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Christian Legal Society v. Martinez: How an Obscure First Amendment Case Inadvertently and Unexpectedly Created a Significant Fourteenth Amendment Advance for LGBT Rights Advocates

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*CHRISTIAN LEGAL SOCIETY V.
MARTINEZ:*
HOW AN OBSCURE FIRST
AMENDMENT CASE INADVERTENTLY
AND UNEXPECTEDLY CREATED A
SIGNIFICANT FOURTEENTH
AMENDMENT ADVANCE FOR LGBT
RIGHTS ADVOCATES

MAX KANIN*

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I. INTRODUCTION

In *Christian Legal Society v. Martinez*, the Supreme Court, in an opinion authored by Justice Ruth Bader Ginsburg, held that a public law school's denial of on-campus recognition to a student group on account of its discrimination against gays and lesbians did not violate the First Amendment.¹ What was notable about this case was not simply its result but the Court's holding that it does not distinguish between gay conduct and gay status.² This Note argues that this holding creates a valuable precedent for LGBT rights advocates.

Part II of this Note discusses the background of this case and briefly summarizes LGBT civil rights law.³ Part III argues that the Court's rejection of a distinction between gay conduct and gay status expands the scope of the Court's prior decision in *Lawrence v. Texas* and creates a powerful precedent that could lead to heightened scrutiny for sexual orientation discrimination.⁴ Part IV concludes that the decision in *Christian Legal Society* signals a new direction by the Court towards sexual orientation equality.⁵

II. BACKGROUND

A. UC Hastings Anti-Discrimination Policy and the Court's Holding in *Christian Legal Society v. Martinez*.

The University of California, Hastings College of Law (UC Hastings), a

1. 130 S. Ct. 2971 (2010).

2. Debra Cassens Weiss, *Gay Rights Advocates Seize on Justice Ginsburg's 'Time Bomb'*, A.B.A. J. (Jul. 20, 2010), available at http://www.abajournal.com/weekly/article/gay-rights_advocates_seize_on_justice_ginsburgs_time_bomb.

3. See *infra* Part II (discussing the background of case law rulings against LGBT rights).

4. See *infra* Part III (arguing that the Supreme Court has linked together its holdings in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996)).

5. See *infra* Part IV (concluding that the Court's refusal to distinguish between gay conduct and gay status demonstrates the Court is becoming more supportive of LGBT rights).

state run law school in San Francisco, California, gives numerous on-campus student groups official recognition that includes a school email address, meeting space on campus, funding from the school, and numerous other benefits.⁶ In accordance with California law, UC Hastings implemented a non-discrimination policy that includes a prohibition of discrimination on the basis of sexual orientation.⁷ In 2004, the Christian Legal Society (CLS), which formed a chapter at UC Hastings, implemented a membership prerequisite where students seeking to join were required to sign a “statement of faith,” which includes an opposition and disavowal of “unrepentant homosexual conduct.”⁸

After implementing this policy, the CLS attempted to become an officially recognized on-campus group, but UC Hastings denied the petition on account of the CLS’s discriminatory policies, particularly those against gays and lesbians.⁹ After this denial, the CLS filed a suit in federal court alleging that UC Hastings violated its First Amendment rights to free speech and association. On April 17, 2006, the Northern District of California granted summary judgment in favor of UC Hastings, holding that UC Hastings did not violate CLS’s First Amendment rights.¹⁰ On March 17, 2009, the Ninth Circuit Court of Appeals, in a two-sentence opinion, affirmed the lower court’s decision, and the Supreme Court granted certiorari on December 7, 2009.¹¹

The Court initially held that it would only analyze the “all comers policy,” a policy requiring registered student groups to accept any student as a fully participating member, pursued by UC Hastings and not the school’s prohibition against sexual orientation discrimination.¹² On the merits, the Court applied the public forum doctrine to the facts of the case.¹³ The Court first determined that because the “all comers policy” was part of an attempt to further the important educational goals of the school,

6. *Christian Legal Soc’y*, 130 S. Ct. at 2978-79.

7. *Id.* at 2979.

8. *Id.* at 2980.

9. *See id.* at 2980 (explaining that the CLS was the first student group to be denied official recognition by UC Hastings).

10. *Christian Legal Soc’y v. Kane*, 2006 WL 997217 (N.D. Cal. May 19, 2006).

11. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010); *Christian Legal Soc’y v. Kane*, 319 F. App’x 645 (9th Cir. 2009).

12. *See Christian Legal Soc’y*, 130 S. Ct. at 2982, 2984 n.10 (advising that the majority did not agree with the dissent’s argument that the anti-discrimination policy was unconstitutional but would not devote time to analyzing an issue that was not properly before the Court).

