# SAME-SEX MARRIAGE AND GENDER IDENTITY ISSUES

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**2015 Family Justice Conference**
**Texas Center for the Judiciary**
**January 28-29, 2015**
**Westin Riverwalk, San Antonio, Texas**

# SAME-SEX MARRIAGE/CIVIL UNION

# *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life. . . .

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . .

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized (cont.)

# *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)

(cont.) society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

# *Griswold v. Connecticut*, 381 U.S. 479 (1965)

- Connecticut law: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

- Defendants/Appellants: Griswold, Executive Director of Planned Parent-hood of Connecticu,t and Buxton, a licensed physician and a professor at the Yale Medical School, were fined $100 each for aiding & abetting.

- Majority Opinion by Justice Douglas:

  Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York*, 198 U.S. 45 [1905] . . . should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

# *Griswold v. Connecticut*, 381 U.S. 479 (1965)

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

- Concurring Opinion by Justice Harlan:

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty' . . . . For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, . . . I believe that it does. . . .

Judicial self-restraint will . . . be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our

# *Griswold v. Connecticut*, 381 U.S. 479 (1965)

society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. . . .

# *Loving v. Virginia,* 388 U.S. 1 (1967)

Chief Justice Warren:

> Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. . . .
>
> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. . . . Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.
>
> . . . These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by

# *Loving v. Virginia,* 388 U.S. 1 (1967)

free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

# *Bowers v. Hardwick*, 478 U.S. 186 (1986)

Justice White (Majority Opinion):

> This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is 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. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.
>
> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable

# *Bowers v. Hardwick*, 478 U.S. 186 (1986)

roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Justice Blackmun (dissenting):

This case is no more about "a fundamental right to engage in homosexual sodomy," . . . 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."

# *Bowers v. Hardwick*, 478 U.S. 186 (1986)

. . . Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality" . . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

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

Justice Kennedy:

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. . . .

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. . . .

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. . . .

[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These

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

considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.

The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

# American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders

Classifications of homosexuality:

- Sociopathic Personality Disturbance (DSM-I, 1952)
- Sexual Deviancy (DSM-II, 1968)
- Sexual Orientation Disturbance (DSM-II, 7th Printing 1974)
- Sexual Disorders NOS (persistent and marked distress about homosexual orientation) (DSM-III, 1980)
- Gender Identity Disorder (DSM-IV, 1994)
- Gender Dysphoria Disorder (DSM-5, 2013)

# Timeline of Significant Events

- 1965 *Griswold v. Connecticut*, U.S. Sup. Ct. invalidated Connecticut law prohibiting the dissemination of birth control information.
- 1967 *Loving v. Virginia*, U.S. Sup. Ct. invalidated Virginia statute prohibiting interracial marriage
- 1972 *Baker v. Nelson*, 409 U.S. 810, Minnesota's refusal to grant SSM did not present a substantial federal question
- 1973 Maryland adopts statutory ban on SSM
- 1982 President Reagan's directive to discharge gays from U.S. military
- 1986 *Bowers v. Hardwick*, U.S. Sup. Ct. upheld Georgia's sodomy statute applied to homosexual sex
- 1989 Denmark is first to pass statute recognizing same-sex partnerships
- 1993 Hawaii Sup. Ct. rules state must show compelling state interest to uphold statute banning SSM; President Clinton's directive "Don't ask, don't tell" for U. S. military
- 1996 President Clinton signs DOMA (no FF&C for SSM; federal def. of spouse)
- 1997 Texas Legislature prohibits issuance of marriage license for SSM

# Timeline of Significant Events

- 1998 Hawaii and Alaska adopt constitutional amendments banning SSM
- 1999 California passes law allowing same-sex partnerships
- 2000 Vermont statute allowing same-sex civil unions; Germany legalizes life partnerships; Netherlands adopts world's first statute allowing SSM
- 2003 Belgian law allowing SSM; British Columbia and Ontario courts require recognition of SSM; In *Lawrence v. Texas*, U.S. Sup. Ct. invalidated Texas law criminalizing consensual homosexual sex as violating right to privacy under 14th Amendment; Tex. Fam. Code amended to ban SSM
- 2004 Mass. Sup. Ct. legalizes SSM
- 2005 Texas voters amend Constitution to ban SSM by vote of 3-to-1
- 2006 New Jersey Sup. Ct. mandates and legislature adopts same-sex partnerships.
- 2007 Mexican State of Coahuila legalizes same-sex civil unions; Washington state passes law permitting same-sex partnerships; Oregon statute permits domestic partnerships; New Hampshire bill allowing civil unions; Uruguay adopts statute for civil unions.

