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The Profound Political but Elusive Legal Legacy of Justice Anthony Kennedy’s LGBT Decisions

MATTHEW COLES[†]

This talk focuses on Anthony Kennedy’s legacy as a Justice in the LGBT cases that he wrote for the Supreme Court. There are four cases in which the Supreme Court recognized important constitutional rights for LGBT people; they were all written by Anthony Kennedy. Those decisions are part of one of the great social movements for change of modern times. Because they’re part of that movement, they represent a powerful political and social legacy. But a jurisprudential legacy . . . not so much.

There’s the *Romer v. Evans* case in 1996 in which the Court said that the people of Colorado could not take away government’s power to pass laws protecting LGBT people from discrimination.¹ In the *Lawrence v. Texas* case in 2003, the Court said that Texas could not make certain forms of intimate sexuality a crime if the participants are a same-sex couple.² There’s *United States v. Windsor* in 2013, in which the Court struck down as unconstitutional the so-called Defense of Marriage Act.³ In that Act, the federal government said even if your state thinks you’re married, we don’t for all federal purposes if you’re a same-sex couple.⁴ Finally, in the 2015 decision in *Obergefell v. Hodges* the Court ruled that states had to allow same-sex couples to marry.⁵

First, let’s look at the political legacy.

Romer halted a national effort by the right wing to essentially derail the political LGBT movement.⁶ The point of the effort was to amend state constitutions to make sure that LGBT people could not get political change

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1. 517 U.S. 620, 635 (1996).

2. 539 U.S. 558, 574 (2003).

3. 570 U.S. 744 (2013).

4. *Id.* at 769–70.

5. 135 S. Ct. 2584, 2604 (2015).

6. *See Romer*, 517 U.S. at 623–24, 626 (holding that Amendment 2—the Colorado constitutional amendment at issue, which would have prohibited “all legislative, executive or judicial action” to protect LGBT persons—violated the Equal Protection Clause because the amendment was based on the desire to harm LGBT persons).

through state legislatures, state executive branches, or state courts. *Romer* stopped the campaign to strip government of the power to respond to the LGBT political movement dead. That was of major importance to a movement that, given the Court's decision in *Bowers v. Hardwick*,⁷ was largely a politically-focused movement.

In context though, by the time *Romer* came down there had been two more state initiatives and we'd beaten both of them, including one in Idaho.⁸ And lower courts, by and large, blew the *Romer* case off. There are far too many opinions explaining why *Romer* is only about its specific facts.⁹ As the Eleventh Circuit once famously said, "*Romer* is no employment case."¹⁰

Doesn't a case that says that a state can't change its constitution to fence a group out of the usual political process speak with a breadth greater than a garden variety employment case? Not to most federal courts that looked at it afterwards.¹¹

The next important case in Justice Kennedy's (and the Court's) LGBT cannon is *Lawrence v. Texas*.¹² *Lawrence* got the monkey of *Bowers v. Hardwick*¹³ off our back.

Bowers v. Hardwick quickly evolved from a case about the Due Process Clause of the federal Constitution to a case that answered almost every constitutional question that came up about gay people. Equal protection for LGBT people? "No, see *Bowers v. Hardwick*."¹⁴ First Amendment, "No, see *Bowers v. Hardwick*."¹⁵ We were just waiting for the contract case involving lesbians in which the courts would say "unenforceable, *Bowers v. Hardwick*."

Taking that monkey off our back was a critical important step, but the significance of *Lawrence* was certainly diminished by what I think was the most effective dissenting opinion written in the second half of the twentieth century—Antonin Scalia's masterpiece in *Lawrence*.¹⁶ In that dissent, Justice Scalia did two remarkable things. First, he convinced lower courts that the correct way to

7. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

8. David Dunlap, *Gay Politicians Cite Gains amid Losses*, N.Y. TIMES, Nov. 14, 1994, at B9; *Idaho Initiative History: Initiative 1*, IDAHO SECRETARY ST.: ELECTION DIVISION (Nov. 8, 1994), <https://sos.idaho.gov/elect/inits/inithist.htm>; *Initiative, Referendum and Recall*, OR. SECRETARY ST., <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf> (last visited May 13, 2019).

9. *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004); *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 295 (6th Cir. 1997); *State v. Limon*, 83 P.3d 229, 240 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

10. *Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (en banc).

11. For a notable exception occasioned by a near incomprehensible attempt to argue *Romer* away, see *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997).

12. 539 U.S. 558 (2003).

13. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), *implied overruling recognized by* *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

15. *See* *Steffan v. Perry*, 41 F.3d 677, 692 (D.C. Cir 1994) (en banc).

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

understand *Lawrence* was found not in anything said in the majority opinion, but rather in his dissent, which despite the majority opinion's plain "balancing" of personal liberty against state endorsed morality, branded it "an unheard-of form of rational-basis review," one "so out of accord with our jurisprudence" as to be unjustifiable under either American constitutional law or the jurisprudence of "any society we know."¹⁷

For the first few years after *Lawrence*, most lower courts treated it as sui generis and inapplicable to anything but its own facts because they saw it as a completely unjustifiable rational basis case and for this, they cite Justice Scalia's dissent.¹⁸ Amazing.

Even more important from a political standpoint, Justice Scalia's dissent effectively turns what could have been a moment to celebrate that LGBT people are not necessarily criminals anymore, into a dire warning that marriage for same-sex couples is the inevitable next step.

"Do not believe it," Justice Scalia warns, when the majority opinion says *Lawrence* does not address whether government has to allow same-sex couples to marry.¹⁹ That call to arms to those opposed to any form of equality for LGBT people helped fuel a political campaign aimed at preemptively stopping marriage. That campaign wound up burying us with twenty-six state constitutional amendments in the next three election cycles, amendments that took away all governmental power to recognize same-sex couples.²⁰ To be that effective politically and that effective judicially, the dissent it seems to me walks away with both the political and judicial honors in *Lawrence v. Texas*.

United States v. Windsor is a hugely important case because it set off a rash of district court, and circuit court decisions saying that states had to let same-sex couples marry.²¹ Those decisions came fast and furious after *Windsor*, and their momentum, I think, led to *Obergefell*, the decision requiring the states to allow same-sex couples to marry, much sooner than it might have come without them.²² There is some reason to think that is not what the Court wanted to do. In *Hollingsworth v. Perry*, a companion to *Windsor* in which the issue was whether the Constitution required states to allow same-sex couples to marry, Justice Kennedy famously expressed reservations about deciding the issue, given that it was a new phenomenon.²³ Perhaps tellingly, the last sentence of *Windsor*,

17. *Id.* at 586, 599 (Scalia, J., dissenting).

18. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 51 n.5 (1st Cir. 2008), *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004).

19. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

20. *See* Haeyoun Park, *Gay Marriage State by State: From a Few States to the Whole Nation*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/03/04/us/gay-marriage-state-by-state.html> (last visited May 13, 2019).

21. *See* 570 U.S. 744, 752 (2013).

22. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

23. Transcript of Oral Argument at 48–49, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

reminiscent of *Bush v. Gore*,²⁴ says that “[t]his opinion and its holdings are confined to those lawful marriages” (referring to marriages of same-sex couples recognized by state law).²⁵

Then there is *Obergefell* itself.²⁶ Look, the truth is that those of us who were involved in advocacy for marriage at the time, we had about run the table on states where the legislatures or state courts still had the power to provide marriage for same-sex couples.²⁷ We were thus looking at a seven to fifteen year fight to take down those state constitutional amendments that took away state power to allow same-sex couples to marry, at first by getting them repealed at the ballot box, and then perhaps with *Romer*-like court decisions invalidating them, waiting at some point for the Supreme Court to step in and bring whatever states remained into line. By stepping in when it did, the Court greatly truncated what would have been a bloody, ugly, expensive, long battle. Had *Obergefell* resulted in a huge blow-back, one could argue about whether that battle should have been avoided or not. I think looking at the way things have played out—that U.S. society has largely accepted marriage by same-sex couples—the decision did us a great favor.

Particularly in *Obergefell*, Kennedy’s LGBT opinions for the Court constitute an important political legacy. But to be honest, there isn’t much of a jurisprudential legacy here. The biggest disappointment has to be the Court’s failure to tell us how courts should look at laws that single LGBT people out for different treatment. In four cases about laws that explicitly singled LGBT people out for different treatment, the Court never told us. Are laws that discriminate presumptively constitutional subject to rational basis review? Or are they to some degree suspect? We just don’t know.

Now, some people would say, “It’s a trivial problem, isn’t it? After *Obergefell*, this is really over.” I don’t think so.

