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## THE SEXUAL ORIENTATION CASES

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### ABSTRACT

*This paper assesses Scalia's contribution to a series of cases, spanning much of his thirty years tenure on the court, which addressed issues relating to sexual orientation discrimination. The argument put forward is that these cases severely undermine any claim that Scalia might make to having been a distinguished judge in an intellectual or juridical sense. The pervasive theme of Scalia's opinions in these matters is that of a constant failure to respect traditional tenets of legal reasoning and a compulsive inclination to engage in abusive castigation both of the litigants challenging the discriminatory laws and his judicial colleagues who did not agree with his viewpoint.*

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## I. INTRODUCTION

When Antonin Scalia was appointed to the Supreme Court in 1986, the notion that Congress, the federal government or the States were constitutionally prohibited from imposing all sorts of discriminatory laws, policies and practices on non-heterosexual people solely because of those people's sexual orientation would have struck most legally literate observers as fanciful if not absurd.<sup>1</sup> There was by that time a groundswell of academic literature pressing such arguments through an extension of the privacy jurisprudence which had emerged in the 1960s to invalidate State proscription of contraception and been built on in *Roe v. Wade* and subsequent abortion judgments,<sup>2</sup> and as well growing political pressures within some States to recognize sexual orientation as a legitimate classification for equality law purposes. But the fact that little more than thirty years later we seem to be arriving at a position in which a majority of the federal judiciary is reading the constitution in just such a prohibitory way offers a remarkable illustration of the rapidity with which supposedly fundamental moral principles within United States society can evolve and change.

It is hardly a revelation to note that Justice Scalia saw few constitutional barriers to such discriminatory treatment, whether in federal or state law. Scalia sat in a cluster of notable cases involving sexual orientation discrimination while he served on the Supreme Court, running from *Hurley v. Irish American Gay Lesbian and Bisexual Group of Boston, Inc.*<sup>3</sup> in 1995 through to *Obergefell v. Hodges*<sup>4</sup> in 2015. This paper assesses the judgments offered or joined by Justice Scalia in six of those cases.<sup>5</sup> My primary interest is to use this issue as a vehicle to explore the hypothesis that Scalia, whatever his personal political ideologies, was nonetheless a distinguished judge – even perhaps a great one – in a purely juridic and intellectual sense.<sup>6</sup> In short terms, the argument presented here is that any such portrayal is quite

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<sup>1</sup> Most notably in 1976, the Supreme Court had summarily upheld (425 U.S. 901 (1976)) a 2-1 Court of Appeals judgment upholding Virginia's criminalization of male to male sexual relations; *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (1975). On the state of the law on this issue up to the late 1970s see especially Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978-1979).

<sup>2</sup> See e.g. David A.J. Richards, *Homosexuality and the Constitutional Right to Privacy*, N.Y. U. REV. L. & SOC. CHANGE 311 (1979); *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1978-1979).

<sup>3</sup> 515 U.S. 557 (1995). The court was Rehnquist, C.J. (Nixon/Reagan 1972/1986), Stevens (Ford 1975), O'Connor (Reagan 1981), Scalia (Reagan 1986), Kennedy (Reagan 1988), Souter (Bush 1990), Thomas (Bush 1991), Ginsburg (Clinton 1993, and Breyer (Clinton 1994).

<sup>4</sup> 576 (U.S.), 135 S. Ct. 2584 (2015).

<sup>5</sup> The list is not exhaustive. For a much more thorough analysis of the first half of Scalia's tenure on the Court see JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* (2002).

<sup>6</sup> Such comments came predictably, from right-leaning blogs and magazines; see e.g. Mark Joseph Stern, *Antonin Scalia Will Be Remembered as One of the Greats*, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/antonin\\_scalia\\_was\\_a\\_truly\\_great\\_supreme\\_court\\_justice.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_a_truly_great_supreme_court_justice.html), SLATE, (Feb. 13 2016 8.44 PM); Jeffrey Rosen, *What Made Scalia Great* (2016) THE ATLANTIC (Feb. 2016) <http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/>. They also came from legal academics who one

unsustainable. While one can find sound doctrinal (or if one prefers constitutional) reasons to support the substantive conclusions that he defended in these cases, Scalia himself did a poor job of building and presenting his arguments. This failing lies in part in matters of intellectual rigor and/or honesty: Scalia's opinions repeatedly mischaracterized the positions adopted by members of the court with whom he disagreed and invoked quite absurd analogies to sustain his own. It also lies in Scalia's repeatedly derogatory, almost demonizing portrayal, of the litigants and organizations seeking to promote the cause of sexual orientation equality. All in all, his opinions offer a most unappetizing constitutional dish.

A. *BOWERS V. HARDWICK (1986)*

*Bowers v. Hardwick*<sup>7</sup> was of course decided shortly before Scalia was appointed to the Supreme Court. Scalia's confirmation hearings were held on August 5 and 6 that year.<sup>8</sup> *Bowers* had been argued on March 31, and judgment was handed down on June 30. Scalia had made it clear at the outset of the hearing that he would not answer questions on specific Supreme Court decisions,<sup>9</sup> which may be why *Bowers* was not raised expressly. The nearest that the Senate came to the case was a question from Joe Biden:

Senator BIDEN. Do you believe that there is such a thing as a constitutional right to privacy, not delineating whether, for example, the right to terminate a pregnancy relates to the right to privacy or the right to engage in homosexual activities in your home is a right to privacy, or the right to use contraceptives in your home is a right—but, in a philosophic sense, is there such a thing as a constitutionally protected right to privacy?  
 Judge SCALIA. I don't think I could answer that, Senator, without violating the line I've tried to hold.<sup>10</sup>

*Bowers* was a profoundly contentious decision both within the Court and outside it.<sup>11</sup> The bench was split 5-4. Justice White delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor;<sup>12</sup> the dissenters

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might think ought to know better, e.g. Cass R. Sunstein, *The Scalia I Knew Will Be Greatly Missed* (2016) <https://www.bloomberg.com/view/articles/2016-02-14/the-scalia-i-knew-will-be-greatly-missed>, and even from President Obama: 'Barack Obama praised Scalia as a "brilliant legal mind" who was "one of the towering legal figures of our time" and "one of the most consequential judges and thinkers to serve on the supreme court".'; <https://www.theguardian.com/law/2016/feb/13/supreme-court-justice-antonin-scalia-dead-at-79>.

<sup>7</sup> 478 U.S. 186 (1986).

<sup>8</sup> A transcript of the confirmation hearings is available at <https://www.congress.gov/supreme-court/GPO-CHRG-SCALIA.pdf>.

<sup>9</sup> *Id.* at 33.

<sup>10</sup> *Id.* at 102.

<sup>11</sup> For a variety of perspectives see DAVID A.J. RICHARDS, *THE SODOMY CASES: BOWERS V. HARDWICK AND LAWRENCE V. TEXAS* (2009); Kendall Thomas, *The Eclipse of Reason*, VA., L. REV. 1805 (1993); Randi Maurer, *Bowers v. Hardwick: A Giant Step Backwards for Privacy Rights*, LOY. L.A. L. REV. 1013 (1987); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001). For a kaleidoscopic set of views on one convenient location see the collection of essays in 79 VA L.R. 1419 (1993).

<sup>12</sup> Chief Justice Burger and Justice Powell filed concurring opinions.

were Justices Blackmun, Brennan, Marshall and Stevens.<sup>13</sup> The case is a powerful illustration both of the way that the ratio of a judgment can be misrepresented by the court that makes it and of the way that the misrepresentation takes hold both in legal and popular consciousness.

