WEAPONIZING CIVIL LIBERTIES: A CRISIS LENS ANALYSIS TO SEX, GENDER, AND SEXUALITY EQUALITY

Aníbal Rosario Lebrón
**Bench press**

United States, judicial confirmations by president, 1981-2020*

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**Appeals courts**

Trump  
Clinton  
Obama  

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

**District courts**

Trump  
Clinton  
Obama  

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

Source: Federal Judicial Centre

*To Feb 13th

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**Circuit Makeup and Vacancies**

- **82** (D)–Nominated
- **86** (R)–Nominated
- **30** Trump Nominees Confirmed
- **3** Current and Known Future Vacancies (No Nominees Pending)
- **2** Current and Known Future Vacancies (Nominees Pending)

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*Chief Judge Roger Gregory is counted as (R)–nominated, but was re-nominated by Bill Clinton before being nominated by George W. Bush.*
STATE RFRA MAP


NONDISCRIMINATION LAWS

Public accommodations and places of public accommodation are defined as any place of public accommodation that is used by the public, such as restaurants, shops, and hotels. These places are required to provide equal protection to all patrons, regardless of their sexual orientation or gender identity. If you feel that you have experienced discrimination based on sexual orientation or gender identity, you can contact a legal aid organization or seek legal advice.

Other rights may exist, but are not recognized in this map. If you believe your rights are not protected, contact a legal aid organization or seek legal advice.

- State law explicitly prohibits discrimination based on sexual orientation and gender identity.
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- State law explicitly prohibits discrimination based on sexual orientation and gender identity.
- No explicit prohibitions for discrimination based on sexual orientation or gender identity in state law.
Arlene's Flowers v. State of Washington; The Downtown Soup Kitchen v. Anchorage; Bostock v. Clayton County  
• Trying to exempt public accommodation Anti-discrimination laws  
• Denying protection services based on gender  
• Attempting to circumvent employment protection to gender non-conforming individuals  

Catholic Charities West Michigan v. Michigan Department of Health and Human Services  
• Depriving same-sex families the right to raise children/have a family  

Schwartz v. City of New York  
•Attempting to continue with Conversion Therapy  

March for Life Education and Defense Fund v. California, Hobby Lobby  
• Restricting access to reproductive medical services  

Meriwether v. Shawnee State University; Vlaming v. West Point School Board  
• Refusing recognition of trans-people
<table>
<thead>
<tr>
<th>Case Study</th>
<th>Description</th>
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</thead>
<tbody>
<tr>
<td>National Institute of Family and Life Advocates v. Becerra</td>
<td>• Preventing women from accessing accurate family-planning information</td>
</tr>
<tr>
<td>Schwartz v. City of New York</td>
<td>• Attempting to continue with Conversion therapy</td>
</tr>
<tr>
<td>Telescope Media Group v. Lindsey; Arlene’s Flowers v. State of Washington;</td>
<td>• Trying to exempt public accommodation discrimination against LGBTQ+</td>
</tr>
<tr>
<td>Masterpiece Cakeshop v. Colorado Civil Rights Commission</td>
<td>individuals)</td>
</tr>
<tr>
<td>Meriwether v. Shawnee State University; Vlaming v. West Point School Board</td>
<td>• Refusing recognition of trans-people</td>
</tr>
</tbody>
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“Once a defense of the powerless, the First Amendment over the last hundred years has mainly become a weapon of the powerful. Legally, what was, toward the beginning of the twentieth century, a shield for radicals, artists and activists, socialists and pacifists, the excluded and the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections.”

Catherine MacKinnon p. 140

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Conservatives in Charge, the Supreme Court Moved Right

Justice Anthony M. Kennedy's last Supreme Court term contained hints of his retirement and foreshadowed a lasting rightward shift.

And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy. Today is not the first time the Court has wielded the First Amendment in such an aggressive way. . . . And it threatens not to be the last. . . . And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance . . .


David Schwartz, Orthodox Jewish therapist, challenges New York City's ban on gay conversion therapy

David Schwartz, Orthodox Jewish therapist, challenges New York City’s ban on gay conversion therapy

Why the N.Y. City Council made the ‘painful’ decision to repeal its ban on conversion therapy

Attorneys from the Alliance Defending Freedom, a conservative Christian nonprofit that advocates religious freedom, filed a lawsuit Wednesday on Mr. Schwartz’s behalf in the U.S. Eastern District Court of New York.

“Dr. Schwartz fears he may be the target of an enforcement action under the newly enacted Counseling Censorship Law,” the lawsuit states. “This knowledge in turn inevitably shifts what should be a free and unfettered confidential conversation between psychotherapist and patient concerning deeply personal feelings and decisions, where counsel is crucial.”
Animus Doctrine

Ginsburg wrote

Dissenting opinion
Ginsburg says the majority is making false comparisons between bakers who refused to create specific cakes with an offensive message and a refusal based on homosexual identity.

joined

Sotomayor

Kagan wrote

Concurring opinion
Kagan says states can distinguish between bakers who refuse offensive requests and those who deny service based on identity, but only "if the State's decisions are not infected by religious hostility or bias."

joined

Concurring opinion
Kennedy writes that a Colorado state commission was impermissibly hostile to the baker's religious beliefs but reaffirmed protections for gay rights. The ruling didn't decide whether the refusal to bake for the marrying couple was legal.

joined

Gorsuch wrote

Majority Opinion
Kennedy doesn't distinguish between the bakers' different kinds of service denials—i.e., a specific, offensive cake as opposed to an event that offends—as they are all ideological refusals.

joined

Thomas wrote

Concurring opinion
Partial concurrence
Thomas argues that the least popular opinions should be protected under the First Amendment and that the refusal to bake for a same-sex wedding could certainly qualify because it's outside "the new orthodoxy."
“The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.”

The Interregnum
Wait for a turn of the tide in terms of judges.

Revert to less expansive interpretations.

Amplifying constitutional protections through legislative action.

Abolish the state action requirement.

“Symmetric Constitutionalism” (Zachary Price)

Processuality

Organicity

Morbidity
"Rethinking State Action" (1985)

- Postivism
- Natural Rights
- Consensual

Prof. Erwin Chemerinsky
Horizontal Direct Effect

✓ Tutela
✓ Amparo
✓ Constitutional Tort

AMPLIFYING CONSTITUTIONAL PROTECTIONS THROUGH LEGISLATIVE ACTION