

LAVENDER SCARE TO LAWFULLY MARRIED: FROM DEVIANT¹ TO DIGNIFIED

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“The privilege of working for the United States Government should not be extended to persons of dubious moral character, such as homosexuals or sex perverts. The confidence of our citizenry in their Government would be severely taxed if we looked with tolerance upon the employment of such persons.”

Secretary of Commerce Charles Sawyer, 1950²

“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”

Justice Anthony Kennedy in *Obergefell v. Hodges*, 2015³

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¹ *Government Persecution of the LGBTQ Community is Widespread*, 1950s, LGBTQ+ VICTORY INST., <https://www.prideandprogress.org/years/1950s>. During the mid-1950s, gays and lesbians were “often labeled” by police as “sexual perverts,” but the government’s preferred term was “deviant.” *Id.*

² Judith Adkins, *These People Are Frightened to Death*, *Congressional Investigations and the Lavender Scare*, NATIONAL ARCHIVES, Summer 2016, Vol. 48, No. 2, <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

³ *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

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I. LAVENDER SCARE TO LAWFULLY MARRIED

“One homosexual can pollute a Government office,” the Hoey Committee warned in its 1950 report, *“Employment of Homosexuals and Other Sex Perverts in Government.”*⁴ The Hoey Report was in response to a congressional charge to ascertain how many “homosexuals and other sex perverts” were government employees, to develop rationales to prove such employment was intolerable, and to evaluate the effectiveness of procedures already in place to address “the problem.”⁵ After consulting with government and military officials, along with psychiatrists, physicians, prosecutors, and police who “deal with the legal and sociological aspects of the problem,”⁶ the Hoey Committee concluded that “homosexuals and other sex perverts” should not be permitted to work for the federal government.⁷

The published report, which was widely distributed,⁸ found that gays and lesbians were emotionally unstable, “had weak moral fiber,” made harmful impacts on co-workers, and “attracted others of their kind to government service.”⁹ It falsely claimed that gays and lesbians were a threat to national security because “most sex perverts” lacked “emotional stability,” which, combined with their weak morals, made them highly susceptible to blackmail by “foreign espionage agent[s]” and communists

⁴ SUBCOMM. ON INVESTIGATIONS, COMM. ON EXPENDITURES IN THE EXECUTIVE DEP’T, EMP. OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOV’T, S. DOC. NO. 81-241 at 1 (2d Sess. 1950) [hereinafter Hoey Committee Report], <https://mattachinesocietywashingtondc.org/wp-content/uploads/2020/05/6.2-senate-subcom-nov-1950-rpt.pdf>.

⁵ *Id.*

⁶ Adkins, *supra* note 2.

⁷ Hoey Committee Report, *supra* note 4, at 3.

⁸ Adkins, *supra* note 2 (“The Hoey committee report was widely promulgated and highly influential. It shaped government agency security manuals for years to come. It was sent abroad to U.S. embassies and to foreign intelligence agencies. The report carried the authority of Congress and so was taken as official proof that gay people did indeed threaten national security.”).

⁹ Hoey Committee Report, *supra* note 4, at 4.

“who prey[] upon the homosexual.”¹⁰ Taking place during the Cold War,¹¹ a time of nationwide fear of communist infiltration of the federal government, the conflation of gays and lesbians with communists led to a sweeping fear of those employed in the federal workforce.¹² The Hoey Report supported the organized firing of gay and lesbian government employees¹³ and justified decades of discriminatory treatment of the LGBTQ community.¹⁴ It also directly contributed to President Eisenhower’s 1953 Executive Order 10450, “*Security Requirements for Government Employment*,”¹⁵ where, “with the stroke of a pen,” gay men and lesbians were officially banned from government employment.¹⁶ This period, known as the “Lavender Scare,”¹⁷ cost thousands of gay men and lesbians their jobs and, for some, their lives.¹⁸ The Hoey Committee Report illustrates the 1950 public perception of gays and lesbians as deviant, perverted, and immoral criminals and social outcasts.¹⁹

In sharp contrast to the public perception of gays and lesbians as deviant criminals, perverted outcasts, and national security risks reflected in the 1950 report, sixty-five years later, the United States Supreme Court recognized the dignity and respect that same-sex couples merit in its 2015 *Obergefell v. Hodges* opinion.²⁰ Announcing that LGBTQ²¹ Americans

¹⁰ *Id.* at 3.

¹¹ National Archives, *House Un-American Activities Committee*, Harry S. Truman, <https://www.trumanlibrary.gov/education/presidential-inquiries/house-un-american-activities-committee>. Following the Second World War, the United States and the Soviet Union became engaged in a “decades-long struggle for supremacy” absent direct military engagement. *See The Cold War*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/the-cold-war>. During this period, the two “superpowers” engaged in “political maneuvering, military coalitions, espionage, propaganda, arms buildups, economic aid, and proxy wars between other nations.” *Id.*

¹² Adkins, *supra* note 2.

¹³ *Id.*

¹⁴ *Id.* (“The U.S. government and even foreign governments repeatedly quoted it to justify discrimination.”).

¹⁵ Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 29, 1953).

¹⁶ Adkins, *supra* note 2.

¹⁷ *See infra* Section 1.

¹⁸ Adkins, *supra* note 2 (“The total fallout in terms of ruined or truncated lives and wasted human potential is ultimately immeasurable.”).

¹⁹ *Id.* The Hoey Committee announced in its final report that the “mere presence of a gay man or lesbian . . . tends to have a corrosive influence” on coworkers and that “[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices.” Hoey Committee Report, *supra* note 4.

²⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²¹ Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>. “LGBTQ” is an acronym for Lesbian, Gay, Bisexual, Transgender, and Queer or Questioning. It represents the evolving understanding of sexual orientation, identity, gender, and expression. *Id.* Although “LGBTQ+” and “LGBTQIA+” are often used to fully recognize the diversity of the LGBTQ community, including those who identify as asexual, intersex, nonbinary, or

were constitutionally entitled to share in the bonds of marriage, the Court declared:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.²²

What happened in just over six decades to transform “deviant” sex pervers into “dignified” human beings worthy of the same constitutional right to marry as their cisgender peers? This Article examines the social and legal history of the LGBTQ community from the mid-20th century Lavender Scare through the 2015 *Obergefell* decision, including the impact of societal views on court decisions, why those views changed over time, and lessons available from this drastic transformation.²³

II. “SEXUAL DEVIANTS” & COMMUNIST TARGETS: THE 40S & EARLY 50S

“The pervert is easy prey to the blackmailer.”²⁴ The Lavender Scare was a systematic campaign fueled by lies and moral panic to identify and

describe their sex characteristics, sexual orientation, or gender identity in another similar way, this article utilizes LGBTQ to comport with the majority of legal cases, articles, and agencies. *Id.*

²² *Obergefell*, 576 U.S. at 681 (emphasis added).

²³ See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993) (providing an in-depth history of early gay rights efforts leading up to the Stonewall Riots, including the first known gay rights organization in the United States).

²⁴ Senator Joe McCarthy, *Homosexuals in the State Department, 1952*, RAYNOR MEMORIAL LIBRARIES MARQUETTE UNIVERSITY, Transcript of Audio Excerpt, Speaking to the Republican Women's Club in Wheeling, W. Va., on Feb. 9, 1952, https://www.marquette.edu/library/archives/DC/JRM/JRM_1952_Wheeling_excerpt.pdf (audio available at Marquette University Raynor Library, <https://cdm16280.contentdm.oclc.org/digital/collection/p128701coll0/id/31/>).

remove gays and lesbians from government employment.²⁵ Once suspected or identified as gay or lesbian, government employees were confronted, threatened with exposure, tricked into identifying gay and lesbian friends and acquaintances, and resigned from or were fired from their jobs.²⁶ Further, the government worked to prevent former gay and lesbian employees from obtaining future work in the federal government, the nation's largest employer, and often exposed them to their communities, harmed their personal lives, and prevented private employment opportunities.²⁷ Thousands of LGBTQ lives were ruined, and many committed suicide as a result.²⁸

Shortly before World War II, the House Un-American Activities Committee (HUAC) was formed to investigate individual citizens, public employees, and business organizations suspected of U.S. disloyalty and ties to communism.²⁹ Later, shortly after the war ended, Cold War fears that communist spies had infiltrated the federal government led to the Red Scare,³⁰ highlighted by efforts to hunt down, expose, and remove communists from the federal government.³¹ In 1947, President Truman enacted Executive Order 9835, referred to as the "Loyalty Oath," to root out communist influence and ensure an employee's "complete and unswerving loyalty to the United States."³² The order authorized the FBI to look into an employee's background to see if "derogatory information" turned up.³³ If so, a full field investigation took place to determine if there was a

²⁵ David K. Johnson, *The Shameful History of the Lavender Scare Echoes Today*, WASH. POST (APR. 27, 2023), <https://www.washingtonpost.com/made-by-history/2023/04/27/shameful-history-lavender-scare-echoes-today/>.

At first the State Department denied harboring any communists, but later admitted to firing 91 "homosexuals." This admission seemed to confirm McCarthy's charges about "sex perverts" and "lavender lads" in high government positions. Mail poured in to the Capitol thanking McCarthy for exposing "sex depravity" in Washington. Journalists given a peek at the 25,000 letters concluded that the vast majority of writers were alarmed more by the presence of gay men and lesbians than communists. All this set off a moral panic we now call "the lavender scare."

Id.

²⁶ Adkins, *supra* note 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ National Archives, *supra* note 11 and accompanying text.

³⁰ See Red Scare, HISTORY (April 21, 2023), <https://www.history.com/topics/cold-war/red-scare>. The moniker "Red Scare" came from the color of the Soviet flag, and communists were often referred to as "Reds" for their allegiance to the Soviet Union. *Id.*

³¹ National Archives, *supra* note 11.

³² Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government, Exec. Order No. 9835, 12 Fed. Reg. 59 (Mar. 25, 1947).

³³ Harvey Klehr, The Post War Red Scare, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/essays/the-postwar-red-scare>.

“reasonable doubt” of loyalty that warranted removal from government service.³⁴ Truman’s order focused on an employee’s association with communists and his loyalty to the United States.³⁵ The “Loyalty Oath” led to the review of millions of government employees and resulted in hundreds of dismissals and several thousand resignations.³⁶

In the late 1940s, feeding on Cold War nationwide fear and paranoia, Senator Joseph McCarthy engaged in a campaign to expose suspected communists in the federal government.³⁷ On February 9, 1950, McCarthy gave a Lincoln Day speech, now referred to as the “Enemies From Within” speech, in Wheeling, West Virginia, at the Women’s Republican Club.³⁸ During his speech, Republican McCarthy criticized Democrat Truman’s administration and stirred nationwide post-war fears by falsely claiming that communist spies had infiltrated the State Department.³⁹ Criticizing Truman’s administration and alleging the State Department was “infested with communists,” McCarthy described the Cold War as “a time of a great armament race” and a “final, all-out battle” “between the democratic Christian world and the communist atheistic world.”⁴⁰

McCarthy then spread his fear-fueled campaign to gays and lesbians by conflating them with communists after he was informed by an intelligence official that “practically every active Communist [was] twisted mentally or physically in some way.”⁴¹ McCarthy decided that gays and lesbians also had “peculiar mental twists” and were therefore national security risks

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, NAT’L ARCHIVES, Fall 2006, Vol. 38, No. 3, <https://www.archives.gov/publications/prologue/2006/fall/agloso.html>.

³⁸ Joseph McCarthy, U.S. Senator, Wheeling Speech, West Virginia (Feb. 9, 1950) (transcript available at:

https://pages.uoregon.edu/cherman/teaching/texts/McCarthy_Wheeling_Speech.pdf).

³⁹ *Senator Joseph McCarthy’s Speech on Communists in the State Department (excerpts)* Feb. 1950, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=3633. McCarthy claimed to have a list of “205 individuals who would appear to be either card-carrying members or certainly loyal to the Communist Party, but who nevertheless are still helping to shape our foreign policy.” Adkins, *supra* note 2. The number of communist infiltrators McCarthy claimed to know of is disputed because advance copies of the speech claimed 205, but the transcript McCarthy submitted to the congressional record claimed 57. *Id.* Days after McCarthy’s Wheeling Speech, he wrote to President Truman repeating his allegations of communists in the State Department. Letter from Joseph McCarthy to President Harry Truman, Feb. 11, 1950, UNIV. OF OREGON, https://pages.uoregon.edu/cherman/teaching/texts/McCarthy_Wheeling_Speech.pdf. McCarthy never made the list public. Adkins, *supra* note 2. Indeed, “McCarthy had no such list.” Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1395 (2005) (“This was a complete fabrication; McCarthy had no such list.”).

⁴⁰ Adkins, *supra* note 2.

⁴¹ *Id.*

likely susceptible to communism and blackmail.⁴² Additional “commonalities” that falsely linked and led to the conflation of gays and lesbians with communists included the belief that both groups were “morally weak or psychologically disturbed, both were . . . godless, both purportedly undermined the traditional family, both were assumed to recruit, and both were shadowy figures with a secret subculture.”⁴³

Eleven days after his Wheeling speech, McCarthy repeated his allegations of communist infiltration in the State Department while speaking on the Senate floor.⁴⁴ Here, however, he claimed two employees on his “list” were “homosexuals,” and for the first time made a direct, but false, link between “homosexuality and Communism.”⁴⁵ This false and unsubstantiated allegation led to political rhetoric addressing “communists and queers,” supporting McCarthy’s allegations that gays and lesbians were “easy prey” to be blackmailed and were national security risks.⁴⁶ While McCarthy was unable to substantiate his allegations or name a single communist working in a classified defense position,⁴⁷ his allegations took root in a fear-filled post-war nation.⁴⁸ The Secretary of Commerce, Charles Sawyer, noted at the time, “The privilege of working for the United States Government should not be extended to persons of dubious moral character, such as homosexuals or sex perverts. The confidence of our citizenry in their Government would be severely taxed if we looked with tolerance upon the employment of such persons.”⁴⁹

As additional support for McCarthy’s unfounded claims, John Peurifoy, the Deputy Undersecretary of State, testified before a Senate subcommittee

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (After hearing that “practically every active Communist is twisted mentally or physically in some way,” McCarthy determined both men “were susceptible to Communist recruitment” because he found the “homosexuals [] had what he called ‘peculiar mental twists.’”).

⁴⁶ Senator Joe McCarthy, *Homosexuals in the State Department, 1952*, RAYNOR MEM’L LIBR.’S MARQUETTE UNIV., Transcript of Audio Excerpt, Speaking to the Republican Women’s Club in Wheeling, W. Va., on Feb. 9, 1952, https://www.marquette.edu/library/archives/DC/JRM/JRM_1952_Wheeling_excerpt.pdf (audio recording available at Marquette Univ. Raynor Library, <https://cdm16280.contentdm.oclc.org/digital/collection/p128701coll0/id/31/>).

⁴⁷ Stone, *supra* note 39 at 1402–03 (“The Christian Science Monitor pointedly observed that despite all of his investigations and accusations, McCarthy had not produced the conviction of a single spy or uncovered a single Communist working in a classified defense position.”).

⁴⁸ Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72, 80 (2002). Even the American Bar Association was impacted by the fear of communism when, in 1952, it “recommended that all attorneys be required to take an anti-Communist loyalty oath and that local bar associations should expel members of the Communist Party.” *Id.*

⁴⁹ *Id.*

shortly after McCarthy's senate floor announcement and confirmed that "91 homosexual [State Department] employees" had been dismissed as "security risks."⁵⁰ As a result of the ensuing "press frenzy and public outcry," three investigative committees were formed.⁵¹ The Tydings Committee⁵² issued the first related report on July 14, 1950.⁵³ The report was critical of McCarthy's accusations, finding they "represented 'perhaps the most nefarious campaign of half-truths and untruth in the history of this republic.'"⁵⁴ Despite that finding, the Tydings Report received criticism for limiting its focus to employee loyalty issues rather than employee security risks, resulting in two additional investigations.⁵⁵

The Wherry-Hill Committee focused on whether the "91 moral weaklings" identified as dismissed from the State Department in Peurifoy's senate testimony were later rehired by the government.⁵⁶ After determining that over a dozen had regained federal government employment, the Wherry-Hill Committee shifted focus to methods to prevent dismissed gays and lesbians from reemployment in the federal workforce.⁵⁷ The Committee's work also resulted in further employee investigations and the dismissal of nearly one hundred additional gay and lesbian employees.⁵⁸ Congress was convinced by the Wherry-Hill Committee's results that a

⁵⁰ Adkins, *supra* note 2.

⁵¹ *Id.*

⁵² *Narrative: Joseph McCarthy and Irresponsibility*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/activities/joseph-mccarthy-and-irresponsibility-narrative> (last visited Apr. 25, 2025). The Tydings Committee, a subcommittee of the Senate Foreign Relations Committee formed to look into McCarthy's claims, released a final report concluding that McCarthy's accusations were "a fraud and a hoax," but that did not stop his "crusade." *Id.* For a detailed analysis of McCarthy's claims, criticisms, and Republican support despite knowledge that his claims were false, see Stone, *supra* note 39.

⁵³ Stone, *supra* note 39 at 1396 (internal citations omitted).

⁵⁴ *Id.*

⁵⁵ Adkins, *supra* note 2. Although the Tydings Report found that McCarthy's allegations were "both spurious and highly damaging to innocent individuals," he received overwhelming support from his party due to public opinion polls that showed "growing support for his crusade." Stone, *supra* note 39, at 1396 (internal citations omitted).

⁵⁶ Adkins, *supra* note 2.

⁵⁷ *Id.*

⁵⁸ *The Lavender Scare*, NAT'L ARCHIVES FOUND., <https://archivesfoundation.org/newsletter/the-lavender-scare/>. Accused gays and lesbians were given the choice of resigning or being outed publicly. *Id.* The Hoey Committee consulted with medical professionals, including psychiatrists, regarding whether gays and lesbians could be cured, whether they were emotionally unstable, whether they recruited and seduced others, and whether they could be easily detected with something like "an x-ray." Adkins, *supra* note 2. The medical community did not provide clear answers, explaining the issue was "complex." *Id.*

third committee was required to lead a larger investigation, leading to the formation of the Hoey Committee.⁵⁹

The Hoey Committee's investigation focused on how many gay and lesbian employees were in the federal workforce and assessed whether that employment was undesirable.⁶⁰ The committee relied on multiple sources inside the federal government, including intelligence agencies, as well as outside sources such as "law enforcement, judicial authorities, and the medical community."⁶¹ It engaged in private hearings to obtain testimony from these numerous sources to gain information regarding the depth of the "problem," utilized internal questionnaires to obtain specific policies and procedures to determine various agency positions on gay and lesbian employment, and attempted to gain information that would lead to the easy identification of gays and lesbians.⁶² Following months of consultation, the Hoey Committee released the Hoey Report, declaring, "There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct."⁶³

The Hoey Report determined that gay men and lesbians were immoral criminals and emotionally unstable social outcasts with weak moral fiber who recruited coworkers and brought other "perverts" into the federal workforce.⁶⁴ Two reasons supported the report's determination that gays and lesbians were not fit for government service: their general unsuitability and the risk they presented to national security.⁶⁵ The Hoey investigation found that gays and lesbians were unsuitable for federal employment by

⁵⁹ *The Lavender Scare*, *supra* note 58; see Hoey Committee Report, *supra* note 4 at Appendix One (citing Senate Congressional Record, Senate Resolution No. 280, 81st Congress, 2d session, June 7, 1950), (directing the Senate Committee on Expenditures in the Executive Departments to "make a thorough and comprehensive study and investigation of (a) the alleged employment by the departments and agencies of the Government of homosexuals and other moral perverts, and (b) the preparedness and diligence of authorities of the District of Columbia, as well as the appropriate authorities of the Federal Government, for the protection of life and property against the threat to security, inherent in the employment of such perverts by such departments and agencies.").

