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## THE VIRTUE OF OBSCURITY

COLIN STARGER\*

IN *Something to (Lex Loci) Celebrationis?*,<sup>1</sup> Professor Meg Penrose echoes some recent criticism of Justice Kennedy's opinion in *United States v. Windsor*.<sup>2</sup> In particular, Professor Penrose highlights the view of those who "have been quick to criticize Justice Kennedy for his lack of clarity, if not fidelity, to constitutional review and applications of constitutional levels of scrutiny."<sup>3</sup> Though her article does not focus on "Justice Kennedy's draftsmanship,"<sup>4</sup> Professor Penrose nonetheless calls Kennedy's review standard "difficult to discern" and bemoans the opinion's constitutional ambiguity.<sup>5</sup> Professor Penrose thus evidently shares the common frustration—expressed by supporters and opponents of same-sex marriage alike—at what may be called Kennedy's "doctrinal obscurity."

This frustration is understandable. After all, Justice Kennedy plainly concludes that Section 3 of the Defense of Marriage Act (DOMA) "violates basic due process and equal protection principles applicable to the Federal Government," but he does not reach this conclusion via any traditional doctrinal test for substantive due process or equal protection.<sup>6</sup> Thus, Kennedy does not ask whether DOMA burdens a right "deeply rooted in this Nation's history and tradition," nor does he identify sexual orientation as a suspect or semi-suspect classification, nor does he subject DOMA to explicit rational basis review.<sup>7</sup> In short, Justice Scalia's characterization of the majority's analysis as "nonspecific hand-waving" seems on the money.<sup>8</sup>

Yet this line of critique assumes that the Court should always aspire to specificity and clarity in its doctrinal analysis. In this brief response, I seek to challenge that assumption and argue for the occasional virtue of doctrinal obscurity. My argument here concerns situations like that presented by DOMA

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\* Assistant Professor, University of Baltimore School of Law. Thanks to Meg Penrose for inspiring this essay and inviting me to participate in the discussion. Thanks too to the editors and staff at the *Villanova Law Review* for their great work and endless patience. Errors, quite naturally, are mine alone.

1. Meg Penrose, *Something to (Lex Loci) Celebrationis?*, 59 VILL. L. REV. TOLLE LEGE 1 (2013), available at [http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/09/Penrose\\_FINAL.pdf](http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/09/Penrose_FINAL.pdf).

2. 133 S. Ct. 2675 (2013).

3. Penrose, *supra* note 1, at 4. In fact, as Professor Penrose notes, this criticism extends to Justice Kennedy's other two significant gay rights decisions as well—*Romer v. Evans* and *Lawrence v. Texas*. See *id.* at 3.

4. *Id.* at 4.

5. See *id.* at 2.

6. *Windsor*, 133 S. Ct. at 2693; see also *id.* at 2693–96.

7. See *id.* at 2707 (Scalia, J., dissenting). Cf. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (offering deeply-rooted-in-tradition test for substantive due process claims); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (discussing "quasi-suspect classification" equal protection analysis but rejecting its applicability to mental retardation).

8. See *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

where the Court confronts ugly social realities that have become codified in unpleasant laws or distasteful precedents. Like speaking with a homophobic relative at a series of family dinners, these situations are inherently awkward and sometimes less-than-direct words are the best way to move the conversation in a productive direction. Sometimes respect for etiquette counsels that the Court should dance around a little before declaring: “The Constitution does not allow this.” In my view, Justice Kennedy’s obscurity in *Windsor* is justified by such doctrinal etiquette.

To conduct this inquiry, I examine Justice Kennedy’s *Windsor* opinion from a different perspective. Though obtuse in its relationship to traditional tests governing due process or equal protection, the opinion is hardly ungrounded in law or untethered to precedent. Indeed, I agree with Professor Penrose’s assessment that “the better argument [is] that *Windsor* is the germinated outgrowth of the Court’s previous jurisprudence relating to gay rights.”<sup>9</sup> In striking down a law undeniably hostile towards same-sex interests, the result in *Windsor* follows the big-picture pattern of *Romer v. Evans*<sup>10</sup> and *Lawrence v. Texas*.<sup>11</sup> As in *Windsor*, Justice Scalia energetically dissented in both *Romer* and *Lawrence*. Analysis of the ongoing argument between Kennedy and Scalia in the two earlier cases provides the ultimate context for Kennedy’s polite recourse to doctrinal obscurity in *Windsor*.

