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**JUSTICE GINSBURG'S
*OBERGEFELL V. HODGES***

Ruthann Robson[†]

INTRODUCTION

It was quite predictable that Justice Anthony Kennedy would write the Court's opinion in *Obergefell v. Hodges* finding that the Fourteenth Amendment requires States to issue marriage licenses to same-sex couples on the same terms as different-sexed couples.¹ After all, Justice Kennedy authored not only the Court's most recent and closely divided same-sex marriage case of *United States v. Windsor* finding the federal Defense of Marriage Act (DOMA) unconstitutional,² but also the less closely divided previous "gay rights" cases, *Lawrence v. Texas*³ and *Romer v. Evans*.⁴ He

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¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

² *United States v. Windsor*, 133 S.Ct. 2675 (2013).

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

⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

was being touted as the “first gay justice,”⁵ a “gay icon,”⁶ gay-rights “hero,”⁷ and “the towering giant” in the struggle for LGBT equality,⁸ even before *Obergefell*. Justice Kennedy’s opinion for the Court in *Obergefell* seemingly cements his reputation as a champion of LGBTQ rights.

Justice Kennedy’s opinions for the Court in the quartet of LGBTQ cases - - *Romer*, *Lawrence*, *Windsor*, and *Obergefell* - - have provoked only one concurrence (Justice O’Connor in *Lawrence*),⁹ even as the dissenting opinions have become increasingly numerous and fractured.¹⁰ The unity of

⁵ Bill Mears, *Is Anthony Kennedy 'the first gay justice'?*, CNN POLITICS (June 28, 2013), <http://www.cnn.com/2013/06/27/politics/scotus-kennedy/> (“‘If Bill Clinton was ‘the first black president,’ Anthony Kennedy has now firmly secured his place in history as ‘the first gay justice,’” said Michael Dorf, a law professor at Cornell University and a former Kennedy law clerk.” Justice Kennedy makes clear that he not only accepts, but welcomes the task of writing majestic opinions affirming the dignity of gay persons and couples.”).

⁶ Sheryl Gay Stolberg, *Justice Anthony Kennedy’s Tolerance Is Seen in His Sacramento Roots*, N.Y. TIMES (June 21, 2015), <http://www.nytimes.com/2015/06/22/us/kennedys-gay-rights-rulings-seen-in-his-sacramento-roots.html> (“Justice Kennedy, a onetime altar boy, has emerged as an unlikely gay rights icon. At 78, he has advanced legal equality for gays more than any other American jurist.”).

⁷ Richard Socarides, *The Top Ten Gay-Rights Heroes of 2013*, THE NEW YORKER (December 16, 2013), <http://www.newyorker.com/news/news-desk/the-top-ten-gay-rights-heroes-of-2013> (listing Justice Kennedy third after Edie Windsor, plaintiff in *United States v. Windsor*, and Pope Francis).

⁸ Adam Liptak, *Surprising Friend of Gay Rights in a High Place*, N.Y. TIMES (Sept. 1, 2013), <http://www.nytimes.com/2013/09/02/us/surprising-friend-of-gay-rights-in-a-high-place.html> (“‘He is the towering giant in the jurisprudence of freedom and equality for gay people,’” said Evan Wolfson, the president of Freedom to Marry and one of the architects of the political and legal push for same-sex marriage.”).

⁹ See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring). O’Connor wrote that she disagreed that the Court should overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which she had joined the majority in upholding the constitutionality of Georgia’s criminalization of sodomy. *Id.* However, she agreed with the Court in *Lawrence* that Texas’ statute banning same-sex sodomy is unconstitutional, but under the Fourteenth Amendment’s Equal Protection Clause rather than the Due Process Clause. *Id.*

¹⁰ In *Romer v. Evans*, Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined. See 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

the so-called liberal Justices may seem remarkable. But it is also strategic. Justice Ruth Bader Ginsburg, speaking about *Obergefell* in a public conversation, noted that it was “more powerful” to have a single opinion from the Court.¹¹ She “said she keeps a volume of the unpublished opinions of Justice Louis Brandeis in her office as a reminder that is it not always prudent for justices to publicly explain every detail of their diverging opinions.”¹²

Yet what if Justice Ginsburg had written an opinion? And what if that opinion were not a concurring opinion, but the Court's opinion in *Obergefell v. Hodges*? As Justice Ginsburg has intimated, her opinion would be more focused on the Equal Protection Clause rather than the Due Process Clause of the Fourteenth Amendment.¹³ But it is not only the Clause of the Fourteenth Amendment that would be distinct. This Essay suggests that Justice Ginsburg's opinion would have been different in three essential ways from the one by Justice Kennedy for the Court: it would have been more doctrinally rigorous; it would have been less sentimental;

In *Lawrence v. Texas*, Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas, joined, see 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); Justice Thomas also filed a separate dissenting opinion. See *id.* at 605 (Thomas, J., dissenting).

In *United States v. Windsor*, Chief Justice Roberts filed a dissenting opinion. See 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting). Justice Scalia filed a dissenting opinion, in which Justice Thomas joined, and in which Chief Justice Roberts, joined as to Part I. See *id.* at 2697 (Scalia, J., dissenting). Justice Alito also filed a dissenting opinion, in which Justice Thomas joined as to Parts II and III. See *id.* at 2711 (Alito, J., dissenting).

And in *Obergefell v. Hodges*, Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia and Thomas joined. See 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting). Justice Scalia also filed a dissenting opinion in which Justice Thomas joined. See *id.* at 2626 (Scalia, J., dissenting). Justice Thomas filed a dissenting opinion in which Justice Scalia joined. See *id.* at 2631 (Thomas, J., dissenting). Finally, Justice Alito filed a dissenting opinion in which Justices Scalia and Thomas joined. See *id.* at 2640 (Alito, J., dissenting).

¹¹ *Justice Ginsburg addresses alumni and Summer Institute in wide-ranging conversation with Siegel*, DUKE LAW NEWS (Aug. 7, 2015), <https://law.duke.edu/news/justice-ginsburg-addresses-alumni-and-summer-institute-wide-ranging-conversation-siegel/>.

¹² *Id.*

¹³ *Id.* (quoting Justice Ginsburg as stating that Kennedy's opinion contained “a nice page on equal protection, and the rest is about due process”).

and it would have jurisprudential integrity. This Essay considers each of these characteristics in turn.