The easy assumption is that the ratio of *Bowers* is that a State was entitled to attach even quite severe criminal sanctions to adults who consensually engaged in private in homosexual sexual activities. However, the Georgia statute at issue in *Bowers* criminalized various sexual practices irrespective of the sexual orientation of the participants. The clause in issue (Georgia Code Ann. §16-6-2 (1984) provided simply that: “(a) A person commits the offence of sodomy when he [or she] performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”. It was therefore entirely possible for heterosexuals to commit ‘sodomy’ with each other under Georgia law whether through anal (whether penetrative or not) or oral sex. While Mr. Hardwick was gay, and was obviously concerned to establish that Georgia could not prevent him having sex with other men, his suit was argued on the basis that consensual private sexual activity between adults was a privacy interest that States could restrict only through laws that could withstand strict scrutiny analysis. On that basis, Mr. Hardwick had been successful before the Court of Appeals for the Seventh Circuit.<sup>14</sup> This was also how the case was characterized by Justice Blackmun for the dissenters:<sup>15</sup>

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, *ante* at 478 U. S. 191, than *Stanley v. Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. U.S.*, 389 U. S. 347 (1967), 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.” *Olmstead v. U.S.*, 277 U. S. 438, (1928) (Brandeis, J., dissenting).

Justice White’s majority opinion however presented the question in much narrower terms:

The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy....<sup>16</sup>  
[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.<sup>17</sup>

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<sup>13</sup> Brennan (Eisenhower 1956), White (Kennedy 1962), Marshall (Johnson 1967), Burger (Nixon 1969) Blackmun (Nixon, 1970), Rehnquist (Nixon 1972), Powell (Nixon 1972), Stevens (Ford 1975), and O’Connor (Reagan 1981).

<sup>14</sup> 760 F 2d. 1202 (7th Cir. 1985).

<sup>15</sup> 478 U.S. 186, 199 (1986).

<sup>16</sup> Justice White presumably meant this to read ‘to engage *with other homosexuals* in sodomy *as defined in Georgia law*.’ Whether Georgia could proscribe ‘sodomy’ by a bisexual man with a woman (whatever her sexual orientation) was a question apparently beyond the majority’s imagination.

<sup>17</sup> 478 U.S. 186, 191 (1986).

Having defined the question in that way, Justice White was able to conclude that none of the by then long and eclectic line of privacy-liberty case law<sup>18</sup> had any bearing on the issue. The matter was easily resolved. Since ‘sodomy’ had long been regarded as a crime in the USA (and was criminal in all States until 1961)<sup>19</sup> it could not possibly be regarded as a fundamental right in the senses envisaged in *Palko v. Connecticut*, i.e. that it was ‘implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed’;<sup>20</sup> or, more helpfully as a guideline, per Powell, J. in *Moore v. East Cleveland*: “deeply rooted in this Nation’s history and tradition.”<sup>21</sup>

The majority judgment is very cursory. It certainly makes clear that there is no need for the Court to subject Georgia law to strict scrutiny, and rather suggests that even if the law were subject to rational basis review no argument could be made against its constitutionality:<sup>22</sup>

[R]espondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed... . Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

The majority in effect upheld a State law other than the one before it. But in doing so the majority confirmed that it was constitutionally quite acceptable for a political majority in a State to attach severe sanctions to homosexual behavior, for no reason other than that the majority found homosexuality morally distasteful, so long as that majority sentiment was shared and had been given legal effect by many other State majorities.<sup>23</sup>

The dissenting view rested on the premise that the Georgia law interfered not with a right to homosexual sodomy, but with: “the fundamental interest all individuals have in controlling the nature of their intimate associations with

<sup>18</sup> On inter alia, schooling and educ. *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925): sterilization, *Skinner v. Oklahoma*, 316 U.S. 535 (1942): and contraception and abortion *Griswold v. Connecticut* 381 U.S. 479 (1965). *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>19</sup> Justice White lists the various laws, but does not explore what ‘sodomy’ meant in each of them, or whether such laws proscribed just homosexual activity or included heterosexual behavior as well.

<sup>20</sup> 302 U.S. 319, 325-26 (1937).

<sup>21</sup> 431 U.S. 494,503 (1977).

<sup>22</sup> 478 U.S. 186, 196 (1986).

<sup>23</sup> For a fascinating ‘inside’ view of the dynamics of the decision-making process in *Bowers*, and especially the role of Justice Powell, see MURDOCH & PRICE, *supra* note 5, at chs. 12-13.

others.”<sup>24</sup> Justice Blackmun was equivocal as to whether the law should therefore be subject to strict scrutiny or rational basis review, but indicated that the question was not relevant because the law would not pass even rational basis scrutiny if the only evidentially credible basis advanced for its enactment was majoritarian disapproval (what he termed ‘animus’) towards homosexuals:

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, *cf. Diamond v. Charles*, 476 U. S. 54, 476 U. S. 65-66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.<sup>25</sup>

While the majority judgment affirmed the constitutionality of legislation criminalizing gay sexual activity, in the years immediately following *Bowers* the legislative trend was firmly towards more widespread decriminalization. Almost twenty years were to pass before *Bowers* was squarely revisited by the Court. In the interim, three further sexual orientation cases, all involving civil rather than criminal law issues, received the Court’s attention.

*B. HURLEY V. IRISH AMERICAN GAY LESBIAN AND BISEXUAL GROUP OF BOSTON, INC. (1995)*

Justice Scalia was a silent adherent to a unanimous court opinion in *Hurley v. Irish-Am. Gay Lesbian and Bisexual Group of Boston, Inc.*<sup>26</sup> The issue presented in *Hurley* revolved around the efforts of the Respondent (referred to in the judgment as GLIB) to participate as a group in Boston’s annual St. Patrick’s Day Parade. The parade had grown by the 1990s into a major cultural event, rooted in celebration in part of the Irish roots of many of Boston’s residents and in part of the evacuation of British troops from the city during the war of independence. Although the event had initially been run by the city itself, since 1947 the parade had been organized – with a city license – by the South Boston Allied War Veterans Council (hereafter referred to as the Veterans Council).

The Veterans Council had refused to allow GLIB to march in the parade. GLIB then sued the Veterans Council under the Massachusetts public accommodations law, which prohibited: “[A]ny distinction, discrimination or restriction on account of [specified criteria] relative to the admission of any person to or treatment in any place of public accommodation, resort or amusement”.<sup>27</sup> That legislation dated from 1865, and was initially targeted only at race discrimination. Its scope however

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<sup>24</sup> *Id.* at 206.

<sup>25</sup> *Id.* at 213.

<sup>26</sup> 515 U.S. 557 (1995). The court was Rehnquist, C.J. (Nixon/Reagan 1972/1986), Stevens (Ford 1975), O’Connor (Reagan 1981), Scalia (Reagan 1986), Kennedy (Reagan 1988) Souter (Bush 1990), Thomas (Bush 1991), Ginsburg (Clinton 1993), and Breyer (Clinton 1994), JJ. On the positions of the individual Justices prior to the judgment being written *see* MURDOCH & PRICE, *supra* note 5, at 428-34.