#### I. *ROMER v. EVANS*

In *Romer*, the Court struck down Colorado’s Amendment 2. Though the Amendment purported to only deny homosexuals “special rights,” the Court majority led by Kennedy found that the law actually imposed a special disability on LGBT persons, was “born of animosity towards [them],” and therefore violated equal protection.<sup>12</sup> In dissent, Justice Scalia succinctly stated his grounds for disagreement:

In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.<sup>13</sup>

To many modern ears, especially those of younger readers, Scalia’s words might sound absurd or even hateful. In this day and age, homophobia is in fact widely considered every bit as reprehensible as racism or religious intolerance. Yet in 1996, nearly two decades ago, a significant portion of the country felt

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9. Penrose, *supra* note 1, at 1.

10. 517 U.S. 620 (1996); *see also id.* at 635 (striking down Colorado’s Amendment 2 on equal protection grounds).

11. 539 U.S. 558 (2003); *see also id.* at 578–79 (striking down Texas law criminalizing same-sex intercourse).

12. *See Romer*, 517 U.S. at 631, 634–35.

13. *Id.* at 636 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

just as Scalia did.

Scalia's reference to *Bowers* proves the point. In 1996, it was still constitutional under *Bowers* to criminalize same-sex intercourse. Laws across the country did just that. So in his *Romer* dissent, Scalia bluntly reasoned that the discrimination against homosexuals authorized by *Bowers a fortiori* permitted the discrimination represented by Amendment 2.<sup>14</sup> As a purely logical matter, this argument made sense. Yet the logic depended on an ugly precedent that reflected an unpleasant reality about majority attitudes towards gays and lesbians. In his dissent then, Scalia could effectively fashion himself as a defender of democracy and majority rule even as he peppered his opinion with sarcastic and paranoid references to "alternative life style[s]" and gay political influence.<sup>15</sup>

This presented an awkward situation for Justice Kennedy and the *Romer* majority. The Court had an arguably homophobic precedent on its own books that seemingly bolstered the constitutionality of the arguably homophobic Amendment 2. Given that *Bowers* was only ten years old, frankly disavowing it because of its regressive attitudes risked embarrassing current and recent members of the Court, as well as harming the Court's reputation. And answering all of the questionable arguments and insinuations in Justice Scalia's dissent would only give those unpleasant remarks credence.

Luckily, Justice Kennedy found a polite way out of the bind. The *Romer* majority could simply ignore *Bowers* because it was a substantive due process case—it had rejected the "claimed constitutional right of homosexuals to engage in acts of sodomy."<sup>16</sup> *Romer* could be decided on equal protection grounds. In good conscience then, the Court could sidestep the whole *Bowers* mess as irrelevant. Of course, this did not take care of the *Bowers* problem. (That would have to wait until *Lawrence*.) Instead, *Romer* delicately moved the constitutional conversation in a helpful direction.

Of course, deciding *Romer* on equal protection grounds did not solve all the Court's doctrinal problems. Traditional "tiers of scrutiny" jurisprudence bore little promise to strike down Amendment 2 because LGBT persons had never been recognized as a suspect class. Given prevailing views and the absence of textual support, granting this recognition would have appeared heavy-handed, if not also anti-democratic. Yet, once again, Justice Kennedy found a discrete way out. First, he characterized Amendment 2 as *sui generis* and used this to justify his own novel decision:

Amendment 2 confounds [the] normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.<sup>17</sup>

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14. See *id.* at 641 (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)).

15. See *id.* at 645–46, 652–53.

16. See *Bowers*, 478 U.S. at 190–91.

17. *Romer*, 517 U.S. at 633.

Second, Kennedy dug deep into the United States Reports and unearthed precedents that supported his approach to equal protection.<sup>18</sup> Two of the precedents cited by Kennedy—*Skinner v. Oklahoma*<sup>19</sup> and *Department of Agriculture v. Moreno*<sup>20</sup>—warrant closer attention because they represent earlier examples of virtuous doctrinal obscurity.

