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## Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights

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## SILENCE OF THE LIBERALS: WHEN SUPREME COURT JUSTICES FAIL TO SPEAK UP FOR LGBT RIGHTS

*David S. Cohen* \*

### ABSTRACT

*In 1985, Justice Brennan did something that had never been done before and has, surprisingly, never been done again—penned a separate opinion from the Court’s left vigorously arguing for the protection of gay rights under the Constitution. Since then, even though the Court has repeatedly protected gay rights, none of the Court’s liberal Justices have said a word on the topic. Rather, the liberal Justices have ceded the territory on the issue of the Constitution and gay rights almost entirely to Justice Kennedy’s notoriously flowery but somewhat vacuous statements about the issue, as well as the pointed and often homophobic critiques of the Court’s more conservative Justices.*

*This liberal silence has been costly. Court developments around gay rights have been one of many factors contributing to the drastic change in this country with respect to accepting gay people and treating them more equally. Concurring opinions could have been a part of this judicial influence, both in society and in lower court doctrine, but the liberal Justices have opted to remain silent. By doing so, they have lost an opportunity to use separate opinions to influence the trajectory of the law on gay and trans rights, solidify the societal and legal gains that may be threatened by Justice Kennedy’s departure from the Court, clarify Justice Kennedy’s vague analysis, and counter the stereotypes and bigotry of the dissenting opinions.*

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## INTRODUCTION

In 1974, Marjorie Rowland, a public high school guidance counselor, confided in her colleagues that she was bisexual.<sup>1</sup> She was at work when her secretary asked her why she was in such a good mood, and Marjorie told her that she was in love with a woman.<sup>2</sup> Her secretary was not happy with this answer, nor was the parent of a student whom Marjorie had earlier counseled to accept her son's sexual orientation.<sup>3</sup> When her supervisors found out about her sexual orientation, Marjorie was suspended from her position midyear and then not rehired for the next year.<sup>4</sup> Marjorie sued, and the district court found that the school district had violated Marjorie's constitutional rights to free speech and equal protection.<sup>5</sup> After the Sixth Circuit reversed on appeal,<sup>6</sup> the Supreme Court refused to hear Marjorie's case.<sup>7</sup>

This somewhat obscure denial of certiorari from 1985 has been mostly forgotten, especially as the Court has forged a different path forward for gay rights<sup>8</sup> under the Constitution. However, one part of the Court's action remains important and unique, even in light of recent advances. Accompanying the denial of certiorari in *Rowland v. Mad River Local School District* was a dissenting opinion from Justice Brennan, joined by Justice Marshall, that has proven to be a historical rarity on the Supreme Court: an opinion from a liberal Justice about gay rights.

In that separate opinion, Justice Brennan gave a roadmap of how to protect gay rights under the Constitution's Equal Protection Clause. Discrimination against gay people, Justice Brennan wrote, "raises significant constitutional questions" because sexual orientation is a suspect class and because discrimination interferes with

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1. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1009, 1016 n.11 (1985) (Brennan, J., dissenting from denial of certiorari).

2. *Id.* at 1016 n.11.

3. *Id.*

4. *Id.* at 1009–10.

5. *Id.* at 1010.

6. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984).

7. *Rowland*, 470 U.S. at 1009.

8. Throughout this article, I use the term "gay rights" to encompass many different rights related to sexual orientation, among them, privacy, autonomy, dignity, and equality. I generally use this term instead of the broader term "LGBT rights" (lesbian, gay, bisexual, and transgender rights) because the Supreme Court cases that I analyze do not involve transgender rights, an issue I discuss at length in Part IV.

a fundamental right.<sup>9</sup> On the suspect class point, Justice Brennan explained that gay people are “a significant and insular minority” who “are particularly powerless to pursue their rights” and “have historically been the object of pernicious and sustained hostility” based on “deep-seated prejudice.”<sup>10</sup> On the fundamental right point, Justice Brennan noted that discrimination against gay people often implicates the rights to privacy and free expression.<sup>11</sup> Justice Brennan concluded that he had “serious doubt” that the Sixth Circuit’s overturning of the trial verdict “can be upheld under any standard of equal protection review.”<sup>12</sup>

What makes this opinion historically important is that nothing like this has happened again on the Court. Over the past three-plus decades, the Supreme Court has decided five cases that directly addressed constitutional recognition of gay rights. *Bowers v. Hardwick*, the Court’s first foray into the topic, infamously rejected a claim that the right to privacy extends to sexual conduct between gay people.<sup>13</sup> After that misstep, the Court reversed course in a series of four decisions that all found for the gay rights claimant: rejecting a state constitutional amendment that banned antidiscrimination laws in *Romer v. Evans*;<sup>14</sup> striking down a state law prohibiting same-sex sexual activity in *Lawrence v. Texas* (and overturning *Bowers* in the process);<sup>15</sup> overturning a federal law defining marriage as between a man and a woman in *United States v. Windsor*;<sup>16</sup> and striking down state bans on same-sex marriage in *Obergefell v. Hodges*.<sup>17</sup>

Each of these four cases has two things in common: (1) the majority opinion was written by Justice Kennedy; and (2) the case had no separate opinion from any of the Court’s liberals. In contrast, every Justice in the Court’s ideological middle and on the right—other than Chief Justice Rehnquist—wrote a separate opinion in these cases. Justice O’Connor, Justice Kennedy’s partner in the Court’s middle, wrote a concurring opinion in *Lawrence* on limited

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9. *Rowland*, 470 U.S. at 1014–15.

10. *Id.* at 1014.

11. *Id.* at 1015.

12. *Id.* at 1017.

13. 478 U.S. 186, 190–91 (1986).

14. 517 U.S. 620, 623–24, 631–32 (1996).

15. 539 U.S. 558, 567, 578 (2003).

16. 570 U.S. 744, 751–52 (2013).

17. 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2605 (2015).

equality grounds, and several of the Court's conservative Justices wrote multiple opinions attacking gay rights. Yet the liberals remained silent.

Meanwhile, in a separate line of cases, the Court has consistently recognized the First Amendment rights of people who oppose gay equality. In these three cases, the Court allowed a St. Patrick's Day parade to exclude an Irish gay rights group in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>18</sup> the Boy Scouts of America to exclude a gay scoutmaster in *Boy Scouts of America v. Dale*,<sup>19</sup> and a cake shop owner to refuse to bake a wedding cake for a same-sex couple in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>20</sup>

Amidst these three First Amendment opinions, one of the Court's liberal voices did chime in about gay rights, but only superficially, and without any doctrinal analysis. In his dissent in *Dale*, Justice Stevens wrote about how changing attitudes are evidence of greater acceptance for gay people and how prejudice against them causes "serious and tangible harm."<sup>21</sup> Interestingly, although each of the other liberals joined Justice Stevens's dissent, Justice Souter wrote a separate dissent joined by Justices Ginsburg and Breyer that called changed attitudes "laudable" but legally irrelevant.<sup>22</sup> Justices Kagan and Ginsburg also wrote separate opinions in *Masterpiece Cakeshop*, but those opinions did not directly address gay rights.<sup>23</sup>

In other words, across the expanses of the Supreme Court's modern constitutional gay rights jurisprudence, no liberal Justice has done what Justice Brennan did in 1985 in his dissent to the denial of certiorari in Marjorie Rowland's case—put forth a substantive argument for constitutional protection for gay rights. Rather, the liberal Justices have ceded the territory on the issue of the Constitution and gay rights almost entirely to Justice Kennedy's notoriously flowery but somewhat vacuous statements about the issue,

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18. 515 U.S. 557, 559–60 (1995).

19. 530 U.S. 640, 644 (2000).

20. 584 U.S. \_\_\_, \_\_\_, 138 S. Ct. 1719, 1723–24 (2018).

21. 530 U.S. at 699–700 (Stevens, J., dissenting).

22. *Id.* at 700–01 (Souter, J., dissenting).

23. 584 U.S. at \_\_\_, 138 S. Ct. at 1732 (Kagan, J., concurring); *id.* at \_\_\_, 138 S. Ct. at 1748–49 (Ginsburg, J., dissenting).

as well as the pointed and often homophobic critiques of the Court's more conservative Justices.

This liberal silence has been costly. Court developments around gay rights have been one of many factors contributing to the drastic change in this country with respect to the acceptance and equal treatment of gay people.<sup>24</sup> Concurring opinions could have been a part of this judicial influence, both in society and in lower court doctrine. Instead, the liberal Justices have opted to remain silent. By doing so, they lost an opportunity to use separate opinions to influence the trajectory of the law on gay and trans rights, solidify the societal and legal gains that may be threatened in the wake of Justice Kennedy's departure from the Court, clarify Justice Kennedy's vague analysis, and counter the stereotypes and bigotry of the dissenting opinions.

Before going further, a short note about terminology throughout this article: I will be using the terminology of "conservative," "middle," and "liberal" to describe Justices. This terminology comes from the widely used Martin-Quinn scores,<sup>25</sup> which measure the relative ideological tendencies of Supreme Court Justices based on case outcomes. The more positive (above 0) the Martin-Quinn score, the more conservative the Justice, while the more negative (below 0) the score, the more liberal the Justice. Justices with scores around 0 are in the middle.<sup>26</sup> Because the scale is relative, the median Justice is not necessarily reaching politically moderate results, but rather is reaching results that are in the middle of the nine Justices on the Supreme Court at the time.<sup>27</sup>

Based on the publicly available data set,<sup>28</sup> during the times most relevant to this article (1995 through the end of the 2017 term, when the last relevant case was decided), the Justices aligned roughly as follows (alphabetically within each group):

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24. See, e.g., Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1726 (2017); Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 896 (2018).

25. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145 (2002).

26. *Id.*

27. Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1299–1300 (2005).

28. *Measures*, MARTIN-QUINN SCORES, <http://mqscores.lsa.umich.edu/measures.php> [<https://perma.cc/G6BV-S7B2>] (last visited Apr. 1, 2019).

Conservative: Alito, Gorsuch, Rehnquist, Roberts, Scalia, Thomas  
Middle: Kennedy, O'Connor  
Liberal: Breyer, Ginsburg, Kagan, Stevens, Sotomayor, Souter

Other methods exist to attach general ideological labels to Supreme Court Justices,<sup>29</sup> but the specific differences among these are not relevant, as it is largely uncontroversial among all systems—as well as consistent with conventional wisdom—to categorize this group of Justices as I do here.

This article makes the argument that the failure of liberal Justices to use separate opinions to put forth a more robust argument for constitutional protection of gay rights has harmed and will continue to harm the push for LGBT equality, and proceeds as follows. First, in Part I, starting with *Bowers* and progressing through this past term's *Masterpiece Cakeshop*, I briefly review and then synthesize the Court's decisions in the eight constitutional cases that have shaped gay rights. Particular emphasis is placed on the ways in which the Court's jurisprudence has had outcome clarity but much less jurisprudential clarity. Next, in Part II, I explore the separate nonmajority opinions in the gay rights cases, which have been almost exclusively from the conservative side of the Court, with almost no liberal opinions addressing substantive issues of gay rights. Part III then develops an argument about the types of concurring opinions that the liberals could have written, drawing on the literature from legal and political science scholars around separate opinion writing. Part IV next argues that, based on the literature about the impact of concurring opinions on lower courts and the Supreme Court, by failing to take advantage of the opportunity, liberal Justices have harmed the development of several different areas of the law, while leaving virtually unanswered the stigmatizing rhetoric of the conservative dissents in this area. This article concludes with thoughts about why the liberal Justices have remained silent and what this silence means for the Court going forward, especially as it is about to decide three important Title VII cases in this area.

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29. See generally Elliott Ash & Daniel L. Chen, *What Kind of Judge Is Brett Kavanaugh?: A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 72–77 (surveying the different approaches within the literature and then later in the article offering their own approach).



## I. MAJORITY OPINIONS IN THE SUPREME COURT'S CONSTITUTIONAL GAY RIGHTS CASES

There have been eight major decisions from the Supreme Court addressing the Constitution and gay rights.<sup>30</sup> The first ruled against protecting gay rights, but then four others that directly addressed the issue reversed the earlier precedent and advanced constitutional support for gay rights. Beyond those five cases that directly confronted the issue, the Court addressed the issue more indirectly in a series of three cases. In each of these cases, the Court found that those who oppose gay rights have First Amendment rights that are protected under the Constitution, even in the face of a local antidiscrimination law requiring equality.

On the surface, these majority opinions produced clear outcomes that had broad and significant effects on gay people's lives. After the initial ruling allowed states to continue to criminalize same-sex sexual activity, the four subsequent decisions shifted the landscape of gay rights. These cases struck down state and federal laws that limited gay rights in antidiscrimination law, sexual activity, and marriage. On the flipside, the three cases indirectly involving gay rights all broadened the rights of private individuals or organizations to discriminate against gay people.

But while the outcome in each of these cases was clear and significant, the jurisprudence of gay rights that emerged remains much less so. In each of these cases, the Court was presented with many core questions about how gay rights fit under the Constitution, as well as other aspects of the law. Instead of resolving many of these questions that could have helped guide the legal landscape of the constitutional treatment of sexual orientation and gender identity going forward, the Court's majority opinions were long on

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30. I am limiting my analysis to these constitutional cases because they presented the greatest opportunity for Justices to speak about gay rights. Therefore, I am not addressing cases such as *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998), a statutory case involving same-sex sexual harassment under Title VII, or *Snyder v. Phelps*, 562 U.S. 443, 454 (2011), a First Amendment case involving derogatory language about sexual orientation targeted at a funeral unrelated to sexual orientation. Nor am I addressing the short per curiam decision in *Pavan v. Smith*, 582 U.S. \_\_, \_\_, 137 S. Ct. 2075, 2078 (2017) (per curiam), which clarified an important aspect of marriage equality but did not purport to break any new doctrinal ground (although some scholars think it did; see, for example, Cary Franklin, *Biological Warfare: Constitutional Conflict over "Inherent Differences" Between the Sexes*, 2017 SUP. CT. REV. 169, 173). I am also not including *Baker v. Nelson*, 409 U.S. 810, 810 (1972), in the discussion because that case, though a clear rebuke to a claim of gay rights, was a one-line dismissal on jurisdictional grounds.

lofty language about dignity and liberty but short on useful doctrinal analysis. This part reviews these cases and the uncertainty left in their wake.<sup>31</sup>

#### A. *Bowers v. Hardwick*

After repeatedly opting to stay out of the issue of constitutional gay rights by issuing summary decisions or denying certiorari,<sup>32</sup> the Supreme Court finally confronted the issue in *Bowers v. Hardwick*.<sup>33</sup> *Bowers* raised the question of whether a state statute that prohibited homosexual sodomy violated the Constitution. Even though the statute at issue prohibited sodomy for everyone, regardless of sexual orientation, Justice White's majority opinion limited the issue under consideration to the application of the statute upon the litigant before the Court, a gay man who had sex with another man.<sup>34</sup>

On that specific question, a five-Justice majority ruled that there was no constitutionally protected right at stake in the case. Justice White wrote that none of the past fundamental rights recognized by the Court "bears any resemblance" to the right at issue.<sup>35</sup> Those past cases involved "family, marriage, or procreation," while *Bowers*, according to Justice White, concerned "homosexual activity."<sup>36</sup> The opinion stated that the two rights are completely different, so precedent did not protect the claimed right.<sup>37</sup>

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31. For a review of these landmark cases to set the stage for the rest of the article, see *infra* Parts I.A–C. Readers already well-versed in this series of cases may skip to Part I.D, which explains the jurisprudential uncertainty that resulted from these decisions.

32. See Christopher R. Leslie, *The Importance of Lawrence in the Context of the Supreme Court's Historical Treatment of Gay Litigants*, 11 WIDENER L. REV. 189, 214 (2005) (reviewing the fate of early cases raising gay rights issues before the Supreme Court).