⁶⁰ Adkins, *supra* note 2.

⁶¹ *Id.*

⁶² *Id.* The summarized information indicated a strong aversion to gay and lesbian civil service workers, although some responses were supportive. *Id.* The Hoey Report focused on evidence collected that supported its findings and disregarded information about the complexities shared by medical professionals as well as views shared by agencies with a more tolerant view. *Id.* The Hoey Committee announced in its final report that the "presence of a [gay man or lesbian] in a government agency tends to have a corrosive influence" on coworkers and that "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices." Hoey Committee Report, *supra* note 4.

⁶³ *Id.* The committee's determination "was based upon the fact that persons who indulge in degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust." *Id.*; see also Adkins *supra* note 2.

⁶⁴ Hoey Committee Report, *supra* note 4.

⁶⁵ *Id.*

violating laws as well as moral standards.⁶⁶ The report identified gays and lesbians as untrustworthy security risks by combining the fear of communist infiltration with the unsubstantiated allegation that they were easy blackmail targets, justifying the need to prevent access to sensitive government information.⁶⁷

While the Hoey Report did not recommend any legislative action, it did recommend the aggressive enforcement of existing policies that disqualified those engaged in “immoral conduct” be applied to gays and lesbians in the federal government.⁶⁸ Importantly, the report had an impact on President Eisenhower’s decision to issue his 1953 executive order officially banning gay men and lesbians from civil service, which became official government policy.⁶⁹ The Lavender Scare, identified by coordinated governmental efforts to investigate and remove gays and lesbians from civil service as well as to prevent their future hiring, also spread to the civilian workforce.⁷⁰ As a result, gays and lesbians by the thousands were fired from their jobs, barred from their professions, evicted, disowned, suffered mentally and financially, faced ruin, and lost their lives.⁷¹

III. EISENHOWER’S 1953 EXECUTIVE ORDER & ITS IMPACT

The prelude to President Eisenhower’s Executive Order 10450 acknowledged the “American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government”—and proceeded to exclude gay and lesbian employees from civil service.⁷² Shortly after his 1953 inauguration, Eisenhower invoked the ongoing societal fear and hysteria that disloyal employees with communist ties had

⁶⁶ *Id.* The committee consulted numerous sources to compile its report, including government intelligence organizations, physicians, psychiatrists, law enforcement professionals, prosecutors, and medical and sociological studies. *Id.*

⁶⁷ Suyin Haynes, *You’ve Probably Heard of the Red Scare, but the Lesser-Known, Anti-Gay ‘Lavender Scare’ Is Rarely Taught in Schools*, TIME (Dec. 22, 2020), <https://time.com/5922679/lavender-scare-history/>.

⁶⁸ Adkins, *supra* note 2.

⁶⁹ *Id.*

⁷⁰ *Id.* (“Even the private sector was no haven. Because Eisenhower’s order stipulated that ‘consultants’ to government agencies could be investigated for adherence to these security requirements, contractors and other employers, especially in metropolitan Washington, followed the government’s lead and adopted discriminatory hiring and firing practices as well.”).

⁷¹ *Id.* (“Some of these tragedies we know; others remain forever hidden because obituaries typically omitted the cause of death in such cases.”).

⁷² Exec. Order No. 10450, 18 Fed. Reg. 2489, 2489 (Apr. 27, 1953) (“WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service”).

infiltrated the government when he issued the order, “*Security Requirements for Government Employees*.”⁷³ Eisenhower’s order went further than Truman’s Loyalty Oath, stating that federal government employees must be “reliable, trustworthy, and of good conduct and character” to maintain national security.⁷⁴ The order directed department and agency heads to implement and maintain an effective system to ensure compliance.⁷⁵

Section 3 of the order expressly made any government employee “subject to investigation,” including fingerprinting and a background, criminal, employment, and educational check, to determine if they were a threat to national security.⁷⁶ The order left discretion to the Office of Personnel Management to determine the extent of the intrusion and required a “full field investigation” if concerns about an employee arose.⁷⁷ For positions designated as sensitive to national security, it required all employees to undergo full investigations to qualify for the job.⁷⁸ Section 8 identified investigation requirements along with examples of the type of information that required dismissal as a national security threat.⁷⁹ The list included any “behavior, activities or associations” indicating the employee is “not reliable or trustworthy,” or had intentionally lied, misled, or omitted important facts.⁸⁰ Section 8(1)(iii), however, doomed gay and lesbian government workers by identifying “sexual perversion” among the following disqualifying criteria: “Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.”⁸¹

Centering on the unsubstantiated concern that gays and lesbians were easy targets for blackmail and communist influence,⁸² the order also included as disqualifying criteria “[a]ny facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the

⁷³ *Id.* at 2489. President Eisenhower’s executive order replaced Truman’s focus on loyalty and associating with communists with a more aggressive focus that included “sexual perversion” as a security risk meriting termination.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2491.

⁷⁷ *Id.* at 2489.

⁷⁸ Exec. Order No. 10450, 18 Fed. Reg. at 2489, 2491.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2491.

⁸¹ *Id.*

⁸² Haynes, *supra* note 67; see also Johnson, *supra* note 25 (“Military intelligence officials and local vice squad officers unanimously testified that gay men and lesbians posed a threat to national security because they could easily be blackmailed. But they offered no proof. They could not point to a single example of a gay American citizen who had betrayed classified information.”).

national security.”⁸³ Further, the “[r]efusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct” led to dismissal.⁸⁴ Suspected gay or lesbian employees were subject to intimate and invasive questioning about their sexual preferences and experiences absent legal representation.⁸⁵ The interrogators often misled individuals to believe they would receive better treatment or remain employed if they provided names of friends or acquaintances who were also gay or lesbian, but even cooperating employees were fired.⁸⁶ Most “voluntarily resigned” rather than face being outed by public charges and a trial, and few challenged the false premises that were the basis of the order.⁸⁷ The order, in effect, cemented the need for gays and lesbians to hide or remain closeted for self-preservation and contributed to the shame and self-loathing many already experienced due to their immutable sexual orientation.⁸⁸

Ultimately, as a result of Executive Order 10450,⁸⁹ thousands of gay and lesbian government employees were fired or resigned.⁹⁰ Thousands more never applied for positions with the federal government, the nation’s largest employer.⁹¹ Outed gays and lesbians were disowned from their families, evicted from their homes, banned by private employers, and faced

⁸³ Exec Order No. 10450, 18 Fed. Reg. at 2491.

⁸⁴ *Id.*

⁸⁵ Haynes, *supra* note 67.

⁸⁶ Adkins, *supra* note 2.

⁸⁷ Johnson, *supra* note 23.

⁸⁸ Cain, *supra* note 23 at 1564 (“In the pre-Stonewall era, the legal consequences of choosing a gay lifestyle were sufficiently severe to make lesbians and gay men think of themselves as criminals just for being who they were.”).

⁸⁹ *Executive Order 10450: Eisenhower and the Lavender Scare*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/lavender-scare.htm>. The language restricting gays and lesbians from classified security access was repealed by President Clinton’s 1995 Executive Order 12968, which established policies for federal government employee access to classified information and expressly prohibited denial based solely on sexual orientation. Exec. Order No. 12968, 50 Fed. Reg. 40245 (Aug. 2, 1995). “The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information” and instructing that “no inference” regarding a person’s suitability for access to classified information “may be raised solely on the basis of the sexual orientation of the employee.” *Id.* at 40250, Sec. 3.1(c). President Clinton’s 1998 Executive Order prohibited discrimination based on sexual orientation in the federal civil service and allowed gays and lesbians to obtain security clearances. Exec. Order No. 13087, 63 Fed. Reg. 30097 (May 28, 1998). Eisenhower’s harmful Executive Order 10450 was not expressly repealed until the final order of President Obama’s presidency. Exec. Order No. 13764, 82 Fed. Reg. 8115, 8128, (Jan 17, 2017) (“Executive Order 10450 of April 27, 1953, as amended, [is] revoked.”).

⁹⁰ Adkins, *supra* note 2.

⁹¹ *Id.*

financial ruin.⁹² Further, society's view of LGBTQ citizens as deviant, dangerous, unstable criminal perverts went unchallenged because most people did not realize they were beloved family members, cherished friends, friendly neighbors, inspiring teachers, and contributing community members, not a bogeyman to be feared. While most gay and lesbian employees forced out of their federal employment did not resist and attempted to remain closeted, some did.⁹³

In the 1950s and 1960s, there was debate within the gay and lesbian activist community regarding the most effective approach to counter discrimination, disinformation, and widespread abuse.⁹⁴ Some believed the best approach was to work with educators and researchers to dispel disinformation and focus on tolerance and understanding.⁹⁵ Others believed the best response to these attacks was to work to show their commonalities with straight Americans and dispute false narratives, working toward the goal of assimilating with mainstream society.⁹⁶ Others still viewed themselves as different from mainstream society and had no desire to conform, assimilate, or gain understanding or tolerance, instead focusing on their liberation.⁹⁷

In 1961, after Frank Kameny, a gay man with a Ph.D. from Harvard, lost his job as an astronomer for the Army Map Service, he organized the Washington D.C. arm (MSW) of the Mattachine Society (MS), a national gay rights association.⁹⁸ However, MSW veered off from the original MS's educational approach and shifted to a civil liberty approach that included extensive advocacy through letter writing, picketing, and filing lawsuits against the government arguing for the full equality of gays and lesbians.⁹⁹

⁹² *Id.* ("Historians estimate that somewhere between 5,000 and tens of thousands of gay workers lost their jobs during the Lavender Scare. Some faced continued unemployment or underemployment, exclusion from their professions, financial strain or even ruin, and considerable emotional distress."). "[S]uicide was not uncommon. Some of these tragedies we know about; others remain forever hidden because obituaries typically omitted the cause of death in such cases." *Id.*

⁹³ *The Lavender Scare: How the federal government purged gay employees*, CBS NEWS (June 9, 2025), <https://www.cbsnews.com/news/the-lavender-scare-how-the-federal-government-purged-gay-employees/>.

⁹⁴ See Jim Downs, *The Gay Liberation Movement*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/essays/the-gay-liberation-movement>.

⁹⁵ *See id.*

⁹⁶ *See id.* The assimilationist strategy, while supported by many in the LGBTQ community, served to marginalize others who did not conform to its conservative image or share its desire to assimilate with mainstream America. *Id.*

⁹⁷ *See id.*

⁹⁸ See Caleb Crain, *Frank Kameny's Orderly, Square Gay-Rights Activism*, NEW YORKER (June 22, 2020), <https://www.newyorker.com/magazine/2020/06/29/frank-kamenys-orderly-square-gay-rights-activism>.

⁹⁹ Stacy Flores Chandler, *Frank Kameny, JFK, & the Case for LGBTQ+ Rights*, NAT'L ARCHIVES (June 2, 2021), <https://jfk.blogs.archives.gov/2021/06/02/kameny-jfk-lgbtq-rights>.

After forming in 1961, MSW combined with the New York chapter of Daughters of Bilitis (DOB), a lesbian organization, to create an umbrella group called the East Coast Homophile Organization (ECHO).¹⁰⁰

At the time, Kameny and ECHO were considered “radical” due to their “militant” approach and demands for equal treatment by focusing on activism, fighting for gay and lesbian rights, and challenging the federal government.¹⁰¹ In 1965, Kameny decided to publicly challenge Eisenhower’s Executive Order 10450, filed a lawsuit, organized picketing at the White House, and demanded that gays and lesbians had the right to keep their jobs.¹⁰² While embracing a more aggressive approach than the earlier MS’s education approach, picketers maintained the same professional appearances, marching in dresses and suits and avoiding any open acts of affection.¹⁰³ Kameny employed the slogan, “Gay is Good” to challenge stereotypes and reframe “homosexuals” in a more positive light.¹⁰⁴ Kameny’s efforts made a significant impact on the future of LGBTQ rights on the road from deviant to dignified.¹⁰⁵

A similar West Coast group was formed in 1964, the Society for Individual Rights (SIR). Amassing 1000 members by 1966, SIR was the largest organization pre-*Stonewall*.¹⁰⁶ SIR focused more on politics and hoped to persuade politicians of the power of the gay vote.¹⁰⁷ In 1964, several liberal ministers supporting the gay community formed the Council on Religion and the Homosexual (CRH).¹⁰⁸ At a New Year’s Ball for the gay and lesbian community, co-sponsored by CRH and SIR, the police raided and arrested CRH ministers and SIR lawyers on obstruction charges.¹⁰⁹ The case went to trial and was dismissed on technical grounds,

¹⁰⁰ Cain, *supra* note 23, at 1562. ECHO was made up of the New York DOB and Mattachine Societies from D.C., New York, and Philadelphia. *Mattachine Society and Daughters of Bilitis Offices*, NYC LGBT HIST. SITES PROJECT, (Rev. Jan. 2023), <https://www.nyclgbtsites.org/site/mattachine-society-daughters-of-bilitis-offices/>.

¹⁰¹ Cain, *supra* note 23, at 1562.

¹⁰² *Id.* at 1561 - 62; Johnson, *supra* note 25. DOB’s national board objected to Kameny’s militant, activist approach, including picketing the White House, and instructed its members to withdraw from ECHO. *Id.* Kameny veered from the DOB’s approach that focused on “education and pleas for tolerance and understanding” to “strategies that boldly asserted the worth of homosexual people as citizens.” *Id.* at 1563.

¹⁰³ Cain, *supra* note 23, at 1562-63. The MS and MSW members maintained a professional appearance, hoping to gain respect, be heard, and demonstrate that they were similar to straight Americans as well as to refute the disinformation that they were sexual perverts, pedophiles, and criminals. *Id.*

¹⁰⁴ Crain, *supra* note 98.

¹⁰⁵ Cain, *supra* note 23, at 1561.

¹⁰⁶ *Id.* at 1563.

¹⁰⁷ *Id.*

¹⁰⁸ Will Roscoe, 1960: *A Turning Point*, FOUNDSF, https://www.foundsf.org/index.php?title=1960:_A_Turning_Point (last visited Apr. 25, 2025).

¹⁰⁹ Cain, *supra* note 23, at 1564.

but the trial publicity and arrest of the ministers, combined with the radical willingness of gays to fight back and demand rights, was a defining moment in the fight for LGBTQ rights.¹¹⁰ Thus, while Executive Order 10450 wreaked havoc on the LGBTQ community,¹¹¹ it also led to organized activism, successful court challenges, visibility, and the increasing demand for civil rights.

IV. GAY BARS & POLICE RAIDS

During the 1950s and 1960s, gay bars provided a vital space to escape anti-gay sentiment and societal persecution and a place to obtain needed relief and a sense of kinship. Historically, gay bars served a much more important role in the LGBTQ community than a place to gather for drinks.¹¹² The overwhelming burden of hiding from society gave way upon entering a gay bar, where acceptance, affirmation, and belonging blended with dancing, drinking, and mingling.¹¹³ At a gay bar, gays and lesbians were no longer deviant outcasts but accepted members of a community.¹¹⁴ People developed friendships, fell in love, and made connections.¹¹⁵ Many felt a sense of safety in a gay bar, despite the fact that it was not truly safe.¹¹⁶ During the 1950s and 1960s, consensual same-sex sexual acts, including

¹¹⁰ *Id.*

¹¹¹ Camilla Domonoske, *State Department Apologizes For Decades Of Anti-LGBT Discrimination*, NPR (Jan. 9, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/09/508966318/state-department-apologizes-for-decades-of-anti-lgbt-discrimination>. In 2017, the federal government officially acknowledged the State Department's deplorable treatment of LGBTQ employees and formally apologized for the department's "pattern of discrimination . . . during a period beginning in the 1940s and stretching for decades." *Id.*

¹¹² Ryan Philemon, *The History of How Gay Bars Became the Battleground for LGBTQ+ Rights*, PROVI (June 3, 2021), <https://www.provi.com/blog/editorial/gay-bar-a-historical-battleground-lgbtq-right> ("It's hard to overstate the importance of the gay bar within the LGBTQ+ rights movement over the past couple hundred years. These bars have served as (not always) safe places for the LGBTQ+ community to be together, to mingle, and to simply *exist* as their true selves.").

¹¹³ Nikki Babri, *The Legacy of LGBTQ Nightlife*, UCI SCH. OF HUMANITIES (Nov. 8, 2023), <https://www.humanities.uci.edu/news/legacy-lgbtq-nightlife> ("For generations, they were more than just bars; they represented a rite of passage. Coming out meant going out, and gay bars provided the space for affirming identities and forging connections with kindred strangers.").

¹¹⁴ *See id.*

¹¹⁵ *Id.* ("Historically, gay bars played a central role in helping queer individuals find friends, lovers and a sense of community.").

¹¹⁶ Philemon, *supra* note 112 ("The LGBTQ+ community was not allowed to exist in peace, in their own little bubble. Even behind closed doors, the patrons and bar itself were subject to bullying and ignorant criticism from outside forces."). *See also Stonewall Riots*, HISTORY (June 20, 2024), <https://www.history.com/topics/lgbtq/the-stonewall-riots#constant-raids-at-gay-bars> ("LGBT individuals flocked to gay bars and clubs, places of refuge where they could express themselves openly and socialize without worry.").

kissing, dancing, and showing outward affection, were illegal,¹¹⁷ adding risk to bars that catered to gay clientele. Nonetheless, gay bars became a place where LGBTQ people could gather to discuss the challenges of daily discrimination and, in some cases, meet to plan the fight for gay rights.¹¹⁸

During the mid-twentieth century, gay bars were often owned by cisgender men or the mafia due to the need for secrecy, the risk of police raids, and the likely revocation of a liquor license and legal challenges if discovered.¹¹⁹ Due to its clandestine nature and experience with police bribery, the mafia was uniquely suited to own and oversee bars that catered to gay clientele.¹²⁰ During “the most homophobic period in American history,”¹²¹ it was not uncommon for the police to raid gay bars and arrest or harass gay patrons throughout the United States, regardless of bar ownership.¹²² Most police raids resulted in violence against gay bar patrons, causing injuries that required medical attention or hospitalization.¹²³ Police raids also resulted in the murder of LGBTQ individuals: “An uncounted number of LGBTQ people have died as a result of police raids on gay spaces.”¹²⁴

Along with police raids, some states revoked liquor licenses of establishments that served gays and lesbians based on morality laws, and some states passed laws that LGBTQ people were prohibited from being served alcohol.¹²⁵ In an unusual instance from the early 1950s, a bar owner prevailed after challenging the suspension of his liquor license due to his gay and lesbian clientele.¹²⁶ Following World War II, a San Francisco establishment became a local hangout for the LGBTQ community.¹²⁷ By

¹¹⁷ On January 1, 1962, an Illinois state law went into effect eliminating the state’s sodomy law, becoming the first state to decriminalize same-sex adult consensual intimacy. *Laws of Illinois 1961*, page 1983, enacted July 28, 1961, effective Jan. 1, 1962.

¹¹⁸ Philemon, *supra* note 112.

¹¹⁹ Patrick Sisson, *How Gay Bars Have Been a Building Block of the LGBTQ Community*, CURBED (June 17, 2016), <https://archive.curbed.com/2016/6/17/11963066/gay-bar-history-stonewall-pulse-lgbtq>.

¹²⁰ Nick Sibilla, *How Liquor Licenses Sparked the Stonewall Riots*, REASON (June 28, 2015), <https://reason.com/2015/06/28/how-liquor-licenses-sparked-stonewall/>.

¹²¹ Suyin Haynes, *How the Fight Against Police Brutality Helped Ignite the LGBTQ-Rights Movement*, TIME (June 19, 2020), <https://time.com/5855232/lgbtq-protest-history/>.

