

# Justice Kennedy's "Gay Agenda": *Romer*, *Lawrence*, and the Struggle for Marriage Equality

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## I. INTRODUCTION

Justice Kennedy, in his near quarter century on the United States Supreme Court, authored the two most important decisions positively affecting the lives of gays and lesbians in the United States: *Romer v. Evans*<sup>1</sup> and *Lawrence v. Texas*.<sup>2</sup> These two decisions were monumental in bringing gays and lesbians in the United States into the realm of constitutional protection.<sup>3</sup> Rightfully, Justice Kennedy has been lauded for his thoughtful and sensitive gay-friendly jurisprudence.<sup>4</sup>

Justice Kennedy's key gay-rights decisions have been subjected to substantial criticism even by those favoring gay and lesbian rights, however. There are ambiguities in both *Romer* and *Lawrence* that have permitted lower courts to interpret these decisions extremely narrowly.<sup>5</sup> Further, because of the

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As will become apparent in this Article, I neither believe that Justice Kennedy has joined some "gay agenda," nor do I believe that any such thing exists. But Justice Scalia accused Justice Kennedy of doing just this—joining the "homosexual agenda"—in his dissent in *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

1. See 517 U.S. 620 (1996). The Court had decided other important gay and lesbian-focused decisions that have had a negative impact, the most notable being *Bowers v. Hardwick*, 478 U.S. 186 (1986).

2. See 539 U.S. 558. Throughout this Article, I largely (though not exclusively) use the term "gay and lesbian" although I am aware of the narrowness of the term. I do this because this language more closely tracks the language used by the U.S. Supreme Court in the opinions I reference above and for ease of expression. I am well aware of the impact of these decisions on, for example, bisexuals. See, e.g., Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012).

3. See *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558.

4. The journalist Jeffrey Toobin, for example, noted that Justice Kennedy's "opinions in the Colorado and Texas cases have made him the Court's most visible defender of gay rights . . ." Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 51; see also FRANK J. COLLUCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 123–26 (2009); HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 93–94 (2009).

5. See Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ.

uncertainties raised in those opinions, the Supreme Court will be free to interpret both quite restrictively in subsequent cases while claiming adherence to stare decisis. Only time will tell how effective Justice Kennedy's opinions will be in protecting the constitutional rights of gays and lesbians.

The uncertainty about the reach and meaning of both *Romer* and *Lawrence* has become particularly problematic in the continuing debate about the constitutionality of the heterosexual marriage monopoly that currently exists in most states.<sup>6</sup> Courts have interpreted *Romer* and *Lawrence* in dramatically different ways.<sup>7</sup> Until the Supreme Court more clearly defines the reach of those decisions, this disagreement will continue.

In this Article, I praise Justice Kennedy's sensitivity and vision when it comes to gay and lesbian rights as no Supreme Court Justice has done more to provide constitutional protection to this community. That said, I also identify some of the problems created by the ambiguous nature of his opinions.

The United States Supreme Court will likely weigh in soon on the ongoing debate about the constitutionality of banning gays and lesbians from marriage.<sup>8</sup> Many believe that Justice Kennedy will be the swing vote on this important issue.<sup>9</sup> For these reasons, I endeavor, with no small amount of trepidation, to prognosticate on Justice Kennedy's likely approach to the issue based on his existing decisions.

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L. REV. 913, 960–83 (2011); see also J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. OF CRIM. L. 41, 57–60 (2011).

6. Before the November 2012 election, the institution of marriage was restricted to heterosexuals in forty-four states. Only Massachusetts, New Hampshire, Iowa, Connecticut, New York, Vermont, and the District of Columbia permitted people of the same sex to wed. RECOGNITION OF SAME-SEX COUPLES WORLDWIDE, RECOGNITION OF SAME-SEX COUPLES IN THE UNITED STATES, LAMBDA LEGAL (Jan. 12, 2012), available at [http://www.lambdalegal.org/sites/default/files/publications/downloads/fs\\_recognition-of-same-sex-couples-worldwide\\_3.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_recognition-of-same-sex-couples-worldwide_3.pdf) (on file with the *McGeorge Law Review*). After the November 2012 election, the voters in three states—Maine, Maryland, and Washington—provided gays and lesbians access to the institution of marriage. Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, REUTERS (Nov. 7, 2012), <http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107> (on file with the *McGeorge Law Review*).

7. Compare, e.g., *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), with *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

8. *Perry*, 671 F.3d 1052, cert. granted sub nom., *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012). The Court may not reach the substantive issues as the Justices specifically raised the issue of standing. *Id.* Despite the different case name on appeal, this Article refers to "*Perry v. Brown*" rather than "*Hollingsworth v. Perry*," due to the notoriety of the former case name.

9. See, e.g., Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 516 (1997) (noting "as Kennedy goes, so goes the Court"). Kennedy is often seen as the Court's swing vote on many important legal issues. If anything, the perception of Justice Kennedy as the deciding vote has only gotten stronger. See Ilya Shapiro, *A Faint Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy* 33 HARV. J.L. & PUB POL'Y 333, 333 (2009) (book review) ("Anyone who has even a passing interest in the Supreme Court knows that, with the departure of Justice Sandra Day O'Connor, Justice Anthony Kennedy became the Court's one and only swing Justice.").

The Ninth Circuit's 2012 opinion in *Perry v. Brown*<sup>10</sup> presents the Supreme Court the opportunity to jump into the marriage-equality debate in this current term. In *Perry*, the Ninth Circuit invalidated on federal constitutional grounds California's Proposition 8, which had overturned California law permitting gays and lesbians equal access to marriage.<sup>11</sup> As explained below, the Supreme Court review of *Perry* enables the Court to enter into the marriage-equality discussion without having to proclaim a far-reaching constitutional right to marriage for gays and lesbians while giving greater guidance on the reach of *Romer*.<sup>12</sup> Nevertheless, the Supreme Court will ultimately have to confront the more difficult issue of whether the Constitution requires all states to permit gays and lesbians equal access to the institution of marriage.

Part II of this Article examines *Romer*, while Part III analyzes *Lawrence*, noting each opinion's positive attributes along with its shortcomings. Part IV looks at the recent *Perry* decision, as this case striking down California's Proposition 8 may be the vehicle enabling the Court to enter the current marriage-equality debate. Part V looks at how the *Romer* and *Lawrence* decisions may influence the legal struggle for marriage equality. Finally, in Part VI, I turn to what those decisions suggest regarding Justice Kennedy's likely perspective on the marriage-equality issue, concluding that neither *Romer* nor *Lawrence* foretell how Justice Kennedy will rule on a case presenting the issue. Justice Kennedy's decisions conferring constitutional protection upon gays and lesbians, along with the potential that his due process liberty concept encompasses broadly defined relational choice, makes his support for marriage equality possible and maybe even probable. Time will tell.

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10. 671 F.3d 1052. As this Article goes to press, the United States Supreme Court has recently granted a petition for certiorari in this case under the name *Hollingsworth v. Perry*. 2012 WL 3134429.

11. 671 F.3d at 1096. In this Article, I intentionally use primarily the term "marriage equality" in lieu of "same-sex marriage" or "gay marriage" for two reasons. First, I use "marriage equality" because it is the best way to highlight that this is a struggle for equal treatment in the marriage context and not about an effort to create some new and foreign institution. Second, in the context of this Article, marriage equality articulates the issue in the way that is likely most appealing to Justice Kennedy's constitutional approach as it puts "tolerance, dignity, and responsibility," over difference and group-based identity. KNOWLES, *supra* note 4, at 16.

12. Other marriage-equality issues will be heard by the Court other than those discussed in this Article. For example, during this term, the Supreme Court will consider the constitutionality of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006), in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, No. 12-307, 2012 WL 4009654 (U.S. Dec. 7, 2012). *Windsor* raises the issue of whether the federal government may deprive federal benefits to those who are legally married under the law of their state. *Id.* While these cases do not require the Court to decide whether states must permit gays and lesbians access to marriage, they invite the Court to consider if there are acceptable justifications for treating some legal marriages differently than other legal marriages based on the sex and sexual orientation of the participants. Although a different issue, a Supreme Court decision upholding DOMA in this context would surely not bode well for the legal struggle for marriage equality.

II. *ROMER V. EVANS*—JUSTICE KENNEDY REFUSES TO ALLOW GAYS AND LESBIANS TO BE “A STRANGER TO THE LAW”<sup>13</sup>

In *Romer v. Evans*, Justice Kennedy, writing for the six-Justice majority, determined that Colorado’s Amendment 2 violated the federal Constitution’s Equal Protection Clause.<sup>14</sup> A majority of Colorado’s voters had approved Amendment 2, which sought to overturn existing state and local anti-discrimination protections afforded to Colorado’s gays, lesbians, and bisexuals (such as bans on job or housing discrimination based on sexual orientation).<sup>15</sup> It also sought to prohibit the state or state entities from enacting any such protections in the future absent another statewide initiative.<sup>16</sup> Had the Court decided the case differently, the impact would have been an enormous setback for gay and lesbian rights; in many jurisdictions, a simple majority vote of the electorate would have successfully erased anti-discrimination protections for gays and lesbians.

There is much to praise in Justice Kennedy’s opinion.<sup>17</sup> Justice Kennedy begins powerfully by citing Justice Harlan’s dissent in *Plessy v. Ferguson*,<sup>18</sup> in which Justice Harlan stated that the Constitution “neither knows nor tolerates classes among citizens.”<sup>19</sup> By referring to the dissent of one of the most maligned

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13. 517 U.S. 620, 635 (1996). For an interesting account of *Romer v. Evans*, see generally LISA KEEN & SUZANNE BETH GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* (2000).

14. 517 U.S. at 635.

15. *Id.* at 624–25.

16. *Id.* Amendment 2 stated:

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.

*Id.* at 624. There was some uncertainty about whether Amendment 2 would also affect laws of general application as they applied to gay, lesbian, and bisexual residents of Colorado. For example, it was unclear whether a lesbian who called the fire department due to her home being aflame could sue if the fire department refused to answer her call due to her sexual orientation. Justice Kennedy raised but did not resolve the question. *Id.* at 628. Justice Scalia in the dissent contended that Amendment 2 did not reach laws of general application. *Id.* at 637 (Scalia, J., dissenting). The majority found Amendment 2 to be unconstitutional even if its reach extended only to laws specifically protecting gays, lesbians, and bisexuals from discrimination based on their sexual orientation. *Id.* at 633.

17. Although, as discussed below, there has been ample criticism of the legal foundations for the opinion, Professor Akil Reed Amar praises the opinion as “an elegant blending of legal formalism and legal realism at their best.” Amar, *supra* note 9, at 530.

