



# THE CASE FOR INCLUSION

News and Legal Analysis on Issues Related to Diversity and Inclusion

## Same Sex Marriage: Where We've Been, Where We Are, Where We're Going

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LGBTQ rights have come a long way in the last thirty years. In the 1986 case, Bowers v. Hardwick, the Supreme Court upheld a sodomy law in Georgia that made private, consensual homosexual conduct a crime. In a concurring opinion, then Chief Justice Warren Burger stated that homosexual conduct was an “infamous crime against nature” that was worse than rape. Seventeen years later in 2003, in Lawrence v. Texas, the Court, essentially, reversed itself, finding that intimate, consensual conduct was part of the liberty protected by substantive due process under the 14<sup>th</sup> Amendment and invalidated a number of similar laws that criminalized homosexual conduct between consenting adults.

Also in 2003, Massachusetts became the first state in the United States to allow same-sex marriage. The Massachusetts Supreme Judicial Court held in Goodrich v. Department of Public Health that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”

Since the Goodrich decision, a number of states followed suit, legalizing marriage for same-sex couples. Then, in the 2013 case United States v. Windsor, the United States Supreme Court struck down a provision of the Defense of Marriage Act finding that the purpose and effect of DOMA was to impose a “disadvantage, a separate status, and so a stigma” on same sex couples in violation of the 5<sup>th</sup> Amendment’s guarantee of equal protection. This decision allows federal laws, such as the Internal Revenue Code, to be applied in the same manner for same-sex married couples as they are applied for heterosexual married couples. In other words, if the couple is legally married in the state in which they reside, they are also married in the eyes of the federal government, regardless of whether the couple is a same-sex couple or a heterosexual couple. The Windsor decision stopped short, though, and left some major questions standing, including whether same-sex couples’ right to marry is a constitutionally protected right and whether states have the right not to recognize same-sex marriages performed in other states.

Since Windsor, there have been numerous same-sex marriage decisions striking down these types of bans. Now, same-

sex marriage is legal in thirty-seven states. Many of these decisions were appealed and upheld in several U.S. Courts of Appeals. However, the U.S. Court of Appeals for the Sixth Circuit created a stark circuit split when it overturned lower court rulings and upheld bans on same sex marriage in Ohio, Tennessee, Michigan, and Kentucky in late 2014. The split compelled the Supreme Court to take up the issue again.

Arguments during the current session of the United States Supreme Court will address the same-sex marriage issue head-on. The Court is being asked to decide exactly the issues that Windsor left on the table: 1) Does the 14<sup>th</sup> Amendment require states to license same-sex marriages; and 2) Does it require them to recognize those marriages performed in other states?

The Supreme Court's answers to these questions could have a drastic impact: a decision in favor of same-sex marriage may make same-sex marriage legal nationwide. However, a decision against same-sex marriage could lead to challenges in a number of states where same-sex marriage bans were found unconstitutional.