

THE ENDURING FORCE OF SCALIA'S *LAWRENCE* AND *ROMER* DISSENTS: THE CASE FOR PROPOSITION 8

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Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.¹

I. INTRODUCTION

In *Romer v. Evans*,² the Supreme Court found a violation of equal protection doctrine when Colorado voters passed an initiative barring anti-discrimination laws protecting gays and lesbians. In *Lawrence v. Texas*,³ the Supreme Court held criminal sodomy laws to be unconstitutional under the Due Process Clause. Both were landmark civil rights decisions. Unlike other landmark civil rights decisions, however, they were not unanimous. The cases generated blistering dissents by Justice Antonin Scalia. Those dissents, no less than the majority opinions themselves, continue to have enduring influence.⁴ This essay, the first installment of a contemplated larger project exploring the pervasive influence that Scalia has played in shaping not only the jurisprudence of sexual orientation rights but also political rhetoric, focuses particularly upon the recent Proposition 8 campaign in California. In that campaign, as in other political contexts starting with the 2004 national presidential campaign, Scalian rhetoric has enabled those who are homophobic or hostile to full equality for LGBTQs⁵ to make arguments more sophisticated and less easily overcome than the patently homophobic rhetoric that has characterized political campaigns of the past.

The focus of Lat Crit XV was *The Color of the Economic Downturn: Exploring the Downturn from the Bottom Up*. In that context, this essay seeks to

1. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

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

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

4. The influence is wide-ranging, going beyond law and politics to arts and culture. In a recent article in the *L.A. Times*, for example, dealing with the Smithsonian's removal of artwork from a gallery under pressure from anti-gay groups, the article's author quoted Scalia's *Lawrence* dissent and described it as "widely noted." Christopher Knight, *CRITIC'S NOTEBOOK; No portrait of resolve; But the Smithsonian's folding to anti-gay groups won't halt the march to equality*, L.A. TIMES, Dec. 6, 2010, at D1.

5. "LGBTQ," which I mean to be the most inclusive term possible, stands for lesbian, gay, bisexual, transgender or queer. However, to the extent that marriage equality has focused on the rights of gay and lesbian couples, the terms gay and lesbian are also used in this essay. In addition, where earlier works or opinions used the terms "gay and lesbian," those terms are used to be faithful to the originals. See, e.g., *Lawrence v. Texas*, 539 U.S. at 602, and accompanying text.

demonstrate the enduring power of rhetoric that continues to seek to locate gay and lesbian couples outside of the zone of rights enjoyed by heterosexual couples—rhetoric that motivated enormous political spending on both sides of the issue. The Proposition 8 campaign was the most expensive proposition campaign in history. During a time of economic crisis, more than \$83 million was spent for and against Proposition 8.

Moreover, in the context of discussing economic rights, it is important not to overlook the role that “culture war” rhetoric plays in seeking to obscure widening economic and social divides. As other scholars have noted, “the idea of the ‘culture wars’ helps shift blame for elitism onto liberal attempts to disrupt traditional social hierarchies, shifting the blame away from conservative policies that widen both economic class divisions and ‘social’ divisions based on race, gender, sexuality, disability and religion.”⁶ The construction of a “cultural elite,” including the “law-profession culture” derided by Justice Scalia, becomes an effective “right-wing strategy for seducing ‘Middle America’ into sacrificing its economic interests for illusory ‘cultural’ power.”⁷

Following this introduction, Part I will briefly lay out the background regarding California’s Proposition 8 (or “Prop 8”) and the interplay between law and politics in that context. Part II will then briefly address *Bowers v. Hardwick*,⁸ which *Lawrence* explicitly overruled, and *Romer v. Evans*, which set the stage for *Lawrence*. The clumsy and much-criticized rhetoric of *Bowers* represented a far less sophisticated means of denying equality than did the later, more polished Scalian approaches, but Scalia’s dissents are ultimately grounded in *Bowers*.

Part III lays out the majority and concurring opinions in *Lawrence*, then addresses Scalia’s dissenting opinion. Finally, in tentative terms, Part IV addresses the degree to which Scalia’s rhetoric has sustained traction, not simply in legal discourse but also in popular and political discourse, suggesting that the courts may ultimately provide the more appropriate venue for overcoming the force of these arguments. In particular, the “sound-bitability” and facile appeal of Scalian logic makes full engagement in the political sphere difficult. Moreover, Scalia’s explicit appeal to raw majoritarianism serves to illustrate the critical role of the courts in securing the rights of sexual orientation minorities.

II. THE LEGAL AND POLITICAL WRANGLING OVER MARRIAGE IN CALIFORNIA

Perhaps nowhere in recent years have arguments about the rights of LGBTQ people played out more dramatically than in the battle over California’s Proposition 8, a 2008 voter initiative that stripped vested marriage rights away from gay and lesbian couples. While many other states have restrictive marriage provisions, California was the first to actually *remove* marriage rights from gay and lesbian couples, making the stakes higher.⁹ Despite having passed more than three

6. Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics From the Court to the “Nanny Wars,”* 35 SETON HALL L. REV. 1291, 1292 (2005).

7. *Id.* at 1292 (quoting THOMAS FRANK, WHAT’S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA 7 (2004)).

8. 478 U.S. 186 (1986).

9. See Decl. of Linda May, Appendix of Exhibits in Support of Brief of Amici Curiae

years ago, Proposition 8 (or “Prop 8”) continues to be the source of study, discussion, and litigation. Prop 8 was passed in the wake of a California State Supreme Court decision, *In re Marriage Cases*, which found unconstitutional a statutory marriage restriction providing that “only marriage between a man and a woman is valid or recognized in California.”¹⁰

The marriage restriction at issue in *In re Marriage Cases* was passed by voter initiative, Proposition 22, in 2000. After a complicated eight years of legal challenges, the California Supreme Court invalidated Proposition 22 in 2008, finding marriage to be a fundamental right, finding that denying the right to gay men and lesbians violated both due process and equal protection under the California Constitution, and also concluding that gay men and lesbians were a “suspect classification” for equal protection purposes. The case was decided exclusively on state law grounds and, significantly, marked the first time that either a state or federal court had deemed classifications based on sexual orientation to be “suspect,” triggering the highest level of scrutiny under equal protection doctrine.