Every major civil rights movement in this Country has been met with the insistence by some of those who disapprove of the newly protected minority that they ought to have a conscience-based First Amendment right to discriminate and be exempted from nondiscrimination laws.²⁸ A similar assault on laws that protect LGBT people from discrimination has already begun, and the favorite way of lawyers and judges to allow a conscience opt-out from sexuality nondiscrimination laws, and not to gut all of our country’s civil rights laws, is to say that laws that prohibit race discrimination and gender discrimination apply to classifications which the Supreme Court has said are inherently suspicious and worthy of close review. Thus, the argument goes, preventing discrimination

24. 531 U.S. 98, 109 (2000).

25. *Windsor*, 570 U.S. at 775.

26. 135 S. Ct. 2584.

27. See Park, *supra* note 20.

28. See, e.g., *Dole v. Shendoan Baptist Church*, 899 F.2d 1389, 1397–98 (4th Cir. 1990) (claimed religious right to pay women less); *Newman v. Piggie Park Enters.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev’d on other grounds*, 390 U.S. 400 (1968) (refusal to serve African-Americans at restaurant on religious grounds).

on those bases is compelling. Not so, the argument concludes, laws against discrimination based on sexual orientation, since the Court has never held that those classifications are suspect.²⁹ I predict this argument will be a significant factor, in what will be a pitched battle about whether you get conscience-based exemptions from nondiscrimination laws that protect LGBT people. It matters.

There's a similar though less obvious failure in *Lawrence*. It never tells us whether the right to form a relationship with someone of the same sex is so basic that states cannot use it as a basis for different treatment without an important purpose and a demonstration that the different treatment is needed. Though the Court did use the kind of balancing that is the hallmark of less deferential review,³⁰ and while the Court may have had good reasons for avoiding the nomenclature of fundamental rights, and though the case law in the area may be wobbly, a clearer statement would have made *Lawrence* harder for lower courts to brush off.³¹

If you look beyond what you might call a parochial LGBT view, those decisions are equally jurisprudentially disappointing.

Since the '70s, there's been a small, but very important disagreement about the consequences of being able to prove that the government passed a law treating people differently not because of some fair notion of difference in terms of its purpose, but in order simply to treat the group of people in question differently. If you can actually prove that different treatment itself was the purpose, does that invalidate the law, subject it to more searching review, or can a law be saved by making up a rationale which we know to be false?³²

The *Romer* case is written in a way that circles around that question and completely avoids it. The *Windsor* case maybe suggests that you take a closer look when you've got actual proof of an improper purpose.³³ As hopeful as *Windsor* was, the opinion in *Trump v. Hawaii*,³⁴ an opinion which Justice Kennedy says in a short concurrence that he fully supports, suggests again that

29. See, e.g., Brief for the United States as Amicus Curiae Supporting Petitioners at 32–33, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111). I've explained elsewhere why this argument makes little sense. See Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Respondent at 18 n.14, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Nonetheless, it has persistent appeal to some. See, e.g., *Smith v. Fair Emp't & Hous. Comm'n*, 30 Cal. Rptr. 2d 395, 404 (Ct. App. 1994), *rev'd on other grounds*, 913 P.2d 909 (Cal. 1996).

30. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

31. See, e.g., *Cook v. Gates*, 528 F.3d 42, 51 n.5 (1st Cir. 2008), *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 815–16 (11th Cir. 2004).

32. For a case suggesting an improper purpose invalidates, see *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984). For cases suggesting a more searching review, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 537–38 (1973). For a case insisting that a made up rationale will save an otherwise invalid law, see *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370–74 (2001).

33. *United States v. Windsor*, 570 U.S. 744, 768, 770 (2013).

34. 138 S. Ct. 2392, 2423 (2018).

a made up rationale will save a discriminatory policy at least in the context of the religion clauses, at least in the context of immigration.³⁵

The missed opportunities to answer important questions about implicit rights in *Lawrence* and *Obergefell* seem to me even more disappointing than the missed opportunity to answer equality questions in *Romer* and *Windsor*. In *Lawrence*, the plaintiffs and their friends made an important argument about how to understand the contours of implicitly protected rights. That argument said in effect, “If you’re going to use history to decide what it is that we’ve always more or less understood to be beyond the power of the government, you shouldn’t just use the history of what’s been protected from government interference by law. You should look at larger social and political history of what has been understood to be more or less off the table.”³⁶

So for example, the argument went, we’ve always behaved as a society that parents have a right to apply mild corporal discipline to their children even though that violates laws against assault. That tells us that parental discipline has always been understood to be off the table, even though the law technically said otherwise.³⁷ Justice Kennedy flirts with the idea, but then drops it and doesn’t use it as a basis of the decision at all.³⁸

There was an equally important point about implicit rights that the *Lawrence* Court could have addressed: while we may use history to discover the contours of an implicitly-protected right, we don’t use the history of who got to exercise it to decide who has the right today. Prior to *Bowers v. Hardwick*, many of the important cases in which the Court found an implicit right could not have been decided as they were had the right been limited to those who had a historic right to it.³⁹

If you want to see a good explanation of the point, read Chief Judge Judith Kay’s dissenting opinion in *Hernandez v. Robles*.⁴⁰ The *Lawrence* opinion never touches the issue.

