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## **YOU CAN'T REMAIN NEUTRAL ON A MOVING TRAIN**

### **MARRIAGE EQUALITY IN THE STATES & IRELAND: THOUGHTS ON FREEDOM TO MARRY, RELIGIOUS HETERONORMATIVITY AND CONCEPTIONS OF EQUALITY<sup>1</sup>**

*Kris McDaniel-Miccio<sup>2</sup>*

This title, in part, was one of the famous phrases uttered by the brilliant historian Howard Zinn, a wonderful image that applies to advocating social justice. In the United States, the train referenced by Zinn was the Freedom Train, whether it be toward gender, racial or ethnic parity. Now it is the Freedom to Marry Train and it has not only left the station, it is moving at break-neck speed and almost unstoppable. This Train built with the blood, sweat and tears of the LGBTI community, forged by fire and situated on a justified track. There is no difference between this train and the 1964 Freedom Train: both are about freedom and equality and both demand that we climb aboard, or as Zinn reminds, be left behind in the dust of inequity.

Since 2013, thirty-seven states extended marriage to lesbian and gay couples and in June of 2015, the United States Supreme Court held that marriage was a fundamental right not to be

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<sup>1</sup> Parts of this article that discuss J. Scalia's opinions were first published by the author, in a previous 2015 article; an article that critiques the Justice's opinions in key cases that address homosexuality. See Kris McDaniel-Miccio, *Tzadek, Tzadek Thou Shalt Pursue: A Critique of Justice Scalia's Opinions in Romer, Lawrence & Windsor*, 21 CARDOZO J. GEN. & LAW \_\_ (2015).

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restricted to heterosexual couples. Because of the Court's ruling, marriage equality was now the rule in all fifty states and not the exception.

In the European Union, the tiny nation-state of Éire passed a marriage referendum that not only challenged the pre-eminence of the Catholic Church, but also of religious conservatism and its dominance over family, constitutional law, and policy. In an historic vote, 62% of Irish voters rejected the NO campaign's heterosexist definition of marriage, and Ireland became the first country to pass a constitutional amendment extending marriage equality to all citizens. Yet, the struggle is not over; rather, it has just begun in both the United States and in Ireland. Indeed, the forces that reduced sexual minorities to less than second class citizens are waging a battle that they believe essential to the survival of not only the primacy of Christianity but of Western Civilisation itself.

In the U.S., the institution of "religious liberty" legislation and laws to repeal LGBTI protection coupled with Citizens United and the Hobby Lobby decision, have given much needed traction to the anti-LGBTI movement. While Ireland has not experienced a continued assault upon the rights of the LGBTI community, it is just a matter of time before there is a crack in the constitutional foundation that supports equality. Thus, this article will examine the issues that have framed divergent opinions on sexuality and marriage. Moreover, it shall decode the lexicon and examine the politics and legal theories of the NO position in both jurisdictions. Unlike Ireland, activists in the U.S. have used the courts; thus, U.S. Supreme Court cases that address homosexuality and same sex marriage will be analyzed. Because Justice Scalia was the leader of the opposition on the Court, deconstructing his opinions will provide much needed insight into the theoretical basis for the "no" side of the Court and oppositional politics in America.

## I. IRELAND: A COLLISION OF CULTURE AND HETERODOXY

Religion and religious canon has not been a voice, a position or a critic in the struggle for equality in Ireland. Indeed, it has been *the* bulwark of constitutional, case, and statutory law, drowning and driving out the voices of opposition from the public square. Yet the primacy of the Church was not always the case: four minutes after noon on April 24<sup>th</sup> 1916, Patrick Pearse read the Proclamation from the steps of the GPO.<sup>3</sup>

The Republic guarantees religious and civil liberty, equal rights and equal opportunities of all its citizens, and declares its resolve to pursue the happiness and prosperity of the whole nation and of all its parts, cherishing all the children of the nation equally, and oblivious of the differences carefully fostered by an alien government, which have divided a minority in the past (emphasis added).<sup>4</sup>

The Proclamation did not condition full citizenship rights on one's sex, sexual identity, or sexual orientation. Indeed, biology was neither destiny nor a disqualifier for the rights and privileges that are constitutive of citizenship. The Free State responded to the inequality of oppression by enshrining civil liberty and equality in its founding document. And religion? It was *a* liberty, not *the* liberty.<sup>5</sup> By 1937, the repositioning of religion would change and affect the legal personage of women and sexual minorities.

Since the 1950s, the personhood of the individual homosexual as a rights-holding member of the state has been subordinate to religious notions of what constitutes morally acceptable behaviour. Homosexual *qua* homosexual was once defective and deformed or, in traditional Christian lexicon, an abomination before G-d<sup>6</sup> and the State. Indeed, until the late

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<sup>3</sup> FEARGHAL MCGARRY, *THE RISING, IRELAND: EASTER 1916* (Oxford 2010)

<sup>4</sup> MCGARRY, *supra* note 3

<sup>5</sup> It is interesting to note that in the U.S., Republican candidates for the Presidency believe that religious liberty is the core liberty or most fundamental liberty. As Ted Cruz has remarked, without religious liberty all other liberties would fall. This is not only a distortion of the Bill of Rights, but of the founders' beliefs concerning religion in general and religious liberty in particular.

<sup>6</sup> As both a Jew and a Rabbi, I do not spell out G-d as is our religious and cultural tradition. This tradition comes from the belief that the ineffable One cannot be captured either in word or in image; hence, anthropomorphic character of the Divine is inappropriate.

20<sup>th</sup> Century the psychological community categorized homosexuality as a psychological disorder, while the Church taught that homosexuality was “the love that dare not speak its name.”<sup>7</sup> This view of same-sex love or intimate expression was grafted onto law and infused into both cultural lexicon and beliefs.

Sodomy laws existed in Ireland as well as in the U.S. Such laws were enforced primarily against the gay and lesbian community even when the statutory lexicon was gender neutral. Cultural selective enforcement translated into legal selective enforcement, violating basic tenants of due process.<sup>8</sup>

Gender inequality, specifically heterosexism, not only framed sodomy prosecution, but also conceptions of marriage and family. In Ireland, the 1937 Constitution created a constitutional provision that appropriated women’s wombs as reproductive instruments.<sup>9</sup> With inclusion of §41 in the 1937 Irish Constitution, acceptable roles for women were reduced to child bearer and child-rearer. The public sphere, with its rights and responsibilities, was closed to women based on an accident of birth.

Marriage was defined as between one man and one woman, drawing upon cultural beliefs that are synonymous with religious canon. Heterosexuality was the *sine qua non* of marriage and family. Moreover, it is such conceptions of marriage and family, charted along

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<sup>7</sup> See ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (W. W. NORTON & COMPANY 1995)

<sup>8</sup> Ireland prosecuted gays and lesbians up until 1993. Selective enforcement of gender-neutral criminal sodomy laws was part of American case law. Indeed, in 1987, the U.S. Supreme Court placed its imprimatur on what every law student learns is a violation of the Fourteenth Amendment to the U.S. Constitution. *Bowers* involved a challenge to Georgia’s criminal sodomy laws that were in fact gender neutral. A heterosexual couple joined Hardwick, who was homosexual, in the challenge. Because the case was brought against the State of Georgia, it was heard in federal court. The U.S. District Court for the Middle District of Georgia non-suited the heterosexual couple because the Court believed the chance of heterosexual prosecution would be infinitesimal. The U.S. Eleventh Circuit Court of Appeals upheld this decision while the U.S. Supreme Court chose not to address the matter. See *Bowers v Hardwick*, 478 U.S. 186 (1986). See also, *Tzadek, Tzadek Thou Shalt Pursue: A Critique of Justice Scalia's Opinions in Romer, Lawrence & Windsor supra* note 1, at 1.

<sup>9</sup> IR. CONST. 1937, art. 41

axes of sexual and gender domination, which prohibited homosexuality and same-sex marriage. There is no question that Roman Catholicism and fundamentalist Protestantism have been ruminating and posting edicts, canons, and dogma on issues particular to sexuality and marriage. With that said, however, there exists a rather schizophrenic view of sexuality and marriage, especially if one examines the writings of Augustine. Augustine had a rather dim view of sex, even within marriage.<sup>10</sup> Indeed, a moral as well as theological precept defined sexual desire as the progenitor of sin and sinfulness. Augustine created an exception, however; sex was moral only if engaged in for the purpose of procreation. Other Catholic theologians such as Aquinas not only followed Augustine regarding the notion of proper or moral sex, but in his belief about the function and moral foundation of women. Females were lesser beings, useful only for the purpose of procreation, and nothing more. They were, “defective and misbegotten,” and, “utterly useless, if one excludes the function of bearing children.”<sup>11</sup> The traditional view of women in Catholic dogma was that of reproductive instrument.

Irish natural law theorists tie their abhorrence to sex *qua* sex, and thereby homosexuality, to Aquinas, derivatively to Augustine of Hippo, and the writings of Paul VI, John Paul II, and Benedict.<sup>12</sup> It is interesting to note that the opponents to the Irish Marriage Equality Referendum based their objections on the notion that sex, as “natural” procreative conduct, should only take place within heterosexual marriage.<sup>13</sup> This raises some serious questions about “fighting an

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<sup>10</sup> Judith Chelius Stark, ed., *FEMINIST INTERPRETATIONS OF SAINT AUGUSTINE* (Univ. of Penn. Press, 2007).

<sup>11</sup> See THOMAS AQUINAS, *THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS*. See also ST. AUGUSTINE, *CITY OF GOD* (ABRIDGED EDITION 1958)

<sup>12</sup> John Finnis, *Law, Morality and “Sexual Orientation,”* in *JUSTICE: A READER*, Michael Sandel (ed.) (Oxford University Press, 2007); Encyclical Letter of Pope Paul VI, *Humanae Vitae, [Of Human Life]*, (July 25, 1968); cf. Winnipeg Statement, *Canadian Bishops Statement in Response to Humanae Vitae*, (Sept. 27, 1968) (arguing against the conclusions of the Church concerning reproduction and birth control). See also POPE JOHN PAUL II, *MEMORY AND IDENTITY: CONVERSATIONS AT THE DAWN OF A MILLENNIUM* (RIZZOLI 2005) (“It is legitimate and necessary to ask oneself if this [same-sex marriage] is not perhaps part of a new ideology of evil, perhaps more insidious and hidden, which attempts to pit human rights against the family and against man.”).