#### A. *Skinner v. Oklahoma*

Decided in 1942, *Skinner* involved a challenge to Oklahoma's Habitual Criminal Sterilization Act (OHCSA).<sup>21</sup> OHCSA provided for forced vasectomies for men (and salpingectomies for women) found to have committed three felonies involving moral turpitude. However, the OHCSA excluded as qualifying crimes certain white-collar felonies including embezzlement and violation of the revenue laws.<sup>22</sup> The OHCSA was thus an obvious piece of class legislation built upon a rather disgusting eugenics premise.<sup>23</sup> The problem facing a Court inclined to strike the law down, however, was the existence of its own rather disgusting precedent seemingly authorizing the OHCSA—*Buck v. Bell*.<sup>24</sup>

In 1927, none other than Justice Oliver Wendell Holmes penned the opinion for the Court upholding a forced sterilization performed upon Carrie Buck, an allegedly second-generation “feeble-minded white woman” residing in a state institution.<sup>25</sup> The Commonwealth of Virginia sought to perform a salpingectomy before releasing her from the institution, and she challenged this action on due process and equal protection grounds. In *Buck v. Bell*, Holmes infamously wrote:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.<sup>26</sup>

Unlike his many other aphorisms, Holmes's pithy words here have not aged well. Yet in fairness, Holmes only reflected a then commonly-shared confidence in the morality and sensibility of eugenics.

Returning to *Skinner*, the delicate nature of the doctrinal task then before

18. *See id.* at 634–35 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) and *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

19. 316 U.S. 535 (1942).

20. 413 U.S. 528 (1973).

21. *See Skinner*, 316 U.S. at 536.

22. *See id.* at 537.

23. The class-driven nature of the statute becomes even more apparent when considering that the petitioner in *Skinner* had “stealing chickens” as one of his qualifying felonies. *See id.*

24. 274 U.S. 200 (1927).

25. *See id.* at 205, 207 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

26. *Id.* at 207.

the Court becomes apparent. Striking down the Oklahoma law on conventional substantive due process grounds would require overruling a precedent penned by one of the Court's most respected justices and revisiting his rather disturbing reasoning. So instead, Justice Douglas turned to equal protection. This was a surprising move at the time because, as Douglas recognized, "claim[s] that state legislation violate[] the equal protection clause of the Fourteenth Amendment [are] 'the usual last resort of constitutional arguments.'"<sup>27</sup> Such arguments almost invariably failed.<sup>28</sup> Yet Douglas nonetheless concluded that the Oklahoma law violated equal protection because "[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination."<sup>29</sup>

To reach this result, Douglas introduced new doctrinal language that eventually became extremely influential. After acknowledging the importance of deferring to the legislature, Douglas described marriage and procreation as "fundamental to the very existence and survival of the race" and warned that "evil or reckless hands" could use sterilization programs to "cause races or types which are inimical to the dominant group to wither and disappear."<sup>30</sup> Douglas then wrote:

We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that *strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.*<sup>31</sup>

Critically, the italicized text represents the doctrinal origin of the modern strict scrutiny test.<sup>32</sup> In other words, Douglas's notion of strictly scrutinizing classifications that burden fundamental interests like marriage and procreation was untethered to precedent.

Today we might praise Justice Douglas for his innovation, but at the time he could have been criticized for not utilizing traditional doctrinal tests.<sup>33</sup> Indeed, given that his "strict scrutiny" phrase would not have had nearly the

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27. *Skinner*, 316 U.S. at 539 (quoting *Buck*, 274 U.S. at 208).

28. *See id.* at 540 (describing cases where equal protection arguments failed).

29. *Id.* at 541.

30. *Id.*

31. *Id.* (emphasis added).

32. After *Skinner*, individual members of the Court started to pick up on *Skinner*'s proposed "strict scrutiny" test in the sixties. *See Poe v. Ullman*, 367 U.S. 497, 548 (1967) (Harlan, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (White, J., concurring). By the seventies, however, the doctrine had been adopted by the majority and developed into something resembling its current form. *See, e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 nn.39–40 (1973).