13. *See id.* at 2984 (explaining that under the First Amendment, the Court evaluates a restriction of speech in a public forum as to whether it is both reasonable and viewpoint neutral).

the “all comers policy” was a reasonable content-based restriction.¹⁴ The Court then determined that because the “all comers policy” was facially applicable to all clubs at UC Hastings, the restriction was viewpoint neutral.¹⁵ Rejecting the argument of the CLS that the group only expressed a viewpoint against “homosexual conduct,” the Court responded by explaining that the Court did not distinguish between the status and conduct of gays and lesbians.¹⁶ Accordingly, the Supreme Court upheld UC Hastings’s policy, holding that the policy did not violate the First Amendment free speech rights of the CLS.¹⁷ The rejection of a distinction between gay status and gay conduct is significant in light of LGBT Rights Jurisprudence.

B. History of LGBT Rights Jurisprudence

Traditionally, courts have not offered an amicable environment for LGBT rights.¹⁸ The Supreme Court, which has heard few cases involving LGBT rights, was traditionally no exception.¹⁹ Given this traditionally hostile attitude of courts, it is perhaps not surprising that courts have often upheld statutes and federal agency decisions that discriminate against gays and lesbians.²⁰ Courts reached these conclusions using rational basis review, an approach extremely deferential to the government.²¹ Numerous

14. *See id.* at 2991 (holding that the “all comers policy” of UC Hastings was reasonable).

15. *See id.* at 2993-94 (holding that just because a regulation has a differential impact on a group seeking to discriminate does not render the regulation viewpoint discriminatory).

16. *See id.* at 2990 (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

17. *See id.* at 2995 (affirming and remanding to the Ninth Circuit for a determination of whether the “all comers policy” had been selectively enforced against the CLS, provided that the issue was preserved on appeal); *see also* *Christian Legal Soc’y v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010) (dismissing the case as the issue had not been properly preserved for appeal).

18. *See, e.g.*, *Bottoms v. Bottoms*, 457 S.E.2d 102, 108-09 (Va. 1995) (ordering that a gay mother be deprived of custody of her son because of the “social condemnation” a child would face from her “active lesbianism”); *In re Kaufmann’s Will*, 20 A.D.2d 464, 485 (N.Y. App. Div. 1964) (invalidating the will of a gay testator to his long time life partner because the will was procured from that life partner’s “insidious, unnatural influence” upon the gay testator).

19. *See* *Boutilier v. I.N.S.*, 387 U.S. 118, 122-23 (1967) (holding that a gay immigrant could be deported because all gay people possessed “psychopathic personalities”); *see also* JOYCE MURDOCH & DEB PRYCE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 13-14* (2001) (describing the Supreme Court’s jurisprudence on LGBT rights as the “Gay Exception” to the Constitution).

20. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (affirming the FBI’s decision to revoke an employment offer to a top-ranked recruit because she was openly gay).

21. *See, e.g.*, *Ben-Shalom v. Marsh*, 881 F.2d 454, 464, 466 (7th Cir. 1989) (applying rational basis standard of review to determine that the Army’s discharge of a decorated soldier for being gay did not violate the soldier’s equal protection rights).

legal scholars have long argued that courts should evaluate sexual orientation discrimination under a higher standard.²² Federal appellate courts, however, have uniformly held that rational basis review applies to sexual orientation discrimination and, until very recently, state courts had followed the same path.²³

The big breakthrough for LGBT rights advocates came in 1996 when the Supreme Court, in *Romer v. Evans*, held that a voter backed anti-gay Colorado constitutional amendment, which prohibited any entity in the state from passing laws prohibiting discrimination against gays, lesbians, and bisexuals, violated the Equal Protection Clause.²⁴ The Court did not address what level of scrutiny applied to sexual orientation discrimination.²⁵ Another significant breakthrough occurred in 2003. In *Bowers v. Hardwick*, the Supreme Court upheld the constitutionality of laws that prohibit gays and lesbians from engaging in consensual sex with the person of their choice, denying gays and lesbians a right to their own identity.²⁶ In *Lawrence v. Texas*, the Supreme Court repudiated its prior decision in *Bowers v. Hardwick*.²⁷ Reversing itself, the Court held that laws prohibiting private consensual sex violated the Due Process Clause.²⁸

Notwithstanding these two cases, federal courts have not applied heightened scrutiny to sexual orientation discrimination. Courts, construing *Romer* narrowly, have continued to apply rational basis review and uphold laws that discriminate on the basis of sexual orientation.²⁹ Similarly, interpreting *Lawrence* narrowly, courts construe it to only apply

22. See, e.g., Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Sexual Orientation*, 57 S. CALIF. L. REV. 797, 797-98 (1984) (arguing that sexual orientation fits within preexisting parameters for establishing heightened scrutiny).

