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JUSTICE SCALIA'S PETARD AND SAME-SEX MARRIAGE

*Ruthann Robson**

Justice Antonin Scalia is well known not only for his conservative views, but also his literary language. So perhaps he might appreciate how the Shakespearean phrase, “hoist with his own petard,”¹ could describe how his dissents are being used to support the very outcome he derided: the constitutional recognition of same-sex marriage.

In *United States v. Windsor* decided in June 2013, the Court, by a bare majority, declared unconstitutional section 3 of the Defense of Marriage Act (DOMA) which prohibited federal recognition of same-sex marriages even if the marriages were recognized by state law.² As in two other important cases involving lesbian and gay rights, *Romer v. Evans* (1996)³ and *Lawrence v. Texas* (2003),⁴ Justice Kennedy wrote an opinion for the majority longer on rhetoric than on analysis and Justice Scalia wrote a dissent guaranteed to be called “scathing.” In these dissents, Justice Scalia not only criticized the majority opinion’s lack of rigor and exercise of judicial supremacy, but he warned of the consequences of the Court’s decision.

In *Romer*, Justice Scalia’s alarm was loud, if imprecise. He famously

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¹ William Shakespeare, *Hamlet* act 3, sc. 4.

² *United States v. Windsor*, 133 S. Ct. 2675 (2013). For further discussion of *Windsor*, see Ruthann Robson, *Case Comment: United States v. Windsor*, CUNY LAW REVIEW: FOOTNOTE FORUM (Sept. 2013), <http://www.cunylawreview.org/prof-ruthann-robson-on-u-s-v-windsor/>.

³ *Romer v. Evans*, 517 U.S. 620 (1996).

⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

accused the Court, like other legal elites—including law schools—of taking sides in the “culture wars” by prohibiting discrimination on the basis of sexual orientation.⁵

At that time, Congress had just passed the Solomon Amendment,⁶ denying federal funding to law schools that enforced their non-discrimination policy against military recruiters because of the military’s exclusion of homosexuals. A decade later, the Court unanimously upheld the constitutionality of the Solomon Amendment in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (2006).⁷ But Justice Scalia’s dissent in *Romer* might also be read as signaling the end of *Bowers v. Hardwick* (1986),⁸ in which the Court upheld the constitutionality of criminalizing homosexual sodomy; Scalia’s dissent in *Romer* chastises the majority for not even mentioning this holding.⁹

Lawrence v. Texas achieved Scalia’s implicit prediction regarding the demise of *Bowers v. Hardwick*. In his dissent in *Lawrence*, he repeats (and at times quotes) his earlier accusations regarding lack of rigor and assertion of judicial supremacy.¹⁰ He adds a further criticism regarding the Court’s failure to honor *stare decisis*.¹¹

Although he agrees that *Romer v. Evans* “eroded” *Bowers v. Hardwick*, he argues that subsequent decisions equally eroded *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, although the majority insists on adhering to *stare decisis* in the abortion context.¹² But Justice

⁵ *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) (“When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”).

⁶ 10 U.S.C.A. § 983 (West 2013).

⁷ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

⁸ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁹ *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

¹⁰ *See, e.g.*, 539 U.S. at 586 (Scalia, J., dissenting) (criticizing the majority’s application of “an unheard-of form of rational basis review”); *id.* at 587 (implying the majority was “manipulative” in invoking *stare decisis*); *id.* at 588 (calling *Casey*’s “famed sweet-mystery-of-life passage” the “passage that ate the rule of law”); *id.* at 591 (declaring the *Bowers* overruling “a massive disruption of the current social order”); *id.* at 603 (stating that Texas’ “hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change”); *id.* at 604 (calling the conclusion of the Court an imposition “by a governing caste that knows best”).

¹¹ *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“‘Liberty finds no refuge in a jurisprudence of doubt.’ That was the Court’s sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*. The Court’s response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick* is very different. The need for stability and certainty presents no barrier.”).