The decision proved controversial. “Predictably, supporters of same-sex marriage lauded the decision as a ‘milestone,’ while opponents decried it as ‘judicial activism’ and as another example of judges ‘making social policy from the bench.’”¹¹

Voters passed Prop 8 a few months after the state marriage decision in direct response to it. The Prop 8 campaign placed heavy rhetorical reliance on the notion that the California Supreme Court’s marriage decision was the product of an “activist court,” arguments that, as discussed below, echo Scalia’s sentiments in both *Romer* and *Lawrence*. By amending the constitution directly, voters evaded the ordinary protections accorded by the equal protection and due process clauses by inserting a restrictive definition of marriage directly into the state constitution. Essentially, Prop 8 provided a footnote, or exception, to the state’s equal protection clause. Ultimately, the same court that had decided *In re Marriage Cases* upheld Prop 8 in *Strauss v. Horton*¹² in 2009, rejecting the argument that the voter initiative wrought a fundamental revision to the Constitution. In the words of Shannon Minter, the court held that “limiting a fundamental right (marriage) only for the members of a suspect class (gay people) was a permissible exercise of a majority’s voting power.”¹³ Counsel for the Prop 8 proponents, Ken Starr, had focused heavily on the importance of the “will of the people” in a democracy, avoiding overtly homo-hostile

Individual Chapman University Organizations, Faculty, Staff and Students, Orange County Equality Coalition, and Other Orange County Community Members Including Legally Married Same-Sex Couples, in Support of Petitioners, *Strauss v. Horton*, Case No. S168047 at Tab 10, Para. 18 (“Proposition 8 . . . stings more than the other equal rights struggles because this is a step backward; something has been taken away. Always before we were struggling to gain something, so no matter what happened, we would be no worse off than when we started. With Prop 8’s passage, we experienced a setback. And it is frightening because it means that reversal is possible. The next question is where will that reversal stop?”) (Jan. 13, 2009) (available on California Supreme Court website by clicking on “High Profile Cases,” then the *Strauss* case, and then “amicus briefs”).

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

11. Tung Yin, *Crying Wolf?: In re Marriage Cases and Charges of Judicial Activism*, 14 NEXUS: CHAP. J. L. & POL’Y 45, 45 (2009).

12. 207 P.3d 48 (Cal. 2009).

13. Shannon Price Minter, *The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence*, 19 S. CAL. REV. L. & SOC. JUST. 89, 89 (2010).

rhetoric.¹⁴

Voter resistance to court recognition of marriage rights for gays and lesbians has not been limited to California. In November 2010, several state supreme court judges who had recognized marriage equality in an Iowa decision¹⁵ were voted out of their offices. More recently, the National Organization of Marriage has pledged to vote out of office those legislators who voted for New York's recent marriage equality bill.¹⁶

In California, Prop 8 is now the subject of a federal lawsuit, *Perry v. Schwarzenegger*, with arguments held in the Ninth Circuit Court of Appeals on December 6, 2010.¹⁷ Plainly, should the federal courts ultimately find that marriage equality is required by federal constitutional law, the views of state voters on this issue would be moot, at least in California.¹⁸ In *Perry*,¹⁹ federal district judge Vaughan Walker invalidated Prop 8, but that was a first step in litigation that promises to be long and whose results are uncertain. Should the Ninth Circuit uphold Walker's decision on the merits, review by the United States Supreme Court appears inevitable.

On the other hand, there is also the possibility that the case will be resolved on more narrow standing grounds, meaning that gay and lesbian couples will be able to marry in California, and perhaps avoiding a review on the merits by the United States Supreme Court.²⁰

There is an ongoing debate within the LGBTQ and allied community about the wisdom of seeking marriage rights through court order as opposed to attempting to change the "hearts and minds" of voters.²¹ The turn to federal court after Prop 8 passed was particularly controversial. Some have argued that the Supreme Court is simply not ready to embrace the full inclusion of LGBTQs in the institution of

14. Indeed, I was present in a satellite room at the courthouse where the oral arguments were being held and simulcast, and was in the room with some who vigorously supported Prop 8. Several of them voiced displeasure at the fact that Starr was not more aggressive in arguing against "same-sex" marriage on the merits. Starr's argument instead was limited to arguing that the voters had the *right* to pass Prop 8; he avoided defending the merits of the proposition.

15. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

16. See National Organization of Marriage ("NOM") website featuring highway billboard proclaiming "Roy McDonald: You're Fired!" and pledging to "hold accountable the legislators who betrayed marriage." <http://www.nomblog.com/13261/> (last visited by author October 1, 2011).

17. See *Judges explore narrow options in Prop. 8 appeal*, L.A. TIMES, Dec. 7, 2010, at A1, A21.

18. It is conceivable that the federal suit might ultimately uphold Judge Walker's opinion finding Prop 8 unconstitutional but that the decision would not reach beyond this state. That would be the case if the Walker opinion were upheld on narrow standing ground. See *infra* note 19 and accompanying text.

19. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

20. Standing has emerged as an issue in the case by virtue of the fact that the official defendants, the governor and attorney general of California, declined to defend Proposition 8 at the trial level and declined to appeal Judge Walker's ruling. While Judge Walker allowed a group supporting Prop 8 to defend the measure at the trial level, he declined to stay enforcement of his ruling, finding that the Prop 8 proponents urging the stay lacked standing. *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132 (N.D. Cal. 2010). The Ninth Circuit, however, did stay the ruling, and standing is now a critical issue in the case. On January 4, 2011, the Ninth Circuit certified to the California Supreme Court the question whether, under California's initiative process, the Prop 8 proponents have the "particularized interest" that would confer standing in the case. *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011). The California Supreme Court on February 16, 2011 unanimously agreed to address that question on an expedited basis.

21. See notes 25-26, *infra*, and accompanying text.

marriage and that a premature effort to achieve marriage equality in that venue could lead to a setback for LGBTQ rights, much as *Bowers v. Hardwick* did when the Court upheld criminal sodomy laws.

In a seminal 2000 article, Nancy Levit pointed out that “many gay legal theorists” appeared to divide between what she termed “outsider or antisubordination strategy” and “a formal equality model.”²² The former “use a variety of theoretical devices to challenge prevailing models of heterosexuality as the norm, and more broadly to destabilize traditional understandings of sex, gender roles and sexual orientation.”²³ Equality theorists, on the other hand, “may be agnostic on the issue or even question whether the heterosexual norm *is* truly an ideal, but they accept it as the paradigm cultural model” and “must be prepared to argue that to the extent an ideal model of family life exists, gays and lesbians conform to that snapshot.”²⁴ Equality theorists, thus, tend to “seek official recognition of their unions.”²⁵

Noted scholar William N. Eskridge, who would probably be classed in the “equality theorist” camp, has argued that the Supreme Court is ultimately responsive to identity-based social movements, pointing out that when *Lawrence v. Texas* invalidated sodomy laws in 2003, there was already a significant trend towards repealing sodomy laws in the states. In contrast, 24 states and the District of Columbia still criminalized sodomy when *Bowers v. Hardwick* upheld the constitutionality of such laws in 1986.²⁶ Because marriage equality remains a novel and threatening concept, which is not only “divisive” but “cut[s] to the core of people’s identities,” Eskridge urged caution in his 2004 article: “Under these circumstances, the Court’s best strategy is to leave the matter to the states, the famous laboratories of experimentation.”²⁷

Eskridge further argued that Justice Kennedy’s majority opinion in *Lawrence* represented a “jurisprudence of tolerance”²⁸ rather than an embrace of homosexuality as the normative equivalent of heterosexuality.²⁹ Indeed, the notion that gay and lesbian couples are in some sense “inferior” to heterosexual couples was an implicit message of the Prop 8 campaign. Eskridge argues that LGBT people must make political strides before seeking greater recognition from the courts, noting that an “implicit message” of Kennedy’s *Lawrence* opinion is that “it is up to LGBT people and their normative politics of recognition to move public opinion from the tolerable variation norm to the norm that homosexuality is a benign variation.”³⁰

Eskridge makes a persuasive case that the Supreme Court is not generally willing to be at the forefront of social change, and that constitutional rights recognized by the Court generally come only after significant recognition of those

22. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 879 (2000).