I. DOCTRINAL RIGOR

It would be difficult to argue that Justice Kennedy's opinion for the Court in *Obergefell v. Hodges* is doctrinally rigorous. Indeed, Justice Kennedy has rightly been criticized for the lack of doctrinal rigor in his "gay rights" cases, most especially the same-sex marriage cases of *Obergefell* and *Windsor*. For example, Justice Scalia, dissenting in *Obergefell*, contended that the while the "world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law."¹⁴ He continued that the "stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis."¹⁵ Likewise, Justice Scalia dissenting in *Windsor*, argued that it is "remarkable" how "rootless and shifting" the Court's reasoning is, noting that "if this is meant to be an equal-protection opinion, it is a confusing one" that does not resolve the central debate regarding how closely the courts should scrutinize the federal law banning recognition of same-sex marriages.¹⁶ Dissenting in

¹⁴ *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting).

¹⁵ *Id.*

¹⁶ *United States v. Windsor*, 133 S. Ct. 2675, 2706-07 (2013) (Scalia, J., dissenting).

Scalia wrote:

The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution;" that it violates "basic due process" principles; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment." The majority never utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. . . . Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role)

Lawrence, Scalia's major point was less that Kennedy's opinion for the Court lacked a standard rather than it incorrectly applied a standard,¹⁷ although Scalia also seemed to argue that the standard in *Lawrence* is not clear.¹⁸ And earlier in *Romer*, Scalia was again closer to contending that Kennedy's opinion for the Court lacked doctrinal support, noting that "the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits" the Colorado state constitutional amendment that prohibited sexual orientation anti-discrimination enactments.¹⁹

This is not to suggest that Justice Scalia would have been persuaded by a more rigorous legal analysis in any of the cases in the LGBTQ quartet.

because it is motivated by a " 'bare ... desire to harm' " couples in same-sex marriages.

Id. (citations omitted).

Interestingly, Justice Scalia's dissent in *Windsor* provided some doctrinal clarity; before the Supreme Court's decision in *Obergefell*, lower court judges relied on his dissent to support their opinions that all same-sex marriage bans were unconstitutional. See Ruthann Robson, *Justice Scalia's Petard and Same-Sex Marriage*, CUNY LAW REVIEW FOOTNOTE FORUM (Mar. 3, 2014), <http://www.cunylawreview.org/prof-robson-on-justice-scalias-petard>.

¹⁷ In *Lawrence*, Scalia argued that the Court's opinion never describes the right to same-sex sexual relations "as a 'fundamental right' or a 'fundamental liberty interest,' nor does it subject the Texas statute to strict scrutiny," but instead incorrectly finds the Texas anti-sodomy statute fails the "rational-basis test." *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (Scalia, J., dissenting). He then argued that such a "proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion," and "effectively decrees the end of all morals legislation." *Id.* at 599.

¹⁸ See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004) (arguing that "One aspect of *Lawrence* that was bound to draw criticism and is likely to generate confusion unless promptly put in proper perspective is the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue," and citing Scalia's dissenting opinion).

¹⁹ *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Scalia later stated that the Court only reached its conclusion "by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes." *Id.* at 652.

Nevertheless, it is worth comparing Scalia's complaints regarding *Obergefell*, *Windsor*, and *Lawrence*, and to a lesser extent *Romer*, with Scalia's equally heated criticism of Justice Ginsberg's opinion for the Court in *United States v. Virginia* concluding that the all-male Virginia Military Institute (VMI) was unconstitutional.²⁰ In his dissent Scalia lamented that the Court "drastically revises our established standards for reviewing sex-based classifications,"²¹ in large part by not hewing exclusively to the words of intermediate scrutiny in equal protection sex-classification cases as articulated in *Mississippi University for Women v. Hogan*,²² but by including other words from *Hogan*.²³ To be sure, Scalia also castigated Justice Ginsburg's majority opinion for rejecting certain factual findings regarding the value of same-sex education and for disregarding "the long tradition, enduring down to the present, of men's military colleges."²⁴ But Justice Scalia's main complaint about the Court's *VMI* opinion was not a lack of doctrinal rigor.

²⁰ *United States v. Virginia*, 518 U.S. 515 (1996).

²¹ *Id.* at 566 (Scalia, J., dissenting).

²² *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

²³ Scalia explained:

Although the Court in two places recites the test as stated in *Hogan*, which asks whether the State has demonstrated "that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase "exceedingly persuasive justification" from *Hogan*. The Court's nine invocations of that phrase, and even its fanciful description of that imponderable as "the core instruction" of the Court's decisions in *J.E.B. v. Alabama ex rel. T. B.* and *Hogan*, would be unobjectionable if the Court acknowledged that *whether* a "justification" is "exceedingly persuasive" must be assessed by asking "[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives." Instead, however, the Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of *Hogan* and our other precedents.

United States v. Virginia, 518 U.S. at 571-72 (Scalia, J., dissenting) (citations omitted).

²⁴ *Id.* at 566.

Again, this is not to suggest that Justice Scalia should be the lodestar on the degree of analytic rigor in opinions from which he is dissenting. But to agree with the ultimate conclusions of the cases in the LGBTQ quartet is not sufficient to rebut the analytic deficiencies of the cases. One obvious comparison is to *Brown v. Board of Education*, famous not only for its importance in holding the racial segregation of “separate but equal” unconstitutional,²⁵ but also for its perceived lack of what Professor Herbert Wechsler deemed “neutral principles.”²⁶ The influential academic defense of *Brown* by Professor Charles Black, *The Lawfulness of the Segregation Decisions*, argued that the persuasiveness of *Brown* was inherent in its simplicity, practicality, reason, and claim to equality.²⁷ Professor Toni Massaro has taken Black’s celebrated essay and “edited” it to replace the references to *Brown* and racial segregation with references to *Obergefell* and marriage exclusion.²⁸ The result stunningly reveals the parallels.

Professor Massaro wisely argues that scholars should “avoid past errors” in the reaction to *Brown* and appreciate the Court for its “right answer” in *Obergefell*, “however imperfectly defended or expressed,” rather than

²⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For example, Professor Laurence Tribe likened *Lawrence* to *Brown*. Tribe, *supra* note 18, at 1895 (“For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America. But one of the lessons of *Brown* is that we cannot assume that society’s acceptance of such watershed decisions--decisions that mediate revolutions in the entrenched social order--will be a straightforward and predictable process.”).