<sup>13</sup> See Charter of the Rights of the Family, Congregation for the Doctrine of the Faith (October 22, 1983)

enemy with outposts in [one's] mind.” The footprints from the “no” vote to Aquinas and Augustine’s conceptions of moral, sacred, and proper sex and marriage raise an important question for fifty percent of the Irish population. Do opponents also cleave to views about women and their role in the family? And for conservative women, does their *political* alignment with the “no” position reinforce stereotypes of women that challenge personhood?<sup>14</sup>

Of equal importance is the No camp’s view of homosexuality. Such attitudes influence political and cultural views of homosexuality in general and homosexuality in particular. Studies indicate two perspectival positions that frame oppositional views of homosexuality: first, gay male relationships constitute the category, “homosexual,” excluding any reference to women and lesbianism. Second, *gay* relationships require that one male partner assume the role of the female during sexual intimacy and home life. Because maleness is culturally and legally privileged, taking on the alleged “female” role may be a source of revulsion because it rejects masculinity while distorting maleness.

In Ireland, the Iona Institute is an example of a Christian organisation with a sophisticated political apparatus that has shaped the NO campaign in Irish society. It has crafted an anti-same-sex marriage platform that closely resembles Catholic encyclicals and pastoral letters of the Popes. An interesting characteristic of the Irish “no” position is its ideological connection to the anti-same-sex marriage movement in the United States. Both jurisdictions claim: (1) marriage is solely for the purpose of procreation; (2) the mother and father familial unit is the most suitable environment for children; (3) the male and female dyad conforms to ancient, biblical, and best iteration of family and; (4) a gender diverse marriage dyad is the cornerstone of Western Civilization.

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<sup>14</sup> IR. CONST. 1937, art. 41.1

During lead-up to the May 22<sup>nd</sup> Referendum, opponents of same sex marriage crafted a mantra that linked procreation with proper aspects of childrearing. Childrearing was the domain of the family headed by a *biological* mother and father. Further, opponents such as the Iona Institute and Mothers and Fathers Matter claimed that the heterosexual dyad was the most beneficial environment for raising children. Consequently, constitutional protection should only be afforded if the familial constellation is rooted in heteronormativity.

Unlike the United States, Ireland has created constitutional families.<sup>15</sup> Applying a heteronormative yardstick, only families with a father and mother are considered inviolate and accorded special rights and protections. Rights inure to the familial unit, not to individuals within the family. As a result, Irish families headed by a single parent, grandparents, or gay and lesbian parents fall outside the ambit and concern of the law and public policy.<sup>16</sup> Thus, the marriage of moral religious theology with conceptions of heteronormativity creates nearly an insuperable chasm between equality for gay and lesbian couples wishing to marry.

### ***So how did the YES vote prevail?***

Instead of using the courts, which would have been a barren preference, the Marriage Equality (ME) movement supported a constitutional amendment that would involve all citizens throughout the Republic. ME built a grassroots movement that went door-to-door throughout the country, organised rallies, meet and greet coffee hours, and debates during the last six months of the eighteen-month campaign. They also organised student groups who then planned debates, meetings, and public lectures on equality and religion at university. The YES Equality movement contested misinformation proffered by Iona and Mothers and Fathers Matter through

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<sup>15</sup> IR. CONST. 1937, art. 41.1

<sup>16</sup> It is interesting to note that preservation of the heterosexual family is a key government interest. A Constitutional Referendum on the Child, comparable to child protective legislation in the U.S., had both a difficult time, low voter turnout and, when it passed, did not take effect for two years. By granting the state quasi *parens patriae*, the inviolate position of the family was viewed as compromised and threatened.



production of data on the welfare of children, the connection between religion and heterosexuality, and by debunking the idea that marriage is primarily about producing and rearing children. And they did this by not devolving into name-calling or engaging in senseless attacks on proponents of the status quo. The ME contingency reduced the decibel level in debates, broadcasts and media. This, however, was not true for the NO campaign; rather their tactics mirrored the often insolent, tough and polarized position of the religious right in the United States. The ME campaign took to the streets and its success was overwhelming.

One last thought. Ireland *was* a profoundly Catholic country. It is no longer. This is due in large measure to the sexual abuse of children in the care of the Church, as well as the indentured servitude of pregnant women and young girls in the Magdalena Laundries. The Irish felt betrayed by a Church that had a hand in structuring a rigid civil society and in dictating private lives. As many a newscaster, commentator and the Archbishop noted, this was a vote as much against the Church as it was for equality.

## **II. THE UNITED STATES: THE RELIGIOUS TRUMP CARD AND THE DEVOLVEMENT OF EQUALITY**

In the United States, pundit and politician alike believe that separation of Church and State is axiomatic. Indeed, members of the Tea Party (and Fox News) hold fast to the notion that an insuperable and perilous chasm exists between Church and State,<sup>17</sup> and that peril lies in the land that spurns G-d. Yet, much like our cousins across the pond, American Jurisprudence is rife

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<sup>17</sup> See Prachi Gupta, *9 reasons Fox News thinks there's a war on Christmas*, SALON, [http://www.salon.com/2013/12/24/9\\_reasons\\_fox\\_news\\_thinks\\_theres\\_a\\_war\\_on\\_christmas/](http://www.salon.com/2013/12/24/9_reasons_fox_news_thinks_theres_a_war_on_christmas/), See also, Stephanie Mencimer, *The Coming Tea Party Civil War*, MOTHER JONES <http://www.motherjones.com/politics/2010/11/tea-party-civil-war> (... a few weeks earlier, Mark Meckler, TPP's national coordinator, appeared at a conference sponsored by Ralph Reed's Faith and Freedom Coalition. There, Meckler told the religious right assembled foot soldiers that he believed the real animating force behind the tea party movement was opposition to the separation of church and state and the 'removal of God from the public square.' One of the group's newest board members is the former Oklahoma Republican congressman Ernest Istook, a stalwart of the Christian right.”).

with references to the “Creator,” “Divine Ordinance,” and other euphemisms for G-d or a god.<sup>18</sup> While we claim there has been neither the establishment of a state nor government religion, our jurisprudential history not only contests such a claim but directly contravenes it. Tea Party protestations to the contrary, the U.S. has operated as a *Christian* country in both law and cultural practice.<sup>19</sup>

Such adherence to a religious politic has had a devastating effect on the LGBTI community, women, children, and the family.<sup>20</sup> The presence of religion in law and culture has limited access to occupations,<sup>21</sup> permitted appropriation of women’s bodies,<sup>22</sup> denied a voice and presence in the body politic,<sup>23</sup> and eliminated women’s personhood and agency. With reference to the LGBTI community, religion has framed laws that criminalized the homosexual, and permitted open and notorious discrimination in housing, employment, and the military. Moreover, culturally, a blind eye was turned on violence perpetrated against gay men, lesbians, transgendered persons in the same way as cases of martial rape and male intimate violence. What linked the material base of women and LGBTI oppression was gender inequality.

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<sup>18</sup> Muller v. Oregon, 208 U.S. 412, 421-22 (1908); Bradwell v. Illinois, 83 U.S. 130, 141 (1872); State v. Black, 60 N.C. 266 (1864).

<sup>19</sup> We will often read that our country was founded on Judeo-Christian principles. I beg to differ. The parsing of Torah or Tanakh by Christians, specifically fundamentalist Christians, ignores and obfuscates the rich interpretive writings, wrestling and struggle of the צדיק (tsaddiq) – (*just, righteous*), regardless of whether written in Talmud, Mishnah or current theological tracts.

<sup>20</sup> See generally JULIET MITCHELL, WOMEN’S ESTATE (Penguin 1972); ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 35 (Oxford Univ. Press, 1987).

<sup>21</sup> See generally Bradwell, 83 U.S. 130. See also Muller, 208 U.S. 412.

<sup>22</sup> Bradley v. State, 2 Miss. (1 Walker) 156, 158 (1824). The Mississippi Supreme Court held that husbands would not be prosecuted if they beat their wives with a stick no thicker than the diameter of their thumb. In effect, husbands had the right to use physical force as a means to control their wives’ behavior. The question that triggered state action and judicial inquiry was the amount of force used—hence it was *excessive* force that was actionable, not the use or threatened use of force. See also State v. Black, 60 N.C. 266 (1864) *overruled by* Harris v. State, 71 Miss. 462 (1894); People v. Liberta, 64 N.Y.2d 152 (1984)(marital rape exemption); See generally Merton v. State, 500 So. 2d 1301(1986); Commonwealth v. Chretien, 383 Mass. 123 (1981).

<sup>23</sup> U.S. CONST. amend. XIX (ratified August 18, 1920). Cf. Minor v. Happersett, 88 U.S. 162,173 (1875) (holding that while Virginia Minor was a U.S. citizen the Privileges and Immunities Clause did not confer a right to vote and state restrictions that limited voting to a specific gender, age, or class was not a violation of either the Privileges and Immunities Clause or the relatively new Fourteenth Amendment.).

While granting religion a niche in the market place of ideas is appropriate and does not harm conceptions of democracy, allowing it to frame both cultural and legal discourse is not only dangerous but anti-democratic. It is dangerous because it presumes moral certitude when such certitude is improper, and it is anti-democratic because it marginalizes spiritual, religious, or humanistic iterations of morality that are disfavored or outside the bounds of what is perceived to be “acceptable.” HLA Hart was correct when he denounced the moral inevitability of Lord Devlin’s prohibition against prostitution and homosexuality.<sup>24</sup> Devlin’s position, not unlike Burger’s concurrence in *Bowers*, Brewer’s opinion in *Muller*, or the State of Virginia’s brief in *Loving*, was grounded in the “inerrant word of G-d,” situated within *Christian* theocratic notions of Divine will. For Hart, the problem was not that Devlin and others held religious beliefs, but that such beliefs structured law and formed the *sole* basis for morality.<sup>25</sup> To Hart the danger was not in the details it was the detail.

In American jurisprudence, there are footprints to the same source as the one commented on by Hart in 1950s England. Politically, the Bible as authority for law and policy is very much alive in the fifty states framing condemnation of same-sex marriage, abortion, and continued mulishness in the face of religious diversity and moral beliefs. Moral certainty in scriptural imperatives supplants justice and, as Hart reminds, laws from this source require no justification or rationale other than it “is morally right,” which, translated means, “scripturally consonant not

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<sup>24</sup> See generally H. L. A. HART, LAW, LIBERTY AND MORALITY (1963).

<sup>25</sup> *Id.*

designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion.”<sup>26</sup>

Indeed, the confluence of *Citizen’s United* with *Hobby Lobby* creates an environment where religious claims usurp equality. Since the Supreme Court decision in *Obergefell*, states have enacted legislation that would enable vendors to claim a First Amendment violation if having to serve, sell, or deliver goods to the LGBTI community. By invoking “strongly held” religious beliefs, *individuals* may withhold services and goods from the community, and it is quite possible that such discrimination could extend to other minorities.