23. *Id.* at 880.

24. *Id.*

25. *Id.*

26. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1087-88 (2004).

27. *Id.* at 1092.

28. *See id.* at 1025, 1079 (noting that the same “jurisprudence of tolerance” supports decisions that went against gay rights claims, such as *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

29. *See id.* at 1086.

30. *Id.* at 1087.

rights in other spheres. Jane S. Schacter has also made this point in the context of recent marriage cases:

Various scholars, including Barry Friedman in a recent book, have shown that courts, across the long march of history, are not often all that far out of step with popular opinion or out front on controversial social issues. In fact, courts typically do not act before the broader society of which they are a part has taken some significant steps. Elected judges may be especially likely to align their decisions with broad currents of public opinion, but appointed judges, too, typically act only after processes of social change are underway and there is a broader sense in society that traditional attitudes toward a group are unfair and may be antiquated. A striking example of this general idea in the realm of LGBT rights is the shift in the Supreme Court's evaluation of the constitutionality of criminalizing sodomy. This shift is reflected in the *Lawrence v. Texas* decision overruling *Bowers v. Hardwick*—a shift more plausibly attributed to surrounding social changes than to any doctrinal niceties.³¹

The focus in this paper, however, is on influence in the other direction, *i.e.*, on the ways in which Supreme Court framing and rhetoric plays a powerful role in shaping popular discourse and the “elaborate dialogue” among societal segments described by Friedman. That framing and rhetoric comes not just from majority opinions but also from influential dissents. Justice Scalia's unusually strident dissenting rhetoric in both *Romer v. Evans* and *Lawrence v. Texas* read as a “call to arms” to those opposed to recognizing full equality for LGBTQ persons.³² *Lawrence*, in which Kennedy's majority opinion demanded that sodomy be de-criminalized, was a critical step in moving towards equality—a move that Scalia deeply resisted. He would have voted to uphold the criminal sanctions upheld 17 years earlier in *Bowers v. Hardwick*. Indeed, understanding the deeply homo-hostile underpinnings of *Bowers* is important in understanding Scalia's resistance to acceptance for LGBTQ equality made manifest in his *Romer* and *Lawrence* dissents.

III. THE BACKGROUND TO *LAWRENCE: BOWERS V. HARDWICK* AND *ROMER V. EVANS*

Michael Hardwick was arrested for sodomy when a police officer entered his home and found him engaged in oral sex with another man.³³ Hardwick

31. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1397-98 (2011) (citing, *inter alia*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 364-65 (2009) (other citations and footnote omitted); *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 585 (1993) (challenging traditional view of courts as “countermajoritarian” and arguing that courts in fact “integrate popular views into constitutional interpretation”).

32. Kate Kendell, *The Right to Marry and the San Francisco Experience*, 44 FAM. CT. REV. 33 (2006).

33. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Portions of the discussions of *Bowers*, *Romer* and *Lawrence* are adapted from an earlier article, M. Katherine B. Darner and Tiffany Chang, *Moving*

challenged the Georgia state anti-sodomy law that prohibited oral or anal sex between both different-sex and same-sex people,³⁴ arguing that the right to privacy is implicit in the Fourteenth Amendment,³⁵ and that the right to privacy protects personal liberty regarding private sexual matters. The Supreme Court rejected this argument.

In framing the decision, Justice Byron White noted for the 5-4 majority³⁶ that the case “does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable.”³⁷ Rather, describing the case in the narrowest possible terms, he stated that, “[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”³⁸ The Court then determined that “we are quite unwilling” to find such a right.³⁹ Notably, while the underlying Georgia statute applied by its terms to heterosexual as well as homosexual sodomy, White focused almost obsessively on the latter, a focus that was much discussed and criticized in academic circles.⁴⁰ White noted that sodomy proscriptions “have ancient roots.” Moreover, at the time of the decision, 24 states and the District of Columbia maintained anti-sodomy laws. “Against this background,” White asserted, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”⁴¹

After finding that no “fundamental right” was implicated, the Court then held that the Georgia anti-sodomy law was constitutional because enforcing morality was a legitimate government interest. This allowed the law to survive a rational basis analysis.⁴²

In a dissent joined by three other justices, Justice Blackmun strenuously disagreed with the majority’s narrow framing of the issue:

Beyond the “Immutability Debate” in the Fight for Equality After Proposition 8, 12 SCHOLAR 1, 13-21 (2009). For a thorough discussion of the background of the *Bowers* case and an analysis of the decision and its aftermath, see WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 229-256 (2008).

34. The relevant language of the Georgia statute was “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” Ga. Code Ann. § 16-6-2 (1984).

35. The Court cited to *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right to privacy is protected under the United States Constitution).

36. Justices Burger, Rehnquist, O’Connor and Powell joined the majority opinion. Justices Burger and Powell also wrote separate concurrences.

37. *Bowers*, 478 U.S. at 190.

38. *Id.*

39. *See id.* at 191.

40. *See, e.g.,* William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1034 (2004) (“White’s obsessive focus on ‘homosexual sodomy,’ notwithstanding the statute’s inclusion of sodomy of all kinds, exposed the Court to criticism that it was not treating gay people impartially.”); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 83 (“The Court . . . focused on the unpopular and (allegedly) nontraditional category of ‘homosexual sodomy.’”) and 82 (“The abhorrence expressed by the majority opinion . . . inhabits the same world as Justice Willis’s condemnation of Oscar Wilde, and shows the same unwillingness to try to see, from the point of view of the homosexual person, what is being sought and what its resemblance is to the actions and rights of heterosexuals.”) (2010); *cf. id.* at 79 (“The state’s strategy was to focus relentlessly on homosexual conduct rather than on the broader notion of forbidden sex acts.”).

41. *Bowers*, 478 U.S. at 194.

42. *See id.* at 196.