18. 163 U.S. 537 (1896).

19. *Romer*, 517 U.S. at 623 (citing *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). Justice Harlan’s dissent in *Plessy* has been lauded by many for not following the despicable “separate but equal” approach to the treatment of African-Americans. See, e.g., T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, U. ILL. L. REV. 961, 963–64 (1992). This remains true notwithstanding his highly offensive comments about Chinese immigrants. *Plessy*, 163 U.S. at 561 (Harlan,

discrimination cases in United States history, Justice Kennedy signals the importance of the issue before the Court and firmly places the struggle for gays and lesbians into the civil rights framework.<sup>20</sup>

In strong and sympathetic language, Justice Kennedy lays out the pernicious impact of Amendment 2, which, as he explains, "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."<sup>21</sup> Further and importantly, Justice Kennedy debunks the common refrain that anti-discrimination policies for gays and lesbians confer upon them "special rights."<sup>22</sup> As Justice Kennedy pointedly explains:

[W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against the exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.<sup>23</sup>

Throughout the brief opinion, Justice Kennedy notes the far-reaching nature of Amendment 2, which he views as "unprecedented in our jurisprudence"<sup>24</sup> and not "within our constitutional tradition"<sup>25</sup> because it refers to a group identified by a single trait and deprives them of "the right to seek specific protection from the law."<sup>26</sup>

In *Romer*, Justice Kennedy does not specifically determine the appropriate level of scrutiny to apply to the class at hand—gays and lesbians—because he determines that in light of Amendment 2's "broad and undifferentiated disability

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J., dissenting) (stating that the "Chinaman" belongs to a "race so different from our own that we do not permit those belonging to it to become citizens of the United States").

20. To this end, *Romer* is not just about unequal treatment of gays and lesbians but more broadly about discrimination of politically unpopular groups. See KNOWLES, *supra* note 4, at 108.

21. *Romer*, 517 U.S. at 627. Justice Kennedy uses the term "gay and lesbian" occasionally in the opinion though he used the term "homosexuals" more often throughout the opinion. Justice Souter was the first Justice to employ "gay and lesbian" in a Supreme Court majority in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

22. *Romer*, 517 U.S. at 631.

23. *Id.* Justice Scalia, for the three dissenters, adopts the "special rights" trope, noting that all Amendment 2 does is to prevent homosexuals from obtaining "preferential treatment without amending the State Constitution." *Id.* at 638 (Scalia, J., dissenting) (emphasis in original).

24. *Id.* at 632.

25. *Id.* at 633.

26. *Id.* at 632.

on a single named group” and because of its “sheer breadth,” Amendment 2 “lacks a rational relationship to legitimate state interests.”<sup>27</sup> In a short paragraph, Justice Kennedy dismisses the state’s asserted bases for Amendment 2 (to not interfere with rights of association and to conserve resources to fight discrimination against other groups) by again noting that the “breadth of the amendment is so far removed from these particular justifications that [it is] impossible to credit them.”<sup>28</sup> In so doing, Justice Kennedy makes clear that at least in the context of laws limiting the rights of gays and lesbians, the state’s asserted bases to justify a law will not be taken at face value.<sup>29</sup>

Justice Kennedy concludes that Amendment 2 must have been the result of animus toward gays and lesbians, which cannot serve as a rational basis.<sup>30</sup> He ends with the oft-quoted and elegantly worded sentence: “A State cannot deem a class of citizens a stranger to its law.”<sup>31</sup>

Justice Kennedy’s opinion reaches the important result of guarding gays and lesbians from majoritarian deprivation of anti-discrimination protection but does so largely through a creative and unusual cobbling together of case precedent to reach its ultimate result.<sup>32</sup> Thus, Justice Scalia, in his biting dissent (which is lengthier than the majority opinion), has some basis for his claim that the opinion is “long on emotive utterance and so short on relevant legal citation.”<sup>33</sup> Part of Justice Kennedy’s challenge in finding authority directly on point is that the U.S. Supreme Court majority approached the issue differently than the Colorado Supreme Court did in striking down Amendment 2.<sup>34</sup> The Colorado Supreme Court invalidated Amendment 2 because it infringed on the fundamental right of gays and lesbians to participate in the political process.<sup>35</sup> Justice Kennedy, to

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27. *Id.*

28. *Id.* at 635. Justice Kennedy’s application of rational basis does not accept the state’s asserted bases for Amendment 2 at face value. *See id.* Because he engaged in a more searching form of rational basis review in *Romer*, some scholars have determined that a heightened form of rational basis applies in cases dealing with discrimination against gays and lesbians. This has led to academic assertions that there may now be two forms of rational basis review: vanilla rational basis and rational basis with a bite. *See, e.g.,* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–63 (2011).

29. *See Romer*, 517 U.S. at 631 (dismissing the state’s justification that Amendment 2 “does no more than deprive homosexuals of a special right”).

30. *Id.* at 632. Justice Scalia lambasts the majority for failing to cite *Bowers v. Hardwick*, which upheld the criminalization of same-sex sodomy based on the legislature’s moral disapproval. *Id.* at 640–42 (Scalia, J., dissenting). With Justice Kennedy’s determination that majoritarian dislike of a group is not a rational basis, Justice Scalia surmises correctly that *Bowers* cannot be long for this world. *See id.*

31. *Id.* at 625.

32. *See id.* at 631–36. Justice Kennedy has support for his position that animus against a disfavored group is not a rational basis, however. *Id.* at 634 (citing *Dep’t of Agriculture v. Moreno*, 413 U.S. 5287 (1973)).

33. *Id.* at 639 (Scalia, J., dissenting).

34. *See id.* at 631–36 (employing an equal protection, rather than due process, analysis to reach the holding).

35. *Id.* at 630–31. As the Colorado court explained: “the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by ‘fencing out’ an independently identifiable



avoid getting drawn into the morass of political-participation cases, opted for a Fourteenth Amendment Equal Protection analysis instead.<sup>36</sup>

Robust debate continues over whether laws treating gays and lesbians unequally should be subjected to some sort of heightened scrutiny.<sup>37</sup> Because Justice Kennedy determines that Amendment 2 is not rationally related to the State's alleged justifications, some interpret *Romer* as determining that gays and lesbians as a class should not be subject to any sort of heightened scrutiny.<sup>38</sup> This is not a fair read of the majority opinion, as Justice Kennedy never discussed the issue of heightened scrutiny for gays and lesbians.<sup>39</sup> Rather, he determined that Amendment 2 failed even a rational basis analysis, as it did not bear "a rational relation to some legitimate end."<sup>40</sup> Thus, the issue of what level of scrutiny applies to gay and lesbians remains unresolved.

Justice Scalia's dissent in *Romer* is so angry and acerbic that it is likely counterproductive.<sup>41</sup> Justice Kennedy's determination that animus toward gays and lesbians was the motivating factor behind Amendment 2 may well have been buttressed by the harshness of the Scalia dissent.<sup>42</sup> In a case concerned with anti-gay animus, Justice Scalia's language could not help but drive a compassionate person such as Justice Kennedy to better understand the unacceptable mistreatment of gays and lesbians in American society.<sup>43</sup> Thus, it has long been my view that Justice Scalia's vitriol in his *Romer* dissent, though offensive and hurtful to many, has been something of a gift to those favoring the equal treatment of gays and lesbians.<sup>44</sup>

There are so many offensive aspects of Justice Scalia's dissent that I will limit myself to a few as a means of example. For starters, Justice Scalia belittles same-sex relationships by analogizing them to "long-time roommate[s],"<sup>45</sup> he

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class of persons must be subject to strict judicial scrutiny." *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993).

36. *Romer*, 517 U.S. at 631-36.

37. *Compare, e.g.*, *State v. Limon*, 122 P.3d 22, 30 (Kan. 2005) (noting the *Lawrence* majority contains an "oblique" indication that rational basis should apply to homosexual persons regarding a Kansas unlawful voluntary sexual relations statute), *with Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (applying heightened scrutiny to the discharge of a military member under "Don't Ask Don't Tell" before it was repealed). Further, President Obama's Department of Justice weighed in on the issue, concluding that "given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." Letter from Eric H. Holder, Jr., Att'y Gen. of the United States, to Hon. John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011) (on file with the *McGeorge Law Review*).

38. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Justice Scalia, not surprisingly, adopts this interpretation of the majority opinion. *Romer*, 517 U.S. at 642 n.1 (Scalia, J., dissenting).

39. *Romer*, 517 U.S. at 631.

40. *Id.*

41. *Id.* at 636-53 (Scalia, J., dissenting).

42. *See id.* at 632.

43. *See id.* at 636-53.

44. *See id.*

45. *Id.* at 638.

likens gays and lesbians to murderers, polygamists, and animal abusers,<sup>46</sup> and he mischaracterizes the political power and wealth of the gay and lesbian community.<sup>47</sup> Indeed, as to this last point, evidence shows that gay men suffer poverty rates equal to heterosexual men, while lesbians suffer disproportionately to heterosexual women.<sup>48</sup> The poverty rates are even more striking for same-sex lesbian couples and their children, with most instances demonstrating rates double that of heterosexual couples and their children.<sup>49</sup> And, even if Justice Scalia's point were true, suggesting that wealth, power, and influence support negative constitutional treatment has little relevance.<sup>50</sup> He also attacks Justice Kennedy's opinion, labeling Justice Kennedy's reasoning as bordering on "terminal silliness," elitist, "facially absurd," and without legal foundation.<sup>51</sup> While perhaps cathartic, none of this helps Justice Scalia to be persuasive.<sup>52</sup>

The greatest challenge of *Romer* is trying to comprehend its reach. A fair read of *Romer* is that, absent a reason extending beyond dislike of the group, sexual minorities (and other disfavored groups) cannot be deprived of laws protecting them from discrimination by a popular referendum.<sup>53</sup> But soon after *Romer*, it became clear that Justice Kennedy's repeated references to the extraordinary and far-reaching nature of Amendment 2 would make it possible for lower courts to give a narrow interpretation to the decision.<sup>54</sup>

Indeed, while *Romer* was pending before the Court, the issue of whether a law enacted by the Cincinnati City Council protecting gays, lesbians, and bisexuals from various forms of discrimination could constitutionally be

46. *Id.* at 644.

47. *Id.* at 645–46 (stating that homosexuals have "high disposable income" and "political power much greater than their numbers, both locally and statewide").