¹² *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) (discussing *Roe*, 410 U.S. 113 (1973) and *Casey*, 505 U.S. 833 (1992). Justice Scalia points to *Washington v. Glucksberg*,

Scalia's specific admonitory tones in the *Lawrence* dissent are directed at same-sex marriage and focus on Justice O'Connor's concurrence¹³ that would have invalidated the Texas sodomy law on equal protection grounds. Scalia writes that O'Connor's "reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."¹⁴ But in *Lawrence*'s majority opinion—resting on due process grounds—Justice Kennedy stated that the Court's opinion "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."¹⁵ And indeed, it often seemed as if the often-called "caveat paragraph" in *Lawrence v. Texas*, which excluded not only relationships and marriage, but also minors, public sex, and commercial sex, was the portion of *Lawrence* most likely to be quoted in other judicial decisions.

But again, perhaps Justice Scalia's dissenting remarks in *Lawrence*, albeit not focused on the majority opinion, proved prescient. For in *United States v. Windsor*, holding section 3 of DOMA unconstitutional, the Court relied upon *Lawrence*, as well as on *Romer v. Evans*. Writing for the Court, Justice Kennedy opined that DOMA "places same-sex couples in an unstable position of being in a second-tier marriage," a "differentiation" that "demeans the couple, whose moral and sexual choices the Constitution protects," citing *Lawrence*.¹⁶ Moreover, Justice Kennedy's opinion relies upon language from *Romer*, decided less than six months before Congress passed DOMA, to label DOMA as a "discrimination of an unusual character" thus requiring "careful consideration."¹⁷ In his dissent, Scalia excoriates the majority with familiar—and well-founded—charges of lack of analytic rigor.¹⁸ The sections of the dissenting opinion that Scalia devotes to disagreement with the Court's finding of Article III power to hear the case contain his customary judicial supremacy argument.¹⁹

The charges regarding *stare decisis* are muted, as they must be, and the allegations of "an arrogant legal culture" have moved to a footnote in Justice Alito's dissent, where they are leveled against "some professors of

521 U.S. 702 (1997), as eroding *Roe* and *Casey* with its holding that substantive due process requires heightened scrutiny only in cases implicating fundamental rights " 'deeply rooted in this Nation's history and tradition.' " *Id.* (quoting *Glucksberg*, 521 U.S. at 721).

¹³ *Id.* at 579–585 (O'Connor, J., concurring).

¹⁴ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting).

¹⁵ *Id.* at 578.

¹⁶ *Windsor*, 133 S. Ct. at 2694.

¹⁷ *Id.* at 2692.

¹⁸ See, e.g., *id.* at 2705–09 (attacking the majority's reasoning as "rootless and shifting," "perplexing," "scatter-shot," and full of "legalistic argle-bargle").

¹⁹ See, e.g., *id.* at 2697–98 (Scalia, J., dissenting) ("We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America.").

constitutional law” and not aimed at the Court itself.²⁰

But what achieves a level of clarity in Scalia’s dissent is *Windsor*’s applicability to state same-sex marriage bans. Scalia notes that the majority in *Windsor* does contain a “penultimate sentence” limiting the *Windsor* decision to DOMA. This strategy, he writes, takes “real cheek” given the *Windsor* majority’s reliance on *Lawrence* despite its similar limitation.²¹ Scalia employs vivid language—at least for those who recognize the idiomatic expression of inevitability—when he refers to “the second, state-law shoe to be dropped later, maybe next Term” and later repeats the shoe image.²² Backtracking a bit with a qualification of belief, he also accuses the Court of writing passages in *Windsor* to be “transposable” to any state same-sex marriage case.²³ He writes that “the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking” by the majority’s opinion in *Windsor*.²⁴ It is “easy” and indeed, “inevitable,” to reach the same conclusion regarding state laws prohibiting same-sex marriage as the Court did with DOMA prohibiting federal recognition.²⁵ And he provides illustrations, complete with a strike out of DOMA and an insertion of “this state’s laws” in two passages and in the third, a simple alteration of what Scalia calls the “invented number” of children being raised by same-sex couples from “tens of thousands” nationally to be “thousands” for the applicable state.²⁶ Again, Scalia invokes the shoe idiom: “no one should be fooled; it is just a matter of listening and waiting for the other shoe.”²⁷ Scalia pronounces that the majority opinion “arms well every challenger to a state law restricting marriage to its traditional definition.”²⁸

But perhaps it is Scalia who has “armed well” those who would challenge—or decide—state same-sex marriage prohibitions. Since *Windsor*, a number of different district judges have found state laws prohibiting the recognition of same-sex marriage unconstitutional: *DeLeon v. Perry* from the Western District of Texas;²⁹ *Bostic v. Rainey* from the

²⁰ *Id.* at 2720, n.7 (Alito, J., dissenting).

