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## Year-End Spate of LGBT Court Rulings

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## LEGAL

# A Challenge to Conservatives

Marriage cases may make justices examine — and perhaps ignore — prior decisions and federalism

BY DUNCAN OSBORNE

In his 2003 dissent in *Lawrence v. Texas*, the US Supreme Court case that struck down sodomy statutes in the 13 states that still had such laws, Antonin Scalia, a conservative justice, excoriated the majority for undoing the justification for many laws.

“Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation,” Scalia wrote, citing the decision in *Bowers v. Hardwick*, a 1986 US Supreme Court decision that upheld the sodomy laws then in force in 24 states. “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”

This spring, the court will hear a challenge to the section of the Defense of Marriage Act (DOMA) that bars federal recognition of same-sex marriages and will also review a 2010 federal court ruling that struck down Proposition 8, a 2008 ballot initiative that eliminated the right of gay and lesbian couples to wed in California. An appeals court later upheld the 2010 ruling.

While few expect Scalia to rule for gay marriage in either case, how does a justice who admits that the central justification for disfavoring homosexuality is gone argue for continuing to disfavor homosexuals?

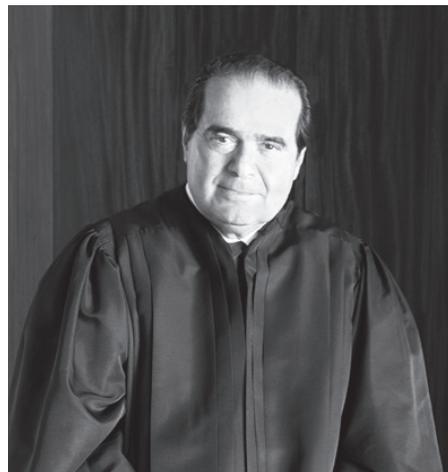
“[T]here is a certain logic to the syllogism that (1) Scalia criticized *Lawrence* for repudiating precedent; (2) that Scalia said the logic of the majority opinion in *Lawrence* left no principled argument for rejecting gay marriage; and (3) therefore, Scalia must vote in favor of gay marriage,” wrote Michael J. Klarman, a law professor at Harvard University, in an email. “[T]here is no chance he will do so. Indeed, he has publicly stated on more than one occasion that the constitutional case for gay marriage is ‘absurd.’”

Scalia’s *Lawrence* dissent has been cited by proponents of same-sex marriage and by judges who ruled for those proponents.

“We’ve seen a number of judges make this observation,” said Susan Sommer, director of constitutional litigation at Lambda Legal, a gay rights law firm. “It will be very interesting to see how Justice Scalia reconciles what he said in his *Lawrence* dissent with his quite obvious reluctance to accord any protections to same-sex relationships.”

Scalia, or any US Supreme Court justice, is not required to follow prior decisions nor must he be consistent. He could argue that by ruling against the gay community in both cases, he is being consistent in that he still believes that homosexuality should be legally penalized.

“It seems very unlikely that Justice Scalia would accept that *Lawrence* is precedent he has to agree with,” wrote Paul M. Smith, a partner at Jenner & Block, LLC, a Washington, DC law firm, who argued for the winning side in the *Lawrence* case. “If he does not, then the problem created by his dissent goes away.”



Justice Antonin Scalia faces the prospect of abandoning his own pronouncements in order to get the position he’s committed to on marriage by same-sex couples.

His *Lawrence* dissent is not the only potential obstacle for Scalia. Justices on the court have repeatedly asserted that the federal government is limited in its power to direct the states. DOMA is the only example of the federal government refusing to recognize legal marriages that are sanctioned by state governments. That refusal is due solely to the spouses being gay or lesbian. Prior to DOMA’s enactment in 1996, the federal government relied on state licenses to determine who was married and it did not have its own definition of marriage.

In a separate lawsuit that is not being heard by the US Supreme Court, Massachusetts charged that DOMA requires it to violate its own laws and asserted that the federal government lacks the legal authority to do that.

“I think there is much in the argument against DOMA which should appeal to

Justice Scalia, and we will have to wait and see how he responds,” wrote Gary Buseck, the legal director at the Boston-based Gay & Lesbian Advocates & Defenders, in an email. “I think both Chief Justice Roberts and Justice Scalia have specifically spoken to the question of where the federal government intrudes on matters of traditional state sovereignty such that they believe the Court takes a careful look at the federal government’s asserted justification for its actions.”

From the vantage point of liberal justices on the court, the marriage cases could stir as much controversy as some civil rights cases caused in the 1950s and ‘60s, and they may fear that Justice Elena Kagan may have been referring to this at a December 13 appearance at a Washington, DC synagogue.

“One’s sense of what to do as a judge is bounded in some way by the society in which one lives” Kagan said, according to Politico.com. “One does think long and hard as a judge, and I’m not sure I’ve ever been in this position... before you do something that you think is required by law that would be incredibly disruptive to society, and that’s where great wisdom is called for.”

