Later Roman Empire (West)

- 342 CE: A statute that may have banned marriage of two males (scholars argue; John Boswell finds this the "obvious reading," challenging Derrick Sherwin Bailey). It is undisputed that Emperor Nero had married two different men during his reign.
- C. 390: Emperors Justinian and Theodosius make homosexual acts unlawful in general; Theodosius bans observation of former Roman religions and makes Christianity the only state religion

The Early "Dark Ages"

- Goth legalities largely unknown because of lack of written records
- Visigoths in Spain: in 693, Egica, monarch of "Spain" urges 16th Council of bishops at Toledo to deal more firmly with "that obscene crime committed by those [clergymen] who lie with males . . . . " Council sets punishment as removal from office, castration, excommunication, 100 lashes, exile. Egica decrees similar punishments on non-clergy as a matter of civil law, increasing the harshness of prior law.
- Carolingian empire: No legislation, but statements of condemnation

Ecclesiastical Law Treatment
End of the First Millenium

- Decretum of Burchard of Worms (1007): treats homosexuality as one of a list of sexual offenses, including adultery, for which penance must be imposed. (various church officials would produce lists of suggested penances)
- Pope Leo IX responds to a suggestion made in Saint Peter Damian's *Liber Gomorrhianus* that all clerics who engaged in male-male sex acts be purged from office by deciding that only those for whom this was a "long standing practice" or a practice engaged in "with many men" should be treated so severely. (*Nos Humanius Agentes ["We More Humanely"]* in the year 1051

Ecclesiastical and Civil Law
Increasing Hostility to Homosexuality

- "Hardliners" become dominant so that penances become increasingly harsh.
- Saint Thomas Aquinas (? – d. 1274) theorizes that all human sexual activity was intended by God to be solely for the purpose of producing children. Therefore any other sort of sexual doing was sinful and "unnatural."
- Urgings by numerous clerics that homosexual acts be subject to punishment by the state as well as by the church. "Penances" not enough, they argue.
- 1532: Homosexual acts criminalized in the Holy Roman Empire

England: The 1533 "Buggery Act"

- "Forasmuch as there is not yet sufficient and condign punishment appointed . . . by . . . The Laws of this Realm for the detestable and abominable Vice of Buggery committed with mankind or beast: It may therefore please the King's Highness with the assent of the Lords Spiritual and the Commons of this present parliament . . .that the same offence be thenceforth adjudged. Felony . . . And that the offenders . . . shall suffer such pains of death and losses and penalties of their goods and chattels debts lands tenements and hereditaments as felons do . . ."

Colonial America

- 1641: Bay Colony (Massachusetts) *Body of Laws and Liberties*
  - Section 8: If any man lyeth with mankind as he lyueth with a woman, both of them have committed abhomination, they both shall surely be put to death
  - Note: An exception was added later for non-consenting youths under 14. Connecticut adopted the same law, but excused those under 15
- Elsewhere: Similar laws in New England colonies, New York; Pennsylvania – dominated by Quakers – did not provide for a death penalty until required in 1718 to bring its laws into line with English laws generally. Most jurisdictions simply treated English criminal laws as in effect

Colonial America: Enforcement

- Executions apparently were rare. Two are well documented: Richard Cornish, in Virginia in 1625; William Plain, 1646.
- Professors Eskridge and Crompton both regard enforcement of the statutes as rare, but caution that research on this is difficult given the destruction of records and the difficulty of using the records that have in fact survived.

Post-Revolutionary America

- 1786: Pennsylvania abolishes the death penalty for sodomy but retains forfeiture of property and imprisonment.
- Over time, the death penalty is gradually eliminated in all state laws, but remains in the North Carolina Code until 1868, the South Carolina code until 1873
- Some statutes include racial classification. Arkansas Penal Code of 1848, § 8: sodomy (or attempted sodomy) by white: 5 to 21 years in prison; death penalty available for blacks. The different treatment is repealed in 1873.

