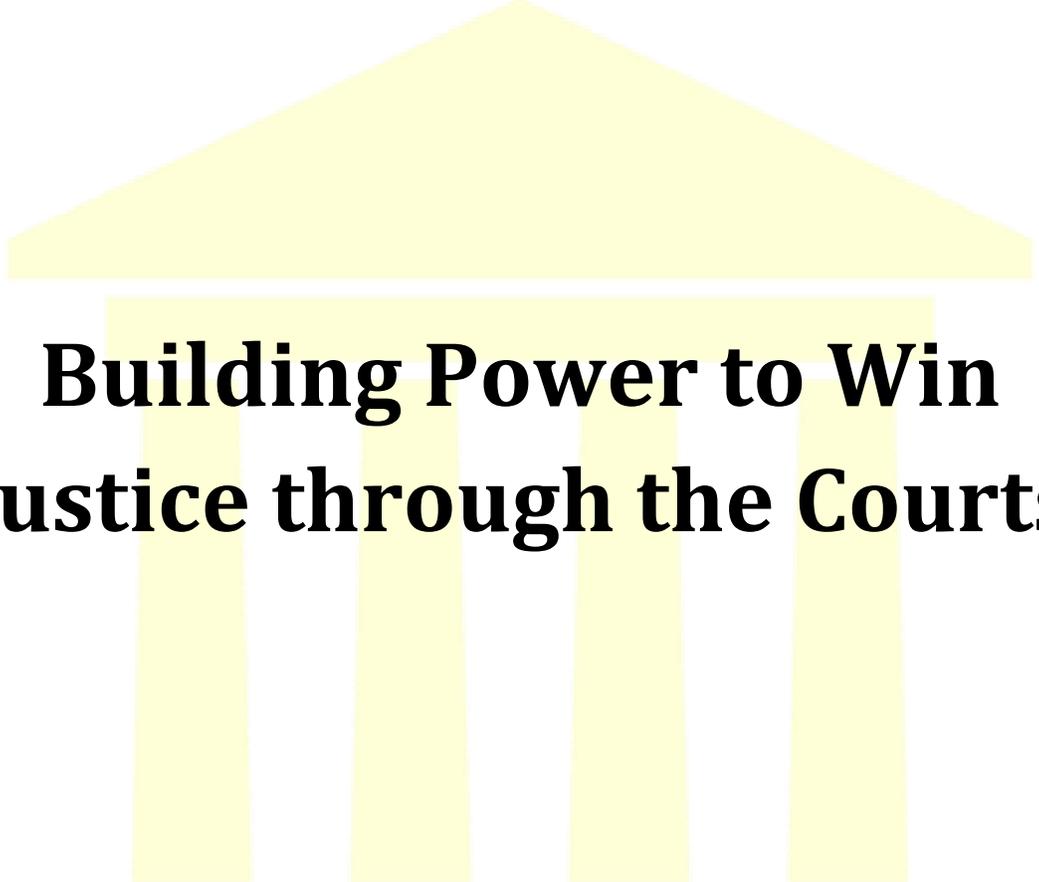


COURTS MATTER



**Building Power to Win
Justice through the Courts**

YOUNG

PEOPLE

FOR

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To help you better understand the courts and their role in advancing positive social change, this toolkit includes an overview of courts' role in the progressive movement, a breakdown of the structure of the judicial system, and an examination of state and federal courts, with case studies for each. Additionally, you will find explanations about the ways in which courts have influenced, and continue to influence, some of the many issues progressives have been fighting for.

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WHY COURTS MATTER TO THE PROGRESSIVE MOVEMENT

The courts are undeniably important in our political and social life. For most of our history, they have been a huge obstacle to social change. The *Dred Scott* decision (1857), which upheld slavery as an institution and denied African-Americans the right even to bring lawsuits in federal court, is a towering example of racist conservatism on the Supreme Court. At other times, the federal judiciary has been a crucial avenue through which progressives have advanced social progress: think of *Brown v. Board of Education* (1954), which struck down racial segregation in public schools, or *Roe v. Wade* (1973), which established women's reproductive freedom in matters of abortion rights.

Our Constitution itself has a progressive character and can be read as a record of exciting democratic struggle and victories. Most amendments to the U.S. Constitution have been progressive efforts to expand voting rights and citizenship, increase popular democracy, and open the society up to people who have faced disenfranchisement and discrimination. The 13th Amendment abolished slavery and involuntary servitude; the 14th Amendment established equal protection and due process; the 15th Amendment prohibited race discrimination in voting; the 24th Amendment banned poll taxes; and the 26th Amendment lowered the voting age to 18.