33. 478 U.S. 186 (1986).

34. *Id.* at 190 (framing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"). A straight couple, John and Mary Doe, were a part of the original lawsuit against the Georgia statute, but they were dismissed from the case for lack of standing. *Id.* at 188 n.2. Justice White thus wrote that "[t]he only claim properly before the Court, therefore, is [Respondent's] challenge to the Georgia statute as applied to consensual homosexual sodomy." *Id.*

35. *Id.* at 190–91 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

36. *Id.* at 191.

37. See *id.*

With no precedent applying to the right at issue, the majority then considered whether it could announce a new protected fundamental right. According to Justice White, new rights are protected when they are “implicit in the concept of ordered liberty,” such that neither liberty nor justice would exist if [they] were sacrificed” or if they are “deeply rooted in this Nation’s history and tradition.”<sup>38</sup> Having already framed the right at issue as the right of gay people to engage in sodomy (as opposed to a more general right of sexual privacy or autonomy for all), Justice White easily concluded that this narrowly framed right met neither test, derisively calling the arguments advanced in favor of finding a new protected right “at best, facetious.”<sup>39</sup>

### B. *The Four Cases That Expanded Constitutional Protection*

Ten years later, the Court began its journey to transform gay rights under the Constitution. With the addition of Justices Kennedy, Souter, Ginsburg, and Breyer, the Court took a new look at gay rights beginning with *Romer v. Evans*, the 1996 case that struck down Colorado’s Amendment 2.<sup>40</sup> That state constitutional provision, adopted by the voters in a statewide referendum, had two components. First, it repealed municipal antidiscrimination provisions that protected people from being discriminated against based on sexual orientation.<sup>41</sup> Second, it prohibited any future state or local action that protected against discrimination based on sexual orientation.<sup>42</sup>

In a 6–3 decision striking down Amendment 2, Justice Kennedy wrote the first of his four majority opinions expanding constitutional protection for gay rights. He began his opinion by reviewing the importance of antidiscrimination laws throughout history, including the more recent move to include sexual orientation as a protected class.<sup>43</sup> Justice Kennedy then explained precisely how much damage Amendment 2 would do to Colorado’s gay residents,

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38. *Id.* at 191–92 (first quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937); then quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (alteration in original)).

39. *Id.* at 192–94.

40. 517 U.S. 620, 635–36 (1996).

41. COLO. CONST. art. II, § 30b, quoted in *Romer*, 517 U.S. at 623–24. Several cities in Colorado had such ordinances, including Denver, Aspen, and Boulder. *Romer*, 517 U.S. at 623–24.

42. COLO. CONST. art. II, § 30b, quoted in *Romer*, 517 U.S. at 624.

43. *Romer*, 517 U.S. at 627–29.

both in terms of prohibiting legislation protecting them, as well as preventing judges and other officials from using generally applicable laws to protect them.<sup>44</sup> He summarized the amendment's effect by saying that it "imposes a special disability" upon gay people, one that will impact "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>45</sup>

From there, Justice Kennedy quickly concluded that Amendment 2 violated the Fourteenth Amendment's Equal Protection Clause. He framed the issue as one raising neither a fundamental right nor implicating a protected class, thus subject only to rational basis review.<sup>46</sup> That level of review, which usually allows states almost limitless leeway in crafting a law,<sup>47</sup> has two limiting principles that Justice Kennedy found determinative in *Romer*. First, by singling out gay people from seeking protection from the government, Justice Kennedy said that the law denied equal protection "in the most literal sense."<sup>48</sup> Second, the law's broad impact on gay people indicated, to Justice Kennedy, that the only possible explanation for enacting it was "animosity toward the class of persons affected," a justification that is not permitted under equal protection doctrine, even in the application of rational basis review.<sup>49</sup> Justice Kennedy rejected Colorado's argument that it had several legitimate bases for the law, such as conserving resources and respecting the freedom of association of its citizens.<sup>50</sup> Rather, to Justice Kennedy, the amendment's breadth indicated that the real reason behind it was hatred of a disfavored group, something the Constitution rejects.<sup>51</sup>

*Romer* was celebrated as a huge victory for LGBT rights, as it was the first of its kind in the history of the Supreme Court. But it

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44. *Id.* at 629–31.

45. *Id.* at 631.

46. *Id.*

47. *See, e.g.*, *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592–93 (1979) (allowing a law under rational basis review despite vast overinclusiveness); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (allowing a law under rational basis review despite vast underinclusiveness).

48. *Romer*, 517 U.S. at 633. Justice Kennedy explained that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.*

49. *Id.* at 634–35 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

50. *Id.* at 635.

51. *Id.*

did not displace the black mark of *Bowers*, with the majority opinion never even mentioning the case. *Bowers* remained good law for another seven years, until the Court decided *Lawrence v. Texas*.<sup>52</sup> *Lawrence*, like *Bowers*, challenged a state law banning sodomy, but this time, unlike in *Bowers*, the law specifically singled out same-sex sexual activity.<sup>53</sup>

Although the law was challenged under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, Justice Kennedy's decision for the Court rested only upon due process.<sup>54</sup> Disagreeing with the holding in *Bowers*, Justice Kennedy wrote that there is protection under the Due Process Clause beyond the confines of the marital relationship.<sup>55</sup> For gay people, the prohibition on sodomy does not impact marriage (there was no same-sex marriage in the United States at the time of *Lawrence*), but it does touch "upon the most private human conduct, sexual behavior, and in the most private of places, the home."<sup>56</sup> This behavior is within the context of "a personal relationship" that Justice Kennedy said was "within the liberty of persons to choose without being punished as criminals."<sup>57</sup>

Justice Kennedy's opinion then proceeded to review the history of laws regulating gay sexuality and its relevance to the case. After surveying the history of law and morality, Justice Kennedy concluded that it was more important to take note of the "emerging awareness" in the country that gay people were entitled to make decisions about how to conduct their own personal lives.<sup>58</sup> Because of this different focus, as well as the intervening decision in *Romer*,<sup>59</sup> Justice Kennedy famously stated that "*Bowers* was not

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52. 539 U.S. 558, 578 (2003). For the definitive history of *Lawrence*, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS (2012).

53. *Lawrence*, 539 U.S. at 562–63, 566 (quoting TEX. PENAL CODE ANN. §§ 21.06(a), 21.01(1) (West 2011)).

54. *Id.* at 564. "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 575.

55. *Id.* at 564–66 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

56. *Id.* at 567.

57. *Id.* ("The liberty protected by the Constitution allows homosexual persons the right to make this choice.")

58. *Id.* at 567–72. Justice Kennedy concluded, "In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 571–72.

59. Justice Kennedy also pointed to *Planned Parenthood of Southeast Pennsylvania v.*

correct when it was decided, and it is not correct today. It . . . should be and now is overruled.”<sup>60</sup> Having cast aside *Bowers* and framed sexual autonomy for gay people as a protected liberty interest, Justice Kennedy struck down the law as a violation of the Due Process Clause, concluding that the statute was not supported by a legitimate state interest that “can justify its intrusion into the personal and private life of the individual.”<sup>61</sup>

With *Romer* and *Lawrence* under his belt and *Bowers* overruled, Justice Kennedy’s next two LGBT rights decisions came in the context of same-sex marriage. The first, *United States v. Windsor*, struck down the federal Defense of Marriage Act (“DOMA”) as unconstitutional.<sup>62</sup> Passed in 1996, DOMA gave states permission not to recognize same-sex marriages from other states and defined marriage (and related terms) under federal law as between a man and a woman.<sup>63</sup> In *Windsor*, two women were married in Ontario, and resided in a state that recognized their marriage.<sup>64</sup> When one of the women died, she left her entire estate to her wife.<sup>65</sup> The widow then sued to challenge the second part of DOMA, because that provision meant the transfer of assets would be taxable under federal law as a gift from a stranger rather than from a spouse.<sup>66</sup>

Justice Kennedy’s majority opinion found that this section of DOMA violated the constitutional guarantee of equal protection.<sup>67</sup> In many ways, the majority opinion tracked the reasoning of *Romer*. After dispensing with the complex standing issue before the Court<sup>68</sup> and explaining the federalism interests that states have in regulating marriage,<sup>69</sup> Justice Kennedy turned to an as-

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*Casey*, 505 U.S. 833 (1992), and its reaffirmation of substantive due process protection for “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” *Lawrence*, 539 U.S. at 573–74.

60. *Id.* at 578.

61. *Id.*

62. 570 U.S. 744, 774 (2013).

63. *Id.* at 752 (reviewing Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7; 28 U.S.C. § 1738C)).

64. *See id.* at 753.

65. *Id.*

66. *See id.*

67. Technically, the law ran afoul of the equal protection component of the Fifth Amendment’s Due Process Clause. *Id.* at 774 (citing *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)).

68. *Id.* at 755–63.

69. *Id.* at 763–69.

assessment of the ways that the federal law harmed same-sex couples who were lawfully married under state law. Like his analysis of Amendment 2 in *Romer*, Justice Kennedy found that DOMA had “great reach” in how unequal it made same-sex couples who were married under state law.<sup>70</sup> The effects of DOMA spanned the areas of family law, bankruptcy, healthcare benefits, taxes, death, criminal law, children’s rights, educational financial aid, and ethics.<sup>71</sup>

Along with this broad harmful effect, according to the Court majority, was a purpose to harm same-sex couples. Justice Kennedy identified several reasons why the law’s intent was harmful, starting with the congressional debates and the very name of the law.<sup>72</sup> Based on this analysis, he concluded that the law’s purpose was to ensure that same-sex marriages were “treated as second-class marriages for purposes of federal law.”<sup>73</sup> Relying on the same body of law as in *Romer* (as well as *Romer* itself in a parenthetical),<sup>74</sup> Justice Kennedy concluded that DOMA was unconstitutional because of its purpose to injure a particular group and its broad effect in doing so.<sup>75</sup>

*Windsor* struck down DOMA, but did not address state bans on same-sex marriage.<sup>76</sup> The Court tackled that issue two years later in the last case in this series of Justice Kennedy-authored opinions advancing gay rights. In *Obergefell v. Hodges*, four states’ bans on same-sex marriage—Michigan, Kentucky, Ohio, and Tennessee—were before the Court, challenged by fourteen same-sex couples and two men whose partners were deceased.<sup>77</sup> Unlike the prior three cases decided on the basis of either equal protection or due process, *Obergefell* struck down the laws under both doctrines.<sup>78</sup>

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70. *Id.* at 772.

71. *See id.* at 772–74.

72. *Id.* at 770–71.

73. *Id.* at 771.

74. *Id.* at 770–71 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

75. *Id.* at 775 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

76. *See id.*

77. 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2593 (2015).

78. *Id.* at \_\_\_, 135 S. Ct. at 2604 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

The Court's opinion struck down the laws by looking at the nature of the fundamental right to marry. Long-recognized within the doctrine of substantive due process, the fundamental right to marry had never previously been articulated as including same-sex couples.<sup>79</sup> Here, Justice Kennedy extrapolated from past cases and said that the four principles that justify treating marriage as a fundamental right apply equally to same-sex marriages.<sup>80</sup> These four principles—that marriage promotes individual autonomy and choice; is a union unlike any other for committed relationships; protects children and families; and is central to civil society—are just as true of same-sex marriages as those between a man and a woman.<sup>81</sup>

As in the other cases, Justice Kennedy then turned to the harm that bans on same-sex marriage impose. Not only do these bans deny same-sex couples the material benefits discussed in *Windsor*, Justice Kennedy explained, they also create instability in the couples' lives, send a message of inequality, and demean their existence.<sup>82</sup> Both the Due Process Clause and the Equal Protection Clause are expansive enough to recognize this harm and to accommodate a broader understanding of marriage than may have existed previously.<sup>83</sup> In a combined analysis of both doctrines, Justice Kennedy concluded:

It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.<sup>84</sup>

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79. *Id.* at \_\_, 135 S. Ct. at 2598 (citing *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

80. *Id.* at \_\_, 135 S. Ct. at 2599.

81. *Id.* at \_\_, 135 S. Ct. at 2599–601.

82. *Id.* at \_\_, 135 S. Ct. at 2601–02.

83. *See id.* at \_\_, 135 S. Ct. at 2602–04.

84. *Id.* at \_\_, 135 S. Ct. at 2604.



Because of this infringement, Justice Kennedy's opinion struck down all state same-sex marriage bans as invalid.<sup>85</sup>

*C. The Three Cases Indirectly Addressing Constitutional Gay Rights*

During the same time period that the Supreme Court was expanding gay rights under the Constitution, it also had to grapple with three cases that each raised essentially the same question: does the Constitution prohibit states from applying antidiscrimination law to people or entities that object to gay rights? The first of these cases, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, presented this issue in the context of Boston's St. Patrick's Day Parade.<sup>86</sup> The private individuals who organized the parade did not want an Irish gay rights group to participate in the parade.<sup>87</sup> However, the state courts read the Massachusetts public accommodations law, which prohibited discrimination based on sexual orientation, to require the parade organizers to include the group.<sup>88</sup>

Before the United States Supreme Court, the parade organizers argued that their First Amendment right to choose their own message was violated, and a unanimous Supreme Court agreed. In an opinion written by Justice Souter, the Court determined that the parade at issue was expressive and thus protected by the First Amendment.<sup>89</sup> Justice Souter acknowledged the importance of antidiscrimination laws in public accommodations,<sup>90</sup> but concluded that they could not force the parade organizers to include a message that they did not choose to include on their own.<sup>91</sup> Doing so would violate the First Amendment's protection against compelled speech; thus, state law could not force the parade organizers to include the gay rights group.<sup>92</sup>

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85. *Id.* at \_\_\_, 135 S. Ct. at 2605.

86. 515 U.S. 557, 560–61 (1995).

87. *Id.* at 561.

88. *Id.* at 561–65.

89. *See id.* at 568–70.

90. *Id.* at 571–72.

91. *Id.* at 572–75. Justice Souter noted that the parade organizers were not excluding LGBT people from the parade, but rather only the message that the LGBT group wanted to convey. *Id.* at 572.

92. *Id.* at 581.

The next case raised very similar issues, this time in the context of the Boy Scouts and a gay scoutmaster. In *Boy Scouts of America v. Dale*, the Court reviewed the case of James Dale, an assistant scoutmaster whose membership was revoked because a newspaper wrote an article that mentioned he was gay.<sup>93</sup> New Jersey law prohibited discrimination in public accommodations based on sexual orientation, and the New Jersey Supreme Court held that the Boy Scouts of America constituted a public accommodation under state law.<sup>94</sup> Thus, the Boy Scouts violated the law by kicking Dale out of the organization on the basis of his sexuality.<sup>95</sup> The New Jersey Supreme Court differentiated *Hurley*, explaining that the Boy Scouts of America as an organization does not express any message, unlike the parade at issue in *Hurley*.<sup>96</sup>

On appeal to the United States Supreme Court, Chief Justice Rehnquist wrote for a five-Justice majority that *Hurley* applies to the case because the Boy Scouts of America does indeed have an expressive message. Chief Justice Rehnquist's opinion reviewed the Scout Oath and Scout Law and concluded that by instilling values in young boys, the Boy Scouts of America has an expressive message.<sup>97</sup> Part of that message is disapproval of homosexuality, something that being forced to allow Dale to continue as scoutmaster would compromise.<sup>98</sup> The fact that New Jersey believed discrimination against people based on their sexual orientation was a grave enough problem that it should be addressed by state law was not enough to "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>99</sup> Chief Justice Rehnquist noted that society's attitudes about gay rights were changing, but used that as further evidence that the Boy Scouts' rights had been violated, stating that "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."<sup>100</sup>

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93. 530 U.S. 640, 644–45 (2000).

94. *Id.* at 645–46.

95. *Id.* at 646.

96. *Id.* at 647.

97. *Id.* at 649–50.

