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Obergefell's Squandered Potential

Peter Nicolas*

Exactly two years to the day from its decision in *United States v. Windsor*,¹ declaring the federal government's refusal to recognize state-authorized same-sex marriages unconstitutional,² the U.S. Supreme Court dropped "the other shoe," as Justice Scalia put it in his *Windsor* dissent.³ In *Obergefell v. Hodges*,⁴ the Court declared unconstitutional state laws and constitutional provisions barring same-sex couples from lawfully marrying in the state or having their lawful out-of-state marriages recognized by the state.⁵

Obergefell was the fourth in a series of closely divided U.S. Supreme Court opinions penned by Justice Kennedy over the past two decades that have vindicated the constitutional rights of gays and lesbians. *Obergefell* was preceded by the 1996 decision of *Romer v. Evans*,⁶ striking down Colorado's Amendment 2; the 2003 decision of *Lawrence v. Texas*,⁷ declaring sodomy laws unconstitutional; and the 2013 decision of *Windsor*. As both the author and often the deciding vote in each of these four cases, Justice Kennedy will no doubt leave behind one of the most important gay rights legacies in U.S. legal history. With each successive opinion, Justice Kennedy has steadily advanced both the legal and political cause of gay rights in the United States.

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1. 133 S. Ct. 2675 (2013).
2. *Id.* at 2695–96.
3. *Id.* at 2710 (Scalia, J., dissenting).
4. 135 S. Ct. 2584 (2015).
5. *Id.* at 2604–05.
6. 517 U.S. 620 (1996).
7. 539 U.S. 558 (2003).

Despite Justice Kennedy's unwavering support for gay rights, securing a fifth vote in support of those rights after he retires is beyond the scope of his powers. The closest substitute would be a clear, class-based equal protection decision declaring sexual orientation a suspect or quasi-suspect classification. Such an opinion would secure an enduring precedent that would bind lower courts—and within the bounds of *stare decisis*, Justice Kennedy's successors—when future laws targeting gays and lesbians are challenged. It would also deter governmental actors from pursuing such actions in the first place, knowing that the laws would be subject to a level of scrutiny they would not likely survive. This heightened level of scrutiny would in turn give gays and lesbians a measure of repose, affording them the same certainty that racial minorities and women have that laws targeting them are unlikely to be upheld by courts today.

Yet, despite having the opportunity in each of the four preceding gay rights cases, Justice Kennedy declined to declare sexual orientation a suspect or quasi-suspect classification. There were arguably sound procedural or jurisprudential reasons for declining to do so in some of these cases, but in others the path to deciding the case on such a ground was clear. In this sense, Justice Kennedy squandered an important opportunity to leave a more enduring gay rights legacy.

Romer v. Evans was the first case to present the Court with an opportunity to declare sexual orientation discrimination a suspect or quasi-suspect classification. At issue in the case was the constitutionality of Amendment 2 to Colorado's Constitution, a voter initiative that both repealed existing state and local laws regarding non-discrimination on the basis of sexual orientation and prohibited the future enactment of such laws.⁸ The Court declared Amendment 2 unconstitutional, but without purporting to apply anything greater than rational basis scrutiny.⁹ Procedurally, it may have been awkward for the Court to apply heightened equal protection scrutiny in *Romer*. The state trial court had rejected the contention that sexual orientation was a suspect or quasi-suspect classification, and those challenging Amendment 2's constitutionality had elected not to appeal that specific ruling within the state appellate court system.¹⁰

Lawrence presented the Court with a more procedurally straightforward opportunity to declare sexual orientation a suspect classification. *Lawrence* addressed the constitutionality of a state sodomy law targeted solely at same-sex sodomy. The Court explicitly granted certiorari on two alternative grounds: substantive due process, which would require the Court to reconsider and

8. *Romer*, 517 U.S. at 623–24.

9. *See id.* at 631–36; *see also id.* at 640 n.1 (Scalia, J., dissenting).