35. *Id.* at 2420. I don’t think though that *Trump* actually settles the question. Apart from the fact that immigration may constitute a “special case,” the Court goes on to say, as it often does after declaiming any need to evidence, to cite “persuasive evidence” that the policy in fact had a legitimate basis. *Id.* at 2421–23.

36. *See, e.g.*, Brief for Professors of History as Amici Curiae Supporting Petitioners at 10–20, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Brief for Cato Institute as Amicus Curiae Supporting Petitioners at 9–16, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief for American Civil Liberties Union & ACLU of Texas as Amici Curiae Supporting Petitioners at 11–26, *Lawrence*, 539 U.S. 558 (No. 02-102).

37. Brief for Professors of History as Amici Curiae Supporting Petitioners, *supra* note 36, at 10–20; Brief for Cato Institute as Amicus Curiae Supporting Petitioners, *supra* note 36, at 9–16; Brief for American Civil Liberties Union & ACLU of Texas as Amici Curiae Supporting Petitioners, *supra* note 36, at 11–26.

38. *Lawrence*, 539 U.S. at 568–71. Justice Scalia, recognizing the potential of the idea to expand the coverage of implicit rights, made sure to take it on in his dissent. *See id.* at 595–98 (Scalia, J., dissenting).

39. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

40. 855 N.E.2d 1, 23–27 (N.Y. 2006) (Kaye, J., dissenting), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also* Matthew Coles, *Lawrence v. Texas and the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 42–48 (2005).

Perhaps the most disappointing opinion is the *Obergefell* opinion, at least in part because it aimed so high and fell so far short. For years, Justice Kennedy, Justice Souter and other Justices said that, while history might be a starting point for deciding the contours of implicit rights, it shouldn't be the ending point.⁴¹ We should be able, those opinions argued, to bring historical understandings forward into the present.⁴² In *Obergefell*, Justice Kennedy laid out four different inquiries that he offered as a way to do just that.⁴³ These factors, the Justice tells us, will show us how to separate the essentials of the implicit right to marry from unimportant historical trappings.

As much as I respect the *Obergefell* opinion as a political milestone, I think those four factors as explained in the opinion tell us mostly what Justice Kennedy admired about the institution of marriage. They don't tell us a great deal about how to separate the essential elements of a fundamental right from outmoded details.

Some think trying to come up with a principled way of using the way history has evolved to understand the contours of an implicit right is a lost cause. While not a full blown theoretical take, I highly recommend Judge Vaughn Walker's decision in the California marriage case, *Perry v. Schwarzenegger*, in which he uses the legal and social evolution of the institution of marriage as a way to identify the essential elements of a recognized implicit fundamental right.⁴⁴ As Judge Walker shows, while gender was an essential element of the legal and social institution of marriage one hundred years ago, marriage is much less socially gendered and no longer legally gendered at all. From that, he concludes that sex is not a part of the essential fundamental right.⁴⁵ It's a brilliant piece of work and shows that achieving a contemporary understanding of an implicit right identified by history is something that can be done. *Obergefell* swings for the same fences, but in my view it's a strikeout.

In context, and I want to put this back into context, I think these four opinions reflect the profound emotional commitment of a very decent human being to right a great historical wrong. For that moral commitment, one that likely overcame many of the values on which he was raised, we should respect and admire the man. I do.

I am also deeply grateful for not having to have engaged in the trench warfare over state constitutional amendments that time has shown us was, in terms of national acceptance of a profound change, unnecessary.

A legal legacy requires something else. But let's not dwell on what it is not here. Let's look instead at that profound commitment to righting a great historic

41. See *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring); *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring).

42. See *Lawrence*, 539 U.S. at 571–72.

43. *Obergefell*, 135 S. Ct. at 2584, 2598–2603.

44. 704 F. Supp. 2d 921, 992–93 (N.D. Cal. 2010).

45. *Id.*

wrong and how important those four decisions were in righting it, and respect the man for that.