<sup>27</sup> Mass. Gen. Laws s.272.98 (1992); <https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section98>.

had been incrementally extended, and sexual orientation discrimination was added in 1989 during the Governorship of Michael Dukakis.<sup>28</sup> The law was accepted to be applicable both to public sector bodies and to private sector individuals or organizations if they provided ‘public accommodation...’. The Massachusetts courts concluded that the Veteran Council’s refusal did amount to a breach of the public accommodation laws (it not being contested that the parade was a ‘public accommodation’ or ‘amusement’ within the statute) and granted GLIB injunctive relief requiring the Veterans Council to allow GLIB to join the parade.<sup>29</sup>

Rather curiously, on the Veteran Council’s appeal to the Supreme Court, GLIB did not argue the case on the basis that the Veterans Council’s activities amounted to state action (through the license granted by the city) under the Fourteenth Amendment,<sup>30</sup> which would have opened the door to the assertion that the liberty and equal protection interests of GLIB’s members were being infringed by the city’s failure to make GLIB’s participation in the parade a term of the license.<sup>31</sup> This had the possibly unhappy consequence that the case was effectively argued on the basis that the Massachusetts’ courts’ use of the public accommodation law infringed the liberty interests of the Veteran’s Council under the First Amendment.

The Supreme Court also proceeded on the basis that – as a matter of fact – the Veterans Council did not and would not exclude any individual from the parade because of her sexual orientation;<sup>32</sup> the exclusion was rather of GLIB, a collectivity; and exclusion was not imposed because of GLIB’s members’ sexual orientation per se, but because of the message that GLIB’s participation in the parade would communicate to other participants in and watchers of the parade. This characterization of the issue fed directly and smoothly into a clearly established tenet of First Amendment jurisprudence; namely that freedom of expression (and no sensible case could be made that the parade was not expressive activity) necessarily entails a freedom to disassociate oneself from expression that one does not wish to endorse. The Court formed no view on the reason underlying the Veteran Council’s decision to exclude GLIB, but saw no need to do so: “...[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to be beyond the government’s power to control”<sup>33</sup>

Whether (some members of) the Court designedly obscured or displaced the sexual orientation discrimination dimension of *Hurley* is a matter for speculation. But the case was decided in a political context within which an increasing number of States (or of municipal governments within them) were beginning to proscribe and/or restrict various manifestations of such discrimination.<sup>34</sup> *Hurley* raised an

<sup>28</sup> <http://www.nytimes.com/1989/11/01/us/a-gay-rights-law-is-voted-in-massachusetts.html>.

<sup>29</sup> *Irish-Am. Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. 238, 636 N.E. 2d 1293 (Mass. 1994).

<sup>30</sup> The point had been raised and lost in the trial court. The argument would have been a strong one in the light of such authorities as *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Jones v. Mayer*, 392 U.S. 409 (1968); *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972).

<sup>31</sup> Essentially the argument successfully made in respect of a challenge to racial discrimination by a nominally private body in *Burton v. Wilmington Parking Auth.*, 366 U.S. 715 (1961).

<sup>32</sup> 515 U.S. 557, 572 (1995).

<sup>33</sup> 515 U.S. 557, 575 (1995).

<sup>34</sup> See MURDOCH & PRICE, *supra* note 5, at ch. 16.



obvious First Amendment cloud over the extent of the constitutionality of such initiatives.<sup>35</sup> Unsurprisingly however, in a political landscape as variegated as that of the United States, it was not long before such actions were met by a reaction which provided the Court – and Justice Scalia – with the opportunity to confront the question more directly.

### C. *ROMER V. EVANS* (1996)

The Court, although its composition was unchanged, could not maintain a united front just a year after *Hurley* when delivering judgment in *Romer v. Evans*.<sup>36</sup> Justices Kennedy, Stevens, O'Connor, Souter, Ginsburg and Breyer, joined in a decision invalidating a recent amendment to the Colorado constitution, over a Scalia-authored dissent joined by Chief Justice Rehnquist, and Justice Thomas.

In a nice illustration of the often fragmented nature of the governmental system in the United States, the titular 'defendant' in the case was Roy Romer, the then (Democrat) Governor of Colorado. Romer found himself defending the constitutionality of a state constitutional provision which he had opposed and campaigned against prior to its adoption. The provision, known as 'Amendment 2' was adopted in 1992.<sup>37</sup> It read:

**No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.**

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>38</sup>

Amendment 2 was subject to injunctive litigation in the state courts before it came into effect. Richard Evans, a gay man, was the lead plaintiff in the action, although he was joined by a variety of other individuals, pressure groups and

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<sup>35</sup> The Veterans Council did not expressly root its arguments in the freedom of religion clause of the First Amendment, but the possibility of deploying such arguments to attack state law prohibiting sexual orientation discrimination laws was well established by that time; see for example Lucien Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, WM. & MARY J. WOMEN & L. 319 (2105).

<sup>36</sup> 517 U.S. 620 (1996).

<sup>37</sup> Colorado uses the initiative device for constitutional reform (Constitution Art V s. 1; [http://tornado.state.co.us/gov\\_dir/leg\\_dir/olls/constitution.htm#ARTICLE\\_V\\_Section\\_1](http://tornado.state.co.us/gov_dir/leg_dir/olls/constitution.htm#ARTICLE_V_Section_1)). A simple majority of votes cast in favor of the proposed amendment is all that is required. In the amendment 2 ballot, the majority in favor was 813,000 to 710,000. See Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 BOSTON COL. L. REV. 221 (1993); MURDOCH & PRICE, *supra* note 5, at ch. 16.

<sup>38</sup> See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

local municipalities.<sup>39</sup> The Colorado Supreme Court was invited to accept that sexual orientation was a suspect category under the Fourteenth Amendment Equal Protection Clause,<sup>40</sup> to subject Amendment 2 to strict scrutiny and to find that the Amendment could not pass the test. Although the Court took the latter two steps, it reached them not through equal protection analysis but by holding that Amendment 2 breached a ‘fundamental right’ of gay people. The court’s reasoning was that if Amendment 2 was effective, gay people could only gain the protection of anti-sexual orientation discrimination by securing a further amendment to the State Constitution. All other groups could gain protection vis-à-vis their own particular defining characteristics through state legislation, or via local government by-laws, or by alterations to government agencies’ policies. The Supreme Court was notably unimpressed by the arguments advanced by the State to justify the Amendment, these being variously the need to protect the religious freedom of service providers whose religious beliefs required them to refuse service to gay people, the need not to undermine the views expressed by parents disapproving of homosexuality to their children, the need to protect the privacy interests of people who did not wish to associate with homosexuals and finally, the need to respect the wishes of the electoral majority.<sup>41</sup>

The case was taken on appeal to the United States Supreme Court, being argued in October 1995 and decided in May 1996. The Colorado Supreme Court’s judgment was upheld by a 6 (Kennedy, Stevens, O’Connor, Souter, Ginsburg and Breyer, J.J.) to 3 (Rehnquist, C.J., Scalia and Thomas, J.J.) majority. The majority upheld the Colorado Supreme Court’s decision that Amendment 2’s requirement that non-heterosexuals had to seek through constitutional amendment what all other groups could achieve through ordinary legislative or governmental processes was properly seen as infringing upon a ‘fundamental right’. The conclusion seemed however to rest at least implicitly on a suggestion that sexual orientation should be recognized as a suspect category – and so a trigger for strict scrutiny – for equal protection purposes. Formally however, the majority view on the equal protection question was that Amendment 2 could not even pass rational basis scrutiny because it amounted in essence to a majoritarian attempt to stigmatize and disfavor a specific group. The majority invoked the decision in *Dep’t. of Agriculture v. Moreno*<sup>42</sup> to sustain this point:

[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.<sup>43</sup>

<sup>39</sup> Denver, Boulder and Aspen (all liberal enclaves within the State) had already enacted anti-sexual orientation discrimination ordinances. Amendment 2 was in part a backlash from the conservative heartlands of Colorado against such metropolitan cultural initiatives. See Jean Hardisty, *Constructing Homophobia: Colorado’s Right Wing Attack on Homosexuals*, PUBLIC EYE (1993) (archived at <http://www.publiceye.org/magazine/v07n1/conshomo.html>).

