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by Tobin A. Sparling*

I. INTRODUCTION

Amidst the excitement surrounding the flurry of decisions supporting gay marriage,[1] which culminates in the United States Supreme Court's affirmation of same-sex marriage in *Obergefell v. Hodges*,[2] *Romer v. Evans*,[3] the Supreme Court's first step on the road to marriage equality, has not received the recognition it deserves. Yet, as its twentieth anniversary nears, *Romer* warrants a reexamination and greater recognition of its place in the advancement of gay rights. Decided in 1996, *Romer* held that Amendment 2 to the Colorado constitution[4] violated the Equal Protection Clause[5] because the amendment discouraged the enactment of laws banning discrimination based on sexual orientation.[6] The decision marked the beginning of an era in which the

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1. *See Marriage Litigation*, FREEDOM TO MARRY (Mar. 2, 2015), http://www.freedomtomarry.org/litigation (providing a comprehensive list of same-sex marriage statuses in the United States).

2. 135 S. Ct. 2584 (2015).

3. 517 U.S. 620 (1996).

4. *See* COLO. CONST. art. II, § 30b.

5. *See* U.S. CONST. amend. XIV, § 1.

6. *Romer*, 517 U.S. at 623-24.

Court examined the discrimination faced by homosexual people differently and finally took it seriously.[7]

In the *Romer* majority opinion, Associate Justice Anthony Kennedy portrayed the effect of Amendment 2 on gay Coloradans as an affront to human dignity.[8] Only ten years earlier in *Bowers v. Hardwick*,[9] a majority of the Supreme Court upheld laws criminalizing homosexual conduct and implied that gay people lacked any dignity at all.[10] In this respect, *Romer* marked a significant change in the way the Court characterized gay people.[11]

Nevertheless, Justice Kennedy's majority opinion, however well-meaning, suffered in a number of respects. Focusing on human dignity as a universal moral imperative, which the United States Constitution must protect, the opinion relegated gay rights to the sideline.[12] Justice Kennedy's evident desire to craft a "landmark" opinion further impaired its effectiveness. His reliance on hyperbole and moral platitudes proved to be distancing. The opinion's majestic tone lacked a sense of either immediacy or urgency. Indeed, the opinion read more like moral philosophy than a response to a specific injurious action.

This Article argues *Romer*'s positive impact is attributable as much to Justice Scalia's strident, angry dissent as to the majority opinion itself. That dissent brought gay rights to the fore of the question. It argued the cause for social disfavor of homosexual behavior in the strongest of terms.[13] However, this angry dissent, by its very association with the majority opinion, framed the majority opinion in a more overtly gay rights context.[14] Attributing to the majority opinion a gay rights agenda, which Justice Kennedy had never enunciated, Justice Scalia effectively radicalized it.[15] Paradoxically, this edgier makeover appealed to and energized gay rights advocates in a way that Justice

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7. *See id.* at 635 (asserting a state does not further a proper legislative end to make homosexual persons unequal to everyone else).

8. *See id.* (concluding that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

9. 478 U.S. 186 (1986).

10. *See id.* at 195-96.

11. *Compare Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (citing approvingly of Blackstone's characterization of homosexuality as "a disgrace to human nature"), *with Romer*, 517 U.S. at 635 (asserting, "A State cannot so deem a class of persons [homosexuals] a stranger to its laws").

12. *See Romer*, 517 U.S. at 633, 635 (discussing Amendment 2 in terms of "persons" and a "single trait" instead of in terms of homosexuals and homosexuality).

13. *See generally id.* at 636-53 (Scalia, J., dissenting).

14. *Id.*

15. *See id.* at 636 (asserting the majority holding stands for the proposition that "opposition to homosexuality is as reprehensible as racial or religious bias").

Kennedy's opinion, standing alone, probably could not. Thus, Justice Scalia played a critical role in making *Romer* a landmark decision on the gay rights front.

Part II of this Article discusses the legal and social landscape of *Romer* and the looming presence of *Bowers*. Part III explores generally the distinctive aspects of both Justice Kennedy's and Justice Scalia's writing in *Romer*. Part IV discusses the *Romer* opinions in detail. It explains how Justice Scalia's dissent enhanced the impact of Justice Kennedy's majority opinion. Finally, Part V assesses how this "odd couple's" opinions in *Romer* contributed to the advancement of gay rights in America.

II. *BOWERS V. HARDWICK* AND THE GAY RIGHTS MOVEMENT BEFORE *ROMER*

In *Bowers v. Hardwick*, decided in 1986, the United States Supreme Court dealt a substantial blow to the nascent gay rights movement by holding that the United States Constitution permitted states to criminalize homosexual conduct.[16] Quiet advocacy for gay rights had begun decades earlier. In 1924, Henry Gerber established the Society for Human Rights, the first organization to advocate for homosexual rights.[17] During the 1950s, the Mattachine Society and the Daughters of Bilitis, a lesbian organization, formed with similar agendas.[18] Although not the first public protest of discrimination against homosexual people,[19] the Stonewall Riots of June 28, 1968 are often credited as

16. 478 U.S. at 196; *see also* Elizabeth Sheyn, *The Shot Heard Around the LGBT World:* Bowers v. Hardwick *as a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE, GENDER & ETHNICITY 2, 2 (2009) (calling *Bowers* "a clear setback for the gay rights movement").

17. *Pride & Prejudice: An Interactive Timeline of the Fight for Gay Rights*, TIME (June 26, 2015), http://www.time.com/3937550/same-sex-marriage-supreme-court-timeline/.

18. Will Roscoe, *Mattachine: Radical Roots of the Gay Movement*, FOUND S.F. (Mar. 4, 2015), http://foundsf.org/index.php?title=Mattachine:_Radical_Roots_of_the_Gay_Movement (explaining that the Mattachine Society was formed in San Francisco in 1950 to protest discrimination against gays and encourage, in the words of the Society's Statement of Mission and Purposes, a "highly ethical homosexual culture"); *Unheard Voices, Stories of LGBT History, Phyllis Lyon, the Daughters of Bilitis and the Homophile Movement*, ANTI-DEFAMATION LEAGUE (2011), http://www.glsen.org/sites/default/files/Phyllis%20Lyon%20Backgrounder.pdf. Established in 1955 as a social group, the Daughters of Bilitis eventually took on a broader agenda and described itself as "A Woman's Organization for the purpose of Promoting the Integration of the Homosexual into Society." *Unheard Voices, Stories of LGBT History*, *supra*.

19. Nan D. Hunter, *Sexuality & Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 568 (2000) (describing a 1965 protest in Philadelphia at a restaurant that refused to serve homosexuals and picketing in front of the White House

the spark that ignited the modern gay rights movement.[20] In conjunction with New York City policy to shut down gay establishments and arrest suspected homosexuals, the police raided the Stonewall Inn in Greenwich Village. Its gay and transgender patrons fought back, making front-page news.[21] A year later, to mark the anniversary of the Stonewall Riots, the first gay rights parades in the United States occurred in New York, Los Angeles, Chicago, and San Francisco.[22] Within several years, the Stonewall Riots inspired the formation of gay rights organizations in most of the country's major cities.[23]

Throughout the 1970s and 1980s, gay rights activism became more visible in tandem with the rise of the feminist and abortion rights movements.[24] Some political successes occurred at the local and state levels with the passage of regulations protecting gay people from discrimination[25] and the repeal of sodomy statutes.[26] However, public hostility towards homosexuality remained prevalent, and organizations formed to oppose gay rights. In 1977, singer Anita Bryant established the group Save Our Children to counter homosexual activists' proposition[27] that "theirs is an acceptable alternate way of life."[28] Her group successfully led the effort to repeal a Miami-Dade County regulation banning discrimination on the basis of sexual orientation.[29]

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by the Mattachine Society to seek job protections for homosexuals like those extended under the recently enacted Civil Rights Act of 1964).

20. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1336 n.25 (2000) (noting that "'Stonewall' is generally viewed as the beginning of a mass gay rights movement"); *Stonewall Riots: The Beginning of the LGBT Movement*, LEADERSHIP CONFERENCE (June 22, 2009), http://www.civilrights.org/archives/2009/06/449-stonewall.html (calling the riots "a catalyst for the LGBT movement for civil rights in the United States").

21. *Pride & Prejudice*, *supra* note 17.

22. *Stonewall Riots*, *supra* note 20.

23. *Id.*

24. Andrew Hartman, *The Culture Wars: Notes Towards a Working Definition*, SOCIETY FOR UNITED STATES INTELLECTUAL HISTORY: U.S. INTELLECTUAL HISTORY BLOG (Mar. 11, 2011), http://s-usih.org/2011/03/culture-wars-notes-towards-working.html (tying the culture wars to the women's movement and the gay rights movement).

25. Hunter, *supra* note 19, at 568-69 (noting the enactment of the first such ordinance in East Lansing, Michigan in 1972).

26. Eskridge, *No Promo Homo*, *supra* note 20, at 1342 (stating that eighteen states repealed their sodomy laws between 1976 and 1979).

27. *Id.* at 1351.

28. *Pride & Prejudice*, *supra* note 17; *see also* Eskridge, *No Promo Homo*, *supra* note 20, at 1351.

29. *Pride & Prejudice*, *supra* note 17.

Bowers demonstrated how tenuous the efforts to achieve public acceptance of gay rights really were.[30] At the time of the Court's decision, twenty-four states and the District of Columbia still criminalized sodomy between consenting adults.[31] In 1982, Michael Hardwick had been charged with engaging in sex with another man in violation of a Georgia statute,[32] which made homosexual and heterosexual sodomy a criminal offense.[33] Hardwick asserted that, as a practicing homosexual, the statute violated his Ninth Amendment[34] and due process rights under the United States Constitution to engage in private and intimate association.[35] The United States Court of Appeals for the Eleventh Circuit ruled in Hardwick's favor.[36] The Supreme Court, however, reversed in a five-to-four decision.[37]

Associate Justice Byron White wrote the majority opinion,[38] which was accompanied by separate concurrences by Chief Justice Warren Burger[39] and Associate Justice Louis Powell.[40] Justice Blackman wrote the dissent.[41] Chief Justice Burger, however, wrote the statement that summed up the *Hardwick* holding best—"[I]n constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy."[42] Thus, the Court transformed the case from a right to privacy to a right to commit homosexual sodomy.

Justice White immediately distinguished sodomy from the actions previously extended under the right to privacy.[43] He noted, "No connection between family, marriage, or procreation on the one hand and

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30. Sheyn, *supra* note 16, at 2 (asserting the decision constituted "a sign that the Court and, by extension, society, did not accept homosexuals").

31. *Bowers*, 478 U.S. at 193.

32. *See* O.C.G.A. § 16-6-62 (2011).

33. *Bowers*, 478 U.S. at 187-88.

34. *See* U.S. CONST. amend. IX.

35. *Bowers*, 478 U.S. at 189.

36. *Id.* (citing Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)).

37. *Id.* at 186.

38. *Id.* at 187.

39. *Id.* at 196 (Burger, C.J., concurring).

40. *Id.* at 197 (Powell, J., concurring). Justice Powell agreed Hardwick had no fundamental right under the Due Process Clause to engage in homosexual conduct. *Id.* In dicta, he indicated a long prison sentence for such conduct, though, could raise an Eighth Amendment claim. *Id.* However, since Hardwick had not been tried, an Eighth Amendment claim would not apply here. *Id.* at 198.

41. *Id.* at 199 (Blackmun, J., dissenting). The dissent argued the majority had improperly focused on Hardwick's homosexual status, which it deemed irrelevant, and ignored his valid privacy and freedom of intimate association claims. *Id.* at 201-03.

42. *Id.* at 196 (Burger, C.J., concurring).

43. *Id.* at 190 (majority opinion).

homosexual activity on the other hand ha[d] been demonstrated."[44] Additionally, sodomy could not be deemed one of "those fundamental liberties"[45] that are "deeply rooted in this Nation's history and tradition."[46] Having outlined America's long history of laws banning homosexual conduct, Justice White asserted that equating sodomy to fundamental rights was "facetious."[47] Chief Justice Burger's concurrence expounded this argument in more graphic terms. He observed, "Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"[48]

Justice White also ruled out finding, under the Due Process Clause,[49] a new fundamental right to homosexual conduct.[50] To do so would expand the Court's authority beyond constitutional bounds.[51] In addition, it did not matter that the conduct had occurred between consenting adults in a private home.[52] Justice White noted that making an exception for consenting adults to engage in homosexual conduct at home would open the door to the protection of illegal drug use, adultery, incest, and other crimes in which consenting adults engaged at home or in a similar setting.[53]

Finally, even if homosexual conduct were not a fundamental right, Hardwick argued that its prohibition still violated the Due Process Clause.[54] Moral disapproval, he asserted, did not provide a rational basis for its ban.[55] Justice White, however, disposed of this argument in short order. He noted that many laws derived from moral precepts and found no reason why proscriptions of sodomy should prove an exception.[56] Chief Justice Burger chimed in, concluding, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[57]

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44. *Id.* at 191.
45. *Id.*
46. *Id.* at 192 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).
47. *Id.* at 194.
48. *Id.* at 197 (Burger, C.J., concurring) (emphasis in original) (quoting the Blackstone commentaries).
49. *See* U.S. CONST. amend. XIV.
50. *Bowers*, 478 U.S. at 194-95.
51. *Id.* at 195 (noting the issue at hand "falls far short" of the Court's "great resistance to expand the substantive" reach of the Due Process and Equal Protection Clauses).
52. *Id.*
53. *Id.* at 195-96.
54. *Id.* at 196.
55. *Id.*
56. *Id.*
57. *Id.* at 197 (Burger, C.J., concurring).

Although the decision in *Bowers* angered the gay community and energized its commitment to reform, the decision dealt a significant blow to the gay rights movement.[58] Efforts to convince legislatures to repeal sodomy statutes stalled.[59] In the family law arena, gay parents suffered grievously in custody adjudications. Courts cited and quoted *Bowers* to demonstrate gay parents' moral unfitness and limited the parents' access to their children.[60] Indeed, *Bowers*' corrosive characterization of homosexuality and its frequent repletion in lower courts made the denigration of gay people almost respectable.[61] With the contemporaneous onset of Acquired Immune Deficiency Syndrome (AIDS), the advent of right-wing talk radio, and the rapid growth and assertion of political power of conservative evangelicals and their associated organizations, publically-voiced disdain of homosexuals became commonplace.[62] Thus, throughout the 1980s and 1990s, the gay rights, feminist, and abortion rights movements, along with the campaign for artistic freedom, served as the focal point in an ongoing debate between conservative advocates of traditional moral values and liberal proponents of self-actualization and personal fulfillment.[63] The Supreme Court considered *Romer v. Evans* while this so-called "culture war" raged.[64]

III. DIFFERENT WRITERS, DIFFERENT AIMS

In *Romer v. Evans*, Justice Kennedy and Justice Scalia squared off on the Supreme Court's first case involving state action and gay rights since *Bowers v. Hardwick*. Coloradan voters had passed Amendment 2 to the Colorado Constitution. The amendment repealed several cities' ordinances banning sexual orientation discrimination and made their reinstatement contingent on a subsequent amendment of the constitution.[65] Gay rights advocates argued Amendment 2 violated the Equal

58. Sheyn, *supra* note 16, at 2 (calling *Bowers* "a clear setback for the gay rights movement" but noting it also "galvanized gay activists and lesbian, gay, bisexual and transgender ("LGBT") organizations").