¹²² Maude Staff, *A Brief History of Gay Bars*, LATINA (Sept. 27, 2021), <https://latina.com/a-brief-history-of-gay-bars/> (“In the ‘50s and the ‘60s when the *existence* of gay bars skyrocketed, things were hardly easy. Most of these establishments were relegated to run-down parts of town with quiet, austere facades to keep the police off of their trails. Of course, those efforts could only go so far — and there were regular police raids in such establishments, most of which were glaringly, brutally violent, and resulted in countless innocent arrests.”).

¹²³ 1969: *The Stonewall Uprising*, LIBRARY OF CONGRESS, <https://guides.loc.gov/lgbtq-studies/stonewall-era#s-lib-ctab-24103782-1>.

¹²⁴ *Id.*

¹²⁵ See Sibilla, *supra* note 120.

¹²⁶ *Stoumen v. Reilly*, 234 P.2d 969, 971 (1951).

¹²⁷ Sibilla, *supra* note 120.

1951, the Black Cat Restaurant was placed on a United States military list of establishments that were “off limits” to military personnel.¹²⁸ The Black Cat’s gay and lesbian customers made it a target of the local police department, which harassed the bar owner and customers.¹²⁹ The police, along with the Alcoholic Beverage Control Commission, ultimately had the State Board of Equalization indefinitely suspend the owner’s liquor license.¹³⁰ As support, the state board alleged the bar’s owner used the premises as “a disorderly house for purposes injurious to public morals” because “persons of known homosexual tendencies patronized [the] premises and used [the] premises as a meeting place.”¹³¹

The cisgender bar owner took the state to court and, in 1951, the California Supreme Court provided one of the earliest U.S. rulings in favor of gay rights by holding that to “establish ‘good cause’ for suspension of plaintiff’s license, something more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place.”¹³² The California Supreme Court also noted that “[m]embers of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal or immoral acts” and that “the proprietor has no right to exclude or eject a patron ‘except for good cause,’ and if he does so without good cause he is liable in damages.”¹³³ Thus, absent evidence of illegal or immoral acts,

¹²⁸ Gary Kamiya, *After long legal fight, life of Black Cat Café comes to end*, SFGATE (Nov. 14, 2014), <https://www.sfgate.com/bayarea/article/After-long-legal-fight-life-of-Black-Cat-Cafe-5893609.php>.

¹²⁹ *Stoumen*, 234 P.2d at 971.

¹³⁰ *Id.* at 970. A second count alleged that the establishment sold beer to a person under the age of 21. *Id.* Before arriving at the California Supreme Court, the California Court of Appeals “upheld the suspension, even going so far as to argue that regular meetings of gay people draw up ‘all of the potentialities for evil and immorality.’” Sibilla, *supra* note 120.

¹³¹ *Stoumen*, 234 P.2d at 970.

¹³² Sibilla, *supra* note 120. Police testimony stated that “many of the patrons of the Black Cat were homosexuals and that it was reputed to be a ‘hangout’ for such persons.” *Stoumen*, 234 P.2d at 970. Further, the police testimony included that “[a] number of people were arrested there, some for vagrancy and some because they ‘demonstrated homosexual actions,’” but there was no evidence that the arrests led to convictions, no evidence of “any illegal or immoral conduct on the premises,” and no evidence that “the patrons resorted to the restaurant for purposes injurious to public morals.” *Id.* at 970–71.

¹³³ *Id.* at 971. The court compared the case before it to an Oklahoma Criminal Court of Appeals case that held that “a conviction of maintaining a bawdy house was not supported by evidence that women of loose or immoral character had obtained lodging in defendant’s hotel.” *Id.* (citing *Patterson v. State*, 132 P. 693, 695 (Okla. Crim. App. 1913)). The *Stoumen* court found the reasoning from *Patterson* that “such women are human beings entitled to shelter and that it is not a crime to give them lodging unless it is done for immoral purposes” to equally apply to gay and lesbian patronage of a public establishment. *Stoumen*, 234 P.2d at 971 (citing *Patterson*, 132 P. at 695). Absent “proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes” a violation does not occur. *Stoumen*, 234 P.2d at 971.

the Black Cat's liquor license suspension was reversed.¹³⁴ Despite the positive outcome for the Black Cat owner, discrimination, harassment, and worse continued to occur at gay and lesbian bars across the United States throughout the 50s and 60s.¹³⁵

Gay bars in New York City also faced regular raids in the 1960s, and “their patrons were frequently arrested for sodomy, sexual deviancy, cross-dressing, and other charges designed to criminalize LGBTQ identities.”¹³⁶ Frequently following the police raid of a gay bar, the local newspaper would publish the arrests and expose individuals, often including their photo, address, and occupation.¹³⁷ These publications often led to job firings and, sometimes, suicides.¹³⁸ Further, in the early 1960s, the New York State Liquor Authority began prohibiting bars from serving alcohol to members of the LGBTQ community and would shut down a bar if it provided liquor to anyone known or suspected to be gay, finding that any gathering of gays and lesbians was de facto “disorderly”¹³⁹ and a place where “unlawful practices [were] habitually carried on by the public.”¹⁴⁰ The Liquor Authority also refused to provide liquor to known gay bars, so many bars served alcohol without a license, resulting in police raids.¹⁴¹

In response to the New York State Liquor Authority's actions, the Mattachine Society, a gay rights group, invited members of the press to an organized “sip in” at New York's Julius Bar on April 21, 1966.¹⁴² At

¹³⁴ *Id.*

¹³⁵ Cain, *supra* note 54, at 1569 (citing 1953 Cal. Stat. 986 (codified at Cal. Bus. & Prof. Code § 24200 and repealed 1963)). In 1953, two years after the *Stoumen* case, California passed a law allowing a liquor license to be revoked if the bar was a “resort for illegal possessors or users of narcotics, prostitutes, pimps, panders, or sexual perverts.” *Id.* In 1959, the statute was declared unconstitutional by the California Supreme Court. *Vallegra v. Dep't of Alcoholic Beverage Control*, 347 P.2d 909, 913 (Cal. 1959).

¹³⁶ Ella Wiley and John Guzman, *Rebellion and Pride: How Police Have Failed LGBT Communities*, LEGAL DEFENSE FUND, <https://www.naacpldf.org/pride-history-police-violence/>.

¹³⁷ Chris Johnson, *Before Stonewall, newspapers complicit with police in gay bar raids*, WASHINGTON BLADE (June 25, 2019), <https://www.washingtonblade.com/2019/06/25/before-stonewall-newspapers-complicit-with-police-in-gay-bar-raids/>; see also Alison Martin, *This Week in History: An Arrest at a Gay Bar*, CHICAGO SUN-TIMES (July 1, 2021), <https://chicago.suntimes.com/2021/7/1/22556373/chicago-gay-bar-raids-fun-lounge-stonewall-riots>.

¹³⁸ Martin, *supra* note 137.

¹³⁹ *Stonewall Riots*, *supra* note 116 (“Thanks to activists’ efforts, these regulations were overturned in 1966, and LGBT patrons could then be served alcohol.”).

¹⁴⁰ *Why Did the Mafia Own the Bar?*, PBS AM. EXPERIENCE, <https://www.pbs.org/wgbh/american-experience/features/stonewall-why-did-mafia-own-bar/>.

¹⁴¹ *Id.*

¹⁴² Jim Farber, *Before the Stonewall Uprising, There Was the ‘Sip-In,’* N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/nyregion/before-the-stonewall-riots->

Julius's, the men announced that they were gay and requested a drink.¹⁴³ Photos were taken when they were refused, and the New York Times announced the following morning, "*3 Deviates Invite Exclusion By Bars; But They Visit Four Before Being Refused Service, in a Test of S.L.A. Rules.*"¹⁴⁴ A later article in the Village Voice explained that "[t]he three men were determined to force the State Liquor Authority to clarify its regulations" about serving gays in public bars because several bars that did were either temporarily closed or lost their liquor license.¹⁴⁵ Following the publicity, the chairman of the State Liquor Authority publicly denied that the Liquor Authority "threatened the liquor licenses of bars that served gays," leaving whether a person is served "up to individual bartenders."¹⁴⁶ After the city's Commission on Human Rights became involved, the New York State Liquor Authority changed its position, no longer denying alcohol service to gay men and lesbians.¹⁴⁷ Further, like the California Supreme Court, courts on the northeast side of the country also ruled that gays and lesbians could assemble at bars peacefully.¹⁴⁸ However, abusive police raids persisted.¹⁴⁹ In 1967, one year after the Julius sip-in, a bar

there-was-the-sip-in.html. The Julius sip-in is considered "one of the first, if not the very first, planned act of civil disobedience for L.G.B.T. rights." *Id.*

¹⁴³ *Id.*

¹⁴⁴ Thomas A. Johnson, *3 Deviates Invite Exclusion by Bars; But They Visit Four Before Being Refused Service, in a Test of S.L.A. Rules*, N.Y. TIMES (Apr. 22, 1966), <https://www.nytimes.com/1966/04/22/archives/3-deviates-invite-exclusion-by-bars-but-they-visit-four-before.html> ("Three homosexuals, intent upon challenging State Liquor Authority regulations cited by some bartenders in refusing to sell liquor to sexual deviates, met with some difficulty yesterday in finding a bar that would deny them service.").

¹⁴⁵ Lucy Komisar, *Three Homosexuals in Search of a Drink*, VILLAGE VOICE (May 5, 1966), Vol. XI, No. 29, <https://www.villagevoice.com/three-homosexuals-in-search-of-a-drink/>.

¹⁴⁶ Farber, *supra* note 142.

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g., One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 13 (N.J. 1967) (holding that the New Jersey Division of Alcoholic Beverage Control improperly suspended and revoked alcohol licenses from bars based on the unjustified ground that gays and lesbians were permitted to gather there). The court commented:

Though in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws. So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like.

Id. at 18 (comparing *Robinson v. State of California*, 370 U.S. 660 (1962)).

¹⁴⁹ *See, e.g., Davis Duncan, LGBTQ Stories: The "Sip-In" paved the way for gay rights*, NPR, WHSU (Feb. 4, 2022), <https://www.wshu.org/2022-02-04/lgbtq-stories-the-sip-in-paved-the-way-for-gay-rights>.

called the Stonewall Inn opened just a block away.¹⁵⁰ Two years later, during a police raid at the Stonewall, patrons fought back.

V. FIGHTING BACK: THE 1969 STONEWALL UPRISING

Located on Christopher Street in New York's Greenwich Village, the Stonewall Inn was originally built in the mid-nineteenth century as a horse stable.¹⁵¹ In 1967, the Stonewall Inn, a private gay bar, was opened by the Genovese mafia organization, which oversaw the majority of gay bars in the area.¹⁵² Despite being described as an often "stuffy and hot" "Mafia-run" "dive bar" without running water that served "over-priced watered-down, and often bootlegged liquor," the gay and lesbian patrons of the Stonewall "felt comfortable and at home."¹⁵³ The Stonewall was one of the only Manhattan bars that served alcohol to gay men and lesbians, and it was usually crowded.¹⁵⁴ Its patrons included an unusual mix of the LGBTQ community, including drag queens not welcome in other establishments, runaways, and homeless gay kids who were struggling to survive and often begged for money to pay the bar's inexpensive cover charge.¹⁵⁵

The Stonewall was divided into one typically packed room with a bar and tables and a separate space for dancing that had a single light bulb hanging from the ceiling to warn patrons to separate when the police raided.¹⁵⁶ Raids at the Stonewall Inn were not uncommon.¹⁵⁷ During the police raids, if patrons were caught "touching, kissing, or dancing," they were arrested for disorderly conduct.¹⁵⁸ The following day, those arrested were identified and exposed in the local newspaper, possibly resulting in their eviction and firing.¹⁵⁹ Raids occurring at the Stonewall Inn typically

¹⁵⁰ Stonewall, *The 1966 "Sip-In" at Julius' Bar*, NAT'L PARK SERV., <https://www.nps.gov/ston/learn/historyculture/julius.htm>. At the time of the uprising, the Stonewall Inn was called the Stonewall Club. *Id.*

¹⁵¹ *Stonewall Inn*, NYC LGBT HISTORIC SITES PROJECT, <https://www.nyclgbtsites.org/site/stonewall-inn-christopher-park/>.

¹⁵² See *Stonewall Riots*, *supra* note 116 ("The Genovese family bribed New York's Sixth Police Precinct to ignore the activities occurring within the club.").

¹⁵³ *Stonewall Inn: Through the Years*, PBS AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/stonewall-inn-through-years/>. One patron describing the Stonewall noted, "The bar itself was a toilet, but it was a refuge, it was a temporary refuge from the street." *Id.*

¹⁵⁴ Marguerite Ward, *'They beat you with their baton': A veteran of the Stonewall riots and the first Pride march shares what life was like for gay Americans before the uprising*, BUS. INSIDER (July 27, 2020), <https://www.businessinsider.com/lgbtq-pride-month-gay-life-before-stonewall-riots-2020-6>.

¹⁵⁵ See *Stonewall Riots*, *supra* note 116.

¹⁵⁶ *Id.*

¹⁵⁷ Ward, *supra* note 154.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ("Public outings caused by these arrests had serious consequences. State officials, and even parents of minors, could mandate forced lobotomies of gay men, a brutal 'conversion therapy' practice.").

involved patrons being identified by police, and those not arrested were released to disperse in the streets.¹⁶⁰

Like earlier raids, on June 24, 1969, just days before the Stonewall Uprising, the police carried out an evening raid of the bar, arresting employees and taking illegal liquor found on the premises.¹⁶¹ Then, during the pre-dawn hours of June 28, 1969, New York City police decided to carry out yet another of the many routine raids on the Stonewall Inn, with the hope this time of shutting it down.¹⁶² This raid, however, was all but routine. The bar was not tipped off ahead of time, and when the police arrived, the patrons of the Stonewall Inn were, collectively, fed up.¹⁶³ After the police entered the bar, the officers engaged in physical violence while attempting to arrest more than a dozen employees and patrons for charges including violating New York's "gender-appropriate clothing statute."¹⁶⁴ This time, "bar patrons resisted."¹⁶⁵

Rather than dispersing as usual, those patrons not arrested gathered on Christopher Street outside of the bar and grew angrier as they witnessed the aggressive actions of the police as they attempted to make arrests.¹⁶⁶ After witnessing the police hit a lesbian on the head, and her shouting "Why don't you guys do something?," the growing crowd reacted, throwing objects from pennies to bottles to cobblestones to garbage cans.¹⁶⁷ Their protests inspired others to become involved, including area residents and "a diverse segment of the local LGBT community—homeless LGBT teens, trans

¹⁶⁰ *Records, Riots, and Rights*, NAT'L CTRS. FOR ENV'T INFO., <https://www.ncei.noaa.gov/news/records-riots-and-rights>.

¹⁶¹ *What Happened at the Stonewall Riots? A Timeline of the 1969 Uprising*, HISTORY (June 20, 2024), <https://www.history.com/news/stonewall-riots-timeline>.

¹⁶² Ward, *supra* note 154.

¹⁶³ See The Editors, *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L.L. REV. 277, 277 (1994) (describing the Stonewall Inn as "a mob-run bar in Greenwich Village that catered to a group of homosexuals whose lives placed them on the edges of even their own marginalized community" and describing the patrons present on the night of the uprising as "street queens and hustlers, dope-smokers and acid-heads. On that Friday night, most were drinking, many were stoned on drugs, and some, who had returned from Judy Garland's funeral, were in a confrontational mood"); see also Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 34 (1995) ("References to the police raids, or to the Riots themselves, however, do not often examine the various social forces converging on that moment when a seedy working-class bar in Manhattan's West Village, which openly served homosexuals and outrageously dressed Black and ethnic drag queens, became the focal point of a conflict that instigated a national gay civil rights movement."). The Stonewall Uprising was not the first instance of gays and lesbians standing up to the police. See Joseph Bennington-Castro, *7 LGBTQ Uprisings Before Stonewall*, HISTORY (Apr. 23, 2024), <https://www.history.com/news/lgbtq-uprisings-before-stonewall-riots> (providing examples of earlier resistance).

¹⁶⁴ *Stonewall Riots*, *supra* note 116.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

women of color, lesbians, drag queens, and gay men.”¹⁶⁸ The New York City police officers, expecting a routine raid, found themselves outmanned, quickly losing control.¹⁶⁹ One historian described the Stonewall Uprising as an “explosion . . . the release of pressure from a valve.”¹⁷⁰

The situation almost immediately developed into a riot. The police took refuge in the Stonewall Inn, barricading themselves inside while they waited for backup.¹⁷¹ Some protestors in the expanding crowd attempted to set the bar on fire, riot police were called, chaos erupted, and a growing riot continued through July 3, 1969, leading to multiple arrests.¹⁷² The riots gained national attention, empowered the LGBTQ community, and led to solidarity, organization, and activism.¹⁷³ While Stonewall was not the first time bar patrons fought back against a police raid, it is the most well-known.¹⁷⁴ And while Stonewall was not the beginning of the gay rights movement, it is considered by many to be the beginning of the modern gay rights crusade.¹⁷⁵ The Stonewall Uprising’s galvanizing impact led to the formation of several important gay and lesbian organizations.¹⁷⁶ Unlike other times when members of the LGBTQ community stood up and fought back against police abuse, the Stonewall Uprising was commemorated the following year and has continued to be celebrated every year since the 1969 riots.

¹⁶⁸ *Stonewall Inn*, *supra* note 151.

¹⁶⁹ *Stonewall Riots*, *supra* note 116.

¹⁷⁰ Haynes, *supra* note 121.

¹⁷¹ *Stonewall Riots*, *supra* note 116 (“The police, a few prisoners and a *Village Voice* writer barricaded themselves in the bar, which the mob attempted to set on fire after breaching the barricade repeatedly.”).

¹⁷² *Id.* After the riot squad and fire department arrived, they extinguished the flames, rescued the police inside the Stonewall Inn, and attempted to clear the riot. *Id.* Despite attempts to disperse the crowd, the riots continued for days, and the crowds grew at times to “thousands of people.” *Id.* Hundreds of people went to Christopher Street to support the patrons of Stonewall. See *Stonewall Inn: Through the Years*, PBS: AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/stonewall-inn-through-years/>; see also Ward, *supra* note 154.

¹⁷³ Cain, *supra* note 23, at 1580.

¹⁷⁴ See Joseph Bennington-Castro, 7 *LGBTQ Uprisings Before Stonewall*, HISTORY (Apr. 23, 2024), <https://www.history.com/news/lgbtq-uprisings-before-stonewall-riots> (providing examples of earlier resistance). The Stonewall Uprising was not the first instance of gays and lesbians standing up to the police. *Id.*

¹⁷⁵ Philemon, *supra* note 112. The Stonewall Inn closed within three months after the uprising. *Stonewall Inn*, *supra* note 153.

¹⁷⁶ *Stonewall Riots*, *supra* note 116. Organizations formed following the Stonewall Uprising include the Gay Liberation Front, the Human Rights Campaign, the Gay and Lesbian Alliance Against Defamation (GLAAD), and Parents, Families and Friends of Lesbians and Gays (PFLAG). *Id.*

VI. THE 1970S: FIRST PRIDE PARADE, SAVE OUR CHILDREN
& THE MORAL MAJORITY

While being gay or lesbian continued to carry a stigma and invite discrimination at the beginning of the 1970s, activists made substantial progress over the decade.¹⁷⁷ The Stonewall Uprising was a catalyst for activism—it led to the formation of several gay and lesbian activist organizations, increased the visibility of the LGBTQ community, and inspired a shift in organizational tactics.¹⁷⁸ Activists formed organizations across the country, including on college campuses, where politically active LGBTQ people began making demands for constitutional rights and protections against discrimination.¹⁷⁹

The goal of mainstream assimilation gave way to advocacy for complete liberation, and coming out became a political act to gain visibility and power in numbers. Political activists, including gay rights pioneer Harvey Milk, realized that gays and lesbians had to come out of the closet to gain political power.¹⁸⁰ As the gay and lesbian community continued to organize, the gay rights movement gained momentum, and more and more members of the LGBTQ community began to “come out.”¹⁸¹ This increase in visibility led to growing political and social support, which then led to increased social acceptance.¹⁸² That visibility included annual parades across the country to celebrate and remember the Stonewall Uprising and show that the LGBTQ community would no longer silently accept discrimination and abuse.