Statutory Language

- Most frequent terminology:
  - "sodomy"; "buggery"; "crime against nature"; "carnal copulation"
  - [Note: The "crime against nature" language was widely used in the United States because of the popularity of the work of Blackstone, who used the term in his *Commentaries*.]
- Common clarifications and expansions:
  - Oral sex acts: fellatio and cunnilingus (thus bringing women into the picture)
  - "Indecent liberties" – usually with minors

The Tennessee Experience: The Statute

- First enacted in 1829, and carried forward into later criminal codes with little if any change:
- "Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five nor more than fifteen years."

Tennessee courts: "Crime against Nature"

- The phrase includes fellatio ("penetration per os"): *Fisher v. State*, 197 Tenn. 594, 277 S.W.2d 340 (1955)
- The phrase includes cunnilingus: *Locke v. State*, 501 S.W.2d 826 (Tenn. Crim. App. 1976)

Twentieth Century America pre-1960

- Early to mid-century: No restoration of death penalty, but other increasingly harsh penalties are enacted, including such measures as castration (California in 1941); sterilization (Idaho, Iowa, Kansas, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, Wisconsin)(usually limited to specific categories of offenses); civil commitment for indefinite periods (Tennessee: a person who in the "course of misconduct in sexual matters has evidenced a general lack of power to control his sexual impulses")

Later Twentieth Century America: The States

- Decriminalization of consensual acts begins with Illinois in 1961.
- Many states go through stages, first reducing penalties, reducing felonies to misdemeanors, redefining what is banned.
- Many statutes are struck down by state courts, as unduly vague, or as violation of state constitutions. (See *Campbell v. Sundquist*, 926 S.W.2d 926, (Tenn. App. 1996)(violation of right of privacy guaranteed by Tennessee constitution).

Why decriminalize?

- Model Penal Code: Decriminalizes (a) private, (b) consensual, (c) acts between adults. Adequate protection of individual safety and integrity is provided by statutes that penalize: (a) assault, and (b) acts with minors.
- Increased research by individual investigators and professional groups lead to new attitudes.
  - The "Kinsey Reports": *Sexual Behavior in the Human Male* (1948): *Sexual Behavior in the Human Female* (1953)
  - Evelyn Hooker, "Adjustment of the Overt Male Homosexual" (1957)
  - American Psychiatrics Association (1973); American Psychological Association (1974)

Why decriminalize? (cont.)

- The gradual "coming out of the closet"
  - Formation of "homophile" organizations (Mattachine Society (1950 -); Daughters of Bilitis (1956-1969)
  - Independence Hall protests (1965-)
  - The Stonewall Riots (June 1969)
  - Gay Pride parades (1970: Chicago, New York, Los Angeles, San Francisco)
  - HIV crisis
- Net result: "I have a friend (sibling, cousin, co-worker, etc.) who . . . ."

The Supreme Court of the United States: Laws Criminalizing Consensual Sex

- Two major decisions: *Bowers v. Hardwick,* 478 U.S. 186 (1986); *Lawrence v. Texas,* 539 U.S. 558 (2003)
- XIVth Amendment, United States Constitution, Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Bowers v. Hardwick (1986)

- Georgia Statute (as given in the Supreme Court opinion):
  - (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .
  - (b) A person convicted of the offense of sodomy shall be imprisoned for not less than one nor more than twenty years . . . .

Bowers v. Hardwick: The majority opinions

- Justice White – for 5: There is no "fundamental constitutional right to engage in homosexual sodomy"; nor do prior cases establishing a constitutionally protected "right of privacy" extend to protect this activity. Such claims fly in the face of (a) a history of criminalization of such activity in England and the United States, and (b) the current laws of many states that treat homosexual conduct as unlawful.
- Chief Justice Burger: Underscores the "historicity" argument.
- Justice Powell: There may be an VIIIth Amendment "cruel and unusual punishment" problem (20 years for a single private act?), but that is not involved in this case.