<sup>40</sup> For an analysis of the state of equal protection jurisprudence at this time see especially, Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, TEMPLE L. REV. 937 (1991).

<sup>41</sup> See Ian Loveland, *A Fundamental Right to Be Gay Under the Fourteenth Amendment*, PUBLIC LAW 601 (1996).

<sup>42</sup> 413 U.S. 528, 534 (1973).

<sup>43</sup> *Romer*, 517 U.S. 623, 634 (citing *Moreno*, 413 U.S. 534) (emphasis in original).

At its core, Kennedy's opinion appeared to assert that a State had no constitutional capacity to allow its citizens to manifest in law their ill-will or bigotry toward a clearly defined sub-group, irrespective of how many of the State's citizens endorsed that particular point of view.

Justice Scalia's opinion for the dissenters might be thought at its strongest when it takes the majority to task for its failure to engage at all with *Bowers*. The gist of the critique would seem to be that *Bowers* manifestly permits State majorities to 'harm' gay people by criminalizing their consensual, private, sexual conduct, and so the majority conclusion in *Romer* could only be correct if *Bowers* was wrongly decided. While this would be an obviously forceful doctrinal point if that is what the issue actually was before the *Bowers* Court, the critique is of course premised on a lie (it is hard to believe it is a misunderstanding), since the Georgia law under assessment in *Bowers* applied (at least on its face) as readily to heterosexual as to homosexual sexual practices. One might have thought a judge as intellectually rigorous as Scalia, J. was supposed to be would have noted this flaw in the *Bowers* majority opinion, but it seemed to pass him by. This endorsement of an essentially mendacious majority judgment is however, perhaps the intellectual high point of his dissent in *Romer v. Evans*.

Initially one might think Scalia is on firmer ground when he makes the observation that several States have rendered polygamy unlawful except through the mechanism of constitutional amendment.<sup>44</sup> This, Scalia suggests, manifests just the same kind of majority disapproval of particular sexual mores as is pursued by Amendment 2. The analogy is plainly a silly one, as polygamy is a question of social choice (at least for the men) rather than, as is sexual orientation, an innate characteristic.<sup>45</sup> Absurd analogies abound however in Scalia's judgment, presumably because he cannot or will not accept that a person's sexual orientation is not simply a matter of choice. In the following passage for example, Scalia combines an attack on the majority for suggesting that there is something mean-spirited about the sentiments underlying Article 2 with a casual equation of same sex marriage to murder and animal cruelty:

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct.<sup>46</sup>

That Scalia can equate a person's consensual sexual activities with committing murder is better described as unhinged than unsound. The comparison with animal

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<sup>44</sup> *Id.* at 649.

<sup>45</sup> The gradual shift towards acceptance of this perspective among the U.S. medical profession – and its more gradual infiltration into judicial thinking - is incisively traced by Richard Posner, *SEX AND REASON* (1992) ch.11.

<sup>46</sup> 517 U.S. 620, 644 (1996).

cruelty is of similar quality, if of lesser degree, and the inapposite nature of the homosexuality/polygamy analogy has already been noted.

A subsequent passage is striking more for its constitutional illiteracy than its logical shortcomings. In criticizing the majority view that subjecting gay people to an atypically onerous lawmaking process is constitutionally objectionable, Scalia offers the following proposition:

What the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition *locally* or through *state legislation*, but even of the power to alter it through *state constitutional amendment* or *federal legislation*. The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.<sup>47</sup>

This is a remarkably silly observation. It ignores of course the rather basic point that while the Colorado Constitution is subject to the limits of the national Constitution, the national Constitution is a legal construct of unlimited competence. No provision of the Constitution can be argued to be unconstitutional.

While Scalia castigates the majority for assuming that the people who voted for Amendment 2 were motivated by animus towards homosexuality, he does not trouble himself to offer any evidenced explanation of just what that motivation was. Nor does Scalia bother to disguise his own clear ‘animus’ towards homosexuality, which rather suggests that if he had even addressed the point that his judicial role would require him to cast aside his own cultural opinions while forming his judgment he had decided there was no need to do so. The comparison of homosexuality to murder was remarked upon above. In a similarly derogatory vein, when touching upon the issue of welfare support for widowed spouses, Scalia equates the “‘life partner’” (Scalia J.’s “...”) of a gay person with a heterosexual person’s ‘long time roommate’. The “...” themselves betoken an obvious distaste for same-sex coupledness, while the suggestion that such a couple are in an analogous position to ‘room-mates’ is a manifest belittling of gay relationships. The use of “...” as a means to connote disdain for the litigants also appears whenever Scalia mentions the notion of sexual “orientation”, something which he seems to equate with what he later refers to – again in “...” - as an “alternative life style”.<sup>48</sup>

Matters of style shade back as well into questions of substance. Scalia devotes much of his judgment to asserting that the only effect of Amendment 2 is to make it harder for gay people to gain ‘preferential treatment’.<sup>49</sup> Assuming the comment to be bona fide, the proposition is quite extraordinary. In what way is one afforded ‘preferential’ or ‘special’ treatment’ by a State law or municipal ordinance which provides that one’s sexual orientation (without the “...”) is per se a justification for, inter alia, being sacked from a job or refused access to a local sports facility?

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<sup>47</sup> *Id.* at 648.

<sup>48</sup> Repeatedly, but not exclusively, at 517 U.S. 620, 643 (1996). The alternative life style label is at 645.

<sup>49</sup> Especially at *id.* 636-37.

Scalia's major concern however seems to be that the Court is faced with a conspiracy between the unholy alliance of an unrepresentative lawyer elite which is improperly sympathetic to sexual orientation equality, and a disproportionately powerful gay mafia:<sup>50</sup>

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see *ibid.*; App. 254 (affidavit of Prof. James Hunter), and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.<sup>51</sup>

All in all, the dissent is not very impressive stuff.

#### D. *BOY SCOUTS OF AMERICA V. DALE* (2000)

Scalia merely assented to the majority judgment in *Boy Scouts of America v. Dale*<sup>52</sup> five years later. The case had a superficial resemblance to *Hurley*, in that the Boy Scouts had been successfully sued under New Jersey's public accommodations law (which as in Massachusetts prohibited sexual orientation discrimination) by a gay man who had been dismissed from his position as an Assistant Scoutmaster because he was homosexual. While the more cynical and salacious observer might surmise that a fair few homosexually-inclined men in the United States of the 1950s, 1960s and 1970s kept firmly locked in their closets same-sex sexual experiences they encountered in the embrace (metaphorical and literal) of the Boy Scouts of America, the organization itself showed no inclination to publicize such activities. Indeed, the Boy Scouts of America had apparently been concerned about the implications of sexual orientation equality for some years, and had indeed filed an *amicus curiae* brief before the Supreme Court in *Hurley* urging reversal of the state court decision.<sup>53</sup>

Mr. Dale had by all accounts been an extremely successful scout. His difficulties with the organization began when, having moved on to university he came out not just to his family and friends but to the wider public by involving himself in various gay-rights lobbying activities. This evidently came to the attention of the Boy Scouts of America, which promptly expelled him from the organization. The New Jersey courts, undeterred it seems by *Hurley*, found in Mr. Dale's favor.

The Supreme Court, unchanged in composition since *Romer v. Evans* changed its alignment in *Dale*, with Justices O'Connor and Kennedy joining the *Romer*

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<sup>50</sup> He is appalled for example that most law schools do not permit sexual orientation discrimination in their hiring policy, even though – once again grasping for the absurd – it is apparently acceptable for them not to hire someone because *inter alia* he [sic] 'eats snails'; *id.* at 652-53.