98. *Id.* at 650–54.

99. *Id.* at 659.

100. *Id.* at 660.

The final case in this trilogy once again ruled in favor of the person objecting to gay rights, although in a more limited manner. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a devout Christian baker objected to creating a custom wedding cake for a same-sex couple.<sup>101</sup> Colorado law includes sexual orientation as a protected status under its public accommodations law, so the state charged the baker with violating the law by refusing to bake the custom cake.<sup>102</sup> The Colorado Civil Rights Commission and the Colorado Court of Appeals ruled against the baker, finding that he violated the law and that requiring him to bake the cake would not infringe on his First Amendment religion or speech rights.<sup>103</sup>

Before the United States Supreme Court, the baker asked the Court to allow his religious objection to trump state antidiscrimination law, but the Court, in a 7–2 decision written by Justice Kennedy, ruled much more narrowly. Justice Kennedy’s opinion walked a fine line, not only recognizing the importance of religious objections to same-sex marriage, but also the value of generally applicable antidiscrimination laws that religion cannot trump.<sup>104</sup> In fact, Justice Kennedy specifically extolled the value of antidiscrimination laws for gay people. He noted that society has advanced to recognize that gay people “cannot be treated as social outcasts or as inferior in dignity and worth” and warned of “community-wide stigma” if broad exceptions were recognized for religious people in antidiscrimination laws.<sup>105</sup>

Instead of resolving this conflict of important principles, Justice Kennedy’s opinion found fault in the way the Colorado agency decided the baker’s case. He explained that several different aspects of the agency’s actions indicated that it was biased against religious individuals.<sup>106</sup> Because the baker did not get a neutral hearing free from religious bias at the agency level, Justice Kennedy

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101. 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1724 (2018).

102. *Id.* at \_\_, 138 S. Ct. at 1725–27.

103. *Id.* at \_\_, 138 S. Ct. at 1726–27.

104. *Id.* at \_\_, 138 S. Ct. at 1727. Compare “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,” with “it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Id.* at \_\_, 138 S. Ct. at 1727.

105. *Id.* at \_\_, 138 S. Ct. at 1727.

106. *Id.* at \_\_, 138 S. Ct. at 1729–31. Justice Kennedy pointed to one commissioner’s comments about religion being an excuse for such things as slavery and the Holocaust as well as the fact that the commission ruled in favor of three other bakers who denied service to people who wanted antigay messages baked onto a cake for religious reasons. *Id.* at \_\_,

ruled that the baker's First Amendment right to free exercise of religion was violated and that he could not be forced to bake the cake for the couple.<sup>107</sup>

Justice Kennedy included an important caveat at the end of the decision, one that is going to beguile lower courts until the overarching issue of the conflict between religion and antidiscrimination law is decided:

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.<sup>108</sup>

In other words, Justice Kennedy is asking lower courts deciding this issue in future cases to walk the tightrope of respecting each side: respecting sincere religious beliefs and not subjecting gay people to indignities.<sup>109</sup>

#### D. *Making Sense of These Majority Opinions*

As noted above, this series of cases has had very clear and important outcomes. As to the basic question of whether gay people have rights under the Constitution, the Court has done an about-face that has undoubtedly advanced the march toward equality. After the rocky start of *Bowers*, the Court has issued four consecutive decisions finding that gay people are protected under the Con-

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138 S. Ct. at 1729–30.

107. *Id.* at \_\_, 138 S. Ct. at 1732.

108. *Id.* at \_\_, 138 S. Ct. at 1732.

109. So far, lower courts have rejected claims from religious objectors in the wake of *Masterpiece Cakeshop*. The Arizona Court of Appeals rejected the claim of a religious calligrapher, finding that local antidiscrimination law prevails when there is no religious bias in its application. *Brush & Nib Studio v. City of Phoenix*, 418 P.3d 426, 431, 443 n.13, 444 (Ariz. Ct. App. 2018). Similarly, the highest courts of Oregon and Hawaii both refused to hear cases from religious objectors that raised these issues in the wake of *Masterpiece Cakeshop*, presumably because there was no religious bias in the application of the state law in those cases, *Hawai'i Supreme Court Declines to Hear Case of B&B That Denied Room to Lesbian Couple*, LAMBDA LEGAL (July 11, 2018), [https://www.lambdalegal.org/blog/20180711\\_hawaii-supreme-court-rejects-case-of-bnb](https://www.lambdalegal.org/blog/20180711_hawaii-supreme-court-rejects-case-of-bnb) [https://perma.cc/W5DY-TU NP], and the United States Supreme Court denied certiorari in the Hawaii case in *March, Aloha Bed & Breakfast v. Cervelli*, No. 18-451, 586 U.S. \_\_, 2019 WL 1231949 (Mar. 18, 2019) (mem.). For now, it appears that *Masterpiece Cakeshop* is being read narrowly in this regard. See *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-CV-01169-YY, 2018 WL 4909902, at \*2–3 (D. Or. Oct. 10, 2018); *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018).

stitution. As a result of these decisions, states cannot ban antidiscrimination laws based on sexual orientation, criminalize same-sex sexual activity, or ban same-sex marriage, and the federal government likewise cannot define marriage as between one man and one woman.

These legal victories for the gay rights movement have had incredibly profound effects on American society. While the legal issue in *Romer* was somewhat esoteric, it gave the Court's imprimatur to a movement that was just starting to change public opinion in this country. Then, with *Lawrence's* holding and its overruling of *Bowers*, the Court removed the stigma of the possibility that states could label core aspects of a gay person's identity as criminal. *Windsor* forced the federal government to recognize the growing number of state-authorized same-sex marriages in the country, and *Obergefell* allowed people nationwide to marry the person they love regardless of sex. Separately and as a group, these decisions moved the needle in significant ways on gay rights in this country.<sup>110</sup>

But jurisprudentially, these decisions were somewhat of a mess. Most prominently, in each of the cases, advocates on both sides briefed the issue of whether sexual orientation is entitled to any form of heightened scrutiny under the Equal Protection Clause. Yet, in both *Romer* and *Windsor*, the two cases that relied exclusively on principles of equality to strike down discriminatory laws, Justice Kennedy's opinion avoided the question altogether.

Instead of finding that sexual orientation is a suspect or quasi-suspect class, or even rejecting these claims, Justice Kennedy based both decisions on the principle that if a law is based on animus toward a disfavored group, it fails equal protection rational

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110. Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. 255, 265 (2017) ("What *Obergefell* represents, both to lay people and movement lawyers, is the happy ending to a very long, very exhausting chapter in LGBT history—a chapter that has to a great degree shaped the way in which the movement is constructed, how its successes are measured, and indeed, how society thinks about LGBT people.").

basis review.<sup>111</sup> Rational basis review for animus-based laws, established in *United States Department of Agriculture v. Moreno*<sup>112</sup> and *City of Cleburne v. Cleburne Living Center*,<sup>113</sup> has been criticized for many reasons.<sup>114</sup> One such criticism is that, under the guise of rational basis review, the Court is looking behind the government's justifications for a law—something it does not ordinarily do at this level of equal protection scrutiny—and labeling otherwise legitimate reasons as hatred or animus.<sup>115</sup>

For instance, in *Romer*, Justice Kennedy acknowledged that the state proffered otherwise legitimate reasons for Amendment 2: freedom of association, as well as conserving resources.<sup>116</sup> However, because of the broad scope of Amendment 2's impact and the state's rationales being "far removed" from this scope, Justice Kennedy said that "we find it impossible to credit [these justifications]."<sup>117</sup> Likewise, in *Windsor*, Congress justified DOMA on the basis of tradition and morality, justifications that would otherwise satisfy rational basis review.<sup>118</sup> But under the animus line of cases, Justice Kennedy rejected those justifications and instead found the law's rejection of state marriages and the far-reaching effects that rejection would bring about to be "strong evidence of a law having the purpose and effect of disapproval of that class."<sup>119</sup>

Critics contend that the Court is not applying real rational basis review, but instead something akin to "rational basis plus" or "rational basis with bite."<sup>120</sup> The Court applied this slightly heightened level of scrutiny without providing any clarity as to why it

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111. *United States v. Windsor*, 570 U.S. 744, 769–70, 774–75 (2013) ("[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

112. 413 U.S. 528, 534 (1973).

113. 473 U.S. 432, 448 (1985).

114. WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 73–75 (2017) (discussing criticisms of the animus doctrine); Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 198 (forthcoming 2019) (criticizing the doctrine as being constitutionally sound but unworkable in application and raising difficult issues of judicial statesmanship).

115. See Conkle, *supra* note 114, at 204–05.

116. 517 U.S. at 635.

117. *Id.*

118. 570 U.S. 744, 770–71 (2013).

119. *Id.* at 770.

120. See Raphael Holoszyk-Pimentel, Note, *Reconciling Rational-Basis Review: When*

rejected truly heightened scrutiny and without offering a principled explanation of when the Court will look behind the state's proffered reasons for a law.<sup>121</sup> Basing the key gay rights cases of *Romer* and *Windsor* on this doctrine gives lower courts less-than-clear guidance about how to address sexual orientation under the Equal Protection Clause in future cases.<sup>122</sup>

Moreover, by repeatedly ignoring the notion that sexual orientation claims under the Equal Protection Clause should be analyzed under a form of heightened or strict scrutiny, Justice Kennedy implicitly conveyed the message that discrimination based on sexual orientation is not a serious constitutional concern. True, the forms of discrimination in each of these cases were constitutionally problematic; but as a general matter, Justice Kennedy could not bring himself to condemn sexual orientation discrimination. The Supreme Court has, on the other hand, clearly analyzed discrimination based on race, national origin, and sex under a heightened form of scrutiny. But in the important gay rights cases, the Court has flatly avoided the issue. One or two times might be an excusable oversight, but four times gives the impression that the Court does not think the issue is serious enough to warrant even a cursory explanation.

With respect to the Due Process Clause, the Court's gay rights decisions have produced a similar lack of clarity. Both *Lawrence*

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*Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015).

121. This lack of explanation was apparent in *Trump v. Hawaii* when the majority and dissent sparred over labeling President Trump's justifications for his travel ban as based on hatred. 585 U.S. \_\_\_, \_\_\_, 138 S. Ct. 2392, 2418, 2433 (2018). The majority cited this line of cases—that laws will be struck down under rational basis review when the “laws at issue lack any purpose other than a ‘bare . . . desire to harm a politically unpopular group’”—but did not think that the circumstances fit and instead accepted the administration's “national security” justification. *Id.* at \_\_\_, 138 S. Ct. at 2420–21. The dissent cited the same line of cases to find that the justification for the travel ban was nothing more than President Trump's “express hostility toward Muslims.” *Id.* at \_\_\_, 138 S. Ct. at 2441–42 (Sotomayor, J., dissenting).

122. See Kate Girard, Note, *The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation That Denies Equal Protection to Members of the Gay Community*, 36 N.M. L. REV. 565, 565–66 (2006) (“[L]ower courts consistently cite *Romer* as the decision in which the U.S. Supreme Court decided not to classify members of the gay community as a suspect group or protected class. As a result, a decade of lower court precedent cites *Romer* for the rule that law that classifies on the basis of sexual orientation is presumed valid so long as the statute is rationally related to any legitimate state interest.”); see also Tobin A. Sparling, *The Odd Couple: How Justices Kennedy and Scalia, Together, Advanced Gay Rights in Romer v. Evans*, 67 MERCER L. REV. 305, 306 (2017) (arguing that Justice Kennedy's unfocused analysis “relegated gay rights to the sideline”).

and *Obergefell* were decided on the basis of substantive due process, but neither is easy to fit within the Court's jurisprudence in the area. In both, advocates attempted to persuade the Court that the fundamental right of sexual and romantic autonomy was at stake.<sup>123</sup> However, in *Lawrence*, Justice Kennedy danced around the issue of a fundamental right. After reviewing the series of cases that found fundamental rights under the Due Process Clause, Justice Kennedy's opinion never returned to that point.<sup>124</sup> Instead, he discussed *Bowers* at length before eventually overturning it.<sup>125</sup>

Once that was accomplished, Justice Kennedy muddied the waters of rights framing under the Due Process Clause. Instead of talking about "fundamental rights" that are analyzed under strict scrutiny, he called the right at issue in the case simply the "right to liberty."<sup>126</sup> Past cases that used a similar formulation contrasted the generic interest in liberty with specific fundamental rights, analyzing the former under rational basis and the latter under strict scrutiny.<sup>127</sup> Justice Kennedy's opinion did neither. He did not say he was applying strict scrutiny or anything like it, but he also rejected Texas's stated interest in morality. He concluded that there was "no legitimate state interest which can justify [the law's] intrusion into the personal and private life of the individual."<sup>128</sup>

What is this "right to liberty" that Justice Kennedy protected in *Lawrence*? He was characteristically grandiose yet vague about it:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.<sup>129</sup>

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123. See *Obergefell v. Hodges*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2599 (2015); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

124. *Lawrence*, 539 U.S. at 558.

125. See *id.* at 566–78 ("*Bowers v. Hardwick* should be and now is overruled.").

126. *Id.* at 578.

127. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719–21 (1997).

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

129. *Id.*



As a result of this “artful ambiguity,”<sup>130</sup> lower courts have been confused about how to apply *Lawrence*,<sup>131</sup> and critics, even those who agree with the outcome in the case, have had many bases upon which to deride the decision.<sup>132</sup>

*Obergefell* took this confusion one step further. Justice Kennedy’s opinion in this case was much more clearly about a fundamental right, given that much of his reasoning relied on the well-established precedent that frames the right to marry as fundamental.<sup>133</sup> However, in analyzing whether the state bans on same-sex marriage fell under this framework, not once did he mention strict scrutiny, the traditional test for analyzing fundamental rights.

Moreover, instead of analyzing due process or equal protection, Justice Kennedy applied a hybrid analysis, melding the two to strike down the state laws. Again, using the lofty language he is known for, he explained:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.<sup>134</sup>

This hybrid analysis meant the end of same-sex marriage bans. These laws “burden the liberty of same-sex couples,” while also

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130. Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1272 (2007).

131. See Eric Berger, *Lawrence’s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 806 n.284 (discussing *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1233, 1236–38 (11th Cir. 2004), which upheld Alabama’s law prohibiting the sale of sex toys under *Lawrence*; and *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743–47 (5th Cir. 2008), which held Texas’ law prohibiting the sale of sex toys unconstitutional under *Lawrence*).

132. See, e.g., *id.* at 767–68 (critiquing *Lawrence* for being “under-theorized” and relying on “a broad level of generality” and “hybrid reasoning” while “declin[ing] to identify a level of scrutiny”); Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 439 (2014) (analyzing how Justice Kennedy’s opinion “ignored the longstanding framework of analysis that the Court has established” for both the Equal Protection Clause and Due Process Clause).

133. *Obergefell v. Hodges*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2591, 2598 (2015).

134. *Id.* at \_\_\_, 135 S. Ct. at 2602–03.

“abridg[ing] central precepts of equality.”<sup>135</sup> The opinion nodded towards the language of suspect class status, noting a long history of discrimination subordinating gay and lesbian individuals.<sup>136</sup> But, there was once again no clarity about what level of scrutiny to apply<sup>137</sup> or how to analyze constitutional issues around sexual orientation when only a liberty claim or only an equality claim is presented to the Court. In other words, like the gay rights cases that preceded it, *Obergefell* clearly answered the question presented to the Court, but did so in a way that will sow confusion in the future.<sup>138</sup>

Only one of the cases addressing the clash between gay rights and the First Amendment raised the same concern. Both *Dale* and *Hurley* gave clear answers to this clash: in the context of anti-discrimination law applied to an entity with an expressive message, antidiscrimination law must give way to the entity’s First Amendment speech rights.<sup>139</sup> The challenge in these cases is determining whether an entity has an expressive message that is entitled to First Amendment protection. This determination is a difficult one, but that difficulty has nothing to do with the issue of gay rights; the Court has struggled with this determination in every other context in which it has arisen.<sup>140</sup>

The clash between gay rights and the First Amendment in *Masterpiece Cakeshop* was different. Justice Kennedy’s decision in that case left unanswered the question of whether the baker was protected under the First Amendment’s free speech clause.<sup>141</sup> Instead,

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135. *Id.* at \_\_, 135 S. Ct. at 2604.