On the first anniversary of the Stonewall Uprising, June 28, 1970, activists gathered in New York City’s West Village for the Christopher

¹⁷⁷ See, e.g., Bonnie J. Morris, *A brief history of lesbian, gay, bisexual, and transgender social movements*, AM. PSYCH. ASS’N (July 21, 2017), <https://www.apa.org/topics/lgbtq/history>.

¹⁷⁸ See, e.g., *Stonewall Riots*, *supra* note 116 (identifying “numerous gay rights organizations, including the Gay Liberation Front, Human Rights Campaign, GLAAD (formerly Gay and Lesbian Alliance Against Defamation), and PFLAG (formerly Parents, Families, and Friends of Lesbians and Gays)”).

¹⁷⁹ See Morris, *supra* note 177. In the early 70s, there was not an organization that represented all of the LGBTQ community, instead focusing on issues common to various groups such as middle-class white male gay men, lesbians, transgender people, separatists, conformists, and extremists. *Id.*

¹⁸⁰ Lex McMenamin, *Harvey Milk, Activist and Politician, Led a Revolution for LGBTQ Rights*, TEENVOGUE (June 7, 2021), <https://www.teenvogue.com/story/harvey-milk-lgbtq-activist-legacy> (“Milk’s real work was to pull LGBTQ Americans out of the closet and into the streets.”).

¹⁸¹ See, e.g., Samatha Schmidt, *Americans’ views flipped on gay rights. How did minds change so quickly?*, THE WASHINGTON POST (May 7, 2009), https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html.

¹⁸² *Id.*

Street Liberation Day March.¹⁸³ Participants protested police discrimination and harassment and commemorated the events that took place one year prior at the Stonewall Inn.¹⁸⁴ Before the resistance at Stonewall, gay and lesbian organizers acted cautiously, hoping to gain support and present as non-threatening, including forbidding displays of affection and dressing and acting professionally.¹⁸⁵ In sharp contrast, the activists organizing the Christopher Street Liberation Day parade abandoned those earlier efforts, instead embracing “raucous celebrations of identity” where marchers had no dress code and demanded liberation.¹⁸⁶ Over one thousand people participated in the fifty-block march from Greenwich Village to Central Park, and those taking part in the march “focus[ed] less on politeness than pride,” with some going shirtless, holding hands, and kissing openly.¹⁸⁷ Shouting positive gay slogans like “gay is okay” and carrying signs, marchers asserted “gay power.”¹⁸⁸ After the march, participants gathered for “speeches and socializing” at Central Park.¹⁸⁹

Similar parades memorializing the Stonewall’s first anniversary also took place the same day in other cities across the U.S., including Chicago, San Francisco, and Los Angeles.¹⁹⁰ A participant of the Los Angeles parade described the parade participants as “a motley group . . . [c]hanting gay liberation slogans, [wearing] Halloween costumes, our best drag, tie-dye T-shirts, or almost nothing.”¹⁹¹ Many participants in the June 1970 parades had not “come out” in public before that day, and experienced “the power and raw energy” of the gatherings for the first time.¹⁹² Not only did the parades offer an opportunity to belong, but they also provided visibility and a clear message that the LGBTQ community was not going away. The pride

¹⁸³ Meg Metcalf, *The History of Pride*, LIBRARY OF CONGRESS (June 7, 2023), <https://www.loc.gov/ghe/cascade/index.html?appid=90dcc35abb714a24914c68c9654adb67>.

¹⁸⁴ *Id.*

¹⁸⁵ Erin Blakemore, *Inside the first Pride parade—a raucous protest for gay liberation*, NAT’L GEOGRAPHIC (June 25, 2021), <https://www.nationalgeographic.com/history/article/inside-the-first-pride-parade-a-raucous-protest-for-gay-liberation-lgbtq>. In 1965, a gay group, the Eastern Regional Conference of Homophile Organizations (ERCHO), began picketing each year on the Fourth of July at Independence Hall in Philadelphia, Pennsylvania. *Id.* They named the event “the Annual Reminders,” “focused on obtaining basic citizenship rights and were subdued by design. Fearing violence, organizers enacted a strict professional dress code and encouraged marching in an orderly picket line to put a non-threatening face forward.” *Id.*; see also, Chandler, *supra* note 99.

¹⁸⁶ Blakemore, *supra* note 185.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ David Kaufman, *How the Pride March Made History*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/gay-lgbt-pride-march-history.html>.

¹⁹¹ *Id.*

¹⁹² Blakemore, *supra* note 185.

marches attracted gay rights activists, and other social movements occurring in the 70s provided ideas for grassroots efforts and additional activist tactics.¹⁹³

The community also began to make inroads into the political realm. In 1972, George McGovern promised a gay activist group that he would support gay rights if elected, leading to the first time gay people ever spoke at the Democratic National Convention.¹⁹⁴ Although McGovern was not elected, the gay coalition was successful in other ways. It highlighted that the LGBTQ community could unite for a common political cause, provided national visibility for the community to discuss their quest for equal rights, and paved the way for Democratic support for LGBTQ rights.¹⁹⁵

In addition to political access, the LGBTQ community experienced a major victory in 1973 when the American Psychiatric Association (APA) announced that being gay or lesbian was no longer identified as a psychiatric disorder and removed the designation from the Diagnostic and Statistical Manual of Mental Disorders (DSM).¹⁹⁶ When the APA published DSM-I in 1952, it categorized “homosexuality” as a mental disorder.¹⁹⁷ In the subsequent 1968 DSM-II, it was reclassified as a “sexual deviation.”¹⁹⁸ In an important milestone, the APA clarified in 1973 that “homosexuality [was] neither a mental illness nor a sickness” and removed the designation from the DSM as a mental disorder.¹⁹⁹ Today, the APA has concluded that

¹⁹³ See e.g., Sasha Cohen, *How Gay Activists Challenged the Politics of Civility*, SMITHSONIAN (July 12, 2018), <https://www.smithsonianmag.com/history/how-gay-activists-challenged-politics-civility-180969579>.

¹⁹⁴ Michael Bedwell, *In 1972, gay people spoke at the Democratic National Convention for the first time*, LGBTQ NATION (Oct. 10, 2019), <https://www.lgbtqnation.com/2019/10/in-1972-gay-people-spoke-at-the-democratic-national-convention-for-the-first-time/>.

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II*, 6th Printing, AM. PSYCHIATRIST ASS’N (Nov. 1973), https://pages.uoregon.edu/eherman/teaching/texts/DSM-II_Homosexuality_Revision.pdf (noting that in December 1973 “the trustees of the American Psychological Association . . . voted to eliminate homosexuality per se as a mental disorder and to substitute . . . a new category titled Sexual Orientation Disturbance.”).

¹⁹⁷ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 38 - 39 (1952); see also Adkins, *supra* note 2 (“The fine print in the [DSM] text admits that people placed in this category were ‘ill primarily in terms of society and of conformity with the prevailing cultural milieu,’” but recognized “that hedging did not soften the blow on gay men and lesbians. That official ‘sociopathic’ designation carried tremendous force, lasting for more than 20 years and justifying widespread discrimination.”).

¹⁹⁸ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 44 - 45 (6th ed. 1968).

¹⁹⁹ *The American Psychiatric Association removes homosexuality from its list of mental illnesses*, HISTORY (Dec. 12, 2023), <https://www.history.com/this-day-in-history/the-american-psychiatric-association-removes-homosexuality-from-its-list-of-mental-illnesses>.

same-sex sexual attraction “represents normal forms of human experience.”²⁰⁰

The APA decision helped alleviate some of the earlier stigmatization of the LGBTQ community, allowed better opportunities to gain social and political power, and brought often splintered gay advocacy groups together for a shared victory.²⁰¹ Activists believed eradicating laws that criminalized same-sex consensual intimacy was crucial to advancing gay rights.²⁰² As gays and lesbians established an increasingly visible presence and demanded better treatment, several states repealed their sodomy statutes.²⁰³ While Illinois was the first state to do so in the early 1960s, Connecticut was the next state to do so in the early 1970s,²⁰⁴ and nineteen states followed suit throughout the decade, officially decriminalizing the act of “being” gay and lesbian in those states.²⁰⁵ In addition, some U.S. cities passed nondiscrimination laws that provided rights to gay men and lesbians for the first time.²⁰⁶

Upon realizing that the LGBTQ community could organize, mobilize, and provide needed votes, politicians began to lend their support. Along with gaining political influence, for the first time, openly gay men and lesbians began to have personal success in the political arena, running for and getting elected to public office.²⁰⁷ In 1974, the first out lesbian was elected to the city council in Ann Arbor, Michigan.²⁰⁸ Harvey Milk was

²⁰⁰ See, e.g., *Understanding sexual orientation and homosexuality*, AM. PSYCH. ASS’N (2008), <https://www.apa.org/topics/lgbtq/orientation>.

²⁰¹ *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCH. ASS’N, <https://www.apa.org/about/policy/sexual-orientation> (last updated Jun. 2022) (“Since 1974, the American Psychological Association (APA) has opposed stigma, prejudice, discrimination, and violence on the basis of sexual orientation and has taken a leadership role in supporting the equal rights of lesbian, gay, and bisexual individuals.”).

²⁰² Paula A. Brantner, *Removing Bricks from A Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 496 (1992).

²⁰³ *Id.*

²⁰⁴ Brantner, *supra* note 202. Illinois removed its sodomy law in 1961, effective on January 1, 1962. See *Laws of Illinois 1961*, *supra* note 117. It was not until a decade later that other states followed suit. For a history of sodomy laws, see *Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision*, ACLU (Jun. 26, 2020), <https://www.aclu.org/documents/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision>.

²⁰⁵ *Id.*

²⁰⁶ Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 MN. JOUR. LAW & POL’Y 3 (Dec. 1999). The first cities to pass gay rights ordinances were East Lansing and Ann Arbor, Michigan, and San Francisco, California.

Id.

²⁰⁷ See, e.g., Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, 26 SOC. SCI. HIST. 531, 531 - 38 (Sept. 2002).

²⁰⁸ Julie Compton, *Meet the lesbian who made political history years before Harvey Milk*, NBC NEWS (Apr. 2, 2020), <https://www.nbcnews.com/feature/nbc-out/meet-lesbian-who-made-political-history-years-harvey-milk-n1174941>.

elected in 1977 to San Francisco's Board of Supervisors after three failed campaigns, becoming the first "out" gay person elected to high public office in a major American city.²⁰⁹ By gaining political representation, gay and lesbian politicians were able to advocate for their own communities and represent issues unique to gays and lesbians. Milk realized the importance of visibility and urged gays and lesbians to come out to family, friends, coworkers, and others to de-mystify their existence and put a face and person behind the label.²¹⁰

The various successes of the LGBTQ community in the 1970s were met with backlash from anti-gay activists and conservative religious organizations in an attempt to repeal protections and prevent further advancements.²¹¹ A former beauty queen turned anti-gay activist falsely claimed gays and lesbians were a danger to children, conflating gays with child sexual abuse.²¹² The Christian Right launched attacks on the LGBTQ community by emphasizing traditional family values and heterosexual norms, painting gays and lesbians as anti-Christian, anti-American, and anti-family.²¹³ The rising Religious Right supported these false allegations with discredited information that touted "values regarding sexuality, family, and religion . . . to establish narrative fidelity" with opponents of gay rights.²¹⁴

At the same time, gay rights activists were focused on amending existing local anti-discrimination ordinances to include protections for gays and lesbians in housing, employment, and public accommodations.²¹⁵ Along with dozens of successful efforts in multiple American cities, a gay lobbying organization in Dade County, Florida, persuaded a commissioner

²⁰⁹ Tim Fitzsimons, *Forty years after his death, Harvey Milk's legacy still lives on*, NBC NEWS (Nov. 27, 2018), <https://www.nbcnews.com/feature/nbc-out/forty-years-after-his-death-harvey-milk-s-legacy-still-n940356>. After winning the election, Milk stated, "If a gay can win, it means there is hope that the system can work for all minorities if we fight. We've given them hope." *Id.*

²¹⁰ *Id.*

²¹¹ *History of the Anti-Gay Movement Since 1977*, S. POVERTY LAW CTR. (Apr. 28, 2005), <https://www.splcenter.org/resources/reports/history-anti-gay-movement-1977/> ("The Rev. Jerry Falwell found[ed] the Moral Majority, a national effort to stimulate the fundamentalist vote and elect Christian Right candidates. Early fundraising appeals include a "Declaration of War" on homosexuality."); *see also*, Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative That Gays and Lesbians Are Harmful to Children*, 21 DUKE J. GENDER L. & POL'Y 125, 153 (2013).

²¹² Niedwiecki, *supra* note 211.

²¹³ Cece Cox, *To Have and To Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY 1, 26–31 (2005); Niedwiecki, *supra* note 211, at 153–58.

²¹⁴ Niedwiecki, *supra* note 211, at 156–57.

²¹⁵ *See e.g.*, Bruce J. Winick, *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 LAW & SEXUALITY 1, 1 (2002). For a detailed account of the Dade County ordinance's passage and the efforts for its repeal, *see* Niedwiecki, *supra* note 211, at 156–57.

to support an ordinance to extend these nondiscrimination protections to gay men and lesbians.²¹⁶ The controversial ordinance was submitted and approved by the Dade County Commission by a vote of five to three, leading to celebrations in the LGBTQ community while “[t]he conservative and church groups who had opposed the ordinance . . . were appalled.”²¹⁷ The ordinance included employment protections that prohibited firing gay and lesbian teachers, angering many Florida parents who argued that the ordinance prioritized civil rights for gays and lesbians over the safety of schoolchildren and parental rights.²¹⁸ Opponents unsuccessfully challenged the ordinance in court and then focused on repealing it, collecting signatures to force a referendum.²¹⁹

Anita Bryant, the first runner-up in the 1958 Miss America pageant and born-again Christian, appeared in Dade County to oppose the ordinance.²²⁰ Bryant and her Save Our Children coalition identified gays and lesbians as an “abomination” and pedophiles who were harmful to children.²²¹ She alleged that gay rights were “a peril to the nation.”²²² She falsely declared that “[h]omosexuals cannot reproduce, so they must recruit. And to freshen their ranks, they must recruit the youth of America.”²²³ She also claimed without basis that gays and lesbians were predators.²²⁴ Bryant was ultimately effective at persuading the voters of Dade County to appeal the legislation that gave the LGBTQ community protections.²²⁵ Her actions and claims were partially responsible for a later Florida law that prohibited same-sex couples from adopting.²²⁶

²¹⁶ Winick, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Niedwiecki, *supra* note 211.

²²¹ *Id.*

²²² *Id.* For a detailed analysis of Anita Bryant’s anti-gay campaign, see Jillian Frank, *The Civil Rights of Parents: Race and Conservative Politics in Anita Bryant’s Campaign against Gay Rights in 1970s Florida*, J. OF THE HIST. OF SEXUALITY (Jan. 2013); see also Jillian Eugenios, *How 1970s Christian crusader Anita Bryant helped spawn Florida’s LGBTQ culture war*, NBC NEWS (Apr. 13, 2022), <https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215>. Bryant further declared, “If gays are granted rights, next we’ll have to give rights to prostitutes and to people who sleep with St. Bernards and nail biters.” Linda Robertson & Devoun Cetoute, *How Anita Bryant’s anti-gay campaign pioneered today’s parental rights movement*, MIAMI HERALD (Jan. 13, 2025), <https://www.miamiherald.com/news/local/community/miami-dade/article298335973.html>.

²²³ Niedwiecki, *supra* note 211.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Alison Gash, *Anti-transgender bills are latest version of conservatives’ longtime strategy to rally their base*, THE CONVERSATION (May 6, 2021), <https://theconversation.com/anti-transgender-bills-are-latest-version-of-conservatives-longtime-strategy-to-rally-their-base-158296>.

Inspired by her success in Florida and joined by Jerry Falwell, founder of the Moral Majority, Bryant took the Save Our Children organization national, continuing to spread fear and false information that demonized gays and lesbians.²²⁷ Bryant and Falwell's nationwide holy war to repeal existing protections for LGBTQ citizens led to publicity and increased support for the Religious Right in its attacks on the gay community.²²⁸ Falwell stated at one of Bryant's rallies that "[s]o-called gay folks [would] just as soon kill you as look at you."²²⁹ Ultimately, Bryant's discriminatory actions and the rise in organized Christian attacks inspired the LGBTQ community to further organize and fight back.²³⁰ Gay organizations grew their memberships, anti-gay laws failed, and nondiscrimination laws in numerous cities that successfully defeated attempted repeals were upheld in court.²³¹

A year after Florida repealed the protections for its gay and lesbian citizens, a ballot measure was introduced in California. Proposition 6 threatened to mandate firing any teacher in the state who was gay or lesbian or who otherwise supported LGBTQ+ rights.²³² The measure, referred to as the Briggs Initiative, was one of many anti-gay measures across the county, and activists, led by Harvey Milk, came out en masse in opposition.²³³ On November 7, 1978, Californians voted down the measure by a landslide, marking the first time a voter initiative successfully blocked an anti-gay campaign.²³⁴

²²⁷ Livia Gershon, *Parents' Rights, Sex, and Race in 1970s Florida*, JSTOR DAILY (Oct. 13, 2023) ("Its members warned of gay teachers 'flaunting' their sexual orientation and 'recruiting' children to homosexuality. And they focused particularly on the private schools that offered all-white environments for families fleeing integration. In its materials, SOC argued that these schools could be forced to hire 'homosexuals no matter how blatant their perverted lives may be.'").

²²⁸ See, e.g., Bethany Woolman, *Celebrating Harvey Milk and the Defeat of the Briggs Initiative* - #ACLUtimeMachine, ACLU N. CALI. (May 22, 2017), <https://www.aclunc.org/blog/celebrating-harvey-milk-and-defeat-briggs-initiative-aclutimemachine>. In addition to Miami, Florida, Bryant and Save Our Children ultimately assisted in overturning gay rights measures in Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon, but failed in Seattle, Washington. Liz Tracey, *Harvey Milk's Gay Freedom Day Speech: Annotated*, JSTOR DAILY (June 13, 2022), <https://daily.jstor.org/harvey-milks-gay-freedom-day-speech-annotated/>.

²²⁹ Niedwiecki, *supra* note 211, at 145–46.

²³⁰ See Eugenios *supra* note 222. The National Gay Task Force published a thank you letter in the New York Times in 1977 stating that Bryant and Save the Children were "doing the 20 million lesbians and gay men in America an enormous favor: They are focusing for the public the nature of the prejudice and discrimination we face." *Id.*

²³¹ *Id.*; see also Fitzsimons, *supra* note 209.

²³² Woolman, *supra* note 228.

²³³ *Id.* Milk was involved in passing the first gay rights ordinance in the U.S., "which sparked the legal LGBTQ-rights revolution that has since resulted in a nationwide right to same-sex marriage and an increasing number of LGBTQ-rights protections in cities and states across the country." Fitzsimons, *supra* note 209.