While constitutional amendments have often been *necessary* to effect sweeping social and political changes, they have not always been *sufficient*. Without a strong Supreme Court and federal judiciary committed to enforcing the rights embodied in the text, powerful reactionary forces have often moved swiftly and effectively to nullify and reverse the constitutional gains of the people. We see the same with landmark progressive laws, which have little effect if biased judges undercut them. Durable social progress, therefore, requires a judiciary that will defend – or at least not thwart – the unfolding progressive will of the people.

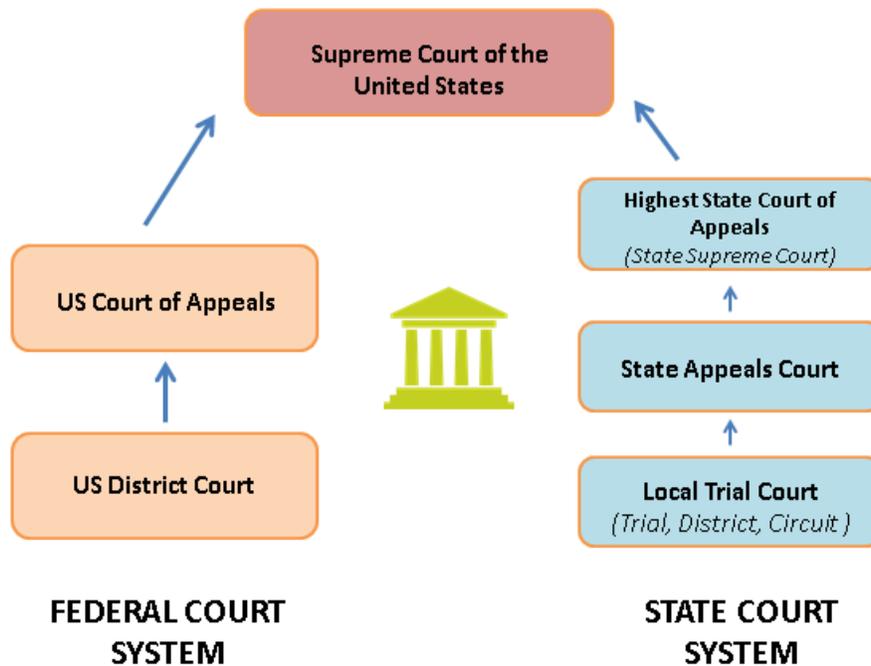
For decades, conservatives have understood the power and importance of the courts to winning on their issues. Ever since the 1960s and 1970s, they have worked to fill courts at every level of government with judges to defend the interests of wealth, power, and privilege, leading to a marked shift towards the right in terms of court rulings. From the Supreme Court's *Citizens United* decision, which endowed corporations with the right to spend on an unlimited basis in politics, to *Shelby County v. Holder*, striking down an important provision in the Voting Rights Act, conservative judges at every level are working to erode the progressive victories we fought hard to win in the social movements of the last century.

It is crucial that progressives fight back. We must develop a federal judiciary composed of judges who represent the diversity of America and who understand how deeply their jurisprudence affects the daily life of the people. People for the American Way Foundation has been leading in this work for decades, but enduring success requires young people who are educated and engaged in the important work of defending impartial courts and the institutions of social and political justice for our communities.

HOW COURTS WORK: OUR JUDICIAL SYSTEM EXPLAINED

In the United States, there are two main “tracks” of courts that work in parallel with one another: the **state courts** and the **federal courts**, which are granted power from the state and federal government, respectively. While each track is different in many ways, they function similarly and are both comprised of different types of courts, through which cases can move.

Because each state governs its own courts, there is a lot of variation among state court systems. Names for the different levels of courts vary, and there can be extra “layers” in addition to the ones presented in the generalized chart above.



Other types of courts exist beyond the state and federal ones. **Tribal Courts** are established by American Indian and Alaska Native tribes for resolving criminal and other legal matters, such as civil disputes. Their powers are dictated by Congress, and they are prohibited from prosecuting non-Indians and major crimes (even if the offenses occur on tribal lands). Other courts, such as **military courts** and the **Court of Claims**, are dealt with differently than regular state and federal courts and will not be covered here.