48. See RANDY ALBELDA ET AL., THE WILLIAMS INSTITUTE, POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf> (on file with the *McGeorge Law Review*). The UCLA study, which uses data from the Census Bureau, the National Family Growth Survey, and the California Health Information Survey to generate household income data for gays, lesbians, same-sex couples, and their children, concludes that "the myth of gay and lesbian affluence is just that—a myth." *Id.* at iii. The authors advise that "access to marriage may improve LGB family incomes and lift some families out of poverty." *Id.*

49. See *id.* at 5–7.

50. See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 232 (1996) (noting that while many of the same stereotyped criticisms have been attached to Jews, "[s]urely Justice Scalia would not allow Colorado to handicap Jews in elections").

51. *Romer*, 517 U.S. at 639, 647 (Scalia, J., dissenting).

52. Surely, Justice Kennedy's *Romer* decision prompted him to receive some amount of hateful, anti-gay mail. See KNOWLES, *supra* note 4, at 112 (noting that Justice Blackman sent a short note to Justice Kennedy, telling him the *Lawrence* decision "took courage" and to expect "a lot of critical and even hateful mail"). I think the likely level of mean-spiritedness only helps Justice Kennedy to see the very animus about which he wrote in *Romer*. See *Romer*, 517 U.S. 620.

53. KNOWLES, *supra* note 4, at 108–12 ("The arguments that [Justice Kennedy] made could be applied to any 'politically unpopular group' that is discriminated against because of a bare majoritarian 'desire to harm' it.").

54. See, e.g., *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).



overturned by a popular vote of the electorate was working its way to the Supreme Court.<sup>55</sup> When the case reached the United States Supreme Court, the Court reversed and remanded the issue to the Sixth Circuit for further consideration in light of *Romer*.<sup>56</sup> In joining Chief Justice Rehnquist and Justice Thomas in dissenting to the majority's reversal and remand, Justice Scalia shockingly contended that *Romer* was entirely irrelevant to the Cincinnati situation.<sup>57</sup> Justice Scalia's interpretation of *Romer*'s reach is both narrow and telling:

*Romer* involved a state constitutional amendment prohibiting special protection for homosexuals. The consequence of its holding is that homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional amendment in order to have the benefit of that democratic preference.<sup>58</sup>

Although the meaning of Justice Scalia's interpretation is as narrow as it is hard to discern, the Sixth Circuit understood it well enough to uphold the Cincinnati referendum even in light of *Romer*.<sup>59</sup> The Sixth Circuit did this even though the *Romer* Court expressly avoided deciding the case on political participation grounds, using Equal Protection instead.<sup>60</sup>

Even more troubling and relevant to the issues covered in this Article is the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*.<sup>61</sup> The trial judge, relying on *Romer*, had determined that a voter-passed initiative amending the Nebraska Constitution to prohibit the state from recognizing same-sex marriage, civil unions, and domestic partnerships, was "indistinguishable" from Amendment 2 and, thus, invalid as a violation of Equal Protection.<sup>62</sup> Seizing on Justice Kennedy's language about the "unprecedented" scope of Amendment 2, the appellate judges found that an initiative that defines who may enter into a marriage or a similar marriage-like arrangement is far narrower in scope.<sup>63</sup> Accordingly, the judges found that no assumption of animus should arise and that

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55. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 128 F.3d 289 (1998).

56. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001, 1001 (1996).

57. See *id.* (Scalia, J., dissenting).

58. See *id.*

59. See *Equality Foundation of Greater Cincinnati, Inc.*, 128 F.3d at 301.

60. See *Romer v. Evans*, 517 U.S. 620, 631-36 (1996). In 2006, the voters of Cincinnati voted to reinstate and expand gay and lesbian anti-discrimination. Eric Resnick, *Cincinnati Ready to Restore Human Rights Ordinance*, GAY PEOPLE'S CHRON. (Mar. 10, 2006), <http://www.gaypeopleschronicle.com/stories06/march/0310061.htm> (on file with the *McGeorge Law Review*).

61. 455 F.3d 859 (8th Cir. 2006).

62. *Id.* at 865 (citations omitted).

63. *Id.* at 868 (citing *Romer*, 517 U.S. at 633).

the state's asserted purpose of "encourag[ing] heterosexual couples to bear and raise children in a committed marriage relationship" was rationally related to the initiative's purpose.<sup>64</sup>

More recently, in *Perry v. Brown*, the Ninth Circuit relied heavily on *Romer* in determining that California's Proposition 8 violated the U.S. Constitution's Equal Protection provisions.<sup>65</sup> Whether that opinion is reconcilable with *Bruning* and consistent with the meaning of *Romer* is discussed below.<sup>66</sup> The Supreme Court, should it reach the merits of the case, has the opportunity to determine the reach of *Romer*.<sup>67</sup> Thus, the question remains: what is the proper reach of *Romer*? Just this year, Professor Kenji Yoshino noted that Justice Kennedy's repeated references to the "unprecedented" scope of Amendment 2 could make *Romer* a "ticket good only for one day."<sup>68</sup> While Professor Yoshino is correct that the Court *could* interpret *Romer* that narrowly, I do not think that is a fair read of the opinion. I am more inclined to agree with Professor Knowles' view:

[E]ven a more narrowly written amendment—whose impact on the legal status of homosexuals was neither sweeping nor comprehensive—could not pass constitutional muster as long as it was underpinned by the same majoritarian, and morality-driven animus that Kennedy concluded was the only way to explain the existence of Amendment 2.<sup>69</sup>

The question then becomes whether there is a non-animus basis to support the disparate treatment of gays and lesbians and the appropriate level of constitutional scrutiny.

### III. LAWRENCE V. TEXAS—THE END OF BOWERS AND THE CELEBRATION OF LIBERTY<sup>70</sup>

It is hard to overstate the importance of *Lawrence*, although, on its face, it simply struck down the dozen or so state sodomy laws that still existed (and were rarely enforced) in the country.<sup>71</sup> In powerful and empathetic language, Justice Kennedy humanizes gay and lesbian citizens by forcefully and directly

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64. *Id.* at 867.

65. *See* 671 F.3d 1052 (9th Cir. 2012).

66. *See infra* Part III.

67. *Compare, e.g., Bruning*, 455 F.3d 859 (construing *Romer* narrowly), *with Perry*, 671 F.3d 1052 (construing *Romer* broadly).

68. Yoshino, *supra* note 28, at 778.

69. KNOWLES, *supra* note 4, at 110.

70. *See generally* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).

71. The sodomy statute at issue in *Lawrence* was one of four in the country that criminalized only same-sex sodomy (Texas being joined by Kansas, Missouri, and Oklahoma). *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). Thirteen states had sodomy statutes that criminalized heterosexual sodomy as well. CARPENTER, *supra* note 70, at 187.

overruling *Bowers v. Hardwick*.<sup>72</sup> Justice Kennedy boldly states: "*Bowers* was not correct when it was decided, and it is not correct today,"<sup>73</sup> adding that "[i]ts continuance as precedent demeans the lives of homosexual persons."<sup>74</sup>

Justice Kennedy understands that the reach of *Bowers* went far beyond the criminalization of certain sex acts.<sup>75</sup> During the seventeen-year reign of *Bowers*, the decision was used to justify various forms of mistreatment of gays and lesbians, including banning gays and lesbians from military service, permitting discharge from employment based solely on sexual orientation,<sup>76</sup> and banning gays and lesbians from adopting children.<sup>77</sup> Under *Bowers*, the moral disapproval of the electorate, as evidenced by a majority vote of the legislature, was an acceptable rational basis for laws disfavoring gays and lesbians.<sup>78</sup>

Actually, Justice Kennedy's rejection of *Bowers* is not all that surprising to those who were attentive to his confirmation hearing and pre-Supreme Court speeches and case decisions. Although prior to *Romer*, none of Judge or Justice Kennedy's decisions sided in favor of gay or lesbian petitioners,<sup>79</sup> Justice Kennedy's pre-confirmation decisions and speeches nonetheless suggested an openness to providing gays and lesbians some degree of constitutional protection.<sup>80</sup> For example, in a case upholding the Navy's right to discharge a gay sailor, then-Judge Kennedy suggested that had the case involved private, consensual sex in a non-military context, the case may well have been decided differently.<sup>81</sup> Further, at his confirmation, Justice Kennedy did not hide his view

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72. *Lawrence*, 539 U.S. at 578; see also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state statute criminalizing private, consensual oral and anal sexual conduct).

73. *Lawrence*, 539 U.S. at 578.

74. *Id.*

75. *Id.*

76. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

77. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004). Indeed, in his *Romer* dissent, Justice Scalia scolded the majority for failing to cite *Bowers*, making the somewhat persuasive point that if *Bowers* permits the criminalization of much of same-sex sexual expression, a state should be permitted to refuse to provide anti-discrimination protections to gays and lesbians. See *Romer v. Evans*, 517 U.S. 620, 640-44 (1996) (Scalia, J., dissenting). *Romer* then may have implicitly overruled *Bowers* although *Bowers* was never cited by the *Romer* majority. See *id.* at 623-36.

78. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The lawyers working on the appeal recognized that getting the Court to overrule *Bowers* would not be an easy task. See CARPENTER, *supra* note 70, at 197.

79. While on the appellate bench, Justice Kennedy ruled five times in cases dealing with gays and lesbians, each time ruling against the gay side. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 377 (2001). Primarily due to his record, Justice Kennedy's 1987 nomination was opposed by gay organizations. See *id.* For example, Jeff Levi, on behalf of the National Gay and Lesbian Task Force, testified against Justice Kennedy at the confirmation hearing, noting that "Justice Kennedy's notion of justice is too narrow for him to be worthy of a role as a final arbiter of the meaning of the U.S. Constitution." *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the S. Comm. Of the Judiciary*, 100th Cong. 427 (1989) [hereinafter *Kennedy Hearing*].

80. See COLUCCI, *supra* note 4; KNOWLES, *supra* note 4, at 125; MURDOCH & PRICE, *supra* note 79, at 378-79.

81. *Beller v. Middendorf*, 632 F.2d 788, 810 (9th Cir. 1980). "The reasons which have led the court to protect some private decisions intimately linked with one's personality, see *e.g. Roe . . .* and family living

that the Constitution should be interpreted beyond its text, embracing due process protection for various forms of intimacy.<sup>82</sup> Indeed, at his confirmation, when asked about the factors a judge should consider when determining the reach of the Constitution's Due Process Clause,<sup>83</sup> Justice Kennedy stated:

[An] abbreviated list of the considerations are the essentials of the right to human dignity, the injury to the person, the harm to the person, the anguish to the person, the inability of the person to manifest his or her personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her potential.<sup>84</sup>

While these terms are broad and ill-defined, they foreshadow Justice Kennedy's articulation of some sort of liberty interest in the Fourteenth Amendment's Due Process Clause.<sup>85</sup>

*Lawrence* provided Justice Kennedy the opportunity to build on his earlier comments about the importance of a constitutional protection of some sort of sphere of intimacy. Framing the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause,"<sup>86</sup> Justice Kennedy notes that the constitutional liberty interest extends beyond just a spatial component to "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>87</sup> Justice Kennedy determines that it is an easy task to find that private, consensual, sexual conduct falls within this liberty interest.<sup>88</sup>

In *Lawrence*, Justice Kennedy sidesteps the traditional discussion of the right to privacy as a fundamental right triggering strict scrutiny, perhaps marking a

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arrangements beyond the core nuclear family suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge." *Id.* (citations omitted).