# Timeline of Significant Events

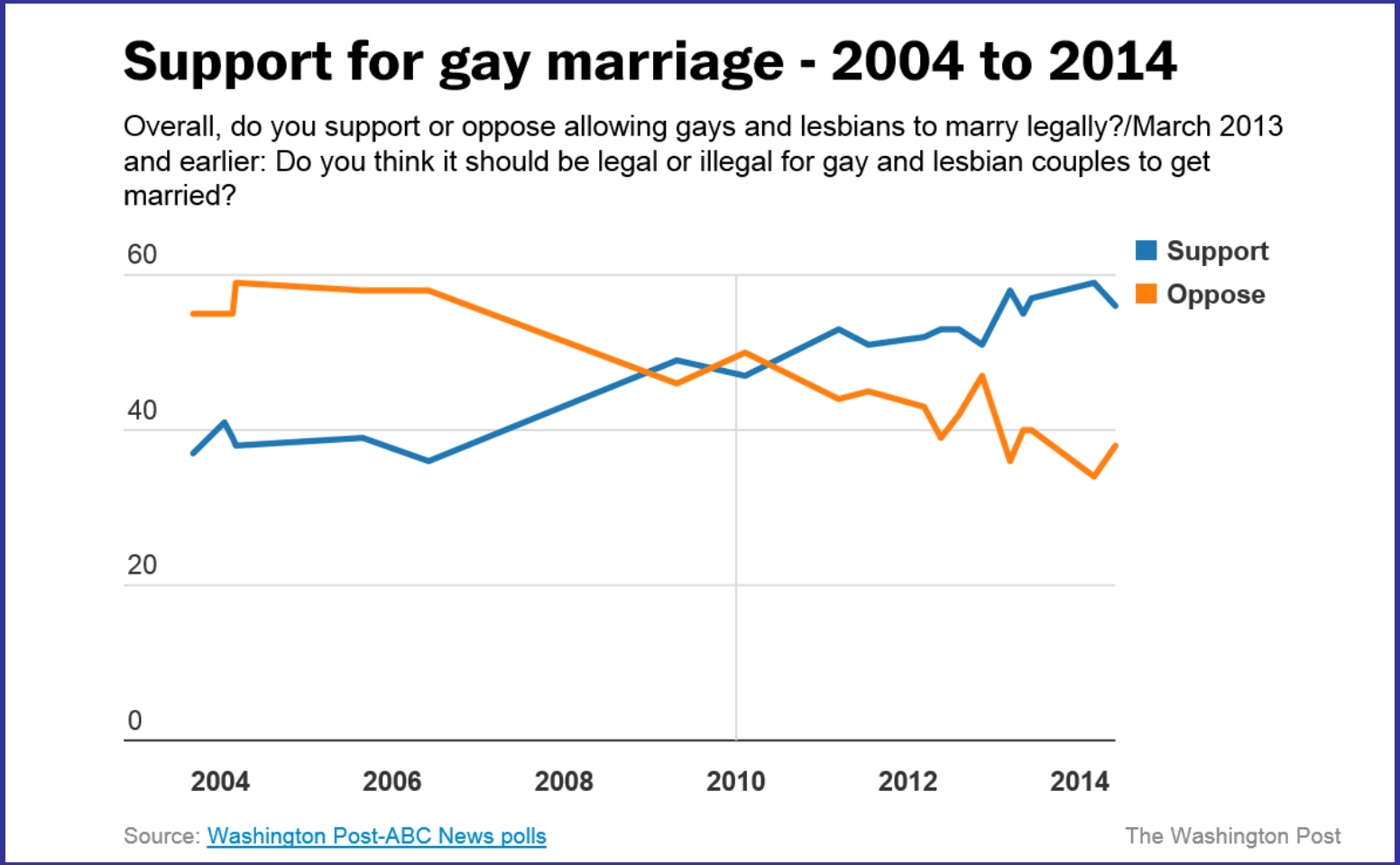
- 2008 California Sup. Ct. legalizes SSM; NY governor mandates FF&C for valid SSM from other states; Conn. Sup. Ct. legalizes SSM; California voters amend state constitution to ban same-sex marriage (Prop 8).
- 2009 Iowa Sup. Ct. legalizes SSM; Vermont legislature overrides governor's veto thus allowing SSM; Cal. Sup. Ct. upholds Prop 8 but leaves interim SSMs in force; Nevada legislature overrides governor's veto and legalizes same-sex domestic partnerships; Maine referendum overturns statute permitting SSM.
- 2010 New Hampshire statute allowing SSM; Federal judge in California rules Prop 8 unconstitutional.
- 2011 Civil unions legalized in Illinois, Hawaii & Delaware. NY statute allows SSM.
- 2012 Legislature pass SSM laws in Washington & Maryland; referendums approve SSM in Maine, Maryland, & Washington.

# Timeline of Significant Events

- 2013 Colorado statute approving civil unions; Uruguay statute permitting SSM; New Zealand statute permitting SSM; Delaware, Hawaii, Illinois, Minnesota, & Rhode Island statutes permitting SSM; France statute permitting SSM; U.S. Sup. Ct. dismisses appeal of Federal dist. ct. decision overturning California's Prop 8; U.S. Supreme Court invalidates DOMA § 2 in *U.S. v. Windsor*; New Mexico Sup. Ct. mandates SSM.