23. See *United States Army v. Watkins*, 875 F.2d 699, 699 (9th Cir. 1989) (vacating the only federal appellate decision to hold that sexual orientation discrimination required heightened scrutiny); see also *Conaway v. Deane*, 932 A.2d 571, 613-14 (Md. 2007) (holding that sexual orientation has “not come of age” to be a suspect classification).

24. See 517 U.S. 620, 635-36 (1996) (holding that a state cannot make an entire class of its citizens “strangers to the law” consistent with the Equal Protection Clause).

25. See *id.* at 632 (holding that Amendment 2, the anti-gay Colorado Constitution Amendment, fails even deferential rational basis review).

26. See 478 U.S. 186, 192-94 (1986) (retorting that the argument that gays and lesbians have a fundamental liberty interest to engage in consensual sex is “facetious”).

27. See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (overruling *Bowers* as a decision that was wrongly decided because it failed to provide a due process analysis of the liberty interest raised).

28. See *id.* at 578-79 (holding that the right to liberty in the Due Process Clause gives gays and lesbians a right to engage in consensual sexual conduct without government intervention).

29. See, e.g., *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997) (suggesting that the Supreme Court rejected strict scrutiny review for sexual orientation discrimination in *Romer*).

to conduct in the privacy of the bedroom.³⁰ The greatest advancement for LGBT rights actually comes from the California Supreme Court, which, in a landmark 2008 decision, held that sexual orientation discrimination was subject to strict scrutiny under the Equal Protection Clause of the California Constitution.³¹ This decision has proven highly influential, as other state courts adopted it, a number of federal courts endorsed it, and most recently the Department of Justice accepted it.³² LGBT rights advocates are left to wonder whether the United States Supreme Court will follow the California Supreme Court as it has done in the past.³³

III. ANALYSIS

A. The Rejection of the Distinction Between Gay Status and Gay Conduct Creates a Significant Precedent by Broadening the Protection of Lawrence v. Texas and Making the Decision Applicable in Equal Protection Cases.

1. By Holding That the CLS Lacked a First Amendment Right to Discriminate Against Gay Conduct, the Court Broadened the Protective Scope of Lawrence v. Texas Beyond the Privacy of the Bedroom.

Lawrence v. Texas has stood for the powerful proposition that the Due Process Clause constitutionally protects gay and lesbian conduct.³⁴ Most courts, however, have adopted a narrow reading of *Lawrence*, applying the decision only to private sexual conduct within the bedroom and not to cases

30. See, e.g., *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 810 (11th Cir. 2004) (noting that the adoption of a child is not private but instead a "public act").

31. See *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008) (holding that the state's same-sex marriage prohibition was unconstitutional under the strict scrutiny standard); see also *Strauss v. Horton*, 207 P.3d 48, 78 (Cal. 2009) (reaffirming that sexual orientation discrimination receives strict scrutiny).

32. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (finding that evidence at trial proves sexual orientation discrimination should be subject to heightened scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (holding that sexual orientation discrimination is subject to heightened scrutiny); Eric H. Holder, Jr., *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, DEPT. OF JUSTICE, (Feb. 23, 2011), <http://www.justice.gov/print/PrintOut2.jsp> (writing that the DOJ will no longer defend DOMA as it does not survive heightened scrutiny).

33. Cf. *Loving v. Virginia*, 388 U.S. 1, 6 n.6 (1967) (acknowledging the California Supreme Court as the first court to recognize the unconstitutionality of interracial marriage prohibitions); *Perez v. Sharp*, 198 P.2d 17, 19 (Cal. 1948) (holding that California's interracial marriage ban violates both the Due Process and Equal Protection Clauses of the Constitution).

34. See *Witt v. Dep't of Air Force*, 527 F.3d 806, 813 (9th Cir. 2008) (holding that *Lawrence* requires a heightened form of scrutiny for governmental restrictions against gay and lesbian conduct in a challenge against Don't Ask Don't Tell).

of institutionalized discrimination.³⁵ This narrow interpretation of *Lawrence* falls in line with the Supreme Court's jurisprudence that privacy rights may be more restricted and controlled than other non-privacy related constitutional rights but has been problematic for gays and lesbians facing institutional discrimination.³⁶