State Court System

While each state has its own unique court system, most follow a common structure comprised of three different types of courts: **local trial courts, state appellate courts, and the state's highest appellate court** (often referred to as a state's Supreme Court). Depending on the state, judges are either elected or are appointed by the Governor and confirmed by state legislatures to state courts. State courts address cases pertaining to state law and are of "general jurisdiction" – meaning anyone can bring their case, whatever it may address, to a state court. The different types of state courts generally are:

- **Local trial courts:** also referred to as District or Circuit courts in some states, trial courts often focus on a particular issue area (drug courts, family courts, traffic courts, etc.). They are the entry point for court cases in the state judicial system, where plaintiffs and lawyers present evidence to a judge and jury in order for a ruling to be made.
- **State Appellate Courts:** if a case has already been resolved in a state trial court but the decision is challenged, it is appealed to a state appellate court, which re-examines the case and determines if the first ruling was correct.
- **Highest State Court of Appeals:** a state's highest appellate court, often called a **state's Supreme Court**, reviews rulings that pertain to issues surrounding state constitutions and other issues and have been appealed to from a lower state appellate court. If one loses a case in a state Supreme Court, they can ask the U.S. Supreme Court to review the decision. However, very few cases make it to this level of review.

Federal Court System

In addition to state courts, there are federal courts. Just like the states, the federal court system has levels of courts. Within the federal court system, there are federal district courts, federal courts of appeal, and the highest court in the country, the U.S. Supreme Court. Judges are appointed to federal courts. The President must nominate a judge, usually with recommendation from one or both of the U.S. Senators from the state in which there is a vacancy. The U.S. Senate must confirm the President's nomination before the judge can serve. Unlike state courts, federal courts have "limited jurisdiction" – meaning they only hear cases pertaining to federal law, or certain cases involving a conflict between citizens of two states. The types of federal courts generally are:

- **Federal District Courts:** there are hundreds of courts in 94 federal districts serving the federal court system as the general trial courts for all federal cases, civil or criminal.
- **Federal Courts of Appeals:** there are 13 federal courts of appeals, to which people can bring cases for review if they have lost in a lower federal district court. However, appeals are not always guaranteed to be heard by a court of appeals.
- **United States Supreme Court:** the Supreme Court (SCOTUS) is at the top of the judicial branch of government and hears cases that are related to federal law or the Constitution. SCOTUS judges – known as "Justices" – are appointed by the President and approved by the Senate. They hear a very small portion of cases that are appealed to them, as is demonstrated in the Federal Courts Caseload diagram on the following page.

All of the judges on the federal courts identified above – district, courts of appeals, and Supreme Court – serve lifetime appointments.

EXAMPLES OF STATE AND FEDERAL COURT CASES

To give you a better understanding of how state and federal court systems work, we have provided case studies surrounding decisions made at different levels of state and federal courts.

State Courts

State Trial Court: *Drug Courts and Court reform*

Traditionally, sentences for people who are arrested for drug usage include time in prison or jail and/or fines but no holistic support upon reentry. As a result, these cases tend to have a high rate of recidivism (meaning people are arrested and incarcerated multiple times). In 1996, New York City opened its first drug treatment court. The Brooklyn Treatment Court connects substance-abusing defendants to drug treatment as an alternative to incarceration and offers services like mental health screenings and a vocational counselor to help participants in the program find jobs. Defendants who successfully complete treatment have their cases dismissed. There is growing evidence that drug courts have reduced substance abuse and recidivism rates.

State Supreme Court: *Milwaukee Branch of the NAACP v. Walker*

Wisconsin passed a law in 2011 requiring voters to show photo ID at the polls. Voces de la Frontera, an immigrant rights group, and the Milwaukee Branch of the NAACP brought a lawsuit, arguing that obtaining photo ID was burdensome and harmed people's right to vote. The groups filed the case at the circuit level, the first level of state courts in Wisconsin. Dane County Circuit Judge David Flanagan agreed with Voces and the NAACP and blocked the voter ID law from being implemented, allowing thousands to vote in the 2012 elections without the burdensome requirement of having to present photo ID at the polls. This case was appealed to the Wisconsin State Supreme Court, where it is now being considered.