Bowers v. Hardwick: The dissenters

- Justice Blackmun: The majority errs in thinking this is about a right to engage in a particular act of sodomy. It is about a right to be left alone, the right of privacy. That is a truly fundamental interest that is constitutionally protected. Private acts of consenting adults in their own home fall within that sphere.
- Justice Stevens: The concession by the defendant state official that the state will enforce it only against homosexuals ought not to influence the outcome here by recasting the issue as one of "homosexual rights." There is a liberty interest here that is shared by all persons.
- Note: Justices Brennan and Marshall sign on to both dissenting opinions.

Lawrence v. Texas, 539 U.S. 558 (2003)

- Odd beginnings: Three friends argue while tipsy
- Justice of the Peace hearing: the "no contest" plea
- County Criminal Court: The motion to quash sets up the constitutional challenge; another "no contest"
- Fourteenth Court of Appeals: The original panel finds the statue unconstitutional; an *en banc* decision reverses that
- Court of Criminal Appeals: refuses to take up the case

Lawrence v. Texas: The Texas Statute

- "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
- "[D]eviate sexual intercourse" includes
  - "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or
  - (B) the penetration of the genitals or the anus of another person with an object."

Lawrence v. Texas: The majority opinions

- Justice Kennedy (joined by Justices Stevens, Souter, Ginsburg and Breyer):
  - *Bowers* did not adequately recognize the liberty interest involved. Being free to make basic decisions about forming a close relationship and engaging in that relationship in private is a significant interest, and is entitled to protection under the Due Process clause of the XIVth Amendment. No compelling state interest justifies compromising that right to make such private decisions.
- Justice O'Connor: This statute violates the Equal Protection clause of the XIVth Amendment by singling our homosexuals without justification.

Lawrence v. Texas: The dissenters

- Scalia (joined by Rehnquist and Thomas):
  - *Bowers* was properly decided. The majority are engaged in a "massive disruption of the current social order." The XIVth amendment only protects "fundamental" rights and the right to engage in this conduct is not one. Moreover, furthering majoritarian conceptions of morality is a justifiable basis for enacting a statute. The majority are simply signing on to "the homosexual agenda" – as are too many institutions.
- Thomas: While the Texas statute is "uncommonly silly," it is not unconstitutional. He cites former Justice Potter Stewart saying there is no general constitutional right to privacy.

Another branch of law: Privileges

- ***Admission to a profession***:

  In re Kimball, 40 App. Div. 2d 252, 339 N.Y.S.2d 302, modified, 41 App. Div. 2d 780,339 N.Y.S.2d 302, reversed *sub nom. Application of Kimball,* 33 N.Y.2d 586 , 301 N.E.2d 436 (1973).

- ***Ability to participate in political activity***

  Romer v. Evans, 517 U.S. 620 (1996)

- ***Family formation***

  United States v. Windsor, 133 S.Ct. 675 (2013); *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015)

In re Kimball, 339 N.Y.S.2d 302 (App. Div. 1973)

- Kimball, a lawyer, was disbarred in Florida in 1957 after his conviction for sodomy. He moved to New York and in the early 1970s took the bar examination there. He passed. The Committee on Character and Fitness found him suitable except for that prior conviction/disbarment, and passed his application for admission to the bar on to the Appellate Division court.
- Held (3-2) The application is denied. The applicant's conduct remains unlawful conduct in New York, though now only a misdemeanor. Moreover, his changing of positions in the Florida disbarment militate against him.

In re Kimball – Dissent and outcome

- The purported bases for the majority's decision are not adequate. The inconsistencies in his testimony in a series of proceedings were minor. Moreover his "conviction" was the result of his decision to enter a plea of *nolo contendere,* (no contest) and it is the general rule that convictions so obtained do not carry further weight in other proceedings.
- The fact that he is homosexual and engages in such acts should not keep him from admission, given the changing *mores* of society.
- The Court of Appeals reverses, agreeing with the dissent below.