- 2014 Fed. dist. courts invalidate SSM bans in Arizona, Arkansas, Michigan, Mississippi, Idaho, Illinois, Kansas, Kentucky, Missouri, Montana, Oregon, Pennsylvania, South Carolina, Texas and Wyoming; Mexico Sup. Ct. invalidates Oaxaca's ban on SSM; 10th Circuit upholds invalidation of Oklahoma's and Utah's bans on SSM; two Florida state district courts and a Fed. dist. ct. invalidate Florida's ban on SSM; 4th Circuit upholds invalidation of Virginia's ban on SSM; 7th Circuit upholds invalidation of Indiana and Wisconsin's ban on SSM; U.S. Sup. Ct. denies cert. of 4th, 7th and 10th Circuit decisions; 9th Circuit upholds invalidation of SSM laws in Idaho and Nevada; 6th Circuit rules that SSM bans in Mich., Ohio, KY., & Tenn. are constitutional.

# Support for Gay Marriage – as of June 1, 2014



# Texas Family Code

- TFC § 2.001 (1997). A license may not be issued for the marriage of persons of the same sex.
- TFC § 6.204 (2003). A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

# The Texas Constitution

On November 8, 2005, Texas voters passed a constitutional amendment to Art. I, by a vote of 76% to 24% which reads:

Sec. 32. MARRIAGE.

(a) Marriage in this state shall consist only of the union of one man and one woman.
(b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

# Texas Court Decisions

- *Ross v. Goldstein*, 203 S.W.3d 508, 514 (Tex. App.–Houston [14th Dist.] 2006, no pet.), the appellate court declined to establish an equitable remedy in probate recognizing a "marriage-like relationship" doctrine.
- *Mireles v. Mireles*, 2009 WL 884815 (Tex. App.–Houston [1st Dist.] 2009, pet. denied) (mem. op.): "[a] Texas court has no more power to issue a divorce decree for a same-sex marriage than it does to administer the estate of a living person."
- *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 658-59 (Tex. App.–Dallas 2010, pet. granted): a Texas court does not have subject-matter jurisdiction over a divorce case arising from a same-sex marriage that occurred in Massachusetts. Tex. Sup. Ct. consolidated with *State v. Naylor,* argued on November 5, 2013; no decision yet.

# Texas Court Decisions

- *State v. Naylor*, 330 S.W.3d 434 (Tex. App.–Austin 2011, pet. granted): the State of Texas did not have standing to appeal a divorce between two women who were legally married in Massachusetts.
- On August 23, 2013, two years and five months after the case was filed, the Texas Supreme Court granted review in *State v. Naylor*. The case was consolidated with *In re J.B. and H.B.* and argued on November 5, 2013; no decision yet.
- *In re Estate of Araguz,* 443 S.W.3d 233 (Tex. App.—Corpus Christi February 13, 2014, pet. Pending): The Ct. App. held that a marriage between two men was not as a matter of law invalid, given the evidence that one spouse's gender self-identity was female, California had issued an updated female birth certificate, etc.

# Texas Attorney General Opinions

- December 16, 1999, Texas Attorney General John Cornyn (now a U.S. Senator) issued an AG's Opinion that county clerks were not required or permitted to accept for filing a "declaration of domestic partnership."
- April 29, 2013, Texas Attorney General Greg Abbott issued Opinion GA-1003, which concluded that Texas cities, counties and school districts could not lawfully offer insurance benefits to domestic partners as part of their employee benefit programs.

# Federal District Court in Texas

## *DeLeon v. Perry*, (W.D. Tex. Feb. 26, 2014)

- Federal District Judge Orlando Garcia
- Texas' Constitution and Family Code banning SSM violate 14th Amendment
- Stayed effect of his ruling pending appeal
- Argued to 3-Justice panel of 5th Circuit on January 9, 2015
- Decision pending

# The 2013 Violence Against Women Act

On March 7, 2013, President Obama signed the new Violence Against Women Act, which contained the following non-discrimination clause:

> No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, **gender identity** (as defined in paragraph 249(c)(4) of title 18, United States Code)*, **sexual orientation**, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 . . . .[Emphasis added]

* "the term 'gender identity' means actual or perceived gender-related characteristics"

# 14th Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# *Hollingsworth v. Perry*

## 133 S. Ct. 2652 (June 26, 2013)

- The California Sup. Ct. had declared a state statutory ban on SSM to violate the California constitution. In Proposition 8, voters later amended the constitution to define mg as between a man and a woman.
- A Federal district court ruled that Proposition 8 denied Equal Protection and Due Process of Law under the 14th Amendment. The California AG refused to appeal, so other parties stepped in.
- On appeal, 9th Circuit certified question to the California Supreme Court: do appellants have standing to appeal? California Supreme Court answered "yes."
- U.S. Supreme Court dismissed the appeal (5-4), C.J. Roberts writing that petitioners had no standing to appeal.
- The Supreme Court vacated 9th Circuit's decision, leaving the Federal district court ruling standing unreviewed.
- The effect of the judge's ruling is limited to California.