<sup>51</sup> *Romer v. Evans*, 517 U.S. 620, 644-45 (1996) (Scalia, J., dissenting).

<sup>52</sup> 530 U.S. 640 (2000). On Mr. Dale's view of the case – and of the Boy Scouts – see especially MURDOCH & PRICE, *supra* note 5, at 496-509.

<sup>53</sup> 515 U.S. 557, 559 (1995).

dissenters (Chief Justice Rehnquist, and Justices Scalia and Thomas) to overturn the State courts decision, with Justices Stevens, Souter, Ginsburg and Breyer dissenting.

The majority saw no difference between the issues before the Court in *Hurley* and *Dale*. The crux of the Boy Scouts' case was that Mr. Dale's continued membership of the organization would run counter to the message that the Boy Scouts wished to communicate to their own members and the world at large about the organization's view of homosexuality:

The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean".<sup>54</sup>

Requiring the Boy Scouts to retain Mr. Dale as a member would compromise the clarity of this message, and thus fell foul of the Boy Scouts' First Amendment entitlements vis-à-vis the State.

The dissenters drew a bright line between the *Hurley* and *Dale* factual scenarios. The parade in issue on *Hurley* was seen as an inherently and entirely expressive activity. Insofar as the Boy Scouts promulgated a view on homosexuality however, (and the dissenters were not convinced that the organization had ever clearly put forward any such view), Mr. Dale's membership did nothing to propagate a competing perspective:

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.<sup>55</sup>

The judgment in *Dale* held back legislative attempts to advance the political cause of sexual orientation equality. Scalia, such an advocate of political majoritarianism in *Romer*; was notably quiet – indeed wholly invisible – in respect of that position in *Dale*. That silence may perhaps be explained in a principled way by the overt presence of First Amendment issues in *Dale* which did not feature in *Romer*. Just three years later, finding himself in the minority, he had no compunction in reasserting his *Romer* viewpoints in even more strident terms.

### E. *LAWRENCE V. TEXAS (2003)*

One might instinctively think there is something problematic about a constitutional order resting on deeply entrenched moral norms in which the final appellate court can hold that within the space of twenty years a previous judgment on an important

<sup>54</sup> 530 U.S. 640, 650 (2000) (Rehnquist, C.J.). Presumably no irony was intended in the Boy Scouts' choice of key words.

<sup>55</sup> 530 U.S. 640, 694-95 (2000) per Stevens, J.

issue can and should be overturned. Such a state of affairs might suggest a distinct lack of certainty in the constitution's content. Concerns of that sort would obviously be mitigated as a matter of practicality if such reversals occurred very infrequently. And as a matter of doctrine one might think that the concern should be further attenuated if the previous judgment is reversed not because it is wrong now; but that it was wrong when it was decided.<sup>56</sup> But that was just the position taken by the Supreme Court in *Lawrence v. Texas*<sup>57</sup> in 2003 in respect of its (not very much earlier) judgment in *Bowers*.<sup>58</sup>

The bench in *Lawrence*, as in *Dale*, remained the same as in *Romer* seven years earlier. The majority in *Lawrence* consisted of Justice Kennedy, J. (authoring the opinion), joined by Justices Stevens, Souter, Ginsburg and Breyer, with Justice O'Connor concurring in the result. Chief Justice Rehnquist, and Justice Thomas joined Scalia in dissent. The Court's membership had however changed markedly from its composition in *Bowers*. Among the *Bowers* majority, White, Burger and Powell had gone, as had Brennan, Blackman and Marshall among the dissenters. Only Stevens (a dissenter), and Rehnquist and O'Connor (for the majority) remained.

The adherents to Kennedy's opinion followed the methodology of Justice Blackmun's dissent in *Bowers*. That case, like this one, was not about sodomy, whether homosexual or otherwise:

That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>59</sup>

Having criticized the *Bowers* majority for 'misapprehending' the nature of the liberty entitlement before it, Justice Kennedy also took issue with its contention that homosexual sexual relations had been criminalized for many years by many of the States. Kennedy's reading of history was that no State had criminalized such activities until the 1970s, and since then only nine had done so. Nor was there evidence to support the proposition that the tiny number of reported prosecutions for sodomy en masse from the nineteenth century onwards contained a significant proportion of same sex, consensual participants.

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<sup>56</sup> The most spectacular example is surely the court's 1942 decision in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) to overrule the judgment given just three years earlier in *Gobitis v. Minersville Sch. Dist.*, 310 U.S. 586 (1940); (the pledge of allegiance to the flag in schools cases).

<sup>57</sup> 539 U.S. 558 (2003).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 567.

The *Lawrence* majority also criticized its *Bowers* predecessor for paying no attention to the fact the European Court of Human Rights in *Dudgeon v. United Kingdom*<sup>60</sup> had held that the criminalization of consensual homosexual activities between adults was incompatible with the Convention, suggesting that this was a helpful indicator (but surely no more than) as to the constitutionality of criminalizing such behavior. In narrow doctrinal terms, however, the *Lawrence* majority derived most assistance from two post-*Bowers* authorities. The first, obviously, was its recent judgment in *Romer*. The second, rather more tenuous in its relevance to *Bowers*, was the abortion judgment in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>61</sup> which was invoked to underscore the point that such issues were connected by a more abstract constitutional principle:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>62</sup>

Justice O'Connor, while concurring in the result, based her judgment on the Equal Protection Clause because the Texas statute, unlike the Georgia law challenged in *Bowers*, applied only to homosexual conduct. She did not go so far as to accept that sexual orientation was a suspect category for equal protection purposes, in which event state law would be subject to strict scrutiny rather than rational basis review.<sup>63</sup>

Scalia had not set the intellectual bar for dissenting judgments very high in *Romer*, but it is safe to say that he did not clear it in *Lawrence*. While his opinion identifies several weaknesses in the reasoning of both Justices Kennedy and O'Connor, it is overall a splenetic rant more suited to a locker room than a court.

The judgment begins with an implicit demonization of the litigants who have had the apparent temerity to challenge the rectitude of the *Bowers* majority's opinion, casting them as having: "engaged in a seventeen year crusade"<sup>64</sup> to have *Bowers* overturned. But Scalia also broadens the targets for abusive rhetoric beyond those singled out in *Romer*. The new *bête noir* that appears in *Lawrence* is 'foreign law' and especially the judgment of the European Court of Human Rights in *Dudgeon* which Scalia denounces as a "foreign mood, fad or fashion."<sup>65</sup>

As the opinion proceeds, Scalia continues to indulge his fondness for inappropriate metaphor. While he no longer brackets gay sex with murder, he does portray it in the same light for the purposes of majoritarian proscription as, inter

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<sup>60</sup> [1981] ECHR 5.

<sup>61</sup> 505 U.S. 833 (1992). See Ian Loveland, *Affirming Roe v. Wade? Planned Parenthood v. Casey*, PUBLIC LAW 14 (Spring 1993).

<sup>62</sup> 505 U.S. 833, 851 (1992).

<sup>63</sup> On the internal dynamics of the judgments see Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, THE NEW YORKER (Mar. 12, 2012).

<sup>64</sup> 539 U.S. 558, 586 (2003). The use of 'crusades' presumably being intended to denote ideological extremism.