²⁷ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). As Black wrote:

My liminal difficulty is rhetorical—or, perhaps more accurately, one of fashion. Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all.

Id. at 421.

²⁸ See Toni M. Massaro, *The Lawfulness of the Same-Sex Marriage Decisions: Charles Black on Obergefell* (Aug. 27, 2015) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638552.

indulge in critique.²⁹ But perhaps we should take more seriously the precedential value of opinions. Clearly articulated standards and rigorous analysis are not simply law professor fantasies.³⁰ While Supreme Court opinions need not be constitutional law examination answers, neither should they leave their readers - - - including law students - - - longing for an articulated “rule” and applied “reasoning.”³¹ Additionally, clearly articulated standards guide lower federal courts and state courts considering similar constitutional challenges.³² It would be a grave mistake to equate “marriage equality” with LGBTQ equality, let alone sexual liberation; there are many remaining important constitutional issues regarding sexuality.³³

²⁹ *Id.* at 6.

³⁰ I made similar observations before the Court’s decision in *United States v. Windsor*. See Ruthann Robson, *Online same-sex marriage symposium: Toward a more perfect analysis*, SCOTUSBLOG, (Sept. 19, 2012), <http://www.scotusblog.com/2012/09/online-same-sex-marriage-symposium-toward-a-more-perfect-analysis/>.

³¹ *Id.*

³² Clarity may be useful even when the constitutional challenges are not obviously “similar.” For example, in *Hassan v. City of New York*, __ F.3d __, No. 14-1688, 2015 WL 5933354, at *24 (3d Cir. Oct. 13, 2015), involving an equal protection challenge to New York City’s surveillance of Muslims in New Jersey, the Third Circuit opinion noted that generally after a court determines that there is intentional unequal treatment,

the adequacy of the reasons for that discrimination are ... separately assessed at equal protection's second step” under the appropriate standard of review. To apply this traditional legal framework to the facts of this case, we must determine the appropriate standard of review (*i.e.*, rational basis, intermediate scrutiny, or strict scrutiny) and then ask whether it is met.

Id. at *14 (citation omitted). The Third Circuit opinion then added a footnote to this seemingly uncontroversial principle, explaining:

Although other modes of analysis have also been employed, *see, e.g., Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S.Ct. 2584, 2596, 192 L.Ed.2d 609 (2015), we find it appropriate to apply the conventional two-part framework in the context of this case.

Id. at *14 n.8.

³³ For example, I previously argued that

the Supreme Court’s clear conclusion that sexuality merits intermediate scrutiny review, like gender, would disentangle the equal protection doctrine from the animus inquiry. While certainly animus can be operative, the inquisition into intent invites protestations of moral belief

Furthermore, the lack of an explicit and rigorous analysis in Kennedy's opinion for the Court in *Obergefell* could have easily been avoided. The Court's opinion lists as an appendix the federal and state decisions that have considered the constitutional issue of same-sex marriage.³⁴ As Kennedy's opinion for the Court observed,

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider.³⁵

But Kennedy's opinion for the Court does not adopt the rigorous analysis

or religious conviction. The false opposition between equality and morals needs to be abandoned. Additionally, the linking of sexual orientation and gender as quasi-suspect should lead courts to find classifications based upon gender identity, transgender identity, or gender nonconformity as similarly subject to intermediate scrutiny review.

Additionally, the Supreme Court's definitive holding that marriage is a fundamental right meriting strict scrutiny review would extricate the issues from the federalism quagmire. Indeed, an explicit declaration of marriage as a fundamental right might call into question the plethora of federal and state statutes that provide benefits and burdens on the basis of marital status.

For if the Court deemed the right to marry fundamental, then the concomitant right – the right not to marry – should likewise be fundamental. Revived proposals to condition poverty assistance on marital status, as well as tax benefits and burdens based on marital status, would require strict judicial scrutiny. While “marriage equality” advocates have often quelled the objections of more nonconformist LGBT activists with assurances that same-sex marriage will not mandate marriage, a judicial commitment to strictly scrutinize government laws channeling people into marriage might make the choice whether or not to marry less legally over-determined. Although conservative advocates have been fretting over the next rung on the slippery ladder – such as plural marriage or man-goat marriage – the next marriage equality issue might well involve the rights of the unmarried. Rigorous Court decisions . . . might not make such litigation less contentious, only less convoluted.

See Robson, *supra* note 30.

³⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608-2611 (2015) (Appendix A).

³⁵ *Id.* at 2597.

apparent in so many of these cases.³⁶ One notable exception to this rigor is the Sixth Circuit's opinion to which the Court granted certiorari and that had upheld the same-sex marriage bans in several states as constitutional.³⁷ Dissenting Sixth Circuit Judge Martha Craig Daughtrey maligned the majority's opinion as more suitable for a "TED Talk or, possibly, an introductory lecture in Political Philosophy," than an appellate court decision grappling with the relevant constitutional question.³⁸ But one could argue that Justice Kennedy's opinion is uncomfortably close to such an unflattering characterization.

An opinion by Justice Ginsburg for the Court in *Obergefell* would have been more likely to clearly articulate a standard and engage in rigorous analysis. This is not simply because Ginsburg has a seeming preference for equal protection doctrine over substantive due process doctrine.³⁹ Equal

³⁶ The Tenth Circuit's opinion in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014), is an excellent example of a rigorous application of a melding of due process and equal protection, applying strict scrutiny and analyzing each of the state's asserted interests and whether a same-sex marriage ban is narrowly tailored to those interests. The opinion of District Judge Orlando Garcia in *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) provides another example of a rigorous analysis. The opinion clearly separates the equal protection and due process analysis. It first considers the level of scrutiny applicable to sexual orientation classifications, stating that such classifications deserve heightened scrutiny, although concluding that the same-sex marriage ban did not survive even minimal scrutiny and then proceeding with its application to the state's asserted interests and the rational relationship of the means chosen to the interests. *Id.* at 650-56. It then analyzes the due process issue, concluding that marriage is a fundamental right warranting strict scrutiny of laws that infringe upon the right and then summarily concluding that strict scrutiny is not satisfy.