The conservative justices may be forced to examine and perhaps defend some of their core beliefs. The DOMA case “may actually have some of the conservative justices joining based on state’s rights” arguments, said Mitchell Katine, a partner at Katine & Nechman, LLP, a Houston law firm, and the local counsel on the *Lawrence* case.

“Scalia and Thomas and the other conservative justices do believe in that and they should invalidate DOMA based on that,” Katine said.

## Year-End Spate of LGBT Court Rulings

State, federal panels consider marriage, free speech, HIV, and ex-gay therapy

BY ARTHUR S. LEONARD

State and federal courts released a flood of new LGBT-related opinions in the last few weeks of 2012. The most significant among them are detailed below:

The Montana Supreme Court divided 4-3 in a December 17 ruling over whether it could issue a declaratory judgment on a claim made by a group of same-sex couples that the statutory structure of Montana law unconstitutionally discriminates against them. Chief Justice Mike McGrath wrote for the majority that the

trial judge correctly ruled that issuing the declaration would “run afoul of the separation of powers” because it would “likely impact a large number of statutes in potentially unknown and unintended ways.”

Montana has a state constitutional amendment that provides that only the union of a man and a woman can be a valid marriage in that state. The plaintiffs, seeking all the rights and benefits associated with marriage — though not the name itself — based their claim on their right to equal protection of the law, required by the State Constitution.

While the majority of the court was unwilling to rule in favor of the plaintiffs, they were also careful not to decide whether the plaintiffs might have a valid claim concerning any particular statute. The case was sent back to the trial court, and the plaintiffs have the opportunity to file an amended complaint attacking particular statutes as violating their equal protection rights.

In a separate opinion, one member of the majority, Justice Jim Rice, argued such an action would be unsuccessful because of the anti-gay-marriage amendment.

The majority’s action stimulated a lengthy, passionate dissenting opinion by retiring Justice James C. Nelson, who noted this was his last opportunity to rule on gay rights. He insisted the majority was mistaken and that the court should declare sexual orientation to be a “suspect classification” under Montana law, which would make all unequal treatment of same-sex couples presumptively unconstitutional. He also suggested the state marriage amendment is itself a violation of the Montana Constitution. The

## ▶ HAGEL, from p.7

In an email message, he wrote, "Our ad run today was not just about an old confirmation hearing." Then after reiterating LCR's critique of the Nebraskan's views on Iran and Israel, he wrote, "While he may have recently apologized for his anti-gay comments to save his possible nomination, Hagel cannot walk away from his consistent record against economic sanctions to try to change the behavior of the Islamist radical regime in Tehran."

Cooper's statement was at stark odds with an assessment of Hagel he offered to the newspaper two weeks earlier — before news of the Nebraskan's comments about Hormel surfaced. Asked about Hagel's history of opposition to gay rights — which earned him a rating of zero from HRC, based on his votes in favor of a constitutional amendment barring marriage by same-sex couples and against hate crimes protections for LGBT Americans — Cooper responded by focusing instead on the former senator's military background and

foreign policy credentials.

Emphasizing he was speaking on his own behalf, not for LCR, Cooper, in an email message, wrote, "I recall working with Senator Chuck Hagel and his staff during the Bush administration and he was certainly not shy about expressing his criticisms. But despite his criticisms, Hagel voted with us most of the time and there was no question he was committed to advancing America's interests abroad. As for his nomination to be secretary of defense, it is well worth noting that Senator Hagel is a combat veteran who has hands-on experience in the field. The battlefield is not just theory for him."

Cooper, in his response to Gay City News on December 27, did not specifically address the reasons for offering two such disparate views on Hagel, but he did note that LCR has been on record in favor of tough sanctions against Iran since early in his tenure as the group's executive director.

The following day, Cooper announced he would be leaving the group effective December 31. The Washington Blade

confirmed his statement that he told an LCR group in late October he planned to step down at the end of the year. His replacement, however, New York State LCR chair Gregory T. Angelo, was named only on an interim basis.

Responding to widespread media and online speculation that LCR ran the Times ad at the behest of Republican neo-cons — and with their financial support — Cooper told the Blade that it was paid for by members of the group.

The National Gay and Lesbian Task Force, responding to a query from the newspaper for its December 14 article about Hagel, voiced strong concerns not only about his record on LGBT rights, but also his views on a woman's right to choose and on issues of concern to communities of color.

Stacey Long, NGLTF's director of public policy and government affairs, wrote in an email, "Despite former Senator Chuck Hagel's early criticism of the war in Iraq after voting to authorize it, we are gravely concerned about his track record on

civil rights and opposition to LGBT equality while a member of the Senate. Cabinet choices help set the tone for an administration, and we believe it is critical that those members support the values of respect, inclusiveness, and the belief in a level playing field for all — and that includes for LGBT people and women in general. We are very concerned that someone with such a poor record on these issues is under consideration to become secretary of defense."

Neither HRC nor Hagel responded to Gay City News' request for comment at that stage in the public discussion of his possible nomination.