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, than *Stanley v. Georgia*⁴³ was about a fundamental right to watch obscene movies Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.”⁴⁴

Eskridge has thoroughly demonstrated the fact that, beginning in the twentieth century, sodomy laws became the basis for targeting “homosexuals,” a group that had not emerged as a target until that time.⁴⁵ *Bowers* provided the Court an opportunity to reject such laws, and it was heavily criticized for failing to do so. This criticism was particularly acute within the legal academy.⁴⁶ As Eskridge has noted, “[t]he chief moral lesson of the majority opinions, suggested by their obsession with ‘homosexual sodomy,’ seemed to be that the Constitution authorized homophobia and anti-gay discrimination.”⁴⁷

In *Beyond the Privacy Principle*, Professor Kendall Thomas issued a particularly stinging indictment of the case, arguing that it effectively legitimated violence perpetrated upon gay men and lesbians.⁴⁸ As Thomas put it, “the lived experience of gay men and lesbians under the legal regime challenged and upheld in *Bowers v. Hardwick* is one in which government not only passively permits, but actively protects, acts of violence directed toward individuals who are, or are taken to be, homosexual.”⁴⁹

Importantly, *Bowers* arose at a time when overt homophobia and homophobia were widespread in the popular culture. Indeed, “[t]he night *Bowers* was handed down, Reverend Falwell appeared on *Larry King Live* to announce a moral renaissance in this country, where church and state would be partners in an enterprise to wean Americans from the soulless hedonism represented by homosexuality and other sins.”⁵⁰

Nussbaum has described *Bowers* as a “low point in recent Supreme Court jurisprudence”; it was a decision that “gave comfort to the idea that gays are

43. 394 U.S. 557 (1969) (invalidating, on First and Fourth Amendment grounds, state laws that forbade the private possession of materials deemed obscene).

44. *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting). Justices Brennan, Marshall and Stevens joined the dissent.

45. See Eskridge, Lawrence’s *Jurisprudence of Tolerance* *supra* note 25, at 1055 (“It was not until well into the twentieth century that sodomy became a metonym for a new category of person, the ‘homosexual,’ and that sodomy laws were . . . a basis for a massive antihomosexual Kulturkampf during the McCarthy era, a state campaign eerily reminiscent of the Nazi’s persecution of gay people and entirely at odds with the anti-caste principle.”) (footnote omitted); cf. Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127, 134 (2008) (noting that the “‘elephant in the room’” on gay rights issues . . . is the visceral disgust reaction that many Americans feel toward homosexual sex, particularly gay anal sex, and the accompanying moral intuition that homosexuality and homosexual relationships are immoral.”).

46. See Eric M. Freedman, Giarratano is a Scarecrow: *The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1080 (describing *Bowers* as a “scarecrow”).

47. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 33, at 249.

48. 92 COLUM. L. REV. 1431 (1992).

49. *Id.* at 1461. Thomas, who himself is African-American, also noted that “[I]f people of color, gay men and lesbians always and everywhere have to live their lives on guard, knowing that they are vulnerable to attack at any time.” *Id.* at 1465.

50. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 32, at 252.

outlaws.”⁵¹ Following the case, “[t]he political struggle” then “moved to the states.”⁵² In the ten years following *Bowers*, a number of states abolished their anti-sodomy laws.⁵³

Moreover, as Eskridge has pointed out, while *Bowers* “marked the Supreme Court’s rejection of gay people’s constitutional politics, it came just as gay people’s normative politics was starting to show some success—persuading many Americans that homosexuality was at least a *tolerable variation* from the norm, one that ought not to be the basis for criminalization.”⁵⁴ And ten years after *Bowers*, a majority of the Court proved significantly more sympathetic to the claims of LGBTQ persons.

In *Romer v. Evans*,⁵⁵ the Court rejected an effort by the state of Colorado to deny gays and lesbians the protections of anti-discrimination laws. The state had passed, via statewide referendum, Amendment 2, which repealed existing anti-discrimination laws based on sexual orientation and precluded similar laws from enactment in the future. Writing for a 6-3 majority, Justice Kennedy declared that the state could not “deem a class of persons,” *i.e.*, gay men and lesbians, “a stranger to its laws.”⁵⁶ The Court, applying equal protection doctrine, found that Amendment 2 failed even “rational basis” review.

The Court found that the effect and point of Amendment 2 was to target a specific group of persons, and Justice Kennedy concluded that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁵⁷ Moreover, this Amendment was “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”⁵⁸ The Court found the initiative to be motivated by animus and that that animus-based lawmaking was illegitimate. As one scholar has noted, the focus on “animus” was “remarkable” because “it is the only time the Court has used that word to invalidate a law under equal protection.”⁵⁹ The importance of animus—and the challenges in defining it—will likely play a significant role in the federal Prop 8 litigation should the higher courts reach the merits of the case.

In his dissenting opinion, Justice Scalia disagreed with the majority’s rejection of moral opprobrium as legitimate and otherwise rejected the majority’s analysis. It is instructive to take a fresh look at that opinion in light of the recent Proposition 8 campaign.

In an opening salvo, Scalia claimed that “[t]he Court has mistaken a Kulturkampf for a fit of spite.” Rejecting the majority’s claims that that the initiative reflected a desire to harm, he claimed that it was instead “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts

51. NUSSBAUM, *supra* note 40, at 84.

52. *Id.* at 85.

53. *See id.*

54. Eskridge, Lawrence’s *Jurisprudence of Tolerance*, *supra* note 26, at 1035 (emphasis added).

55. 517 U.S. 620 (1996).

56. *Id.* at 635.

57. *Id.* at 634 (emphasis in original).

58. *Id.* at 635.

59. Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 718 (2008).

of a politically powerful minority to revise those mores through use of the laws.”⁶⁰

Scalia’s description of the Colorado voters as “tolerant” flew in the face of ballot materials evincing extreme homo-hostility. Furthermore, his reference to a “politically powerful minority” seemed deliberately deployed to foster resentment of gay men and lesbians, often stereotyped as members of a wealthy elite,⁶¹ and to paint them as making unreasonable demands. It also ignores the fact that to be LGBTQ under the *Bowers* regime was to be a criminal—meaning that political activism on behalf of one’s sexual orientation carried grave risks. Moreover, given that under Amendment 2, gay men, lesbian, and bisexual people lost all protections under the law, Scalia essentially suggested that a claim for protection was itself illegitimate.

Seeking to draw a distinction between discrimination based upon sexual orientation and other forms of discrimination, he claimed that the majority “places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.”⁶² Scalia thus sought deliberately to de-legitimate reliance on parallels with the earlier civil rights movement, encouraging wedge politics and the drawing of a false and invidious dichotomy between “blacks” and “gays,” a dichotomy that serves to erase the experiences of LGBTQ persons of color. Indeed, in the aftermath of Prop 8, the media pounced on the notion, ultimately proved false, that the “black vote” was responsible for the pass of Prop 8.

In a later part of his *Romer* dissent, Scalia sought to justify the moral opprobrium attached to homosexuality, and noted, with tacit disapproval, that gays and lesbians were seeking full social acceptance. In this part of his dissent, while he seemed to concede that some animus might be at work in Amendment 2, he also suggested that the animus was legitimate:

The Court’s opinion contains grim, disapproving hints that Coloradans have been guilty of “animus” or “animosity” toward homosexuality, as though that has been established as un-American But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct⁶³

Here, lumping homosexuality into the same category as murder and cruelty to animals avoids the important distinction that homosexuality does not harm—or even affect—others.⁶⁴ Implicit in Scalia’s rhetoric, however, is the idea of

60. 517 U.S. at 636 (Scalia, J., dissenting) (emphasis added).