Romer v. Evans, 517 U.S. 620 (1996)

- The Amendment to the Colorado Constitution in question:

  No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation

  Neither the State of Colorado . . . nor any of its agencies, political subdivisions, municipalities, or school districts shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationship shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preference, protected status, or claim of discrimination. . . .

Romer v. Evans: Decisions below

- Various municipalities and individuals sought injunctions against putting this Amendment into practice, which would have voided a number of municipal ordinances and policies outlawing discriminatory treatment of homosexuals persons. The Colorado Supreme Court ultimately determined that the Amendment infringed the fundamental right of homosexual people to engage in the political process in seeking vindication of their rights and privileges. It thus violated the Equal Protection Clause of the XIVth Amendment.

Romer v. Evans: Majority opinion

- Justice Kennedy (joined by Stevens, O'Connor, Souter, Ginsburg and Breyer): This Amendment deprives a specific group of a privilege enjoyed by all other citizens: to seek protection from government for their legitimate interests. As such, it does far more than – as its supporters claim – put this group in the same position as all other persons. Even when tested only as whether it has a "rational basis," this provision fails, as one clearly motivated simply by animus against a particular class of people rather than by legitimate concerns.

Romer v. Evans: The Dissenters

- Justice Scalia (for himself, Chief Justice Rehnquist and Justice Thomas):

This court only recently decided *Bowers v. Hardwick*. It is therefore clearly permissible for the people of Colorado to regard persons who engage in homosexual conduct differently from the way they regard others. Moreover our political and social history indicate suspicions and distrust of this group. All the Amendment does is to counter the "geographic concentration and disproportionate political power" of the homosexual community. Moreover, the majority decision may implicate provisions in state constitutions prohibiting polygamy.

United States v. Windsor, 133 S.Ct. 2675 (2013)

- The plaintiff, Edith Windsor, sought a tax refund of over $360,000 as the "spouse" of a deceased entitled to favorable treatment under the estate tax provisions of the Internal Revenue Code. Plaintiff's claim to be a spouse is based on her 2007 marriage in Canada to the late Thea Spyer, a woman. They resided in New York, which recognized their Canadian marriage as lawful.
- Section Three of the Defense of Marriage Act defines marriage for purposes of all federal legislation as "only a legal union between one man and one woman . . . ."

Windsor: A complication: the "Who speaks for whom?" issue

- The Attorney General and President, having determined that Section 3 of DOMA was unconstitutional , announced that the federal executive would continue to enforce the DOMA provision, pending repeal or court review, but not defend it. This message was sent to the Congress, under a statute [28 U.S.C. § 530D] calling for such notification. Thereafter, the case involved three parties: Windsor, the IRS, and a House of Representatives group called the Bipartisan Legal Advisory Group (BLAG), seeking to be the sole representative of the United States, eliminating the Attorney General.

Windsor: The decisions below

- The district court determined that Ms. Windsor was entitled to a tax refund of more than $360,000.
- The United States filed an appeal.
- BLAG also filed an appeal, seeking to be treated as sole proper representative of the United States, since the Attorney General agreed with the district court outcome.
- The Circuit Court of Appeals (a) denied BLAG's motion to have the United States, as represented by the AG, dismissed as a party, and (b) affirmed the district court outcome.

Windsor: The "who participates" issue

- The Solicitor General's argument:
  - The plaintiff clearly had standing, since she had paid taxes and wishes to obtain refund of that money.
  - The United States clearly has standing, since it will be required to pay out money if the rulings below are affirmed.
  - Moreover, since the President has directed the Executive Branch to continue to enforce DOMA, and since DOMA affects many programs, the federal executive has a legitimate interest in the outcome of the case.
  - That the Executive Branch agrees with the outcome below does not deprive it of "aggrieved" status.