Pundits handicapping Hagel's chances of actually being nominated have typically distinguished between criticism on the right — about Israel and Iran — and that from the political left, where gay rights, women's rights, and other issues have been emphasized. The LCR ad is the first public volley against Hagel that has merged the two lines of critique, and its ad was featured prominently on the conservative Weekly Standard's blog.

## ▶ COURT RULINGS, from p.4

two other dissenters were not willing to go so far, and wrote separately to endorse most but not all of Nelson's opinion.

**In Wisconsin, the Court of Appeals**, an intermediate bench, issued a more favorable decision, on December 20, in a lawsuit involving the rights of same-sex couples. Wisconsin also has a marriage amendment, but this one goes farther than Montana's, providing that the Legislature may not create a "legal status" for same-sex couples "substantially similar" to marriage. A few years after the amendment was enacted, the Legislature passed a Domestic Partnership Registration Act, which established a status of "domestic partner" and amended several state laws to provide that domestic partners be treated equally with married couples for specified purposes. A group of proponents of the marriage amendment filed suit against that statute.

Affirming a circuit court ruling, the Court of Appeals found that the plaintiffs failed to show that the new domestic partnerships are "substantially similar" to marriage, noting the law provided a list of rights for domestic partners that fell significantly short of conferring all the rights of marriage. Based on a review of the amendment proponents' statements during the campaign to enact it, the court also found they had explicitly disavowed any intent to block the state from recognizing same-sex partners for specific purposes, instead intending only to prevent "Vermont-style" civil unions.

**Federal appeals courts also issued some notable rulings last month.**

On December 17, the Sixth Circuit Court of Appeals, based in Cincinnati, upheld a ruling in favor of the University of Toledo, which had discharged its associate vice president for human resources, Crystal Dixon, after she published an anti-gay op-ed article in the Toledo Free Press.

In an editorial criticizing the university's failure to extend domestic partnership benefits to employees at a newly merged medical campus, the Free Press compared the gay rights movement to the push for black civil rights and disability rights. In a response, Dixon wrote, "As a Black woman who happens to be an alumnus of University of Toledo's Graduate School, an employee and business owner, I take great umbrage at the notion that those choosing the homosexual lifestyle are 'civil rights victims.'" She went on to talk about "thousands of homosexuals" leaving "the gay lifestyle" through "Exodus International," while defending the university's benefits policy.

Apparently appalled, the university's president suspended and then discharged Dixon and published a statement disassociating the school from her remarks. Dixon claimed that her First Amendment rights were violated, but the court held that the university was free to discharge a person in her position for making public statements contrary to its policies. The court also rejected her equal protection argument, finding she could not show that another employee with her responsibilities — enforcing the university's civil rights policies — had

been retained after making public statements in conflict with those policies.

**The US District Court in Alabama**

issued a notable ruling on December 21, finding that changes in medical knowledge and treatments for HIV infection put that state Department of Corrections policy on inmates living with HIV at odds with the Americans with Disabilities Act. In the 1990s, the Atlanta-based 11th Circuit Court of Appeals rejected a similar claim challenging the policy of strictly segregated housing for positive inmates, but District Judge Myron H. Thompson pointed out the prior decision was based on medical knowledge at the time. The world of HIV in prisons has moved on, he found, noting that inmates compliant with their treatment regimens presented little risk of HIV transmission to others.

The state was given the opportunity to propose a program to comply with the ruling, rather than having a solution imposed on it.

**The Iowa US District Court**

on December 12, ruled in favor of Lambda Legal's claim that the state Department of Health (DPH) should not have refused to list both members of a married lesbian couple, Jessica and Jennifer Buntmeyer, as parents on the Certificate of Fetal Death issued when Jessica gave birth to a stillborn infant. The women married in Iowa in 2010, and their child was stillborn in October 2011. Indicating that the couple was married, the women submitted a Certificate listing Jessica as "mother" and Jennifer as "father." DPH removed Jennifer's name,

leaving the "father" space blank.

DPH argued its job is to maintain "accurate and complete records and statistics," and that listing Jennifer as "father" would make the record inaccurate. The court disagreed, accepting Lambda Legal's argument that under the Iowa Supreme Court's unanimous marriage decision, same-sex marriages are to be treated the same under state law as different-sex marriages. The right of both parents to be listed on the Certificate, it found, would not compromise the accuracy of the Department's records.

**In a further development in the challenges to a new California law**

that bans health care providers from engaging in "sexual orientation change efforts" on minors, its opponents gained a temporary victory when they persuaded the emergency appeals panel of the Ninth Circuit Court of Appeals to block the ban from going into effect on New Year's Day. The court is considering an appeal of District Judge Kimberly Mueller's December 4 ruling that the ban does not violate the First Amendment rights of health care providers. The appellate panel issued its order on December 21.

Another judge in the same district court, William Shubb, ruling December 3 on claims brought by a different set of plaintiffs, had issued a preliminary injunction blocking the state from enforcing the new law against those specific three plaintiffs, though not any other health care providers. The Ninth Circuit's consideration of the merits in the appeal of Mueller's ruling may render Shubb's proceedings superfluous.