²³⁴ *Id.*

Further assisting with the movement's goal of gay and lesbian visibility, the pride flag was introduced in San Francisco in 1978.²³⁵ Commissioned by Harvey Milk, the flag represented solidarity, was featured in Pride parades, and became more popular over the years.²³⁶ Milk urged gays and lesbians to come out by declaring, "[W]e will not win our rights by staying quietly in our closets." The need to come out, he explained, was to "fight the lies, the myths, the distortions" and "tell the truth about gays."²³⁷ Milk accurately believed that most people were afraid of the unknown and that, by coming out, society would realize members of the LGBTQ community were "successful, productive members of society" and "their families and friends would support protections for their equal rights."²³⁸

When Harvey Milk was assassinated on November 27, 1978, his pre-recorded tape—to "be played only in the event of [his] death by assassination"—was released with his "plea for the action he felt was the most radical and powerful for LGBT people: coming out."²³⁹ In the recording, he stated:

I would like to see every gay doctor come out, every gay lawyer, every gay architect come out, stand up and let that world know. That would do more to end prejudice overnight than anybody would imagine. I urge them to do that, urge them to come out. Only that way will we start to achieve our rights. If a bullet should enter my brain, let that bullet destroy every closet door in the country.²⁴⁰

Milk's request led to an untold number of "coming out" stories and the October 14, 1979, National Gay Rights March on Washington, where an estimated 100,000 people marched for gay rights in the largest LGBTQ+ gathering at the time.²⁴¹ The march, which took place ten years after Stonewall, "signified a new national movement" and, as shouted in chants

²³⁵ Thaddeus Morgan, *How Did the Rainbow Flag Become an LGBTQ+ Symbol?*, HISTORY (June 20, 2024), <https://www.history.com/news/how-did-the-rainbow-flag-become-an-lgbt-symbol>. Created by Gilbert Baker at the request of Harvey Milk, the rainbow flag's colors illustrated the diversity of the LGBTQ+ community, representing "all races, ages and genders" as well as the connection that, like the LGBTQ+ community, "rainbows are both natural and beautiful." *Id.*

²³⁶ *A Brief History of the Rainbow Flag*, SAN FRANCISCO, <https://www.sftavel.com/article/brief-history-rainbow-flag>.

²³⁷ Tracey, *supra* note 228.

²³⁸ Manny Rodriguez, *9 Ways Harvey Milk Helped LGBTQ People*, LA FUENTE (May 20, 2021), <https://www.lafuentehollywood.com/rehab-blog/harvey-milk-help-lgbtq/>.

²³⁹ Fitzsimons, *supra* note 209.

²⁴⁰ *Id.*

²⁴¹ *1979 March on Washington for Lesbian and Gay Rights*, NAT'L PARK SERV., <https://www.nps.gov/places/1979-gay-rights-march.htm>.

at the march, affirmed that gays and lesbians were “everywhere.”²⁴² The March on Washington marked a pivotal milestone, building on the momentum of the 1970 Christopher Street Liberation Day March, which set the stage for a decade defined by activism, visibility, and the relentless fight against discrimination.”

The June 1970 Christopher Street Liberation Day March set the visible, activist tone for the 1970s, which grew throughout the decade, peaking with the October 1979 March on Washington. Parades memorializing the Stonewall Uprising have continued to take place every June since, becoming more organized, taking place in more locations, and increasing in size. The annual Pride parades have provided visibility, furthered gay political activism, and ultimately spread across the world.

VII. THE 1980s, AIDS & *BOWERS V. HARDWICK*

The 1980s have been described as “a time of both progress and hardship for the LGBTQ+ community.”²⁴³ With the advent of AIDS, the *Bowers v. Hardwick* decision, and homophobia within the highest levels of government, the LGBTQ community faced enormous challenges. While gays and lesbians became increasingly visible, the AIDS crisis took an enormous toll on the gay community, leading to deepening discrimination and impacting earlier progress.

The decade began with continued success in eliminating state sodomy statutes.²⁴⁴ In 1980, the sodomy laws in New York²⁴⁵ and Pennsylvania²⁴⁶ were struck down by their highest state courts as unconstitutional. Two additional states, Alaska and Wisconsin, repealed their sodomy laws in 1980, following the dozens of states that did so in the 1970s.²⁴⁷ However, these successes were quickly dimmed by a devastating crisis that annihilated the gay community.

At the beginning of the 1980s, Acquired Immune Deficiency Syndrome (AIDS) was a little-known illness that was not publicly reported on until 1981.²⁴⁸ However, by the end of the decade, the AIDS crisis was in full

²⁴² *Id.*

²⁴³ *Pride in the 80s*, Stonewall National Monument, NAT’L PARK SERV., <https://www.nps.gov/articles/000/pride-in-the-1980-s.htm>.

²⁴⁴ See *supra* notes 203–206 and accompanying text.

²⁴⁵ *People v. Onofre*, 415 N.E.2d 936, 937 (N.Y. 1980).

²⁴⁶ *Com. v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980).

²⁴⁷ *History of Sodomy Laws and the Strategy that Led Up to Today’s Decision*, ACLU (June 16, 2003), <https://www.aclu.org/documents/history-sodomy-laws-and-strategy-led-todays-decision>.

²⁴⁸ See, e.g., Ronda B. Goldfein, Sarah R. Schalman-Bergen, *From the Streets of Philadelphia: The AIDS Law Project of Pennsylvania’s How-to Primer on Mitigating Health Disparities*, 82 TEMP. L. REV. 1205, 1207 (2010).

force and thousands from the gay community were dying.²⁴⁹ In 1981, the Centers for Disease Control (CDC) formed a task force to investigate why gay men were increasingly being diagnosed with immunity-related terminal conditions.²⁵⁰ After identifying both gay men and straight intravenous drug users with the same condition, health experts determined that the disease was likely blood-borne, and hemophiliacs were soon diagnosed with the disease.²⁵¹ By 1982, the CDC developed blood tests to identify those who had pre-AIDS antibodies.²⁵²

As the disease became more widespread and gained media attention, Americans panicked. AIDS patients were stigmatized, and some gay rights opponents identified AIDS as a “gay plague.”²⁵³ Anti-gay members on the Right argued that AIDS was a punishment from God as revenge for immorality, with many praising the disease for killing young gay men.²⁵⁴ Without a cure, the CDC focused on testing, counseling, prevention, and education.²⁵⁵ Meanwhile, as the LGBTQ community lost more and more of its members to the devastating disease, activist organizations worked desperately to bring attention to their plight and the need for funding, treatment, and a cure.²⁵⁶ President Reagan, elected in 1980, supported anti-LGBTQ legislation and waited until the mid-80s before publicly acknowledging the disease.²⁵⁷

Over the next several years, AIDS devastated the gay population. Although the CDC had “identified all of [AIDS] major transmission routes”

²⁴⁹ *Id.*

²⁵⁰ *The AIDS Epidemic in the United States*, CDC (July 8, 2024), <https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html>. Young men in Los Angeles were diagnosed with pneumocystis carini pneumonia, while in New York there was an increase in Kaposi’s sarcoma diagnoses, both “rare, deadly diseases associated with immune suppression.” *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See, e.g., Emily J. Carton, *Lethal but Not Disabled? – the Circuits Split on ADA Coverage of the Asymptomatic HIV-Positive Victim*, 103 DICK. L. REV. 129, 130 (1998).

²⁵⁴ See, e.g., THE SOCIAL IMPACT OF AIDS IN THE UNITED STATES, CH. 5 - RELIGION AND RELIGIOUS GROUPS, NAT’L ACADEMIC PRESS (Albert R. Jonsen & Jeff Stryker, eds., 1993), <https://www.ncbi.nlm.nih.gov/books/NBK234566/> (“Falwell’s political organization, Moral Majority, opposed governmentally funded research to find a cure for AIDS because the disease was a gay problem. He promoted the idea that AIDS was not only God’s judgment on gay men, but also that divine judgment extended to all of society: ‘AIDS is a lethal judgment of God on America for endorsing this vulgar, perverted and reprobate lifestyle.’”) (internal citations omitted).

²⁵⁵ *The AIDS Epidemic in the United States, 1981-early 1990s*, CDC (July 8, 2024), <https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html>.

²⁵⁶ See, e.g., *Looking Back: The AIDS Epidemic*, SFLGBTCENTER (Dec. 15, 2018), <https://www.sflgbtcenter.org/history/looking-back-the-aids-epidemic/>.

²⁵⁷ See, e.g., Joseph Bennington Castro, *How AIDS Remained an Unspoken—But Deadly—Epidemic for Years*, HISTORY (Aug. 22, 2023), <https://www.history.com/news/aids-epidemic-ronald-reagan>.

by the end of 1984, Reagan refused to engage in the crisis.²⁵⁸ Anti-gay sentiment led to gay men losing housing, healthcare, and employment, as well as public and political support.²⁵⁹ As the crisis grew, gay and lesbian coalitions combined forces, uniting on the singular cause of finding a treatment or cure and sparking a period of urgent activism.²⁶⁰ Gay rights organizations worked to gain research funding for AIDS research, shifting their focus from rights and visibility to educating the public, raising AIDS awareness, and demanding that the government take action.²⁶¹

The gay community continued to experience legal defeats in the mid and late 1980s, but the most devastating loss suffered occurred when the Supreme Court decided *Bowers v. Hardwick* in 1986.²⁶² In *Bowers*, the Court heard a challenge to a Georgia criminal statute to determine whether there was a constitutional right to privacy under the Fourteenth Amendment's Due Process Clause for consenting adults to engage in same-sex intimacy in their home.²⁶³ In ruling that there was not a fundamental constitutional right to engage in same-sex intimacy, the Court upheld the Georgia sodomy statute, 5-4, stating that otherwise "it would be difficult,

²⁵⁸ After receiving the committee's report in June 1988, which recommended more HIV testing and a focus on prevention and treatment as well as nationally expanding HIV care, Reagan directed his Special Assistant for Drug Policy to determine how to move forward. *Statement on the Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic*, RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM, (June 27, 1988), <https://www.reaganlibrary.gov/archives/speech/statement-report-presidential-commission-human-immunodeficiency-virus-epidemic>. However, the commission's recommended "changes did not take place" and were "largely ignored." Baligh Yehia and Ian Frank, *Battling AIDS in America: An Evaluation of the National HIV/AIDS Strategy*, AM. J. OF PUB. HEALTH (Jan. 20, 2012), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3154226/>.

²⁵⁹ See, e.g., Goldfein, *supra* note 248, at 1208.

²⁶⁰ By 1984, HIV was identified as the cause of AIDS, and in 1985, the FDA licensed the first commercial blood test. *History of AIDS*, HISTORY (July 13, 2017), <https://www.history.com/topics/1980s/history-of-aids>. By 1987, the first medication to treat HIV became available. *Id.*

²⁶¹ See, e.g., Lewis A. Grossman, *AIDS Activists, FDA Regulation, and the Amendment of America's Drug Constitution*, 42 AM. J.L. & MED. 687, 688 (2016).

²⁶² For example, in 1984 a divided U.S. Supreme Court upheld the Tenth Circuit's split decision that held sexual orientation was not a suspect class, and that a statute allowing the firing of a teacher for engaging in "public homosexual activity" was not unconstitutional. *Nat'l Gay Task Force v. Bd. of Educ. of Oklahoma City, Oklahoma*, 729 F.2d 1270 (10th Cir. 1984). The following year, the Supreme Court denied certiorari after the Sixth Circuit reversed a magistrate judge and jury's determination that a guidance counselor's constitutional free speech and equal protection rights were violated when she was fired solely for saying she was bisexual. See, e.g., *Rowland v. Mad River Local Sch. Dist., Montgomery Cnty., Ohio*, 470 U.S. 1009, 1010 (1985). In dissent, Justices Brennan and Marshall criticized the Sixth Circuit's decision, announcing they would have granted certiorari "[b]ecause petitioner's case raises serious and unsettled constitutional questions relating to this issue of national importance, an issue that cannot any longer be ignored." *Id.* at 1018.

²⁶³ *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

except by fiat, to limit the claimed right to [consensual adult] homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.”²⁶⁴ In a powerful dissent, Justice Blackmun declared,

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”²⁶⁵

In response to *Bowers* and to raise funds for AIDS, show unity, and gain national attention for their ongoing plight, the LGBTQ community held a second National March on Washington on October 11, 1987.²⁶⁶ As evidence of their inroad in the political sphere, “more than 1,000 elected officials, including about 100 members of Congress, and other prominent civic, labor and religious leaders signed letters endorsing the march.”²⁶⁷ Additionally, Jesse Jackson, a candidate for the 1980 Democratic Presidential nomination, gave an address.²⁶⁸ During his speech, Jackson called for equal protection for all, including “for the rights of sexual preference,” and for additional federal commitments for AIDS research and education.²⁶⁹ He concluded by telling the crowd, “Today I stand with you. Election Day you stand with me.”²⁷⁰

Overall, the challenges and devastating losses of the 1980s led to greater unity in the LGBTQ community, which led to greater political influence and more sophisticated activism.²⁷¹ Organizations, working together, made significant inroads. By the close of the 1980s, groups successfully accessed increased federal AIDS funding and speedier approval of AIDS drugs.²⁷² Ultimately, the AIDS crisis brought previously separated gay and lesbian

²⁶⁴ *Bowers*, 478 U.S. at 195–96 (The Court clarified that it was “unwilling to start down that road.”).

²⁶⁵ *Id.* at 199 (Blackmun, J., dissenting) (internal citations omitted).

²⁶⁶ Lena Williams, *200,000 March in Capital to Seek Gay Rights and Money for AIDS*, N.Y. TIMES (Oct. 12, 1987), <https://www.nytimes.com/1987/10/12/us/200000-march-in-capital-to-see-gay-rights-and-money-for-aids.html>.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See, e.g., Bonnie J. Morris, PhD, A brief history of lesbian, gay, bisexual, and transgender social movements, AM. PSYCH. ASS’N, July 21, 2017, <https://www.apa.org/topics/lgbtq/history>.

²⁷² See, e.g., Grossman, *supra* note 261, at 716.

coalitions together, focused on a singular united cause, demanding that the federal government take action. By the end of this challenging decade, *Bowers* stripped LGBTQ citizens of constitutional privacy rights, and AIDS was responsible for over 70,000 deaths. Over 30,000 more would be reported in the first year of the following decade.

VIII. THE 1990S: *ROMER V. EVANS*, ANIMUS & DOMA

The 1990s were an important decade for gay rights, beginning with several defeats but ending with major victories, including the first United States Supreme Court decision favoring the LGBTQ community. Efforts to change public perceptions of LGBTQ people in the two prior decades led to significant changes in public policy. In the 1990s, the movement saw improved, coordinated organization, positive media depictions, increased public approval, and a new generation of activists. Advocacy and financial resources led to an increase in political power. Activists continued to fight against AIDS, which had caused the death of over 100,000 Americans by the beginning of the decade.²⁷³ People living with HIV/AIDS received some protection in 1990 when Congress enacted the Americans with Disabilities Act (ADA).²⁷⁴ The ADA prohibits discrimination against individuals with disabilities, including people with HIV.²⁷⁵ By 1994, an oral HIV test became available, improving efforts to control the spread of the disease.²⁷⁶

The fight for gay rights in the 1990s shifted when “a younger generation began to realize that LGBTQ people were entitled to the same rights as

²⁷³ Michail Takach, *How AIDS Activists Fought for Patients' Rights*, HISTORY (Nov. 30, 2022), <https://www.history.com/news/act-up-aids-patient-rights>.

²⁷⁴ See, e.g., David W. Webber & Lawrence O. Gostin, *Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” As Defined Under Federal and State Law*, 3 J. HEALTH CARE L. & POL’Y 266, 275 (2000).

²⁷⁵ *Id.* (“In essence, Congress appears to have considered HIV as a per se disability in enacting the ADA.”). When it was passed, the ADA’s broad remedial protections against disability discrimination included protections for those with HIV/AIDS, although courts did not consistently agree. See L. O. Gostin, C. Feldblum & D. W. Webber, *Disability discrimination in America: HIV/AIDS and other health conditions*, J. OF THE AM. MED. ASS’N (Feb. 24, 1999), <https://pubmed.ncbi.nlm.nih.gov/10052447/>. The Supreme Court first addressed HIV/AIDS in 1998 in *Bragdon v. Abbott* when an HIV-infected patient brought an ADA action against a dentist who refused to provide treatment. The Court held that HIV qualified as a physical impairment under the ADA, was covered as a disability, and that refusal of treatment cannot be based on a belief that a risk was present, requiring objective scientific evidence. *Bragdon v. Abbott*, 524 U.S. 624, 654–65 (1998).

²⁷⁶ ASSOC. PRESS, *Government Authorizes a New H.I.V. Test*, N.Y. TIMES (Dec. 24, 1994), <https://www.nytimes.com/1994/12/24/us/government-authorizes-a-new-hiv-test.html>. Within two years, the FDA also approved a home testing kit and urine test for HIV. Warren A. Leary, *F.D.A. Approves Home AIDS Test; Marketing Is to Begin in June*, N.Y. TIMES (May 15, 1996), <https://archive.nytimes.com/www.nytimes.com/library/national/science/aids/051596sci-aids.html>.

anyone else.”²⁷⁷ As a result, the fight for equality took on a new focus, bringing gay rights to “the forefront of political conversations.”²⁷⁸ Like the antidiscrimination protections that Anita Bryant worked to repeal in Dade County in the 1970s, Colorado gay rights activists had secured protections against sexual orientation discrimination in several Colorado cities.²⁷⁹ In response to these successful efforts, a conservative Colorado organization submitted a ballot initiative, Amendment 2, to repeal and prohibit future protections for the LGBT community, identifying such protections as “special rights.”²⁸⁰ Colorado voters passed Amendment 2 on November 3, 1992, leading to state boycotts and a legal challenge filed on November 12, 1994, that sought to declare the amendment unconstitutional.²⁸¹ Before the amendment was signed into law on January 15, the district court issued a temporary injunction, followed later by a permanent injunction.²⁸² In 1994, the Colorado Supreme Court found Amendment 2 unconstitutional, and the United States Supreme Court granted certiorari in the case.²⁸³ In 1996, *Romer v. Evans* would become the first positive LGBTQ decision of the Court.²⁸⁴

During the same timeframe, the 1992 presidential election took place. Candidate Bill Clinton reached out to the LGBTQ community for support, making him the first presidential candidate to openly recognize the political and voting power of the minority group.²⁸⁵ The media noticed, and gays and lesbians received national attention for their organized ability to provide significant support and votes for a political candidate.²⁸⁶ In exchange for their support and donations, gay and lesbian organizations and political supporters expected Clinton, once elected, to come through on his campaign promises, including fulfilling his promise to lift the ban on gays and lesbians serving in the military.²⁸⁷ However, a newly elected President Clinton signed “Don’t Ask, Don’t Tell” (DADT) in 1993, which the military

²⁷⁷ *A Brief History of Civil Rights in the United States: The 1990s, “Don’t Ask, Don’t Tell,” and DOMA*, VERNON E. JORDAN L. LIB., HOW. UNIV. SCH. OF L. (Jan. 6, 2023), <https://library.law.howard.edu/civilrightshistory/lgbtq/90s>.

²⁷⁸ *Id.*

²⁷⁹ *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

²⁸⁰ *Id.* at 626.

²⁸¹ *Evans v. Romer*, No. CIV. A. 92 CV 7223, 1993 WL 518586, at *1 (Colo. Dist. Ct. Dec. 14, 1993), *aff’d*, 882 P.2d 1335 (Colo. 1994), *aff’d*, 517 U.S. 620 (1996).

²⁸² *Romer*, 517 U.S. at 625–26.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See, e.g., Aliyah Frumin, *Timeline: Bill Clinton’s evolution on gay rights*, MSNBC (Mar. 8, 2013), <https://www.msnbc.com/hardball/timeline-bill-clintons-evolution-gay-rig-msna19626>.