Windsor: The "who participates" issue (cont.)

- BLAG's argument
  - BLAG is an appropriate representative of the House of Representatives and is entitled to be treated as the House would be
  - As a house of Congress, it has an interest in the defense of a statute it has passed.
  - When the executive branch determines not to defend the constitutionality of a statute, it is appropriate for the House to be allowed full party status for that purpose.

Windsor: The "who participates" issue (cont.)

- Appointed Amica's argument:
  - The case should be dismissed since neither BLAG nor the Executive Branch has standing.
  - BLAG lacks standing because (a) a ruling that Section Three of DOMA is unconstitutional does not affect the House with respect to any of its particular prerogatives, and (b) it is improper to grant standing to one house of Congress by itself.
  - The Executive Branch lacks standing since it agrees with the outcome below, and any aggrievance it may suffer because of the remedy issued is not of sufficient magnitude to justify considering it a true "party."

Windsor: The Defense Of Marriage Act (DOMA) issue

- Ms. Windsor's argument:
  - Discrimination on the basis of sexual orientation should be reviewed using "heightened scrutiny." She relies on the Second Circuit's reasoning that (a) homosexuals have historically endured discrimination; (b) homosexuality has no relation to aptitude or ability; (c) homosexuals are a distinct group with non-obvious characteristics; and (d) homosexuals lack significant political power.
  - Section 3 of DOMA furthers no significant federal interest.
  - Section 3 would fail even using "rational basis" analysis, since it creates unnecessary difficulties for states that wish to recognize gay marriage.

Windsor: The DOMA Issue

Argument by the United States (Executive Branch): No asserted interest justifies the statute

- Morality: long-term committed relationship immoral?
- Tradition: at most, a matter for states to consider
- Procreation and child-rearing: studies indicate gay couples are often good parents
- Sovereign choice: Since 1996, several states have moved to recognize gay marriage
- Federal fiscal policy: uncertain at best whether DOMA saves money

Windsor: The DOMA Issue (cont.)

- The BLAG Argument: Gays are not a distinct group entitled to heightened scrutiny
  - Gays are not politically powerless
  - Gays do not tend to have unplanned and unintended children – and thus the social concerns that lead society to value marriage do not apply to gays
  - Sexual orientation is not an "immutable" characteristic
  - Discrimination against gays has been historically different from discrimination based on race, gender, and illegitimacy
- Rational bases exist for DOMA

Supporting briefs from amici curiae – a sampling

- In support of Ms. Windsor:
  - American Psychological Association/American Academy of Pediatrics/ American Medical Association *et al.* (scientific evidence on homosexuality and child rearing)
  - 278 Employers and employer associations (impact on cost of doing business when federal and state laws are out of sync)
  - Religious figures, including several Episcopal bishops, United Synagogue of Conservative Judaism *et al.* (uncoupling civil and religious marriage preserves religious freedom)
  - Fifteen states and D.C. (unfortunate effect of DOMA on state sovereignty and ability to legislate)

DOMA Supporting briefs from Amici – a sampling

- Citizens United/Gun Owners of America/ English First Foundation *et al.* (BLAG has standing)
- Evangelical churches/Church of Jesus Christ of LDS; *et al.* (rational basis the proper standard for legislation that "implicates fundamental questions of social values and policy")
- Conference of Catholic Bishops (no "fundamental right to marry a person of the same sex")

Windsor: Majority Opinion

- Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor and Kagan):
  - There is a justiciable controversy here because (a) entitlement to money remains at stake, since the IRS continued to refuse to pay a refund after the Court of Appeals decision; (b) none of the "prudential" reasons to refuse to consider a case is applicable here
  - Section Three of DOMA violates the Equal Protection clause which the Court has held applies to the federal government under the Vth Amendment

The "Equal Protection" Clause Reasoning in *Windsor*

- "The liberty protected by the Fifth Amendment's Due Process clause contains within it the prohibition against denying to any person the equal protection of the laws. [citing prior cases] . . . The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class . . . ."