What is fascinating about the current political climate is how it parallels claims made in the era prior to the establishment of the Civil Rights Act of 1964 (CRA). During Jim Crow, houses of worship, private and public companies and sole vendors denied access and service to African-Americans. This precipitated the counter sit-ins throughout the South, as well as the Birmingham bus boycott led by Martin Luther King. The 1964 CRA eradicated inequality based on race, and subsequently sex, by creating a federal legislative scheme that made discriminatory conduct in public accommodation unconstitutional. The CRA included a religious exemption but only for religious *institutions*. Individual members of the public were not empowered to

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<sup>26</sup> MARCI A. HAMILTON AND EDWARD R. BECKER, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2007), and *GOD V. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY* (2014). In Hamilton and Becker’s writings, they analyze the religious basis for law finding it to be deleterious to conceptions of democracy. In their newest publication, they sound an alarm in relation to the *Hobby Lobby* case argued before the U.S. Supreme Court in April 2014. In *Hobby Lobby*, the appellants, fundamentalist Christians and owners of a chain of stores that employed in excess of 25,000 workers, challenged the Affordable Care Act’s requirement that insurance cover contraception. Appellants argued that such a requirement violated their First Amendment right to express their religious beliefs. In *City of Boerne v Flores*, 521 U.S. 507 (1997), Justice Kennedy, writing for the majority, found that Congress exceeded section 5 enforcement power in the enactment of Religious Freedom Restoration Act (“RFRA”) as applied to the states. While this was important, the explanation in Justice Stevens’ concurring opinion is even more interesting and clearly outlines the problem with unfettered exercise of religious beliefs by individuals: “RFRA is not a proper exercise of Congress’ §5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance.”

invoke a First Amendment claim of religious liberty to refuse service to anyone on the basis of race or sex.

The distinction made in the 1964 CRA between religious institutions and religious beliefs of individuals seems to be important; they are however a difference without a distinction. By creating an exemption, it opened the door for *Hobby Lobby*. In terms of commerce, Catholic, Evangelical, and Orthodox Jewish adoption agencies, hospitals, and care facilities are no different from individuals who run such organisations. What triggers the withholding of services or goods is a religious belief, canon, or stricture. Seemingly, such beliefs guide the actions of individuals as well as institutions. Thus, religious exemption in 1964 via the CRA and again in the 1990's via RFRA, created a potential constitutional confrontation between religious liberty and equality claims. *Citizens' United's* ruling that "corporations are people too" for purposes of the First Amendment, not only opened the floodgates for a tsunami of funding by corporations to political candidates, but raised the specter that corporations could interpose claims of religious discrimination. *Hobby Lobby* is the *sine qua non* for the religious right because it primatizes religion whilst distorting conceptions of liberty. Moreover, it blasts a hole in the wall that separates civil from religious society. What is on the horizon is ominous, not only for equality but for religious liberty as well. The architects of current legislation that would give a "get out from under the Constitution card," for religion is not universal, rather it applies only to those persons who have "deeply held *Christian* religious beliefs." It appears that religious liberty is not *a* liberty interest but *the* liberty interest, and one that is narrowly crafted and trumps equality.

### **III. SAME-SEX MARRIAGE, OR THE LOVE THAT DARE NOT SPEAK ITS NAME**

Justice Scalia is prolific when it comes to constructing an opinion, regardless of whether it is consonant with the majority or the dissent. The constant, according to Erwin Chermersky,

is how he created a juridical trajectory that is at once miserly and callous.<sup>27</sup> While it would be interesting and quite entertaining to address Chermerinsky's observation, the real danger caused is not Justice Scalia's tone but rather his legal interpretation of rights, defined by and grounded in an ideology bound by a conservative politic: a politic that is hostile to women, gay men and lesbians. It should be noted from the outset, this ideology is inconsistent with the Constitution and the moral imperatives of dignity and respect embedded within it. Moreover, it denies to this class of persons their humanity.

On June 26, 2013, the United States Supreme Court handed down its decision in *Windsor*<sup>28</sup> and *Perry*.<sup>29</sup> These long awaited decisions were the death knell to § 3 of the Defense of Marriage Act and to California's bar to same sex marriage. Writing for the majority, Kennedy's words inscribed into law the dignity promised to all persons by the Fifth and Fourteenth Amendment of the U.S. Constitution. Additionally, he cautioned states to mind the admonition that while jurisdictions are empowered to set guidelines pertaining to marriage; such guidelines must conform to the Constitution.<sup>30</sup> Finally, he stated what every parent and child knows: denigration of a familial unit or marriage bond is humiliating, not merely to the parties involved, but the children who are part of the family.<sup>31</sup>

Justice Scalia objected. His dissent in *Windsor* tracked the underlying ideology that structured his opinions in *Romer*<sup>32</sup> and *Lawrence*.<sup>33</sup> As Carlo Pedrioli makes clear, Justice Scalia

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<sup>27</sup> Erwin Chermerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 UNIV. OF HAWAI'I L. REV. 385 (2012). Other scholars have used such adjectives to describe his opinions; specifically, as they apply to gender equality or gender issues—unprincipled, inconsistent and ideological to a fault.

<sup>28</sup> *United States v. Windsor*, No. 12-307, 570 U.S. \_\_\_\_ (2013)(slip op.); 133 S. Ct. 2675.

<sup>29</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>30</sup> *U.S. v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>31</sup> *Id.* at 2678.

<sup>32</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>33</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

did not adopt advancement of constitutional rights for sexual minorities.<sup>34</sup> Rather, his opinions reinscribed a rights paradigm that protects traditional notions of heterosexuality and sexual expression. Before deconstructing Justice Scalia’s dissent in *Windsor* and *Obergefell*, the key marriage equality cases of the 21<sup>st</sup> Century, it is essential to unpack the beliefs that shaped his position on constitutional recognition and extension of rights to homosexuals, homosexuality, and same sex marriage.

### A. The Pattern Emerges

In *Van Orden v Perry*,<sup>35</sup> religious beliefs seem to structure Justice Scalia’s understanding of government’s legitimacy as well as the source for human behaviour. Both flow from the Divine or, more correctly, are constructed by the Divine. During oral argument in *Van Orden*,<sup>36</sup> Scalia opined, “[w]hat the commandments stand for is the direction of human affairs by G-d,” and the commandments are symbolic of the “*fact* that government derives its authority from G-d.”<sup>37</sup> Yet, this brief window into Scalia’s thinking reveals a rather simplistic, rote, or formulaic understanding of the G-d, civil society debate. First, his use of the word “fact,” is at once perplexing and problematic. Indeed, the existence of a Divine Being is neither provable nor

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<sup>34</sup> Carlo Pedrioli, *Judicial Neutrality Awash with Ideology: Justice Scalia, Sexual Orientation and Rhetorical Personae*, (Sept. 20, 2013)(unpublished comment, on file with the author) available at [http://works.bepress.com/carlo\\_pedrioli/3/](http://works.bepress.com/carlo_pedrioli/3/). Pedrioli makes the case that Scalia’s opinions are rife with ideological positions as opposed to anything approximating judicial neutrality or what some would term “detached objectivity. I would in fact take issue with Professor Pedrioli regarding his generous use of the term “judicial neutrality,” since Justice Scalia’s writings are anything but neutral and some would argue devoid of juridical care. For a marvelous analysis of the lack of judicial temperament or inquiry, see, Chemerinsky, *supra*, note 28.

<sup>35</sup> *Perry*, 545 U.S. 677 (2005).

<sup>36</sup> *Id.*

<sup>37</sup> Trans. of Oral Argument, at 16, 23-24, *Van Orden v. Perry*, No. 03-1500 (March 2, 2005), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/03-1500.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-1500.pdf). (“ . . . They're saying these basic principles of human behavior that we're governed by come from God. And that message would be conveyed so long as you use the terminology of the Ten Commandments. That's what the Ten Commandments stand for . . . .”) (“It's a symbol of the fact that government comes—derives its authority from God. And that is, it seems to me, an appropriate symbol to be on State grounds.”). The term “religious” encompasses atheist, agnostic, and those who do not believe in a monotheistic deity.

disprovable; rather belief in a divinity or Divine architect is a consequence of *faith* not fact.<sup>38</sup> While natural law theorists, such as Lord Devlin, would agree that human rights are endowed by a Creator, Scalia's notion of law or legitimacy of (state) authority is highly contested by theologians. Indeed, Abraham Joshua Heschel interrogates the supposition that mere faith comports with Judaism and contests the idea that law, religious or secular, is worthy of uncritical adherence. Harvey Cox, Hollis Professor of Divinity at Harvard, makes clear that authority grounded in religious claims or claims of legitimacy derived though scripture or religious canon are neither legitimate nor authentic.

HLA Hart would find Justice Scalia's admonition most disturbing because of the moral certitude that accompanies his assertion. The most troubling aspect of locating the source of civil, legal or political authority in scripture is its dilution of the First Amendment and shifting of power from the will of the people to the will of god. This is problematic because it denies the existence of spiritual pluralism while distorting notions of civil and secular when used to modify either society or our legal system. Finally, Justice Scalia's reliance on a divine source for government's legitimacy and its authority exceeded permissible notions of using religion or spiritual beliefs as a guide; here, religion is both foundation and fortification.

Justice Scalia's juridical views, however, are not shaped solely by his reliance on a selective reading of *Torah*<sup>39</sup> but rather his penchant for ideological as well as religious dogma

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<sup>38</sup> See generally, TEILHARD DE CHARDIN, *THE PHENOMENON OF MAN*, (1965). De Chardin was a Jesuit theologian and paleontologist who reconciled his faith in the Divine with evolution through "le dedans de la matière" his theory of the inside of matter-matter has an inner property that propels it spontaneously to organize itself with other matter into the biosphere and eventually uniting with the Divine. His view of evolution was teleological. The notion of inner matter should not be confused with the existence of the "soul," that is another Christian theological belief. Yet de Chardin does not claim he has proof; rather he has a theory of the unity of god with human, called the Omega-point, becoming one with the divine. Every Catholic knows the Alpha-Omega distinction—the beginning and the end. For de Chardin, Omega is an ending, an end to the purely human and into the Divine. See also, ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* (1976).