59. *Id.* at 25 (noting that between 1986 and 1991 no state sodomy laws were repealed).

60. *See* Tobin A. Sparling, *Judicial Bias Claims of Homosexual Persons in the Wake of* Lawrence v. Texas, 46 S. TEX. L. REV. 255, 284-85 (2004) (noting the difficulty of combatting institutional bias against homosexuals while *Bowers* remained good law).

61. *Id.* at 256 ("*Bowers*, which has been condemned by many commentators as the epitome of judicial homophobia, provided an authoritative cover for judicial bias and served as a template for scores of decisions disabling homosexuals of a wide variety of rights.").

62. Hartman, *supra* note 24.

63. IRENE TAVISS THOMSON, CULTURE WARS AND ENDURING AMERICAN DILEMMAS 2 (2010).

64. *Id.*

65. *Romer*, 517 U.S. at 623, 624.

Protection Clause of the United States Constitution.[66] *Romer* provided a showcase for Justice Kennedy's and Justice Scalia's different writing styles and different aims.

Nevertheless, Justice Kennedy's and Justice Scalia's opinions in *Romer* shared certain qualities, however different the respective authors' perspectives. Recognizing the wide public interest generated by gay rights issues, Justice Kennedy and Justice Scalia crafted opinions intended for a public, as well as a legal, audience. Both justices appear to have strived to generate quotable phrases. Both justices also drafted opinions with an inherent, although vastly different, musicality. The similarities between their opinions ended there.

Justice Kennedy's majority opinion in *Romer* could be compared to classic grand opera. He sought, like many operatic composers, to focus on essential elements of the human condition in a way that transcended the current time and place. Interestingly, Justice Kennedy singled out the writing in the Declaration of Independence as particularly compelling.[67] In *Romer*, Justice Kennedy could almost be channeling the Declaration's author, Thomas Jefferson. Like the Declaration of Independence, his *Romer* opinion highlighted fundamental principles of liberty and citizenship, not the minutiae of rule-making or legal tests.[68]

In *Romer*, Justice Kennedy aimed for grandeur. Embellishment took precedence over simplicity. Rhetoric subsumed plain speaking. In lieu of stating that Amendment 2 also lacks any rational basis he wrote, "We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose."[69] Thus, in musical terms, his writing evoked the long phrases and swelling crescendos of Puccini or Verdi.[70] Some observers have found it "majestic,"[71] while others have criticized it as "pompous" and pretentious.[72] Some truth lies in both

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66. *Id.* at 623-24.

67. Bryan A. Garner, *Justice M. Kennedy*, 13 SCRIBES J. LEGAL WRITING 79, 79 (2010) (noting the Declaration of Independence "has a dramatic progression to it").

68. *See Romer*, 517 U.S. at 631.

69. *Id.* at 635.

70. Bill Mears, *Is Anthony Kennedy 'the First Gay Justice'?*, CNN (June 28, 2013), http://www.cnn.com/2013/06/27/politics/scotus-kennedy/ (referring to Justice Kennedy's "sweeping rhetoric").

71. *Id.* (quoting former Kennedy law clerk, Professor Michael Dorf: "Justice Kennedy makes clear that he not only accepts, but welcomes the task of writing majestic opinions affirming the dignity of gay persons and couples").

72. Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011), http://www.newrepublic.com/article/politics/magazine/92773/elena-kagan-writings (calling Justice Kennedy's

views. Yet, undeniably, Justice Kennedy's writing in *Romer* appeared heart-felt and genuine, as when he declared, "A State cannot so deem a class of persons a stranger to its laws."[73]

Justice Kennedy has explained that precedent and historical tradition take a back seat when he reviews questions of constitutional magnitude.[74] His thought process involves "a substantive consideration of whether the government action challenged in the case violates 'the essentials of the right to human dignity.'"[75] He fundamentally questions whether the state has fostered "the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her self-fulfillment, [or] the inability of a person to reach his or her own potential."[76]

In *Romer*, the minimal citation to precedent and avoidance of traditional legal tests were consonant with Justice Kennedy's belief that moral imperatives transcend traditional foundations of judicial review. Benefits and disadvantages arose from this approach. *Romer* generated a ringing pronouncement from Justice Kennedy that disparate treatment in the political process violates the personal dignity of those to whom it is directed. He observed, "[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[77] Yet, ultimately, the generality and subjectivity inherent in this animus-based approach made *Romer* less useful to courts that were more accustomed to following specific legal tests than less, well-defined moral principles.[78]

Paradoxically, while Justice Kennedy's opinion in *Romer* expressed universal moral precepts, it also revealed considerable caution and restraint, most notably in its treatment of homosexuality. He rarely addressed head-on the homosexual context of the question. More frequently, he argued in terms of single traits, disadvantaged groups, and single classes, not of homosexuality, gay men, and lesbians.[79] He

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writing "pompous").

73. *Romer*, 517 U.S. at 635.

74. FRANK J. COLLUCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 4 (2009).

75. *Id.* at 3.

76. *Id.* at 3-4.

77. *Romer*, 517 U.S. at 632.

78. *See* Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in* Perry v. Brown, 64 STAN. L. REV. ONLINE 111, 113 (2012), http://www.stanfordlawreview.org/online/animus-thick-thin (noting "the concept of animus marked highly contested ground" even within the Supreme Court itself).

79. *Romer*, 517 U.S. at 632.

chose "animus," not homophobia, as the watchword of the opinion.[80] Although the issue in *Romer* directly involved—and would directly affect—gay people, he oddly pushed them to the peripheries. Thus, Justice Kennedy's majority opinion appeared written more in the spirit of the "love that dare not speak its name"[81] than of "out and proud" gay rights advocacy. Above all, he strove to be polite and not offend anyone.

Justice Scalia, on the other hand, actively sought to offend, making his dissent more like rap than grand opera. Unlike Justice Kennedy, Justice Scalia had no dealings with majesty or timelessness.[82] Like a rapper, he focused on the here and now–acceptance of homosexual conduct–and aimed to deliver a punch to its gut. Similar to rap, Justice Scalia's dissent in *Romer* bristled with discordant emotions. They ranged from incredulity, exasperation, dismissiveness, irritation, anger, and plain rudeness. He wrote forthrightly and pugnaciously.[83] Justice Scalia focused his targets clearly within his and the readers' sights. In *Romer*, he explained in simple terms what irked him before shooting it down.[84] More importantly, he gave the impression that he had pierced the veil that Justice Kennedy's grand themes had thrown over the real issues at hand.[85] For example he asserted, "In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[86] Thus, Justice Scalia appeared, in his *Romer* dissent, to disclose inside knowledge of the inner workings and motivations of the majority opinion.