**another WI voter ID case very similar to this one is being considered through the federal system. The decision in the federal case could affect the status of the state case.*

Federal Courts

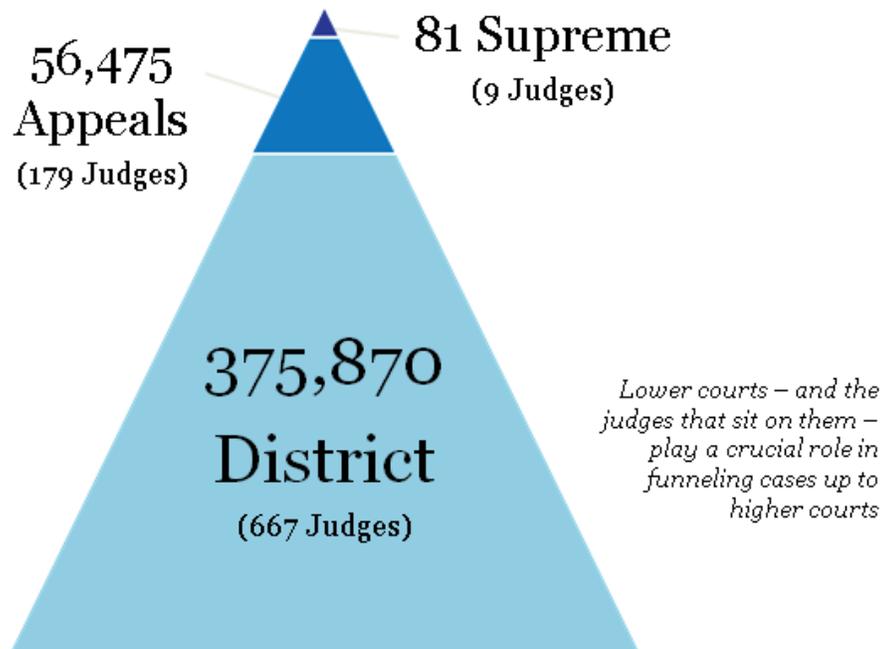
US Supreme Court: *United States v. Windsor*

Edith Windsor and Thea Spyer were a same-sex couple married in Canada and living in New York. When Thea passed away, the IRS denied Edith's claim for a federal tax exemption for surviving spouses because "spouse" only applied to marriages between a man and a woman under the Defense of Marriage Act. In 2010, she filed a lawsuit with the **federal District Court** for the Southern District of New York, which ruled in 2012 that DOMA was unconstitutional. The Department of Justice appealed this ruling to the **U.S. Court of Appeals** for the Second Circuit, which agreed with Edith and the District Court that DOMA was unconstitutional. The Department of Justice then re-appealed to the **Supreme Court**, which agreed to hear the case. On June 26, 2013, the Supreme Court ultimately agreed with the lower courts and found DOMA to be unconstitutional.

THE IMPORTANCE OF GETTING PROGRESSIVES AT ALL LEVELS ON STATE AND FEDERAL COURTS

Getting progressives on the benches of the courts is crucial if we want to win on our issues. Lower courts in the federal judicial system have the last say in the majority of cases. As you can see in the diagram below regarding federal court caseloads, only a fraction of federal district court cases make their way to federal circuit courts (also known as the U.S. Court of Appeals), and only 0.02% of all federal cases make their way to the U.S. Supreme Court. Similarly, if one loses a case at the state appellate court level, they are not guaranteed to have the case heard by a state's highest appellate court.

Federal Courts Caseload per Year



What is decided by the lower courts is often the final word – meaning that lower courts and their judges are very important in determining policy and law that affect us all. This is precisely why we must get progressives on the benches of lower *and* higher courts in both state and federal court systems!

HOW COURTS RELATE TO OUR PROGRESSIVE ISSUES

Voting Rights and the Courts

When the Constitution went into effect, the right of the people to vote depended entirely on the grace of the state legislatures, and most people were simply shut out. Women, slaves, and men without property or wealth were generally disenfranchised. We were much more a slave republic of white male property owners than what we would think of today as a popular democracy.

Successive waves of struggle for the right to vote have produced in the Constitution a series of anti-discrimination amendments to broaden suffrage rights. Today, the right to vote cannot be denied on account of race (the 15th amendment), gender (the 19th), failure to pay a poll tax (the 24th), or age once citizens reach 18 (26th). Indeed, when read together with other democracy-perfecting amendments—like the 13th (abolishing slavery), the 14th (establishing Equal Protection and Due Process), the 17th (transferring election of U.S. Senators from state legislatures to the people), and the 23rd (giving residents of the capital city the right to participate in presidential elections)—these amendments define a clear democratic impulse in the text. But nowhere does the Constitution affirmatively grant all Americans the right to vote and to be represented on an equal basis. This omission not only distances us from other modern democracies around the world but also creates huge problems for citizens trying to win the right to vote or enforce it fairly against the inevitable eruptions of hostile legislation by politicians.