33. This, of course, captures a problem inherent in any legal system rooted in *stare decisis*. For further discussion, see Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in *PRECEDENT ON THE U.S. SUPREME COURT 21–24* (Christopher J. Peters ed., forthcoming 2014). A draft of this chapter is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2251556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2251556).

familiar ring that it does now, Douglas could have been fairly accused of being obscure. This demonstrates a key characteristic of doctrinal obscurity—in a system where words live long past their authors, it is a relative concept. What once sounds obscure may later become accepted common sense. And, sometimes the initial impulse towards obscurity may be understood as a means of avoiding direct conflict with words that once rang true but now ring false or ugly.

#### B. Department of Agriculture v. Moreno

Now let us consider the other key cite made by Kennedy in *Romer* to justify his unusual brand of equal protection analysis—to Justice Brennan’s 1973 majority opinion in *Moreno*. In *Romer*, Kennedy cited *Moreno* for the proposition that equal protection prohibits laws that evince “a bare . . . desire to harm a politically unpopular group.”<sup>34</sup> This notion that a law motivated by animus towards unpopular groups violates equal protection played a vital role in Kennedy’s *Romer* opinion. Yet the concept’s doctrinal origins are again obscure.

*Moreno* concerned the constitutionality of an amendment to the federal Food Stamp Act that denied food stamps to people in households composed of unrelated individuals.<sup>35</sup> Justice Brennan noted that “traditional equal protection analysis” would only require that the legislative classification in the amendment be “rationally related to a legitimate government interest.”<sup>36</sup> Brennan then pointed to the amendment’s legislative history, which revealed that the “amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>37</sup> (Here it is worth recalling that this amendment passed in 1971 when those freaked-out hippies really scared The Man). For Brennan, this went beyond the pale. He penned the line recalled above: “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>38</sup>

The result in *Moreno* was disputed. Justice (not yet Chief) Rehnquist argued in dissent that the amendment could easily be sustained under traditional rational basis analysis with its generous deference to legislative classifications.<sup>39</sup> As he very reasonably argued, the asserted congressional concern with the fraudulent use of food stamps was entirely rational, even if the Congress attacked the problem with “a rather blunt instrument.”<sup>40</sup> Despite this

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34. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (quoting U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)). As discussed below, Justice Kennedy cited *Moreno* for the exact same proposition in *Windsor*. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Moreno*, 413 U.S. at 534–35)).

35. See *Moreno*, 413 U.S. at 529.

36. *Id.* at 533.

37. *Id.* at 534 (citing statement of Senator Holland).

38. *Id.*

39. See *id.* at 545–46 (Rehnquist, J., dissenting).

40. See *id.*

analysis, Rehnquist's dissent does read persuasively today because it did not address at all Brennan's now-famous and intuitively appealing argument that laws motivated by animus offend equal protection. Perhaps Rehnquist ignored this argument because Brennan provided no doctrinal justification to back it up. Why contradict an argument based only on Brennan's own say-so rather than precedent? It must have seemed obscure.

Yet Brennan's approach has survived and even thrived. Though it still does not fit neatly with traditional rational basis analysis,<sup>41</sup> the idea that animus towards unpopular groups can violate equal protection is now firmly entrenched in the Court's precedent. Of course, Justice Kennedy's invocation of *Moreno* in *Romer* very much helped the entrenchment process along.<sup>42</sup> Perhaps Kennedy's subsequent re-invocation of *Moreno* in *Windsor* marks entrenchment's last step—making *Moreno* mainstream. The point I wish to stress, however, is that *Moreno*, as well as *Skinner*, were doctrinally obscure at the time they were decided. Yet this did not prevent the cases from helping to move the constitutional conversation in new—and, to my mind, positive—directions.

I similarly believe that Justice Kennedy's obscurity in *Romer* also helpfully moved the Court's gay rights jurisprudence. To appreciate how, we must turn to the last pre-*Windsor* piece in the Court's gay-rights puzzle—*Lawrence v. Texas*.<sup>43</sup>

## II. *LAWRENCE v. TEXAS*

Decided in 2003, the *Lawrence* Court forthrightly overruled *Bowers v. Hardwick* and struck down a Texas law criminalizing same-sex intercourse on substantive due process grounds.<sup>44</sup> While the bottom-line of Justice Kennedy's majority opinion was crystal clear, the doctrinal path he followed to reach this result was less so.