Justice Scalia then brought his penchant for drama into play, and overstatement became the name of his game. He not only placed Justice Kennedy's fundamental principles and generic analyses within a specific gay rights context, but he also blew them out of proportion, beyond

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80. *See id.* at 632, 633 (discussing Amendment 2 in terms of "persons" and a "single trait" instead of in terms of homosexuals and homosexuality).

81. LORD ALFRED DOUGLAS, *TWO LOVES*, *in* THE CHAMELEON (1894), *available at* http://law2.umkc.edu/faculty/projects/ftrials/wilde/poemsofdouglas.htm (a euphemism for homosexuality, coined by Oscar Wilde's lover, Lord Alfred Douglas).

82. *See generally* Conor Clarke, *How Scalia Lost His Mojo*, SLATE (July 5, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html (describing Justice Scalia's writing generally as "Catholic-school headmistress meets Vladimir Nabokov").

83. *See id.* (noting that Justice Scalia's writing generally is "accessible," and that he "tries not to get bogged down in abstruse legal jargon").

84. *See, e.g.*, *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

85. *See id.* at 638.

86. *Id.* at 636.

Justice Kennedy's probable intentions. The meanings he imputed to the majority opinion made it appear more radical than Kennedy wrote. For example, Justice Scalia asserted, "Th[e] 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."[87] He intended, of course, to create a straw man, which he could easily knock down. However, he also unintentionally gave Justice Kennedy's polite platitudes an edge they otherwise lacked. Thus, while the radicalization of Justice Kennedy's relatively vanilla ideology played well to Justice Scalia's conservative audience, it also appealed to supporters of gay rights. By effectively putting words in Justice Kennedy's mouth, Justice Scalia unintentionally spurred the gay rights agenda to a degree that would not have occurred had Justice Kennedy's majority opinion appeared alone.

IV. THE SYMBIOTIC NATURE OF *ROMER*'S MAJORITY OPINION AND DISSENT

Romer v. Evans introduced the dueling themes that Justice Kennedy and Justice Scalia more fully developed in the gay rights cases that followed. The majority held that a regulation is presumptively the product of animus and, therefore, unconstitutional when it makes participation in government harder for an unpopular class of persons.[88] Those persons, in *Romer*, happened to be homosexual.[89] Justice Scalia responded, chastising the majority's implicit holding that disapproval of homosexual conduct was as morally objectionable as disapproval on the basis of race and religion.[90] Thus, *Romer* gave birth to a duet that recurred in *Lawrence v. Texas*[91] and *United States v. Windsor*.[92] *Romer* featured Justice Kennedy's yin of high-minded morality answered by Justice Scalia's yang of pointed indignation.

Romer examined whether an amendment to Colorado's constitution, adopted through a statewide referendum, violated the Equal Protection Clause of the United States Constitution.[93] The enactment of ordinances forbidding discrimination on the basis of sexual orientation in a variety of contexts in several Colorado cities triggered the amendment,

87. *Id.* (quoting majority opinion at 634).
88. *Id.* at 633 (majority opinion).
89. *Id.* at 625.
90. *Id.* at 636 (Scalia, J., dissenting).
91. 539 U.S. 558, 578-79 (2003) (holding Texas' sodomy statute unconstitutional).
92. 133 S. Ct. 2675, 2682 (2013) (holding unconstitutional the Defense of Marriage Act's definition of marriage as between a man and a woman).
93. *Romer*, 517 U.S. at 623.

called Amendment 2.[94] Amendment 2 repealed those bans.[95] It also made subsequent adoptions of similar protections by local or state governments contingent upon the passage of a constitutional amendment approving them.[96]

Justice Kennedy revealed Amendment 2's constitutional infirmity in his first sentence of *Romer* when he quoted an iconic passage from Justice Harlan's dissent in *Plessy v. Ferguson*[97]–"[T]he Constitution 'neither knows nor tolerates classes among citizens.'"[98] Justice Kennedy, thereby, also indicated his intention to frame the opinion in terms of universal, rather than gay, rights.[99] Indeed, equally iconic expressions of universal rights by Justice Fred Vinson[100] and Justice Stanley Matthews[101] appear at key points throughout *Romer* and serve as its underlying foundation. These quotations created a platform from which Justice Kennedy could argue above the fray of the so-called culture war between liberals and conservatives at the time of *Romer*'s writing. Justice Kennedy's use of these quotations was revealing in another respect. Each use epitomized judicial phraseology that transcended the context in which it had been written. Thus, these passages constituted the kind of writing that Justice Kennedy so much admired. Notably, in the last paragraph of *Romer*, he attempted such a phrase of his own–"A State cannot so deem a class of persons a stranger to its laws."[102]

In *Romer*, Justice Kennedy performed the time-honored practice of "bait and switch." Ostensibly, the analysis relied on the rational basis test typically employed in equal protection cases. Justice Kennedy explained early on that this "most deferential of standards" demarcates the line beyond which the Court cannot act.[103] He subsequently invoked rational basis terminology throughout the opinion.[104]

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94. *Id.* at 623-24. These ordinances related to housing, employment, education, public accommodations, and health and welfare services. *Id.* at 624.

95. *Id.* at 624.

96. *Id.*

97. 163 U.S. 537 (1896).

98. *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

99. *See id.*

100. *Id.* at 633 ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (quoting Swealt v. Painter, 339 U.S. 629, 635 (1950) and Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

101. *Id.* at 633-34 ("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) and Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))).

102. *Id.* at 635.

103. *Id.* at 632.

104. *See id.* at 632-35.

Justice Kennedy, however, did not actually apply the traditional rational basis test. This test typically involves examining whether any conceivable rational basis exists for the government's action.[105] While paying lip service to the test, Justice Kennedy reached the holding by jumping over it. He noted that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[106] However, consonant with his morality-based approach to constitutional adjudication, he then stated, "Amendment 2 confounds this normal process of judicial review."[107] Having pronounced this is not "the ordinary case," Justice Kennedy turned the light of moral principle upon Amendment 2.[108] He particularly focused on Amendment 2's requirement of a constitutional amendment to enact protections against discrimination based on sexual orientation.[109] This requirement, in his view, set apart one group of people by a single, and traditionally disfavored, trait (homosexuality) and made it harder for them to seek legal safeguards of their interests.[110] He observed that "[i]t is not within our constitutional tradition to enact laws of this sort."[111] Moreover, he stated "laws of the kind now before [the Court] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[112] Without examining whether animosity inspired Amendment 2, Justice Kennedy concluded that no rational reason could be advanced for any legislation engendered by such animosity, which made Amendment 2 unconstitutional.[113]

Justice Kennedy's opinion in *Romer* initially appears straightforward. Animus towards a socially disfavored group cannot serve as a rational basis for the government's disparate treatment towards that group. A closer reading, however, raises many questions. For one, why did Justice Kennedy invoke the rational basis test but not employ it in its traditional form? Given that sexual orientation remained so much on the fringes of the opinion, how is *Romer* relevant to other forms of discrimination against gay people? How is animus defined and to what extent does it encompass moral disapproval? Justice Kennedy's analysis

105. *Id.* at 631.
106. *Id.* at 632.
107. *Id.* at 633.
108. *Id.* at 632.
109. *Id.* at 633.
110. *See id.*
111. *Id.*
112. *Id.* at 634.
113. *Id.* at 634-35.

never mentioned *Bowers v. Hardwick*. How can the animus rationale he enunciated in *Romer* logically coexist with the approval of the criminalization of sodomy in *Bowers*? Thus, in deciding the issue at hand, the majority in *Romer* posed more questions than answers and treated gay rights as more of an incidental factor to the outcome than a guiding principle.