82. *Kennedy Hearing*, *supra* note 79, at 180.

83. The line of questioning was in response to a question regarding "privacy" as then-Judge Kennedy saw it. Although he was asked specifically about privacy, Kennedy answered that he prefers "to think of the value of privacy as being protected by the liberty clause." *Id.* at 121.

84. *Kennedy Hearing*, *supra* note 79, at 180.

85. See COLUCCI, *supra* note 4, at 13 (noting that unlike Bork, who is wedded to originalism, Justice Kennedy looks to "moral concepts embodied by the text of the Constitution . . . [to] provide the basis for determining the extent of the personal liberty that courts have a duty to enforce.").

86. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

87. *Id.* at 562.

88. See *id.* at 578–79. In many ways, Justice Kennedy's *Lawrence* opinion is something of an homage to Justice Stevens, who assigned Justice Kennedy the task of writing the opinion. Justice Stevens in his *Bowers* dissent, a small part of which Justice Kennedy cites in *Lawrence*, wrote about the liberty interest invaded by the majority's approach. See *Bowers v. Hardwick*, 478 U.S. 186, 214–20 (1986) (Stevens, J., dissenting). I must confess that I had long struggled with Justice Steven's opinion, finding Justice Blackmun's dissent more in line with the traditional thinking I brought to the issue. See *id.* at 199–214 (Blackmun, J., dissenting). Justice Kennedy's *Lawrence* opinion has helped me to better grasp the sheer beauty and depth of Justice Stevens' dissent in *Bowers*.

new direction of due process analysis for the Court.<sup>89</sup> It is both elegant and frustrating; its parameters remain undefined. To some measure, *Lawrence* blurs the lines between Equal Protection and Due Process, shifting the focus to a different, and possibly broader, concept of liberty.<sup>90</sup> In lauding Justice Kennedy's approach in *Lawrence*, Professor Yoshino notes:

The Court evaded the charge that it was picking and choosing among groups by highlighting that the right in question belonged to all persons within the United States. *Lawrence* was ultimately not a group-based equality case about gays, but rather a universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their own homes.<sup>91</sup>

The reach of the liberty interest Justice Kennedy articulated in *Lawrence*, however, even by his own terms, reaches beyond private, consensual, sexual conduct. Citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>92</sup> Justice Kennedy acknowledged that "homosexual persons"<sup>93</sup> are entitled to the same level of constitutional protection as heterosexuals when it comes to "choices central to personal dignity and autonomy" and that homosexuals like heterosexuals have "the right to define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>94</sup> The focus in *Lawrence* then was on sameness, not difference.<sup>95</sup> Of course, the parameters of this ill-defined liberty interest remain to be determined.

As in *Romer*, Justice Kennedy provides little discussion of the state's asserted bases for the gay-focused sodomy law.<sup>96</sup> Texas tried to provide a basis

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89. See *Lawrence*, 539 U.S. at 578-79. The case, of course, could have been resolved under the Equal Protection Clause as the Texas sodomy statute only applied to same-sex sexual expression. Indeed, Justice O'Connor in her concurrence elected to take that more traditional and narrower track by finding that, following the logic of *Romer*, the Texas sodomy statute that singled out only homosexuals for punishment violated the Equal Protection Clause because it was only based on animus toward the group affected. *Id.* at 599 (O'Connor, J., concurring).

90. See *id.* at 578-79; Yoshino, *supra* note 28, at 802.

91. Yoshino, *supra* note 28, at 802; see also COLUCCI, *supra* note 4, at 22 (asserting that "[u]sing 'liberty' in place of 'privacy' avoids a textual objection, and it brings moral and practical considerations to the forefront of constitutional adjudication").

92. 505 U.S. 833 (1992).

93. *Lawrence*, 539 U.S. at 575.

94. *Id.* at 574 (internal quotation marks omitted) (quoting *Casey*, 505 U.S. at 851).

95. See CARPENTER, *supra* note 70, at 189. Indeed, the lawyers for the petitioners in *Lawrence* had hoped to highlight this perspective. See *id.* As Professor Carpenter explains: "To the extent that the members of the Court believed that what they were being asked to protect in *Bowers* was *difference*, they were less likely to grant it constitutional protection. To the extent that the Justices now believed what they were being asked to protect in *Lawrence* was *sameness*, they could perhaps be persuaded to extend it constitutional protection." *Id.* (emphasis in original).

96. See *Lawrence*, 539 U.S. at 563 (discussing only the law's text and the case's procedural history before beginning his analysis).

for its law, claiming that Texas had an interest in “the preservation of marriage, families and the procreation of children” that transcended the moral disapproval of gay people.<sup>97</sup> Having had the good fortune to attend the oral argument in October of 1995, I recall well that Justice Scalia was becoming increasingly frustrated at the lawyer representing Texas because he refused to take the position, ultimately taken by Justice Scalia in his dissent, that moral disapproval by the majority was enough of a rational basis to justify the law.<sup>98</sup> Justice Kennedy rejected Texas’s asserted bases for the criminalization of same-sex sodomy; he found that the only believable basis was majoritarian moral disapproval, which could not serve as a valid justification for the law.<sup>99</sup>

Further, as in *Romer*, Justice Scalia writes an angry dissent.<sup>100</sup> He criticizes the majority for its failure to adhere to *stare decisis*.<sup>101</sup> He condemns the majority’s position that the majoritarian belief that an act is immoral cannot serve as a rational basis for such a law.<sup>102</sup> Justice Scalia contends that such a view portends the likely end to laws “against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity . . . .”<sup>103</sup> At its core, Justice Scalia’s dissent rejects Justice Kennedy’s move away from “fundamental rights” language to a focus on the liberty interest of the Due Process Clause.<sup>104</sup> Justice Scalia adheres to the *Bowers* majority’s approach, requiring a finding that permitting same-sex couples to engage in private, consensual, sexual conduct must be either deeply rooted in this Nation’s history or implicit in the concept of ordered liberty.<sup>105</sup> He then, of course, rejects the notion that changing attitudes could influence an interpretation of the Due Process Clause, criticizing Justice Kennedy’s position that an “emerging awareness” is somehow relevant to whether the conduct in *Lawrence* merits constitutional protection.<sup>106</sup>

Justice Scalia does raise a powerful criticism of Justice Kennedy’s majority opinion if one assumes it is based on traditional due process jurisprudence: if the

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97. CARPENTER, *supra* note 70, at 240 (internal quotation marks omitted) (quoting Charles Rosenthal, the lawyer for Texas, at oral argument for *Lawrence*).

98. *See id.* at 243–44. As an observer of the oral argument, I can say too that, though Justice Kennedy was an active participant in the oral argument, he was inscrutable; in no way could one discern Justice Kennedy’s position from the argument.

99. *Lawrence*, 539 U.S. at 577–78. For this point, Justice Kennedy cited the Stevens dissent: “[T]he fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Id.* (internal quotation marks omitted) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

100. *See id.* at 586–605 (Scalia, J., dissenting).

101. *Id.* at 586–92.

102. *Id.* at 599.

103. *Id.* at 590.

104. *See id.* at 586.

105. *See id.* at 593–94.

106. *Id.* at 590.



majority is indeed finding some sort of fundamental right, even if going under the name of "liberty," strict scrutiny rather than the kind of rational basis review employed by Justice Kennedy would apply.<sup>107</sup> In this key way, *Lawrence* (and *Romer*) may represent something of a sea-change that has led some to talk in terms of a "rational basis with a bite" standard that is applied to gays and lesbians.<sup>108</sup> While it is evident that Justice Kennedy did not use a highly deferential form of rational basis in *Romer* or *Lawrence*, it is also clear that the Court has yet to decide the specific issue of whether gays and lesbians are entitled to some form of heightened scrutiny.<sup>109</sup>

But Justice Scalia's dissent does more than disagree with the majority opinion.<sup>110</sup> Just as in *Bowers*, the Scalia dissent "demeans" (to use Justice Kennedy's term)<sup>111</sup> gays and lesbians throughout.<sup>112</sup> By likening gays and lesbians to those who commit incest, adultery, and bestiality,<sup>113</sup> Justice Scalia brings to the fore exactly the kind of animus toward gays and lesbians that pushes a person of compassion in the opposite direction. Justice Scalia accuses Justice Kennedy of embracing "the homosexual agenda," which seemingly includes the desire to be treated equally under the Constitution.<sup>114</sup>

In *Lawrence*, Justice Kennedy recognizes the humanity of gay and lesbian citizens.<sup>115</sup> He grasps the broad and pernicious impact of sodomy laws and recognizes the autonomy and dignity of gays and lesbians.<sup>116</sup> In essence, Justice Kennedy once again refuses to leave gays and lesbians outside the Constitution; he refuses for gays and lesbians to be a "stranger to [the] law[]." <sup>117</sup>

*Lawrence* marks an important victory for gay and lesbian constitutional rights and Justice Kennedy gets there via a powerful and compassionate

107. *Id.* at 586.

108. See Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 807, 811 (2006).

109. See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence*, 539 U.S. 558.

110. See *Lawrence*, 539 U.S. at 586-605 (Scalia, J., dissenting).

111. See, e.g., *id.* at 525 (referring to *Bowers*: "Its continuance as precedent demeans the lives of homosexual persons.").

112. See *id.* at 586-605 (Scalia, J., dissenting).

113. *Id.* at 590 (noting "the impossibility of distinguishing homosexuality from other traditional 'morals' offenses").

114. *Id.* at 602. In the same way that Justice Scalia's vitriol may have proven counterproductive, the highly offensive tone of some of the amicus briefs submitted in support of the Texas sodomy law may well have horrified Justice Kennedy and others by their venomous tone. See CARPENTER, *supra* note 70, at 204-06 (discussing the Liberty Counsel amicus brief that asserted that the overruling of the Texas sodomy law was a part of a gay agenda designed to destroy families and religion using language from a satirical essay in a gay publication and other highly-offensive amicus briefs).