As Justice Scalia pointed out in his dissent, the Court did not strike down the Texas law via the well-known test from *Washington v. Glucksberg*<sup>45</sup> that grants substantive due process protection only to fundamental rights “deeply rooted in this Nation's history and tradition.”<sup>46</sup> Instead, Kennedy argued that “our laws and traditions in the past half century are of most relevance here,” and that the traditions “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in

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41. For an early critique suggesting that *Moreno* and its progeny be considered as employing a heightening form of scrutiny rather than rational basis, see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460, 478 n.4 (1985) (Marshall, J., concurring in judgment and dissenting in part).

42. *City of Cleburne* is the other major case that facilitated this entrenchment process. See *id.* at 446 (citing *Moreno*, 413 U.S. at 535).

43. 539 U.S. 558 (2003).

44. See *id.* at 578–79.

45. 521 U.S. 702 (1997).

46. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721 (internal quotations omitted)).



matters pertaining to sex.”<sup>47</sup> Though appealing, the idea that substantive due process gives special protection to private sexual choices was a new take on prior jurisprudence.

To establish the existence of “emerging awareness” in the Court’s own doctrine, Kennedy relied on two principal cases—*Planned Parenthood v. Casey*<sup>48</sup> and *Romer v. Evans*.<sup>49</sup> Kennedy also argued that these same cases eroded the foundations of *Bowers* and authorized its overruling.<sup>50</sup> Kennedy’s reference to *Casey* was fair enough. *Casey* had reaffirmed a woman’s right to choose an abortion, and in so doing, suggested that due process liberty protected “intimate and personal choices” in matters of personal autonomy.<sup>51</sup> On the other hand, Kennedy’s invocation of *Romer* showed a little cheek. Kennedy argued that *Romer* challenged the central holding of *Bowers* because:

[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private spheres.<sup>52</sup>

Here, Kennedy is being nothing if not obscure.

As discussed above, Kennedy had steadfastly ignored *Bowers* in *Romer*. He had thus ignored Scalia’s logical argument that the constitutionality of criminalizing same-sex intercourse justified other less harsh discriminations against homosexuals. Now in *Lawrence*, Kennedy deployed the precise inverse logical argument—reasoning that because *Romer* prohibited certain invidious discriminations against homosexuals, the even harsher discrimination of criminalizing homosexual conduct must also be unconstitutional. This is quite a rhetorical sequence.

Yet Kennedy’s discursive gymnastics have to be put in the context of Justice Scalia’s ongoing and unapologetic defense of the majority’s supposedly democratic prerogative to oppose gay rights and condemn LGBT people. During the course of his *Lawrence* dissent, Justice Scalia analogized same-sex intercourse to incest, prostitution, and bestiality.<sup>53</sup> He chided the majority for signing on to “the so-called homosexual agenda . . . directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”<sup>54</sup> This was illegitimate, per Scalia, because:

[m]any Americans do not want persons who openly engage in

47. *Id.* at 571–72 (majority opinion).

48. 505 U.S. 833 (1992); *see also Lawrence*, 539 U.S. at 573–75 (discussing *Casey*, 505 U.S. at 851).

49. 517 U.S. 620 (1996); *see also Lawrence*, 539 U.S. at 573–75 (discussing *Romer*, 517 at 624, 634).

50. *See Lawrence*, 539 U.S. at 576.

51. *See Casey*, 505 U.S. at 851.

52. *Lawrence*, 539 U.S. at 575.

53. *See id.* at 590 (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”).

54. *Id.* at 602.

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.<sup>55</sup>

In the end, Scalia's argument boiled down to the idea that the Court was acting in a fundamentally undemocratic manner—"imposing [its] views in absence of democratic majority will."<sup>56</sup>

In a literal sense, Scalia has a valid point. The *Lawrence* Court did strike down democratic legislation and many Americans did embrace homophobic views in 2003 (as many, though no doubt less, do today). Yet such logic would have upheld democratically enacted laws prohibiting inter-marriage at a time when many Americans embraced racist beliefs. Of course, Scalia would likely reject the miscegenation analogy because prohibitions against race-based discriminations find textual support in the Constitution. This is true so far as it goes, but ignores the fact that the relevant constitutional amendments became law after a bloody civil war rather than through truly democratic deliberation.