In stark contrast, Justice Scalia's dissent focused almost exclusively on gay people and gay rights. His first sentence also set the tone for what followed–"The Court has mistaken a Kulturkampf for a fit of spite."[114] Thus, unlike Justice Kennedy, Justice Scalia showed no hesitation about invoking the culture war and, in fact, entered into it with relish.[115]

Justice Scalia directly attacked Justice Kennedy's fundamental premise that animus must necessarily lie at the root of any regulation that makes participation in government harder for one group than for others.[116] He noted that government regulation at the local level routinely affects the rights of particular people, requiring those who seek change to operate at a higher level of government under presumably more difficult circumstances.[117] For that reason, he asserted Amendment 2 was neither as unusual nor as special as Justice Kennedy claimed.[118] Before this decision, no one, Justice Scalia argued, had ever equated such a fundamental aspect of the democratic system with animus or found it to violate the Equal Protection Clause.[119]

Secondly, Justice Scalia pointed out that *Bowers* fundamentally stripped the animus principle of any logic.[120] Even if Amendment 2 embodied social disfavor of homosexual conduct, how, he argued, could this disfavor be deemed evil enough to invalidate the Amendment when

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114. *Id.* at 636 (Scalia, J., dissenting).

115. *See* GARY R. HARTMAN ET AL., LANDMARK SUPREME COURT CASES: THE MOST INFLUENTIAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES 111 (2004) ("*Romer* could signal a greater willingness on the part of the Court to be an actor in America's 'culture wars,' to use a term invoked in Justice Scalia's dissent.").

116. *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

117. *Id.* at 638-39.

118. *Id.* at 653.

119. *Id.* at 639. In an important footnote, Justice Scalia also makes two points that further clarify the approach used by the majority in its equal protection analysis. He states that the majority plainly believed the rational basis test properly applied to the matter at hand. *Id.* at 640 n.1. Thus, as Justice Scalia observes, the majority evidently rejected the Colorado Supreme Court's holding that Amendment 2 infringed upon a "fundamental right" of persons, as homosexuals, to "participate equally in the political process." *Id.* (quoting majority opinion at 625).

120. *Id.* at 640.

Bowers permitted the criminalization of the same conduct?[121] Justice Scalia noted that Justice Kennedy never referred to *Bowers* or resolved this conundrum.[122]

Finally, Justice Scalia argued that homosexuals were not the politically-disadvantaged class as Justice Kennedy described.[123] He noted the tendency of gay people to cluster in particular localities.[124] This grouping, he stated, actually tipped the political scales in their favor but out of proportion to their presence in society as a whole.[125] Given that, he portrayed Amendment 2 as adherents of traditional values exercising their role in democracy to address this imbalance and bring public policy back into line with traditional disapproval of homosexual conduct.[126]

The foregoing led Justice Scalia to conclude the majority had based its holding not on law, but rather on its personal belief that disapproval of homosexuality was morally wrong. Wading directly into the culture war, he accused the majority and the entire legal academy of holding an elitist acceptance of homosexuality that was out of touch with the traditional moral values of people outside law schools' gates.[127] The majority in *Romer*, he asserted, sought to coerce a disapproving public to accept homosexuality and shame those who did not.[128]

Justice Kennedy tried mightily to frame the issue in *Romer* as one of universal principle standing apart from the ongoing culture war. Justice Scalia's dissent, however, inexorably drew the majority opinion into that war by giving it an overtly gay rights gloss. One can argue which Justice made the better argument. However, Justice Scalia's argument proved the more memorable for its clarity of language and directness of approach. Unlike Justice Kennedy's opinion, which aimed for immortality and often seemed fuzzy, the dissent never aspired to be anything other than a point-by-point rebuttal, which made it the stronger opinion.[129]

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121. *Id.* at 640-41.

122. *Id.* (noting the majority neither mentions *Bowers* nor addresses the question it raises: "whether there was a legitimate rational basis for the substance of the constitutional amendment").

123. *Id.* at 640.

124. *Id.* at 646.

125. *See id.*

126. *Id.* at 645-46.

127. *Id.* at 652-53.

128. *See id.* at 653 (referring to "[t]his law-school view of what 'prejudices' must be stamped out").

129. *See* Rosen, *supra* note 72 (calling Justice Kennedy's writing "pompous and clueless at the same time").

Paradoxically, Justice Scalia's dissent, at the same time, cast Justice Kennedy's opinion in a stronger light. Justice Scalia's innuendos about the motivations behind the majority opinion, although grossly overstated, made it appear more proactive as a harbinger of further advances in gay rights. Indeed, Justice Scalia, not Justice Kennedy, pointed out the contradictory nature of the holdings in *Romer* and *Bowers*.[130] Thus, Justice Scalia, not Justice Kennedy, raised the possibility that the holding in *Romer* cracked a chink in *Bowers*' wall.[131] Justice Scalia, not Justice Kennedy, suggested that *Romer* indicated "the perceived social harm of homosexuality" was not a legitimate government concern.[132] Justice Scalia, not Justice Kennedy, foresaw that the *Romer* holding would lead to a day when sexual discrimination becomes as morally reprehensible as discrimination based on race or religion.[133] Justice Kennedy's opinion expressed none of these things, but Justice Scalia's dissent made it seem as though it had.

Moreover, the contrast between Justice Scalia's manic anger and Justice Kennedy's quiet assuredness lent further strength to the majority opinion. Oddly, the contrasting tones created a difference between perception and reality. The majority opinion, based more on personal philosophy than precedent, seemed like the reasoned opinion. Conversely, Justice Scalia's dissent, based more solidly on precedent, seemed to be the product of emotion. Indeed, Justice Scalia's intense anger more clearly expressed the monumental turn the *Romer* majority had taken from *Bowers* better than Justice Kennedy's majestic phrases themselves.

V. THE "ODD COUPLE'S" LEGACY IN *ROMER*

Together, Justice Kennedy's majority opinion and Justice Scalia's dissent indicated the Supreme Court had dramatically shifted its attitude towards gay people. The Court's majority framed gay people, not as criminal sodomites like *Bowers v. Hardwick* had done, but as people.[134] The contrast between the majority opinion and the dissent

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130. *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting).

131. *See* Mark E. Papadopoulos, *Inkblot Jurisprudence:* Romer v. Evans *as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J. L. & PUB. POL'Y 165, 181 (1997) (noting "a significant amount of legal literature concurs, although perhaps for different reasons, with Justice Scalia's view that *Romer*, at a minimum, severely undermined *Bowers*").

132. *Romer*, 517 U.S. at 651 (Scalia, J., dissenting).

133. *Id.* at 636.

134. *Compare Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (calling homosexuality "a disgrace to human nature"), *with Romer*, 517 U.S. at 635 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else . . . . A State cannot so deem a class of persons a stranger

made that distinction clear. Justice Kennedy viewed the gay Coloradans as persons entitled to dignified human treatment.[135] Justice Scalia saw them as offenders of morality entitled to nothing but social disapproval.[136] The Justices' starkly different outlooks, presented one after the other, exemplified that some degree of change in the law's treatment of gay people was in the air.[137] How their joint contribution in making this point may have affected the gay rights movement will be discussed below.