115. As Professor Suzanne Goldberg put it: "[*Lawrence*] removes the reflexive assumption of gay people's inferiority. *Bowers* took away the humanity of gay people, and this decision give it back." CARPENTER, *supra* note 70, at 264 (quoting Suzanne Goldberg) (internal quotation marks omitted).

116. See *Lawrence*, 539 U.S. 558.

117. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

opinion.<sup>118</sup> That said, Justice Kennedy employs an approach that is innovative, unorthodox, and largely ill-defined. As Professor Parshall explains: “*Lawrence* neither defined the liberty interest it protected as fundamental, nor clearly applied the traditional rational basis test associated with non-fundamental rights.”<sup>119</sup> While a departure from traditional due process analysis, Justice Kennedy’s approach in *Lawrence* has many positive attributes as well.<sup>120</sup> For example, legal scholars have praised his liberty-based focus as being more inclusive and universal in its reach than the traditional privacy approach.<sup>121</sup> Nonetheless, courts and commentators struggle with the actual meaning and reach of the decision.<sup>122</sup>

Justice Kennedy’s unorthodox approach relying on a yet-to-be-defined concept of liberty has allowed lower courts to interpret *Lawrence* narrowly.<sup>123</sup> As Professor Kelly Strader points out, because of the ambiguity in the applicable test and because of the uncertain reach of the concept of liberty, some courts have viewed the effect of *Lawrence* to not extend beyond rendering sodomy laws to be unconstitutional.<sup>124</sup> In so doing, these courts have ignored Justice Kennedy’s determination in *Lawrence* that moral disapproval alone is not an adequate justification.<sup>125</sup>

It is hard to imagine that Justice Kennedy’s opinion in *Lawrence* and his conception of liberty are limited to a debate on the constitutionality of sodomy statutes.<sup>126</sup> The opinion is rife with references to autonomy, dignity, and self-

118. See *Lawrence*, 539 U.S. at 562–79.

119. Lisa K. Parshall, *Redefining Due Process Analysis: Justice Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 238 (2005); see also Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 8 MINN. L. REV. 1582, 1587 (2005) (noting that Justice Kennedy’s opinion “strayed from seemingly well-settled due process doctrine”).

120. See *Lawrence*, 539 U.S. at 562.

121. Yoshino, *supra* note 28, at 803; see also Barnett *supra* note 119, at 1589 (while agreeing with some of the criticism of Justice Kennedy’s opinion, labels *Lawrence* “a ‘potentially revolutionary’ liberty-protecting case”).

122. As Professor Cass Sunstein puts it: “*Lawrence*’s words sound in due process, but much of its music involves equal protection.” Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2004); see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004).

123. Compare, e.g., *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (construing *Romer* narrowly), with *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (construing *Romer* broadly).

124. Strader, *supra* note 5, at 57–60; see also Rosky, *supra* note 5, at 966.

125. Strader, *supra* note 5, at 43 (citing Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1281 (2004)). For example, in a decision upholding a law banning the sale of sex toys, the Eleventh Circuit stated: “[W]e do not read *Lawrence* . . . to have rendered public morality altogether illegitimate as a rational basis.” *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007). But see *Reliable Consultants, Inc. v. Earle*, in which the Fifth Circuit, relying on *Lawrence*, reaches the opposite conclusion, highlighting the ambiguity of the reach of *Lawrence*. 517 F.3d 738 (5th Cir. 2008). Further, the Eleventh Circuit upheld a law banning the right of gays and lesbians to adopt children, *Lawrence* notwithstanding. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004); see also Rosky, *supra* note 5, at 966.

126. Justice Kennedy has raised this conception of liberty in various contexts including in the oral argument on the constitutionality of the Affordable Care Act. Adam Liptak, *The Patient Protection and*

determination.<sup>127</sup> That said, Justice Kennedy perhaps prudently and appropriately limited the reach of the decision to the issue before the Court: the constitutionality of Texas's sodomy law.<sup>128</sup> Future cases will further define the reach of *Lawrence*. Whether *Lawrence* portends Justice Kennedy's support of a constitutional challenge to a law limiting marriage to heterosexuals will be discussed shortly. Before that topic, I will discuss briefly *Perry v. Brown*, as that decision provides the vehicle to bring the marriage-equality issue to the Court.<sup>129</sup>

#### IV. *PERRY V. BROWN*—OVERTURNING CALIFORNIA'S PROPOSITION 8 IN THE NAME OF *ROMER*<sup>130</sup>

The issue of marriage equality is now before the United States Supreme Court.<sup>131</sup> The Supreme Court recently granted certiorari in *Perry v. Brown*, in which the Ninth Circuit determined that California's Proposition 8 (which took away the marriage rights that had been given to gays and lesbians by the California Supreme Court in May 2008) violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>132</sup>

The *Perry* case crystallizes the debate about the reach of *Romer*.<sup>133</sup> First, there is nothing surprising that a case involving a state referendum specifically taking away rights from gays, lesbians, and bisexuals would implicate *Romer*, despite the claims of some journalists that the opinion was some shameless attempt to curry favor with Justice Kennedy on a possible appeal to the Court.<sup>134</sup> Both the

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*Affordable Health Care Act, Appealing to a Justice's Notion of Liberty*, N.Y. TIMES, Mar. 30, 2012, at A1.

127. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

128. See *id.* at 562–79. Indeed, the lawyer who argued the case for the petitioners before the Court, Paul Smith, made clear that they were asking the Court to “get rid” of sodomy laws and were not “worried about establishing a precedent for the eleven other things that came after that.” CARPENTER, *supra* note 70, at 197.

129. See *infra* Part IV.

130. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom., *Hollingsworth v. Perry*, No. 12-144, 2012 WL 3134429 (U.S. Dec. 7, 2012).

131. As mentioned earlier, constitutional challenges to DOMA are also before the Court. See *supra* note 12.

132. 671 F.3d at 1096. The *Perry* decision lays out the long and convoluted process that ultimately brought the issue of the constitutionality of Proposition 8 to the Ninth Circuit. *Id.* at 1066–68. In a nutshell, in May of 2008, the California Supreme Court determined California's law limiting marriage to heterosexuals was unconstitutional under the California Constitution. *Id.* at 1067. Proposition 8 was passed by a majority of voters in November 2008, overturning by initiative the California Supreme Court's marriage decision. *Id.* Before Proposition 8 was passed, however, over 18,000 same-sex couples were legally wed in California. *Id.* The California Supreme Court upheld the constitutionality of Proposition 8 under the California Constitution. *Id.* at 1068. Plaintiffs, after being denied marriage licenses, filed a federal challenge, and in May 2009, after a twelve-day bench trial, Federal District Judge Vaughn Walker determined that Proposition 8 violated the U.S. Constitution. *Id.* at 1069. In February 2012, the majority of the Ninth Circuit panel hearing the appeal to Judge Walker's decision agreed. *Id.* at 1052. In June 2012, the Ninth Circuit declined to rehear *Perry*. *Id.* at 1065. Subsequently, the Supreme Court granted certiorari under the name *Hollingsworth v. Perry*. *Id.*, cert. granted, 2012 WL 3134429.

133. See *id.* at 1080–85.

134. See, e.g., Noah Feldman, *Gay Marriage Ruling a Memo to Justice Kennedy*: Noah Feldman,

*Perry* majority and dissent agree on the relevance of *Romer*; their disagreement revolves around their interpretation of the reach of the *Romer* decision itself.<sup>135</sup> *Perry* provides the Supreme Court the opportunity to better define the reach of *Romer*.

The Ninth Circuit majority went to great lengths to keep its decision California-centric, noting repeatedly that it was reaching its decision on the unconstitutionality of Proposition 8 in the specific context of a state that conferred equal marriage rights on gays and lesbians, then took them away via popular initiative, while maintaining its other broad legal protections for gays and lesbians.<sup>136</sup> Sidestepping the controversial issue of whether the U.S. Constitution confers upon gays and lesbians an equal right to marriage, the majority held that “[b]y using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause” of the Fourteenth Amendment.<sup>137</sup> Or, as the court explained earlier in the opinion:

We need not and do not answer the broader question in this case [of whether gays and lesbians have a constitutional right to marry] . . . because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of ‘marriage,’ and Proposition 8’s only effect was to take away that important and legally significant designation, while leaving in place all of its incidents.<sup>138</sup>

Whether the specific context so important to the majority proves to be a meaningful distinction in terms of federal constitutional law remains to be seen. But California’s near-equal treatment of gay and lesbian couples surely makes it harder to show that there is a rational basis supporting Proposition 8.

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BLOOMBERG NEWS (Feb. 8, 2012), <http://www.bloomberg.com/news/2012-02-08/gay-marriage-ruling-a-memo-to-justice-kennedy-commentary-by-noah-feldman.html> (on file with the *McGeorge Law Review*).

135. See *Perry*, 671 F.3d at 1104–05 (Smith, J., dissenting) (distinguishing *Romer* and stating that it does not “directly” control).

136. See, e.g., *id.* at 1076. Many thought that the narrowness of the opinion would make it less likely for the Supreme Court to grant certiorari. Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012), <http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html> (on file with the *McGeorge Law Review*). But see David Cole, *Gambling with Gay Marriage*, N.Y. REV. OF BOOKS (Feb. 9, 2012), <http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/> (on file with the *McGeorge Law Review*). However, the Court may well have decided to hear an appeal because the case raises issues regarding the reach of *Romer* and arguably conflicts with the Eighth Circuit’s *Bruning* opinion.

137. *Perry*, 671 F.3d at 1096.

138. *Id.* at 1064.

The *Romer* analogy was determinative to the majority; indeed in their view, *Romer* “compel[led]” them to strike down Proposition 8.<sup>139</sup> The majority explained, freely citing *Romer*:

Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 “single[s] out a certain class of citizens for disfavored legal status. . . .” Like Amendment 2, Proposition 8 has the “peculiar property” of “withdraw[ing] from homosexuals, but not others” an existing legal right . . . that has been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place. Like Amendment 2, Proposition 8 denies “equal protection of the laws in the most literal sense” because it “carves out” an “exception” to California’s equal protection clause. . . . Like Amendment 2, Proposition 8 “by its very decree . . . put[s] [homosexuals] in a solitary class with respect to” an important aspect of human relations, and accordingly “imposes a special disability upon [homosexuals] alone.” And like Amendment 2, Proposition 8 constitutionalizes that disability, meaning gays and lesbians may overcome it “only by enlisting the citizenry of [the state] to amend the State Constitution” for a second time.<sup>140</sup>

The *Perry* majority quickly dismissed the Eighth Circuit’s *Bruning* decision, which upheld an even more far-reaching voter-backed constitutional initiative on the ground that *Romer* extended only to far-reaching initiatives, simply noting that “Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect.”<sup>141</sup>

Not surprisingly, the *Perry* dissent distinguishes the Proposition 8 challenges from Amendment 2 because of Proposition 8’s narrow reach.<sup>142</sup> Thus, in the view of the dissenter, *Romer* did not command a finding of Proposition 8’s unconstitutionality.<sup>143</sup>

Ultimately, the majority, relying on an exhaustive record created by the trial court,<sup>144</sup> debunks all of the purported bases for depriving gays and lesbians access to marriage.<sup>145</sup> Thus, based on the record, the majority concludes that, as in

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139. See *id.* at 1080–85.