The Supreme Court is crucial to the success of the voting rights of the people because it has tremendous discretion when it comes to interpreting and enforcing those rights. The major advances we have seen in the voting rights field have come under progressive Supreme Courts that have interpreted Equal Protection robustly to defend the democratic liberties and political equality of all citizens. The most important decisions arrived in the middle of the 20th Century when the Court acted with vigor to reject discrimination at the polls and assure the equality of electoral conditions and participation.

The major advances we have seen in the voting rights field have come under progressive Supreme Courts that have interpreted Equal Protection robustly to defend the democratic liberties and political equality of all citizens. In the “white primary” line of authority in the 1940s, the Supreme Court struck down a series of efforts by white supremacists in Texas to exclude African-Americans from participation in the all-important state Democratic Party primaries. Even more dramatically, the Warren Court in the 60s picked up on the organizing rhetoric of Bob Moses of the Southern Non-violent Coordinating Committee (SNCC) and spelled out the essential democratic principle of “one person, one vote.” This watershed new principle destabilized the lopsided racist gerrymanders of the South and created through Equal Protection analysis the foundation for political equality in legislative reapportionment and redistricting

across the country. It also invalidated poll taxes in state elections on Equal Protection grounds, a surprisingly radical statement given that the 24th Amendment banning poll taxes in federal elections had been added just two years before and had carefully left the poll taxes in state elections untouched. As Justice Douglas put it for the Court, “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”

But before these decades of democratic ferment within the Court, the judiciary had been a bastion of diehard opposition to voting rights challenges and reform, upholding grandfather clauses, literacy tests, and poll taxes, all instruments of racial disenfranchisement for decades after the passage of the 14th and 15th amendments. And after the zenith of the Supreme Court’s interest in defending voting rights in the Warren Court era, it returned to its posture of chilly indifference and hostility, looking the other way when it came to the denial of voting rights to African-Americans, just as it did from the late 1800s until the Warren Court era.

In the 1970’s the Court upheld the power of states to disenfranchise citizens with past felony convictions as consistent with the 14th Amendment. In the 1990’s, the Court imposed an outrageous double standard in the redistricting process by invalidating “bizarrely drawn” majority-African American and Hispanic legislative districts while upholding majority-white districts that look equally strange on a map. In *Bush v. Gore* (2000), in an unprecedented interference to stop vote-counting, another five-justice majority declared that the “individual citizen has no federal constitutional right to vote” for president, and proceeded with alacrity to stop the manual counting of more than 175,000 ballots in Florida, essentially clinching the presidential election for the very lucky Republican nominee, George W. Bush.

The Court has not only under-enforced the constitutional norms of political equality and citizen voting rights but also actively undermined federal laws adopted to protect voting rights. In *Shelby County v. Holder* (2013), the familiar conservative 5-4 majority trashed the pre-clearance procedure of the 1965 Voting Rights Act, ruling that the “coverage formula,” which had survived assault for decades, was obsolete and a violation of the heretofore unknown “equal sovereignty” rights of the states. This decision rips the heart out of the most important voting rights law in American history and leaves the voting rights of millions of African-Americans and other members of minority groups at the mercy of state and local political structures, which have already begun to revoke early voting, impose photo ID requirements, and generally put suffrage rights in a straitjacket.

In sum, because of the absence of a universal right to vote and to be represented equally in our Constitution, voting rights are especially vulnerable and dependent on judicial interpretation and enforcement. Progressive courts have given us a vision of strong one person-one vote democracy, but conservative courts have undercut that vision at every turn, leaving us with a dangerously ragged electoral process and constantly imperiled voting rights.

HOW COURTS RELATE TO OUR PROGRESSIVE ISSUES

Marriage Equality and the Courts

The gay-lesbian community has also seen dramatic changes in its favor accomplished through the dynamic interaction of political organizing, strategic litigation and the Supreme Court's dynamic interpretation of equal protection and due process liberty. When the Fourteenth Amendment was added in 1868, no one dreamed that it would be used to strike down laws criminalizing gay sex or discriminating against gay people in marriage. For most of its history, the Fourteenth Amendment was considered completely irrelevant to the gay and lesbian population, but today equal protection and due process have become essential catalysts for achieving equal rights for gay and lesbian Americans.