Romer v. Evans gave gay rights organizations, shackled by *Bowers*, a much needed shot in the arm.[138] Political advocacy thrives on the possibility that change can happen as much as it does on its actual success. The possibility of change builds momentum, attracts more active supporters, and generates greater financial support.[139] It also stimulates the rise of identity politics.[140] *Romer* demonstrated a change in attitude towards gay people at the highest level and sparked all of these things. *Romer*'s acknowledgment of gay people's fundamental dignity provided a rallying point for the advocacy organizations. It further cemented the notion of gay pride. Even Justice Scalia's dissent played a positive role. It compensated for any juicy drama Justice Kennedy's opinion lacked. On the one hand, the dissent represented an opinion gay rights supporters could love to hate. On the other hand, its doomsday tone suggested gay equality was not merely possible but highly probable. Thus, while Justice Kennedy's majority opinion provided the cake to gay rights advocates, Justice Scalia's dissent added

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to its laws.").

135. *Romer*, 517 U.S. at 635.

136. *Id.* at 636 ("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.") (quoting majority opinion at 628).

137. Lawrence C. Levine, *Justice Kennedy's "Gay Agenda":* Romer, Lawrence, *and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 8 (2013) ("The greatest challenge of *Romer* is trying to comprehend its reach.").

138. *See Civil Rights Monitor*, THE LEADERSHIP CONFERENCE, no. 5-6, 1996, http://www.civilrights.org/monitor/vol8_no5_6/art3.html ("Gay-rights advocates were jubilant after the Court's decision. Elizabeth Birch, Executive Director of the Human Rights Campaign, the largest national lesbian and gay political organization in the nation, stated the Court's decision was 'an outstanding mor al [sic] victory' that 'merely ensures that Colorado–and every other state–cannot pass laws to deny gay and lesbian Americans equal access to the democratic process.'").

139. *See* Scott A. Giordano, *Twenty Years as the Nation's Premier Gay and Lesbian Civil Rights Group*, EDGE BOSTON (Jan. 20, 2000), http://www.edgeboston.com/index.php?ch=news&sc=&sc3=&id=58219&pf=1 (noting that between 1995 and 2000 the Human Rights Campaign tripled in size).

140. Eskridge, *No Promo Homo*, *supra* note 20, at 1336-37.

a highly satisfying icing. Together, they provided the mixture for a powerful organizing tool.

Most importantly, together, the majority opinion and dissent in *Romer* practically invited gay rights advocacy groups to challenge *Bowers'* legitimization of criminal sodomy laws. Indeed, Justice Scalia, himself, noted the contradictory nature of the holdings in the two cases.[141] *Romer*, as Professor William Eskridge noted, left *Bowers* "in equal protection purgatory."[142] *Bowers'* wounded state made equal protection seem fair game and spurred gay rights groups to take action.[143] These groups began earnestly looking for a sodomy arrest on which to build a challenge.[144] That time came when Houston Police arrested Tyron Garner and John Lawrence under Texas' sodomy statute.[145] Ultimately, in *Lawrence v. Texas*, Justice Kennedy wrote the majority opinion overruling *Bowers*.[146] Justice Scalia again angrily dissented.[147] Thus, *Romer* indicated the path that gay rights advocates would tread down to further victory.

The duality of *Romer* also drew attention in the public sphere.[148] Scholars disagree on the extent judicial opinions influence public attitudes.[149] The confluence in *Romer* of positive and negative gay

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141. *Romer*, 517 U.S. at 640-41 (Scalia, J., dissenting).

142. William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1091 (1999).

143. *See* Eskridge, *No Promo Homo*, *supra* note 20, at 1406 (noting the preference of gay rights advocacy groups to act "only if there is a reasonable chance of success").

144. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 130 (2012) (calling the arrest "the spark the gay-rights movement had been awaiting for more than a decade").

145. *Lawrence*, 539 U.S. at 562-63. The applicable statute, section 21.06(a) of the Texas Penal Code Annotated, provided, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

146. *See generally Lawrence*, 539 U.S. at 562-77. Justice Kennedy did not replicate the animus analysis used in *Romer*, but he stated the statute violated the right of personal autonomy granted by the Due Process Clause. *Id.* at 573-74.

147. *See generally id.* at 586-605 (Scalia, J., dissenting). Justice Scalia asserted the majority applied "an unheard-of form of rational-basis review that will have far-reaching implications beyond this case." *Id.* at 586.

148. *See* Richard Nunan, *Constitutional Rights versus State Autonomy and Direct Democracy: The Story So Far on Same-Sex Marriage*, (APA) NEWSLETTER ON PHILOSOPHY AND LESBIAN, GAY, BISEXUAL AND TRANSGENDER ISSUES, Fall 2009, at 4 (noting the prospect of judicial decisions attracts some attention by the general public).

149. Kevin Orszac, The Effects of Judicial Decisions on Public Support for Same-Sex Marriage 3 (2011) (unpublished Senior Honors Thesis, New York University Politics Department) (2011), http://politics.as.nyu.edu/docs/IO/5628/Orszak.pdf ("Despite the numerous studies regarding aggregate and individual-level opinion responses to court decisions, a complete consensus has not emerged amongst political science scholars.").

rights arguments may have cancelled out its potential to influence minds not already leaning towards one side or the other.[150] However, the disagreement between Justice Kennedy and Justice Scalia undoubtedly appealed to the news media and may have increased coverage of gay issues in general.[151] The opinion brought gay rights out of the closet on a national level. In some parts of the country, it may have provided the first public demonstration of a government interest in gay equality.[152] It stimulated public discussion. Much of that discussion surely disparaged gay people as Justice Scalia did, or even worse. Yet, "for better or worse," this discussion began the process of introducing the idea of gay rights into the general public's consciousness.[153] The enhanced presence of gay rights in the public discourse indicated the rights were an issue unlikely to go back in the closet.[154]

Of course, *Romer* stimulated the advocacy of opponents of gay rights as well. Whereas gay rights proponents expressed uncertainty about *Romer*'s ramifications, the opponents immediately recognized the holding's potential to erode traditional values.[155] In hindsight, these opponents, like Justice Scalia, overestimated the speed with which such change would occur. Yet, in many respects, they predicted the nature of the change with surprising accuracy.[156] Their advocacy against gay

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150. *See* Paul R. Brewer, *Framing, Value Words, and Citizens' Explanations of Their Issue Opinions*, 19 POL. COMM. 303, 311-12 (2002) (suggesting that the presentation of competing frames of view can reduce their effectiveness to influence).

151. *See* Joseph Daniel Ura, *The Supreme Court and Issue Attention: The Case of Homosexuality*, 26 POL. COMM. 430, 440 (2009) (reporting the outcome of a study, which found *Romer* "significant[ly] influence[d]" USA Today's level of coverage of homosexual issues). *But see* Brian J. Fogarty & James E. Monogan III, *Modeling Time-Series Count Data: The Unique Challenges Facing Political Communication Studies*, 45 SOC. SCI. RES. 73, 84-86 (2014) (reporting that several models do not support Ura's findings).

152. *See* Eskridge, *Multivocal Prejudices, supra* note 142, at 1095 ("*Evans* can be read as the Court's recognition that the state contribution to the apartheid of the closet carries with it today a modest state responsibility not to reinforce the closet.").

153. *See* Hunter, *supra* note 19, at 576-77 (2000) (noting that "dominant American [hetero]sexual culture hinges on keeping the silence").

154. *See* Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 403-05 (1997) (stating that "[c]oerced invisibility [] works to reinforce gay inequality").