³⁷ *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) and *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁸ *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014) (Daughtrey, J., dissenting), *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) and *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁹ See, e.g., Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 553 (2012) ("Given the choice . . . , Justice Ginsburg has long favored equal protection over substantive due process analysis."); Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1086 (2009) ("Justice Ginsburg has continued to resist the temptation to use substantive due process . . .

protection standards can be just as murky as due process ones. Indeed, Kennedy's opinion for the Court did articulate one of Justice Ginsburg's seeming jurisprudential beliefs: the interrelationship of equality and due process. The Court in *Obergefell* clearly rested its opinion on both the Equal Protection Clause and the Due Process Clause.⁴⁰ This is not unique. Almost two decades earlier, Justice Ginsburg wrote the Court's opinion in *M.L.B. v. S.J.B.*, involving the state's duty to provide a transcript for appeal in a parental rights termination proceeding, and articulated a similar rationale based on precedent and positing a balancing test: "we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."⁴¹ Interestingly, Justice Kennedy penned a short concurrence stating that the case should rest on due process clause grounds alone.⁴²

But whatever the constitutional grounding of the *Obergefell* opinion, more rigor would have been welcome. Justice Kennedy proved unwilling to

”). See also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

⁴⁰ The Court stated:

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.

Obergefell, 135 S. Ct. at 2604-05.

⁴¹ *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996). Justice Ginsburg reasoned that the Court's decisions concerning access to judicial processes “reflect both equal protection and due process concerns.” *Id.* at 120.

The equal protection concern relates to the legitimacy of fencing out would be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state ordered proceedings anterior to adverse state action.

Id. However, she explained that most decisions in this area have rested on an equal protection framework because “due process does not independently require that the State provide a right to appeal.” *Id.*

⁴² *Id.* at 129 (Kennedy, J., concurring) (“In my view the cases most on point, and the ones which persuade me we must reverse the judgment now reviewed, are the decisions addressing procedures involving the rights and privileges inherent in family and personal relations . . . all cases resting exclusively upon the Due Process Clause. Here, due process is quite a sufficient basis for our holding.”).

provide analytic clarity; I believe Justice Ginsburg's opinion would have been at least as rigorous as most of the lower court opinions. Even if Justice Ginsburg's opinion for the Court would not have articulated the traditional due process or equal protection levels of scrutiny with a concomitant analysis of whether the proffered government interests served those interests, it would not have substituted sentimentality for such an analysis.

II. SENTIMENTALITY

The penultimate paragraph of Justice Kennedy's opinion for the Court in *Obergefell* declares:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.⁴³

Certainly there is room for disagreement regarding the tone of this passage: some will applaud its emotional eloquence while others will disparage its sentimentality. Justice Ginsburg seems to eschew such rhetoric; one can search in vain in her opinions for similar text. It is not that Justice Ginsburg's opinions have not addressed topics of high passion. Her opinions for the Court in *United States v. Virginia (VMI)* and *M.L.B. v. S.L.J.* could easily have included more poignant passages.⁴⁴

⁴³ *Obergefell*, 135 S. Ct. at 2608.

⁴⁴ See *United States v. Virginia*, 518 U.S. 515 (1996) (regarding equal educational opportunities for women); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (regarding termination of parental rights of a mother).

To label Justice Kennedy's language sentimental is unquestionably insulting. "But just what sentimentality is and why it is objectionable is something of a mystery," just as much today as more than three decades ago when this statement appeared in Mark Jefferson's influential essay "*What's Wrong With Sentimentality?*"⁴⁵ Moreover, there is a conflation of sentimentality as an aesthetic matter and as an ethical one.⁴⁶ For Mark Jefferson, the problem with sentimentality - - - seemingly as both an aesthetic and ethical matter - - - is its distortion of reality. Moreover, this distortion is one that emphasizes "the sweetness, dearness, littleness, blamelessness, and vulnerability of the emotions' objects," what he names the "fiction of innocence."⁴⁷ Jefferson identifies the "moral danger" of this fiction, using E.M. Forster's novel *A Passage to India* as illustration, as the tendency to extend the distortion beyond the sentimentalized good person to a caricatured vilification of the oppositional figure.⁴⁸

The dissenting opinions in *Obergefell* might be heard to echo the dynamic Jefferson articulated when they invoke - - - and object to - - - the Court's implicit creation of the oppositional figure of "the bigot." Chief Justice Roberts complained, "It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's 'better informed understanding' as bigoted."⁴⁹ Although Justice Kennedy's opinion does

⁴⁵ Mark Jefferson, *What's Wrong With Sentimentality?*, 92 MIND 519 (1983).

⁴⁶ In her brilliant essay *In Defense of Saccharin(e)*, Leslie Jamison succinctly articulates the distinction and the conflicting objections:

While its moral critics tend to attack sentimentality because it accords an undue agency to emotions—distracting us from “reason” and tenable ethics—its aesthetic opponents attack sentimentality from the opposite direction, claiming it does our emotions a disservice by flattening them into dual oblivions of hyperbole and simplicity.

Leslie Jamison, *In Defense of Saccharin(e)*, in THE EMPATHY EXAMS 111 (2014).

⁴⁷ Jefferson, *supra* note 45, at 526-27, 529.

⁴⁸ *Id.* at 527-28 (citing E.M. FORSTER, *A PASSAGE TO INDIA* (1961) [originally published 1924]). Jefferson's discussion focuses on the character Miss Quested, who was not particularly liked but who comes to be viewed as symbolizing the purity and bravery of English womanhood after she alleges an Indian doctor attacked her. Jefferson argues that as a corollary to this portrait, the Indian doctor must then be viewed as her opposite: a "treacherous monster." *Id.*

⁴⁹ *Obergefell*, 135 S. Ct. at 2584 (Roberts, C.J., dissenting).

not use any form of the term “bigot,” Chief Justice Roberts grounded his characterization in the language Kennedy does use:

Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to “lock ... out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors.⁵⁰

Justice Scalia took a somewhat different approach, but nevertheless impugned the Court’s opinion for (implicitly) characterizing oppositional viewpoints as “bigotry.”⁵¹ And Justice Alito, indulging in his own sentimentalized rhetoric, lamented the impact of the Court’s opinion as including the risk that “those who cling to old beliefs” will be “labeled as bigots and treated as such by governments, employers, and schools” if they dare repeat their views in public rather than “whisper their thoughts in the recesses of their homes.”⁵²

There is another - - - and to my mind, more important - - - “moral danger” of vilification posed by Justice Kennedy’s sentimentalization that is not addressed by any of the various opinions in *Obergefell*. This peril was, however, contemplated by many scholars including myself as the “marriage equality” movement became a centerpiece of LGBTQ advocacy. As the 2006 statement, “Beyond Same-Sex Marriage: A Strategic Vision for All Our Families and Relationships,” articulated it:

Marriage is not the only worthy form of family or relationship, and it should not be legally and economically

⁵⁰ *Id.* (quoting majority opinion).