140. *Id.* at 1081 (alteration in original) (citations omitted).

141. *Id.*

142. *Id.* at 1104 (Smith, J., dissenting).

143. *Id.* at 1097.

144. The Federal District Court Judge who heard the *Perry* case required a twelve-day bench trial, complete with nineteen witnesses that led to a detailed and thoughtful opinion debunking all of the arguments made by Proposition 8 proponents and justifying the end to marriage equality in California. For a thoughtful and detailed discussion of the trial court’s opinion, see Rosky, *supra* note 5.

145. *Perry*, 671 F.3d at 1092–95.

*Romer*, animus has to be the only explanation for the passage of Proposition 8.<sup>146</sup> Unlike in *Romer*, in which Justice Kennedy dismisses Colorado's asserted justifications for Amendment 2 in one short paragraph, the *Perry* majority provides a detailed account of how the purported justifications for Proposition 8 ring hollow, largely based on California's still existing domestic-partnership law that confers the benefits of marriage on registered same-sex couples.<sup>147</sup>

*Perry* provides the Court the occasion to weigh in on the marriage-equality issue in a limited context. The California-centric focus of the opinion may persuade the Court to decide the marriage-equality issue on narrow grounds.<sup>148</sup>

#### V. ROMER, LAWRENCE, AND THE LIKELIHOOD OF JUSTICE KENNEDY'S SUPPORT FOR CONSTITUTIONAL MARRIAGE EQUALITY

Neither *Romer* nor *Lawrence* dictates the outcome of the marriage-equality issue. *Romer* is most relevant to an Equal Protection challenge involving a popular referendum on the issue of marriage equality.<sup>149</sup> Whether *Romer* means that a State cannot, via initiative, ban gays and lesbians access to legal marriage absent a significant reason may find its way to the Court in the not too distant future, perhaps in the context of the *Perry* case.

Likewise, *Lawrence* does not predetermine the outcome in a marriage-equality case.<sup>150</sup> Throughout the *Lawrence* opinion, Justice Kennedy made various references asserting that the reach of the opinion does not necessarily extend to the issue of marriage equality.<sup>151</sup> Relatively early in the *Lawrence* opinion, Justice Kennedy, though noting with sensitivity the broad harm inflicted by sodomy statutes on gay people, adds "the [sodomy] 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>152</sup> Finally, near the end of the opinion, Justice Kennedy stresses that

146. *Id.* at 1093.

147. *Id.* at 1076–80. The dissent, in a temperately written opinion that notes how deferential the rational basis standard tends to be, finds that there are some plausible justifications for Proposition 8, such as promoting procreational responsibility. *Id.* at 1097 (Smith, J., dissenting).

148. See Andrew Koppelman, Online Forum, *Reaction: Salvaging Perry*, 125 HARV. L. REV. F. 69 (2012), [http://www.harvardlawreview.org/issues/125/march12/forum\\_828.php](http://www.harvardlawreview.org/issues/125/march12/forum_828.php) (on file with the *McGeorge Law Review*) (arguing that the Ninth Circuit purposefully narrowed the "legal claim" of the case in an attempt to limit its application to California); see also Robin West, Online Forum, *A Marriage Is a Marriage Is a Marriage: The Limits of Perry v. Brown*, 125 HARV. L. REV. F. 47 (2012), [http://www.harvardlawreview.org/issues/125/march12/forum\\_848.php](http://www.harvardlawreview.org/issues/125/march12/forum_848.php) (on file with the *McGeorge Law Review*) (stating that the Ninth Circuit's decision has been "widely lauded . . . by marriage equality proponents for its creative minimalism").

149. See *Romer v. Evans*, 517 U.S. 620 (1996).

150. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

151. See *id.*

152. *Id.* at 567 (emphasis added). Soon thereafter, Justice Kennedy adds that a state should avoid defining the nature of an adult relationship "*absent . . . abuse of an institution the law protects.*" *Id.* (emphasis added).



the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>153</sup> While this language can support the argument that *Lawrence* does not necessarily find that a liberty interest encompasses marriage equality, nothing in the majority opinion forecloses such a finding either.<sup>154</sup>

That Justice Kennedy takes particular care to exempt the marriage issue from the reach of the opinion is no surprise for several reasons. First and foremost, that issue was not before the Court; the case involved the constitutionality of sodomy laws and nothing about the definition of marriage.<sup>155</sup> Another reason that the *Lawrence* majority opinion does not embrace marriage equality is because the lawyers for the Petitioners went to great lengths to assure the Court that it could overrule *Bowers* without having to do so, asserting specifically that the case was not about "any right to affirmative state recognition or benefits."<sup>156</sup>

Only one Justice interprets *Lawrence* as resolving the marriage-equality issue—Justice Scalia.<sup>157</sup> Justice Scalia bluntly asserts that *Lawrence* "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"<sup>158</sup> because he rather surprisingly accepts that the only reason for the disparate treatment is the moral disapproval of permitting gays and lesbians to have equal access to the institution of marriage.<sup>159</sup> Justice Scalia concedes that encouraging procreation is not a believable basis for treating gays differently from straights in the marriage context,<sup>160</sup> although many advocates of a heterosexual monopoly on marriage argue to the contrary.<sup>161</sup> Indeed, none of the decisions in which a court has upheld restricting marriages to heterosexuals has done so based solely on the right of a majority to express their displeasure with the notion of gays and lesbians being permitted to legally wed, which to Justice

153. *Id.* at 578.

154. Professor Carpenter notes that in *Lawrence*, Justice Kennedy remains "agnostic" on the issue of whether "gays might aspire to formal recognition" of their relationships. CARPENTER, *supra* note 70, at 260. Justice Kennedy's silence on the issue stands in contrast to Justice O'Connor's concurrence in which she strongly suggests that her Equal Protection-based opinion does not impose a state obligation of marriage equality. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. . . . Unlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.*

155. *See Lawrence*, 539 U.S. 558.

156. CARPENTER, *supra* note 70, at 207 (internal quotation marks omitted) (quoting the petitioner's reply brief).

157. *See Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting).

158. *Id.* at 604.

159. *Id.* at 605.

160. *Id.* (stating that "encouragement of procreation" cannot be the basis "since the sterile and the elderly are allowed to marry").

161. *Anderson v. King Cnty.*, 138 P.3d 963, 969 (Wash. 2006) (upholding the law banning gay marriage in part because it "furthers procreation, essential to the survival of the human race").

Scalia would be an appropriate justification. But it is quite clear that Justice Scalia will not be siding with marriage-equality advocates any time soon, even though he believes that a constitutional right to marriage equality is preordained by *Lawrence*.<sup>162</sup> While Justice Scalia's *Lawrence* dissent discusses at length the impropriety of the majority's rejection of *stare decisis* when it overruled *Bowers*,<sup>163</sup> Justice Scalia admits that he does not "believe in rigid adherence to *stare decisis* in constitutional cases."<sup>164</sup> Surely, Justice Scalia will not feel bound to follow *Lawrence*.

## VI. THE LIKELY KENNEDY VOTE

Neither *Romer* nor *Lawrence*, then, predetermines the result in a constitutional marriage-equality case.<sup>165</sup> Similarly, these decisions do not provide a certain answer to how Justice Kennedy will vote when confronted with the marriage-equality issue.

Justice Kennedy understands the impact that *Romer* and *Lawrence* have had on the lives of real people, and I have every reason to agree with Professor Pam Karlan's gleeful pronouncement that Justice Kennedy knows and likes gay people.<sup>166</sup> In contrast to Justice Powell, who, while struggling with how to vote in *Bowers*, famously proclaimed that he had never met a gay person even though he had a gay law clerk at the time he made that comment,<sup>167</sup> Justice Kennedy's close friendships have included gays and lesbians.<sup>168</sup> While there is ample evidence that having close gay friends positively affects one's attitudes regarding homosexuals,<sup>169</sup> and while Justice Kennedy is a person of compassion,<sup>170</sup> he will base his vote on same-sex marriage issues on his interpretation of the relevant

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162. See *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting).

163. *Id.* at 587.

164. *Id.*

165. See *supra* Part V.

166. David G. Savage, *Gay Marriage Fight May Hinge on Supreme Court's Anthony Kennedy*, L.A. TIMES (Feb. 8, 2012), <http://articles.latimes.com/2012/feb/08/nation/la-na-marriage-kennedy-20120209> (on file with the *McGeorge Law Review*). Professor Karlan said of Justice Kennedy: "He is a California establishment Republican with moderately libertarian instincts. . . . He travels in circles where he has met and likes lots of gay people." *Id.*

167. MURDOCH & PRICE, *supra* note 79, at 272–75.

168. See Massimo Calabresi & David Von Drehle, *What Will Justice Kennedy Do?*, TIME, June 7, 2012, at 28. Indeed, Justice Kennedy's close friend and mentor, Gordon Schaber, the long-time dean of McGeorge School of Law, was assumed to be gay by many people who knew him, though it was not a topic he and others discussed openly. *Id.*

169. Michael J. Brown & Ernesto Henriquez, *Socio-Demographic Predictors of Attitudes Towards Gays and Lesbians*, 6 INDIVIDUAL DIFFERENCES RESEARCH 192, 195, 197 (2008), available at [http://homepage.mac.com/psychresearch/Sites/site2/publications/manuscripts/brown\\_henriquez.pdf](http://homepage.mac.com/psychresearch/Sites/site2/publications/manuscripts/brown_henriquez.pdf) (on file with the *McGeorge Law Review*).

170. KNOWLES, *supra* note 4, at 197 (referring to the "humane element of Justice Kennedy's jurisprudence").

law, including his evolving definition of the meaning and scope of liberty.<sup>171</sup> To be sure, judges cannot fully insulate themselves from their life experiences, upbringing, faith, and family,<sup>172</sup> but I truly believe most, and Justice Kennedy particularly, try hard to do so.<sup>173</sup>

How, then, will Justice Kennedy rule when confronted with the issue of whether it is constitutional to limit marriage to heterosexuals? To a large measure, the answer depends on how the issue is framed and when the issue gets to the Court.