61. *Cf. Levit, supra* note 22 at 885-86 (“Gay rights opponents thus denied discrimination by claiming that gay men and lesbians were affluent, well educated, and politically powerful.”).

62. *Romer*, 517 U.S. at 636 (emphasis added).

63. *Id.* at 644 (emphasis added).

64. The parallel between homosexual conduct and polygamy is perhaps more salient. Arguably polygamy, so long as all parties to the arrangement are consenting, likewise does no harm. On the other hand, one could certainly argue that historically, polygamy has contained earmarks of coercion of women and, moreover, that children of polygamous marriages face challenges absent in two-parent families. In addition, should polygamous marriages be recognized by the state, a number of logistical challenges would follow in terms of allocating benefits to multiple spouses and other such issues that are absent when full equality for LGBTQ persons is contemplated. A full consideration of the frequent

homosexuality as contagion.⁶⁵

Scalia claimed further that any animus on the part of Coloradans was “the smallest conceivable,”⁶⁶ a claim that, again, was belied by the virulently homophobic campaign that surrounded Amendment 2, which even included the sensationalist claims that gay people “eat feces and drink raw blood.”⁶⁷ To suggest the relevant tolerance of Coloradans, Scalia relied upon that fact that Colorado had repealed its anti-sodomy laws, but then noted that there is a “problem” when a society decriminalizes sodomy but seeks to retain “moral and social disapprobation” of homosexuality. The “problem” for those who wish to maintain “social disapprobation of homosexuality” is that “those who engage in homosexual conduct,” will not be satisfied simply with having their intimate acts decriminalized.⁶⁸ Rather, harnessing “political power much greater than their numbers” they seek “not merely a grudging social toleration, but full social acceptance, of homosexuality.”⁶⁹

Scalia specifically described “disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable ‘alternative life style.’”⁷⁰ One example of this phenomenon gained traction in the Prop 8 campaign some twelve years after *Romer*: what school children would be taught became a major issue.⁷¹

Scalia further argued that Amendment 2 merely prohibited “special treatment of homosexuals,” while leaving intact the baseline protection that all Colorado citizens are afforded under the Colorado Constitution. The dissent argued that the anti-discrimination law at issue simply made it more difficult for a group to receive “preferential” treatment, and that this was not a violation of equal protection.⁷² Justice Scalia would have upheld Amendment 2, deferring to the “legitimate government interest” of honoring the public majority’s decision to voice their moral disapproval of homosexuality by denying “special” rights.

As Levit has described, the “‘special rights’ rhetoric was behind several successful campaigns to repeal antidiscrimination ordinances,” including Amendment 2.⁷³ This was a “clever” campaign strategy, as Nussbaum puts it.⁷⁴

comparison between homosexuality and polygamy, however, is beyond the scope of this article. For a fuller discussion, see Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008) and Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66 (2011).

65. Eskridge, *Jurisprudence of Tolerance*, *supra* note 26, at 1049.

66. *Romer*, 517 U.S. at 644.

67. See NUSSBAUM, *supra* note 40, at 102 (“material about the degenerate lives and horrible sex practices of gays and lesbians was always present . . . I personally heard the testimony of Will Perkins in the bench trial of Amendment 2 on October 15, 1993. I heard him admit (somewhat reluctantly) to circulating yet other pamphlets that mentioned the classic [Paul] Cameron [of the Family Research Institute] claim that gays eat feces and drink raw blood. The proponents hired Cameron to help direct their strategy, well aware of his views”).

68. *Romer*, 517 U.S. at 645.

69. *Id.* at 646.

70. *Id.* at 645.

71. See *infra* notes 112-18 and accompanying text.

72. *Romer*, 517 U.S. at 638-39.

73. Levit, *supra* note 22, at 885.

74. NUSSBAUM, *supra* note 40, at 101.

Rather than foregrounding “naked disgust or dislike,”⁷⁵ the “leading theme was always that of ‘equal rights, not special rights.’ That gave ordinary citizens a reason to support the referendum without thinking that in so doing they were expressing dislike of gays and lesbians.”⁷⁶

Scalia also contended that enforcing public sexual morality was a legitimate government interest to which Amendment 2 was rationally related. In his view, the majority opinion could not be reconciled with precedents such as *Bowers v. Hardwick* and *Davis v. Beason*.⁷⁷ In the context of *Bowers*, Scalia pointed out that it was irreconcilable that a law preventing “special favor and protection” to persons with a tendency to engage in sodomy could be held unconstitutional when laws criminalizing sodomy themselves had been upheld as constitutional in *Bowers*.⁷⁸

Indeed, the majority had “ignored” *Bowers*, and *Romer* left the earlier case “in constitutional limbo.”⁷⁹ But seven years later, in *Lawrence v. Texas*,⁸⁰ the Supreme Court confronted its *Bowers* holding directly.

IV. LAWRENCE V. TEXAS

A. The Majority and Concurring Opinions

In *Lawrence*, adults John Lawrence and Tyron Garner were charged and convicted of violating a Texas statute prohibiting sexual intercourse between people of the same sex, a conviction that was sustained by the lower courts under the authority of *Bowers*.⁸¹

The *Lawrence* majority opinion, again authored by Justice Kennedy, relied on the Due Process Clause, finding that liberty “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁸² The law that was the subject of the case targeted homosexual sex specifically.⁸³ Petitioner Lawrence and his partner were prosecuted after police entered a private residence and found the men engaged in consensual sex in the privacy of a bedroom.⁸⁴

At the time that sodomy laws were deconstitutionalized, only twelve states besides Texas had anti-sodomy laws and three other states besides Texas applied

75. That theme was in the background. *See id.* at 102.

76. *Id.* at 101. For a further discussion of the “special rights” stratagem, see Samuel A. Morcosson, *The “Special Rights” Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137 (1995).

77. 133 U.S. 333 (1890) (upholding state constitutional provisions barring polygamous relationships).

78. *See* 517 U.S. at 642 (Scalia, J., dissenting); *see also id.* at 648-51 (discussing *Beason*).

79. Eskridge, *Jurisprudence of Tolerance*, *supra* note 26, at 1038.

80. 539 U.S. 558 (2003).

81. *See Lawrence v. State*, 41 S.W.3d 349 (2001).

82. *Lawrence v. Texas*, 539 U.S. at 562.

83. *Id.* at 563. The relevant state law provided that “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) (2003). “Deviate sexual intercourse” was, in turn, defined to include “any contact between any part of the genitals of one person and the mouth or anus of another” *Lawrence*, 539 U.S. at 563. Petitioner John Geddes Lawrence and his partner Tyron Garner, were specifically charged with engaging in anal sex.