⁵¹ The five Justices in the majority

know that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

Obergefell, 135 S. Ct. at 2630 (Scalia, J., dissenting) (emphasis in original).

⁵² *Obergefell*, 135 S. Ct. at 2642-43 (Alito, J., dissenting).

privileged above all others. . . . LGBT movement strategies must never secure privilege for some while at the same time foreclosing options for many. Our strategies should expand the current terms of debate, not reinforce them.⁵³

On this view, same-sex marriage has the potential to divide LGBTQ persons into two groups: the deserving and the undeserving.⁵⁴ For example, this demarcation “serves as a convenient division between ‘good’ lesbians and ‘bad’ ones.”⁵⁵ Moreover, this demarcation occurs because pressure to assimilate to the “good” group is coercive.⁵⁶ A stark argument that this demarcation is not only inevitable but desirable was advanced by gay male conservative Andrew Sullivan in his 1989 article *Here Comes the Groom: A (Conservative) Case for Gay Marriage*.⁵⁷ Andrew Sullivan’s conclusion that the formation of families through “gay marriage” is not a “denial of family values” but “an extension of them” is buttressed with a chilling argument: “Since persecution is not an option in a civilized society, why not coax gays into traditional values rather than rail incoherently against them?”⁵⁸ Thus, this conservative argument contains an implicit promise of protection to those who conform our relations to traditional family values and a threat of persecution, albeit of a civilized sort, to those who do not.⁵⁹ Justice Kennedy’s penultimate paragraph in *Obergefell* is faithful to Sullivan’s view. In Kennedy’s passage, there is thankfully not persecution, but banishment: the “hope is not to be condemned to live in loneliness.”⁶⁰ Similarly, earlier Justice Kennedy’s opinion stated, “Marriage responds to

⁵³ Beyond Same-Sex Marriage: A Strategic Vision for All Our Families and Relationships (July 26, 2006), at 2, 5, <http://www.beyondmarriage.org/beyondmarriage.pdf>.

⁵⁴ See *id.* at 2 (“To have our government define as ‘legitimate families’ only those households with couples in conjugal relationships does a tremendous disservice to the many other ways in which people actually construct their families, kinship networks, households, and relationships.”).

⁵⁵ Ruthann Robson, *Sappho Goes to Law School* 166 (1998).

⁵⁶ *Id.*

⁵⁷ Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, *NEW REPUBLIC*, Aug. 28, 1989, at 20.

⁵⁸ *Id.*

⁵⁹ See ROBSON, *supra* note 55, at 166.

⁶⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

the universal fear that a lonely person might call out only to find no one there.”⁶¹

Paeans to marriage in United States Supreme Court cases are nothing new.⁶² Justice Kennedy’s opinion quotes from two of the most famous:⁶³ the Supreme Court’s oft-repeated 1888 pronouncement in *Maynard v. Hill* that marriage is “the most important relation in life,” and “the foundation of the family and of society, without which there would be neither civilization nor progress”⁶⁴ and this century’s hyperbole in *Griswold v. Connecticut* that marriage “is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred.”⁶⁵ But neither *Maynard*, in which the issue was the validity of a legislatively declared territory divorce, nor *Griswold*, in which the issue was the constitutionality of contraception prohibition under the Due Process Clause, contained such implicitly exclusionary rhetoric.⁶⁶ As one commentator noted, Justice Kennedy’s opinion makes it seem as if being unmarried makes the world “empty and awful.”⁶⁷ This sentimentalized rhetoric operates to make marriage seem as compulsory as heterosexuality once was.⁶⁸

Moreover, such sentimentalization can support the denial of the very rights that many LGBTQ persons depend upon for sexual autonomy, including

⁶¹ *Id.* at 2600.

⁶² See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 793 (2002).

⁶³ *Obergefell*, 135 S. Ct. at 2601.

⁶⁴ *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888).

⁶⁵ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁶⁶ See Robson, *supra* note 62, at 793.

⁶⁷ Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, Op-Ed, N.Y. TIMES (June 30, 2015), <http://nyti.ms/1dvrvfj>. Cobb also wondered

how Justices Sonia Sotomayor and Elena Kagan — two of the most high-profile single women in the federal government — felt as they reviewed and had to join Justice Kennedy’s opinion: “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”

Id.

⁶⁸ See Ruthann Robson, *Compulsory Matrimony*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 313 (Martha Albertson Fineman et. al. eds., 2009) (arguing that just as a variety of forces impose, organize, and propagandize heterosexuality, a variety of forces impose, organize, and propagandize the political institution of marriage).

the right to abortion that is constitutionally linked to sexual autonomy and is practically important for many women, especially including young lesbians.⁶⁹ In his opinion for the Court in *Gonzales v. Carhart*, upholding the constitutionality of a Congressional statute severely restricting abortion, Justice Kennedy wrote:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.⁷⁰

Justice Ginsburg's dissenting opinion, joined by Stevens, Breyer, and Souter, castigates this sentimentalism as archaic paternalism:

Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure." The solution the Court approves, then, is not to require doctors inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.⁷¹

⁶⁹ See Ruthann Robson, *Lesbians & Abortions*, 35 NYU REV. LAW & SOC. CHANGE 247 (2011) (arguing that in addition to the constitutional links regarding sexual autonomy, lesbians need access to abortion because of male violence that includes rape and because they may be "reproductive amateurs" who are not familiar with birth control or have access to informal networks of knowledge about pregnancy).

⁷⁰ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (citations omitted).