²⁸⁶ See, e.g., Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y. L. SCH. L. REV. 679, 690 (1996).

²⁸⁷ *Id.*

implemented in February 1994.²⁸⁸ Although Clinton campaigned on ending the ban, his efforts after his election were “met with stiff bipartisan opposition in Congress” and from Colin Powell, then-chairman of the Joint Chiefs of Staff.²⁸⁹ As one legal scholar recognized, “[I]n spite of increased visibility and an outpouring of money and votes, the rights of sexual minorities were, ultimately, sacrificed to achieve other political goals.”²⁹⁰

The policy was initially described as a “compromise between those who wanted to end the longstanding ban on gays serving in the U.S. military and those who felt having openly gay troops would hurt morale and cause problems within military ranks.”²⁹¹ Ultimately, however, the policy “forced [] service members into secrecy [and did] little to combat the prejudice against them,” and gay and lesbian military members continued to be discharged.²⁹² In the end, DADT prohibited gays and lesbians from serving openly in the military and resulted in thousands of discharges.²⁹³

In response to the DADT policy, the passage of Colorado’s Amendment 2 permitting open discrimination of gays and lesbians, and ongoing nationwide LGBTQ discrimination, the LGBTQ community organized the March on Washington for Lesbian, Gay, and Bi-Equal Rights and Liberation.²⁹⁴ On April 25, 1993, close to a million marchers descended on Washington D.C. in a united stand against ongoing discrimination.²⁹⁵ The marches gained national attention and support from famous politicians, athletes, singers, and Hollywood actors.²⁹⁶ The event included smaller events, workshops, and outings in the days leading up to the march. The list of demands included ending state and federal discrimination, ending the military ban, increasing AIDS funding, and repealing sodomy laws.²⁹⁷

²⁸⁸ Sarah Pruitt, *Once Banned, Then Silenced: How Clinton’s ‘Don’t Ask, Don’t Tell’ Policy Affected LGBTQ Military*, HISTORY (July 3, 2019), <https://www.history.com/news/dont-ask-dont-tell-repeal-compromise>.

²⁸⁹ *Id.*

²⁹⁰ Neal, *supra* note 286, at 692.

²⁹¹ Pruitt, *supra* note 288.

²⁹² *Id.*

²⁹³ While DADT allowed gays and lesbians to serve in the military, so long as they did not disclose their sexual orientation, it also banned any same-sex activity. Pruitt, *supra* note 288. The policy resulted in over 13,000 military members being discharged before it was repealed in 2011. Jim Garamone, *DOD Finishes ‘Don’t Ask, Don’t Tell’ Discharge Reviews*, U.S. DEP’T OF DEF. (Oct. 15, 2024), <https://www.defense.gov/News/News-Stories/Article/Article/3934894/dod-finishes-dont-ask-dont-tell-discharge-reviews/>.

²⁹⁴ Jeffrey Schmalz, *March For Gay Rights; Gay Marchers Throng Mall in Appeal for Rights*, N.Y. TIMES (Apr. 26, 1989), <https://www.nytimes.com/1993/04/26/us/march-for-gay-rights-gay-marchers-throng-mall-in-appeal-for-rights.html>.

²⁹⁵ Lou Chibbaro, Jr., *Our history of marching on Washington*, BLADE (June 11, 2017), <https://www.washingtonblade.com/2017/06/11/history-marching-washington/>.

²⁹⁶ *Id.*

²⁹⁷ Nadine Smith, *The 20th Anniversary of the LGBT March on Washington: How Far Have We Come?*, HUFF. POST (Apr. 25, 2013), https://www.huffpost.com/entry/the-20th-anniversary-of-the-lgbt-march-on-washington_b_3149185.

Following challenges in the early 1990s, the gay community had its first historical win in the United States Supreme Court on May 20, 1996, when the Court addressed Colorado's Amendment 2.²⁹⁸ In response to LGBTQ nondiscrimination protections in effect in several Colorado cities, a conservative Colorado organization submitted a ballot initiative to repeal and prohibit future LGBTQ protections.²⁹⁹ The amendment, which barred discrimination protections for gays and lesbians, was described by opponents as "special rights" as opposed to the identical rights enjoyed by straight Coloradoans.³⁰⁰ In the landmark *Romer v. Evans* decision, the Court ruled in favor of the gay community for the first time.³⁰¹ Finding that the amendment was based on animus and that there was nothing "special" about the protections, the Court struck down the amendment as a violation of the Fourteenth Amendment's Equal Protection Clause.³⁰² The Court found the state's position "implausible," instead finding that the amendment "impose[d] a special disability" only on gay people who were "forbidden the safeguards others enjoy or may seek without constraint."³⁰³ The Court further noted that Amendment 2 "nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education and employment" and repealed and forbade "all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government."³⁰⁴

While *Romer* provided a major win for LGBTQ rights, the Defense of Marriage Act (DOMA) was passed by Congress and signed by Clinton just a few months later, on September 21, 1996.³⁰⁵ DOMA represented another loss in the fight for equality—and further betrayal by a president that the gay community had supported and expected to fulfill his assurances of support. One of the major events leading to DOMA's passage was a 1990 challenge to Hawaii's ban on same-sex marriage.³⁰⁶ Plaintiff couples sued the state after being denied marriage certificates, and after losing in the trial

²⁹⁸ See generally *Romer v. Evans*, 517 U.S. 620 (1996). Colorado gay rights activists had secured protections against sexual orientation discrimination in several Colorado cities, including Aspen in 1977, Boulder in 1987, and Denver in 1991. *Id.*

²⁹⁹ *Id.* at 626.

³⁰⁰ *Id.* at 629.

³⁰¹ *Id.* at 635.

³⁰² *Id.*

³⁰³ *Romer*, 517 U.S. at 629.

³⁰⁴ *Id.*

³⁰⁵ See, e.g., Linda L. Barkacs et al., *Divorcing the Defense of Marriage Act: Judicial Tensions in Upholding the Legislated Preclusion of Federal Same-Sex Marital Rights*, 3 AM. U. LAB. & EMP. L.F. 88, 90 (2013).

³⁰⁶ See, e.g., Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 278 (2014).

and appellate courts, they appealed to the Hawaii Supreme Court.³⁰⁷ In 1993, the Hawaii Supreme Court held that the denials likely violated the state's equal protection clause and remanded the case, instructing the trial court to determine whether the law could pass a strict scrutiny analysis.³⁰⁸ While the case was proceeding in the Hawaii courts,³⁰⁹ it raised federal and state concerns that the litigation would lead to the legalization of same-sex marriage in Hawaii.³¹⁰ Conservatives worried about the potential impact of the case on other states in light of the "usual presumption that a lawful marriage in one state is recognized in others."³¹¹ In response to this concern, Congress passed DOMA, identifying marriage for federal purposes as the union of "one man and one woman."

Although DOMA did not stop states from recognizing same-sex marriages, it allowed them to deny recognition of valid out-of-state marriages, preventing couples married in states that allowed same-sex marriage from receiving federal recognition.³¹² Additionally, the federal DOMA's refusal to recognize valid state marriages excluded those same-sex couples from over a thousand federal marriage benefits, including social security spousal support, immigration assistance, joint tax return filing, family medical leave, and insurance benefits for federal employees.³¹³ Thirty-seven states ultimately followed suit and passed state versions of DOMA, identifying marriage as a union between one man and one woman and denying recognition of valid out-of-state same-sex marriages.³¹⁴

The gay community continued to become more visible during the 90s as a result of "coming out" efforts, media portrayals, political inroads, and marches.³¹⁵ For the twenty-fifth anniversary of Stonewall, more than a million people marched in New York City.³¹⁶ LGBTQ subgroups held separate marches—including Black and transgender marches—to bring attention to their unique plight, attributed to their lack of representation

³⁰⁷ See, e.g., Mary Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U.L. REV. 813, 832–33 (2007).

³⁰⁸ *Id.* at 833.

³⁰⁹ While the case moved through the Hawaii state courts, the 1998 passage of an amendment to the Hawaii state constitution resulted in the case's 1999 dismissal. *Id.* at 835–36.

³¹⁰ John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUST. (Sept. 29, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality>.

³¹¹ *Id.*

³¹² *Id.*

³¹³ See Barkacs, *supra* note 305, at 92.

³¹⁴ See, e.g., *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2687 (2004).

³¹⁵ *Pride in the 90s*, NAT'L PARK SERV., <https://www.nps.gov/articles/000/pride-in-the-1990-s.htm> (last visited Apr. 4, 2025).

³¹⁶ *Id.*

within the community.³¹⁷ Marches and demonstrations were also taking place internationally, including the first EuroPride march, which brought further attention to the LGBTQ community and its demands for protection and equality.³¹⁸ Despite the challenges presented in the 1990s, including DADT and DOMA, by the end of the twentieth century, the LGBTQ community celebrated its first Supreme Court win, made inroads in AIDS detection and treatment, engaged in meaningful political activism, achieved nondiscrimination protections in several cities and states, and experienced an increase in public awareness and acceptance.

IX. A NEW CENTURY & THE SHIFT FROM MORAL JUDGMENT TO
DIGNITARY HARM: MARRIAGE EQUALITY IN THE STATES,
TEXAS V. LAWRENCE & PRESIDENT OBAMA

During the first decade of the twenty-first century, LGBTQ rights advanced significantly, and with increased visibility, public support also increased. In April 2000, hundreds of thousands of LGBTQ Americans and supporters participated in the Millennium March on Washington. Three years later, the Supreme Court declared sodomy laws still enforced in thirteen states unconstitutional, acknowledging the profound dignitary harm inflicted on those affected.³¹⁹ States began legalizing same-sex marriage. And the advancement of LGBTQ rights received increased political support. Importantly, Barack Obama was elected in 2008, providing support for the queer community and impacting Americans' perspective of LGBTQ Americans as citizens entitled to respect, equality, and constitutional rights. In addition, the murder of Matthew Sheppard and associated national media coverage led to LGBTQ federal hate crimes protections.

On June 26, 2003, the Supreme Court issued a watershed decision impacting every LGBTQ American. In *Lawrence v. Texas*, the Court struck down the Texas sodomy statute and all remaining state sodomy laws, overruling the 1986 *Bowers v. Hardwick* decision by announcing that the *Bowers* decision was “not correct when it was decided, is not correct today, and is hereby overruled.”³²⁰ The *Lawrence* decision marked the first time that the Court held that discrimination against “gay people violated constitutionally protected rights.”³²¹ The Court’s analysis recognized that *Bowers* was seriously eroded by the Court’s decisions in *Casey* and *Romer*, noting that “criticism of *Bowers* has been substantial and continuing,

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

³²⁰ *Id.* at 578.

³²¹ Kowal, *supra* note 310.

disapproving of its reasoning in all respects, not just as to its historical assumptions.”³²² In evaluating the earlier *Bowers* opinion, the Court found error in its reliance on “centuries . . . [of] powerful voices [that had] condemn[ed] homosexual conduct as immoral.”³²³ Further, the Court determined that the *Bowers* decision was “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family,” which was inapplicable to the legal question at issue.³²⁴

Kennedy’s majority opinion criticized the *Bowers* Court’s framing of the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”³²⁵ The correct issue, as identified by the *Lawrence* Court, was “whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”³²⁶ Importantly, the Court shifted its focus away from moral opprobrium toward gay people, instead recognizing the dignity of the person and applying the law equally to gay and lesbian plaintiffs absent societal judgment.³²⁷ Further, the Court announced that its “obligation is to define the liberty of all, not to mandate [its] own moral code.”³²⁸ As such, the Court determined that “[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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”³²⁹

³²² *Lawrence*, 539 U.S. at 576 (internal citations omitted).

³²³ *Id.* at 571.

³²⁴ *Id.*

³²⁵ *Id.* at 566–67.

³²⁶ *Id.* at 571 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

³²⁷ *Lawrence*, 539 U.S. at 560 (“Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the **dignity** of the persons charged”) (emphasis added); *id.* at 567 (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their **dignity** as free persons.”) (emphasis added); *id.* at 575 (“Still, it remains a criminal offense with all that imports for the **dignity** of the persons charged.”) (emphasis added).

³²⁸ *Lawrence*, *Id.* at 571 (citing *Casey*, 505 U.S. at 850).

³²⁹ *Lawrence*, 539 U.S. at 567. In its holding, the Court addressed the drafters of the Constitution:

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

The sweeping nature of the Court's decision, including its determination that gays and lesbians were entitled to constitutional liberty protections and its use of the word "dignity" to describe injuries suffered by those impacted by the sodomy laws, evidenced a major step forward for the LGBTQ community. By decriminalizing intimate relations between same-sex consenting adults and holding that sodomy laws were unconstitutional, the Court "removed a major roadblock in the battle for LGBTQ rights."³³⁰ Two of the serious obstacles created by the *Bowers* decision were the presumed criminality of gay people and the negative impact on parental custody issues.³³¹ The *Lawrence* decision eliminated those obstacles and also challenged negative stereotypes, decreased prejudice, and lessened discrimination against the LGBTQ community.³³² Additionally, by decriminalizing sodomy, gay activists were able to make a greater political impact, and the LGBTQ community could further develop a positive image and increase public support as they continued the march toward full citizenship.³³³

Just months after *Lawrence*, in November 2003, another major advancement in LGBTQ rights took place in the landmark ruling in *Goodridge v. Department of Public Health*, a case filed by seven same-sex couples against the state of Massachusetts after being denied marriage licenses.³³⁴ Addressing the issue of whether Massachusetts "may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry," the Massachusetts Supreme Judicial Court concluded 4-3 "that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."³³⁵ The court further declared that

endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578–79.

³³⁰ *Lawrence v. Texas*, LAMBDA LEGAL, <https://lambdalegal.org/case/lawrence-v-texas> (last visited Apr. 6, 2025).

³³¹ *Lawrence*, 539 U.S. at 560 ("The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law.").

³³² See, e.g., *The Meaning of Lawrence*, LAMBDA LEGAL (Apr. 23, 2012), <https://lambdalegal.org/blogs/the-meaning-of-lawrence/>.

³³³ Andrew R. Flores, *National Trends In Public Opinion on LGBT Rights in the United States*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf> (last updated Nov. 2014).

³³⁴ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

³³⁵ *Id.* at 948. While the issue before the court related solely to Massachusetts's state law and constitution, the majority opinion cited the *Lawrence* case: "Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'" *Id.* (citing *Lawrence*, 538 U.S. at 571).

“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.”³³⁶

The *Goodrich* court provided the Massachusetts state legislature 180 days to comply with its ruling by staying the rule’s implementation.³³⁷ Beginning on May 17, 2004, American same-sex couples were able to legally marry for the first time.³³⁸ In a backlash to the *Goodrich* decision, same-sex marriage opponents initially looked to Congress to amend the U.S. Constitution to ban same-sex marriage nationally.³³⁹ After those efforts failed to gain the votes necessary, opponents refocused efforts on state constitutional amendments to ban same-sex marriage in addition to their state DOMA. Thirteen states amended their constitutions in 2004.³⁴⁰ Several more states followed suit in subsequent years. In contrast, by 2009, Massachusetts, Connecticut, and Iowa recognized marriage equality based on a court order. And Vermont, New Hampshire, Washington, D.C., and New York recognized marriage equality through legislative action.³⁴¹

President Obama was elected on November 4, 2008, and took office on January 20, 2009.³⁴² During his campaign, he made several promises to the LGBTQ community, including repealing DADT, ending enforcement of DOMA, and extending federal hate crimes protection to the LGBTQ community.³⁴³ In his first six months in office, Obama issued a directive resulting in legal benefits to same-sex domestic partners of members of the Foreign Service serving abroad.³⁴⁴ Despite this action, many community

³³⁶ *Goodridge*, 798 N.E.2d at 969.

³³⁷ *Id.*

³³⁸ *Id.* In 1999, the Vermont Supreme Court determined in *Baker v. Vermont* that same-sex couples were entitled to the same legal rights as married cisgender couples under the Vermont state constitution. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).

³³⁹ See e.g., Earl M. Maltz, *The Ripples of Backlash: Same-Sex Marriage, the Election of 2004, and the Evolution of Constitutional Law*, 42 U. ARK. LITTLE ROCK L. REV. 485, 486–87 (2020); see also Wyatt Fore, *DeBoer v. Snyder: A Case Study in Litigation and Social Reform*, 22 MICH. J. GENDER & L. 169, 172 (2015).

³⁴⁰ Maltz, *supra* note 339; Fore, *supra* note 339.

³⁴¹ *Factbox: List of states that legalized state marriage*, REUTERS (June 26, 2013), <https://www.reuters.com/article/lifestyle/factbox-list-of-states-that-legalized-gay-marriage-idUSBRE95P07A/>.

³⁴² *President Barack Obama*, NAT’L ARCHIVES, <https://www.obamalibrary.gov/obamas/president-barack-obama> (last visited Apr. 6, 2025).

³⁴³ Tony Grew, *President-elect Obama promises to back gay rights legislation*, PINK NEWS (Nov. 19, 2008), <https://www.thepinknews.com/2008/11/19/president-elect-obama-promises-to-back-gay-rights-legislation/>.

³⁴⁴ Brian Montopoli, *Obama Signs Same-Sex Benefits Memorandum*, CBS NEWS (June 17, 2009), [tps://www.cbsnews.com/news/obama-signs-same-sex-benefits-memorandum/](https://www.cbsnews.com/news/obama-signs-same-sex-benefits-memorandum/). As described by a fact sheet issued by the White House, Obama’s “memorandum means that domestic partners of federal civil service employees can be added to the long-term care insurance program and that supervisors can allow employees to use sick leave to care for domestic partners and ‘non-biological, non-adopted’ children.” *Id.*

activists who had expected major steps to be taken immediately following Obama's inauguration were critical of the delay in addressing more major issues highlighted during his campaign.³⁴⁵

Public support for marriage equality and LGBTQ protections continued to increase throughout the first decade of the twenty-first century.³⁴⁶ Nationwide media coverage detailed the 1998 murder of 21-year-old Matthew Shepard, a college student who was targeted for being gay, violently beaten, and left tied to a fence to die. Coverage of Shepard's brutal murder led to an increased awareness of the LGBTQ community's plight and resulted in federal hate crime legislation. The legislation was supported by newly-elected President Obama and fulfilled one of his campaign promises.³⁴⁷ While nationwide support for marriage equality was also on the rise by the end of 2009, Obama had not yet officially expressed support, which concerned some supporters.³⁴⁸ The decade that began with the Millennial March ended with the National Equality March on October 11, 2009, an event that was endorsed by most major national LGBTQ organizations and that included multiple workshops and speakers.³⁴⁹ Some, representing a new generation of gay rights activists, described the event as "the passing of the torch" from the older generation's organization, priorities, tactics, and counseling for "patience" to the younger activists' sense of urgency and push for immediate LGBTQ equality, including pressuring the new Obama administration for action.³⁵⁰

³⁴⁵ See, e.g., Sheryl Gay Stolberg, *Obama Invites Gay Rights Advocates to White House*, N.Y. TIMES (Jun. 22, 2009), <https://archive.nytimes.com/thecaucus.blogs.nytimes.com/2009/06/22/obama-invites-gay-rights-advocates-to-white-house/>.

³⁴⁶ *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Apr. 6, 2025).

³⁴⁷ See generally MATTHEW SHEPARD FOUND., *Erasing Hate Since 1998*, <https://www.matthewshepard.org/> (last visited Apr. 6, 2025); see also The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2009).

³⁴⁸ Nate Silver, *Opinion on Same-Sex Marriage Appears to Shift at Accelerated Pace*, FIVETHIRTYEIGHT (Aug. 12, 2010), <https://fivethirtyeight.com/features/opinion-on-same-sex-marriage-appears-to/> ("In April, 2009, when we last took a survey of gay marriage polls, we found that support for it had converged somewhere into the area of 41 or 42 percent of the country. Now, it appears to have risen by several points, and as I reported yesterday, it has become increasingly unclear whether opposition to gay marriage still outweighs support for it.").