84. *Id.* at 562-63.

their laws only to same-sex couples.⁸⁵ The laws were rarely enforced, with even Texas admitting in 1994 that, as of that time, it had not prosecuted anyone for private consensual sex.⁸⁶

In deciding the case, the Court explained that the majority in *Bowers* had erroneously framed the issue as being about the right to engage in a particular sexual conduct rather than, more accurately, as a person's right to privacy—including with regard to intimate sexual behavior. As Kennedy stated in the *Lawrence* majority opinion: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."⁸⁷ Criticizing *Bowers*, Justice Kennedy wrote that the case "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."⁸⁸

Justice O'Connor concurred in the opinion, contending that the Texas anti-sodomy law should have been invalidated under the Equal Protection Clause, which would have left *Bowers* intact because *Bowers* upheld a law that by its terms applied equally to both heterosexual and homosexual sodomy. Relying on a rationale similar to that deployed in *Romer*, Justice O'Connor used a rational basis analysis in finding unconstitutional a law that sought to target and harm a particular group based simply upon moral disapproval.⁸⁹ She found unconvincing the state's argument that the Texas law targeted only certain conduct, rather than gays and lesbians themselves. In her view, the conduct was so intimately related to gays and lesbians, it inevitably targeted that group.⁹⁰ She went on to support the use of only a "rational basis" review in the case by noting that there may be times that classification based on sexual orientation would be permissible.⁹¹ Indeed, O'Connor explicitly mentioned the preservation of a traditional definition of marriage as a possible legitimate state interest.

While O'Connor's opinion provided an appealing equal protection rationale, Professor Eskridge points out that O'Connor's approach would have retained *Bowers* "as a symbol of permanent gay inequality."⁹² Instead, the majority decision, explicitly criticizing and overruling *Bowers*, was of enormous symbolic importance to the LGBTQ community, but that symbol came at the cost of a "call to arms" in the form of another polemical dissent by Justice Scalia.

B. Scalia's Lawrence Dissent

In his dissent, Scalia objected to overruling *Bowers*, disagreed that the Texas anti-sodomy law violated the Due Process Clause, and argued that Justice O'Connor's concurrence that the law failed under the Equal Protection Clause was

85. *See id.* at 573.

86. *Id.*

87. *Id.* at 567.

88. *Lawrence v. Texas*, 539 U.S. 558 at 578 (2003).

89. *Id.* at 580.

90. *Id.* at 583.

91. *Id.* at 585.

92. Eskridge, *Tolerance*, *supra* note 26, at 1062.

also wrong.⁹³ Scalia persisted in framing the issue narrowly—considering only the right to engage in *homosexual sodomy*—rather than focusing on a more broadly-articulated privacy right. As pointed out in another recent article, “Professor Sharon Rush identifies this approach to the issue as the ‘collapsible error,’ in which the ‘underlying right is defined by the group targeted by the law.’”⁹⁴ Where the group is unpopular or has faced a history of discrimination as have LGBTQ persons, defining the right as being limited to the group itself makes it easier to reject the right, as the Court had in *Bowers*. Recall that Justice White framed the issue as “the right to engage in homosexual sodomy,” a right then more easily dismissed as “facetious” given the unpopularity of the group claiming the right.⁹⁵

In his *Lawrence* dissent, Scalia claimed that whether or not the laws targeted homosexuals, the history of criminalizing sodomy in general precluded a finding that homosexual sodomy is a fundamental right because Scalia defined a fundamental right as “deeply rooted in our Nation’s history and tradition.”⁹⁶ Because he found there was no “fundamental right” that would trigger heightened scrutiny, Scalia argued that moral disapproval of certain sexual conduct was a legitimate government interest sufficient to satisfy the rational basis test used in both the majority’s due process analysis and the concurrence’s equal protection analysis. Scalia gave examples of existing criminal laws against “fornication, bigamy, adultery, adult incest, bestiality, and obscenity,”⁹⁷ as other morality-based laws that would be vulnerable after *Lawrence*.

Scalia further argued that there was no equal protection violation because the Texas law equally prohibited all people, heterosexual or homosexual, from engaging in sexual acts with someone of the same sex. Scalia distinguished this case from the anti-miscegenation cases, because racial classifications were subject to “strict scrutiny” that required the state to show that the law was narrowly tailored to a “compelling state interest,” rather than to the mere “rational basis” test that all Justices and opinions had applied in the *Lawrence* case.⁹⁸

After rejecting the analysis of the majority and concurring opinions, Scalia scathingly accused the Court of undemocratically imposing its own value judgments:

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called

93. For Justice Scalia’s full dissent, see *Lawrence v. Texas*, 539 U.S. 558, 586-605 (2003).

94. Darmer and Chang, *supra* note 33, at 20-21. Rush explains that courts commit this error when they “conflate the equal protection question (“Are gays a suspect class?”) into the due process question (“Is there an underlying fundamental right?”) by defining the underlying right by the group targeted by the law” Sharon E. Rush, *Whither Sexual Orientation Analysis? The Proper Methodology when Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685,(2008). This tendency is seen by some courts in addressing marriage rights for same-sex couples: the right considered is framed as a right to “gay marriage,” rather than asking the question whether same-sex couples have a right to marriage. See generally *id.*

95. See William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1053-54 (2004) (“By unnecessarily focusing on ‘homosexual sodomy,’ Justice White’s opinion not only revealed a bias in its application of the liberty principle, but sanctioned (and perhaps encouraged) state and private discrimination that exacerbated sodomy laws’ tension with the Fourteenth Amendment’s anti-caste principle.”).

96. 593 U.S. at 596 (Scalia, J., dissenting).

97. *Id.* at 599.

98. See *id.* at 600.

homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct . . . the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.⁹⁹

Scalia was explicit in noting that:

[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.¹⁰⁰

The notion of the need for “protection” from LGBTQs is a theme that has played out in political campaigns, as discussed below.

Noting that he had “nothing against homosexuals . . . promoting their agenda through normal democratic means,” Scalia issued a warning call as to the implications of *Lawrence*. In his view, “homosexual marriage” would be the likely result of the Court’s ruling. While “[t]he Court today pretends . . . that we need not fear judicial imposition of homosexual marriage . . . [d]o not believe it.”¹⁰¹ Rather, “[i]f moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ?”¹⁰²

V. THE IMPACT OF SCALIAN RHETORIC ON THE PROP 8 CAMPAIGN

In their article on originalism as a political practice, Robert Post and Reva Siegel note that Scalia’s warning that delegitimizing moral disapprobation of homosexuality would lead inexorably to marriage for same-sex couples are “inflammatory words,” which seem “explicitly addressed to the general public and designed to mobilize political resistance to the Court’s decision.”¹⁰³ Indeed, “[w]ithin days Scalia’s words were quoted by right wing activist Randall Terry in a letter seeking to raise funds for the impeachment of the Justices who had joined the *Lawrence* opinion. Opposition to same-sex marriage has since become a major site of political mobilization for conservative groups.”¹⁰⁴

Focusing specifically on the Proposition 8 campaign, there were two major campaign themes that can be traced to arguments articulated by Scalia in his *Romer* and *Lawrence* dissents. The first was the notion that the California Supreme Court

99. *Id.* at 602.