<sup>65</sup> *Id.* at 599.



alia, “prostitution” and “recreational use of heroin”, “adult incest” and “obscenity” and “child pornography” and “bestiality.”<sup>66</sup>

Nor, he contends, could any credible argument be made that such laws are empirically redundant or obsolete. Scalia notes that he has uncovered: “203 prosecutions for consensual adult homosexual sodomy reported...from the years 1880-1995.”<sup>67</sup> Quite why Scalia sees this as a powerful rebuttal to the suggestion of the law’s practical obsolescence is a mystery. 203 prosecutions is an average of fewer than 2 per year. In 1995, the population of the United States was 266.3 million people. Obviously the population was much smaller in 1880, but even then it comprised 50.2 million people. Assuming even as few as 2% of the then population engaged in same sex sodomy just once a month (one cliché or demonization that Scalia does spare us is that gay people have sex more often than straights), those 203 prosecutions (Scalia does not tell us how many of those led to convictions) are in quantitative terms of infinitesimally minimal significance.

Scalia then matches ludicrous metaphor with ludicrous hyperbole in a cringing echo of his opinion in *Romer*:

This effectively decrees the end of all morals legislation. If, as the court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above mentioned laws [inter alia prostitution, adult incest and child pornography] can survive rational basis review.<sup>68</sup>

That there are many ways of ‘promoting’ majoritarian sexual morality that do not entail criminalizing people whose sexual preferences do not follow majoritarian tastes is a point on which Scalia does not dwell. His main concern however appears to be the implications that the majority opinion has for the States’ capacity to prohibit same-sex marriage:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, *ante*, at 18; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” *ante*, at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.<sup>69</sup>

Scalia’s views on that specific issue are entertainingly revealed in an account of a moot he judged at NYU law school in 1996.<sup>70</sup> Suffice it to say that he did not appear

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<sup>66</sup> 539 U.S. 558, 592, 598 & 599 (2003) respectively.

<sup>67</sup> *Id.* at 597.

<sup>68</sup> *Id.* at 599.

<sup>69</sup> *Id.* at 604-05.

<sup>70</sup> MURDOCH & PRICE, *supra* note 5, at 517-22.

receptive to the suggestion that either the liberty or equal protection dimensions of the Fourteenth Amendment could preclude States from forbidding same sex marriage. He would have wait over ten years however to take those views from the pretend courtroom to the real one.

F. *UNITED STATES V. WINDSOR (2013)*

The specific target of the litigation in *U.S. v. Windsor*<sup>71</sup> was s.3 of the federal Defense of Marriage Act (1996) (hereafter ‘DOMA’). S.3 was an interpretation clause, which provided:

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 wife”.

S.3 was intended to apply to all federal measures in which marriage was a relevant criterion. It was presumably designed to disqualify same sex spouses from receiving any benefits or other favorable treatment which Congress granted to married couples. No States actually recognized same sex marriage at that time, and the Act appeared to be a pre-emptive strike lest any State (or perhaps Canada) should do so in future. The bill had been approved by 342–67 in the House, and by 85–14 in the Senate.<sup>72</sup> That it was then signed rather than vetoed by the President may surprise observers with an inaccurately rose-tinted view of Bill Clinton’s liberal political credentials. The bill passed through Congress shortly before the 1996 presidential elections; Clinton was evidently worried that rejecting it would lose him more votes than signing it would win.<sup>73</sup>

The bill’s proponents in Congress were manifestly motivated by the animus (homophobic bigotry is perhaps the more apt descriptor) which had escaped Scalia’s attention in *Romer* and *Lawrence*. Its sponsor in the house, Bill Barr (Republican Georgia), told his colleagues that the United States was in dire peril from the onward march of the gays:

The very foundations of our society are in danger of being burned....  
The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit.<sup>74</sup>

<sup>71</sup> 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013). For a more detailed analysis, see Ian Loveland, *A Right to Engage in Same Sex Marriage in the United States?* EUR. HUM. RTS. L. REV, 10 (2014).

<sup>72</sup> For a brief recall of some of the opposing voices see <http://tv.msnbc.com/2013/03/28/speaking-out-who-opposed-doma-during-1996-debate/>.

<sup>73</sup> The weight of votes for the measure was clearly more than sufficient to overturn a Presidential veto.

<sup>74</sup> CONG. REC. (H 4782; July 12, 1996). See also the speech of Cliff Stearns, (Rep., Fla) speaking to Barney Frank, the gay Democrat from Massachusetts: “You do not threaten

Congressman Funderbunk (Republican North Carolina) had apparently not anticipated the judgment in *Dale*, for he was terribly concerned about the fate of the Boy Scouts of America, who were apparently: “being told to abandon their moral code of 80 years and to place young boys under homosexual men on camping trips or face financial ruin.”<sup>75</sup>

The few Democrats who opposed the bill saw no bona fide motive behind it. Senator Charles Robb (Democrat, Virginia) announced “I feel very strongly that this legislation is fundamentally wrong, and feeling as I do it would not be true to my conscience or my oath of office if I fail to speak out against it.”<sup>76</sup> Senator Barbara Boxer (Democrat, California) was more scathing. The bill was: “ugly politics. To me, it is about dividing us instead of bringing us together. To me, it is about scapegoating. To me, it is a diversion from what we should be doing.”<sup>77</sup> Her colleague Charles Robb, a Virginia Democrat, was equally forthright: “I feel very strongly that this legislation is fundamentally wrong, and feeling as I do it would not be true to my conscience or my oath of office if I fail to speak out against it.”<sup>78</sup>

DOMA’s supporters had accurately anticipated that States would begin to legalize gay marriage however. By 2013, 13 States (and Washington DC) had legislated to allow same-sex marriage,<sup>79</sup> although 35 expressly prohibited it.<sup>80</sup> The problem that DOMA posed for Windsor related to federal inheritance tax. Ms. Windsor had married her wife in Canada in 2007. When her wife died, Ms. Windsor was presented with a bill for federal inheritance tax, from which she would have been exempt had her spouse been a man.

The composition of the Court had changed notably since *Lawrence* was decided. Chief Justice Roberts (Bush 2005) had replaced Rehnquist, and Justice Alito (Bush 2006) had taken O’Connor’s seat. Both might sensibly have been thought unreceptive to either the liberty or equal protection arguments against sexual orientation discrimination. Sonia Sotomayor (2009, Obama) had been appointed to the Court on David Souter’s retirement, and Elena Kagan (2010, Obama) took the seat vacated by John Paul Stevens. Both would likely be supportive of those arguments.

Given his judgment in *Lawrence*, Kennedy’s alignment with Breyer, Ginsburg, Sotomayor and Kagan in a 5- 4 judgment invalidating DOMA s.3 was predictable. The majority’s reasoning in Kennedy’s opinion was not entirely compelling. Its core was the assertion that marriage was demonstrably a privacy right that amounted to a liberty interest under the Fifth Amendment. That assertion is of course uncontentious. The more difficult proposition to sustain is that the liberty interest in marriage is indifferent to the genders of the married couple.

To an extent, the majority sidestepped that historically difficult question by focusing on the motivation that underlay DOMA. Drawing on the Congressional

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my marriage but you do threaten the moral fiber that keeps this nation together. You threaten the future of families which have traditional marriage at their very heart...”. (142 CONG. REC. (H 7488; July 12, 1996).

<sup>75</sup> 142 CONG. REC. (H 7487; July 12, 1996).

<sup>76</sup> 142 CONG. REC. (S 10121; Sept. 10, 1996).

<sup>77</sup> 142 CONG. REC. (S 10065; Sept. 9, 1996).

<sup>78</sup> 142 CONG. REC. (S 10121; Septe. 10, 1996).

<sup>79</sup> California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.