⁷¹ *Id.* at 183-86 (Ginsburg, J., dissenting). In support of her contention, Ginsburg wrote:

Compare, e.g., *Muller v. Oregon*, 208 U. S. 412, 422-423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a

Ginsburg's rebuke makes it clear that Kennedy's sentimentalism can be deployed to negate sexual autonomy. Mark Jefferson's insight that sentimentality is directed to "the sweetness, dearness, littleness, blamelessness, and vulnerability of the emotions' objects," in a "fiction of innocence"⁷² implies that sentimentality tends toward the repudiation of autonomy. Autonomous choices, especially sexual ones, are rarely characterized as sweet or dear or blameless. Indeed, they imply a knowledge that is the opposite of innocence.

It is difficult to imagine that Justice Ginsburg would have included sentimental rhetoric had she authored the Court's opinion in *Obergefell*. Rather than Justice Kennedy's invocations of personal loneliness that would be cured by allowing same-sex couples to marry, Justice Ginsburg may have stressed that the institution of marriage itself was in the process of necessary change. Echoing her comments during oral argument, her opinion might have emphasized that it would be a mistake to "cling to marriage as it once was" given that marriage had perpetuated inequality.⁷³

proper discharge of her maternal funct[ion]"); *Bradwell v. State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U. S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U. S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Id. (ellipses in original).

⁷² See Jefferson, *supra* note 45 and surrounding text.

⁷³ Transcript of Oral Argument at 71, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), available at

http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_15gm.pdf.

Earlier she stated:

But you wouldn't be asking for this relief if the law of marriage was what it was a millennium ago. I mean, it wasn't possible. Same-sex unions

Thus, rather than sentimentalizing same-sex couples or marriage, she might have articulated a more rigorous analytic structure for resolving future disputes.⁷⁴ She might also have brought to bear the jurisprudential integrity she has exhibited across various identities and issues, including those involving race.

III JURISPRUDENTIAL INTEGRITY

The issue of judicial review - - - when the federal courts should intervene to declare a legislative act unconstitutional - - - is one of the most vexing in a constitutional democracy.⁷⁵ A widely accepted theory derived from *Carolene Products* footnote four suggests that there should be more “searching judicial inquiry” when democratically enacted statutes are directed at particular religious, national or racial minorities, or when “prejudice against discrete and insular minorities” seriously curtails “the operation of those political processes ordinarily to be relied upon to protect minorities.”⁷⁶ It is most famously expressed in John Hart Ely's representation-reinforcement theory of judicial review, positing that “courts should protect those who cannot protect themselves politically.”⁷⁷ Exactly what this means is of course unclear; Ely himself thought that under this theory women should not be protected, but that “fetuses” should.⁷⁸ Nevertheless, when courts act to safeguard majoritarian enactments against some minorities but not others, such disparities implicate jurisprudential integrity.

would not have opted into the pattern of marriage, which was a relationship, a dominant and a subordinate relationship. Yes, it was marriage between a man and a woman, but the man decided where the couple would be domiciled; it was her obligation to follow him.

There was a change in the institution of marriage to make it egalitarian when it wasn't egalitarian. And same-sex unions wouldn't -- wouldn't fit into what marriage was once.

Id. at 10-11.

⁷⁴ See *supra* Section I.

⁷⁵ See Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1 (2007).

⁷⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

⁷⁷ John Hart Ely, *Democracy And Distrust: A Theory of Judicial Review* 152 (1980).

⁷⁸ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973).

At its most generous interpretation, the representation-reinforcement theory embodied in footnote four of *Carolene Products* might place sexual minorities and racial minorities in the same status. Current equal protection doctrine differs; it generally accords racial classifications strict scrutiny while sexual orientation classifications merit a heightened rationality standard that includes a consideration of animus.⁷⁹ Justice Kennedy's jurisprudential approach seemingly inverts this: it identifies LGBTQ persons as worthy of judicial protection, while racialized persons are relegated to the political process until they are successful, after which their successes will be rigorously scrutinized.

Three recent cases involving the constitutionality of race-based enactments illuminate Justice Kennedy's jurisprudence regarding race. In *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, Justice Kennedy wrote the plurality opinion upholding the constitutionality of Michigan's Proposal 2 which banned affirmative action on the basis of race and gender.⁸⁰ In *Fisher v. University of Texas at Austin*, Justice Kennedy authored the opinion for the Court vacating and remanding the Fifth Circuit's conclusion that the university's affirmative action policy was constitutional.⁸¹ And in *Shelby County v. Holder*, Justice Kennedy joined the opinion for Court declaring unconstitutional section four of the federal Voting Rights Act that

⁷⁹ The Court has repeatedly made clear the level of scrutiny for all racial classifications, *see, e.g.*, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2417 (2013) ("Any racial classification must meet strict scrutiny, for when government decisions 'touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'). However, the Court's opinions on sexual orientation classifications - - - the opinions in the LGBTQ quartet all authored by Justice Kennedy - - - are much less clear. For a good discussion of rational basis scrutiny with animus as applied to sexual orientation classifications, see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012).

⁸⁰ *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

⁸¹ *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013). The *Fisher* controversy will be returning to the Court in the 2015 Term; the Fifth Circuit essentially confirmed its earlier decision on remand and the Court again granted certiorari. *Fisher v. Univ. of Texas at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

included a “formula” provoking procedures meant to address racial voting discrimination in states.⁸² Thus, in each of these cases, whether upholding the legislative enactment as in *Schuette* or striking the state action as in *Fisher* and *Shelby*, Justice Kennedy’s position impugns racialized minorities.

In *Obergefell*, Justice Kennedy’s opinion for the Court does confront the apparent inconsistency with *Schuette*. In *Schuette v BAMN*, Kennedy’s plurality opinion emphasized allowing the democratic process to prevail over court intervention on the “sensitive,” “divisive” and “profound” subject of racial affirmative action.⁸³ In *Obergefell*, Kennedy, essentially quoting himself, noted that *Schuette* “reaffirmed the importance of the democratic principle” when it recognized the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.”⁸⁴ However, he continued in *Obergefell*,

as *Schuette* also said, “[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power.” Thus, when the rights of persons are violated, “the Constitution requires redress by the courts,” notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.⁸⁵

⁸² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2617 (2013).

⁸³ See *Schuette*, 134 S. Ct. at 1638 (“Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.”).

⁸⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (“Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. Last Term, a plurality of this Court reaffirmed the importance of the democratic principle in *Schuette v. BAMN*, 134 S.Ct. 1623 (2014), noting the “right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times.”).