100. *Id.*

101. *Id.* at 604.

102. *Id.* at 604-05.

103. Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM. L. REV.* 545, 567 (2006).

104. *Id.* at 567-68.

had acted undemocratically to countermand the will of the people in California. The second was the notion that Prop 8 “protects” children from being taught in public schools that marriage between same-sex couples is “the same” as traditional marriage and further protects Californians from being forced to go beyond mere “tolerance” of “gay lifestyles.”¹⁰⁵

A. Culture Wars and Activist Courts

A major Scalian theme in both *Romer* and *Lawrence* was the illegitimacy of the Court stepping in to resolve “cultural” issues. By framing the demand for LGBTQ equality as a “cultural” issue rather than as an issue involving rights protection, Scalia allows wide space for criticism of the Court as “activist” and counter-majoritarian. While these Scalian themes are by no means unique to the context of LGBTQ rights, they are particularly susceptible, in this context, to exploitation in the political arena.

At an earlier Lat Crit conference, Martha McCluskey pointed out that Scalia’s approach in *Romer* and *Evans* bears similarities to the Court’s approach in *Plessy v. Ferguson*, where the Court concluded that racial segregation was a “social” matter, enabling the Court to “dismiss the resulting racial inequality as too contingent and personal to be a serious constitutional problem.”¹⁰⁶ Labeling a claim to rights as a “cultural” or “social” matter instantly and effectively serves to delegitimize not only those making the claims—gay and lesbian couples—but also the courts willing to enforce those rights.

One of the prevailing themes of the Prop 8 campaign was the notion that the California Supreme Court had acted in an “activist” and illegitimate manner. The voter initiative was thus conceived as the public “taking back” their right to define marriage as they saw fit. Because of the context in which Prop 8 arose, this was a particularly resonant argument. The voters, after all, had passed Prop 22 in 2000, defining marriage as between a man and a woman. The California Supreme Court invalidated that initiative in 2008. It was a perfect context for setting up the Court as acting in a “countermajoritarian” manner, or against the “will of the people.”

Again, when the right being claimed is seen as a “social” or “cultural” issue and not as a fundamental civil right, the claim that the court has acted in a “countermajoritarian manner” has powerful resonance. It fits the notion that there is a sphere for the courts and a sphere for popular will, a strongly articulated theme of Ken Starr in the oral arguments defending Prop 8 before the California Supreme Court. Going back to *Romer*, Scalian rhetoric suggests that courts that recognize rights for LGBTQs are going outside their proper sphere of constitutional jurisprudence and interfering, inappropriately, in a matter that is simply a “cultural issue.” Gay and lesbian couples have no proper recourse in the courts, Scalia suggests. They are rather limited to the political sphere, and to convincing their fellow citizens that rights should be extended to them as a matter of grace.

In a recent article, Shannon Minter, legal director of the National Center for Lesbian Rights and the lead attorney in the legal battle against Prop 8, explains that

105. See Lydia Edwards, *Commentary on Proposition 8: Much Ado About Nothing or a Wake Up Call to do Something*, 5 MOD. AM. 50 (2009) (discussing Prop 8 campaign).

106. McCluskey, *supra* note 6, at 1296.

the “standard account” of equality and democracy, rooted in the thinking of Alexander Bickel, sets up the view that vindication of equality is in inevitable tension with democratic norms.¹⁰⁷ As Barry Friedman has argued,

[f]or Bickel, and virtually everyone who followed him, the bedrock premise of American political life is democracy, by which Bickel meant some sort of system of governance representative of the will of the people. When courts exercise the power of judicial review to overturn decisions made by other branches of government, their acts appear to conflict with the bedrock premise of representative governance.¹⁰⁸

Arguably, this “countermajoritarian difficulty” is even more problematic when courts act directly upon initiatives voted upon directly by the people, such as Prop 8. In essence, the federal district court in *Perry* countermanded the California majority’s view that “marriage” should be reserved for heterosexual couples by finding, *inter alia*, a violation of equal protection, setting up a conflict between “democracy” and “equality,” whereby the latter can be achieved only at the expense of the former.

Minter argues this view of equality and democracy as being in tension is necessarily incomplete. Building on the work of John Hart Ely, Minter argues that equality is not just an individual right, but that equality itself is “a critical condition for legitimate democratic government.”¹⁰⁹ Equality is thus posited not as an individual right that must be won at the expense of democratic norms, but as itself being foundational to participation in the political process itself. In the context of the current California marriage struggles, the majority’s “preferences” have been inevitably and importantly shaped by the history of official discrimination against LGBTQ persons; LGBTQ persons have suffered at the ballot box in part *because* voters have internalized negative stereotypes that have been perpetuated by official action.

Simplistic appeals to the “will of the people” elide this difficulty. Indeed, the strident rhetoric of Scalia’s dissents, including his references to a “law profession culture” that has signed on to a “homosexual agenda,” deliberately sets up calls for equality by LGBTQ persons as inherently selfish and at odds with democratic values. This notion is premised on a very particular and narrow viewpoint, however, about what notions of democracy mean. Moreover, political campaigns, particularly in our “soundbite culture,” do a particularly poor job of theorizing and going beyond simplistic appeals to the “will of the people.” The Prop 8 campaign simply assumed that the will of the people should predominate on the question of marriage equality.

107. Shannon Price Minter, *The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence*, 19 S. CAL. REV. L. & SOC. JUST. 89, 101-04 (2010).

108. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 579 (1993) (critiquing standard account of American constitutionalism); see also Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1015 (2002) (defining “countermajoritarian difficulty” as fact that “[u]nconstrained judicial interpretation of the Constitution is problematic because federal judges are not democratically accountable – at least not after they are confirmed”).

109. Minter, *supra* note 107, at 104.

B. "Protection"

This notion of militant anti-democratic forces at work then plays into the next major theme deployed during the Prop 8 campaign: the suggestion that children and ordinary Californians need to be "protected" from a "homosexual agenda." Notions of parental autonomy and the innocence of children were deployed in subtle ways during the Prop 8 campaign, which rather than relying on an explicitly homophobic message, suggested that traditionalists would become victims if Prop 8 were not passed.

