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

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I. INTRODUCTION

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

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

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* Professor of Law, University of the Pacific, McGeorge School of Law. I had the opportunity to present a version of this Article at a *McGeorge Law Review*-sponsored symposium on April 6, 2012. I benefited greatly from hearing the presentations of the authors of the pieces that accompany this Article in this symposium issue, as well as from comments I received from several of participants about my piece in particular. I especially wish to thank Professors Arthur Leonard, Amy Ronner, and John Sims for their comments on earlier drafts of this Article. I want to thank my McGeorge research assistants, David Bass and Danielle Lenth for their invaluable assistance with this project.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. *ROMER V. EVANS*—JUSTICE KENNEDY REFUSES TO ALLOW GAYS AND LESBIANS TO BE "A STRANGER TO THE LAW"[13]

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

There is much to praise in Justice Kennedy's opinion.[17] Justice Kennedy begins powerfully by citing Justice Harlan's dissent in *Plessy v. Ferguson*,[18] in which Justice Harlan stated that the Constitution "neither knows nor tolerates classes among citizens."[19] By referring to the dissent of one of the most maligned

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

14. 517 U.S. at 635.

15. *Id.* at 624–25.

16. *Id.* Amendment 2 stated:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. *Id.* at 632.

25. *Id.* at 633.

26. *Id.* at 632.

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

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

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

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27. *Id.*

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

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

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

31. *Id.* at 625.

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

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

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

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

avoid getting drawn into the morass of political-participation cases, opted for a Fourteenth Amendment Equal Protection analysis instead.[36]

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

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

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

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

36. *Romer*, 517 U.S. at 631–36.

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

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

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

40. *Id.*

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

42. *See id.* at 632.

43. *See id.* at 636–53.

44. *See id.*

45. *Id.* at 638.