136. *Id.* at \_\_, 135 S. Ct. at 2604.

137. Susan Frelich Appleton accuses the Court of “abandon[ing] . . . tiers of scrutiny in the LGBTQ cases.” Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 957–58 (2016) (footnote omitted).

138. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148, 179 (2015) (trying to explain the promise of *Obergefell*, but concluding that “[d]iscerning new liberties has always been, and will always be, more an art than a science,” and that [a]fter *Obergefell*, it is simply much more openly an art”); see also Appleton, *supra* note 137, at 977 (applauding the *Obergefell* ruling but calling it “problematic” and missing “a more focused and coherent analysis” that engendered “confusion”).

139. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995).

140. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984) (distinguishing between the constitutional protections for “freedom of intimate association” and “freedom of expressive association”).

141. Justice Kennedy noted that the “free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1723 (2018). After noting this difficulty, he did not return to

he decided the case on the basis of religious neutrality, finding that the Colorado agency charged with administering the antidiscrimination law was infused with religious bias when it heard the case.<sup>142</sup> Thus, it is clear from *Masterpiece Cakeshop* that agency determinations regarding religious objectors to generally applicable laws must be neutral with respect to religion. Moreover, the Court's analysis of the problems with the agency determination indicated that it will not give such agencies much leeway in how they discuss religion, as Justice Kennedy reached his conclusion with less than extensive proof that religious bias was at work.<sup>143</sup>

But what is not at all clear from *Masterpiece Cakeshop* is what to do in the case of a religious objector to an antidiscrimination law when the agency makes its determination free from religious bias. Justice Kennedy noted that future cases are going to have to resolve that issue, and the matter "await[s] further elaboration in the courts."<sup>144</sup> These future courts are going to find plenty to work with in Justice Kennedy's opinion; however, nothing from the opinion will resolve the issue, as Justice Kennedy spoke favorably of the rights on both sides.

As noted above, his opinion praised antidiscrimination laws that protect against sexual orientation discrimination, noting their importance to gay people's "dignity and worth."<sup>145</sup> Thus, he noted that "it is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."<sup>146</sup> He also concluded the opinion by stating that future disputes have to be resolved "without subjecting gay persons to indignities when they seek goods and services in an open market."<sup>147</sup> Lawyers for gay

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address the issue, instead deciding the case on religious neutrality principles. *Id.* at \_\_, 138 S. Ct. at 1724. Justice Thomas's separate concurrence, discussed in depth *infra* Part III, addresses the free speech issue.

142. *Masterpiece Cakeshop*, 584 U.S. at \_\_, 138 S. Ct. at 1724.

143. *See id.* at \_\_, 138 S. Ct. at 1729–31 (noting a small number of comments about religion and three separate determinations in cases posing related, but different, issues).

144. *Id.* at \_\_, 138 S. Ct. at 1732.

145. *See id.* at \_\_, 138 S. Ct. at 1727.

146. *Id.* (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (*per curiam*)). Justice Kennedy also wrote that Supreme Court "precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws." *Id.* at \_\_, 138 S. Ct. at 1723–24.

147. *Id.* at \_\_, 138 S. Ct. at 1732.

couples challenging religious objections to providing them services will include this language in bold when they brief agencies and courts on the issue.

However, when they make their case, lawyers for religious objectors will also have plenty to highlight from Justice Kennedy's opinion. The opinion talks about religious objections as "protected views" that are "in some instances protected forms of expression."<sup>148</sup> Justice Kennedy wrote sympathetically about the baker's predicament in drawing a line between the customer's right to service and the baker's own right to disagree with the message he believed the cake would convey.<sup>149</sup> And in the same sentence in which he said that future decisions must not subject gay people to indignities, he called on future decision makers to resolve matters "with tolerance, [and] without undue disrespect to sincere religious beliefs."<sup>150</sup>

Thus, the gift of Justice Kennedy's Rorschach opinion is that future courts will be able to choose from language that supports whichever outcome they want. This has already come to pass in the lower courts. Despite the baker's victory before the Supreme Court, an appellate court in Arizona used *Masterpiece Cakeshop* to require a calligrapher with religious objections to same-sex marriage to create invitations for a same-sex couple.<sup>151</sup> In that case, the court found that, unlike in *Masterpiece Cakeshop*, there was no religious bias in the application of the law.<sup>152</sup> The court then referenced the language from *Masterpiece Cakeshop* about the importance of antidiscrimination law and how religious objections cannot create loopholes in such laws.<sup>153</sup>

In other words, the Arizona court chose the language that Justice Kennedy included that favored antidiscrimination law and ruled for the same-sex couple. Although there have not yet been any cases post-*Masterpiece Cakeshop* that have ruled in favor of a religious objector, it is easy to see how this could happen. All a

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148. *Id.* at \_\_, 138 S. Ct. at 1727.

149. *Id.* at \_\_, 138 S. Ct. at 1728 ("Phillips' dilemma was particularly understandable . . .").

150. *Id.* at \_\_, 138 S. Ct. at 1732.

151. *Brush & Nib Studio v. City of Phoenix*, 418 P.3d 426, 431–32, 438 (Ariz. Ct. App. 2018).

152. *Id.* at 443 n.13 (citing *Masterpiece Cakeshop*, 584 U.S. at \_\_, 138 S. Ct. at 1731–32).

153. *Id.* at 434 (quoting *Masterpiece Cakeshop*'s paragraph about the "dignity and worth" of gay people, 584 U.S. at \_\_, 138 S. Ct. at 1727).

court would have to do is emphasize the case's other language about the difficult position religious objectors find themselves in, rather than the language highlighted in the Arizona case. That is because, as much as Justice Kennedy's opinion was clear that religious bias cannot form a part of a state determination, the opinion was vague and unclear about how to resolve the dispute between religion and antidiscrimination law that will repeatedly arise going forward.

## II. SEPARATE OPINIONS IN THE GAY RIGHTS CASES

While the Supreme Court's gay rights cases have profoundly changed American life in many ways, the majority opinions have left many unanswered questions in the wake of the Court's vague language and doctrinal analysis, all of it from Justice Anthony Kennedy. The concurring and dissenting opinions in these cases have addressed these flaws, as well as many other major gay rights issues.

However, these separate opinions have been almost exclusively from the conservative wing of the Court. Conservatives have mocked gay rights, mocked their colleagues, attacked doctrinal opacity, battled over how lower courts should respond, and predicted the end of traditional morality and religious freedom. In response, liberals have been virtually silent.

### A. *From Justice Kennedy's Right*

In almost every gay rights case before the Court, conservative Justices have written separately to drive home their positions against recognition or expansion of gay rights. This trend began with Chief Justice Burger in *Bowers*. Even though the Court found there was no fundamental right involved in the case, Chief Justice Burger wrote separately to emphasize the point and explain that laws penalizing gay sex have "ancient roots."<sup>154</sup> He explained this point by recounting ancient Judeo-Christian ethics, Roman law, Blackstone, and the common law of England to prove that, in his view, "millennia of moral teaching" have opposed "the act of homosexual sodomy."<sup>155</sup>

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154. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

155. *Id.* at 196–97.

Picking up from Chief Justice Burger's inauspicious start, Justice Scalia has since dissented in every single case directly raising the issue of gay rights and used those dissents as a platform for writing antigay broadsides into the *United States Reports*. In *Romer*, he did not mince words, repeatedly accusing Justice Kennedy and the majority of siding with the "elite class" in a culture war that the Court has no business joining.<sup>156</sup> In the process, he painted a picture of warring factions, portraying the case as a battle between the time-honored views of sexual morality held by the "traditional forces" within Colorado and the views of those who want to change common understandings of "reprehensible" behaviors that are, like being gay, appropriate for "moral disapproval": murder, polygamy, and cruelty to animals.<sup>157</sup> His opinion also demonized what he saw as the outsized influence of gay rights activists who "possess political power much greater than their numbers."<sup>158</sup>

Justice Scalia's other dissents continued this same disparaging line of argument. In *Lawrence*, he lamented that the Court "signed on to the so-called homosexual agenda"<sup>159</sup> and he sympathized with Americans who "do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."<sup>160</sup> In *Windsor*, he excused the language of "Defense of Marriage" as nothing more than respecting "an aspect of marriage that had been . . . unquestioned in virtually all societies for virtually all of human history."<sup>161</sup>

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156. "This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that 'animosity' toward homosexuality is evil." *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (citation omitted). He started the opinion saying that the "Court has mistaken a Kulturkampf for a fit of spite." *Id.*; see also *id.* at 652 ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

157. *Id.* at 644–53. Justice Scalia similarly invoked the slippery slope in his *Lawrence* dissent. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.").

158. *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting).

159. *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

160. *Id.*

161. *United States v. Windsor*, 570 U.S. 744, 797–98 (2013) (Scalia, J., dissenting).

By the time *Obergefell* rolled around, Justice Scalia had apparently used up all of his disparaging comments for gay rights, so he changed his target to his colleagues. He called Justice Kennedy's opinion "pretentious," "egotistic," and akin to "the mystical aphorisms of the fortune cookie," and said that each Justice who signed onto Justice Kennedy's imprecise language should "hide [their] head in a bag."<sup>162</sup> Chief Justice Roberts joined this effort, as he expressed shock at his colleagues who had transformed "a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"<sup>163</sup> He then concluded by chastising the majority for a decision that "had nothing to do with" the Constitution.<sup>164</sup>

Beyond mocking gay rights and fellow Justices, the conservative dissents also derided the doctrinal confusion within the majority opinions in these cases. In both his *Romer* and *Windsor* dissents, Justice Scalia claimed that the equal protection analysis was unprecedented and indefensible.<sup>165</sup> In *Romer*, because *Bowers* was still good law, he questioned how the Equal Protection Clause could prohibit a state from discriminating against a class of people that the Court at that specific point in time (post-*Bowers* and pre-*Lawrence*) allowed to be criminalized.<sup>166</sup> And in *Windsor*, he accused the majority of mixing up equal protection and due process principles in an impossible-to-discern way.<sup>167</sup> Moreover, he claimed that the majority ignored the central question in the case as briefed by the parties—whether laws restricting marriage to a man and a woman are subject to heightened scrutiny—and instead applied an unrecognizable form of rational basis review.<sup>168</sup> Justice Alito added

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162. *Obergefell v. Hodges*, 576 U.S. \_\_, \_\_, 135 S. Ct. 2584, 2630 & n.22 (2015) (Scalia, J., dissenting).

163. *Id.* at \_\_, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

164. *Id.* at \_\_, 135 S. Ct. at 2626.

165. *Windsor*, 570 U.S. at 793 (Scalia, J., dissenting) ("[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."); *Romer v. Evans*, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) ("The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation.").

166. *Romer*, 517 U.S. at 640–43.

167. *See Windsor*, 570 U.S. at 792 (Scalia, J., dissenting) (exclaiming about the majority's conflation of the two doctrines, at one point, "what can *that* mean?").

168. *Id.* at 793–94 ("But the Court certainly does not *apply* anything that resembles that deferential framework.").

to Justice Scalia's doctrinal critique in his own *Windsor* dissent. He reviewed the standard three categories of review under equal protection analysis—strict scrutiny, intermediate scrutiny, and rational basis review—and then puzzled over where the majority's analysis fit within this framework.<sup>169</sup> Similarly, Chief Justice Roberts' separate dissent in *Obergefell* pulled no punches about the majority's equal protection analysis in the case, calling it “quite frankly, difficult to follow.”<sup>170</sup>

The conservatives had similar critiques of the due process analysis in *Lawrence* and *Obergefell*. In *Lawrence* in particular, Justice Scalia argued that the majority's due process analysis was not anchored to any previous doctrinal framework; according to Justice Scalia, without calling the right at issue fundamental or saying that strict scrutiny applied, the majority should have applied rational basis review and approved the law.<sup>171</sup> Instead, the majority looked to emerging trends about sexual orientation, something Justice Scalia said is not appropriate in substantive due process analysis, which should be focused on tradition.<sup>172</sup> In *Obergefell*, he aimed his doctrinal criticism at the majority's view of the Fourteenth Amendment from the perspective of originalism. In Justice Scalia's understanding, because no one doubted that laws limiting marriage to one man and one woman were constitutional at the time of ratification, the Fourteenth Amendment leaves this determination to the people to change, not to the Justices.<sup>173</sup> Chief Justice Roberts' *Obergefell* dissent was even more critical of the due process analysis, likening the majority's analysis to two of the Court's most infamous decisions: *Dred Scott* and *Lochner*.<sup>174</sup>

In *Windsor* in particular, the conservatives battled over how lower courts should respond to the decision. With the issue of whether state bans on same-sex marriage were now at risk given the Court striking down the federal definition of marriage as one man and one woman, Chief Justice Roberts and Justice Scalia presented two different visions. Chief Justice Roberts, saying that “it

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169. *Id.* at 811–16 (Alito, J., dissenting).

170. *Obergefell v. Hodges*, 576 U.S. \_\_, \_\_, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

171. *See Lawrence v. Texas*, 539 U.S. 558, 586, 594, 599 (2003) (Scalia, J., dissenting).

172. *Id.* at 597–98.

173. *Obergefell*, 576 U.S. at \_\_, 135 S. Ct. at 2628 (Scalia, J., dissenting).

174. *See id.* at \_\_, 135 S. Ct. at 2616–17 (Roberts, C.J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).



is undeniable that [the majority's] judgment is based on federalism," explained why the decision should be cabined to the federal law and not have any relevance for state marriage bans.<sup>175</sup> Justice Alito's dissent similarly urged lower courts to focus on the federalism aspect of the decision.<sup>176</sup> In contrast, Justice Scalia recognized the value in Chief Justice Roberts' argument, but was so dismayed by what he thought was sloppy reasoning from the majority that he telegraphed in painstaking detail how lower courts could ignore the federalism aspect of the decision and instead use its language to strike down state same-sex marriage bans.<sup>177</sup>

Finally, the conservative dissents are littered with parades of horrors, portraying a future world without morality. In *Romer*, Justice Scalia said that with the majority's decision "polygamy must be permitted."<sup>178</sup> Chief Justice Roberts similarly lamented the potential for acceptance of plural marriage in his *Obergefell* dissent.<sup>179</sup> Justice Scalia went even further in *Lawrence*, claiming that the Court's decision likely spelled the end of "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."<sup>180</sup> In *Windsor*, Justice Alito worried that the Court's decision to strike down the federal definition of marriage would have long-term effects on marriage and the family structure.<sup>181</sup> To him, the "ancient and universal" family structure of the past was threatened by this fundamental change, a shift about which no one can predict the consequences.<sup>182</sup> In his *Obergefell* dissent, Justice Alito feared that same-sex marriage would increase the number of children born out of wedlock and lead to "marriage's further decay."<sup>183</sup>

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175. *United States v. Windsor*, 570 U.S. 744, 777–78 (2013) (Roberts, C.J., dissenting).

176. *See id.* at 817 (Alito, J., dissenting) ("To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree.").

177. *Id.* at 799–800 (Scalia, J., dissenting) ("How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status."). Many lower courts accepted his invitation. *See, e.g., Bourke v. Beshear*, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014).

178. *Romer v. Evans*, 517 U.S. 620, 648 (1996) (Scalia, J., dissenting).

179. *Obergefell*, 576 U.S. at \_\_\_, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting) ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage.").

180. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting). He later claimed that the decision "effectively decrees the end of all morals legislation." *Id.* at 599.

181. 570 U.S. at 809–10 (Alito, J., dissenting).

182. *Id.*

183. 576 U.S. at \_\_\_, 135 S. Ct. at 2641–42 (Alito, J., dissenting).

The conservative dissents also expressed concern that those who believe in a traditional view of marriage will now be punished and shamed. Chief Justice Roberts explained at length in *Obergefell* the effect the decision will have on the “[m]any good and decent people [who] oppose same-sex marriage as a tenet of faith.”<sup>184</sup> These “people of faith,” whom Chief Justice Roberts believes the majority labeled as “bigoted,” will now be forced by the government to act in ways that violate their conscience, such as housing same-sex couples or losing tax-exempt status.<sup>185</sup> Justice Thomas’s dissent also predicted “inevitable” conflict between the new government definition of marriage and the traditional religious definition of marriage, “particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”<sup>186</sup> Justice Alito wrote about an even darker future for marriage objectors. In his *Obergefell* dissent he worried that they will be forced to “whisper their thoughts in the recesses of their homes” out of a fear of being labeled and treated as bigots in public.<sup>187</sup> Even worse, they may be subject to the same discrimination and physical violence that gays and lesbians have faced in the past because “some may think that turnabout is fair play.”<sup>188</sup>

In the three cases that present a clash between the First Amendment and antidiscrimination law, the separate opinions from conservative Justices highlight the fear at the heart of this last aspect

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184. *Id.* at \_\_, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

185. *Id.* at \_\_, 135 S. Ct. at 2625–26.

186. *Id.* at \_\_, 135 S. Ct. at 2638 (Thomas, J., dissenting). Interestingly, the rest of Justice Thomas’s dissenting opinion in *Obergefell* is the most level-headed response to the changes in LGBT rights at the Court. He focuses much of his dissent on the different visions of liberty at stake—the difference between “freedom from governmental action” as opposed to “entitlement to governmental benefits.” *Id.* at \_\_, 135 S. Ct. at 2632, 2637 (endorsing a strong view of the Due Process Clause that is about the right to be left alone rather than any affirmative substantive right). Other than predicting problems in the clash between religion and LGBT rights, he refrains from the over-the-top language that his conservative colleagues used in their dissents in these cases. Emblematic of this approach is his dissent in *Lawrence*, which is just two paragraphs long, asserting that the law at issue is “uncommonly silly” but not prohibited by the Constitution. *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)). However, in contrast to this more balanced approach, Justice Thomas did join each of Justice Scalia’s dissents discussed here, as well as Chief Justice Roberts’ dissent in *Obergefell* and Justice Alito’s dissents in *Windsor* and *Obergefell*. See *Obergefell*, 576 U.S. at \_\_, 135 S. Ct. at 2611 (Roberts, C.J., dissenting); *id.* at \_\_, 135 S. Ct. at 2640 (Alito, J., dissenting); *Windsor*, 570 U.S. at 802 (Alito, J., dissenting).

187. 576 U.S. \_\_, \_\_, 135 S. Ct. 2584, 2642–43 (Alito, J., dissenting).

188. *Id.* at \_\_, 135 S. Ct. at 2643.

of the parade of horrors. No conservatives wrote separately in *Hurley* or *Dale*,<sup>189</sup> but both Justice Gorsuch and Justice Thomas wrote separate concurrences in *Masterpiece Cakeshop*. Justice Gorsuch wrote to emphasize the importance, in future cases, of scrupulously protecting the religious rights of those who object to same-sex marriage.<sup>190</sup> Justice Thomas went even further, explaining that the baker not only had free exercise rights at issue in the case, but also free speech rights.<sup>191</sup> He concluded his analysis of the baker's free speech rights by reminding the reader of his warning in *Obergefell*, urging future courts to ensure that dissent is not stamped out and that freedom of thought is not vilified.<sup>192</sup>

### B. *From the Middle*

Compared to the large number of conservative separate opinions on issues relating to gay rights at the Supreme Court, there have been only two separate opinions from Justices in the middle of the Court. This makes sense, as Justice Kennedy is generally regarded as part of that middle, and he was the author of so many of the majority opinions at issue here. It would be odd for Justices largely in ideological agreement with him to write many separate opinions.

But there are two, both of which deserve some attention. Justice Powell concurred in *Bowers*, agreeing with the Court on the fundamental rights issue.<sup>193</sup> He wrote separately to emphasize that he would strike down any actual imprisonment of two individuals engaging in private, consensual sex because doing so would raise serious issues under the Eighth Amendment.<sup>194</sup> However, in this case, there was no conviction, nor did the parties raise the Eighth Amendment issue below.<sup>195</sup>

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189. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 642 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

190. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. \_\_\_, \_\_\_, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

191. *Id.* at \_\_\_, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in judgment).

192. *Id.* at \_\_\_, 138 S. Ct. at 1748.

193. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring). Famously, after he retired from the bench, Justice Powell stated that he regretted his vote in *Bowers*, telling a group of students in 1990 that "I think I probably made a mistake in that one." Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, at A3.

194. *Bowers*, 478 U.S. at 197–98.

195. *Id.* at 198.

The only other separate opinion came from Justice O'Connor, who concurred in the judgment in *Lawrence*.<sup>196</sup> Perhaps because she was part of the majority in *Bowers*<sup>197</sup> and did not want to call into question her vote in that case, she joined in the result in *Lawrence* but on equal protection grounds, not the due process grounds that formed the basis of the majority opinion.<sup>198</sup> To Justice O'Connor, because the Texas law applied only to same-sex sexual behavior, it "makes homosexuals unequal in the eyes of the law."<sup>199</sup> Applying the same rationale as in *Romer*, Justice O'Connor would have applied rational basis review, striking the law down because "moral disapproval, without any other asserted state interest, is [not] a sufficient rationale."<sup>200</sup>

### C. From Justice Kennedy's Left

The liberal Justices have not been entirely silent in these cases, but since *Bowers*, they have been almost completely absent from the substantive debate about how the Constitution protects gay rights. In fact, other than the dissents in *Bowers* and the dissent in the denial of certiorari in *Rowland* that began this article, the liberal Justices have not written one word in any of the cases that directly address the issue of gay rights under the Constitution. Rather, they have saved their meager words on the issue for the cases involving the clash between objectors and antidiscrimination law, but even those words have been extremely limited.

In *Bowers*, both Justice Blackmun and Justice Stevens wrote dissenting opinions, but only a small portion of Justice Stevens's opinion addressed the substantive issue of gay rights. Justice Blackmun's dissent developed a constitutional "right of intimate association [that] does not depend in any way on [a person's] sexual orientation."<sup>201</sup> He did not reach the equal protection issue or the "controversial question whether homosexuals are a suspect

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196. *Lawrence v. Texas*, 539 U.S. 558, 561 (2003).

197. 478 U.S. at 187.

198. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring in the judgment) ("I joined *Bowers*, and do not join the Court in overruling it.").

199. *Id.* at 581.

200. *Id.* at 582–83. Justice Kennedy rejected this position in his majority opinion because it would allow the legislature to then, on the face of the law, ban sodomy for everyone, while knowing that it would have the greatest effect on same-sex sexual activity. *Id.* at 574–75 (majority opinion).

201. *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting).

class.”<sup>202</sup> Undoubtedly, the right suggested by Justice Blackmun would have advanced gay rights immensely, as it would have protected core sexual behavior, but his opinion did not ground this protection in any notion of gay rights.

Justice Stevens’s *Bowers* dissent did reach that issue, but only superficially. He first argued that the Constitution protects “the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral,” and that this right applies to everyone, regardless of sexual orientation.<sup>203</sup> Only after first engaging in this analysis of a generalized sexual right did he explore whether the state can apply this law selectively just to gay people.<sup>204</sup> He called this “plainly unacceptable,” and stated that “the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”<sup>205</sup> However, his analysis went no further than this conclusory statement.

The remaining four liberal opinions in the gay rights cases all appear in cases about the clash between objectors and antidiscrimination law, as the liberal Justices were completely silent in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.<sup>206</sup> *Hurley* was unanimous with no separate opinions,<sup>207</sup> but *Dale* had dissents from Justice Stevens and Justice Souter. Justice Stevens’s opinion began by explaining how the presence of a gay scoutmaster did not conflict with any message the Boy Scouts of America have professed.<sup>208</sup> After addressing that issue at length, Justice Stevens talked more generally about gay equality under the Constitution. In criticizing the majority, he invoked the language of equal protection “suspect classifications,” explaining that the majority adopted a view that

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202. *Id.* at 202 n.2.

203. *Id.* at 216–18 (Stevens, J., dissenting).

204. *Id.* at 218.

205. *Id.* at 218–19. Moreover, according to Justice Stevens, the state had no legitimate interest in applying this law just to gay people, nor did it honestly advance such an interest in this case. *Id.* at 219–20.

206. *See supra* notes 14–17 and accompanying text.

207. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

208. *See Boy Scouts of Am. v. Dale*, 530 U.S. at 640, 665–98 (2000) (Stevens, J., dissenting).

“is tantamount to a constitutionally prescribed symbol of inferiority,” and referring to gay people as a “discrete group.”<sup>209</sup> He then took note of the positive changes that had been taking place around gay rights in the country:

Unfavorable opinions about homosexuals “have ancient roots.” Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association’s and the American Psychological Association’s removal of “homosexuality” from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun’s classic opinion in *Bowers*; Georgia’s invalidation of the statute upheld in *Bowers*; and New Jersey’s enactment of the provision at issue in this case.<sup>210</sup>

Justice Stevens acknowledged the prevalence of prejudice and the “serious and tangible harm to countless” people that this prejudice breeds.<sup>211</sup> He concluded by decrying the “constitutional shield” the majority erected to protect these prejudices, and urged instead that “the light of reason” guide the law and that “we must let our minds be bold.”<sup>212</sup>

As much as this opinion constituted an important recognition of the discrimination faced by gay people, it did not expound upon a theory of constitutional law that protects gay rights. Rather, it hinted at the requirements of heightened scrutiny but went no further. Perhaps most notably, the other liberal Justices on the Court at the time were part of a separate dissent from Justice Souter that disclaimed the impact of this portion of Justice Stevens’s opinion. Justice Souter wrote, “The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.”<sup>213</sup>

The remaining two opinions from the left both appear in *Masterpiece Cakeshop*, but again, neither addressed the substantive issues of gay rights. Instead, Justice Kagan’s and Justice Ginsburg’s separate opinions sparred over the future of cases of this type. Justice Kagan wrote a concurrence that, while agreeing with Justice

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209. *Id.* at 696, 698.

210. *Id.* at 699–700 (citations omitted).

211. *Id.* at 700.

212. *Id.*

213. *Id.* at 701 (Souter, J., dissenting).

Kennedy's conclusion that there was religious bias in this case,<sup>214</sup> emphasized that future applications of state antidiscrimination law can be applied in a nondiscriminatory way against religious objectors. She clearly stated that "a vendor cannot escape a public accommodations law because his religion disapproves of selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait."<sup>215</sup> Justice Ginsburg's dissent made the same point, but disagreed with Justice Kennedy's analysis of whether there was religious bias at the administrative hearing.<sup>216</sup>

Thus, while the liberals have occasionally written separately in these cases, none has developed a reasoned argument for gay rights under the Constitution. There have been glimmers of such an argument, particularly in Justice Stevens's dissent in *Dale*, but that opinion fails to say anything other than basic characteristics of the nature of antigay discrimination and that society is changing.<sup>217</sup> Even the dissents in *Bowers*, which squarely presented the issue to the Court,<sup>218</sup> are nowhere near as developed as Justice Brennan's *Rowland* certiorari dissent that begins this article. That opinion, now over three decades old and in the obscure position of a dissent to a certiorari denial, continues to stand alone as the only clear liberal statement of gay rights in the Court's history.

### III. WHAT THE LIBERALS COULD HAVE DONE

Despite the series of cases advancing constitutional protection for gay rights, albeit tempered by the cases in which objectors' First Amendment claims prevailed over antidiscrimination norms, liberal Justices have been virtually silent about gay rights under the Constitution. Instead, they have let Justice Kennedy speak alone on the issue. As a result, the doctrine around LGBT<sup>219</sup> constitu-

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214. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1732 (2018) (Kagan, J., concurring).

215. *Id.* at \_\_, 138 S. Ct. at 1733.

216. *Id.* at \_\_, 138 S. Ct. at 1748–49.

217. *See supra* notes 203–06 and accompanying text.

218. *See supra* Part I.A.

219. As noted in *supra* note 8, in this article I differentiate between "gay rights" and "LGBT rights." Until now, I have been using "gay rights" because that has been what the Supreme Court has addressed. Now that the article is talking about future issues and cases, I will be using "LGBT rights" more, because these issues on the horizon are broader than the issues the Court has addressed in the past.

tional rights is murky at best, and key issues have been left unanswered. Moreover, there has been no response to extreme statements from over-the-top dissents.

The liberal Justices should have done more, and they could have used the vehicle of the concurrence to do so. In the four cases addressing the substance of gay rights—*Romer*, *Lawrence*, *Windsor*, and *Obergefell*—Justice Kennedy wrote for 6–3 (*Romer* and *Lawrence*) or 5–4 majorities (*Windsor* and *Obergefell*).<sup>220</sup> In any and all of these cases, one or more of the liberal Justices could have written a concurring opinion addressing any number of issues related to LGBT rights, and they could have done so without harming the overall impact of Justice Kennedy’s majority opinion.

#### A. *Regular Versus Special Concurrences*

At the simplest level, there are two types of concurrences: regular and special.<sup>221</sup> A regular concurrence is one in which the Justice writing the concurrence joins the entirety of the majority—both the opinion and the disposition—but writes separately about some aspect of the case.<sup>222</sup> This is in contrast to a special concurrence, where the Justice agrees with the disposition the majority opinion reached but not with the opinion.<sup>223</sup> With a special concurrence, the Justice writes a separate opinion explaining the reasoning that Justice believes is the correct way to reach the same outcome as the majority.<sup>224</sup> The easiest way to tell the difference between the two is how they are listed in the summary of the case and at the start of the individual opinion. A regular concurrence is listed as a “concurring opinion” while a special concurrence is listed as “concurring in the judgment.”<sup>225</sup>

Two of the separate opinions discussed above highlight the difference. In *Masterpiece Cakeshop*, Justice Kagan wrote a regular

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220. *Obergefell v. Hodges*, 576 U.S. \_\_, \_\_, 135 S. Ct. 2584, 2591 (2015); *United States v. Windsor*, 570 U.S. 744, 747 (2013); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003); *Romer v. Evans*, 517 U.S. 620, 621 (1996).

221. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 383–84 (1993).

222. *See id.*

223. *See id.*

224. *See* PAMELA C. CORLEY, *CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT* 5 (2010); Greg Goelzhauser, *Silent Concurrences*, 31 *CONST. COMMENT.* 351, 353–54 (2016) (explaining the difference between the two types of concurrences).