⁸⁵ *Id.* (citations omitted).

Thus, for Justice Kennedy, there is no injury when a state voter referendum bans affirmative action by amending the state constitution to prohibit it. The very specific injury recognized in the dissenting opinion by Justice Sotomayor, joined by Justice Ginsburg, as well as the Sixth Circuit en banc opinion being reversed, was that a person advocating race-sensitive admission policies could only do so through amending the state constitution while a person advocating almost any other admission policy could simply persuade the Board of Regents.⁸⁶ One might almost say that the state constitutional “amendment imposes a special disability upon those persons alone,” who can only obtain relief “by enlisting the citizenry” of the state “to amend the State Constitution,” as Kennedy did say in the Court’s opinion in *Romer v. Evans* concluding that a state constitutional amendment prohibiting sexual minority anti-discrimination laws violated the Fourteenth Amendment.⁸⁷ But Kennedy did not say that in his opinion

⁸⁶ The Sixth Circuit’s opinion began by focusing on the injury in concrete terms:

A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change.

Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Michigan, 701 F.3d 466, 470 (6th Cir. 2012), *rev'd sub nom.* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014).

Justice Sotomayor’s dissenting opinion contains a similar explanation. *See Schuette* 134 S. Ct. at 1653 (Sotomayor, J., dissenting) (“As a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State's universities: one for persons interested in race-sensitive admissions policies and one for everyone else.”).

⁸⁷ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

for the Court in *Schuette*. Indeed, the opinion in *Schuette* does not distinguish, or even mention, *Romer v. Evans*.⁸⁸

Justice Kennedy's tendency toward the protection of LGBTQ persons with a concomitant lack of protection for racial minorities has not gone unnoticed. For example, as Professor Russell Robinson has demonstrated in his empirical analysis of Justice Kennedy's votes regarding constitutional claims involving race, sex, and sexual orientation, Kennedy is generally supportive of sexual orientation claims while he is generally hostile to claims involving race (and even more hostile to claims involving sex/gender).⁸⁹ Similarly, but without focusing on Justice Kennedy in particular, Professor Atiba Ellis has argued that the Court's post-racial and "triumphalist" narrative regarding the contemporary irrelevancy of race is accompanied by "an implicit narrative about the hierarchy of rights needing to turn its attention to the truly marginalized: homosexuals."⁹⁰ And in considering the cases decided in the 2012 Term, including *Windsor*, *Fisher*, and *Shelby County*, Professor Reva Siegel has argued that the disparate decisions in the race and sexual orientation cases "reflects the vote of only one Justice," Kennedy.⁹¹ She contends that in his opinion for the Court in *Windsor* "asking whether a law's enforcement 'tells' minorities they are 'unworthy,' or by asking whether a law's enforcement 'demeans' and 'humiliates' them, Justice Kennedy reasons about equality in the tradition of Brown."⁹² Siegel, however, is not willing to consign Kennedy to the post-racialist narrative, noting that Kennedy "clearly repudiated" such a view in his concurring opinion in the 2007 case of *Parents Involved v.*

⁸⁸ Justice Sotomayor, dissenting in *Schuette*, does note the similarity of *Schuette* to *Romer v. Evans*. *Schuette v. BAMN*, 134 S. Ct. at 1670-71 (noting that in *Romer* the Court rejected an attempt by the majority to transfer decisionmaking authority from localities, where the targeted minority group could influence the process, to state government, where it had less ability to participate effectively, and thus the minority was forced to enlist the citizenry of Colorado to amend the State Constitution, just as in the case before the Court in *Schuette*).

⁸⁹ Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. ____ (2015) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476714.

⁹⁰ Atiba R. Ellis, Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era, 2014 MICH. ST. L. REV. 789, 846 (2014).

⁹¹ Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 91-92 (2013).

⁹² *Id.*

Seattle.⁹³ Subsequently, Kennedy's opinion for the Court in *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.* - - - rendered the day before *Obergefell* at the end of the 2014 Term- - - held that racial disparate-impact claims are cognizable under the Fair Housing Act.⁹⁴ Although a nonconstitutional case with a somewhat narrow holding, Kennedy notably stated that much "progress remains to be made in our Nation's continuing struggle against racial isolation, and that the federal Fair Housing Act "must play an important part" in preventing the realization of predictions that the United States is "moving toward two societies, one black, one white—separate and unequal."⁹⁵

Inclusive Communities may indicate that Justice Kennedy's views on race - - - and a judicial orientation towards racial equality - - - are leaning more towards those of Justice Ginsburg.⁹⁶ But another case from the 2014 Term, rendered the week before *Inclusive Communities* and *Obergefell* points in the opposite direction. In *Kerry v. Din*, a due process challenge to a visa denial, race is implicit, but citizenship, marriage, and the Court's role are central.⁹⁷ Fauzia Din, a United States citizen, sought further explanation for the denial of a visa to her husband, an Afghan citizen. The Court's plurality

⁹³ *Id.* at 92 & n.466 (citing and quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does.")).

⁹⁴ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

⁹⁵ *Inclusive Communities Project*, 135 S. Ct. at 2525 (quoting and citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) (KERNER COMMISSION REPORT)). It is noteworthy that Kennedy harkens back to the Kerner Commission Report given its conclusion that "the uprisings of the 1960s arose in no small measure from the ghettoization and racial apartheid of American cities." Alan White, *The Supreme Court, the Fair Housing Act and the Racism Debate*, CREDIT SLIPS (July 9, 2015),

<http://www.creditslips.org/creditslips/2015/07/the-supreme-court-the-fair-housing-act-and-the-racism-debate- html>.

⁹⁶ Richard Rothstein, *Symposium: Fisher II – Could a Surprise be in Store?*, SCOTUSBLOG (Sept.8, 2015),

<http://www.scotusblog.com/2015/09/symposium-fisher-ii-could-a-surprise-be-in-store/> ("Will Justice Ginsburg find a new ally on affirmative action issues in the author of the Court's fair housing/d disparate impact decision, ensuring that the University of Texas can continue to make very minor efforts to consciously integrate its student body?").