²¹ *Id.* at 2709 (Scalia, J., dissenting).

²² *Id.* at 2705, 2709.

²³ *Windsor*, 133 S. Ct. at 2710 (Scalia, J., dissenting).

²⁴ *Id.* at 2709.

²⁵ *Id.*

²⁶ *Id.* at 2710.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *DeLeon v. Perry*, No. 5:13-cv-00982-OLG (W.D. Tex. Feb. 26, 2014), available at <http://lawprofessors.typepad.com/files/deleonvperry.pdf>; see also Ruthann Robson, *Federal Judge Declares Texas Same-Sex Marriage Ban Unconstitutional*, CONSTITUTIONAL LAW PROF BLOG (February 26, 2014), <http://lawprofessors.typepad.com/conlaw/2014/02/federal-judge-declares-texas-same-sex-marriage-ban-unconstitutional.html>.

Eastern District of Virginia;³⁰ *Bourke v. Beshear* from the Western District of Kentucky;³¹ *Bishop v. United States* from the Northern District of Oklahoma;³² *Obergefell v. Wymyslo* from the Southern District of Ohio;³³ and *Kitchen v. Herbert* from the District of Utah.³⁴

All of these judges rely on Scalia's dissents and almost all mention Scalia's dissent in *Windsor*. Scalia's language—the “arms well,” the shoe dropping, the “beyond mistaking,” and the “easy” “inevitable” consequences of the majority's opinion in *Windsor*—is repeated and ratified.³⁵ At times the quoted material is condensed and at other times scattered throughout the opinion. Some times the quoted material is extensive, at times it is in a footnote, and at times it rests in a parenthetical. But beyond mistaking, it is there, and perhaps inevitable.

Indeed, several judges explicitly express their accord. One judge notes that it is “just as Justice Scalia predicted.”³⁶ Another judge opines that the propriety of invoking the Constitution to protect the rights of lesbian and gay citizens was “described eloquently” by the “Honorable Antonin Scalia.”³⁷ And another judge “agrees with Justice Scalia's interpretation of

³⁰ *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014), available at <https://casetext.com/case/bostic-v-rainey#UwUNX15kImt>.

³¹ *Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), available at <http://lawprofessors.typepad.com/files/bourkevbeshearky.pdf>; see also Ruthann Robson, *Kentucky Federal Judge Rules State's Nonrecognition of Same-Sex Marriages Violates Equal Protection*, CONSTITUTIONAL LAW PROF BLOG (Feb. 13, 2014), <http://lawprofessors.typepad.com/conlaw/2014/02/kentucky-federal-judge-rules-states-nonrecognition-of-same-sex-marriages-violates-equal-protection.html>.

³² *Bishop v. United States*, No. 04-cv-848-TCK-TLW, 2009 WL 4505951 (N.D. Okla. Nov. 24, 2009), <http://lawprofessors.typepad.com/files/1505878-0-32667.pdf>; see also Ruthann Robson, *Oklahoma District Judge Invalidates State's Prohibition of Same-Sex Marriage (But Stays Judgment)*, CONSTITUTIONAL LAW PROF BLOG (January 14, 2014), <http://lawprofessors.typepad.com/conlaw/2014/01/oklahoma-district-judge-invalidates-states-prohibition-of-same-sex-marriage-but-stays-judgment.html>.

³³ *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 U.S. Dist. WL 6726688 (S.D. Ohio Dec. 23, 2013), available at <http://lawprofessors.typepad.com/files/obergefell.pdf>; see also Ruthann Robson, *Ohio Federal Judge Issues Permanent Injunction in Ohio Same-Sex Marriage Case*, CONSTITUTIONAL LAW PROF BLOG (Dec. 23, 2014), <http://lawprofessors.typepad.com/conlaw/2013/12/ohio-federal-judge-issues-permanent-injunction-in-ohio-same-sex-marriage-case.html>.