<sup>39</sup> Justice Scalia's reliance on scripture or the gospels is, at best, very loose. Indeed, some may even refer to either it as "cherry-picking," or cafeteria Christianity. See, *Mullins Coal v. Director, Office of Workers' Compensation*, 484



contributes to their construction. Starting in 1996, Justice Scalia's commitment to a conservative ideology is discernable. In *Romer v Evans*,<sup>40</sup> the Supreme Court struck down Colorado's Constitutional Amendment 2, which invalidated any claim of discrimination by LGB persons. It further prohibited the establishment, adoption, or enforcement of any "statute, regulation, ordinance or policy,"<sup>41</sup> by any political subdivision of the State of Colorado to, *inter alia*, protection of the relationships, conduct, orientation, or practices by or of the LGB community or individuals.<sup>42</sup> The aim of Amendment 2 was to leave lesbians, gay men, and bisexual persons *unprotected* against arbitrary discrimination and open to majoritarian "animosity."<sup>43</sup> Unable to treat discrimination based on sexual orientation as a semi-suspect or suspect class, Justice Kennedy found that the Amendment violated the Equal Protection Clause because the *purpose* of the Amendment failed the rational basis test.<sup>44</sup> Simply put, the objective of the Amendment was *unreasonable*.<sup>45</sup>

Justice Scalia, writing for the dissent, characterized the majority as favoring *preferential* treatment for lesbians, gay men, and bisexual persons.<sup>46</sup> There was nothing preferential in the claim by plaintiffs or by the majority. Amendment 2 was crafted with only one goal—to remove any protection from discrimination regardless of whether state or private actors withheld employment, housing, or wage-labour benefits based on sexual orientation.<sup>47</sup> Moreover,

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U.S. 135 (1989) (upholding Labor Department regulations making it much more difficult for miners to get black lung benefits); *Sullivan v. Stoop*, 110 S. Ct. 2499 (1990) (denying needy children a \$50 disregard if they receive Social Security Benefits) *See also*, Peter Edelman, *Justice Scalia is Wrong About Poverty Law Being 'Made-Up Stuff'*, THINKPROGRESS (Access Date, at \_PM/AM), <http://thinkprogress.org/economy/2008/09/19/172360/scalia-poverty/>. Justice Scalia's comments to the Federalist Society where he claimed that poverty law is "made up stuff."

<sup>40</sup> *Romer*, 517 U.S. 620 (1996).

<sup>41</sup> *Id.* at 624

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 635

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Romer*, 517 U.S. at 638-639 (Scalia, J. dissenting).

<sup>47</sup> *Id.* at 635

Amendment 2 was in response to various county laws and ordinances that attempted to protect the LGBT community from rampant discrimination, as well as police arrest avoidance in queer-bashing cases. If there was any preferential treatment, it was to protect “majoritarian” notions of sexual morality. Indeed, Scalia claims that the *raison d’être* for Amendment 2 was quite properly the protection of sexual morality by the majority.<sup>48</sup> In championing moral efficacy of the majority, Justice Scalia invoked the now discredited ruling and rationale of *Bowers v. Hardwick*.<sup>49</sup>

*Bowers* was perhaps the most tortured opinion in the Twentieth Century on the rights of the LGBT community. Forget for a moment that the majority conflated the issue; indeed the challenged statute was gender neutral, effecting the private sexual practices of heterosexuals as well as homosexuals.<sup>50</sup> Yet the Court truncated the issue to decide only the question of private expression of intimacy by homosexuals, ignoring the fact that sodomy is a sexual behaviour engaged in by both straight and gay couples.<sup>51</sup> What is instructive is why the Court chose to examine and rule as it did. The “why” is attributable to a political reality; admittedly, *only* homosexuals were prosecuted while nary a straight couple. Indeed, one can imagine the political outcry if the straight community was caught in the police or prosecutorial dragnet reserved for the likes of Michael Hardwick and his ilk. Thus, in conflating the dual categories into one, the Court placed its imprimatur on selective prosecution by the State—a clear violation of the Fourteenth Amendment Due Process Clause.

*Bowers* is much more troubling than reported by either the press or legal scholars because the Court reinscribes arcane myths about homosexuals and homosexuality. These myths are in

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<sup>48</sup> *Id.* at 648.

<sup>49</sup> *Id.* at 40; *See also* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>50</sup> *Bowers*, 478 U.S. at 190.

<sup>51</sup> *Id.*

part constructed by religious or biblical interpretations of sexuality. Devoid of any critical analysis of the cultural iterations of sexual expression, the Court not only espoused but premised the grant or denial of fundamental rights upon cultural mythology constructed by biblical tome. Burger opined that the immorality of homosexuality was firmly “rooted in the Judeo-Christian moral and ethical standards,”<sup>52</sup> found in the Bible. I suspect that Justice Burger was referencing the oft-cited passages from the *Book of Leviticus* in *Torah* that invoke conceptions of sanctification.<sup>53</sup> For Burger this is evidence of a legitimate bar of homosexuality that is not only a tradition within Christianity but Judaism. I trust that Justice Burger, as well as his colleagues on the bench in 1986, were neither theologians nor historians, and certainly they had no facility with *Torah*, the source of the alleged bar. Burger merely grafted this rather odious myth into law by drawing from what he *perceived* as common culture.

As for civil society, neither Burger nor Justice White, the author of the majority opinion, had any knowledge of the rather long history of the acceptance of homosexuality and of homosexual marriage. According to Professor William Eskridge, same sex relationships in Ancient Greece were not barred, and in Ancient Rome same sex relationships were afforded the civil bond of marriage.<sup>54</sup> What is striking about Rome, however, is how acceptance of homosexuality was not confined to males; indeed women married as well.<sup>55</sup> Yet, the Court ruled

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<sup>52</sup> *Id.* at 196, *See, e.g., Leviticus* 17:1-26:46; *See generally*, W. GUNTHER PLAUT ET AL., THE TORACH: A MODERN COMMENTARY, 654-655 (W. Gunther Plaut ed., 2006) As the commentator in *The Torah*, William Hallo, notes, the Holiness Code, or the Laws of Sanctification, “may well have once constituted a discrete literary entity,” woven into *Leviticus* as illustrated by the author’s use of the word *kappēr*, atonement, used in chapter 16. Moreover, Bamberger reminds that many of the laws dealing with sexual conduct in the *Torah* were part of Near Eastern case law, with homosexuality addressed in Assyrian laws. Thus, it appears that the authors of this section, as well as others, were influenced by the cultures found during the period of authorship. Communication between scribe and Divine Being seems quite unlikely unless that Being was also sharing ideas on sexual purity with Assyrians, Hittites, and Sumarians. *See also Leviticus*, 20:10; *The Code of Ur-Nammu*, § 4; *Laws of Eshnunna* §28; and *The Code of Hammurabi*, §§ 129, 133 (Cases of adultery where both adulterer and adulteress “shall be put to death.”).

<sup>53</sup> PLAUT, *supra*, note 54.

<sup>54</sup> *See* William Eskridge, *A History of Same Sex Marriage*, 79 VA. L. REV. 1419, 1444 (1993).

<sup>55</sup> *Id.* at 1447.

against Michael Hardwick, and in effect the entire LGBT community, relying upon apoloque—the prohibition’s “ancient roots,” and how homosexuality is an “infamous crime against nature...a disgrace to human nature...and a crime not fit to be named.”<sup>56</sup>

The Court will often use the phrase, “conceptions of ordered liberty.” This is shorthand for not only legal but also cultural tradition. Ordered liberty is the root or at the heart of numerous Supreme Court decision. As it should be; but with a measure of caution and skepticism. There have been many traditions from our past that the Court disavows; the dehumanisation of African Americans, the subordination of women and even the heightened status of contracts. Yet, the majority in *Bowers*, cleaved to a tradition that was on the cusp of disfavor, recognising some traditions whilst casting aside others. Perhaps, Justice Oliver Wendell Holmes was correct when he stated, “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is more revolting of the grounds upon which it was laid down have long since vanished and the rule simply persists from blind imitation of the past.”<sup>57</sup> Blind imitation of the past. Holmes was so correct indeed. It was as if he reached down and penned the next opinion addressing the privacy rights of homosexuals.

*Lawrence v. Texas*<sup>58</sup> was factually and legally similar to *Bowers*. Police officers had entered Lawrence’s apartment based on a “weapons disturbance claim.”<sup>59</sup> Once inside, the police observed Lawrence and his partner, Garner, in a “sexual act.”<sup>60</sup> Both men were arrested for violating the Texas Penal code<sup>61</sup> that prohibited homosexual sodomy.<sup>62</sup> Texas criminalized

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<sup>56</sup> *Id.* at 196-97.

<sup>57</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

<sup>58</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>59</sup> *Id.* at 562.

<sup>60</sup> *See Lawrence*, 539 U.S. at 563.

<sup>61</sup> The Code states, “A person commits an offense if he engages in deviate sexual intercourse with another person of the same sex.” Deviate sexual intercourse is defined as, “(a) any contact between any part of the genitals of one person and the mouth or anus of another or (b) the penetration of the genitals or the anus of another person with an object. *Id.* at 574.

intimate expression between members of the same sex. Interestingly, the exact same behaviour can and is performed by members of the opposite sex. Thus, I read this statute as criminalisation of homosexuality, well aware that critics will claim that the act, not the person, is the focus of the legislation. There is a rather Machiavellian interpretation because the criminality of the act is conditioned upon the gender of the persons engaged in the act. Texas, rather clearly, was going after homosexuality through the criminalisation of private intimate sexual expression by homosexual couples. The omission of heterosexual non-procreative sexual intimacy is striking because it seems to suggest that Texas understood that criminalising heterosexual sexual behaviour was a political landmine as well as a legal nullity. Indeed, *Bowers* was instructive on these points.

Once again, Kennedy wrote for the majority, repudiating the “ancient roots” theory, as well as the interpretation of ordered liberty by the *Bowers* Court. Kennedy found that reliance on tradition by the *Bowers* majority was not only misplaced, but also misapplied. Kennedy’s healthy skepticism of *Bowers* revealed the following: the ancient roots of anti-homosexuality were in fact incorrect, at the time of *Bowers* the states were moving away from criminalisation of homosexual sodomy, and *Romer* had recognised amendments such as Colorado’s were nothing more than majoritarian animosity toward a, “specific class of persons.”<sup>63</sup> The majority then administered the one-two punch to the heterosexism of both *Bowers* and the Texas Penal Code, overruling the former and finding the latter unconstitutional.<sup>64</sup>

Justice Scalia did not join the majority view that laws akin to Texas and opinions such as *Bowers*, “demean the lives of homosexual persons.”<sup>65</sup> Rather, he penned a dissent, which

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<sup>62</sup> *Id.* at 563

<sup>63</sup> *Id.* at 574.

<sup>64</sup> *Id.* at 578.

<sup>65</sup> *Id.* at 575

incorporated a rigid and flawed interpretation of ordered liberty. Since homosexuality and homosexual intimate expression were not part of our cultural or legal tradition, constitutional rights and protection would not extend to LGBT persons. This dissent however went further than a rigid application of “ordered liberty.” It disaggregated the *person* from the act, repudiating by inference, *Loving*.<sup>66</sup>

In 1967, the US Supreme Court struck down misigenation laws *via* the case of *Loving v Virginia*.<sup>67</sup> Much like the class of cases addressing homosexuals and homosexual intimate sexual expression, the State of Virginia maintained that prohibition of interracial cohabitation was constitutional because the statute was neutral, affecting both white persons as well as persons of color. Thankfully, the Court rejected this claim by opining, “the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”<sup>68</sup> The *Loving* Court continued, “this Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”<sup>69</sup> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, submit to the “most rigid scrutiny,” and “if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination.”<sup>70</sup>

In his dissent, Justice Scalia focused on the act, “homosexual sodomy,” whilst opining that Texas’ prohibition of such conduct is reasonable. Virginia and Texas’ law involve both *persons* as well as conduct. In *Loving*, we are talking about marriage-the act of marriage and

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<sup>66</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 9

<sup>69</sup> *Id.* at 11.