³⁴⁹ Jeremy W. Peters, *Gay Rights Marchers Press Cause in Washington*, N.Y. TIMES (Oct. 11, 2009), <https://www.nytimes.com/2009/10/12/us/politics/12protest.html>. There was opposition "from within gay political circles and from those who argued that [the march] was hastily planned and would divert resources from campaigns at the state level." *Id.*

³⁵⁰ *Id.* The Obama campaign promises included ending DADT to allow LGBTQ service members to serve openly, repealing DOMA, and federal rights for gay couples. *Id.*

X. THE 2010S, THE REPEAL OF “DON’T ASK, DON’T TELL”
& GAINING MOMENTUM

During the first year of the new decade, President Obama implemented the changes that the LGBTQ community had been waiting for. On June 2, 2010, Obama issued a Presidential Memorandum titled “Extension of Benefits to Same-Sex Domestic Partners of Federal Employees.” The memorandum noted that “[f]or far too long, many of our Government’s hard-working, dedicated LGBT employees have been denied equal access to the basic rights and benefits their colleagues enjoy.”³⁵¹ Obama explained that “[t]his kind of systemic inequality undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities.”³⁵² The memo directed federal agencies to act immediately “consistent with existing law . . . to extend benefits to the same-sex domestic partners of Federal employees, and, where applicable, to the children of same-sex domestic partners of Federal employees.”³⁵³

Shortly after, Obama delivered on another one of his major campaign promises. On December 22, 2010, Obama signed the Don’t Ask, Don’t Tell Repeal Act of 2010 into law, which would repeal DADT a week after the bill passed the House and four days after it passed the Senate.³⁵⁴ The repeal, which permitted gay, lesbian, and bisexual military members to openly serve, went into effect on September 20, 2011, sixty days after Obama, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff “certified that the Department of Defense had taken all the steps needed to prepare the military for repeal.”³⁵⁵ On the day the repeal took effect, Obama announced, “As of today, patriotic Americans in uniform will no longer have to lie about who they are in order to serve the country they love. As

³⁵¹ Grew, *supra* note 343. On April 15, 2020, the Obama Administration issued “Ensuring Hospital Visitation Rights for LGBT Patients and Their Loved Ones,” a directive from the President informing that the Department of Health and Human Services (HHS) now requires all hospitals receiving Medicare or Medicaid funds to allow visitation rights for LGBT patients. *Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, WHITE HOUSE, OFF. OF PRESS SEC’Y (June 2, 2010), <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo> [hereinafter *President Obama Memorandum*]. The President also directed HHS to ensure that medical decision-making rights of LGBTQ patients were respected. *Id.*

³⁵² *President Obama Memorandum*, *supra* note 351.

³⁵³ *Id.*

³⁵⁴ Catherine Connell, *Right to Serve or Responsibility to Protect? Civil Rights Framing and the DADT Repeal*, 95 B.U. L. REV. 1015, 1023 (2015). The final bill Obama signed was controversial and only came about after much debate, testimony, studies, and revisions in the House and Senate, including moving to a final stand-alone bill. *Id.*

³⁵⁵ Megan Slack, *From the Archives: The End of Don’t Ask, Don’t Tell*, WHITE HOUSE, PRES. BARACK OBAMA (Sept. 20, 2012), <https://obamawhitehouse.archives.gov/blog/2012/09/20/archives-end-dont-ask-dont-tell>.

of today, our armed forces will no longer lose the extraordinary skills and combat experience of so many gay and lesbian service members.”³⁵⁶

In February 2011, in another major move and fulfilled campaign promise, Obama and Attorney General Holder announced that the Justice Department (DOJ) would no longer defend Section 3 of the Defense of Marriage Act, which required one man and one woman for federal marriage recognition.³⁵⁷ The DOJ’s analysis of the federal statute found it could not withstand heightened scrutiny and, therefore, unconstitutionally violated the Equal Protection Clause.³⁵⁸ Attorney General Holder notified Congress that the DOJ would no longer defend Section 3 in lawsuits challenging its legality.³⁵⁹ The announcement was a major hit to DOMA’s constitutionality and came at a time when challenges to the law were working their way through the federal courts. As a result of the DOJ’s position, the House’s Bipartisan Legal Advisory Group (BLAG) decided to hire legal counsel to defend Section 3 of DOMA in ongoing litigation.³⁶⁰

In one of his most consequential moves, President Obama announced in an ABC News interview in May 2012 that he supported marriage for same-sex couples.³⁶¹ Having evolved on the issue, Obama explained, “I’ve just concluded that for me, personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.”³⁶² Obama’s announcement impacted millions of Americans, increasing nationwide support for marriage equality. This support included a jump in African American support for marriage equality—from 41% before Obama’s ABC interview to 59% afterwards.³⁶³

After his reelection to a second term in 2012, Obama remained true to his word, taking further steps to protect the LGBT community. For

³⁵⁶ *Statement of the President on the Repeal of Don’t Ask, Don’t Tell*, WHITE HOUSE, OFF. OF PRESS SEC’y (Sept. 20, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/20/statement-president-repeal-dont-ask-dont-tell>.

³⁵⁷ See, e.g., Kathleen Tipler, *Obama Administration’s Non-Defense of Doma and Executive Duty to Represent*, 73 MD. L. REV. 287, 293 (2013) (“Attorney General Holder thus argued ‘classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.’”).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 293–94 (“Attorney General Holder also explained the Executive would continue to enforce and comply with Section 3, ‘unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality.’”).

³⁶⁰ *Id.* at 294.

³⁶¹ Rick Klein, *Obama: ‘I Think Same-Sex Couples Should Be Able to Get Married,’* ABC NEWS (May 9, 2012), <https://abcnews.go.com/blogs/politics/2012/05/obama-comes-out-i-think-same-sex-couples-should-be-able-to-get-married>.

³⁶² *Id.*

³⁶³ Corey Dade, *Polls Show Obama’s Support for Gay Marriage Influencing Blacks*, NPR (May 27, 2012), <https://www.npr.org/sections/itsallpolitics/2012/05/27/153735584/polls-show-obamas-support-for-gay-marriage-influencing-blacks>.

example, on July 21, 2014, he issued Executive Order 13672, which amended two earlier executive orders that prohibit discrimination in hiring and employment in the civilian federal workforce to add “sexual orientation” and “gender identity” among the protected classes.³⁶⁴ This order stands in stark contrast to Eisenhower’s Executive Order 10450, banning gays and lesbians from employment with the federal government, labeling them deviant security risks, Godless communist targets, and much worse.³⁶⁵ In a span of only fifty years, Eisenhower’s message of deviance evolved into Obama’s message of dignity, illustrating the vast amount of progress and many inroads attained by LGBTQ activists.

Throughout the remainder of his eight years in office, President Obama continued to support the LGBTQ community. He endorsed legislation that would further LGBTQ rights and engaged in anti-bullying efforts in schools.³⁶⁶ He announced that the DOJ and Department of Education interpreted Title IX’s sex discrimination prohibition to include sexual orientation and gender identity.³⁶⁷ And he required hospitals receiving federal funds to allow visitation rights for LGBTQ patients.³⁶⁸ During this timeframe, corporate America also began providing domestic partner benefits to its employees and speaking out against LGBTQ discrimination, including state anti-LGBTQ legislation.³⁶⁹ As community and corporate support increased, more businesses became involved, putting pressure on states by threatening to move sporting events, relocate company offices, boycott the state, and otherwise bring financial consequences for LGBTQ discriminatory actions.³⁷⁰

Along with invaluable political and corporate support, the years leading up to the *Obergefell* decision saw positive portrayals of the LGBTQ community in television shows, movies, books, and music, which benefited

³⁶⁴ Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72985 (Dec. 9, 2014), <https://www.govinfo.gov/content/pkg/FR-2014-12-09/pdf/2014-28902.pdf>.

³⁶⁵ See *supra* Section III.

³⁶⁶ *FACT SHEET: Obama Administration’s Record and the LGBT Community*, WHITE HOUSE, OFF. OF PRESS SEC’y (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community>.

Obama also initiated a needed comprehensive study of LGBTQ housing discrimination.

Id.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ Jessica Shortall, *Why Many Businesses Are Becoming More Vocal In Support of LGBTQ Rights*, HARV. BUS. REV. (Mar. 7, 2019), <https://hbr.org/2019/03/why-many-businesses-are-becoming-more-vocal-in-support-of-lgbtq-rights>.

³⁷⁰ *Id.*

the public perception of the LGBTQ community.³⁷¹ Pop culture icons who came out as LGBTQ provided inspiration and support for others to emulate, and influential celebrities who expressed support encouraged others to become allies.³⁷² Television and movie portrayals that positively showcased LGBTQ characters reached additional audiences.³⁷³ These many forms of ally support from politicians, corporations, media, and individuals led to increasing public acceptance of LGBTQ people and boosted nationwide polls showing increased support for marriage equality and discrimination protections.³⁷⁴

XI. PAVING THE ROAD TO DIGNITY IN 2013: *UNITED STATES V. WINDSOR*

In 2013, the Supreme Court paved the federal road to dignity in *United States v. Windsor*.³⁷⁵ After a four-decade-long relationship, a marriage in Canada, and recognition of that marriage by the State of New York, Edith Windsor's spouse, Thea Spyer, died in New York in 2009.³⁷⁶ Under DOMA, Edith did not qualify for the unlimited marital deduction that allowed money to transfer between spouses tax and penalty free, including after death.³⁷⁷ Therefore, she paid the required \$363,000 in federal estate taxes that a heterosexual widow would not have been required to pay.³⁷⁸ After paying the taxes, Windsor sued the government, challenging Section 3's constitutionality.³⁷⁹ The district court found DOMA's Section 3 unconstitutional and ordered the refund of Edith's tax payment with interest.³⁸⁰ The Second Circuit affirmed, and the Supreme Court granted certiorari.³⁸¹

³⁷¹ See, e.g., William Douglas, Leslie Clark, *Pop culture helps change minds on gay rights*, THE SEATTLE TIMES (Jan 2, 2015) <https://www.seattletimes.com/nation-world/pop-culture-helps-change-minds-on-gay-rights/>.

³⁷² See, e.g., Tracy Lambe, *A Decade of Coming Out: How LGBTQ Celebs Changed the Game in the 2010s*, ENT. TONIGHT (Dec. 17, 2019), <https://www.etonline.com/a-decade-of-coming-out-how-lgbtq-celebs-changed-the-game-in-the-2010s-137933>.

³⁷³ See e.g., *Where we are on TV: 2010-2011*, GLAAD, <https://assets.glaad.org/m/5b1d5a933e355b98/original/GLAAD-2010-11-Where-We-Are-on-TV.pdf> (last visited Apr. 6, 2025).

³⁷⁴ *LGBT Rights*, *supra* note 346.

³⁷⁵ *United States v. Windsor*, 570 U.S. 744 (2013).

³⁷⁶ *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).

³⁷⁷ *Windsor*, 833 F. Supp. 2d at 397; see also *SOI Tax Stats - Gift tax study terms and concepts*, IRS, <https://www.irs.gov/statistics/soi-tax-stats-gift-tax-study-terms-and-concepts> (last visited Apr. 6, 2025) ("For transfers of property between spouses the donor may take an unlimited marital deduction for the full amount of the transfer; all transfers of assets between spouses are tax-free.").

³⁷⁸ *Id.*

³⁷⁹ *Windsor*, 570 U.S. at 753.

³⁸⁰ *Id.* at 754.

³⁸¹ *Id.* at 754–55.

On June 26, 2013, the Supreme Court struck down Section 3 as unconstitutional, holding that DOMA violated the Fourteenth Amendment's Due Process and Equal Protection Clauses.³⁸² The Court noted that "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration."³⁸³ The Court held that DOMA could not "survive under [those] principles," finding that "[t]he avowed purpose and practical effect of the law" was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."³⁸⁴ In recognizing the dignity that states granted their citizens when conferring the right to same-sex marriage, the Court announced:

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the *dignity* and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to *dignify*.³⁸⁵

As a result of the Court striking down Section 3 of DOMA, same-sex couples who were validly married in marriage equality states were granted

³⁸² *Id.* at 769.

³⁸³ *Id.* at 770 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

³⁸⁴ *Windsor*, 570 U.S. at 770.

³⁸⁵ *Id.* at 772 (emphasis added). The Court also found that DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*

the same federal tax rights as married opposite-sex couples.³⁸⁶ More than that, same-sex couples were finally entitled to the more than one thousand federal benefits that accompany marriage, including social security benefits and veterans' benefits.³⁸⁷ Following *Windsor*, Obama instructed his administration to immediately review hundreds of federal statutes and regulations to ensure that same-sex couples received the federal benefits for which they were now eligible.³⁸⁸ While the Court's decision did not impact state DOMAs, Justice Scalia accurately predicted in his dissent that it was "just a matter of listening and waiting for the other shoe."³⁸⁹

And he was right. When the *Windsor* case was decided in June 2013, eleven states had marriage equality, and those that did not were sued within a relatively short time following the decision.³⁹⁰ *Windsor* provided significant momentum to the marriage equality movement and invigorated activists who began filing federal lawsuits challenging state bans on same-sex marriage and the denial of recognition of valid out-of-state same-sex marriages.³⁹¹ Federal district courts applying *Windsor*'s reasoning unanimously held that the state DOMAs and state constitutional amendments were unconstitutional.³⁹² The first four federal circuit courts to

³⁸⁶ Charles Joughin, *All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes*, HUM. RTS. CAMPAIGN (Aug. 29, 2013), <https://www.hrc.org/press-releases/all-legal-same-sex-marriages-will-be-recognized-for-federal-tax-purposes>.

³⁸⁷ Daniel Arkin, *Gay Couples Stand to Receive Thousands of Benefits in Wake of DOMA Decision*, ABC NEWS (June 26, 2013), <https://www.nbcnews.com/news/us-news/gay-couples-stand-receive-thousands-benefits-wake-doma-decision-flna6c10456620>; Baskin v. Bogan, 766 F.3d 648, 658 (7th Cir. 2014) (listing some of the extensive federal benefits of marriage).

³⁸⁸ See, e.g., *One Year After Supreme Court's Historic Windsor Decision, Attorney General Holder Issues Report Outlining Obama Administration's Work to Extend Federal Benefits to Same-sex Married Couples*, U.S. DEP'T OF JUST. ARCHIVES (June 20, 2014), <https://www.justice.gov/archives/opa/pr/one-year-after-supreme-court-s-historic-windsor-decision-attorney-general-holder-issues>.

³⁸⁹ *United States v. Windsor*, 570 U.S. 744, 800 (2013) (Scalia, J., dissenting).

³⁹⁰ Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. S52, S52 (2015) ("Within six months, district courts began striking down state bans, and within another year twenty-nine district courts and five appeals courts had followed suit.").

³⁹¹ *Id.*

³⁹² *Id.* at S59 (explaining that "[s]everal of these cases had been filed well before the *Windsor* decision, but a few had been filed after *Windsor* and reached a decision quickly because the plaintiffs filed for a temporary restraining order.").

weigh in—the Tenth,³⁹³ Fourth,³⁹⁴ Seventh,³⁹⁵ and Ninth³⁹⁶ Circuits—unanimously agreed, affirming district courts’ holdings overturning the state laws. By the end of October 2014, same-sex marriage was legal in thirty-two states, and nearly every court addressing the constitutionality of state marriage bans agreed that they were unconstitutional.³⁹⁷ That changed within days.

On November 6, 2014, the United States Court of Appeals for the Sixth Circuit reversed six district court cases from Kentucky,³⁹⁸ Michigan,³⁹⁹

³⁹³ On June 25, 2014, the Tenth Circuit affirmed the district court holding 2-1 in *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014). In *Kitchen*, the court held that Utah’s marriage ban was unconstitutional, striking down the law. *Id.* *Kitchen* addressed a concern to marriage rights activists: a one-line Supreme Court decision from 1972 in *Baker v. Nelson*. *Id.* (citing *Baker v. Nelson* 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 576 U.S. 644 (2015)). In *Baker*, a gay male couple challenged Minnesota’s denial of a marriage license, arguing, among other things, that the law was unconstitutional. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971). In a required review of the constitutional challenge, the Supreme Court responded with one sentence: “The appeal is dismissed for want of a federal question.” *Baker*, 409 U.S. at 810. In *Kitchen*, the Tenth Circuit expressly addressed *Baker*, noting the doctrinal developments in the decades since. 755 F.3d at 1198. Twenty days later, the same court also struck down Oklahoma’s marriage ban in *Bishop v. Smith* on July 14, 2014. 760 F.3d 1070, 1074 (10th Cir. 2014).

³⁹⁴ On July 28, 2014, the Fourth Circuit affirmed the district court holding, 2-1, that an amendment to Virginia’s constitution banning same-sex marriage violated the Fourteenth Amendment. *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014).

³⁹⁵ On September 4, 2014, the Seventh Circuit addressed cases from Indiana and Wisconsin, holding both state marriage bans violated the Constitution in *Baskin v. Bogan*. 766 F.3d 648 (7th Cir. 2014). Of note, the day before the Seventh Circuit’s decision was released, a district court judge in Louisiana was the first to uphold the state’s marriage ban, holding that “Louisiana has a legitimate interest under a rational basis standard of review for addressing the meaning of marriage through the democratic process.” *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 913 (E.D. La. 2014), *rev’d*, 791 F.3d 616 (5th Cir. 2015), *and recalled*, No. CIV.A. 13-5090, 2015 WL 4090353 (E.D. La. July 2, 2015), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁹⁶ On October 7, 2014, the Ninth Circuit affirmed two lower district court cases from Idaho and Nevada, finding both state marriage bans violated the U.S. Constitution. *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

³⁹⁷ Amanda Holpuch, *Gay marriage is legal in 32 US states – but what about the other 18?*, GUARDIAN (Oct. 27, 2014), <https://www.theguardian.com/us-news/2014/oct/27/gay-marriage-legal-us-states>.

³⁹⁸ *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014).

³⁹⁹ *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015). For a detailed explanation of the Kentucky, Ohio, Michigan, and Tennessee district court cases as well as the Sixth Circuit’s decision, see Regina M. Lambert & Abby R. Rubenfeld, *Deviant to Dignified: From Campbell v. Sundquist to Tanco v. Haslam – the Progression of LGBT Rights & Marital Equality in Tennessee*, 83 TENN. L. REV. 371, 434 (2016).

Ohio,⁴⁰⁰ and Tennessee.⁴⁰¹ In each case, the federal district court held that the respective state marriage and/or recognition ban was, or likely was, unconstitutional, depending on the stage of the case's litigation.⁴⁰² Following those plaintiff-favorable decisions, on April 25, 2014, the Sixth Circuit issued a stay of all case outcomes and set each case for expedited review on August 6, 2015.⁴⁰³ On that date, a panel consisting of Judge Martha Craig Daughtrey, Judge Jeffrey Sutton, and Judge Deborah Cook heard back-to-back arguments in alphabetical order from the four states.⁴⁰⁴ Three months later, the panel released its opinion.