³⁴ *Kitchen v. Herbert*, No. 2:13-cv-217, 2014 U.S. WL 30367 (C.D. Utah Jan. 6, 2014), available at <http://lawprofessors.typepad.com/files/kitchen-court-ruling-131220.pdf>; see also Ruthann Robson, *U.S. Supreme Court Stays Utah's Same-Sex Marriage Decision*, CONSTITUTIONAL LAW PROF BLOG (Jan. 6, 2014), <http://lawprofessors.typepad.com/conlaw/2014/01/us-supreme-court-stays-utahs-same-sex-marriage-decision.html>.

³⁵ See, e.g., *Obergefell*, slip op. at 3; *Bostic*, slip op. at 26; *Kitchen*, slip op. at 13; *Bourke*, slip op. at 14; *DeLeon*, slip op. at 29; *Bishop*, slip op. at 65.

³⁶ *Obergefell*, slip op. at 3.

³⁷ *Bostic*, slip op. at 26.

Windsor.³⁸

And while Scalia's dissent in *Windsor* predominates, it is not alone. The judge who agrees with Scalia's interpretation of *Windsor* also "agrees with the portion of Justice Scalia's dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court's reasoning logically extends to protect an individual's right to marry a person of the same sex."³⁹ Other judges also rely on the *Lawrence* dissent, seemingly admiring Scalia's candor. "Justice Scalia was more blunt, stating that 'preserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples."⁴⁰ One judge who confines his Scalia citations to *Lawrence* and to parentheticals expresses the argument most economically: "However, tradition, alone, cannot form a rational basis for a law. See *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting) ('Preserving the traditional institution of marriage . . . is just a kinder way of describing the State's moral disapproval of same-sex couples,' which, in turn, is not a legitimate reason)."⁴¹ Another judge also quotes the "kinder" language to defeat the contention that this could be a legitimate state interest.⁴² Interestingly, this judge notes that Justice Scalia has "repeatedly expressed his disagreement" with the conclusion that morality cannot be a legitimate government interest, but then adds: "However, these are dissenting opinions."⁴³

Scalia's dissenting opinions, like all dissenting opinions, have numerous functions. One of their purposes is akin to the petard: to attack the fortress of the majority opinion and exploit its weaknesses. But the danger of such an incendiary device is that its explosiveness can hurl the one who wields it into the air. In Shakespeare's play, it is Hamlet's erstwhile friends who are hoist by their own petard. Rosenkrantz and Guildenstern carry a message for the King of England that would result in Hamlet's death; Hamlet changes the letter so that it refers to them. Here are the lines from Act III, Scene IV of *Hamlet*:

*Let it work;
For 'tis the sport to have the enginer
Hoist with his own petar.*⁴⁴

It works. The device that brings about the pair's demise is the very one they

³⁸ *Kitchen*, slip op. at 13.

³⁹ *Id.* at 31.

⁴⁰ *Bourke*, slip op. at 14.

⁴¹ *DeLeon*, slip op. at 29.

⁴² *Bishop*, slip op. at 65.

⁴³ *Id.* at 65, n.37.

⁴⁴ Shakespeare, *supra* note 2.

sought to use to have Hamlet killed. Sometimes that is called poetic justice.

But while Rosenkrantz and Guildenstern may be dead, this does not mean that same-sex marriage prohibitions are extinct in every state. For that to happen, such a case would need to reach the United States Supreme Court and the majority would have to hold in the manner that Justice Scalia predicted. It would be refreshing if the majority opinion did evince the type of doctrinal rigor that has so often been absent.⁴⁵ If it did, perhaps Justice Scalia's dissent would not need to hurl such dangerous petards.

* * *

⁴⁵ For further discussion, see Ruthann Robson, *Online same-sex marriage symposium: Toward a more perfect analysis*, SCOTUSBLOG (Sep. 19, 2012, 9:57 AM), <http://www.scotusblog.com/2012/09/online-same-sex-marriage-symposium-toward-a-more-perfect-analysis/>.