<sup>70</sup> *Id.*

cohabitation – by people across the racial divide. In *Lawrence*, the law references specific sexual acts by people within a gender category. Thus, if we apply Justice Scalia’s reasoning in *Lawrence* to *Loving*, it is doubtful he would have joined the majority.<sup>71</sup>

When reading Justice Scalia’s dissent in *Lawrence*, I am reminded of the cliché used by parents and religious folk alike, “Hate the sin, love the sinner.” Both Scalia and my parents reduce complex notions of the self into rather pedestrian functions. Sometimes an “act” is indistinguishable from the self or the person. Here, sexual conduct is intimately linked to the persons performing the act. Moreover, this link is explicit in the statute. Sodomy between consenting heterosexual couples does not violate the Texas Penal Code.<sup>72</sup> Thus disaggregating “who” from “what” is at once mendacious and dishonest.

In *Loving*, the Court did not link sex *qua* sex to a fundamental rights paradigm; rather, the Court’s concern is the right of individuals to intimately associate by cohabiting through marriage.<sup>73</sup> This is the same for *Lawrence*. As Justice O’Connor pointed out in her concurrence, “it is true that the law applies...to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas’ sodomy law targeted more than conduct; it was directed at LGB [gay] persons as a class.”<sup>74</sup> Unlike her counterpart, Justice O’Connor was on the right track: the Texas statute, as well as Virginia’s, cordoned off intimate acts *because of*, not *in spite of*, the race and gender of the parties. Justice Scalia chose to ignore this, as well as the systemic inequality incorporated into the Texas anti-sodomy statute.

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<sup>71</sup> See *Loving*, 388 U.S. 1 and *Lawrence*, 539 U.S. 558. ((a) the statute was racially neutral, applying equally to whites and persons of color; (b) separation of the races was embedded in notions of ordered liberty (long history, cultural and legal tradition) and not parenthetically (c) certain interpretations of the Bible speak of the divine plan that separates the race).

<sup>72</sup> It is however a violation of Leviticus. See *Leviticus*, 20:10.

<sup>73</sup> *Loving*, 388 U.S. at 4.

<sup>74</sup> *Lawrence*, 539 U.S. at 583 (O’Connor, J. concurring).

What, then, would he do with *Windsor* and *Obergefell*?

## **B. Justice Scalia's Dissent in *Windsor***

### ***1. Procedure as Sword***

Admittedly, *Windsor* raised complex procedural and substantive questions. Edie Windsor had filed suit against the federal government because DOMA denied federal recognition of same sex marriages.<sup>75</sup> While New York has had a rather checkered history when it comes to equality for the LGBT community,<sup>76</sup> it changed course in the early 21<sup>st</sup> Century, finally extending the fundamental right to marry and equality to same sex couples.<sup>77</sup>

Windsor and her partner for more than a quarter of a century were married and their Canadian marriage was recognized by the State of New York.<sup>78</sup> Thea Spyer, Edie's wife, passed away, leaving Windsor her entire estate.<sup>79</sup> As a result, a tax bill generated for \$363,000 USD.<sup>80</sup> Windsor was required to pay this tax because under DOMA, she was not recognized as a surviving spouse and, therefore, subject to the estate tax.<sup>81</sup> Under IRS rules, surviving spouses are spared the estate tax because the property devolves to the widow or widower.<sup>82</sup> This benefit was denied to Windsor because DOMA specifically excluded same sex marriages from recognition and the ensuing federal benefits.<sup>83</sup>

The case was heard in the District Court for the Southern District, which declared DOMA unconstitutional.<sup>84</sup> The federal government was ordered to issue the tax refund, which it did

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<sup>75</sup> U.S. v. *Windsor*, 133 S. Ct. 2675, 2683 (2013).

<sup>76</sup> *Id.*

<sup>77</sup> N.Y. CLS Dom. Rel. § 10-a, §10-b, § 13 (West 2013)

<sup>78</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *Windsor*, 133 S. Ct. at 2683; see also 26 U.S.C.A. § 2056.

<sup>83</sup> *Id.* at 2683.

<sup>84</sup> *Windsor*, 133 S. Ct. at 2679.



not.<sup>85</sup> During pendency of the tax suit, however, the U.S. Attorney General notified the Speaker of the House of Representatives that under 28 U.S.C. §530 D, the Department of Justice (DOJ) would no longer defend, as constitutional, §3 of DOMA.<sup>86</sup> In response to the notice sent by the Executive Branch, the Bipartisan Legal Advisory Group (BLAG) moved to intervene.<sup>87</sup> The District Court permitted intervention as an interested party.<sup>88</sup> Prior to the appeal in the U.S. Supreme Court, the U.S. Court of Appeals for the Second Circuit affirmed the District Court's ruling.<sup>89</sup>

We know that the Supreme Court found jurisdiction appropriate even with the procedural twists and turns presented by this case.<sup>90</sup> The majority held that there was in fact a controversy between the parties and the parties had standing to press their claims in the Second Circuit and the Supreme Court.<sup>91</sup> Two facts satisfied the justiciability issue. First, the Government had not complied with the order to release a refund<sup>92</sup> and, second, whilst the Executive Branch would not defend DOMA, the Government would enforce it.<sup>93</sup> This meant that the Executive Branch, through the DOJ, would not push for or permit remedies such as estate tax credits to devolve to same sex surviving spouses.

As for the second problem, the issue of standing,<sup>94</sup> the Court found that the U.S. did in fact suffer an injury—the financial cost of the estate tax refund.<sup>95</sup> Moreover, an additional injury resulted—the inability of the federal government to exercise its enforcement powers in the area

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<sup>85</sup> *Id.* at 2684.

<sup>86</sup> *Id.* at 2683.

<sup>87</sup> *Id.* at 2684.

<sup>88</sup> *Id.* See Fed. R. Civ. P. 24(a)(2).

<sup>89</sup> *Windsor*, 133 S. Ct. at 2684.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 2679..

<sup>93</sup> *Id.* at 2684.

<sup>94</sup> Standing rules require that the plaintiff either suffer a direct injury or shall imminently suffer such injury. Here, there is a causation and also redressability. See, *Lujan v. Defenders of Wildlife*, 504 U.S.555 (1992).

<sup>95</sup> *Windsor*, 133 S. Ct. at 2686.

of revenue collection.<sup>96</sup> As the Court noted, standing would not have presented if the Executive had ordered the IRS to release the refund.<sup>97</sup> It did not.

According to Scalia, because there was neither a justiciable issue nor standing, the suit should have ended with the issuance of the District Court ruling.<sup>98</sup> Scalia seemed to ignore the ruling in *Roper*, which stated that appeal from a party “may be permitted on the merits so long as that party retains a stake in the appeal satisfying the requirements of Article III.”<sup>99</sup> Both Windsor and the federal Government had a stake in the merits. Ms. Windsor because the Government was choosing to enforce the provisions of DOMA, in particular §3, thus leaving her bereft of the \$363,000 USD taken by the IRS, and the Government if forced to remit the estate tax refund.<sup>100</sup>

Yet, there is something quite troubling about Scalia’s crabbed notion of standing (injury) and justiciability. In *Roe v. Wade*,<sup>101</sup> similar procedural problems were evident. By the time cert was granted the plaintiff, Norma McCorvey, had given birth.<sup>102</sup> Thus, questions involving the right to privacy, the right to bodily integrity, as well as the constitutionality of anti-abortion statutes was moot.<sup>103</sup> There was no longer “an injury” to plaintiff – “an invasion of a legally protected interest” because the pregnancy had ended.<sup>104</sup> Yet, the *Roe* Court heard the appeal because the constitutional issues triggered by anti-abortion statutes would inevitably reoccur. Perhaps the plaintiff would re-file if she became pregnant again or women in the anti-abortion

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<sup>96</sup> *Windsor*, 133 S. Ct. at 2680.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2697-2711 (Scalia, J., dissenting).

<sup>99</sup> *Id.* at 2688. *See also* *Roper v. Evans* 445 U.S. 326, 333-334 (1980).

<sup>100</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>101</sup> *See generally* *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)(articulating the requirements of Art. III standing: a constitutional injury, that is concrete and particularized, imminent or immediate, a causal connection between the injury and challenged action of the defendant and it must be likely that the injury will be redressed by a favorable decision.).

states would seek redress because the criminalization of abortion was widespread. Regardless of how the issue might reoccur, the Court understood that standing and justiciability (case or controversy) was present because of the political reality in the late Twentieth Century.

Justice Scalia was not on the Supreme Court bench when *Roe* was decided. Yet, he was a very vocal opponent, believing that the Blackmun decision fashions matter out of nothing. In Justice Scalia's world, there is no constitutional right to privacy because it does not appear in the text. His disdain for the "penumbra" theory, first espoused by Justice Douglas in *Griswold*, is well known. Yet, the procedural issues raised in *Roe* and *Windsor* do not approximate, much less rely on, an interpretation of the First, Fourth, or Fourteenth Amendments; rather, they raise procedural questions a law student would recognize—as most certainly a justice of the United State Supreme Court. Thus, it is telling that Scalia had a "stack blowing" experience whilst responding to the Article III issues.

### **C. Religious Belief as a Shield**

Justice Scalia was repelled by not only the procedural questions raised in *Windsor*, but also the political and moral issues it placed before the Court. Politically, more flexible thinking on questions of human sexuality eclipsed the rather antediluvian position of the right wing. Poll after poll heralded a new day in America, and not one consonant with the right or religious fundamentalists. The role of the church, specifically the Mormon Church, in funding Prop 8 and other anti-gay marriage initiatives coupled with the Supreme Court opinion in *Citizens United*, contributed to a shift in public opinion. By the time *Windsor* was argued in March of 2013, the majority of Americans approved of same sex marriage.

The plaintiffs in *Windsor* and *Perry* raised claims rooted in moral imperatives that frame and embedded in our founding document—the right of every person to dignity and respect. Edie

Windsor and her co-plaintiffs challenged notions of equality and freedom that had been denied to a class of persons because of who they were and who they loved. Not unlike Mildred Jeffries in *Loving*,<sup>105</sup> the *Windsor* and *Perry* plaintiffs placed before the Court the question of whether dignity and respect embedded in conceptions of liberty and equality were the sole province of the sexual majority. To this, the majority declared a resounding, “NO.”