What makes this narrow reading of *Lawrence* problematic for gays and lesbians is that gay and lesbian conduct is often unrelated to private sexual conduct. For example, a lesbian high school student who wants to go to the prom with another girl or a gay professional athlete who wants his boyfriend to attend his games are not engaging in private conduct in the bedroom.³⁷ A narrow reading of *Lawrence* does not protect these individuals because their gay conduct is public rather than private. Under this narrow reading, the protection of gay conduct by *Lawrence* would not apply to gay and lesbian law students seeking to join an on-campus club at a law school.³⁸

By rejecting the distinction between conduct and status, the Supreme Court has rejected the narrow view of *Lawrence*.³⁹ Had the Supreme Court accepted this view, it seems likely that the Court would have held that the denial of official on-campus recognition to the CLS for requiring members to sign its statement of faith was a violation of its First Amendment rights.⁴⁰ After all, if the distinction between conduct and status is accepted, the CLS is merely expressing their view of opposition to gay and lesbian conduct and UC Hastings is impermissibly restricting their viewpoint.⁴¹

35. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (explaining that *Lawrence* is inapplicable to a gay parent adoption ban because *Lawrence* only protects private sexual conduct).

36. See *Washington v. Glucksberg*, 521 U.S. 702, 778 (1997) (Souter, J., concurring) (pointing out that a woman has the right to an abortion but that the government has a legitimate interest in discouraging abortion).

37. Cf. *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, 705-06 (N.D. Miss. 2010) (issuing an injunction against a public high school for violating the First Amendment rights of a lesbian student by preventing her from wearing a tuxedo and bringing her girlfriend to the high school prom); Bryony Jones, *Cricketer Offers to Help Other Gay Sportsmen*, CNN.COM (Mar. 4, 2011), http://www.cnn.com/2011/SPORT/03/04/uk.cricket.davies.gay/index.html?section=cnn_latest (reporting on the decision of an active twenty-four year old English star cricket player, Steven Davies, to announce he was gay).

38. Cf. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2989 (2010) (explaining that the "all comers policy" is interpreted by UC Hastings to require that on-campus groups accept all students as members and potential group leaders).

39. See *id.* at 2990 (responding that to accept the CLS's arguments for a conduct-status distinction would impose a "daunting" burden upon UC Hastings).

40. See *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (holding that the CLS had a First Amendment right to require members to sign a statement of faith that expressed opposition to gay conduct).

41. See *id.* at 860 (explaining that the CLS was not discriminating on the basis of sexual orientation because the group did not bar gays and lesbians from group

What is interesting to note for purposes of equal protection is that the reasoning of the CLS's defense is akin to numerous government defenses of discriminatory legislation that have successfully distinguished *Lawrence*.⁴² Courts have upheld governmental discrimination against gays and lesbians on the basis that governmental policies expressing an opposition to gay conduct are different from laws prohibiting gay and lesbian conduct in the privacy of the bedroom.⁴³ Thus, the position of the CLS was similar to that of governmental entities in that the CLS did not (and could not) prohibit gay and lesbian conduct but merely expressed its opposition to that conduct.⁴⁴

What the Supreme Court has recognized in *Christian Legal Society* is that discrimination on the basis of gay and lesbian conduct, in this instance the requirement of gays to renounce their identity in order to join a club, is indistinguishable from outright discrimination against gays and lesbians for their status.⁴⁵ Thus, by rejecting the CLS's argument, discrimination on the basis of gay conduct is prohibited just as much as an outright prohibition of gay conduct in private is under *Lawrence*. In this way, the Court has extended the reach of *Lawrence* because gay conduct is not simply protected in the privacy of the bedroom, but it is also protected from discrimination outside the privacy of the bedroom as well.

2. By Rejecting the Distinction Between Gay Status and Gay Conduct, the Supreme Court has Tied Together the Holdings of Lawrence and Romer and Created a New Precedent for Moving to a Heightened Level of Scrutiny for Sexual Orientation Discrimination.

The Supreme Court's decision in *Romer* is seen as providing protection against discrimination on the basis of gay status.⁴⁶ Some courts have

membership).

42. Compare *Christian Legal Soc'y*, 130 S. Ct. at 2990 (taking into account CLS's argument that it does not discriminate against gays and lesbians but simply expresses its opposition to gay and lesbian conduct), with *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (holding that *Lawrence* does not invalidate Don't Ask Don't Tell because Don't Ask Don't Tell does not prohibit private gay and lesbian conduct inside the home).

43. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring) (arguing that same-sex marriage prohibitions do not discriminate on the basis of sexual orientation because gay men can still marry women and lesbian women can still marry men).

44. See, e.g., *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion) (holding that the government could prohibit same-sex marriage because it has a rational interest in encouraging procreation and traditional child rearing).