# The Defense of Marriage Act

In 1996, the U.S. Congress passed and President Bill Clinton signed the Defense of Marriage Act ("DOMA").

- Section 1 described the Bill as "The Defense of Marriage Act."
- Section 2 adopted 28 U.S.C. § 1738C:

  No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

- Section 3 added 1 U.S. Code § 7, which says:

  In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

# *U.S. v. Windsor*
## 133 S. Ct. 2675 (June 26, 2013)

- U.S. Supreme Court (5-4) declared Section 3 of DOMA unconstitutional.
- The Majority Opinion was written by Justice Kennedy.
- Unconstitutional for the Federal government to refuse to recognize a marriage between persons of the same sex when that same-sex marriage is recognized under the law of the state where the parties *reside*.
- The Supreme Court did *not* rule that states are required to permit same-sex marriages or to recognize same-sex marriages originating elsewhere.
- The Texas law, that courts must ignore same sex marriages, is still in force, unless it is later decided that Federal law preempts Texas law.

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# Subsequent U.S. Courts of Appeals Cases

- *Herbert v. Kitchen* (10th Cir. June 29, 2014) (unconstitutional)
- *Bostic v. Schafer* (4th Cir. July 28, 2014) (unconstitutional)
- *Baskin v. Bogan* (7th Cir. Sept. 4, 2014) (unconstitutional)
- *Latta v. Otter* (9th Cir. Oct. 7, 2014) (unconstitutional)
- *DeBour v. Schneider* (6th Cir. Oct. 7, 2014) (constitutional)
- *DeLeon v. Perry* (5th Cir.) (argued Jan. 9, 2015)
- *Brenner v. Armstrong* (11th Cir.) (pending submission)

# U.S. Executive Department

- Although Justice Kennedy's Opinion in *U.S. v. Windsor*, 133 S. Ct. 2675 (June 26, 2013), held that the Federal gov't must recognize the validity of a SSM if valid under the law of the current *residence*, the U.S. Executive Department is recognizing SSMs that were valid in the place of *celebration*.
- On 7-1-13 Dep't Homeland Security recognized SSM for immigration purposes.
- On 7-17-13 Office of Personnel Mgmt. extended spousal benefits to SSM federal employees.
- On 8-13-13 DOD extended spousal benefits to SSM
- On 2-10-14, the U.S. DOJ recognized SSMs, valid in the place of *celebration*, for courthouse proceedings, prison visits, retired DOJ employees.

# U.S. Supreme Court Grants Review

- On January 16, 2014, in *Obergefell v. Hodges,* 14-556, the U.S. Supreme Court consolidated four appeals from the 6th Circuit and granted certiorari, saying:

  "The cases are consolidated and the petitions for writs of certiorari are granted limited to the following 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 the same sex when their marriage was lawfully licensed and performed out-of-state?"

# Full Faith and Credit

U.S. Constitution, art. IV, § 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 United States Code § 1738

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

# Full Faith and Credit
# Public Policy Exception

- No state is required to give Full Faith and Credit if to do so would violate the strong public policy of the forum state.
- Historically, the public policy exception was applied to marriages that were polygamous, incestuous, or interracial (interracial bans was declared unconstitutional in *Loving v. Virginia* (1967)).
- Tex. Fam. Code § 6.204 says that a SSM or civil union "is contrary to the public policy of this state."

# Is Full Faith & Credit a Dead End?

- "Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction." *Loughran v. Loughran*, 292 U.S. 216 (1934).
- Recent cases mandating recognition of sister-state SSMs rely on the 14th Amendment, not Full Faith & Credit clause.
- The U.S. Supreme Court's grant of certiorari in 14-556, *Obergefell v. Hodges,* on January 16, 2015, was "limited to the following 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 the same sex when their marriage was lawfully licensed and performed out-of-state?"

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# Bringing a Constitutional Challenge

1. Notice to the Attorney General
2. Can Legislate Up To Constitutional Limits
3. Due Course of Law Attack Only For Constitutionally-Protected Right
4. Complaining Party Must Be Injured
5. Limit Inquiry to Record in Case
6. Presumption of Validity
7. Interpret to Avoid Unconstitutionality
8. "Facial Invalidity"
9. Unconstitutional "As Applied"
10. Procedural vs. Substantive Due Process Challenge
11. Must Raise Constitutional Challenge in Trial Court
12. Avoid Constitutional Ruling if Other Grounds Are Available

## Challenge to Constitutionality of a State Statute

This form must be completed by a party filing a petition, motion or other pleading **challenging the constitutionality of a state statute**. The completed form must be filed with the court in which the cause is pending as required by Section 402.010 (a-1), Texas Government Code.