225. *See* CORLEY, *supra* note 224.



concurrence, joining Justice Kennedy's opinion in full but writing separately to highlight her understanding of exactly how the Colorado Civil Rights Commission erred in considering the other cases involving bakers and same-sex marriage.<sup>226</sup> This regular concurrence did not change the vote count in the case because she fully agreed with the majority opinion, on both reasoning and result.<sup>227</sup>

Contrast that opinion with Justice O'Connor's special concurrence in *Lawrence*. In that opinion, she agreed with the result of Justice Kennedy's majority opinion, which struck down the Texas law, but did not agree with the rationale, preferring to reach the outcome under the Equal Protection Clause rather than the Due Process Clause.<sup>228</sup> This opinion did not change the vote on the *result* in the case (6–3). However, it did change the vote on the *legal reasoning* in the case. Because of Justice O'Connor's special concurrence, the case is a 5–1–3 vote on legal reasoning, with five Justices believing the law violated the Due Process Clause (Justice Kennedy's opinion joined fully by the four liberal Justices), one Justice believing it violated the Equal Protection Clause (Justice O'Connor's special concurrence for herself alone), and three Justices believing it violated neither (Justice Scalia's dissent joined by two others).<sup>229</sup>

Special concurrences raise the potential for jurisprudential problems that regular concurrences do not. While Justice O'Connor's special concurrence in *Lawrence* did not change the fact that a majority of the Court voted to strike the law down under the Due Process Clause, if the vote had been 5–4 on the result of striking down Texas's law, a special concurrence would convert Justice Kennedy's opinion from a majority to a plurality.<sup>230</sup>

Plurality opinions introduce confusion into the law that majority opinions do not. Lower courts faced with a plurality opinion from the Supreme Court must use the narrowest-grounds rule of *Marks v. United States* to determine the holding of the Supreme Court:

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226. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1732 (2018) (Kagan, J., concurring).

227. *Id.*

228. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment).

229. *Id.* at 561 (majority opinion); *id.* at 579 (O'Connor, J., concurring in the judgment); *id.* at 586 (Scalia, J., dissenting).

230. See generally Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 164–70 (2009) (reviewing plurality opinions).

“[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”<sup>231</sup> Although this rule is easy to state and almost second-nature to recite in briefs, it is often confusing in application.<sup>232</sup> Moreover, plurality opinions can result in voting paradoxes which make it impossible for lower courts to apply any particular rule from the case.<sup>233</sup> With each of these problems, a special concurrence that leaves less than five Justices in agreement with the rationale of the main opinion can act to diminish the precedential value of the Court’s decision.

Thus, given the importance of preserving the precedential value of these core gay rights cases, the argument of this article is that the liberals should have written regular concurrences supporting gay rights, not a special concurrence. Only in *Romer* was there room to write a special concurrence, as there were six Justices in the majority.<sup>234</sup> In all of the other cases, the majority opinion was a five-Justice coalition that would have been reduced to a plurality with a special concurrence.<sup>235</sup>

### B. *Expansive and Emphatic Concurrences*

Besides the basic distinction between regular and special concurring opinions, academics who have studied concurring opinions have also distinguished them based on their content. Perhaps the most systematic analysis of concurrences comes from political scientist Pamela Corley in her book on the topic.<sup>236</sup> In her analysis, there are six different types of concurring opinions: expansive, doctrinal, limiting, reluctant, emphatic, and unnecessary.<sup>237</sup> The basic

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231. 430 U.S. 188, 193 (1977).

232. Compare Brief of Law Professors as Amici Curiae in Support of Neither Party, *Hughes v. United States*, 584 U.S. \_\_\_, 138 S. Ct. 1765 (2018) (No. 17-155), with Brief of Professor Richard M. Re as Amicus Curiae in Support of Neither Party, *Hughes*, 584 U.S. \_\_\_, 138 S. Ct. 1765 (No. 17-155). See generally Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000).

233. See generally David S. Cohen, *McDonald’s Paradoxical Legacy: State Restrictions of Non-Citizens’ Gun Rights*, 71 MD. L. REV. 1219 (2012) (examining a voting paradox in a particular case); David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183 (2010) (reviewing the literature and theory of various types of voting paradoxes).

234. *Romer v. Evans*, 517 U.S. 620, 621 (1996).

235. See *supra* notes 223–24 and accompanying text.

236. See generally CORLEY, *supra* note 224.

237. *Id.* at 16. Other authors have used different terminology to classify concurring opinions, but Corley’s is the most well-developed and useful. See also Igor Kirman, *Standing*

differences between these types of concurring opinions are as follows:

- (1) *Expansive concurrence*: a regular concurrence that expands the holding or supplements the reasoning of the majority opinion, often based on an additional legal theory.
- (2) *Doctrinal concurrence*: the basic special concurrence, disagrees with the rationale of the majority opinion and offers a different theory to support the outcome.
- (3) *Limiting concurrence*: also usually in the form of a special concurrence, states that part of the majority opinion was unnecessary or tries to limit its reach.
- (4) *Reluctant concurrence*: a regular concurrence that joins the majority opinion but notes that the author is doing so because the writer is compelled by precedent or prudence rather than that the writer believes this is the right reasoning.
- (5) *Emphatic concurrence*: a regular concurrence that emphasizes an aspect of the majority opinion as a way to clarify for future courts or Justices.
- (6) *Unnecessary concurrence*: a special concurrence in the judgment without any written opinion.<sup>238</sup>

In the gay rights cases, the liberals missed an opportunity to write expansive or emphatic concurrences. The other types of concurrences would have done harm to the precedential value of the majority opinion, which was not in the best interests of the liberal Justices.<sup>239</sup> But either an expansive or emphatic concurrence would have agreed with the majority opinion's result and rationale

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*Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2088–89 (1995) (exploring some of the terminology suggested by others); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 784–809 (1990).

238. CORLEY, *supra* note 224, at 16–19.

239. SEGAL & SPAETH, *supra* note 221, at 293 (explaining why conservative Justices have been more likely to write special concurrences in recent history than liberal Justices).

At least since . . . the beginning of the 1981 term, conservative justices have constituted a majority. As such, they have less to lose than their opponents when they fail to avail themselves of their built-in majority to articulate binding policy. The liberals . . . find themselves in the majority far less frequently. When they do, they may be more reluctant to eviscerate their victory by unyielding adherence to their individual policy preferences.

*Id.*

in its entirety, doing no harm to the five-Justice majority. Thus, without harming the Court's majority, the liberal Justices could have written about other important theories that could support LGBT rights or could have clarified some of the ambiguity stemming from Justice Kennedy's opaque writing style.

In *Masterpiece Cakeshop*, we saw the Justices to the right of Justice Kennedy do both of these things with their concurring opinions. Justice Gorsuch wrote an emphatic concurrence that agreed with Justice Kennedy's opinion but spent seven pages explaining in detail just how biased the Commission was against the baker's religion.<sup>240</sup> There is no new doctrine or theory in Justice Gorsuch's opinion, just further elaboration of the factual basis for his argument that the original administrative hearing was biased against the plaintiff.<sup>241</sup>

In contrast, Justice Thomas's concurring opinion is styled as both a regular and a special concurrence.<sup>242</sup> The lengthy section of his opinion constituting a regular concurrence is a classic example of an expansive concurrence. In it, Justice Thomas explained why Colorado violated not only the baker's free exercise rights, which was the basis of Justice Kennedy's majority opinion, but also the baker's free speech rights. To Justice Thomas, baking and decorating a custom cake was expressive conduct.<sup>243</sup> The free speech issue had been briefed and argued to the Court;<sup>244</sup> however, the majority

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240. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1734–40 (2018) (Gorsuch, J., concurring).

241. *Id.*

242. *Id.* at \_\_, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas's special concurrence opened by noting his disagreement with the Justice Kennedy's claim that the record was unclear as to whether the baker refused to sell any cake to the same-sex couple or whether he simply refused to sell them a custom cake. *Id.* Justice Kennedy wrote:

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

*Id.* at \_\_, 138 S. Ct. at 1723 (majority opinion). As Justice Thomas read the record, the court of appeals decided that the baker only refused to sell a custom cake. *Id.* at \_\_, 138 S. Ct. at 1740 (Thomas, J., concurring in part and concurring in the judgment).

243. *Id.* at \_\_, 138 S. Ct. at 1740–45.

244. *Id.* at \_\_, 138 S. Ct. at 1723–24. See generally Brief for Petitioner, *Masterpiece Cakeshop*, 584 U.S. \_\_, 138 S. Ct. 1719 (No. 16-111); Brief for Respondent, *Masterpiece Cakeshop*, 584 U.S. \_\_, 138 S. Ct. 1719 (No. 16-111).

opinion acknowledged the issue but did not address it, instead deciding the case exclusively on the basis of the baker's right to be free from religious bias at the administrative hearing.<sup>245</sup> Justice Thomas's concurring opinion expanded on the majority's reasoning, analyzing a separate issue that he believed was important to resolving this and future disputes.<sup>246</sup>

### C. *Why and When Do Justices Concur?*

Unless the *Marks* rule applies,<sup>247</sup> concurring opinions are not binding authority. So why and when do Justices write them? Using sixteen years' worth of data from the Burger Court, Paul Wahlbeck, James Spriggs, and Forrest Maltzman answered that question in 1999.<sup>248</sup> What they found was not surprising—Justices write concurring opinions to pursue their own policy preferences when those preferences differ from those of the author of the majority opinion.<sup>249</sup> But what they also found was that there are certain circumstances that make it more likely for a Justice to write a concurring opinion.

First, the further a Justice is ideologically from the Justice authoring the majority opinion, the more likely there is to be a concurring opinion.<sup>250</sup> Jeffrey Segal and Harold Spaeth explained this in their discussion of the attitudinal model of judicial decision making:

Those who join the majority opinion are ideologically closer to the opinion writer than those who write regular concurrences; regular concurren- cers, in turn, are ideologically closer to the majority opinion writer than special concurren- cers; and to complete the picture, special concurren- cers are ideologically closer to the majority opinion writer than are justices who dissent.<sup>251</sup>

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245. *Masterpiece Cakeshop*, 584 U.S. at \_\_\_, 138 S. Ct. at 1723–24.

246. *See id.* at \_\_\_, 138 S. Ct. at 1740–45, 1748 (Thomas, J., concurring in part and concurring in the judgment) (“[I]n future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to ‘stamp out every vestige of dissent’ and ‘vilify Americans who are unwilling to assent to the new orthodoxy.’” (quoting *Obergefell v. Hodges*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting))).

247. *See supra* notes 231–33 and accompanying text.

248. Paul J. Wahlbeck et al., *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 AM. POL. Q. 488 (1999).

249. *Id.* at 489.

250. *Id.* at 501.

251. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 386–87 (2002).

In other words, when a majority coalition is made up of Justices with great ideological disagreement, there is more likely to be a concurrence.

Wahlbeck and his team found that cases with greater legal complexity also give rise to more concurring opinions.<sup>252</sup> Complex cases include more legal provisions and issues necessary to the resolution of the cases, which means that there are more axes upon which the Justices must agree in order to form a stable majority opinion.<sup>253</sup> Simply put, complex cases have more room for disagreement than simple ones. And if you combine a highly complex case with ideologically distant Justices, the increased possibility of a concurrence seems obvious.

Second, strategic factors influence whether there will be a concurring opinion. Justices are less likely to write concurring opinions when they have a cooperative relationship with the author of the majority opinion.<sup>254</sup> As Wahlbeck and his team explain, “Justices are likely to reward colleagues who have cooperated with them in the past and punish those who have not.”<sup>255</sup>

In contrast, Justices are more likely to write concurring opinions in politically or legally important cases.<sup>256</sup> In cases that are not important, the Justices are more likely to gloss over any disagreement because writing a concurrence is not worth their effort; but in the important cases, they are more likely to want to express their different view publicly.<sup>257</sup> The final strategic consideration is that Justices are less likely to write a special concurrence in a 5–4 case because doing so would destroy the majority.<sup>258</sup> However, the study found that “this strategic context exerts no influence on regular concurrences.”<sup>259</sup>

Finally, the study found that some basic, practical factors influence whether a Justice will write a concurring opinion. When a Justice has a higher workload, that Justice is less likely to write a

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252. Wahlbeck et al., *supra* note 248, at 501–02.

253. *Id.* at 502.

254. *Id.*

255. *Id.* at 496.

256. *Id.* at 503.

257. *Id.* at 496–97.

258. *Id.* at 503.

259. *Id.*

concurring opinion.<sup>260</sup> Likewise, as each annual Term of the Supreme Court draws to a close, Justices are less likely to author a concurring opinion.<sup>261</sup> These considerations reflect the very real fact that, as Justice Ginsburg noted, “concurrences are written on one’s own time.”<sup>262</sup>

Professor Corley’s study of concurring opinions added a wrinkle to Wahlbeck’s team’s study. She took those results and added nuance to them, considering when different *types* of concurring opinions are written.<sup>263</sup> What she found was that Justices are more likely to write the two types of concurrences that are of most concern to this article—expansive and emphatic concurrences—in politically or legally important cases.<sup>264</sup> She explained her hypothesis, leading to these findings, similarly to Wahlbeck’s team, but went into greater detail about the type of concurrence:

In unimportant cases, justices may be willing to ignore their preferences and create an illusion of consensus. Furthermore, the policy implications of an important case are broader. Thus, I expect that a justice will be more likely to write or join a limiting or expansive concurrence if the case is important. . . . [Also] the emphatic concurrence may be more likely to be written or joined in important cases in order to provide clarity.<sup>265</sup>

Corley also found that emphatic concurrences are more likely when a case is complex,<sup>266</sup> which makes sense given that her definition of an emphatic concurrence is that it helps to clarify issues.<sup>267</sup> Finally, she found that emphatic concurrences are less likely when there is a cooperative relationship between the Justices in the majority bloc.<sup>268</sup>

Putting these factors together suggests that a concurrence from one or more of the liberal Justices should have been expected in one or more of the gay rights cases. The majority bloc in those cases featured Justice Kennedy and four liberal Justices (and Justice

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260. *Id.* at 504–05.

261. *Id.*

262. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990).

263. CORLEY, *supra* note 224, at 26.

264. *Id.* at 39.

265. *Id.* at 28.

266. *Id.* at 39.

267. *Id.* at 18 (“The fifth category is the *emphatic concurrence*, which emphasizes some aspect of the Court’s holding, and functions largely as a means of clarification.”).

268. *Id.* at 39.

O'Connor in two of the cases).<sup>269</sup> This ideological difference should have increased the likelihood of a concurring opinion, as should the fact that the gay rights cases were complex. Each involved not only two different constitutional provisions—the Due Process and the Equal Protection Clauses—but also many different theories under each provision.<sup>270</sup> Moreover, these cases were politically and legally important, some of the most closely watched decisions in the Court's past several decades. Also, while the cases involved close majorities, the position advocated here is that the Justices should have written regular concurrences, not special concurrences that would have broken apart that majority. Finally, there was no obvious special relationship between the four liberal Justices and Justice Kennedy.

In light of these factors, the gay rights cases were ripe for one or more expansive and/or emphatic concurrences from the liberals on the Court. They could have used these complex, high-profile cases to articulate a liberal position on the constitutional rights of gay people. However, as we know, they did not and instead remained silent amidst the confusion and moderation from Justice Kennedy and the inflammatory dissents from the Court's conservatives. The last section of this article explores the harm that this silence caused.

#### IV. THE HARM OF LIBERAL SILENCE

Concurring opinions can have real value in the law, and the liberal Justices on the Court missed their opportunity to concur in the core gay rights cases discussed here. What the liberal Justices missed was the opportunity to send a signal to lower courts and other legal actors—legislators, the public, even future Supreme Court Justices—about issues related to LGBT rights.<sup>271</sup> By failing to take advantage of this opportunity, the liberal Justices weakened the precedential value of the gay rights cases, letting the aggressively homophobic dissents from the conservative members of the Court linger unanswered in the judicial ether.

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269. *See generally supra* Part I.B.

270. *See generally supra* Part I.B.

271. CORLEY, *supra* note 224, at 6 (“Concurrences are the perfect vehicle for sending cues to other actors because concurring opinions are not the product of compromise as are majority opinions.”).



Taking a cue from the literature on concurring opinions, it is clear that the liberal Justices could have used concurring opinions in these core gay rights cases to accomplish many different goals and, by failing to do so, hampered these efforts. First, through one or more concurring opinions, they could have influenced the trajectory of the law on at least three burning questions regarding LGBT rights: the level of scrutiny for constitutional claims of sexual orientation discrimination; whether Title VII protects against discrimination on the basis of sexual orientation; and how the Constitution treats claims of transgender discrimination. Second, concurring opinions could have helped solidify the advances of the gay rights cases, particularly in light of the Supreme Court's changing composition. Third, they could have helped clarify the doctrine that emerged from these cases. Finally, concurring opinions from Justice Kennedy's left could have served as important counter-dissents, addressing some of the vile language from the Court's conservatives.