Windsor's Equal Protection Reasoning (cont.)

- "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages."

Dissenting opinions

- Three dissenting opinions were issued, one by the Chief Justice, who emphasizes the limited nature of the majority's ruling, even as he disagrees with it.
- Justice Scalia's opinion characterizes the majority opinion as a sort of power grab.
- Justice Alito's opinion indicates that BLAG should be regarded as having standing, since the Executive branch decided not to defend the statute. On the merits, he would find that the Congress had a legitimate purpose in enacting a uniform definition of marriage to be used in applying its laws.

Subsequent developments – *Windsor*

- The Department of Defense quickly implemented a plan to provide benefits to same-sex spouses of members of the military on an equal basis with spouses in heterosexual marriages..
- On July 17, 2013, the Office of Personnel Management Benefits Administration announced a 60-day enrollment period ending August 26, 2013, for existing federal government employees in legal same-sex marriages to apply for spousal benefits, treating these relationships as "new marriages" for purposes of various regulations.

Subsequent Developments -- *Windsor*

- On August, 30, 2013, the Internal Revenue Service issued Revenue Ruling 2013-17, which states:
  - [T]he Service has determined to interpret the Code as incorporating a general rule, for federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.
  - For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships that are not denominated as a marriage under that state's law . . . .regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.

Obergefell v. Hodges, 135 S.Ct. 2584 (2015)

- Four cases in one:
  - Challenge to the Michigan Marriage Amendment (voter-approved) prohibiting same-sex marriages
  - Two challenges to Ohio law forbidding recognition of same-sex marriage by couples legally married elsewhere and by a funeral director
  - Challenges to Kentucky's marriage laws by couples legally married elsewhere
  - Challenge to Tennessee's marriage laws by a couple legally married elsewhere
- All challengers won at the trial level, but a decision by the Sixth Circuit Court of Appeals upheld the statutes on appeal (Judge Daughtrey dissenting)

Obergefell: Two issues

- Does the XIVth Amendment require a State to license a marriage between two people of the same sex?
- Does the XIVth Amendment require a State to recognize a same-sex marriage licensed and performed in another State?

Obergefell: Majority opinion

- Justice Kennedy (joined by Ginsburg, Breyer, Sotomayor and Kagan):
- "[T]he Court has long held the right to marry is protect by the Constitution." [The opinion concedes the earlier cases assumed two-gender couples.]
- "[F]our principles and traditions demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."
- (1) "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."

Obergefell: Majority opinion (cont.)

- (2) "[I]t supports a two-person union unlike any other in its importance to the committed individuals."
- (3) "[T]he right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education."
- (4) "[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."
- Thus the right to choose one's marriage partner is a fundamental right protected by the XIVth Amendment.

Obergefell: Majority opinion (cont.)

- The opinion then rejects arguments that allowing same-sex marriage will undermine the institution of marriage, and rejects other claims of possible harms.
- The opinion notes that this decision in no way takes away the First Amendment freedom enjoyed by opponents of same-sex marriage to preach and teach that it is sinful, immoral and the like.
- On the second issue: "It follows that the Court must hold . . that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State." (Special mention of the Tennessee soldiers.)

Obergefell: Dissents

- Chief Justice Roberts (joined by Justices Scalia and Thomas): The privilege of deciding who is entitled to marry belongs to the states, and is not governed by the federal constitution except in the most extreme cases.
- Justice Scalia (joined by Justice Thomas): The majority are legislating, not acting as judicial officers. This should be left to the people of the various states.
- Justice Thomas (joined by Justice Scalia): The majority give too much "substantive" interpretation to the Due Process clause

Obergefell: Dissents

- Justice Alito (joined by Justices Scalia and Thomas): The issue of the propriety of same-sex marriage should be left to the states.