**Cause Number** *(For Clerk Use Only)*: **Court** *(For Clerk Use Only)*:

Styled:

(e.g., John Smith v. All American Insurance Co.; in re Mary Ann Jones; In the Matter of the Estate of George Jackson)

**Contact information for party* challenging the constitutionality of a state statute.** (**If party is not a person, provide contact information for party, party's representative or attorney.)*

Name: Telephone:

Address: Fax:

City/State/Zip: State Bar No. (if applicable):

Email:

Person completing this form is: ☐ Attorney for Party ☐ Unrepresented Party ☐ Other:

**Identify the type of pleading you have filed challenging the constitutionality of a state statute.**

☐ Petition ☐ Answer ☐ Motion (Specify type):

☐ Other:

**Is the Attorney General of the State of Texas a party to or counsel in this cause?**

☐ Yes ☐ No

**List the state statute(s) being challenged in your pleading and provide a summary of the basis for your challenge**. (Additional pages may be attached if necessary.)

9/5/13

# Choice of Law Issues

- Validity of marriage

  old rule: Law of place of celebration (valid, unless invalid under law of domicile at time of marriage)

  new rule: most significant relationship test (valid, unless invalid under law of the state which had the most significant relationship to parties or the marriage at time of marriage)

  public policy exception: polygamy, incest, under-age, SSM

- Property rights

  old rule: movables, law of domicile at acquisition immovables, law of situs

  new rule: movables, most significant relationship immovables, law of situs (incl. choice of law rules)

  relocation: vested rights stay vested

# Applying Sister State Law
# Public Policy Exception

- No state is required to apply the law of a sister state if to do so would violate the strong public policy of the forum state.
- "Fugitive Marriage" – going elsewhere to enter into a marriage prohibited under the law of domicile.
- Restatement (1st) of Conflict of Laws § 132 said that a marriage against the law of either party's domicile at the time of marriage is invalid everywhere, even though valid under the law of the place of celebration.
- Restatement (2nd) of Conflict of Laws § 282(2) provides that the forum state can ignore a marriage that violates a "strong public policy" if the forum state has the most significant relationship to the spouses and the marriage at the time of celebration.

# Other Non-Traditional Marriages

Polygamy (more than one spouse)

- Polygyny (one man, more than one wife; allowed under Shari'a law)
- Polyandry (one wife, more than one husband, not allowed in most countries/religions)
- 1% - 3% of marriages in Muslim world are polygynous
- Polygamous marriage prohibited in Turkey (1926), Tunisia (1956), Israel (1978)
- The marriage contract can prohibit polygamy in India, Iran, Morocco, Jordan & Kuwait
- First wife must consent in Iran & Pakistan
- First wife and governmental religious authority must consent in Malaysia

# Other Non-Traditional Marriages

## Temporary Marriages Under Shari'a Law

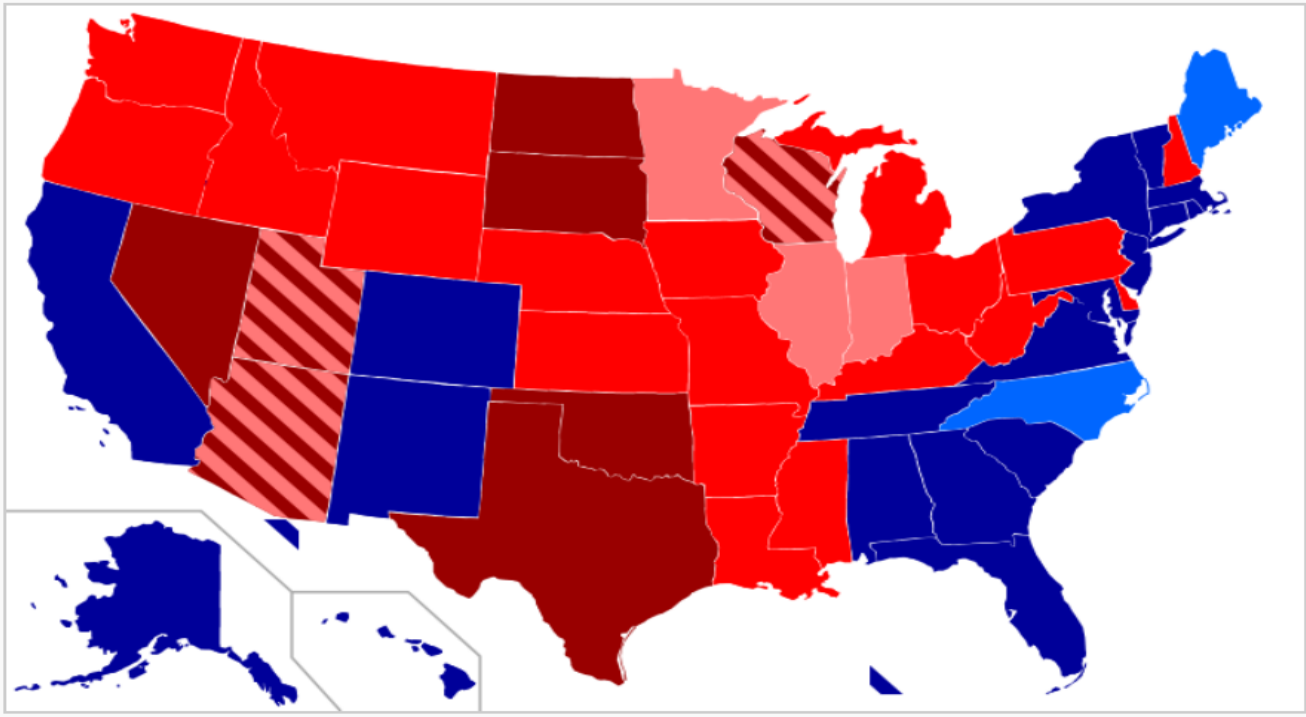
- "Nikāḥ" – permanent marriage.
- "Nikāḥ al-Mutʿah" – temporary marriage (for Shi'i Muslims).
- Terms of marriage are spelled out in agreement (verbal or written).
- Marriage automatically self-terminates.
- Dowry is paid. To wife? To her family?
- Will Texas recognize automatic termination?
- Will Texas enforce other terms of agreement?