Recall the moral "signaling" role that sodomy laws represented before *Lawrence*. As previously discussed, at the time that sodomy laws were deconstitutionalized in *Lawrence*, only twelve states besides Texas had anti-sodomy laws.¹¹⁰ Accordingly, the law acted primarily as a symbol or signal of moral opprobrium. Strongly animating Scalia's dissents in both *Romer* and *Lawrence* was the notion that such moral opprobrium is appropriate. In the Prop 8 campaign, those opposed to marriage equality fought strenuously to maintain a distinction between the moral standing of same-sex and opposite-sex couples. Thus, while the mainstream Prop 8 campaign did not make explicit appeals to homophobia, it did make appeals to the importance of drawing a distinction between same-sex and opposite-sex couples. That distinction must necessarily be grounded in a view of the moral superiority of opposite-sex couples, as Judge Walker's opinion made clear.

Running through both the *Romer* and *Lawrence* dissents was an explicit message that moral disapproval of homosexuality is legitimate. Indeed, Scalia was pointed in noting, in *Lawrence*, that many Americans do not want openly gay persons as business partners, scoutmasters, teachers or boarders because they want to "protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive."¹¹¹ Animating this view is no doubt an underlying distrust or disgust directed at LGBTQ persons, even if unarticulated.¹¹²

While the notion of "protection" is ill-defined here by Scalia, elsewhere he articulates a particular concern that also played out in the Prop 8 campaign: the notion that children would be taught, in schools, that marriage between same-sex couples was "the same" or "just as good" as traditional heterosexual marriage.¹¹³ One particularly powerful advertisement deployed by the Prop 8 campaign featured a lesbian wedding attended by a group of schoolchildren. The camera panned in on a child "looking wide-eyed and almost frightened."¹¹⁴ Although the children attended the wedding with the express approval of their parents, the campaign suggested just the opposite: that "exposure" to a wedding between same-sex partners was being forced on unwilling children and their parents.¹¹⁵

The response by the *No on 8* campaign to Prop 8's theme of the need to

110. See *supra* notes 85-86 and accompanying text.

111. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003).

112. See, e.g., Redding, *supra* note 45.

113. See *supra* notes 62-63 and accompanying text.

114. M. Katherine Baird Darmer, "Activist" Courts, Misleading Wedge Politics and the Tragedy of Proposition 8, 14 NEXUS: CHAP. J. L. & POL'Y 69, 74 (2009).

115. The parents of the children were outraged that their children were being exploited by the Prop 8 campaign. See *id.*; see also *Parents outraged after kids shown in Prop 8 ad*, <http://abclocal.go.com/kgostory?section=news/local&id=6471449> (last accessed on September 30, 2011).

protect children was not particularly effective. Rather than, for example, showcasing the many families headed by same-sex couples and the children thriving in those families, the opposition to Prop 8 took a more cautious approach. In response to the Prop 8 campaign's highly effective ads suggesting that innocent children would be prematurely exposed to sexual content in schools, for example, the *No on 8* campaign ran an ad pointing out that "schools aren't required to teach anything about marriage."¹¹⁶ This failed to address parents' concerns head-on and failed to directly affirm the legitimacy of families headed by same-sex couples.

In sharp contrast, Judge Vaughn Walker, in his *Perry* decision, attacked the arguments made by Prop 8 supporters head-on. In a carefully researched opinion, he thoroughly exposed the Prop 8 campaign's arguments for what they were: fear-mongering,¹¹⁷ and pointed out that individual moral preferences that are not based in evidence cannot form a rational basis for discrimination.¹¹⁸ In a careful, evidence-based opinion, he established that, indeed, there is "no real difference" between same-sex and opposite-sex couples in terms of commitment level, ability to parent, or the like.¹¹⁹

While it remains to be seen whether Judge Walker's opinion will survive higher court review, Scalia's success in the political sphere may sow the seeds of the undoing of his own jurisprudential preferences. Scalia, after all, frankly suggested in *Lawrence* that if morals-based lawmaking is rejected, then there may be no rational basis to prevent gay and lesbian couples from marrying. Arguably, Prop 8 came down to a view that opposite-sex couples were simply, in some ill-defined way "better," such that same-sex couples could legitimately be excluded from the institution.

At the Ninth Circuit Prop 8 oral arguments, there was some suggestion from the bench that the judges may be sympathetic to the notion that, in California, which currently bestows all of the rights and benefit of marriage upon same-sex domestic partners, withholding simply the label "marriage" may be based upon nothing but animus.¹²⁰ Under *Romer*, of course, animus-based distinctions should not hold up if the federal courts are true to that precedent. Whether they will be remains to be seen.

VI. CONCLUSION

As the marriage case winds its way through the federal courts, further political fights for the rights of LGBTQs are inevitable. As the debate about marriage

116. See The Prop 8 Report (analyzing highly effective ads run by the Yes on 8 campaign that targeted parents and exploited fears related to children and concluding that No on 8 campaign response was ineffectual) (<http://prop8report.lgbtmentoring.org/>). All of the campaign ads, including the so-called "O'Connell Ad" that responded to the Yes on 8's "Prince" ad, can be viewed by accessing the Prop 8 Report online (last visited by author October 1, 2011).

117. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 936-37, 1002 (citing Findings of Fact ("FF") 33), 1003 (citing FF 74, 77-80).

118. *Id.* at 1003 (citing FF 76, 79-80; *Romer*, 517 U.S. at 634).

119. *Id.* at 934-35, 993 (citing FF 48); See also FF 32.

120. Maura Dolan & Jessica Garrison, *9th Circuit Judges Explore Narrow Routes to Reinstate Gay Marriage*, L.A. TIMES, Dec. 7, 2010, at A1 ("Judge N. Randy Smith, a Republican appointee and the panel's most conservative member, said he was concerned that the particular history of Proposition 8 and California's strong laws in favor of gay rights might undermine legal pinning for the measure. He noted that California laws give gays virtually all the rights of marriage, and that Proposition 8 did not infringe on those. 'We're left with a word — 'marriage,' Smith said. 'What is the rational basis for that?'").

equality continues, it is important to keep in mind that not only is the Supreme Court affected by politics and popular culture, but popular culture and politics are likewise affected by Supreme Court rhetoric: both majority and dissenting. Justice Scalia has proved a particularly formidable force in shaping the debate about LGBTQ rights, not only in the courts, but also in the political arena. And while Scalia himself may have been simply further developing arguments first articulated in anti-gay political campaigns, a Supreme Court Justice is in a powerfully unique position to put a legitimizing imprimatur on anti-gay sentiment. While the mainstream Prop 8 campaign did not rely on brochures such as those used during Colorado's Amendment 2 that relied explicitly on disgust at the alleged practices of gays and lesbians, it did rely heavily on appeals to the "will of the people" and then played on those people's implicit fears of LGBTQ persons.

Friedman has pointed out that "[c]ourts serve to facilitate and mold the national dialogue concerning the meaning of our Constitution;"¹²¹ individual Justices, especially those attuned to the political force of judicial rhetoric, may well have the political arena in mind when they craft their opinion—dissenting as well as majority. An understanding of that dynamic is critical in moving ahead with greater rights recognitions in the political sphere.

121. Friedman, *Dialogue and Judicial Review*, *supra* note 31, at 581.