Announcing that it was bound by the 1972 Supreme Court's *Baker v. Nelson* one-line, twelve-word holding—that Minnesota was not required to issue a same-sex couple a marriage license for “want of [a] substantial federal question”—a divided panel of the Sixth Circuit held that state marriage and recognition bans did not violate the constitution.⁴⁰⁵ Although the six cases from the four states were not officially consolidated, the circuit panel released a single opinion.⁴⁰⁶ The November 6, 2014, opinion deviated from all but one federal district court opinion as well as the unanimous holdings from every circuit court that had addressed the issue, creating a 4-1 circuit split.⁴⁰⁷ Legal teams from each state rushed to file certiorari petitions in time for consideration during the Supreme Court's 2014–15

⁴⁰⁰ *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴⁰¹ *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴⁰² *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴⁰³ Order, *DeBoer*, 772 F.3d 388 (6th Cir. Apr. 25, 2014) (No. 14-5297). One rationale the Sixth Circuit expressed to justify the stay was the “unsettled” nature of the law, although nearly every district court and all four federal appellate courts that had addressed the issue held the bans were unconstitutional. *Id.* While the six cases were not technically consolidated, the Sixth Circuit set all oral arguments on the same date and heard the cases back-to-back. *See, e.g.,* Erik Eckholm, *One Court, Three Judges and Four States with Gay Marriage Cases*, N.Y. TIMES (Aug. 6, 2014), <http://www.nytimes.com/2014/08/07/us/one-court-three-judges-and-four-states-with-gay-marriage-cases.html>. For a detailed explanation of the arguments made before the Sixth Circuit, see Lambert & Rubinfeld, *supra* note 399 at 433–34.

⁴⁰⁴ *See* Eckholm, *supra* note 403.

⁴⁰⁵ *DeBoer*, 772 F.3d at 421 (Daughtrey, J., dissenting) (citing *Baker v. Nelson*, 409 U.S. 810 (1972)).

⁴⁰⁶ While the opinion recognized each individual state case, it titled its opinion as *DeBoer v. Snyder*, named for the Michigan case filed for review with the Sixth Circuit first of the four states. *See generally DeBoer*, 772 F.3d 388.

⁴⁰⁷ *Id.* at 421.

Term.⁴⁰⁸ On November 14, just eight days after the Sixth Circuit's opinion, legal teams from Ohio, Tennessee, and Michigan filed separate certiorari petitions with the Supreme Court.⁴⁰⁹ Kentucky followed with its filing on November 18.⁴¹⁰

The certiorari petitions provided the Court with multiple options for review as they raised numerous challenges to the state marriage and recognition bans, along with challenges to adoption recognition laws, the right to travel, and *Baker v. Nelson*'s legitimacy. Kentucky petitioners asked the Court to address whether prohibiting marriage to same-sex couples violated Due Process and Equal Protection under the Fourteenth Amendment and whether refusing to recognize same-sex marriages from out-of-state violated the Fourteenth Amendment.⁴¹¹ Michigan's petitioners asked the Court to determine whether the Fourteenth Amendment is violated when a state denies same-sex couples the right to marry.⁴¹² Ohio petitioners raised the issue of whether the refusal to recognize valid out-of-state same-sex marriages violated Fourteenth Amendment Due Process and Equal Protection guarantees and whether the state's refusal to recognize the adoption judgment of another state violated Full Faith and Credit under the Constitution.⁴¹³ Finally, Tennessee petitioners asked the Court to address three issues: (1) whether the state's refusal to recognize valid out-of-state marriages violated the Fourteenth Amendment's Due Process and Equal Protection Clauses, (2) whether the recognition refusal violated same-sex couples' right to interstate travel, and (3) whether *Baker v. Nelson* remained binding precedent.⁴¹⁴ Following the mid-November filings, the legal teams from each state waited for the Court's reply.

On January 16, 2015, the Supreme Court consolidated the state certiorari requests and granted review to all four states, limited to two questions: "1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of

⁴⁰⁸ Parties normally have ninety days after entry of a judgment or decree to file a certiorari petition under 28 U.S.C. §2101(c).

⁴⁰⁹ See *infra* notes 412–414.

⁴¹⁰ See *infra* note 411.

⁴¹¹ Petition for Writ of Certiorari, *Love v. Beshear and Bourke v. Beshear*, No. 14-574 (U.S. Nov. 17, 2014), <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Kentucky-marriage-joint-cert-petition-11-17-14.pdf>.

⁴¹² Petition for Writ of Certiorari, *DeBoer v. Snyder*, No. 14-571 (U.S. Nov. 14, 2014), <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Michigan-marriage-cert-petition-11-17-14.pdf>.

⁴¹³ Petition for Writ of Certiorari, *Henry v. Hodges and Obergefell v. Hodges*, No. 14-556 (U.S. Nov. 14, 2014), <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Ohio-Henry-Obergefell-petition-11-14-141.pdf>.

⁴¹⁴ Petition for Writ of Certiorari, *Tanco v. Haslam*, No. 14-562 (U.S. Nov. 14, 2014), https://sblog.s3.amazonaws.com/wp-content/uploads/2014/11/Tanco_Petition_for_Cert.pdf.

the same sex when their marriage was lawfully licensed and performed out-of-state?”⁴¹⁵ In its certiorari grant, the court allotted ninety minutes of oral argument for the first question and sixty minutes for the second.⁴¹⁶ Oral arguments took place on April 17, 2015.⁴¹⁷ The Obama administration had filed an amicus brief in favor of repealing the states’ bans on same-sex marriage, maintaining that same-sex marriage was a constitutional right.⁴¹⁸ Two oralists were selected by the states’ legal teams to argue Questions One and Two, and the federal solicitor general shared fifteen minutes of the allotted time for Question One. The solicitor general used this time to argue on behalf of the federal government for nationwide marriage equality.⁴¹⁹

XII. LAWFULLY MARRIED: 2015, *OBERGEFELL V. HODGES*
& NATIONWIDE VOWS

In a monumental and historic ruling, the Supreme Court on June 26, 2015, issued a 5-4 decision reversing the Sixth Circuit and overturning *Baker v. Nelson*.⁴²⁰ The Court determined that the Constitution requires states to issue marriage licenses to same-sex couples and to recognize valid same-sex marriages performed in other states.⁴²¹ The landmark *Obergefell* decision, authored by Justice Kennedy, struck down the marriage and recognition bans in the four states, established same-sex marriage nationwide, and required states to honor same-sex marriage licenses from other states.⁴²² Kennedy’s majority opinion focused on the “transcendent importance of marriage,” including the “centrality of marriage to the human condition”⁴²³ and the dignitary harms suffered by denying same-sex marital rights.⁴²⁴ The Court also recognized that fundamental understandings of discrimination and inequality had evolved since *Baker*’s 1972 holding by observing:

⁴¹⁵ See generally *Obergefell v. Hodges*, 574 U.S. 1118 (2015). The Court’s certiorari grant consolidated the cases and specified the two questions for review.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ See, e.g., Joan Frawley Desmond, *U.S. Supreme Court Hears Oral Arguments on Same-Sex ‘Marriage,’* NAT’L CATHOLIC REG. (Apr. 29, 2015), <https://www.ncregister.com/news/u-s-supreme-court-hears-oral-arguments-on-same-sex-marriage> (“Donald Verrilli, the solicitor general who offered the Obama administration’s strong endorsement of same-sex “marriage.”).

⁴¹⁹ *Id.*

⁴²⁰ *Obergefell v. Hodges*, 576 U.S. 644, 675, 680–81 (2015).

⁴²¹ *Id.* at 681.

⁴²² *Id.* Before *Obergefell* was announced, thirteen states, including the plaintiff states, had state marriage bans and/or recognition bans in effect. Faith Karimi & Michael Pearson, *The 13 states that still ban same-sex marriage*, CNN (Feb. 1, 2015), <https://www.cnn.com/2015/02/13/us/states-same-sex-marriage-ban/index.html>.

⁴²³ *Obergefell*, 576 U.S. at 656–62.

⁴²⁴ *Id.* at 667–69.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.⁴²⁵

The Court identified and analyzed four principles of marriage and determined that they demonstrated that the fundamental constitutional right to marry applied equally to same-sex couples, stating:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.⁴²⁶

The Court noted that earlier marriage cases each addressed marriage comprehensively, evaluating whether sufficient justification existed to “exclude[e] the relevant class from the right,” finding the same principle applied to same-sex marriage.⁴²⁷

Addressing the argument that the decision belonged to the democratic process alone, the Court responded that “when the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking.”⁴²⁸ The Court further clarified by asserting that “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”⁴²⁹ After addressing the remaining arguments by the states, the Court reversed the Sixth Circuit and made same-sex marriage the law of the land, announcing that same-sex

⁴²⁵ *Id.* at 664.

⁴²⁶ *Id.* at 670–71.

⁴²⁷ *Id.* at 671 (noting that “[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”).

⁴²⁸ *Id.* at 677.

⁴²⁹ *Obergefell*, U.S. 576 at 677.

couples “ask for equal *dignity* in the eyes of the law” and declaring that “[t]he Constitution grants them that right.”⁴³⁰

Immediately following *Obergefell*’s announcement, celebrations began to take place throughout the United States, including at the White House, which was illuminated by rainbow lights in support of the watershed ruling.⁴³¹ Other U.S. landmarks mirrored the White House, including the Empire State Building, Disney World, and San Francisco’s City Hall, all celebrating in the Court’s momentous decision.⁴³² Following the decision, same-sex married couples received equal treatment under federal tax laws, and the Social Security Administration began recognizing all valid same-sex marriages, guaranteeing previously unavailable benefits.⁴³³

In stark and striking contrast to the rainbows, parades, and celebrations reveling in the *Obergefell* Court’s decision—fifteen years into the twenty-first century—that gays and lesbians had a constitutional right to marry, gays and lesbians of the mid-twentieth-century were demeaned, scorned, abused, fired, disowned, evicted, rejected, shamed, humiliated, and dishonored.⁴³⁴ The “deviant” label applied to gays and lesbians only decades earlier⁴³⁵ gave way to the “dignified” designation of gays and lesbians in the new century.⁴³⁶ Fewer than thirty years after the Court denied gays and lesbians a constitutional right to adult consensual intimacy,⁴³⁷ the Court held that gay and lesbian couples had a fundamental constitutional right to marry.⁴³⁸

XIII. THE IMPACT OF SOCIETAL VIEWS ON LGBTQ RIGHTS & LESSONS MOVING FORWARD

How did the LGBTQ community advance from deviant to dignified? From being fired and rejected to being protected and celebrated? One critical factor was a change in societal acceptance and support. And the increase in societal acceptance and support required visibility. Harvey Milk

⁴³⁰ *Id.* at 681 (emphasis added).

⁴³¹ *White House Lit Up With Rainbow Colors in 2015*, NAT’L PARK SERV., <https://www.nps.gov/places/white-house-lit-up-with-rainbow-colors.htm> (last visited Apr. 6, 2025).

⁴³² *See, e.g., US landmarks light up in rainbows over gay marriage ruling – in pictures*, GUARDIAN (June 26, 2015), <https://www.theguardian.com/us-news/2015/jun/27/us-landmarks-light-up-in-rainbows-over-gay-marriage-ruling-in-pictures>.

⁴³³ *See, e.g., Attorney General Lynch Announces Federal Marriage Benefits Available to Same-Sex Couples Nationwide*, DEPT. OF JUST., OFFICE OF PUBLIC AFFAIRS (July 9, 2015) <https://www.justice.gov/archives/opa/pr/attorney-general-lynch-announces-federal-marriage-benefits-available-same-sex-couples>.

⁴³⁴ *See supra* Section III.

⁴³⁵ *Id.*

⁴³⁶ *See supra* notes 327, 385, and 430 and accompanying text.

⁴³⁷ *See supra* note 264 and accompanying text.

⁴³⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

was right.⁴³⁹ Coming out worked. As we know today, the damage and devastation inflicted upon gays and lesbians during the mid-twentieth-century Lavender Scare was fueled by political lies and fearmongering.⁴⁴⁰ The harm was amplified because gays and lesbians—who often remained closeted and hidden—were unable to debunk the lies, share experiences, make true connections, or reveal their humanity.⁴⁴¹ While some courageous community members fought back, it took until the 1960s for coordinated groups to effectively organize, fight back, and stand up against rampant discrimination and abuse.⁴⁴² While the 1969 Stonewall Uprising in New York’s Greenwich Village was not the first time the LGBTQ community fought back, it is one of the most well-known, and, importantly, led to organized gay and lesbian leadership.⁴⁴³ It was a turning point.

As the LGBTQ community began to fight back against government mistreatment, police abuse, work discrimination, and the denial of basic rights and equal treatment, organizers benefited from experience and networking.⁴⁴⁴ Marches brought visibility to the harsh and rampant abuse inflicted on the gay community, and coming out forced Americans to realize gay men and lesbians were everywhere, including valued members of their families, neighborhoods, and communities. Further, by organizing, the LGBTQ community began to gain political influence, using it to back LGBTQ-supportive candidates and, later, LGBTQ candidates.⁴⁴⁵ More sophisticated and experienced gay activists started to recognize that when independent groups came together and collaborated, it led to greater political power and influence.

Ally support was also crucial to the advancement of gay rights. Before the Court’s *Obergefell* decision, corporate America became increasingly supportive of the LGBTQ community, with many companies offering significant domestic partner benefits to employees unable to marry.⁴⁴⁶ National sports organizations, including the NCAA and NFL, were able to

⁴³⁹ See *supra* notes 180, 210, 240 and accompanying text.

⁴⁴⁰ See *supra* note 111.

⁴⁴¹ See, e.g., Cain, *supra* note 23, at 1558–59.

⁴⁴² See *supra* note 93 and accompanying text.

⁴⁴³ See *supra* Section V.

⁴⁴⁴ Lucy Santos Green, *Stonewall and Its Impact on the Gay Liberation Movement*, DIGIT. PUB. LIB. OF AM., <https://dp.la/primary-source-sets/stonewall-and-its-impact-on-the-gay-liberation-movement> (last visited Apr. 6, 2025).

⁴⁴⁵ Aleena Khan, *How Lesbian and Gay People Came Out as Democrats*, AM. POL. SCI. ASS’N (Mar. 22, 2022), <https://politicalsciencenow.com/how-lesbian-and-gay-people-came-out-as-democrats/>.

⁴⁴⁶ Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 563 (2000) (“Given that freedom and driven by a variety of reasons including competition for employees and heightened interest in addressing discrimination against gay and lesbian and unmarried employees, a growing number of employers have voluntarily instituted domestic partnership benefits policies.”).

stave off discriminatory laws in states where major sporting events occurred.⁴⁴⁷ Increased public support for marriage equality jumped from 35% shortly before the turn of the century to 60% a month before the *Obergefell* decision.⁴⁴⁸ Today, ten years after *Obergefell*, public support remains high at nearly 70%.⁴⁴⁹

A decade after the Court's *Obergefell* decision, what are the lessons to learn from the transformation from deviant to dignified? History confirms the crucial need for solidarity among the LGBTQ community, including a resolute commitment to full LGBTQ rights and a willingness to challenge attacks aggressively, loudly, and relentlessly. Strong, supportive relationships with corporate America must be reestablished and maintained. Visibility remains essential to increase public support and understanding.

Current political attacks on the transgender community evoke memories of similar attacks weaponizing disinformation and fearmongering against gays and lesbians during the Lavender Scare. As the transgender community represents a much smaller percentage of the LGBTQ+ population than other represented groups, safe visibility, education, and outreach are vital to counter the false narrative of this vulnerable group. Similar to the false perceptions and fear of gays and lesbians in the 1950s, public understanding of the trans community is limited and fear-driven by false and misleading political representations and outright lies. As in the prior century, it remains essential to deliver widely available, relatable, and understandable messages challenging the public's flawed understanding while providing basic education about transgender people and the challenges they face.

On the road to LGBTQ rights, it was essential to engage in meaningful dialogue with mainstream America to "de-other" gays and lesbians and develop a basic understanding of their shared humanity. Through storytelling and fostering relationships, public support for gay and lesbian rights dramatically increased. In today's high-tech world, full engagement in social media campaigns and other forms of electronic outreach is central to "change hearts and minds," share stories, remove stigma and misunderstanding, and "de-other" the transgender community. Proven avenues to visibility, such as parades, marches, and demonstrations, are also

⁴⁴⁷ See, e.g., David A. Graham, *Why the NCAA Is Pulling Championships From North Carolina*, ATLANTIC (Sept. 13, 2016), <https://www.theatlantic.com/politics/archive/2016/09/ncaa-kos-nc-on-hb2/499733/>; see also Tommy Tomlinson, *How The NFL Helped Kill Arizona's Anti-Gay Rights Bill*, FORBES (Feb. 27, 2014), <https://www.forbes.com/sites/tommytomlinson/2014/02/27/arizona-gay-rights-and-the-super-bowl/>.

⁴⁴⁸ *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Apr. 6, 2025).

⁴⁴⁹ *Id.*

necessary. Steadfast and committed political support is also crucial to future gains in public support and the legislature. In that same vein, increasing LGBTQ representation in state and local politics is vital to moving forward in the fight for full LGBTQ citizenship.

Of utmost importance, the LGBTQ community must continue to follow Harvey Milk's plea to come out. As proven by the past, visibility is key to challenging false beliefs, demystifying societal misconceptions, and making common human connections.

XIV. THE FIGHT CONTINUES

From the Lavender Scare to lawfully married, the LGBTQ community's fight for rights has led to significant advancements and stunning successes. Five years after the *Obergefell* decision, the Supreme Court's 2020 decision in *Bostock v. Clayton County, Georgia*, marked another impactful ruling. The *Bostock* Court held that Title VII's workplace sex discrimination prohibition includes discrimination based on sexual orientation and gender identity.⁴⁵⁰ Further, in response to concerns about *Obergefell*'s stability, the Respect for Marriage Act was passed by a bipartisan Congress, signed by President Biden, and became law on December 13, 2022.⁴⁵¹

Today, the forward momentum inspired by *Obergefell*, *Bostock*, and other historical gains has been stunted by ongoing legal challenges and a new presidential administration. The extent of *Bostock*'s reach is the subject of intense litigation in areas from employment⁴⁵² to education⁴⁵³ to healthcare⁴⁵⁴ and beyond. Trump's return to the White House has been devastating to the LGBTQ community.⁴⁵⁵ In facing the harsh obstacles and new challenges ahead, the lessons of the past provide both direction and

⁴⁵⁰ *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 651–52 (2020) (“An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”).

⁴⁵¹ Respect for Marriage Act, Pub. L. No. 117-228, 136 Stat 2305 (2022).

⁴⁵² Regina L. Hillman, *The Battle over Bostock: Dueling Presidential Administrations & the Need for Consistent and Reliable LGBT Rights*, 32 AM. U.J. GENDER SOC. POL'Y & L. 1, 74 (2023) (noting that the *Bostock* Court expressly declined to address other LGBT-related Title VII issues, including bathrooms, locker rooms, and pronouns, saving the determination for “future cases” when those topics are at issue).

⁴⁵³ See, e.g., Karen Moulding, § 10:7, *Scope of Bostock and applicability beyond Title VII*, in *SEXUAL ORIENTATION AND THE LAW* (addressing the split in the circuits regarding whether Title IX, like Title VII, prohibits sex discrimination based on sexual orientation and gender identity in education).

⁴⁵⁴ Naomi Seiler et. al., *Gender Identity, Health, and the Law: An Overview of Key Laws Impacting the Health of Transgender and Gender Non-Conforming People*, 16 ST. LOUIS U.J. HEALTH L. & POL'Y 171, 195 (2023).

⁴⁵⁵ See, e.g., *6 ways Trump's executive orders are targeting transgender people*, PBS NEWS (Feb. 1, 2015), <https://www.pbs.org/newshour/politics/6-ways-trumps-executive-orders-are-targeting-transgender-people>.

hope. We have been here before. We have prevailed time and time again. The battle for full citizenship will continue its forward march until every LGBTQ American lives free from discrimination, receives full and equal protection under the Constitution, and equally enjoys the Pledge of Allegiance's guarantee of "liberty and justice for ALL."⁴⁵⁶

⁴⁵⁶ 4 U.S.C. § 4 (emphasis added).