# Other Non-Traditional Marriages

## Incestuous (ancestors, descendants, 1st cousins)

- 20 states allow 1st cousins to marry
- 6 states conditionally allow 1st cousins to marry
- Tex. Fam. Code § 2.004(b)(4)(F) does not permit a marriage license to issue to first cousins. Tex. Fam. Code § 6.201 does not make a first-cousin marriage void, but Texas Penal Code § 25.02 makes sexual relations between first cousins illegal.

# Cousin Marriage Law in United States by State



**Laws regarding first-cousin marriage in the United States**

- First-cousin marriage is legal
- Allowed with requirements or exceptions
- Banned with exceptions[1]
- Statute bans first-cousin marriage[1]
- Criminal offense[1]

[1]Some states recognize marriages performed elsewhere, especially when the spouses were not residents of the state when married. clarification needed

# FAMILY VIOLENCE, PARENT-CHILD RIGHTS, APPLIED TO SAME-SEX RELATIONSHIPS

# Same-Sex Family Violence

- TFC § 71.004 defines "family violence" as an act by a member of a family or household.
- TFC § 71.005 defines "household" as "a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other."
- TFC § 71.0021 defines "dating violence" as an act against someone with whom the actor has or had a dating relationship.
- TFC § 71.0021(b) defines "dating relationship" as "a continuing relationship of a romantic or intimate nature."
- *Ochoa v. State* 355 S.W.3d 48 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), held that "dating relationship" applies to both same-sex and opposite-sex relationships.

# Same-Sex Parent Child Issues: Standing to Litigate

- TFC § 101.024. Parent

  "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. . . .

- Standing by agreement or by default

- General Standing to File Suit under TFC § 102.003:

  (9) "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition."

# Antidiscrimination Provision

Sec. 153.003. NO DISCRIMINATION BASED ON SEX OR MARITAL STATUS.

The court shall consider the qualifications of the parties without regard to their marital status or to the sex of the party or the child in determining:

(1) which party to appoint as sole managing conservator;

(2) whether to appoint a party as joint managing conservator; and

(3) the terms and conditions of conservatorship and possession of and access to the child.

# IF BAN ON SSM SURVIVES, ALTERNATE CLAIMS?



Richard R. Orsinger, Attorney at Law http://www.orsinger.com/articles.shtml

# Alternative Claims

Tex. H.R.J. Res. 6, § 2, 79th Leg., R.S. (2005):

> "This state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage."

Non-Marital Claims/Defenses Between Unmarried Domestic Partners

- Contributing Money or Labor to Purchase Price
- Partnership
- Joint Venture
- Contract Claim
- Quantum Meruit
- Express, Resulting and Constructive Trust
- Financial Accounts (Jointly-held, POD, Trust)
- Tort Claims
- Statute of Frauds
- Statute of Limitations

# Alternative Claims

- *Ayala v. Valderas*, 2008 WL 4661846 (Tex. App.--Fort Worth 2008, no pet.) (memo. op.): in a meretricious heterosexual relationship, "[e]ach party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition."

- *Hovious v. Hovious*, 2005 WL 555219 (Tex. App.--Fort Worth 2005, pet. denied) (memo. opinion): upon declaring a marriage void, "each party is entitled to the property acquired during the relationship in proportion to the value that his or her labor contributed to its acquisition."

- *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. App.–Houston [1st Dist.] 1982, writ ref'd n.r.e.), held that unmarried same-sex companions who both contributed labor or cash to the acquisition of assets had joint ownership interests in proportion to the labor or money each party contributed to the purchase money.