The *Perry* case provides an opportunity for the Court to decide a marriage-related case and to do so in a somewhat narrow context.<sup>174</sup> Ironically, Judge Reinhardt's effort to draft a California-centric opinion in *Perry*, perhaps to minimize the likelihood that the case would be heard by the Supreme Court, may have enticed the Court to hear the case due to the narrowness of the issue. The Court would be able to take its first step into what will likely be an ongoing legal battle about same-sex marriage rights without having to grapple with the more controversial issue of whether the Constitution commands that all states permit marriage rights to gays and lesbians. *Perry* provides the Court the opportunity to decide the proper scope of *Romer*, currently very much in dispute.<sup>175</sup> Until recently, there has been little desire to bring a federal challenge and Supreme Court appeal to these so-called mini-DOMAs out of fear that a bad ruling would be a major setback for gay and lesbian rights.<sup>176</sup> Now that a case involving a

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171. My view that the Justices successfully put aside their own personal views when deciding cases may be overly optimistic, however. The public opinion of the Supreme Court is at its lowest point in recent history with three-quarters of the respondents in a recent poll stating that the Justices' opinions are influenced by their political and personal views. See Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1.

172. RICHARD A. POSNER, *HOW JUDGES THINK* 8 (2010).

173. Professor Colucci posits that Justice Kennedy's "reliance on liberty and human dignity—criticized by Scalia as merely Kennedy's personal preference—is likely inspired by his Catholicism." COLUCCI, *supra* note 4, at 31. He specifically asserts that Justice Kennedy's focus on human dignity in *Lawrence* is "characteristically Catholic." *Id.* at 33. Professor Colucci then, with a quick reference, notes that Justice Kennedy conforms to the position of the Catholic Church in *Lawrence* by noting that the decision does not involve the legal recognition of same-sex relationships. *Id.* at 34–35. If Justice Kennedy should decide against a constitutional requirement of marriage equality, he will not do so to conform to positions of the Catholic Church. Justice Kennedy is quite capable of adopting a constitutional interpretation that puts him at odds with the position of his church. For example, Justice Kennedy, despite his deep commitment to the Roman Catholic faith, has gone against church doctrine in the abortion context because of his interpretation of the Due Process Clauses. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

174. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

175. Compare *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006) (interpreting the reach of *Romer* narrowly), with *Perry*, 671 F.3d 1052 (interpreting the reach of *Romer* more broadly).

176. Koppelman, *supra* note 148, at 69 (noting that gay rights litigators such as Gay and Lesbian Advocates and Defenders and the Lambda Legal Defense Fund "feared a premature appeal to the Supreme Court, generating a decision that same-sex couples do not have the right to marry"). A substantial majority of states have passed laws or constitutional amendments that seek to prohibit gays and lesbians from having access to the institution of marriage. Because of their similarity to the federal Defense of Marriage Act, they are commonly referred to as "mini-DOMAs."

popular vote on marriage equality is before the Supreme Court, Justice Kennedy and the Court will have the opportunity to discuss the scope of his *Romer* decision. It is hard to imagine that *Romer* is as narrow as some courts, such as the *Bruning* court, found it.<sup>177</sup> Justice Kennedy will not be quick to overturn the vote of the people, but he will do so unless there is an adequate showing made to justify the law just as he did in *Romer*. In light of Judge Walker's exhaustive trial record debunking the asserted bases in support of Proposition 8,<sup>178</sup> along with the detailed discussion by Judge Reinhart of the disconnect of those asserted bases in the California context,<sup>179</sup> the Court may well decide the case on narrow grounds.

Should the Court decide *Perry* on the merits, a strong case can be made that the only valid bases for Proposition 8 are the sort of moral and religious justifications that Justice Kennedy would likely find unacceptable.<sup>180</sup> Like the California Supreme Court in the *Marriage Cases*,<sup>181</sup> the Ninth Circuit majority in *Perry* determined that California gays and lesbians had the constitutional right to marry because the asserted bases to bar them from marriage rang hollow in a state that largely treats its gay and lesbian couples equally to its heterosexual couples.<sup>182</sup> There does seem something peculiar about the fact that those states that treat their gay and lesbian citizens with dignity are those on which a federal constitutional requirement of marriage equality will most likely be imposed, while those states that are largely dismissive of the rights of their gay and lesbian inhabitants will avoid having to provide equal marriage access.<sup>183</sup>

It seems inevitable that the Court eventually will have to confront the broader constitutional challenge to the laws of most states that restrict marriage to heterosexuals. Indeed, former Solicitor General Ted Olson, who, along with David Boies, is famously leading the federal constitutional charge against California's Proposition 8, recently made clear that the goal should be for a

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177. As Professor Knowles explained, "even a more narrowly written amendment—whose impact on the legal status of homosexuals was neither sweeping nor comprehensive—could not pass constitutional muster as long as it was underpinned by the same majoritarian, and morality-driven animus that Kennedy concluded was the only way to explain the existence of Amendment 2." KNOWLES, *supra* note 4, at 110.

178. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

179. *Perry*, 671 F.3d 1052.

180. See Rosky, *supra* note 5, at 983.

181. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

182. See *Perry*, 671 F.3d at 1076–77.

183. See Will Ripley & Brandom Rittiman, *Emotional Testimony Couldn't Save Colorado's Civil Unions Bill*, ASSOCIATED PRESS (May 14, 2012), <http://www.9news.com/rss/story.aspx?storyid=267940> (on file with the *McGeorge Law Review*). This somewhat perverse situation has not gone unnoticed. Recently, in an effort to prevent passage of a bill to permit same sex-civil unions in Colorado, the argument was made that doing so would be the precursor to the judicial imposition of same-sex marriage. See *id.* Brian Raum, attorney for the Alliance Defense Fund, argued in front of the State Affairs Committee that, "[a]chieving civil unions is a calculated step to achieving court-ordered same sex marriage. Opposing same-sex marriage while supporting civil unions is akin to the Trojans dragging a wood horse into the middle of Troy." *Id.* Raum offered New Jersey, Connecticut, and California—where civil union proponents eventually filed for the legalization of same-sex marriage—as proof. *Id.*

Supreme Court decision mandating all states to permit gays and lesbians equal access to marriage.<sup>184</sup> Decisions by the Supreme Court striking down existing state laws on constitutional grounds, of course, are not unprecedented.<sup>185</sup> They are often controversial, however.

The Court in general and Justice Kennedy in particular believe in incremental steps.<sup>186</sup> Indeed, in discussing *Roe v. Wade* at Columbia Law School, Justice Ginsburg recently stated, "It's not that the judgment was wrong, but it moved too far too fast."<sup>187</sup> Justice Ginsburg seemed to suggest that the Court should have waited to decide such a contentious issue in order to give the states more time to work through it.<sup>188</sup> The Justices, including Justice Kennedy, might find this sentiment persuasive, especially in light of the fierce debate currently raging about marriage equality.<sup>189</sup>

While important, the ending of sodomy laws in *Lawrence* had a limited impact, as relatively few states had sodomy statutes and those that did rarely enforced them.<sup>190</sup> The Supreme Court affected sixteen states when it struck down

184. *Hardball with Chris Matthews* (MSNBC television broadcast May 10, 2012), available at [http://www.msnbc.msn.com/id/47356785/ns/msnbc\\_tv-hardball\\_with\\_chris\\_matthews/t/hardball-chris-matthews-thursday-may/#.T-umj2iIn14](http://www.msnbc.msn.com/id/47356785/ns/msnbc_tv-hardball_with_chris_matthews/t/hardball-chris-matthews-thursday-may/#.T-umj2iIn14) [hereinafter Olson Interview] (on file with the *McGeorge Law Review*) (Mr. Olson analogizing the current struggle for marriage equality to the fight to overturn laws that restricted marriage to persons of the same race).

185. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967).

186. Parshall, *supra* note 119, at 246 ("Romer was a spare opinion, only fourteen pages long and its failure to confront *Bowers* seemed a cautious effort to avoid addressing its continued legitimacy. Furthermore, *Romer* 'represent[ed]' an incremental, but important step in affording gay Americans the full benefits of the Equal Protection Clause.") (quoting Katherine M. Hamill, *Romer v. Evans: Dulling the Equal Protection Gloss On Bowers v. Hardwick*, 77 B.U. L. REV. 655, 684 (1997)); see also, CARPENTER, *supra* note 70, at 196 (noting that "the Supreme Court is ordinarily a cautious, minimalist, and incremental institution").

187. Debra Cassens Weiss, *Justice Ginsburg: Roe v. Wade Decision Came Too Soon*, ABA J. ONLINE (Feb. 13, 2012), [http://www.abajournal.com/news/article/justice\\_ginsburg\\_roe\\_v.\\_wade\\_decision\\_came\\_too\\_soon/](http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon/) (on file with the *McGeorge Law Review*).

188. See *id.*

189. On May 8, 2012, the voters of North Carolina overwhelming passed a far-reaching voter initiative that not only bans same-sex marriage but also the recognition of other sorts of legally created relationships, such as civil unions and domestic partnerships. The next day, President of the United States, Barack Obama, expressed his personal support for the right of gays and lesbians to legally marry. The President did add that he believed that this was an issue for the states, however. Thirty-one states have had popular votes limiting marriage to heterosexuals. See Campbell Robertson, *In North Carolina, Beliefs Clash on Marriage Law*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/2012/05/12/us/in-north-carolina-gay-rights-not-a-simple-issue.html> (on file with the *McGeorge Law Review*); see also Phil Gast, *Obama Announces He Supports Same-Sex Marriage*, CNN (May 09, 2012), [http://articles.cnn.com/2012-05-09/politics/politics\\_obama-same-sex-marriage\\_1\\_gay-marriage-civil-unions-word-marriage?\\_s=PM:POLITICS](http://articles.cnn.com/2012-05-09/politics/politics_obama-same-sex-marriage_1_gay-marriage-civil-unions-word-marriage?_s=PM:POLITICS) (on file with the *McGeorge Law Review*). Recently, a Nevada District Court judge held that limiting marriage to a man and a woman was a legitimate state interest and excluding same-sex couples is rationally related to that purpose. *Sevcik v. Sandoval*, No. 2:12-cv-00578-RCJ-PAL, 2012 WL 5989662 (D. Nev. Nov. 26, 2012). On the other hand, in the recent general election, the voters in three states voted to provide gays and lesbians access to the institution of marriage. Honan, *supra* note 6 (Maine, Maryland, and Washington).