155. *Compare* Eskridge, *Multivocal Prejudices*, *supra* note 142, at 1086 ("*Evans* contains broad language supporting claims for homo equality, but it arose in a unique factual setting that could render it sui generis."), *with* Hadley Arkes, *The End of Democracy? A Culture Corrupted*, FIRST THINGS (Nov. 1996), http://www.firstthings.com/article/1996/11/005-the-end-of-democracy-a-culture-corrupted ("And now, with *Romer v. Evans*, the Court has handed the activists a powerful new device for advancing the movement ever further.").

156. *See, e.g.*, Arkes, *supra* note 155 (asserting that *Romer* "could have vast, unsettling effects on our law 'that it could be used as a powerful lever in changing the professions, the

equality took a number of forms, ranging from scholarly argument to public denunciations of homosexuality, that banded the old stereotypes and exploited people's fear of new and different things.[157] However, the rabid cruelty of many of these denunciations no doubt swayed some Americans who were sitting on the fence to cross to the gay rights side.[158] Such cruelty probably also motivated gay rights advocates to stay on top of their game to ensure the closet door never swung shut.

Individuals came out of the closet as well. Post-*Romer*, the rise in number of openly gay people may have been attributable, in part, to the publicity *Romer* generated about the gay rights movement and the boost it gave to gay rights advocacy.[159] Seeing gay people, and realizing one is not alone in being gay, frequently invokes a powerful self-recognition of gay identity.[160] How many people came out of the closet between *Romer* and *Lawrence* will never be known. Undeniably, however, gay people became more visible.[161] The number of gay couples forming households increased significantly.[162] At the same time, the likelihood of Americans neither knowing nor having interacted with a gay person significantly decreased.[163]

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universities, and the cast of our private lives'"). Professor Arkes specifically feared the advent of same-sex marriage. *Id.*

157. *See, e.g.*, Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997); *see also* Teresa Stanton Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, 2 U. ST. THOMAS L.J. 95 (2004).

158. The comments of Fred Phelps and supporters of the Westboro Church come immediately to mind. *See* Gary Younge, *Extreme Prejudice*, GUARDIAN (Mar. 7, 2005), http://www.theguardian.com/world/2005/mar/07/gayrights.usa (noting calls for the death of homosexuals).

159. Eskridge, *No Promo Homo*, *supra* note 20, at 1371 (asserting "the only likely consequence—but a big one—of shifting policy in a progay direction is encouragement of more *open* homosexuals and more *public* displays of homosexual identity" (alterations in original)).

160. *See* Joseph J. Manera & Dennis A. Frank, II, *Coming Out & Identity Development Needs*, *in* COUNSELING GAY MEN, ADOLESCENTS AND BOYS 12 (Michael M. Lout ed., 2014) (noting that, in developing a personal gay identity status, "[i]ndividuals gain a certain amount of definition through their interactions with others who share a similar identity").

161. Eskridge, *No Promo Homo*, *supra* note 20, at 1371 (asserting "the only likely consequence—but a big one—of shifting policy in a pro-gay direction is encouragement of more *open* homosexuals and more *public* displays of homosexual identity" (alterations in original)).

162. Cheryl Wetzstein, *Census: Households Led by Gay Couples Rose 80 Percent*, WASH. TIMES (Sept. 27, 2011), http://www.washingtontimes.com/news/2011/sep/27/census-house holds-led-by-gay-couples-rose-80-perce/?page=all (discussing findings of census data between 2000 and 2010).

163. *See* Suzanne Goldberg, *Introductions and Panel Discussion: Transcription of Proceedings*, 46 S. TEX. L. REV. 323, 351 (2004) (discussing the greater familiarity of people,

As more gay people came out of the closet, the diversity of gay people became more apparent. Also, as noted, more people came to know gay people and began to think of them not as "the other," but as family, friends, or acquaintances. Correspondingly, negative stereotypes about gay people became less prevalent or, at least, less openly expressed in polite company.[164] Gradually, public attitudes towards gay people swung more in Justice Kennedy's direction than Justice Scalia's. None of these social changes can be attributed specifically to *Romer*. However, the majority opinion in *Romer* certainly ranks among the first prominent and public renunciations of the gay stereotypes enshrined in *Bowers*. Today, Justice Scalia's dissent in *Romer* appears mean-spirited and coarse compared to the majority opinion. Thus, his dissent may have contributed, albeit unintentionally, to a phenomenon it openly scorns–the increasing prevalence of the belief that disparaging gay people in public discourse is socially unacceptable.[165]

As gay visibility increased, gay people became harder to ignore. On the one hand, this visibility created political momentum, most evidenced by the adoption of anti-discrimination ordinances in numerous towns and cities. On the other hand, it also created a steamroller effect in the social sphere. Increased visibility made a once hidden facet of American culture more integrated into the fabric of daily life. Popular culture reflected this phenomenon as openly gay characters appeared frequently in television shows and movies.[166] Even the fundamentally conservative American business community began to respond to the more visible gay presence. An increasing number of companies instituted domestic partnership benefits.[167] Thus, in terms of gay political and social integration, America changed markedly during the seven years between the Supreme Court holdings in *Romer v. Evans* and *Lawrence v.*

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particularly Supreme Court Justices, with gay people).

164. *See* Eskridge, *No Promo Homo*, *supra* note 20, at 1376 (noting how the closet breeds stereotyping).

165. *See id.* (explaining that stereotyping engenders inappropriate discourse).

166. Michael Medved, *Homosexuality and the Entertainment Media*, NEW OXFORD REV. INC. (July 1, 2001), *available at* 2001 WLNR 9659436.

167. *Domestic Partner Benefits Doubled From* 1997, EPM COMM. INC., *available at* 2001 WLNR 12106061 ("The proportion of large U.S. companies offering domestic partner benefits has more than doubled, to 22% from 10% in 1997, and 35% of companies that don't offer such benefits indicate that they may begin to do so in the next three years, according to Hewitt Associates. Three quarters (76%) of companies offering these benefits do so to attract and retain employees . . . .").

Texas.[168] The Court in *Bowers* could never have imagined gay people becoming so ubiquitous in American life.

Romer's direct legal impact on the gay rights movement has, until recently, been underestimated. Although some have credited *Romer* with forestalling the enactment of pending laws similar to Amendment 2,[169] others believed it did not live up to its promise.[170] Indeed, Justice Kennedy's opinion and Justice Scalia's dissent both discouraged *Romer*'s subsequent application to some degree. Justice Kennedy's characterization of Amendment 2 as "unique" invited lower courts to distinguish subsequent disparate treatment of gay people from the treatment in *Romer*.[171] In addition, the amorphousness and subjectivity of "animus" impaired its usefulness as a measuring tool.[172] Finally, Justice Scalia's clarification in his dissent—that the majority had not employed heightened scrutiny in its examination of Amendment 2—foreclosed that line of inquiry in a number of later cases.[173]

Recently, however, *Romer* has gained stature. Accordingly, a more convincing argument can be made that *Romer*'s majority and dissent presaged a future line of gay rights jurisprudence and its consequences. In *Perry v. Brown*,[174] for example, the United States Court of Appeals for the Ninth Circuit deployed *Romer* to find a violation of the Equal Protection Clause.[175] In this case, the court focused on California's Proposition 8, a ballot initiative that withdrew the right to marry from same-sex couples.[176] The court held that no reason could be attributed to Proposition 8 other than animus towards gay people.[177] More

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168. Jay Michaelson, *On Listening to the Kulterkampf, or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1560 (2000).