- *In re Marriage of Sanger*, 1999 WL 742607 (Tex. App.--Texarkana 1999, no pet.) (not for publication), the court said: "when a meretricious relationship ends, a party only has an interest in the property that he separately purchased and that he acquired an interest in through an express trust, a resulting trust, or the existence of a partnership."

# Alternative Claims

- *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ): "the prospective husband and wife had decided to buy the property as co-tenants prior to marriage; both filled out the loan application forms and the property was to be purchased in both names. Prior to closing, Mr. Andrews unilaterally and surreptitiously removed his fiancée's name from the purchase documents and assumed title solely in his name. We found that a fiduciary relationship existed between the parties, and that the parties had agreed to purchase the property jointly for use as their marital residence." The court imposed a constructive trust, establishing a 50-50 ownership.

# Alternative Claims

- *Rockowitz v. Rockowitz*, 146 S.W. 1070, 1071-72 (Tex. Civ. App. 1912, no writ): "The rule is well settled that, where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation."

- *Quigley v. Bennett*, 256 S.W.3d 356, 361 (Tex. App.--San Antonio 2008, no pet.): there is a four-year statute of limitations on such claims, whether for express contract or implied contract/quantum meruit.

# GENDER IDENTITY ISSUES



Richard R. Orsinger, Attorney at Law http://www.orsinger.com/articles.shtml


JUNE 9, 2014
TIME
THE
TRANSGENDER
TIPPING
POINT
America's next
civil rights frontier
BY KATY STEINMETZ
Laverne Cox, a star of Orange Is the New Black, is one of an estimated 1.5 million Americans who identify as transgender
time.com

# How is Gender Determined?

- Genitalia (at birth)
- Genitalia (after operation)
- Birth certificate (original)
- Birth certificate (reissued with different gender)
- Chromosomes
- Self-Identity
- Court Declaration



Richard R. Orsinger, Attorney at Law http://www.orsinger.com/articles.shtml

# Am. Psychological Ass'n Definitions

"Sex refers to a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia."

"Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity."

# Am. Psychological Ass'n Definitions

Gender Identity refers to "one's sense of oneself as male, female, or transgender" (American Psychological Association, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000).

Gender Expression refers to the "…way in which a person acts to communicate gender within a given culture; for example, in terms of clothing, communication patterns and interests. A person's gender expression may or may not be consistent with socially prescribed gender roles, and may or may not reflect his or her gender identity" (American Psychological Association, 2008, p. 28).

# Am. Psychological Ass'n Definitions

Sexual Orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum (e.g., Kinsey, Pomeroy, Martin, & Gebhard, 1953; Klein, 1993; Klein, Sepekoff, & Wolff, 1985; Shiveley & DeCecco, 1977). In addition, some research indicates that sexual orientation is fluid for some people; this may be especially true for women (e.g., Diamond, 2007; Golden, 1987; Peplau & Garnets, 2000).

# Texas Law on Gender Change

- *Littleton v. Prang*, 9 S.W.3d 223 (Tex. App.–San Antonio 1999, pet. denied) (a 1-1-1 decision): C.J. Hardberger's plurality opinion said that a person's gender is not changed by genital surgery, and the designation of gender on the birth certificate controls over a sex-change operation.
- *Mireles v. Mireles*, 2009 WL 884815 (Tex. App.--Houston [1st Dist.] Apr. 2, 2009, pet. denied) (mem. op.): agreed with *Littleton v. Prang*.
- In 2009, the Legislature amended TFC § 2.005(8) to provide that proof of identity for purposes of obtaining a marriage license could consist of "an original or certified copy of a court order relating to the applicant's name change *or sex change* . . . ." [Emphasis added]
- 2014 WL 576085 (2-13-14), *In re Estate of Araguz*, involves a marriage between a man and another man who was born male but underwent a sex-change operation after the ceremonial marriage. Trial Court granted SJ denying widow's claims in probate. The Corpus Christi Ct. App. reversed, saying that under Texas law a valid heterosexual marriage can exist based a spouse's overall sexuality, not just biology. The Court said that "sexuality is a 'complex phenomenon'" and that genitalia was only one factor in determining gender. Case was remanded for a jury finding on gender during mg. Case now on appeal to Tex. Sup. Ct.

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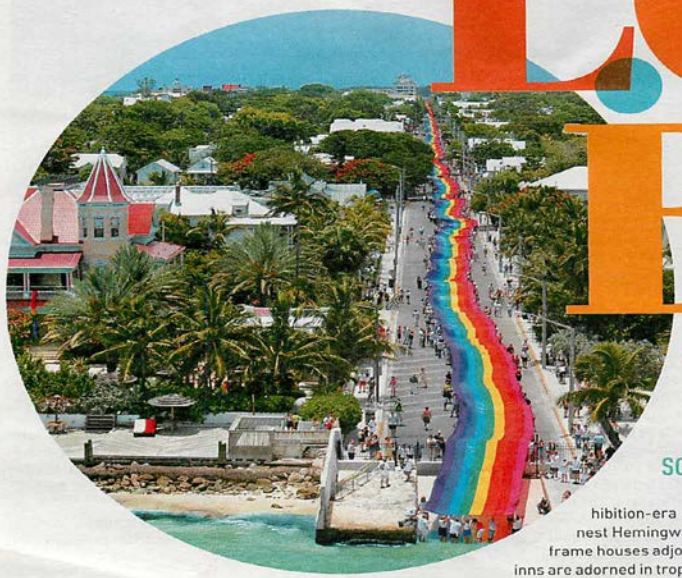