10. *See Evans v. Romer*, 882 P.2d 1335, 1341 n.3 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996).

overrule its prior decision in *Bowers v. Hardwick*,¹¹ or class-based equal protection, since the law targeted only same-sex sodomy.¹² In his decision for the Court, Justice Kennedy acknowledged the Equal Protection Clause as a tenable alternative basis for declaring the statute unconstitutional,¹³ but declined to do so because that ground would lead some to “question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants,” and *Bowers*’s “continuance as precedent demeans the lives of homosexual persons.”¹⁴ Justice Kennedy was certainly correct that the continued existence of the *Bowers* precedent was an impediment to gays and lesbians achieving equality. Pre-*Lawrence*, lower courts frequently cited *Bowers* or the existence of lawful sodomy laws to uphold laws denying gays and lesbians a whole host of rights.¹⁵ Yet, even if he felt compelled to address the due process claim and overrule *Bowers*, Justice Kennedy could have also addressed the class-based equal protection claim by following the example of *Loving v. Virginia*.¹⁶ There the Court struck down miscegenation laws alternatively on the ground that they violated the fundamental right to marry *and* the ground that they constituted class-based discrimination in violation of the Equal Protection Clause.¹⁷

Justice Kennedy’s refusal to declare sexual orientation a suspect or quasi-suspect classification is even harder to defend in the Court’s two marriage cases. In *Windsor*, no procedural hurdles stood in the Court’s way yet Justice Kennedy issued a murky opinion citing *Romer* and *Lawrence* along with federalism principles to declare unconstitutional the federal government’s refusal to recognize state-sanctioned same-sex marriages.¹⁸ And in *Obergefell*, Justice Kennedy’s majority opinion eschewed class-based equal protection grounds. Instead, the Justice concluded that such laws interfered with the fundamental right to marry¹⁹ protected by both the Fourteenth Amendment’s

11. 478 U.S. 186 (1986) (holding that there is no fundamental right to homosexual sodomy, and therefore Georgia’s sodomy statute did not violate such a right).

12. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

13. *Id.* at 574.

14. *Id.* at 575.

15. See, e.g., *Padula v. Webster*, 822 F.2d 97, 102–03 (D.C. Cir. 1987) (public employment); *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (child custody).

16. 388 U.S. 1, 12 (1967).

17. Although one could argue that a decision rendering a statute unconstitutional on alternative constitutional grounds contravenes the Court’s canon of constitutional avoidance, that canon is focused on minimizing friction with the political branches and requires courts to construe statutes to avoid having to declare any conduct from the political branches unconstitutional. See *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991). Yet once the Court concludes that such a construction is not possible, deciding the case on only one rather than multiple constitutional grounds does nothing to further the underlying purpose of the canon.

18. *United States v. Windsor*, 133 S. Ct. 2675, 2689–96 (2013); see also *id.* at 2696–97 (Roberts, C.J., dissenting); *id.* at 2705–07 (Scalia, J., dissenting).

19. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

Due Process and Equal Protection Clauses.²⁰ Even if Justice Kennedy felt it necessary to reach the fundamental rights claim in *Obergefell* and overrule the Court's summary dismissal of such a claim in *Baker v. Nelson*,²¹ he could again have followed the *Loving* example and rendered a decision declaring the statute unconstitutional on both substantive due process and class-based equal protection grounds.

To be sure, the Court has historically proceeded incrementally before declaring a classification suspect or quasi-suspect, often first applying a more aggressive form of rational basis scrutiny to strike down a law targeting a particular group and only later re-characterizing the earlier decision as having in fact applied intermediate or strict scrutiny. The Court followed this trajectory with respect to laws targeting African-Americans, women, and non-marital children.²² Since announcing a suspect or quasi-suspect classification is strong judicial medicine and effectively decides most or all future laws impacting a given group, the Court understandably treads carefully before making such a declaration.²³ Thus, for example, the Court struck down laws denying African Americans equal access to educational opportunities without declaring those laws subject to strict scrutiny because it wished to avoid deciding the constitutionality of miscegenation laws before the Court was ready to take on that controversy.²⁴

Yet, even accounting for the Court's need to proceed with caution, the lag period with respect to sexual orientation is excessive compared to other historically disadvantaged groups. Had Justice Kennedy declared sexual orientation discrimination a suspect or quasi-suspect classification in *Obergefell* and re-characterized the Court's decisions in *Romer*, *Lawrence*, and *Windsor* as applying such scrutiny, that would have culminated a nineteen-year period, assuring the Court of the soundness of the new suspect classification. Historically, the lag between these two events—the first vindicating the equal protection rights of a targeted group under purported rational basis scrutiny and the second applying intermediate or strict scrutiny—has been no greater than nineteen years and often far shorter.

For example, the Court first invoked the Equal Protection Clause in the modern era²⁵ to strike down laws targeting African Americans in 1954 in

20. *Id.* at 2597–2604.

21. 409 U.S. 810 (1972) (dismissing appeal on grounds that prohibition of same-sex marriage under Minnesota statute did not raise a substantial federal question).

22. *See infra* notes 25–36.