45. See *Christian Legal Soc'y*, 130 S. Ct. at 2990 (analogizing that discrimination against gay conduct is discrimination against gay status in the same way that taxing Jews for wearing yarmulkes is discrimination against Jews).

46. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (arguing that *Romer* applied a level of scrutiny to sexual orientation

interpreted the Supreme Court's decision in *Lawrence* as providing at least a strong protection against prohibitions of gay conduct.⁴⁷ However, these two decisions have often been seen as separate decisions inapplicable to each other because both cases rested on different constitutional provisions.⁴⁸ Therefore, courts acknowledge that *Lawrence* protects gay conduct but find that *Lawrence* is inapplicable to discrimination on the basis of gay status and apply rational basis review to sexual orientation discrimination under the Equal Protection Clause.⁴⁹

By rejecting the distinction between gay status and gay conduct, the Supreme Court has changed the equation for courts in cases involving challenges to laws that discriminate on the basis of sexual orientation.⁵⁰ It is now clear that discrimination on the basis of gay conduct is the same as discrimination on the basis of gay status, and the two cannot be distinguished from each other.⁵¹ This is an important holding if, as some courts argue, *Lawrence* does require a heightened standard of review for discrimination on the basis of gay conduct.⁵² If rational basis review is no longer an applicable standard for evaluating discrimination on the basis of gay conduct, then by the fact that there is no difference between gay status and gay conduct, rational basis review cannot be the proper standard of review for sexual orientation discrimination under the Equal Protection Clause.⁵³

This is crucial for LGBT rights advocates because if sexual orientation discrimination is subject to heightened scrutiny, courts would likely find most types of governmental discrimination against gays and lesbians

discrimination greater than rational basis review).

47. See *Witt v. Dep't of Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (concluding that the Supreme Court applied a form of heightened scrutiny in *Lawrence*).

48. See, e.g., *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 n.3 (8th Cir. 2006) (explaining that the Court's decision in *Lawrence* is inapplicable to an equal protection challenge to a same-sex marriage prohibition because *Lawrence* only rested on Due Process Clause grounds).

49. See, e.g., *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (holding that *Lawrence* does not alter the level of scrutiny for sexual orientation discrimination under the Equal Protection Clause).

50. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 979 (N.D. Cal. 2010) (citing to *Christian Legal Society* for the proposition that discrimination against gay conduct cannot be distinguished from discrimination on the basis of gay status).

51. See *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (explaining that the Court has never distinguished between gay status and gay conduct).

52. Cf. *Witt*, 527 F.3d at 825-26 (Canby, J., concurring and dissenting) (arguing that it is illogical to subject discrimination against gay conduct to heightened scrutiny under the Due Process Clause but not to sexual orientation discrimination under the Equal Protection Clause).

53. Cf. *id.* at 825 (pointing out that *Lawrence* did not engage in an equal protection analysis in order to render an opinion that was more protective of gay rights).

unconstitutional.⁵⁴ For LGBT rights advocates, the application of rational basis review for sexual orientation discrimination has required finding creative, albeit unsuccessful, ways to subject discrimination to heightened scrutiny.⁵⁵ However, with no distinction between gay conduct and gay status, a potentially powerful precedent has been created that could lead to courts applying heightened scrutiny to all sexual orientation discrimination, not just discrimination on the basis of gay conduct.

IV. CONCLUSION

The Court's rejection of the distinction between gay conduct and gay status has broadened the protective scope of *Lawrence v. Texas* and laid the groundwork for heightened scrutiny of sexual orientation discrimination. Justice Ruth Bader Ginsburg who, as a young attorney, established heightened scrutiny for gender discrimination has been often quoted as saying that "Justice is not to be taken by storm. She is to be wooed by slow advance."⁵⁶ Certainly the lack of progress for LGBT rights advocates in the aftermath of the decisions in *Romer* and *Lawrence* is demonstrative of this quote. However, if justice for gays and lesbians is heightened scrutiny for sexual orientation discrimination, *Christian Legal Society* is certainly an advance towards justice.

54. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (holding that there is no need to determine whether the standard of review for sexual orientation discrimination is strict scrutiny or intermediate scrutiny because the same-sex marriage prohibition cannot survive even intermediate scrutiny).

55. See, e.g., Heather Hodges, Note, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER SOC. POL'Y & L. 93, 118 (1996) (arguing that same-sex marriage prohibitions are unconstitutional as they discriminate on the basis of gender).

56. See Kathleen G. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 739-43, 752-54, 763-64 (2002) (explaining how Justice Ginsburg won a series of seemingly small cases challenging obscure laws that often discriminated against men instead of women); MURDOCH & PRYCE, *supra* note 19, at 1.