⁹⁷ *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality).

opinion, by Justice Scalia, found that Fauzia Din did not have a cognizable liberty interest in her marriage under the Due Process Clause.⁹⁸ Justice Kennedy, concurring, found that the Court should not reach the liberty issue because even “assuming she has such an interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar.”⁹⁹ Kennedy's opinion thus does not engage in any discussion of marriage, sentimentalized or otherwise, as providing a liberty interest worthy of protection. Instead, Justice Kennedy analogizes Fauzia Din's marital due process claim to a group of professors' First Amendment claim challenging the denial of a visa to a Marxist scholar they had invited to speak at a university.¹⁰⁰ Kennedy contended that given the Attorney General's discretion regarding visas, the courts should not “look behind the exercise of that discretion, nor test it by balancing its justification against” the constitutional interests of citizens the visa denial might implicate.¹⁰¹

Thus, for Kennedy, the consular office's general reason for denying the visa - - - terrorism - - - needed no further elaboration, either with reference to specific subsections of the statute or with a disclosure of any factual basis.¹⁰² This almost complete deference occurs not only in the context of

⁹⁸ *Id.*

⁹⁹ *Id.* at 2136 (Kennedy, J., concurring). Justice Alito joined Kennedy's opinion.

¹⁰⁰ *Id.* at 2139-40 (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

¹⁰¹ *Id.* at 2140 (quoting *Kleindienst v. Mandel*, 408 U.S. at 770).

¹⁰² *Id.* at 2140-41. Justice Kennedy argued that the Government's citation of the “subsection” of the statutory provision, 8 USC § 1182(a)(3)(B), was sufficient because it “specifies discrete factual predicates the consular officer must find to exist before denying a visa.” *Id.* at 2141. However, as the dissenting opinion sets out, the § 1182(a)(3)(B) provision:

sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. See Appendix, *infra*. Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. §§ 1182(a)(3)(B)(iii)(I), (IV). Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled “terrorist.” One set of cross-referenced subsections, for example, brings within the section's visa prohibition any individual who has “transfer[red] ... [any] material financial benefit” to “a group of two or more individuals, whether organized or not, which ... has a subgroup which engages” in “afford[ing] material support ... for ... any individual who ... plans” “[t]he use of any ... weapon ... with intent ... to cause substantial damage to property.” §§

executive power but also with reference to the racialized subjects in this immigration case, albeit without explicit references to race, only nationality. The dissenting opinion, authored by Justice Breyer and joined by Ginsburg, Sotomayor and Kagan, found a liberty interest in the marriage and concluded that the visa denial was the type of individualized adjudication that normally calls for the ordinary application of Due Process Clause procedures.¹⁰³ The dissent recognized that “national security” was important, but argued that “the presence of security considerations does not suspend the Constitution,” and that the process Ms. Din sought was minimal: a statement of reasons for the denial of the visa.¹⁰⁴ Thus, the dissent argued, the courts should intervene to vindicate the liberty interest of Ms. Din and require at least some minimal due process from the government.

Justice Kennedy’s various positions invite speculation and explanation; Justice Ginsburg’s do not. Justice Ginsburg has consistently ruled in favor of the Court’s role in protecting minorities, including sexual minorities and racialized minorities. She joined Justice Kennedy’s opinions in the quartet of LGBTQ cases and she joined Justice Kennedy’s opinion in *Inclusive Communities Project* regarding the Fair Housing Act. But in *Schuette*, she was the sole Justice to join the dissent of Justice Sotomayor, which concluded by noting the Court’s failure: “For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.”¹⁰⁵ In *Fisher*, Justice Ginsburg was the lone dissenter,¹⁰⁶ repeating her position that “government actors, including state

1182(a)(3)(B)(iv)(VI), (vi)(III), (iv)(VI)(bb), (iii)(V). At the same time, some subsections provide the visa applicant with a defense; others do not.

Id. at 2145-46 (Breyer, J., dissenting) (ellipses in original).

¹⁰³ *Id.* at 2142. The dissent also stressed that “Ms. Din seeks to protect consists of her freedom to live together with her husband in the United States. She seeks *procedural*, not *substantive*, protection for this freedom.” *Id.*

¹⁰⁴ *Id.* at 2141-42.

¹⁰⁵ *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1683 (2014). (Sotomayor, J., dissenting).

¹⁰⁶ Justice Ginsburg as the only dissenting Justice in *Fisher* has perplexed some. As in *Schuette*, Justice Kagan “took no part in the consideration or decision of the case.” *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2414 (2013). A “behind the scenes” explanation for Justice Sotomayor’s joining of Kennedy’s opinion for

universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality,' and that the candid disclosure of considerations of race is preferable to dissembling.¹⁰⁷ And in *Shelby County v. Holder*, Justice Ginsburg wrote the opinion for the four dissenters that the success of the Voting Rights Act should not prove its dormancy and that "the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding."¹⁰⁸ When the issue was the due process to be accorded when a marital relationship was at stake in *Kerry v. Din*, Justice Ginsburg joined the opinion that clearly argued for a liberty interest and clearly argued that the government was not entitled to absolute deference.¹⁰⁹

In these and other cases Justice Ginsburg's position is consistent: the Court should act as a guardian to ensure that our constitutional narrative is one that extends constitutional protections to "people once ignored or excluded."¹¹⁰ She would have brought that jurisprudential integrity to any opinion for the Court in *Obergefell v. Hodges*.

CONCLUSION

Justice Ginsburg stated that it was "more powerful" for the Court majority to speak with one voice in *Obergefell v. Hodges*.¹¹¹ This is difficult to contradict. But considering *Obergefell's* lack of doctrinal rigor and its resort to sentimentality, as well as issues of jurisprudential integrity, it is

the Court was that a compromise in Kennedy's opinion - - - remanding the case rather than reversing it - - - convinced Sotomayor to withhold her draft dissent. See JOAN BISKUPIC, *BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200-10* (2014).

¹⁰⁷ *Fisher*, 133 S. Ct. at 2433-34 (Ginsburg, J., dissenting).

¹⁰⁸ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2651 (2013) (Ginsburg, J., dissenting).

¹⁰⁹ *Din*, 135 S. Ct. at 2141 (Breyer, J., dissenting).

¹¹⁰ See *United States v. Virginia*, 518 U.S. 515, 557 (1996).

¹¹¹ See *supra* note 11 and surrounding text.

regrettable that the one voice is that of Justice Kennedy. How much better - - - and indeed, more powerful - - - it would have been if the Court majority's one voice in *Obergefell* had been that of Justice Ginsburg.