23. *See* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 32–37, 74 (Univ. of Chicago Press 1999).

24. *See id.* at 36.

25. I am here discounting *Strauder v. Virginia*, 100 U.S. 303 (1880) (striking down a West Virginia statute that discriminated in jury selection against African Americans on account of race and holding that it denied equal protection to an African-American defendant), and other cases preceding *Plessy v. Ferguson*, 163 U.S. 537 (1896), because *Plessy* kicked off a new era in equal protection jurisprudence in which African Americans were effectively unprotected by the Clause. I am also here

Brown v. Board of Education,²⁶ and a decade later in *McLaughlin v. Florida*,²⁷ the Court re-characterized that case as applying strict scrutiny.²⁸ This in turn paved the way for the Court's invalidation of miscegenation laws thirteen years after *Brown* in *Loving v. Virginia*.²⁹ Similarly, the Court first invoked the Equal Protection Clause to strike down a law discriminating on the basis of sex in 1971,³⁰ a plurality of the Court re-characterized that case as applying strict scrutiny two years later,³¹ and, by 1976, a majority of the Court coalesced around intermediate scrutiny for sex-based classifications.³² Finally, the Court first invoked the Equal Protection Clause to strike down a law discriminating on the basis of legitimacy in 1968,³³ and by 1976, appeared to acknowledge something more robust than rational basis review but something less than strict scrutiny.³⁴ By 1988, the Court had formally coalesced around intermediate scrutiny for legitimacy-based classifications.³⁵ Thus, if the Court ever decides to declare sexual orientation a suspect or quasi-suspect classification in the future, gays and lesbians will have experienced the longest lag time of any group.

Justice Kennedy's refusal to declare sexual orientation a suspect classification in *Obergefell* is all the more surprising given the relatively low stakes of such an announcement. When the Court held that laws targeting African Americans were subject to strict scrutiny in *McLaughlin*, it effectively decided the constitutionality of interracial marriage, one of the most highly contested social matters of the time.³⁶ *Obergefell* itself directly decided same-sex marriage, the most socially sensitive gay rights issue of this time.³⁷ While other laws, such as parentage rights, targeting gays and lesbians have yet to be adjudicated by the Court, such laws do not raise issues nearly as socially sensitive as marriage—the lightning rod that generated constitutional

discounting cases like *Sweatt v. Painter*, 339 U.S. 629 (1950), which found in favor of the African-American plaintiff but did not challenge the constitutionality of *Plessy's* underlying separate-but-equal scheme.

26. 347 U.S. 483 (1954).

27. 379 U.S. 184 (1964).

28. *Id.* at 192.

29. 388 U.S. 1, 12 (1967).

30. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

31. *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (plurality opinion).

32. *Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

33. *Levy v. Louisiana*, 391 U.S. 68 (1968).

34. *See Mathews v. Lucas*, 427 U.S. 495, 504–06, 509–10 (1976). The Court did not create the intermediate scrutiny standard until the following Term. *See Craig*, 429 U.S. at 197; *id.* at 218 (Rehnquist, J., dissenting).

35. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

36. *See Kenji Yoshino, The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2 UTAH L. REV. 527, 540 (2012).

37. *See Gay and Lesbian Rights*, GALLUP.COM (poll showing greater public opposition to same-sex marriage than to other gay rights issues, such as same-sex adoption or employment discrimination) (visited Oct. 26, 2015) <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<http://perma.cc/U74L-KV53>].

amendments banning the practice in a supermajority of states.³⁸ Accordingly, announcing heightened scrutiny in *Obergefell* would not have come close to the strong medicine that it would have been had the Court announced it earlier in *Romer* or *Lawrence*, for example.

The Court's failure to declare sexual orientation a suspect classification has resulted in concrete harm to gays and lesbians. Despite precedents like *Romer* and *Lawrence*, lower courts have repeatedly upheld laws discriminating on the basis of sexual orientation, such as the military's Don't Ask, Don't Tell policy³⁹ and laws prohibiting gays and lesbians from adopting,⁴⁰ reasoning that only rational basis review applies and that the laws satisfy that deferential level of review. Moreover, numerous pre-*Windsor* courts upheld laws refusing to permit or recognize same-sex marriage, applying no more than rational basis scrutiny because *Romer* and *Lawrence* did not announce a higher standard.⁴¹ The guarded nature of Justice Kennedy's opinions have not been without cost.