### ***And Justice Scalia?***

Justice Scalia’s dissent involved three distinct claims. First, he charged the majority with distorting the Congressional Record concerning the legislative history of DOMA to fit the conclusion it desired.<sup>106</sup> Second, Scalia claimed the Court, opining as it did, reneged on assurances given in *Lawrence* specifically, “[*Lawrence*] has nothing, nothing at all to do with whether the government must give formal recognition to any relationship that homosexuals seek to enter.”<sup>107</sup> Third, he lamented how, by judicial fiat, the majority traded away the right of the people to rule themselves through federal or state enactments.<sup>108</sup>

The dissent employs distortion riddled with *political* rhetoric and hubris. Indeed, Justice Posner correctly summed up Justice Scalia’s opinions as, “[O]mitting contrary evidence”<sup>109</sup> ... ignoring distinctions and critical [judicial] passages,” and dismissing key facts.<sup>110</sup> Posner characterizes Scalia’s writing as ahistorical and inconsistent with his own canons.<sup>111</sup> Indeed, what structures Scalia’s opinions and influences their outcome are “strongly felt views on such

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<sup>105</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>106</sup> *Windsor*, 133 S. Ct. at 2697-2711 (Scalia, J., dissenting).

<sup>107</sup> *Id.* at 2709. *See also* *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

<sup>108</sup> *Windsor*, 133 S. Ct. at 2698-99 (Scalia, J., dissenting).

<sup>109</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (AUG. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>

<sup>110</sup> *Id.* (noting that Scalia fails to mention a critical fact in the *Braschi* decision—that the plaintiff was decedent’s homosexual partner in a suit involving his dispossession of the apartment by the landlord. The issue was whether the plaintiff was a member of his deceased partner’s family).

<sup>111</sup> *Id.* I would urge readers to take a look at Posner’s article because it aptly describes Scalia’s opinions and beliefs. This is an important article because it comes from another jurist, a scholar and a conservative member of the Seventh Circuit bench.

matters as..., homosexuality.”<sup>112</sup> I would amend Justice Posner’s description as follows; the decisions penned by Scalia reflect strongly held *religious* and *political* views.

Now, let us begin dismantling the dissent.

***1. Scalia’s First Claim: The Windsor Court Distorted the Congressional Record to Reach Its Conclusion***

Justice Scalia’s first two points combine into a rather interesting claim on his part. Essentially, he asserts that the majority twisted the legislative record to support the majority’s *belief* that DOMA was passed to “demean, to disparage...[to] injure same sex couples, to impose inequality and to humiliate their children.”<sup>113</sup> To use a Scaliest, *this*, is nothing but, “argle-bargle.”<sup>114</sup>

It is unclear whether Justice Scalia deliberately misrepresented the opinion of the Court or failed to either understand or account for cause and effect. Throughout the opinion, the Court uses phrases such as “DOMA’s principal effect,”<sup>115</sup> or “DOMA’s operation in practice,”<sup>116</sup> to explain the consequences that flow from DOMA. The Court explicitly states that DOMA creates outcomes that adversely affect children, parents, spouses – families that happen to be linked through same sex marriage or coupling. The Court demonstrates *how* DOMA sets up a constitutionally offensive caste system that denies to married gay and lesbians couples over one thousand benefits. Such benefits include veteran’s benefits to army dependent spouses, filing as joint married couples for federal and state income tax, receipt of government health care benefits, access to special protections regarding domestic-support obligations under the Bankruptcy Code,

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<sup>112</sup> *Id.*

<sup>113</sup> *Windsor*, 133 S. Ct. at 2708 (Scalia, J. dissenting).

<sup>114</sup> *Id.* at 2709.

<sup>115</sup> *Id.* at 2694.

<sup>116</sup> *Id.*

and the right of burial together in a National Veterans Cemetery.<sup>117</sup> The impact on children is equally discordant because it results in financial insecurity due to the spousal requirements under Social Security Survivor benefits, federal pensions, and the additional reduction of family income via taxation of health benefits under domestic partnership or civil union employer or government plans.<sup>118</sup> The Court enumerated the myriad real-life disabilities and burdens created by DOMA. Yet, the most offensive effect of DOMA is the inequality it structures and the disrespect it fosters: inequality because it carefully crafts a two-tiered system of recognition based solely on the gender of the parties to a marriage and disrespect because it telegraphs a message that gay or lesbian families are not to be given the same benefits or cultural deference as their heterosexual counterparts.

Scalia not only conceals the palpable reality of DOMA but misrepresents the Court's position, as well as the consequences of a federal recognition ban. In essence, by denying recognition to same sex marriages, Congress disrespected the intrinsic humanity of gay men, lesbians, and, derivatively, their children. The denial of both equality and dignity rings true not merely because of a social caste-system erected by DOMA and supported by Scalia, but because of the decision in *Loving*. *Loving* is not about sex nor is it about religious marriage; rather, it is about the recognition of the commitment through civil marriage between a man and a woman who happen to be from two different racial classifications.<sup>119</sup> Moreover, *Loving* articulates the fundamental nature of intimate association, through marriage, that is authentically human. Edie Windsor and Thea Spyer participated in an authentically human act recognized by the State of New York but rejected by their country of origin.

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<sup>117</sup> *Id.*

<sup>118</sup> *Windsor*, 133 S. Ct. at 2695.

<sup>119</sup> *See Loving v. Virginia*, 388 U.S. 1 (1967).

Finally, whilst not articulating a fundamental right to marry that covers homosexuals, the *Windsor* Court nonetheless brought the plaintiffs under a discernable part of the *Loving* decision. First, the Fourteenth Amendment protects dignity of persons and their intimate sexual association and second, neither should be debased by majoritarian disapproval. Thus, Justice Scalia adopted not only a crabbed notion of equality, but of compassion.

**2. *Scalia's Second Claim: The Windsor Court Was Unduly Harsh In Its Characterization of the Supporters of DOMA***

It is interesting to note that Justice Scalia failed to cite a single example from the Congressional Record that supported his claim of deliberate concealment by the Court of the “arguments that exist,” to justify DOMA. Instead, Scalia relies on secondary sources to ground this missive, declaring, “I imagine ...it is harder to maintain the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they see them*.”<sup>120</sup> The “they” in this diatribe refers to *any* supporter, not the Congressional supporters of DOMA, or even President Clinton.

Let us start with Clinton.

In 1993, President Clinton engaged in a toe-to-toe battle with the Armed Services over the issue of gay and lesbian soldiers in the military. The hearings, convened by the Armed Services Committee, were very difficult to witness for those service men and women who were homosexuals. Those testifying claimed that LGB service members were threats to unit cohesion, and if allowed to join or to remain in the military would cause destruction of U.S. fighting forces. Such hyperbole was reminiscent of two prior historic moments—the desegregation of the Armed Services following WWII and the question of women in combat.

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<sup>120</sup> *Windsor*, 133 S. Ct. at 2708.

Because of these hearings, *Don't Ask, Don't Tell* was integrated into the USCMJ, resulting in a surge of separations from the Armed Services of homosexuals or those perceived to be homosexuals. Clinton and the Democrats suffered deep political wounds because of President Clinton's initial support of allowing gays to serve openly in the military. As reported in the *New York Times*, George Stephanopoulos, a senior Presidential adviser said, "[i]t's wrong for people to use this issue to demonize gays and lesbians and *it's pretty clear that that was the intent in trying to create a buzz on this issue. But the fact remains that if the legislation is in accord with the President's stated position, he would have no choice but to sign it.*"<sup>121</sup> Clinton's stated position was in opposition to gay marriage, later repudiated in 2013.

Congress on the other hand, led by Newt Gingrich in the House, was apoplectic over the prospect of gay marriage finding its way into Americana. The first case, *Baehr v. Lewin*<sup>122</sup> was winding its way through the Hawaii courts and it was just a matter of time before the issue would be on the front *political* burner. In 1996, DOMA was proposed, rushed through Congress, and then signed by the President. Whilst not a virulent opponent of same- sex marriage, the President aligned himself with the anti-homosexual cabal in Congress.

Turning to the Congressional Record, it states the following, "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage...H.R.3396 is appropriately entitled the Defense of Marriage Act."<sup>123</sup> The House Report continued, stating, "both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality" and the

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<sup>121</sup> *Id.*, Todd S. Purdum, *President Would Sign Legislation Striking at Homosexual Marriages*, N.Y. TIMES, <http://www.nytimes.com/1996/05/23/us/president-would-sign-legislation-striking-at-homosexual-marriages.html>

<sup>122</sup> *See generally* *Baehr v. Lewin*, 852 P.2d 44 (1993).

<sup>123</sup> *Windsor*, 133 S. Ct. at 2693.



purpose of DOMA was, “[the] promo[tion] in protecting the traditional moral teachings reflected in heterosexual marriage laws.”<sup>124</sup>

The arguments for DOMA that Scalia claims exist are nowhere to be found in the House Report, not problems associated with “choice of law”<sup>125</sup> nor protection from “unforeseen... circumstance.”<sup>126</sup> Indeed, the choice-of-law issue cited by Justice Scalia was penned in 2012, sixteen years after DOMA sailed through Congress. The article, published in *Stanford Law Review*, correctly raised issues that could flow from the failure to implement a “uniform federal definition of marriage,” but that was *not* questioned, raised, or even hinted by Congressional members during debate on DOMA. In fact, according to proponents of DOMA, there *is a federal and cultural definition* of marriage, which is heterosexual marriage, as scripturally ordained.

Justice Posner was correct. Scalia cares not at all about “contrary evidence” or facts. Rather, ideology guides his thinking and frames his dissents.

### ***3. Scalia’s Third Claim: The Will of the People Violated***

Scalia’s tethers his last hope of discrediting the *Windsor* decision to the people. Scalia claimed that the Court usurped the power of the Legislature by declaring part of DOMA unconstitutional.<sup>127</sup> As the Peoples’ representative, Congress was acting on our behalf. Whilst representative democracy permits legislators to act as stand-ins for constituents, this theory of governance does not override the Constitution.

The *Windsor* Court outlines with stunning clarity how §3 of DOMA violates the Constitution. Let us consider this for a moment. What if Congress enacted a law requiring only

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2708.

<sup>126</sup> *Id.*

<sup>127</sup> *Windsor*, 133 S. Ct. at 2713.

New Yorkers to pay for primary and secondary education via a special federal tax. The rest of the country would receive federal funds to offset state taxation, thereby lowering state tax rates whilst still providing free K-12 education. Even with deference given to government enactments under rational basis, Congress would still need to establish the reasonableness of the law's purpose and statutory scheme. Put another way, a nexus must exist between chosen strategy (law) and rationale (purpose).