190. See *Lawrence*, 539 U.S. at 573.

laws banning interracial marriage,<sup>191</sup> and the Court's unanimous result could hardly have held much surprise in light of the civil rights victories that were taking place.<sup>192</sup> Conversely, when the Court decided *Roe v. Wade*, only four states had completely repealed their antiabortion laws.<sup>193</sup> Currently, fewer than a handful of states have full marriage equality; many states continue to struggle with how they will define marriage.<sup>194</sup> Even many of the strongest advocates for marriage equality see the debate playing out at the state level. For example, in a recent MSNBC interview, Evan Wolfson, who has been fighting longer and harder for marriage equality than just about anyone, parted ways with Ted Olson and suggested a Supreme Court case at this point would be premature.<sup>195</sup> Mr. Wolfson noted:

[T]he President is also right that the way our country gets there is through a patchwork of struggle, in which some states advance further faster, other states regress and struggle. The country debates, and it creates a climate that enables the Court to ultimately do the right thing . . . .<sup>196</sup>

A premature Supreme Court decision could lead to a decision harmful to the marriage-equality cause.<sup>197</sup>

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191. *Loving v. Virginia*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, [http://www.oyez.org/cases/1960-1969/1966/1966\\_395](http://www.oyez.org/cases/1960-1969/1966/1966_395) (last visited Aug. 28, 2012) (on file with the *McGeorge Law Review*).

192. *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964) (striking down Florida's prohibition on interracial cohabitation law just three years before the *Loving v. Virginia* decision). Public attitudes, however, did not support the Court's decision. Public polling in 1963 had public support for bans on interracial marriage at sixty-three percent, yet public backlash towards the court was lacking after the *Loving* decision. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1155–56 (2009) (citing polling numbers from HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 238–39 (rev. ed. 1997)).

193. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?* 6 GUTTMACHER REP. ON PUB. POL'Y 8 (2003), available at <http://www.guttmacher.org/pubs/tgr/06/1/gr060108.html#box> (on file with the *McGeorge Law Review*). Alaska, Washington, New York, and Hawaii had repealed their antiabortion laws, replacing them with statutes allowing abortion when deemed necessary by the woman and her physician. *Id.*

194. See LAMBDA LEGAL, *supra* note 6.

195. See Olson Interview, *supra* note 184.

196. *Id.*

197. For example, in the interracial marriage context, the Supreme Court first upheld a state law banning interracial marriage in *Naim v. Naim*, 350 U.S. 483 (1956). As racial tensions grew after *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court waited thirteen years to invalidate state bars to interracial marriage in *Loving v. Virginia*, 388 U.S. 1 (1967). Perhaps as an incremental step, the Supreme Court struck down a state prohibition on interracial cohabitation to test the waters of the polity so-to-speak in *McLaughlin v. Florida*, 379 U.S. 184 (1964).



The passage of time favors the advocates for marriage equality. Author Jeffrey Toobin noted in 2005:

[Kennedy's] opinions in the Colorado and Texas cases have made him the Court's most visible defender of gay rights, but his support of gay marriage, a subject that many expect the Court will eventually take on, seems far from certain. In the *Lawrence* decision, Kennedy cited a consensus in "Western civilization" against punishing homosexual sodomy. But foreign traditions of tolerance for homosexual activity have not led to broad international support for gay marriage . . . .<sup>198</sup>

That was nearly a decade ago, and the number of countries that join the four he noted has now expanded the count to eleven.<sup>199</sup> Further, I believe that Toobin overstates the influence of what is done by most of "Western civilization" on Justice Kennedy's decision-making.<sup>200</sup> What is surely more relevant are the quickly changing attitudes on marriage equality here in the United States. When Toobin wrote his piece in 2005, approximately thirty-nine percent of Americans favored marriage equality.<sup>201</sup> Now, some polls show that there is majority support for marriage equality with consistent trending in that direction.<sup>202</sup>

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198. Toobin, *supra* note 4, at 51. And there is the lesson of *Bowers v. Hardwick*, still very much in the minds of those advocating for gay and lesbian rights. See 478 U.S.186 (1986).

199. LAMBDA LEGAL, *supra* note 6. Since 2005, South Africa, Norway, Sweden, Argentina, Iceland, Portugal, and Denmark joined the Netherlands, Belgium, Canada, and Spain in recognizing same-sex marriages. Several other countries (twenty-five) recognize non-marital partnership registration, including the United Kingdom, Israel, Germany, France, and Australia, to name a few. *Id.* Other countries appear to be moving toward marriage equality as well. See Andrew Potts, *Colombia Debates Same-Sex Marriage Ahead of Deadline*, GAYSTARNEWS (Aug. 24, 2012), <http://www.gaystarnews.com/article/colombia-debates-same-sex-marriage-ahead-deadline240812> (on file with the *McGeorge Law Review*) (Colombia is currently debating whether to expand marriage to same-sex couples.); Pablo Fernandez, *Uruguay's Gay Marriage Law Approved by Lower House*, HUFFINGTON POST (Dec. 11, 2012), [http://www.huffingtonpost.com/2012/12/12/uruguay-gay-marriage-lower-house-approval-\\_n\\_2284377.html](http://www.huffingtonpost.com/2012/12/12/uruguay-gay-marriage-lower-house-approval-_n_2284377.html) (on file with the *McGeorge Law Review*) (Legislation extending marriage to gays and lesbians is currently working through Uruguay's legislative process.).

200. See Toobin, *supra* note 4, at 51.

201. See *id.*

202. See Nate Silver, *Gay Marriage Opponents Now in the Minority*, N.Y. TIMES (Apr. 20, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority> (on file with the *McGeorge Law Review*); Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP POLITICS (Dec. 5, 2012), <http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx> (on file with the *McGeorge Law Review*) (providing that fifty-three percent of those polled supported same-sex marriage). Indeed, support of marriage equality is far greater than the public support for interracial marriage was when the Supreme Court struck down anti-miscegenation laws. See Schacter, note 192, at 1155.

Justice Kennedy's conception of liberty might well include a constitutionally protected right to intimate relationships that are treated with equal dignity. As Professor Colucci puts it:

Given [Justice Kennedy's] broad ideal of personal liberty, his willingness to move beyond text and specific tradition . . . it is unlikely Kennedy would accept traditional disapproval and continuing disapproval by a majority alone as a sufficient state interest to override a law that interferes with an individual's free choice and development of his or her own identity.<sup>203</sup>

Justice Kennedy's move to a liberty standard of inclusion rather than an equality focus grounded on difference makes it plausible that relational dignity for all could be the ticket to marriage equality.<sup>204</sup>

## VII. CONCLUSION

One so inclined can criticize the unorthodox constitutional analysis and the uncertain reach of Justice Kennedy's *Romer* and *Lawrence* opinions. Consistent with Justice Kennedy's cautious approach,<sup>205</sup> these cases simply did not go further than was necessary while strongly supporting the constitutional rights of gays and lesbians.

*Romer* and *Lawrence* are foundational cases in the ongoing struggle for gay and lesbian constitutional rights.<sup>206</sup> Both cases, in often elegant and powerful terms, go far in restoring the humanity to gay and lesbian citizens that *Bowers* took from them.<sup>207</sup> Justice Kennedy is acutely aware of how these decisions have affected the lives of real people. I venture too that a person as empathetic, thoughtful, and compassionate as Justice Kennedy is unsettled by the scorn and contempt to which gays and lesbians are often subjected simply because of whom they elect to love. In *Lawrence*, Justice Kennedy recognizes the importance of the autonomy to make decisions regarding the formation of lasting and meaningful relationships and fully connects ending sodomy laws with the broader goal of human self-actualization.<sup>208</sup> Following the logic of *Lawrence*, a state would seemingly have a heavy burden to show a valid reason for depriving

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203. COLUCCI, *supra* 5 note, at 22.

204. *See id.* at 23; *see generally* Yoshino, *supra* note 31.

205. *See* EDWARD LAZARUS, CLOSED CHAMBERS 253 (1998); Cynthia Gorney, *A Cautious Conservatism; Judge Kennedy Lives by the Rules*, WASH. POST, Dec. 14, 1987, at A1.

206. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

207. *See* *Lawrence*, 539 U.S. 558; *Romer*, 517 U.S. 620; *Bowers v. Hardwick*, 478 U.S. 186 (1986).

208. *See* *Lawrence*, 539 U.S. at 574.

gay and lesbian people of the right to form lasting and loving bonds in the same manner as their heterosexual counterparts.<sup>209</sup>

Whether Justice Kennedy is ready to take the next step and join those Justices who would find the heterosexual marriage monopoly of most states to be unconstitutional is yet to be seen. Might he find that the concept of liberty enshrined in the Due Process Clause extends so far? Surely, there is reason to think that he will.

As Justice Kennedy so beautifully put it in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truth and that later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its own principles in their own search for greater freedom.<sup>210</sup>

In light of the long history of evolving attitudes about the meaning of marriage, coupled with the Supreme Court's clear support for marriage as a fundamental right<sup>211</sup> and its privacy jurisprudence,<sup>212</sup> it is not hard to imagine that the liberty interest enshrined in the Constitution would extend to the right of adults to form lasting and meaningful bonds. For a state to deem some of those relationships as lesser simply because of the sex of the participants requires some significant justification extending beyond tradition, morality, and general dislike.<sup>213</sup>

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209. See *id.* at 558.

210. *Id.* at 578–79. Professor Colucci contends that Justice Kennedy's "'ideal of liberty' . . . considers whether government actions have the effect of preventing an individual from developing his or her distinctive personality or acting according to conscience, demean a person's standing in the community, or violate essential elements of human dignity." COLUCCI, *supra* note 4, at 8–9. Similarly, Professor Knowles has noted that "the humane element of Justice Kennedy's jurisprudence . . . protects an individual's 'right to search for' the dignity that is central to his or her liberty." KNOWLES, *supra* note 4, at 197. Surely, a right to equal access to marriage could fall within the liberty ideal, and the search for dignity, as defined by Professors Colucci and Knowles.

211. *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[I]nmate marriages, like others, are expressions of emotional support and public commitment."); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("The right to marry is of fundamental importance for all individuals."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

212. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

213. See generally MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010). Surely if the Court is prepared to see that intimate sexual conduct is a central part of forming loving and meaningful bonds, providing equal access to the revered institution of marriage is an even easier sell. Rather than an undercurrent of sex which permeates sodomy statutes, marriage is largely about

The struggle for marriage equality will likely give Justice Kennedy the opportunity to define the reach of the liberty interest as it applies to committed, loving couples. And maybe the happy end of the story will indeed be "Liberty and Justice for All."<sup>214</sup>

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fidelity, commitment, and love.

214. FRANCIS BELLAMY, THE PLEDGE OF ALLEGIANCE (1892).