Moreover, the failure to declare sexual orientation a suspect classification creates future harm—in the form of continued legal uncertainty for gays and lesbians. Consider first current or future laws restricting the ability of gays and lesbians to legally adopt children. Because *Obergefell* was laser focused on the fundamental right to marry and not the nature of the classification, and because the Court noted, without casting doubt on its constitutionality, that some states do not permit gays and lesbians to adopt children,⁴² future courts can easily distinguish *Obergefell*. Consider, as a second example, the use of peremptory challenges to strike jurors. Where a peremptory challenge implicates a suspect or quasi-suspect classification, such as race or sex, the Equal Protection Clause prohibits the exercise of that challenge on that ground. Such a protection does not apply to non-suspect grounds.⁴³ Thus, it is only if heightened scrutiny applies to sexual orientation that litigants may prevent opposing counsel from striking people from juries solely on the basis of their sexual orientation.⁴⁴

Perhaps one way to defend Justice Kennedy is to view his approach as that of a cautious judicial minimalist, eschewing the broad implications of a holding that would declare sexual orientation a suspect or quasi-suspect classification. Such a minimalist approach would certainly justify a decision like *Romer*. But judicial minimalism is hardly furthered by decisions like *Lawrence* and *Obergefell*, which avoid a class-based equal protection decision

38. See Jonathan Rauch, *Red Families, Blue Families, Gay Families, and the Search for a New Normal*, 28 LAW & INEQ. 333, 334 (2010).

39. See, e.g., *Cook v. Gates*, 528 F.3d 42, 60–62 (1st Cir. 1998).

40. See, e.g., *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 815–18, 826–27 (11th Cir. 2004).

41. See, e.g., *In re Kandu*, 315 B.R. 123, 143 (W.D. Wash. 2004); *Andersen v. King Cnty.*, 138 P.3d 963, 974–76 (Wash. 2006).

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

43. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–45 (1994).

44. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479–81 (9th Cir. 2014).

by instead striking down laws on the ground that they infringe on fundamental rights. As between the two bases for decision, class-based equal protection decisions are more consistent with judicial minimalism.

Although a class-based equal protection decision in *Lawrence* or *Obergefell* would at first seem to represent a broad approach because it would apply across the board to any law discriminating on the basis of sexual orientation, it is narrower than the fundamental rights approach in several ways. First, a class-based equal protection decision would only apply to laws discriminating on the basis of sexual orientation, not other classifications. Thus, for example, in the realm of marriage, a class-based equal protection decision would only apply to laws prohibiting same-sex (or opposite-sex) marriage. In contrast, *Obergefell*'s sweeping fundamental rights language opens the door to marriage claims by others, including those seeking plural marriage, cousin marriage, or marriage between underage persons. Having declared the *right* fundamental rather than the classification suspect, states must defend all restrictions on the right. Second, by declaring something a fundamental right under the Due Process Clause, the Court takes away the states' power to simply eliminate the right altogether by treating everyone even-handedly.⁴⁵ These characteristics make due process the stronger medicine and equal protection the minimalist approach. Take *Lawrence* as an example. Justice Kennedy's majority opinion eschewed a class-based equal protection approach because it would lead some to "question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."⁴⁶ This is the exact opposite of the minimalist approach taken by Justice O'Connor in her concurrence, which left that possibility open but instead struck down the law on equal protection grounds.⁴⁷ For these reasons, a penchant for judicial minimalism cannot justify Justice Kennedy's approach in the gay rights cases.

Justice Kennedy may well have an altogether different view of the proper role of the Equal Protection Clause, preferring an approach that is rights-focused rather than class-focused and moving away from the rigid tiered approach in favor of a more unitary approach. Yet his approach lacks the transparency that comes with announcing a classification to be suspect or quasi-suspect. That lack of transparency both leaves the Court's decisions vulnerable to criticism as *ipse dixit* of the sort employed by the Court in *Lochner v. New York*⁴⁸—as the Chief Justice contended in his *Obergefell*

45. See *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111–12 (1949) (Jackson, J., concurring) ("Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.").

46. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

47. *Id.* at 580 (O'Connor, J., concurring).

48. 198 U.S. 45 (1905).

dissent⁴⁹—and denies litigants and lower courts the guidance they need to apply the constitutional principle consistently in future cases.⁵⁰ For this reason, *Obergefell* and its antecedents represent a somewhat unstable foundation upon which to build future gay rights victories.

49. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616–22 (Roberts, C.J., dissenting).

50. See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459–60 (1985) (Marshall, J., concurring in part and dissenting in part) (“[B]y failing to articulate the factors that justify today’s ‘second order’ rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked.”).