<sup>80</sup> <http://edition.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts>.

debates, Kennedy saw little scope to doubt that those motives were: “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”; and to protect: “the traditional moral teaching reflected in heterosexual-only marriage laws”.<sup>81</sup> This led to the conclusion that: “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status and so a stigma upon all those who enter into same sex marriages...”<sup>82</sup> and that the “essence” of DOMA was: “interference with the equal dignity of same sex marriages”.<sup>83</sup> The majority did not in terms confirm that the constitutional barrier to Congress discriminating against same sex marriage also meant that States could not do so, but it was hard to resist the conclusion that *Windsor* would not lead to that result.

This seemed to be Scalia’s primary concern in another hyperbolic, almost hysterical dissent. He was manifestly unconvinced by the majority’s assertion that its conclusion addressed only the constitutionality of DOMA:

In my opinion, however, the view that *this* Court will take of State prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion... The real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by ‘bare desire to harm’ couples in same sex marriages.<sup>84</sup>

Scalia saw no meaningful barrier to altering the language used in the majority opinion to reach embrace state laws. If DOMA humiliates same sex spouses by according their relationship an inferior (i.e. married only for state law purposes) status, then it would seem logical that state laws prohibiting same-sex marriage entirely humiliates gay couples by according their relationships an inferior (i.e. non-married) status. That Scalia foresaw and vehemently disapproved of where the majority was likely to go in a subsequent case dealing with state laws perhaps explains in part the vitriolic nature of his dissent, although as noted above his opinions in both *Romer* and *Lawrence* had already displayed that unhappy quality.

His analytical starting point was a perfectly proper one; namely that the majority was overstepping the legitimate boundaries of its constitutional role by interfering in a political dispute that should be left to elected legislators to resolve. He was however unable and/or unwilling to make that point in a dispassionately judicial style:

This case is about power in several respects. It is about the power of people to govern themselves, and the power of this Court to pronounce the law. Today, opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate

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<sup>81</sup> *Id.* at 16.

<sup>82</sup> 570 U.S. \_\_\_, 133 S.Ct. 2675, 2693 (2013) (Kennedy, J.).

<sup>83</sup> *Id.* The Fifth has no Equal Protection Clause in its text, but that concept has been implied into the Fifth since the Court’s judgment in *Bolling v. Sharpe*, 347 U.S. 497 (1954), which, decided alongside *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), held that racial segregation in Washington, D.C. schools breached an implied equal protection provision within the liberty clause of the Fifth.

<sup>84</sup> 570 U.S. \_\_\_, 133 S.Ct. 2675, 2709 (2013) (Scalia, J. dissenting).

this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased roots: an exalted conception of the role of this institution in America.<sup>85</sup>

There is certainly some force in Scalia's substantive point that the majority's opinion is not securely rooted in authority, although expressing that view by deriding the opinion as "rootless and shifting"<sup>86</sup> might better be categorized as abuse rather than rebuttal. He puts his case rather better in noting that the majority seems not squarely to have decided if it is dealing with a rational basis rather than strict scrutiny standard of review. As in his earlier judgments however, Scalia maintained a Nelsonian blindness to the realities of the motives of the legislators who supported the law under challenge. He denounced the majority's conclusion that the Act sprang from homophobic hostility as "quite untrue."<sup>87</sup> The assertion is bizarre in the face of the speeches in the Congressional Record referred to by the majority, and Scalia does not draw upon any part of the Congressional Record which reveals a "rational" basis for DOMA motivated by some more palatable concerns. He suggests that one rational basis for the Act would be to avoid difficult choice of law problems which might arise given that some States allowed same-sex marriage and some did not; although he is unable to show any member of Congress making that point during the Act's passage.<sup>87</sup>

Scalia does eschew in *Windsor* however the direct demonization of gay activists that he indulged in both in *Romer* and in *Lawrence*. But while that is a welcome move towards a judgment displaying what Scalia himself calls at the end of his opinion "the judicial temperament", he counterbalances that move and compromises his judgment's intellectual weight by his casual, caustic dismissal of *Lawrence* as the case that declared: "a constitutional right to homosexual sodomy,"<sup>88</sup> He does not accept that the case was really about a right of privacy for adults of sound mind to engage in consensual, non-violent sexual behavior in their own homes. Homophobic bigotry does not lose its character just because it is expressed obliquely rather than head-on; a point of which Scalia was surely aware but with which he chose not to engage.

### G. *OBERGEFELL V. HODGES* (2015)

It took barely a year for Scalia's prediction in *Windsor* to bear fruit. In *Obergefell v. Hodges*<sup>89</sup> the Court split in just the same way as in *Windsor* on the question of whether States could indeed limit marriage to 'heterosexual' couples.<sup>90</sup> The majority's reasoning also followed the path laid out in *Windsor*. While some weight

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<sup>85</sup> *Id.* at 2697-98.

<sup>86</sup> *Id.* at 2705.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2708.

<sup>89</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584 (2015).

<sup>90</sup> The facetiously inclined might note that State laws restricting marriage to that between 'a man and a woman' do not prevent bi-sexuals marrying each other, nor a lesbian marrying a gay man. And insofar as such couples might raise children in a long term settled relationship, such marriages would presumably hit all of the right buttons of 'traditional' views as to what marriage is and what marriage is for.

was accorded to an equal protection analysis, the judgment is based primarily on the conclusion that the right to marry is a liberty issue which entitles any and all adults to marry any other adult he/she might wish, and which liberty States could restrict only for reasons that would survive strict scrutiny review.<sup>91</sup>

Justice Kennedy presents marriage as an evolving social phenomenon. This was presumably done to pre-emptively rebut the argument that the ‘liberties’ embraced by the Fourteenth Amendment comprised only those things that had a longstanding empirical root in the fabric of American life; a quality which same-sex marriage obviously lacked:

...[M]arriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman.... As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity...As women gained legal, political, and property rights, and *as society began to understand that women have their own equal dignity, the law of coverture was abandoned....* These and other developments in the institution of marriage over the past centuries were *not mere superficial changes*. Rather, *they worked deep transformations* in its structure, affecting aspects of marriage long viewed by many as essential....<sup>92</sup>

This presumption of constant evolution enables the majority to assert that the gender identity of spouses is an ‘aspect’ - and a ‘deep’ aspect - of marriage, but is not an *indispensable* element of it. Rather its essential character may lie in spouses’ reciprocal desire for companionship and emotional intimacy, which is a quality not dependent on sexual orientation.

The majority offers a similarly ‘evolutionary’ perspective on the issue of ‘equal dignity’ by equating the long term rejection of the subordinate status of women vis-à-vis men with the more recently emerging attitudinal changes in modern American society to homosexuality:

Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.... Same-sex intimacy remained a crime in many States.... For much of the 20th century, moreover, homosexuality was treated as an illness....Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable....<sup>93</sup>

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<sup>91</sup> Which presumably - at least at present - enables States to retain restrictions based on, inter alia, age, mental competence, consanguinity and polygamy.

<sup>92</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584, 2595 (2015) (Kennedy, J. for the Court).

<sup>93</sup> *Id.* at 2596.

After rooting this notion of ‘dignity’ in the 1960s contraception cases, Justice Kennedy then finds it having been applied, albeit not under that label, in three ‘marriage cases’ in which State prohibitions were invalidated. In the first, *Loving v. Virginia*,<sup>94</sup> the Warren Court struck down Virginia’s laws which forbade marriage between a white and non-white person. In the second, *Zablocki v. Redhail*,<sup>95</sup> the Burger court held that Wisconsin’s law which prevented fathers who defaulted on child support payments from marrying was unconstitutional. And in the third, *Turner v. Saffley*,<sup>96</sup> the court invalidated a Missouri law which precluded any prison inmate from marrying unless the prison governor considered there were compelling reasons to allow the inmate to do so. Since the majority took the view – as in *Romer* and *Lawrence* – that the effect of laws prohibiting same sex couples from marrying was to stigmatize gay people, and that their motivation was simply moral disapproval of homosexuality, the laws simply could not withstand constitutional scrutiny.