Recent developments: Federal Criminal laws

- 2009: President Obama signs into law a "hate crimes" provision:
  - 18 U.S.C. § 249(a)(2): "Whoever . . . willfully causes bodily injury to any person . . . because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person –

    (i) shall be imprisoned not more than 10 years, fined . . . or both; and

    (ii) shall be imprisoned for any term of years, or for life, . . . If

    (I) death results from the offense; or

    (II) the offense involves kidnapping . . . or aggravated sexual abuse . . . .

State Criminal Laws: Tennessee Code Annotated §40-35-114

- If appropriate for the offense . . the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence:
- . . . (17) The defendant intentionally selected the person against whom the crime was committed . . . in whole or in part because of the defendant's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person . . . .
- [Note: Does not mention gender identity.]

Current Civil Law Controversies in the Courts

- Employment by government: *Glenn v. Brumby,* 663 F.3d 1312 (11th Cir. 2011)(transgender employee fired as she made transition; unlawful under Equal Protection clause of XIVth Amendment)
- Bathroom bills and ordinances: Challenges include *Whitaker v. Kenosha Unified School District No. 1 Board of Education,* 2016 WL 5239829 (E.D. Wis. 2016); *Evancho v. Pine-Richland School District,* 2017 WL 710619 (W.D. Pa. 2017). Department of Education/Department of Justice Guidance letters in 2015, 2016 indicated transgender students were protected by "Title IX" but a 2017 Guidance takes a different position

Current Controveries: Title VII of the Civil Rights Act of 1964

- *Hively v. Ivy Tech Community College of Indiana*, ___ F. 3d ___ (7th Cir 2017), 2017 Westlaw 1230393: The term "sex" in the statute includes sexual orientation. (This creates a "circuit split" and makes Supreme Court review of the issue more likely.)
- Equal Employment Opportunities Commission opinions:
  - Macy v. Department of Justice, EEOC Appeal 0120120821 (2012)(transgender)
  - David Baldwin v. Department of Transportation, EEOC Appeal 120133080 (2015) (sexual orientation)

Side note: States continuing to carry same-sex laws on the books

- Thirteen states continue to carry on the books laws making same-sex sexual conduct of some sort unlawful, despite the decision in *Lawrence v. Texas:*

  Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, Virginia

Around the Globe: Criminal laws

- In the Americas: Same-sex sexual activity remains unlawful in 10 Caribbean nations, including Guyana, Jamaica, and Trinidad & Tobago
- In Africa: 33 nations criminalize homosexual acts, including several heavily populated countries, such as Algeria, Egypt, Kenya, Nigeria, Zimbabwe
- In Asia: 25 countries criminalize homosexual acts, including India, Afghanistan, Iran, Iraq, Pakistan, Saudi Arabia, Syria, United Arab Emirates
- Europe: No country now criminalizes homosexual acts, but Russia and some other former Soviet nations punish “homosexual propaganda”

Around the Globe: Family Formation

- The Pew Research Center identifies the following countries as ones allowing gay marriage: Argentina (2010); Belgium (2003); Brazil (2013); Canada (2005); Colombia (2016); Denmark (2012); England/Wales (2013); Finland (2015); France (2013); Greenland (2015); Iceland (2010); Ireland (2015); Luxembourg (2014); The Netherlands (2000); New Zealand (2013); Norway (2009); Portugal (2010); Scotland (2014); South Africa (2006); Spain (2005); Sweden (2009); United States of America (2015); Uruguay (2013). Certain States in Mexico also provide for gay marriage.

Around the Globe Family Formation (cont.)

- Several other countries provide "near-marriage" status for same-sex couples, often through some form of civil union, like Germany's "registered life partnerships." These are almost universal in Europe, and are available in several Australian states and in some jurisdictions in Japan.
- A few other countries, such as Israel, "recognize" marriages legally performed elsewhere, but do not provide for marriage or marriage equivalents.