Consider this: *The democratic process cannot solve all constitutional problems. Minority rights cannot be completely protected by relying on constitutional text and traditional doctrinal tests.* However true these observations may be, any Supreme Court justice would hesitate to enshrine such words in an opinion striking down democratic legislation. Even though they essentially say nothing more than "our system is not perfect," such words could be twisted to sound like a flat-out rejection of our entire system.

So it makes sense that Justice Kennedy did not directly answer Justice Scalia's argument in *Lawrence* regarding the majority views towards LGBT people. It makes sense that he instead resorted to obscurity and abstraction, making assertions like "[the Court's] obligation is to define the liberty of all, not to mandate our own moral code."<sup>57</sup> On this view, Justice Kennedy's obscurity in *Lawrence* functioned as a polite response to Justice Scalia's venom. It made clear that the Court was receptive to gay rights jurisprudence without needlessly insulting those who might be hostile to this undertaking. *Lawrence* thus took a slow, albeit muddled, step towards civil equality for LGBT persons. And this was a good thing.

### III. CONCLUSION

I have argued that the doctrinal obscurity inherent in the Court's majority opinions from cases like *Skinner*, *Moreno*, *Romer*, and *Lawrence* has a certain virtue; and, Justice Kennedy's *Windsor* opinion shares this virtue. Part of the virtue I see in these earlier cases is that they helped facilitate positive changes in the law. Admittedly, the notion that these particular cases represent positive developments stems from my own subjective moral judgment.

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55. *Id.*

56. *Id.* at 603.

57. *Id.* at 571 (majority opinion) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)) (internal quotations omitted).

Yet I am comfortable in this judgment. Not only do I reject eugenics and discrimination against unpopular groups like hippies, I also believe that Colorado's Amendment 2 was a hateful piece of legislation. I am therefore glad that *Skinner* and *Moreno* helped create the wiggle room in equal protection jurisprudence that permitted Justice Kennedy to compose a defensible justification for striking down the Colorado law in *Romer*. Similarly, I regard the anti-sodomy law in Texas and DOMA as the product of outmoded—though, perhaps sincerely held—homophobic sentiment. I therefore admire how Justice Kennedy cleverly built upon *Romer* in *Lawrence* and then upon both *Romer* and *Lawrence* in *Windsor*.

At the same time, I recognize that my present moral judgment may not have aligned with the collective moral judgment of the majority of Americans at the time *Skinner*, *Moreno*, *Romer*, or *Lawrence* were decided. I further recognize that the majority of Americans may not support the Court's striking down of DOMA in *Windsor*. In other words, I accept that all the cases I have called virtuous may have had an anti-democratic character. But I do not believe this character marks the opinions as inherently anti-constitutional.

Our Constitution seeks to strike a delicate balance between the rights of minorities against the will of the majority. Similarly, the rule of law aims to promote stability through fidelity to the past while allowing change when innovation becomes necessary. In a system such as this, tension abounds and contradictions are inevitable. Constitutional moments will arise where one set of values must prevail—and a competing set must give way. In such moments, it is not always the wisest course to frankly expose our system's contradictions and risk undermining faith in a legal enterprise that fundamentally requires faith to function. In such moments, obscurity can help reduce tensions and facilitate smoother transitions from the regrettable past to the promising future.

In the end, I think the Court's gay rights jurisprudence demonstrates this idea. Americans' attitudes about LGBT issues have come a long way since 1986 and *Bowers v. Hardwick*. The arc of Justice Kennedy's majority opinions from *Romer* to *Lawrence* and now to *Windsor* seemed to keep the Court in the national conversation without needlessly stirring the pot. Only time will tell how history will judge this trilogy of cases. But I suspect that future generations will look back and find that, notwithstanding his obscurity, Justice Kennedy had the better of this long-running argument with Justice Scalia.