Scalia’s dissent is notably short in *Obergefell*. Equally notably, he seems here to underline the shift he made in *Windsor* in no longer demonizing the advocates of same-sex marriage. Indeed, he refers to them – and their opponents – in perfectly respectful terms. They are apparently not ‘crusaders’ any more:

[P]ublic debate over same sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately but respectfully attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote...<sup>97</sup>

Silly metaphor has also been expunged from Scalia’s analysis. There is no suggestion of that prohibiting murder, incest or prostitution has anything valuable to tell us about whether we might also prohibit sexual orientation discrimination. Indeed, there is even a suggestion that Scalia is acknowledging the stylistic and substantive excesses of his own opinions in *Romer*, *Lawrence* and *Windsor*: “It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so”.<sup>98</sup> The great bulk of the opinion is however a marvelous example of such ‘extravagance’, taking the form of a petulant diatribe against the majority of the Court. The second paragraph sets the tone:

Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs

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<sup>94</sup> 388 U.S. 1 (1967).

<sup>95</sup> 434 U.S. 374 (1978).

<sup>96</sup> 482 U.S. 78 (1978).

<sup>97</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

<sup>98</sup> *Id.* at 2630.

the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>99</sup>

The crux of this argument in substantive terms is of course simple. It is very hard credibly to view same sex marriage as a liberty in the orthodox *Palko* sense, if it is a legal status which has not been recognized by any State at all until very recently and which at present is recognized only by a minority of them. The same problem would attend any assertion that sexual orientation is a suspect category for equal protection purposes. This was in essence the argument made in restrained terms by Chief Justice Roberts. Scalia's brief opinion however is an unrelenting tirade of sarcasm and abuse:<sup>100</sup>

The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie ...

.... Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.

... Rights, we are told, can "rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?)... .

... [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation...

But what really astounds is the hubris reflected in today's judicial Putsch... .

There are also substantive shortcomings in Scalia's judgment. Although he does not engage with the animus argument, he offers no explanation of why the States that prohibited same sex marriage chose to do so. That the relevant majorities in each State did do so is apparently all that is required. The main weakness in the judgment however is the way in which Scalia continually misrepresents the nature of 'the People'. Scalia constantly equates 'the People' in the sense of the Article V amendment process (ie 'the People' with the power to amend the constitution) with the United States' fifty geographically discrete lawmaking majorities which pass legislation or constitutional amendment under State constitutions. But these majorities are obviously not 'the People' in a sovereign sense. They are no more than a cluster of 'mini-Peoples', many of them comprising no more than a tiny

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<sup>99</sup> *Id.* at 2627.

<sup>100</sup> 576 U.S. \_\_\_, 135 S. Ct. 2584, 2630 n. 22, 2630, 2629 (2015).



minority of the true ‘People’. That ‘People’ can reverse the majority decision in *Obergefell* whenever and however it should choose to do so. A new amendment along the lines of: “Marriage may only be contracted between an adult man and an adult woman, and no institution of the Federal government nor any institution of any State’s government shall recognize as valid for any purposes any marriage, wherever or whenever entered into, between persons of the same gender” would achieve that result. If that is what ‘the People’ of the United States want the law to be, the *Obergefell* majority offers no obstacle to them doing so. It may be in practical political terms very unlikely that such a majority will emerge, but that is the point of having a constitutional order resting on deeply entrenched laws. And of course if ‘the People’ had ever felt so strongly that marriage should be an exclusively heterosexual legal status we might wonder why that view was never made clear in the text of the constitution.

Scalia manages to match substantive nonsense with stylistic excess in a section of his judgment in which he asserts that the majority are “... willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.”<sup>101</sup>

This is also a remarkably foolish statement. One does not “stand against” the Constitution by advocating that its text be changed or its interpretation altered. The ability to make such arguments is a basic tenet of the entire constitutional system. Did critics of *Dred Scott* or of *Plessy* or of *Lochner*<sup>102</sup> “stand against” the constitution? Of course not. And neither does anyone who advocates constitutional amendment to forbid same-sex marriage, or who raises the issue again before the courts in the hope of having *Obergefell* reversed.

Scalia concludes, with no apparent irony, with this criticism of the majority opinion:

The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.<sup>103</sup>

‘Clear thinking and sober analysis’ are without doubt traits demanded of judges, especially those who exercise as much power as the members of the United States Supreme Court. It is perhaps rather a shame that those qualities seemed to be in such short supply in Scalia’s own judgment in this case.

## II. CONCLUSION

Insofar as one can find a constitutionally principled rationale underlying Scalia’s position in this line of cases, it presumably lies in his insistence on the need for the Supreme Court to acknowledge and to respect the dividing line between

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<sup>101</sup> *Id.* at 2630.

<sup>102</sup> *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 567 (1896); *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>103</sup> 576 U.S. \_\_\_, 135 S. Ct. 2584, 2630 (2015).

law and politics (and courts and politicians/electorates). He – along presumably with Rehnquist, Thomas and Alito – evidently roots his jurisprudence firmly in the appropriate sphere of judicial restraint in the face of majoritarian political lawmaking, while the shifting majorities who have disagreed with them are abandoning the proper judicial role to engage in not just un- but anti- ‘democratic’ cultural engineering. The fascinating irony here is that a judge who eschews ‘politics’ produces judgments replete with substantive sentiments and styles of expression which fit more readily in the world of demagogic politicking than of dispassionate judicial analysis. The substantive analysis is shot through with misrepresentation of opposing argument and inapposite metaphor, while the style in which that substance is couched descends frequently into abuse, hyperbole and hysteria.

Were one to search for a judicial precursor of such judgments, the examples that spring most readily to mind are Roger Taney’s mendacious misuse of original intent jurisprudence in *Dred Scott v. Sandford*<sup>104</sup> and James McReynolds’ splenetic dissents from the Court’s pro-New Deal and (timid) racial equality judgments in the 1930s.<sup>105</sup> But perhaps a nearer ideological bedfellow can be found a little closer (chronologically if not institutionally) to home in the presidential campaign of Donald Trump. It is hardly a surprise that Trump joined in the ‘he was a great judge’ fanfare after Scalia’s death, and promised that as President he would seek to appoint judges in a similar mold.<sup>106</sup> Both men persistently displayed in their respective legal and political spheres a disdain for the truth of their empirical observations and a contempt for the arguments advanced by their opponents. Those are unhappy qualities in a politician; they are an obscenity in a judge.

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<sup>104</sup> (1857) 19 Howard 393 The nature of and basis for Taney’s dishonesty are nicely unpicked by Donald Bogan, *The Maryland Context of Dred Scott*, AM. J. LEGAL HIST. 381 (1990-91).

<sup>105</sup> See especially his comments in the law school desegregation case, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) at 353: For a long time, Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school, and thereby disadvantage her white citizens without improving petitioner’s opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races.

<sup>106</sup> Nico Lang, *Donald Trump Vows to Appoint Supreme Court Justice ‘In the Mold of Scalia’*, THE ADVOCATE (2016) <http://www.advocate.com/election/2016/10/10/donald-trump-vows-appoint-supreme-court-justice-mold-scalia>.