This 1.25-mile rainbow flag was a highlight of the 2003 PrideFest Key West celebrations.
**PHOTO:** Andy Newman, NewmanPR

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## KEY WEST

### COME AS YOU ARE

Famed for its small-town friendliness and live-and-let-live vibe, Key West is one of the world's top-ranked L.G.B.T. travel destinations. Lying at the southernmost end of the Florida Keys, this quirky and charming spot boasts a unique mix of history, natural beauty, cultural diversity, architecture and romantic appeal. And with an average temperature in the high 70s, Key West promises sensational Caribbean-like weather almost 365 days a year.

Key West has been home to Caribbean pirates, Prohibition-era rumrunners and literary luminaries from Ernest Hemingway to Robert Frost. Lovingly restored Victorian frame houses adjoin quaint cottages, and many guesthouses and inns are adorned in tropical pastels or wooden gingerbread lacework. Bicycles are a favored mode of transportation in the historic district.

The only living coral barrier reef in the continental United States lies just seven miles offshore, offering unparalleled diving and snorkeling. Fish, sail and paddleboard on the turquoise water, or stay on land and explore the historic sites and museums, including an exhibition devoted to Tennessee Williams's life in Key West.

By night, become part of the sunset celebration held each evening at Mallory Square, when tightrope walkers, jugglers and animal acts perform. Stroll through streets filled with sidewalk cafés, open-air bars, legendary pubs and world-class restaurants serving up island specialties. Walk along Duval Street, Key West's main roadway, and browse galleries and inviting shops (some downright funky, some fabulously upscale). Throughout the colorful downtown area, clubs abound — many featuring drag shows or intimate cabarets.

Check out a host of productions this winter at Key West's noted Waterfront Playhouse and the intimate Red Barn Theatre. On Jan. 30, playwright Terrence McNally will take the stage at the Waterfront Playhouse to celebrate the theater's 75th anniversary. Other 2015 shows include "Noises Off" and "Monty Python's Spamalot."

Enjoy a range of accommodations in the Old Town historic district, including La Te Da, one of Key West's first gay hotels, newly renovated under new ownership, or the newly expanded all-male Equator Resort.

"One Human Family" is the official philosophy of the modern island community of the Florida Keys and Key West, a place where L.G.B.T. visitors can be relaxed

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and open. Here, you can make new friends, dress up or dress down, play from dawn to dusk or luxuriate in laziness. Key West is truly carefree, a subtropical island unlike any other.

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## GREATER FORT LAUDERDALE

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Considered by many the gay capital of Florida, Greater Fort Lauderdale has everything you could want in a tropical vacation — from year-round sun to hundreds of L.G.B.T.-owned and -operated hotels and resorts, bars, clubs, restaurants and exciting attractions.

In 2013, over one million L.G.B.T. travelers visited Greater Fort Lauderdale, making it Florida's No. 1 L.G.B.T. destination and one of the top L.G.B.T. destinations in the United States. According to the U.S. Census, Fort Lauderdale has the country's highest concentration of same-sex households. "We have a burgeoning L.G.B.T. scene, and it's still growing," said Richard Gray, managing director of the destination's L.G.B.T. market. "We are a progressive, diverse, all-welcoming, multifaceted fun destination."

Greater Fort Lauderdale boasts a vibrant gay community.
**PHOTO:** Doug Castanedo

The L.G.B.T. community is rooted in history here; check out the Stonewall National Museum & Archives, the largest independent circulating library of L.G.B.T. media; the World AIDS Museum; the Pride Center at Equality Park; and the "gayborhood" of Wilton Manors, home to Greater Fort Lauderdale's largest L.G.B.T. community.

Choose from 16 gay hotels, the most of any destination in the world — including the Grand Resort and Spa, just steps from the beach; the ultra-luxe Pineapple Point Guesthouse & Resort, set in a lush tropical paradise; or the waterfront Cabanas Guesthouse & Spa, the ultimate blend of fun and sophistication.

Get a delicious taste of Florida at Dapur, a tapas bar and lounge serving Asian-fusion fare, and at Rosie's Bar & Grill in Wilton Manors, featuring great burgers, salads and an amazing Sunday brunch.

Celebrating marriage equality, the Greater Fort Lauderdale Convention and Visitor's Bureau is planning a group wedding on the beach on Feb. 5 for L.G.B.T. couples and heterosexuals, as well.

*For more information, visit sunny.org/loveislove.*

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# The End

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