Scalia ignores the role of the Supreme Court in relation to enactment of law and policy, and dismissed entirely jurisprudence that has addressed this role since the founding. Indeed, the will of the People and the conduct of the legislature, whether federal or state, is neither above nor supersedes the Constitution. The Constitution is the supreme law of the land. Ms. Windsor was challenging a federal enactment on Constitutional grounds, and the Court responded appropriately notwithstanding Scalia's claim to the contrary. As Justice Kennedy observed, "the power the Constitution grants, it also restrains,"<sup>128</sup> a principle Justice Scalia conveniently ignores.

There is, however, an aberrant quality to Scalia's invocation of "The People."

In 2005, Justice Scalia penned the now infamous *Castle Rock* decision, which did in fact usurp the will of the People of the State of Colorado.<sup>129</sup> In *Castle Rock*, Scalia wrote that the Colorado Legislature could not have endorsed mandatory arrest in its 1994 legislation.<sup>130</sup> In opining as he did, Scalia distorted the legislative history of Colorado, dismissed the Congressional Record regarding the enactment of VAWA, marginalized the history of mandatory arrest legislation in thirty-two states, and discounted the 1978 and 1984 Congressional Hearings on Domestic Violence, as well as myriad State Court Reports on the

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<sup>128</sup> *Id.* at 2695.

<sup>129</sup> *See generally* *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 750-56 (2005). ,

<sup>130</sup> *Id.* at 782.

Status of Women in 1985 and 1995. He deliberately misused the statutory meaning of “shall,” characterizing it as an invitation to act,<sup>131</sup> whilst dismissing over one hundred amicus briefs in support of the Colorado statute as well as appellant, Jessica Gonzales, relying instead on *one* report published by the ABA in 1980.<sup>132</sup> In *Castle Rock*, Justice Scalia not only dismissed the will of the people of the State of Colorado but the will of the people from thirty-one states where mandatory arrest was part of law enforcement procedure. Thus, it appears that this claim, as well as the other two, is purely artifice.

*a. And Obergefell?*

After *Windsor*, federal Circuit Courts, as well as State Supreme Courts, issued opinions striking down state constitutional amendments that restricted marriage to heterosexual couples. Citing both the Fourteenth Amendment liberty interest as well as equality, the Courts located a fundamental right to marry in the Fourteenth Amendment for adults regardless of the gender of the parties. Of great importance was the invocation of an equality theory to nullify state statutes and constitutional amendments that privileged heterosexuality over homosexuality. In rendering these decisions, the underlying theme was consistent with *Windsor*.

*Justice Scalia got one thing right: Windsor would open the door to full equality regarding marriage.*

On June 26, 2015, two years to the day that *Windsor* was decided, Justice Kennedy crafted a response to the dissenting Justices as well as the NO campaign in the States that once and for all, lesbians and gay men had a fundamental right to marry. Kennedy rejected the claim that children fare better in homes built upon a heterosexual dyad. The majority recognised the

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<sup>131</sup> *Id.* at 760 (“[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory”). See also, G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservativization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237 (2005)

<sup>132</sup> *Castle Rock*, 545 U.S. at 782.

gender of one's parents is irrelevant to children's cognitive and emotional development. Instead, the majority held fast to the social science that documented what children need is a stable, loving home environment.

Kennedy did spend a good deal of column space opining on conceptions of dignity, and while some pundits dismissed this part of the opinion, it was perhaps one of the most moving sections. Dispensing with the need for religious approbation, Kennedy stressed the importance of the dignity and worth of individuals and through marriage, dignity is conferred upon the individual *and* the couple. "The majority opined, "fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs." By linking dignity, autonomy, and personal identity, the Court affirmed the right of every individual to determine for herself, her sexual identity and whether marriage, either within or outside her gender, is a proper choice. This underscored the fundamental nature of sexual identity to both personhood and personal autonomy. Moreover, the Court situated sexual identity and marriage in conceptions of liberty. It should be noted, notwithstanding protestation by the dissenters, Justice Kennedy, and, derivatively, Justices Ginsburg, Sotomayor, Kagan, and Breyer did not fashion a new constitutional right, rather they simply recognised that gay and lesbian couples should be accorded the same rights as their heterosexual counterparts – the fundamental right to marry.<sup>133</sup>

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<sup>133</sup> *See generally*, *Loving v. Virginia*, 388 U.S. 1 (1967); *See also*, *Turner v. Safley*, 482 U.S. 78 (1987) (ruling marriage is a fundamental right that cannot be restricted by the Department of Correction absent a compelling state interest); *See also*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding marriage is a fundamental right not to be denied on the basis of incarceration).

***b. And Justice Scalia?***

There were four dissenters in *Obergefell*, Justices Scalia, Thomas, Alito, and Chief Justice Roberts. All but Justice Scalia raised the issue of freedom of conscience and religious liberty. It is clear that among the three dissenters, an ideological battle waged, supported by the *Hobby Lobby* decision, against the majority. Alito, Thomas, and Roberts conferred a privileged status upon religious liberty, in effect creating a religious trump card to restrict the liberty and equality rights of disfavored sexual minorities. Scalia then did not have to concern himself explicitly with religion; rather, he could devise a dissent that not only dispensed with historical context, but distorted fundamental constitutional norms.

Justice Scalia's dissent was peppered with contempt for his colleagues in the majority. Erwin Chemerinsky's was correct when he characterized Scalia's opinions as mean spirited and convoluted. In *Obergefell*, Scalia even surpassed the nit-picking, sarcastic, constitutionally tortured diatribes that marked his commentary in prior opinions that addressed homosexuality.

Scalia wrote:

Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>134</sup>

What amazes is the utter dishonesty of this one passage. Since *Roe v. Wade*, Justice Scalia fulminated over the notion of a right to privacy and conceptions of a fundamental right to liberty. His main objection is rooted in textualism, a theory of constitutional interpretation that relies solely upon the intent and lexicon of the drafters or the architects of a document. As

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<sup>134</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

applied to the U.S. Constitution, Scalia believed that the document is static as opposed to dynamic. Thus, if the words are not on the page, the *ideas* they represent hold no quarter. Since the word privacy is not in the Constitution, the Court is limited in its interpretation of liberty. Based on Scalia's adherence to textualism, since privacy is not explicitly linked to conceptions of liberty, the right does not exist.<sup>135</sup>

Even at face value, this theory is not only problematic, but frankly ridiculous. The framers of the Constitution could not have imagined the existence of vehicles, mobile phones, landline phones, and the Internet. Yet, Fourth Amendment protections are afforded to these objects because of their use to transmit thoughts, people, and their belongings. Hence, the word "effects," in the Fourth Amendment has expanded to include these objects. Justice Scalia was on board with the interpretation and expansion of effects.

It would be fair to say that the framers had limited knowledge of corporations, especially privately or publically held corporations. I dare say that the framers never contemplated that corporations such as those contemplated in *Citizens United* and *Hobby Lobby* would be treated as *persons* for the purpose of political expression and freedom of conscience. But that is exactly what the Supreme Court held with regard to political contributions vis-à-vis a form of expression, as well as refusing to comply with the federal Affordable Care Act based on religious liberty and freedom of conscience. To say that Scalia's jurisprudence is at once disingenuous as well as duplicitous is quite frankly an understatement.

In *Reading Law*,<sup>136</sup> Justice Scalia, along with co-author Bryan A. Garner, produced a voluminous tome that indeed speaks volumes. The authors reject notions of originalism, instead

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<sup>135</sup> Justice Scalia seems to repudiate the existence of a privacy right in the Fourth as well as Fourteenth Amendment: "to be free from unreasonable searches and seizures in one's person, home, letters, and effects."

<sup>136</sup> See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (1st ed. 2012).

preferring textualism.<sup>137</sup> Scalia believed that textual reliance exemplifies an objective interpretive methodology.<sup>138</sup> Since it is objective, it does not implicate ideology or its cousin, politics.<sup>139</sup> Yet, as Stephen F. Rohde notes, textualism *qua* textualism is political because it is conservative.<sup>140</sup> Whilst it may be true that text is neither intrinsically liberal nor conservative, textualism is part of a conservative ideology.<sup>141</sup> And while Scalia rejected original intent, he does rely on meaning, determined by interpretation by “reasonable people,” at the time.<sup>142</sup>

Yet, words do not have intrinsic meaning. We know this as we move through the years using certain words to mean X that once meant Y. As an example, take the word “boss.” At one time it meant supervisor or superior or command. However if you asked a teenager in 1960 the meaning of “boss,” it would be altogether different. Meaning is derived from context and context changes; indeed, the older the text or words, the more remote the “original” meaning.

Reliance on the reasonable person to determine meaning is also problematic. Who is the reasonable person? If we freeze time at 1775, the reasonable person would be the reasonable man—not a generic man. For example, the reasonable man of 1775 would interpret or define head of household quite differently than the reasonable person of 2016. In the 18<sup>th</sup> Century, head of household was male, most likely Caucasian, and part of the landed gentry. Head of household would have excluded women, thereby stratifying familial power according to gender. Use of “reasonable person,” regardless of historical moment, is packed with cultural meaning that may

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Stephen F. Rhode, *Scalia's Shameless Political Agenda*, SALON.COM (Oct. 1, 2012, 02:53 PM), [http://www.salon.com/2012/10/01/scalias\\_shameless\\_political\\_agenda/](http://www.salon.com/2012/10/01/scalias_shameless_political_agenda/).

<sup>141</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> (Arguing that when textualists, “demand that the Legislature think through myriad hypothetical scenarios and provide for all of them explicitly rather than rely on courts to be sensible. In this way, textualism hobbles legislation-and thereby tilts toward ‘small government’ and away from...which in modern America is a conservative preference.”).

<sup>142</sup> SCALIA, *supra* note 147.

be constructed along axis of domination. Thus Scalia’s methodology was not only inconsistent, it did not approximate either objectivity or cultural detachment.

Constitutional interpretation requires more than the intent of framers, or the beliefs of reasonable men at the time of drafting, or even context. It requires a process that factors into the juridical equation context-past and present, historical meaning, and faithfulness to moral imperatives that are foundational to conceptions of justice. The gravamen of conceptions of justice is the dignity and worth of all individuals, manifest in the Fourteenth Amendment guarantee of liberty and equality. Religion and ideology are baggage that should be left at the courthouse door. Unfortunately, Justice Scalia uses both religious and political ideology to frame rights discourse. The result not only limits, but extinguishes basic human and political rights.