In 1972, the Supreme Court in *Baker v. Nelson* simply dismissed a Minnesota gay couple's marriage equality lawsuit "for want of a substantial federal question," meaning that it was not even worth talking about. In 1986, the Court majority in *Bowers v. Hardwick* upheld the use of Georgia's criminal sodomy law against gay people. It rejected the claim that due process liberty protected the right of gay people to have an intimate sexual life. Rather, the majority decision, written by Justice Byron White, framed the question as whether the Constitution confers "a fundamental right upon homosexuals to engage in sodomy." It answered in the negative, stating that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." Concurring, Chief Justice Warren Burger approvingly quoted William Blackstone's description of sodomy as "a crime not fit to be named." Burger concluded in a spirit of condemnation and judgment: "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching," he wrote.

But, while the conservative Rehnquist Court could not find anything in "equal protection" or "due process liberty" that would save gay people from criminal prosecution and imprisonment for having sex, there were huge tectonic changes underway in American political and cultural life. The Stonewall riots of 1969 unleashed a movement for gay and lesbian equality that came to reshape American culture. In 1977 Harvey Milk became the first openly gay elected official in the nation's history when he was elected to the San Francisco Board of Supervisors. And the catastrophe of AIDS in the 1980s produced a massive and cohesive response in the gay community, which built an awesome political, legal and cultural infrastructure for change across the country.

Just a decade after it upheld the criminalization of gay sex in 1986, the Supreme Court in *Romer v. Evans* rendered its first watershed decision in defense of gay civil rights. The Court struck down Colorado's "Amendment 2," which prevented cities like Aspen, Boulder and Denver from recognizing gay civil rights and locked in this selective rule forever, absent a state

constitutional amendment in favor of the gay community. Justice Anthony Kennedy, who emerged as a leading voice for civil rights for gay people on the Court, wrote for the majority that Amendment 2 could not survive equal protection “rational basis” scrutiny because it was motivated simply by animosity and prejudice. These discriminatory purposes cannot be a “rational basis” for government legislation under the Fourteenth Amendment.

Romer set the stage for the Court’s landmark decision in *Lawrence v. Texas*, which in 2003 struck down anti-gay sodomy laws, reversing *Bowers v. Hardwick* and proclaiming that gay people enjoy a right to privacy in matters of sexual and romantic life like straight Americans. This dramatic turnaround obviously reflected no change in the language of the Fourteenth Amendment but rather a dramatic change in the thinking of the Court and the country’s expectations for fairness towards the LGBT population.

The Court’s transformation in constitutional analysis continued in the context of a series of state court rulings and legislative decisions to extend the right to marry to gay and lesbian citizens. In 2013, the Supreme Court in *U.S. v. Windsor* invalidated Section 3 of the Defense of Marriage Act, which withheld federal recognition, rights and benefits from gay couples married in any of the 17 marriage-equality states or the District of Columbia. The Court determined that the selective denial of federal marriage benefits to gay spouses violates the equal protection principle built into the Fifth Amendment. Although its logic is airtight and bullet-proof, the *Windsor* decision was nonetheless extraordinary in historical perspective. A Court that less than three decades earlier upheld the branding of gay people as criminal now struck down a federal law to grant married gay couples equal rights. For federal district and state judges all over the country who have since begun to knock down exclusionary marriage laws, it was like a dam breaking; all of the judges in the land can now safely declare that discriminating against gay people in marriage laws is a plain violation of equal protection of the laws. It is only a matter of time before the Supreme Court strikes down discriminatory marriage laws across the land.

We learn again that courts matter because it takes judges and justices to translate constitutional language into the actual defense of people’s rights. In the case of the gay community, this has meant taking language of a general nature—“equal protection of the laws” and due process “liberty”—and applying it to a vulnerable--and unexpected—minority group asserting its rights against the claims of social tradition and religious authority. The Court would not have moved as far or as fast as it has without popular pressure and political agitation, but the Court has been indispensable to the exciting breakthroughs of the LGBT community.

CALL TO ACTION

After decades of pervasive conservative influence on our judicial system, it is critical for progressives to fight back to organize and win in the courts. We must push for judges that represent the diversity of America and who share the progressive values of our Constitution and Bill of Rights. We must fight for courts that will stand for the people and our communities. We must ensure that our judiciary is just and fair for all people.

That change must start now, and we need your help. People For the American Way Foundation is launching a Courts Matter Collaborative Campaign, in which a group of YP4 Fellows, alumni, and partner organizations will learn how to use the courts as a positive force for progress and to create positive social change in our communities.

To learn more, please contact Poy Winichakul at pwinichakul@pfaw.org.

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