#### *A. Influence Trajectory of Law*

The liberal Justices' failure to write expansive concurrences presents perhaps the most harmful missed opportunity because expansive concurrences increase the likelihood of lower court compliance with Supreme Court precedent. Professor Corley studied the impact of different types of concurring opinions on lower court compliance, and found that expansive concurrences were the only type of concurrence that increased this likelihood.<sup>272</sup> As Corley explains, "expansive concurrences increase lower court compliance by giving lower court judges more reason to extend the Supreme Court's reasoning to their specific case."<sup>273</sup> They do so with supplemental reasoning or additional doctrinal arguments that support the result that the majority opinion reached.<sup>274</sup> As Professor Corley's empirical study makes clear, these expansive concurrences are signals for the lower court judges, "and the lower courts are using these signals."<sup>275</sup>

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272. *Id.* at 84. Doctrinal concurrences decreased the likelihood of compliance, while all of the remaining types had no effect. *Id.*

273. *Id.* at 86.

274. *Id.* at 76.

275. *Id.* at 73.

In the post-*Obergefell* world, there remain many different, developing issues regarding LGBT rights,<sup>276</sup> but three prominent areas could have greatly benefited from expansive concurring opinions from the liberal Justices. For each of the areas discussed here, had a liberal position for gay rights been advanced in a concurring opinion, the lower courts considering these issues could have been more inclined to use the precedent to further LGBT rights.

### 1. What Level of Scrutiny for Constitutional Sexual Orientation Discrimination Claims?

In each Supreme Court case that directly raised the issue of gay rights, the parties briefed the issue of whether sexual orientation is a protected class under the Equal Protection Clause.<sup>277</sup> Emblematic is the briefing in *Obergefell*, in which the Petitioner and the United States as amicus curiae both argued for heightened scrutiny for sexual orientation classifications. As framed by the Petitioner, the Court should have used the case to state that classifications based on sexual orientation are not entitled to the presumption of constitutionality that comes with rational basis review.<sup>278</sup> The Petitioner based his argument on the fact that the Court's past gay rights decisions—*Romer*, *Lawrence*, and *Windsor*—had “implicitly repudiated the notion that discrimination based on sexual orientation is presumptively legitimate.”<sup>279</sup>

The United States took a different approach. In its brief, it noted that the Court had failed to previously decide this issue.<sup>280</sup> It then applied four factors that the Court had previously used to determine whether a characteristic should be analyzed under a standard of heightened scrutiny: a history of past discrimination based on the classification; the irrelevance of the characteristic to the ability to perform or contribute to society; the presence of immutable characteristics that define the group; and the lack of political

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276. See generally Carpenter, *supra* note 110.

277. See David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 860–61 (2016).

278. Brief for Petitioners at 38–39, *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015) (No. 14-556).

279. *Id.* at 38.

280. Brief for the United States as Amicus Curiae Supporting Petitioners at 16, *Obergefell*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (No. 14-556) (“This Court has yet to determine what level of equal-protection scrutiny is appropriate for review of laws that classify based on sexual orientation.”).

power for the group.<sup>281</sup> The brief then analyzed these factors, and concluded that because each was present in the case of sexual orientation, the Court should apply heightened scrutiny.<sup>282</sup>

Despite the power of these arguments, their centrality to the briefs in *Obergefell*, and their being briefed in each of the LGBT cases that came before *Obergefell*, Justice Kennedy's majority opinion once again ignored these arguments and this issue entirely. Without any concurrence from a liberal Justice, the only mention of heightened scrutiny appeared in dissenting opinions, and then only ridiculing Justice Kennedy for his undisciplined reasoning on this point.<sup>283</sup>

As a result, lower courts continue to grapple with the issue without any guidance from the Supreme Court.<sup>284</sup> As Professor Stacey Sobel has explained, determining the level of scrutiny for sexual orientation claims is important beyond the cases already decided by the Supreme Court.<sup>285</sup> Gay people face discrimination in government housing and employment, in family law matters such as wills and custody, in name change procedures, and in other government functions.<sup>286</sup>

Current Supreme Court jurisprudence from the gay rights cases provides a starting point for analyzing these types of discrimination cases. Justice Kennedy's rationale for striking down antigay laws helps when there is animus behind a law or when it impacts a liberty interest, but that analysis does not go far enough.<sup>287</sup> The liberal Justices had an opportunity to address these issues with an expansive concurrence that agreed with Justice Kennedy but also explained, like Justice Brennan in his *Rowland* dissent,<sup>288</sup> why modern equal protection doctrine requires heightened scrutiny for

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281. *Id.* at 16–17.

282. *Id.* at 17–20.

283. *See, e.g., Obergefell*, 576 U.S. at \_\_\_, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (calling Justice Kennedy's opinion "difficult to follow").

284. As the Second Circuit put it in its decision that led to the Supreme Court's decision in *Windsor*, "[w]e think it is safe to say that there is some doctrinal instability in this area." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).

285. Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 527 (2015).

286. *Id.*

287. *Id.* at 499, 530–31.

288. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014–17 (1985) (Brennan, J., dissenting from denial of certiorari).

sexual orientation. There is no guarantee that such a concurring opinion would have been used by lower courts to answer this question, but without such liberal guidance in the post-*Bowers* Supreme Court landscape, lower courts are left with no Supreme Court guidance whatsoever. And, as Corley's research shows, such an opinion would have increased the likelihood that lower courts could apply such a precedent in expansive ways.<sup>289</sup>

## 2. Do Title VII and Title IX Protect Against Sexual Orientation Discrimination?

Title VII is the federal law that prohibits discrimination in employment.<sup>290</sup> However, it does not protect against discrimination based on sexual orientation or gender identity, as the protected classes defined by the statute are restricted to "race, color, religion, sex, [and] national origin."<sup>291</sup> For decades, advocates have pushed legislators to amend Title VII to include sexual orientation and gender identity, but to date all such efforts have been unsuccessful.<sup>292</sup> Title IX likewise protects against discrimination in education, but also solely on the basis of sex, not sexual orientation.<sup>293</sup>

What does this statutory protection against discrimination have to do with the constitutional rights addressed in this article? One of the theories litigants have advanced to try to convince courts to interpret Title VII and Title IX to cover discrimination on the basis of sexual orientation is that the already-included prohibition on sex discrimination also covers discrimination based on sexual orientation.<sup>294</sup> There are three different rationales to support this theory:

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289. See *supra* notes 272–75 and accompanying text.

290. 42 U.S.C. § 2000e-2(a)(1) (2012).

291. See *id.*

292. See Brief for the United States as Amicus Curiae at 3, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) (including in Addendum A a list of every proposed federal law that would have barred discrimination based on sexual orientation under Title VII).

293. 20 U.S.C. § 1681(a) (2012).

294. The Second and Seventh Circuits have recently adopted this theory. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108, 112 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 340–41 (7th Cir. 2017). The Supreme Court granted review of *Zarda* and another Title VII case in April 2019. Adam Liptak, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/us/politics/supreme-court-gay-transgender-employees.html> [<https://perma.cc/CW6T-KS3C>]. Scholars have long argued for this interpretation of Title VII. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 234 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 229–30;

(1) that someone who discriminates against Bob for being in a relationship with Gary would not have fired Barbara for being in a relationship with Gary, so discrimination is based on Bob's sex;<sup>295</sup> (2) that someone who discriminates against Bob for being in a relationship with Gary is relying on sex-based stereotypes that a man should be in a relationship with a woman;<sup>296</sup> and (3) that someone who discriminates against Bob for being in a relationship with Gary is doing so because of the sex of the people Bob associates with, something that courts have said cannot be done for race (an employer cannot fire a black employee for being married to or associated with a white person).<sup>297</sup>

These theories have been adopted by the Equal Employment Opportunity Commission,<sup>298</sup> but only sporadically adopted by lower federal courts. The circuit courts in particular have split on this issue in the very recent past, with the Second and Seventh Circuits issuing decisions finding that sexual orientation is protected under Title VII, while the Eleventh Circuit said sexual orientation is not protected.<sup>299</sup> The Supreme Court has not yet weighed in, though in April 2019, it announced that it would hear two Title VII cases on the issue during its next Term.<sup>300</sup>

The Court could have given some guidance on the issue in the gay rights cases discussed in this article. In each of these cases, the litigants presented, along with the argument that sexual orientation classifications should be subject to heightened scrutiny, the argument that the already-existing precedent about sex classifica-

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Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Non-Conforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 468–69, 473–74.

295. This is but-for discrimination, a “simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’” *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

296. This is discrimination based on sex stereotyping, something the Supreme Court said was prohibited in *Price Waterhouse v. Hopkins*. 490 U.S. 228, 251 (1989).

297. This type of associational discrimination has long been prohibited in the lower courts, though the Supreme Court has not explicitly ruled on the issue. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 131–32, 140 (2d Cir. 2008) (exhibiting an associational race discrimination claim); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 990, 993–94 (6th Cir. 1999).

298. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641, at \*2, \*4 (July 15, 2015).

299. *Zarda*, 883 F.3d at 108; *Hively*, 853 F.3d at 340–41; *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).

300. Liptak, *supra* note 294.

tions should cover the discrimination at issue in the sexual orientation cases. For example, an amicus brief in *Obergefell* from legal scholars directly raised this issue,<sup>301</sup> and Chief Justice Roberts was intrigued enough by this argument that he asked a question about it at oral argument.<sup>302</sup> However, like the sexual orientation classification argument, Justice Kennedy repeatedly ignored this sex classification argument in his majority opinion in that case as well as the others where it has been raised.

Had the liberal Justices used a concurring opinion to address this sex discrimination argument, as many lower court judges have done,<sup>303</sup> it not only could have helped expand the Court's precedent into the equal protection issues addressed above, but it also could have helped in Title VII and Title IX cases. No doubt an opinion from a Justice supporting the sex discrimination argument under the Constitution would be a powerful resource for other jurists in the effort to use sex discrimination as the basis for prohibiting sexual orientation discrimination under Title VII and Title IX. Although the statutory and constitutional protections do not perfectly overlap, courts do look to one when interpreting the other.<sup>304</sup> By failing to address this issue in a concurring opinion, the liberal Justices missed an opportunity to further protect gay people through its already clear prohibition of sex discrimination under statutory antidiscrimination law.

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301. Brief Amicus Curiae of Legal Scholars Stephen Clark et al. at 8–9, 20–21, 32, *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-571, 14-574, 14-578).

302. Chief Justice Roberts asked, “I’m not sure it’s necessary to get into sexual orientation to resolve this case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?” Adam Liptak, *Gender Bias Issue Could Tip Chief Justice Roberts into Ruling for Gay Marriage*, N.Y. TIMES (Apr. 29, 2015), <https://www.nytimes.com/2015/04/30/us/gender-bias-could-tip-chief-justice-roberts-into-ruling-for-gay-marriage.html> [https://perma.cc/H2SQ-7UG2].

303. See, e.g., *Latta v. Otter*, 771 F.3d 456, 479 (9th Cir. 2014) (Berzon, J., concurring) (“I write separately because I am persuaded that Idaho and Nevada’s same-sex marriage bans are also unconstitutional for another reason: They are classifications on the basis of gender that do not survive the level of scrutiny applicable to such classifications.”); *Baker v. State*, 744 A.2d 864, 898 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (“I would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants.”).

304. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 222–23 (2005).

### 3. Do Existing Statutes and Constitutional Provisions Protect Trans People from Discrimination?

Gavin Grimm was poised to make Supreme Court history when the Trump Administration pulled the rug out from under him. While a high school student, Grimm was being treated for severe gender dysphoria.<sup>305</sup> Grimm had been assigned female at birth, but identified as male.<sup>306</sup> As part of the process of socially transitioning in all parts of his life, he sought to use the boys' restroom at his high school.<sup>307</sup> Grimm did so for two months without any problem, but the school board, after receiving complaints from some parents, instituted a new policy that required transgender students to use an alternative private bathroom rather than the school bathrooms consistent with their identity.<sup>308</sup> Grimm objected to the stigmatizing segregation and brought a federal lawsuit under both the Equal Protection Clause and Title IX.<sup>309</sup>

As much as the Supreme Court has addressed gay rights in the cases discussed in this article, it has barely touched on the topic of transgender rights.<sup>310</sup> For a short time, Grimm's case seemed that it would be the vehicle to change that. After initially losing in the district court, Grimm won in the Fourth Circuit, which found that Title IX applied to Grimm's case.<sup>311</sup> The Supreme Court then granted the school district's petition for certiorari.<sup>312</sup> However, just before oral argument in the case, the Trump Administration changed the Obama Administration's Title IX guidance, upon which Grimm had relied.<sup>313</sup> As a result, the Supreme Court vacated the Fourth Circuit's previous judgment and remanded the case for further consideration.<sup>314</sup> On remand, the district court ruled that Grimm had sufficiently pled both Title IX and Equal Protection

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305. *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016).

306. *Id.*

307. *Id.*

308. *Id.* at 715–16.

309. *Id.* at 717.

310. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (addressing Eighth Amendment liability in a prison case about the housing of a transgender prisoner, but failing to address transgender rights).

311. *Gloucester Cty. Sch. Bd.*, 822 F.3d at 714–15.

312. *Gloucester Cty. Sch. Bd. v. G.G.*, 580 U.S. \_\_\_, 137 S. Ct. 369 (2016) (mem.).

313. Sandra Battle, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, Dear Colleague Letter 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> [<https://perma.cc/QQU2-9J64>].

314. *Gloucester Cty. Sch. Bd. v. G.G.*, 580 U.S. \_\_\_, 137 S. Ct. 1239 (2017) (mem.).

Clause claims of discrimination based on his transgender status and allowed his case to move forward.<sup>315</sup> For now, though, the Supreme Court still has not addressed this or related issues, though along with the Title VII sexual orientation cases that it agreed to hear in April 2019, it also agreed to hear a Title VII gender identity case during its next Term.<sup>316</sup>

The Supreme Court's silence on transgender rights under the Equal Protection Clause, Title VII, and Title IX has, so far, left the issue entirely up to discretion of the lower courts. The most relevant Supreme Court precedent employed by the lower courts is *Price Waterhouse v. Hopkins*, the Title VII case that held sex stereotyping is a form of unlawful employment discrimination.<sup>317</sup> Under that theory, courts have held that discrimination on the basis of transgender or transitioning status is a form of sex stereotyping because such treatment "punishes that individual for his or her gender non-conformance."<sup>318</sup> Although many of the lower courts considering the issue have agreed, not all have.<sup>319</sup> Yet, until the Supreme Court resolves the matter next Term, the issue will continue to arise. Lower courts will continue to grapple with whether President Trump's ban on transgender individuals serving in the military violates the Constitution, whether private employees can fire transgender individuals outside of the bounds of protection under Title VII, and whether schools can require transgender students to use separate bathrooms under Title IX.

The argument here is no different than previously articulated. With an expansive concurrence in the gay rights cases, the liberal Justices could have helped influence the trajectory of the law in the area of transgender rights. None of the cases discussed earlier was actually about transgender rights, so it would have been too much to expect an expansive concurrence to address transgender rights specifically. However, several of the theories that an expansive

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315. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 752 (E.D. Va. 2018).

316. *See* Liptak, *supra* note 294.

317. 490 U.S. 228, 258 (1989).

318. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017); *see also* *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 600 (6th Cir. 2018).

319. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218, 1221–23, 1228 (10th Cir. 2007) (holding that Etsitty was discriminated against on the basis of being "transsexual," but that this is not a protected class); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that Ulane was not discriminated against as a woman); *see also* *Wittmer v. Phillips 66 Co.*, No. 18-20251, 2019 WL 458405, at \*4 (5th Cir. Feb. 6, 2019) (holding that transgender discrimination does not violate Title VII).



concurrence could have legitimately addressed about gay rights could have impacted the fight for transgender rights.

For instance, as noted earlier, one of the prominent theories explaining how sexual orientation discrimination is a form of sex discrimination is that it is a form of gender stereotyping.<sup>320</sup> A powerful concurring opinion explaining the basis for this theory could easily be extrapolated into the area of transgender discrimination, which several courts have found is a form of gender stereotyping.<sup>321</sup> Alternatively, an expansive concurrence that laid out the basis for including sexual orientation as a quasi-suspect class could establish the groundwork for doing the same with transgender status or gender identity more generally.<sup>322</sup> In these and other ways, the expansive concurrence would not need to directly address transgender discrimination in order to have the beneficial effect ascribed to such concurrences by Corley—increasing the likelihood that lower courts look to the case as useful precedent for this new situation.

### B. *Solidifying Advances at the Supreme Court*

Concurrences decrease the likelihood that lower courts, as well as the Supreme Court in future cases, will follow a majority opinion. Previous studies have found that the more concurrences a Supreme Court decision has, the more likely it is to be overruled by the Supreme Court in the future.<sup>323</sup> The authors of that study explained that “concurrences lower the credibility of a precedent and offer alternative legal rationales.”<sup>324</sup>

However, Corley’s method of classifying different types of concurrences shows that not all concurrences are created equal in this regard. In fact, what she found was that while doctrinal concurrences—special concurrences that disagree with proposed doctrine and propose a different basis for the decision—decrease the likelihood that the Supreme Court will follow its own precedent (a result

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320. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 600; *Whitaker*, 858 F.3d at 1049.

321. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 571; *Whitaker*, 858 F.3d at 1049.

322. See *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017) (articulating the criteria through which a suspect class could be created).

323. James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1095 (2001).

324. *Id.* at 1105.

consistent with earlier studies), expansive concurrences *increase* the likelihood that the Supreme Court will follow its own precedent.<sup>325</sup> As she explains it, “An expansive concurrence signals [to future Courts] that the majority opinion did not go far enough and that the justices writing or joining this type of concurrence would go farther in the future.”<sup>326</sup> Moreover, when there is an expansive concurrence, the probability of positive treatment by the Supreme Court in the future is, using Corley’s words, “quite substantial,” as she found that the likelihood nears one hundred percent.<sup>327</sup>

The liberal Justices missed the opportunity to use an expansive concurrence to increase the likelihood that the gay rights decisions are followed and treated positively in future Supreme Court cases, like the three Title VII cases it will hear next Term. So far, each of the cases the Court has decided has been followed and treated positively, as *Lawrence* built on *Romer*, *Windsor* built on those two, and *Obergefell* built on all three. However, with Justice Kavanaugh replacing Justice Kennedy in 2018, the Supreme Court is likely going to become even more conservative than it already is.<sup>328</sup> The slim majorities in the gay rights cases make it possible that when the Title VII cases come before the Justices next Term, the more conservative Supreme Court could chip away at, or even overturn, these precedents. Although there is of course no guarantee,<sup>329</sup> the liberal Justices could have increased the likelihood of the gay rights precedent being followed in the future if they had authored an expansive concurrence. Failing to do so put the precedent in a weaker position for future reconsideration.

### C. *Clarity*

As noted above, Justice Kennedy’s core gay rights majority opinions reached clear results but relied upon confusing, opaque reasoning. When he based his decisions on the Equal Protection

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325. CORLEY, *supra* note 224, at 90–91.

326. *Id.* at 90.

327. She found the baseline probability to be 0.561, and the probability with an expansive concurrence to be 0.960. *Id.* at 91.

328. See Oliver Roeder & Amelia Thomson-DeVeaux, *How Conservative Is Brett Kavanaugh?*, FIVETHIRTYEIGHT (July 17, 2018), <https://fivethirtyeight.com/features/how-conservative-is-brett-kavanaugh/> [<https://perma.cc/YN47-AYH7>].

329. See CORLEY, *supra* note 224, at 90–91 (finding that ideological differences between the original Court and the Court considering the precedent decrease the likelihood of the precedent being treated positively).

Clause, he relied on the difficult-to-constrain doctrine of animus and the widely criticized “rational basis plus” theory.<sup>330</sup> His decisions based on the Due Process Clause were even harder to follow, as he refused to apply standards of review developed in previous cases, labeled some rights fundamental and others merely liberty, and mixed in equality principles without carefully parsing the difference.<sup>331</sup> Many of the dissenting opinions lambasted Justice Kennedy for the doctrinal mess he created, and even for those who agree with the results Justice Kennedy reached, it is easy to agree with the dissents’ critiques.<sup>332</sup>

Without taking anything away from the precedential value of Justice Kennedy’s majority, one or more liberal Justices could have written an emphatic concurrence to clarify portions of Justice Kennedy’s opinions. Although Corley’s studies indicate that emphatic concurrences do not have any effect on lower court compliance with Supreme Court precedent, nor with Supreme Court adherence to its own precedent,<sup>333</sup> it seems almost axiomatic that they would have an effect beyond compliance or adherence to precedent.

For instance, when a Supreme Court concurrence clarifies otherwise murky doctrine in the majority opinion, scholars have theorized that the opinion will “provide[] an essential adjustment to the majority’s imperfect focus.”<sup>334</sup> The audience is lower courts, lawyers, and scholars who are trying to make sense of what the majority wrote, and sometimes help from another Justice could be what tips the reader into understanding what the majority meant.<sup>335</sup> It might not bring about greater compliance, as Corley’s study found, but it can certainly assist in greater understanding.

This theorized impact has already played out in the case of Justice Kagan’s emphatic concurrence in *Masterpiece Cakeshop*. In that concurrence, she explained her understanding of exactly why the Colorado administrative decision was biased against religion and laid out just how easy it would have been for the agency to

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330. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

331. *See Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

332. *See, e.g., United States v. Windsor*, 570 U.S. 744, 794 (2013) (Scalia, J., dissenting) (discussing the majority’s lack of a deferential framework); *id.* at 811 (Alito, J., dissenting) (questioning whether the majority analysis fits within this framework).

333. CORLEY, *supra* note 224, at 84, 91.

334. Ray, *supra* note 237, at 829.

335. *See also id.* at 799–800.

reach the same legal conclusion without religious bias.<sup>336</sup> She also emphasized that “a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait.”<sup>337</sup> The same week that *Masterpiece Cakeshop* was decided, the Arizona Court of Appeals used Justice Kagan’s concurring opinion to support its conclusion that a Phoenix antidiscrimination law could be applied against religious owners of a wedding artwork business.<sup>338</sup> That court cited the clear statement from Justice Kagan’s concurrence that religion cannot be the basis for excusing compliance with antidiscrimination law.<sup>339</sup>

Emphatic concurrences in the direct gay rights cases could have done the same. Just as Justice Kagan’s concurrence helped the Arizona Court of Appeals choose between two different readings of Justice Kennedy’s majority opinion, a clarifying concurrence could have assisted the lower courts in choosing between different readings of Justice Kennedy’s majority opinions in, for instance, *Lawrence* and *Windsor*. Both resulted in lower courts being unclear about Justice Kennedy’s holding,<sup>340</sup> and an emphatic concurrence might have tipped the balance in this regard. By remaining silent throughout this series of cases, the liberals missed their opportunity to provide this clarity.

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336. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. \_\_, \_\_, 138 S. Ct. 1719, 1732–34 (2018) (Kagan, J., concurring). Justice Gorsuch’s separate concurring opinion was in direct response to Justice Kagan’s concurrence. He wrote that

[i]n the face of so much evidence suggesting hostility toward Mr. Phillips’s sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. But, respectfully, I do not see how we might rescue the Commission from its error.

*Id.* at \_\_, 138 S. Ct. at 1734 (Gorsuch, J., concurring) (citation omitted).

337. *Id.* at \_\_, 138 S. Ct. at 1733 n.\* (Kagan, J., concurring).

338. *Brush & Nib Studio v. City of Phoenix*, 418 P.3d 426, 443–44, 443 n.13 (Ariz. Ct. App. 2018).

339. *Id.* at 443 n.13.

340. On *Lawrence*, compare *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743–44 (5th Cir. 2008), striking down Texas’ ban on sex toys under *Lawrence*, with *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1236–38 (11th Cir. 2004), upholding Alabama’s ban on sex toys under *Lawrence*. On *Windsor*, compare *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430–31 (M.D. Pa. 2014) (striking down Pennsylvania’s ban on same-sex marriage under *Windsor*), with *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 915–17, 927 (E.D. La. 2014) (upholding Louisiana’s ban on same-sex marriage under *Windsor*).

#### D. *Counterdissents*

Within the realm of emphatic concurrences, there is a particular type called the “counterdissent.” As explained by Professor Gerald Dunne decades ago, in a counterdissent, “the Justice who wrote the opinion was concerned not so much with the traditional role of explaining the judgment of the court . . . [r]ather, it was all counter attack, a dissent from dissent, so to speak, in which the writer assailed those in disagreement with the majority . . . .”<sup>341</sup> Majority opinions often include responses to dissenters, but sometimes the author of the majority opinion chooses to leave the dissent unanswered, or takes a more restrained approach in responding to an over-the-top dissent in order to take the higher ground or not detract from the Court’s opinion. When that happens, other Justices who joined the majority can take on the task by writing a counterdissent.

Academic literature has given almost no attention to counterdissents as a general matter, but the nature of this type of concurring opinion leads to some common-sense observations. Concurrences as counterdissents make the most sense when the majority opinion refrains from addressing the dissent. In the four direct gay rights cases, Justice Kennedy responded to a dissent just one time, but he did so in a very limited way. In *Romer*, Justice Scalia’s dissent claimed that the Supreme Court had previously approved a law that targeted polygamists by making them ineligible to vote or hold government office.<sup>342</sup> That earlier case, *Davis v. Beason*, was proof to Justice Scalia that Colorado’s Amendment 2 was within the generally noncontroversial tradition of states depriving groups of people who engage in morally reprehensible conduct of certain rights in civil society.<sup>343</sup> Justice Kennedy responded to this line of argument in his opinion, claiming the parts of *Davis* targeting a particular group of people based on their status or advocacy are “no longer good law,” but that if it is interpreted as merely allowing

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341. Gerald T. Dunne, *Justices Hugo Black and Robert Jackson: The Great Feud*, 19 ST. LOUIS U. L.J. 465, 468 (1975); see also *United States v. N.Y.C., New Haven & Hartford R.R. Co.*, 276 F.2d 525, 549 (2d Cir. 1959) (Clark, J., dissenting) (referring to an opinion responding to his dissent as a “counterdissent”); JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 273 (2004) (referring to the “counterdissent” as “a new species of opinion concurring with [the majority] for the sole purpose of scolding” the dissent).

342. *Romer v. Evans*, 517 U.S. 620, 649–50 (1996) (Scalia, J., dissenting) (citing *Davis v. Beason*, 133 U.S. 333 (1890)).

343. *Id.*

states to deny the right to vote to convicted felons, it is “unexceptionable.”<sup>344</sup> Justice Scalia then responded to this point in a lengthy footnote in his dissent.<sup>345</sup>

Other than this brief exchange about an esoteric precedent from the late 19th century, Justice Kennedy allowed the dissents in all of the gay rights cases to go unanswered. That means that Justice Kennedy left unanswered: Justice Scalia’s cries of culture war in *Romer*<sup>346</sup> and prediction of the end of prohibitions on bestiality and pedophilia in *Lawrence*;<sup>347</sup> Chief Justice Roberts’ comparisons to *Dred Scott* and *Lochner* in *Obergefell*;<sup>348</sup> Justice Alito’s concern that same-sex marriage would destroy families in both *Windsor*<sup>349</sup> and *Obergefell*,<sup>350</sup> as well as his outrageous prophecy in *Obergefell* that those who oppose gay rights will be physically attacked for refusing to remain silent;<sup>351</sup> and Justice Thomas’s claims that liberty and dignity are better served by allowing states to prohibit gay couples from marrying in *Obergefell*,<sup>352</sup> and that same-sex marriage would threaten religious liberty.<sup>353</sup>

Given Justice Kennedy’s failure to answer this antigay rhetoric and argument in any of his majority opinions, the liberal Justices could have jumped in with counterdissents to respond to some of these claims, but they did not. As a result, the bigotry and apocalyptic predictions apparent throughout these opinions were left unanswered, at least directly. Counterdissents would not have wiped these claims from the pages of the *United States Reports*, but they could have addressed these points with the authority of a Supreme Court Justice and tried to tamp down any effect they might have

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344. *Id.* at 634 (majority opinion).

345. *Id.* at 650 n.3 (Scalia, J., dissenting).

346. *Id.* at 636.

347. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

348. *Obergefell v. Hodges*, 576 U.S. \_\_\_, \_\_\_, 135 S. Ct. 2584, 2616–22 (2015) (Roberts, C.J., dissenting).

349. *United States v. Windsor*, 570 U.S. 744, 809–10 (Alito, J., dissenting).

350. *Obergefell*, 576 U.S. at \_\_\_, 135 S. Ct. at 2641–42 (Alito, J., dissenting).

351. *Id.* at \_\_\_, 135 S. Ct. at 2642–43.

352. *Id.* at \_\_\_, 135 S. Ct. at 2631–40 (Thomas, J., dissenting).

353. *Id.* at \_\_\_, 135 S. Ct. at 2638.

in future cases.<sup>354</sup> They could have also served as a powerful counterpoint in the discussion of the cases among the general public, which often included references to the dissents' quips.<sup>355</sup>

### CONCLUSION

No one knows exactly why the liberal Justices have been silent on gay rights for decades. Perhaps Justice Kennedy required (or they felt Justice Kennedy required) their silence in order to vote the way he did on these landmark cases. Perhaps they thought they would leave well enough alone and wait for these concerns to arise another day. Perhaps they *did* draft concurring opinions, but Justice Kennedy responded to them by making changes that addressed the concurrence's concerns. Perhaps they just did not have the time or thought that on balance the effort would not be worth the payoff. Or, perhaps, they really believe that Justice Kennedy's opinions could not be improved upon.<sup>356</sup>

Whatever the reason for this liberal silence, though, the jurisprudence around LGBT rights in this country is poorer as a result, and the future trajectory more concerning. Concurring opinions, such as the expansive or emphatic concurrence, that do not diminish the effect of the majority opinion would have been the perfect vehicle for the liberal Justices to have developed a clearer and more powerful vision for LGBT rights under the Constitution.

As it is, without these concurring opinions, lower courts, future Supreme Courts, other political actors, and the general public are left with Justice Kennedy's cramped and cloudy view of LGBT rights. That view has undoubtedly advanced the cause with major wins, but it has stunted progress in other areas. As the post-Kennedy Court now embarks on deciding three sure-to-be-landmark cases on LGBT discrimination under Title VII, it is time to recognize that the liberals lost their opportunity to solidify these gains,

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354. Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 126 (2011) ("Although there are famous examples of Supreme Court dissents that later became the law, the average Supreme Court dissent is not heavily cited, even in the lower courts.").

355. See, e.g., Tina Nguyen, *The Bitchiest Quotes from Scalia's Gay Marriage Dissent*, VANITY FAIR (June 26, 2015), <https://www.vanityfair.com/news/2015/06/scalia-dissent-gay-marriage-ruling-2015> [<https://perma.cc/BK5P-5UC3>].

356. See generally CORLEY, *supra* note 224, at 21–39 (examining the reasons Justices do and do not write concurring opinions).

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as they are more likely to be speaking from the position of dissent  
in the future.