*c. The Last Word on Obergefell*

*Obergefell* is not only the last case but also the most important. The Court acknowledged the interlocking nature of liberty and equality in the context of the legal treatment of gays and lesbians.<sup>143</sup> The Court found the challenged laws burdened the liberty of same-sex couples and abridged central precepts of equality. The marriage laws at issue were in essence unequal. Same-sex couples were denied benefits afforded opposite-sex couples and barred from exercising a fundamental right. When the Court recognised the long history of social antipathy toward gay and lesbian relationships, it found the continued denial of the fundamental right to marry “work[ed] a grave and continuing harm [that] served to disrespect and subordinate gays and lesbians.”<sup>144</sup> Thus, *Obergefell* was a seismic shift in both law and culture, displacing religious heteronormativity whilst reinscribing the centrality of equality. *Unfortunately, it is not*

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<sup>143</sup>*Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), *See also*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>144</sup>*Obergefell*, 135 S. Ct. at 2604.



*the last word; Hobby Lobby reminds that the struggle for equality, liberty, and autonomy is not over in the United States.*

#### **IV. THE STRUGGLE CONTINUES: DISAGGREGATING RELIGIOUS HETERONORMATIVITY, HOMOSEXUALITY AND SAME-SEX MARRIAGE**

America and Ireland, whilst divided by an ocean, are much closer culturally than one might expect. Religious dogma has framed constitutional, case, statutory, and common law in both jurisdictions. While America denies the presence of religious dogma in law, such dogma is readily apparent in the writings of Antonin Scalia and his brethren that came before and currently share the bench.

The cultural and legal position of the NO constituency in Ireland and the NO politicians, religious leaders, and jurists in the United States, threaten not only conceptions of equality, but of liberty. Moreover, the application of religion in law threatens conceptions of gender equality.

The Christian heteronormative roots run deep. Regardless of iteration, Christianity has created a link between gender hierarchy and moral theology concerning sex, sexual expression, marriage, and conceptions of family. The primary arguments derive from what is known as the “natural-law tradition” of ethical thought, beginning with Plato and Aristotle, and continuing through Thomas Aquinas and other medieval and modern philosophers. Yet, Thomas Aquinas made the most influential formulation of a natural law theory of sexuality. Integrating an Aristotelian approach with Christian theology, Aquinas emphasized the centrality of the distinctive goods of marriage, primarily love, companionship, and legitimate offspring. For Aquinas, sexual intimacy within marriage was morally permissible and even good. For a sex act to be moral however, the act must be procreant.<sup>145</sup> For it to be procreant there must be “natural”

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<sup>145</sup> Since it is only penal/vaginal penetration that can inseminate, homosexual sex is not considered moral.

insemination, which quite clearly rules out non-procreative heterosexual sexual conduct<sup>146</sup> and clearly homosexual sexual intimacy.

21<sup>st</sup> Century Thomistic natural law theorists approach the issue of sex and marriage by invoking the notion of “natural fulfilment” of sexual acts. “Natural” is synonymous with male and female and “fulfilment” is identical to reproduction. Procreation is at the centre of what is treated as morally permissible. The 21<sup>st</sup> Century Thomists narrowed Aquinas’s list of the social and moral goods by jettisoning conceptions of love and companionship as integral to marriage and sexual intimacy. By privileging procreation, modern natural law theorists preclude inclusion of same-sex couples within a marriage paradigm. On the other hand, if love and companionship *are* distinct social and moral goods, then barring same-sex couples from marriage would be problematic.

Exclusion of same-sex couples from marriage requires both privileging procreant sex and the male and female dyad. If Christian moral theology, as shaped by Aquinas and current natural law theorists, has structured the “no” platform, then proponents of anti-same-sex marriage are taking decisive steps to dismantle the wall that separates Church and State. Additionally, where equality is subordinate to religious belief, there is a real danger that equality will be displaced by religious canon.

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<sup>146</sup> The impact of Catholic dogma upon the formulation of *criminal* sodomy statutes is revealing. Sodomy was illegal in Ireland and Northern Ireland because of the prevailing view of homosexual sex, but also in relation to the non-procreative outcome of anything other than penile-vaginal penetration. The laws in the U.S. clearly demonstrate the reach of Roman Catholic canon on the purpose of sex. Some may argue that what structures both attitude and law is the Hellenistic writings of Plato and Aristotle. While their fingerprints are on matters particular to homosexual sex and the inferiority of women, the nexus between sex and offspring was refined by and through Catholic dogma. See Caroline Whitbeck, *Theories of Sex Difference* in *WOMEN AND PHILOSOPHY* 54-80 (Carol C. Gould & Marx W. Wartofsky eds., 1976), See also Linda M. Maloney, *The Arguments for Women’s Difference in Classical Philosophy and Early Christianity* in *THE SPECIAL NATURE OF WOMEN* 41-49 (Int’l Journal for Theology ed. 1991).

## **A. Constructing a Rights Paradigm that Centralises Equality and Reflects a Rights Discourse that Neither Primatizes nor Privileges Religious Belief**

### ***1. Equality qua Equality***

Equality as a legal concept is not a stable element. Rather, it is a loaded and highly contested concept. Since the *Magna Carta Libertatum* and the French and American Revolutions, equality has been a guiding principle for the body politic; in this respect, it is at present probably the most controversial of the great social ideals. There is controversy concerning the precise notion of equality, the relation of justice and equality, the material requirements and measure of the ideal of equality, the extension of equality, and its status within a comprehensive theory of justice.<sup>147</sup> With the resurgence of religious hegemony in Ireland and America, conceptions of equality are challenged further by claims of religious liberty and freedom of conscience asserted by opponents to same-sex marriage. There are, in fact, a myriad of notions as to the constitutive principles of equality, including formal, proportional, moral, and the presumption of equality.<sup>148</sup> Each theory is bound by specific rules and expectations, and founded upon basic principles. In the U.S. and Ireland however, the leading theory is formalism.

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<sup>147</sup> John Baker, et. al., *EQUALITY FROM THEORY TO ACTION* (2d ed. 2009).

<sup>148</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974) comes to mind. The plaintiffs in this class action suit were denied health insurance benefits because pregnancy and pregnancy related complications were specifically excluded from coverage by the State of California. The U.S. Supreme Court ruled that the exclusion of benefits was not based on sex discrimination. Using what is referred to as class-based analysis; the Court divided the affected classes as “pregnant” and “non-pregnant persons.” In class-based analysis, also used by Ireland, Northern Ireland and the International Courts, how one draws or constructs the classes is extremely important because the classification triggers the level of scrutiny, from rational basis (least rigorous) to heightened or strict scrutiny (most rigorous review). The U.S., unlike International Courts, treat gender or sex as “mid-level,” requiring a legitimate state interest and the means chosen by the State must have a substantial relationship to the interest. In other words, the means chosen must be significantly close to the interest articulated. If the classes are not entirely single sex (all male or all female), the degree of scrutiny drops to the lowest level. In *Geduldig*, because the classes were constructed as pregnant and non-pregnant persons and men and women were in the non-pregnant” classification, thus “sameness” could not be established. Consequently, using rational basis, the Court concluded that discrimination based on sex did not exist. While this conduct on the part of the Court borders on the surreal, it points out key problems with formalistic approaches to equality.

Formal equality focuses on sameness and difference; like objects ought to be similarly treated, while objects marked by difference may be treated differently. When thinking of sameness and difference, the adage about “apples and oranges” comes to mind. The formalist would view these objects as distinctly different and, therefore, subject to different treatment. Critics of formalism would claim the objects are in fact similar, and any perceived differences are irrelevant. Here sameness derives from the category, “fruit,” while difference marked by colour and perhaps size. This may seem as if legal theorists are splitting hairs, however, the sameness and difference dichotomy is critical not only to how we define equality, but also the judicial standard of review employed to assess the presence, or absence, of inequality. With formal equality, the characterization of the object will determine whether sameness or difference is triggered. Consequently, legal outcome is tied to how one defines the “thing” that has been burdened or benefitted.

Formalised equality is problematic in the same-sex marriage debate in the same way as the apple and orange example. While heterosexuals and homosexuals share the same “race,” there are differences when it comes to the procreative capability of each subset of humankind. There is, however, another problem; how we define the nature of the inequality claimed. If marriage is about procreation, following modern natural law as well as Aquinian theory, sameness is impossible because the operational definition of marriage is linked to biology. Once a difference is located, unequal treatment may not violate conceptions of equality. Structuring the affected classes is inextricably linked to the operational definition of the right denied, or the responsibility imposed. If the cultural definition of marriage shifts from procreation to love and companionship, biological difference becomes irrelevant, thus barring homosexual marriage would violate notions of formal equality.

Formal equality creates theoretical gerrymandering while diminishing the *importance* of difference. A theory is required that neither diminishes nor sublimates difference, but rather accounts for human variation whether such variation is based on, *inter alia*, race, sex, gender identity, or sexual orientation. Moreover, in structuring an equality paradigm, socially constructed hierarchies are neither emancipatory nor democratic, because such hierarchies particularize and subordinate parts of the self. As Patricia Williams noted, we are the sum of our parts and there are times when particularities converge or diverge, depending on the social environment. For instance, homosexuality may be significant if social factors create either a burden or benefit connected to sexual orientation. On the other hand, race, gender, and sexual orientation may conflate under circumstances such as sexual assault. Barbara Smith reminded of both the particularity and generality of identity when she claimed, “[w]hen I was raped, my blackness, gender and lesbianism all converged in that moment.” Indeed, the perils of reducing anything “to a single story,”<sup>149</sup> as formalized equality tends to do, not only flattens the topography of the self but creates a “one-dimensional man.”<sup>150</sup>

The distribution of a social good, such as marriage, premised upon sex, race, or any other “ism,” produces the same harm. An equality theory that accounts for difference, privileges, and the full expanse of human experience, requires rejection of both the “hierarchy of oppression” and the sliding scale for judicial review. Moreover, it is a theory that does justice to who we are—the sum of our parts.

## V. CONCLUSION

The YES Campaign in Ireland and the Freedom to Marry Campaign in the U.S. embraced different strategies to accomplish their goals. In doing so, they represent the notion

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<sup>149</sup> Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED.COM (Jul. 2009), [http://www.ted.com/talks/chimamanda\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story/transcript?language=en](http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story/transcript?language=en).

<sup>150</sup> Herbet Marcuse, *ONE DIMENSIONAL MAN* (2d ed. 1991).

that there is not one road or option to achieve equality. Marriage Equality was the first step in dismantling second-class citizenship for sexual minorities. Yet, as *Hobby Lobby* in the United States and the position of radical religious conservatives in both jurisdictions illustrate, the battle is far from over. Inequality in housing, employment, social services and fundamental human rights, is at once prevalent and in some quarters of the U.S. and Ireland very much alive. What is required is a system of laws premised upon the centrality of equality and not the primacy of religion. As Howard Zinn reminds, there is no such thing as neutrality; rather, we either shall adhere to conceptions of gender equality and rights for sexual minorities or we shall not. There is no middle course or ground. The Freedom Train is here, it is moving, and it is up to scholar and activist alike to bring it home: where equality and liberty are the province of us all.