169. Dale Carpenter, *A Pre-Decision Guide to a Post-Decision World of Gay Marriage*, WASH. POST (Jan. 17, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/17/a-pre-decision-guide-to-the-post-decision-world-of-same-sex-marriage/.

170. William C. Duncan, *The Legacy of* Romer v. Evans*–So Far*, 10 WIDENER J. PUB. L. 161, 185 (2000) ("A review of the cases discussing and citing *Romer* thus far seems to indicate that the opinion has not had a major impact on the law."); Papadopoulos, *supra* note 131, at 201 (asserting that, aside from its specific holding, "*Romer* is nothing if not ambiguous").

171. Levine, *supra* note 137, at 8.

172. *See* Massachusetts v. United States HHS, 682 F.3d 1, 10-11 (1st Cir. 2012) (noting that "[c]ircuit courts . . . have concluded that equal protection assessments are sensitive to the circumstances of the case and not dependent entirely on abstract categorizations").

173. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008).

174. 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

175. *Perry*, 671 F.3d at 1076.

176. *Id.*

177. *Id.* at 1080-81.

importantly, in *United States v. Windsor*, Justice Kennedy replicated the *Romer* analysis and found such animus underlay and made unconstitutional the provision of the Defense of Marriage Act (DOMA)[178] restricting the provision of federal benefits to marriages between a man and a woman.[179] In *Windsor*, Justice Scalia issued another Cassandra-like dissent in a similar tone as his dissent in *Romer*. This time, however, he predicted the institution of same-sex marriage nationwide.[180]

In the recently decided *Obergefell v. Hodges*,[181] which found a constitutional right to same-sex marriage, Justices Kennedy and Scalia resumed their colloquy on gay rights.[182] Once again, Justice Kennedy invoked the respect for human dignity as central to the determination of eligibility for fundamental constitutional rights.[183] Likewise, Justice Scalia counters that this position amounts to the imposition of personal preference over the rule of law.[184] The roots of both arguments can, of course, be traced to *Romer*. The intensity, not the content of the Justices' arguments in *Obergefell* distinguishes the case from *Romer* and the other successive gay rights cases.

Both Justices argued on steroids. Justice Kennedy, writing for the majority, began by describing the "transcendent importance of marriage," which "[rises] from the most basic human needs" and is "essential to our most profound hopes and aspirations."[185] Marriage achieves a status as a fundamental constitutional right for several reasons. It invokes the right of personal autonomy.[186] It creates a uniquely personal bond

178. Pub. L. No. 104-99, 110 Stat. 2419 (codified at U.S.C. § 7 (2012) on Sept. 21, 1996).

179. *See Windsor*, 133 S. Ct. at 2693-96 (explaining how the unique nature and background of the DOMA provision revealed animus).

180. *Id.* at 2709 (Scalia, J., dissenting) ("It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here–when what has preceded that assurance is a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it. I promise you this: The only thing that will 'confine' the Court's holding is its sense of what it can get away with.").

181. 135 S. Ct. 2584 (2015).

182. *See generally id.*

183. *See id.* at 2602 (describing marriage generally as a fundamental right and noting that "[u]nder the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right").

184. *Id.* at 2628 (Scalia, J., dissenting) (characterizing the majority opinion as "lacking even a thin veneer of law").

185. *See id.* at 2594 (majority opinion) (noting that marriage is a fundamental right because it entails principles central to personhood such as the right of individual autonomy, the uniqueness of the bond marriage exerts between committed individuals, and the safeguarding of one's children).

186. *Id.* at 2599.

between committed couples.[187] It safeguards the rights of children.[188] Finally, it serves as the cornerstone of family and society.[189] Accordingly, Justice Kennedy believed depriving same-sex couples of marriage, and its associated benefits, "serve[d] to disrespect and subordinate them" in violation of the Equal Protection and Due Process Clauses.[190] Indeed, the passion with which Justice Kennedy laid out these arguments, relating marriage to personal dignity and well-being, reportedly resulted in portions of his opinion being included in marriage vows at a number of same-sex marriage ceremonies that followed.[191]

On the other hand, Justice Scalia attempted to tear the Majority's fundamental rights arguments to shreds in his remarkable pejorative dissent. He mocked the "mummeries and straining-to-be memorable passages of [Justice Kennedy's] opinion," which he called "profoundly incoherent."[192] Having castigated Justice Kennedy's writing, Justice Scalia pounced on its substance with even greater disdain. In his view, the majority's decision represented a "Judicial Putsch," or, in other words, "a naked judicial claim to legislative—indeed, *super*-legislative—power . . . fundamentally at odds with our system of government."[193] Justice Scalia asserted that "to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[194] Thus, Justice Scalia, too, returned to the themes he expressed in *Romer*, albeit at an even more dismissive level.

Obergefell makes *Romer*, once considered highly enigmatic,[195] seem highly prophetic in hindsight. Moreover, *Romer*, which some deemed insignificant as a catalyst to the further development of gay rights in America,[196] now appears increasingly relevant. Indeed, the Court's

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187. *Id.* at 2599-600.

188. *Id.* at 2600.

189. *Id.* at 2601.

190. *Id.* at 2604.

191. Dahlia Lithwick, *With this Withering Dissent, I Thee Wed: Subversive Language of Love from the Supreme Court's Losers*, SLATE (June 30, 2015), http://www.slate.com/articles/news_and_politics/low_concept/2015/06/supreme_court_obergefell_dissents_celebrate_a_marriage_with_decision_language.html.

192. *Obergefell*, 135 S. Ct. at 2628, 2630 (Scalia, J., dissenting).

193. *Id.* at 2629.

194. *Id.*

195. *See* Papadopoulos, *supra* note 131, at 201 (calling *Romer* "ambiguous").

196. *See* Duncan, *supra* note 170, at 185 (asserting *Romer* had little subsequent impact).

endorsement of same-sex marriage has brought the Amendment 2 question full circle. Politicians who share Justice Scalia's moral disapproval of homosexuality have responded, or are responding, to marriage equality by enacting state laws, which, once again, effectively remove local government protections for gay people.[197] The intersection of same-sex marriage and issues of religious freedom again raises questions about the role of notions of traditional morality in the delineation of gay and lesbian people's constitutional rights.[198] Thus, the resurgence of *Romer* is likely to continue for the foreseeable future.

VI. CONCLUSION

The majority opinion and dissent in *Romer v. Evans* combined to change the course of gay rights in America. As a legal force against gay discrimination, *Romer* appears more vital than ever. Although one cannot precisely measure *Romer*'s effect on the social fabric, *Romer* surely served as a stepping-stone to the greater respect and equality gay Americans enjoy today. It deserves greater recognition for both achievements.

197. *See* Emma Margolin, *Arkansas Clears a New Kind of Anti-LGBT Law*, MSNBC (Feb. 24, 2015), http://www.msnbc.com/msnbc/arkansas-clears-new-kind-anti-lgbt-law (noting the passage in Arkansas and Tennessee, and the introduction in Texas and West Virginia, of bills requiring local governments to conform with state anti-discrimination laws, which do not encompass sexual orientation discrimination).

198. David G. Savage, *Battles Over Religious Freedom Are Sure to Follow Same-Sex Marriage Ruling*, L.A. TIMES (July 30, 2015), http://www.latimes.com/nation/la-na-religion-gay-marriage-20150713-story.html#page=1 (discussing the potential ramifications of *Obergefell* in relation to the rights of persons with religious objections to same-sex marriage who refuse to extend governmental and non-governmental services to same-sex couples).

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