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### The Unnecessary and Unfortunate Focus on “Animus,” “Bare Desire to Harm,” and “Bigotry” in Analyzing Opposition to Gay and Lesbian Rights

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**THE UNNECESSARY AND UNFORTUNATE FOCUS ON  
“ANIMUS,” “BARE DESIRE TO HARM,” AND “BIGOTRY”  
IN ANALYZING OPPOSITION TO GAY AND LESBIAN  
RIGHTS**

**JAMES E. FLEMING\***

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I presented a draft of these remarks at the conference on Linda C. McClain’s manuscript held at the National Autonomous University of Mexico, organized by Professor Imer Flores, and I benefited from the discussion on that occasion. In these remarks, I draw extensively from a paper I published with a similar title in *RECHT UND EMOTION II: SPHÄREN DER VERLETZLICHKEIT* (Hilge Landweer & Fabian Bernhardt eds., 2017).

## INTRODUCTION

I am delighted to participate in this symposium on Professor Linda C. McClain's wonderful new book, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*.<sup>1</sup> All of the other papers in this symposium focus on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>2</sup> (and thus connect with Chapter Eight of her book, on claims of religious exemptions from protections of gay and lesbian rights), while my piece will join issue with the related Chapter Seven, on bigotry, motives, and morality in the Supreme Court's gay and lesbian rights cases. In this brief Essay, I cannot do justice to McClain's rich, insightful, and illuminating treatment of bigotry. But I can offer some thoughts on the unnecessary and unfortunate focus on "bigotry" in analyzing opposition to gay and lesbian rights that are deeply informed by and congruent with those in her book.

Over the past twenty years, the Supreme Court's analysis of the constitutional flaws in laws denying liberty or equality to gays and lesbians has undergone a significant shift—from forbidding illegitimate emotions to rejecting inadequate reasons. I sketch that shift by examining three leading decisions. In *Romer v. Evans*,<sup>3</sup> the Court held that a state constitutional amendment—barring protection of gays and lesbians from discrimination on the basis of sexual orientation—reflected unconstitutional "animus" against and "a bare . . . desire to harm [them as] a politically unpopular group."<sup>4</sup> In *Lawrence v. Texas*,<sup>5</sup> by contrast, the Court concluded that laws banning intimate sexual conduct between same-sex persons unconstitutionally "demean[ed] the lives" of gays and lesbians.<sup>6</sup> I will leave *United States v. Windsor*<sup>7</sup> out of the analysis, viewing it as a ladder<sup>8</sup> from *Romer* and *Lawrence* to *Obergefell v. Hodges*.<sup>9</sup> Finally, in *Obergefell*, the Court ruled that laws not extending the fundamental right to marry to same-sex couples unconstitutionally denied equal dignity and respect to gays and lesbians and failed to afford them and their children the status and benefits of equal citizenship.<sup>10</sup>

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<sup>1</sup> See generally LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2020) (on file with the Boston University Law Review). Page references to *Who's the Bigot?* in this Essay refer to the penultimate version of the book (indicated as "manuscript").

<sup>2</sup> 138 S. Ct. 1719 (2018).

<sup>3</sup> 517 U.S. 620 (1996).

<sup>4</sup> *Id.* at 632, 634 (omission in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>5</sup> 539 U.S. 558 (2003).

<sup>6</sup> *Id.* at 575.

<sup>7</sup> 570 U.S. 744 (2013).

<sup>8</sup> See *id.* at 769-70, 772-75 (applying both animus and social meaning of denial frameworks).

<sup>9</sup> 135 S. Ct. 2584 (2015).

<sup>10</sup> *Id.* at 2604, 2608.

Thus, in *Romer*, emotions animating the denials of gay and lesbian rights evidently played a central role, whereas in *Lawrence* and *Obergefell*, it was the social meaning of the denials that was crucial. I shall argue that the focus in *Romer* on emotions—“animus” and the “bare desire to harm,” which Justice Scalia’s dissent equated with “racial or religious bias” or “bigotry”<sup>11</sup>—is unnecessary and unfortunate.<sup>12</sup> I shall also contend that the shift in *Lawrence* and *Obergefell*—to concluding that laws denying rights to gays and lesbians demean their existence and deny them the status and benefits of equal citizenship—puts gay and lesbian rights on firmer ground and better deflects Justice Scalia’s and other dissenters’ allegations that the Court is charging opponents of gay and lesbian rights with bigotry.<sup>13</sup>

Some arguments against discrimination on the basis of sexual orientation have drawn analogies to discrimination on the basis of race.<sup>14</sup> These arguments typically presuppose that the wrong in racial discrimination is—in the famous formulation of *United States v. Carolene Products Co.*<sup>15</sup>—“prejudice against discrete and insular minorities” or bigotry and irrational hatred.<sup>16</sup> These sound like strong emotions. When people make arguments for gay and lesbian rights using such formulations—along with their “lite” cousins “animus” and the “bare . . . desire to harm a politically unpopular group”<sup>17</sup>—they provoke strong reactions. Indeed, some conservative justices have objected that these formulations disparage the character of the people defending the laws discriminating on the basis of sexual orientation when in fact their opposition to gay and lesbian rights is rooted in sincerely and conscientiously held religious convictions. For example, in dissent in *Romer*, Justice Scalia took umbrage at what he interpreted to be the Court’s charge that people who support preserving traditional sexual morality—as against what he would call in *Lawrence* the “homosexual agenda”<sup>18</sup>—are the moral equivalent of racial and religious bigots.<sup>19</sup> And in dissent in *Obergefell*, Chief Justice Roberts objected that the majority was tarring religious opponents of same-sex marriage with the brush of bigotry.<sup>20</sup>

In the best justifications for rights of gays and lesbians, including the rights to intimate association and to marry, such emotions need not play a central role. Analysis of prejudice, bigotry, and irrational hatred—and their “lite” cousins

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<sup>11</sup> *Romer v. Evans*, 517 U.S. 620, 636, 652 (1996) (Scalia, J., dissenting).

<sup>12</sup> See discussion *infra* Part I.

<sup>13</sup> See discussion *infra* Parts II-III.

<sup>14</sup> See McCLAIN, *supra* note 1 (manuscript at 77).

<sup>15</sup> 304 U.S. 144 (1938).

<sup>16</sup> *Id.* at 152-53 n.4.

<sup>17</sup> *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) (omission in original) (quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

<sup>18</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>19</sup> *Romer*, 517 U.S. at 636, 652 (Scalia, J., dissenting).

<sup>20</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

“animus” and the “bare . . . desire to harm a politically unpopular group”<sup>21</sup>—is unnecessary to justify gay and lesbian rights. In fact, such analysis has proven to be an unfortunate distraction—to be sure, an understandable one but a distraction nonetheless. The better ground for justifying gay and lesbian rights stresses that laws failing to afford such rights deny them equal dignity and respect, demean their existence, and deprive them of the status and benefits of equal citizenship without adequate reasons. Let us begin at the beginning, with *Romer*, and then trace the shift in the ground for rights through *Lawrence* and *Obergefell*.

I. *ROMER*: “ANIMUS” AGAINST AND A “BARE DESIRE TO HARM A POLITICALLY UNPOPULAR GROUP” DENIES EQUAL PROTECTION OF THE LAWS TO GAYS AND LESBIANS

*Romer* involved a challenge, under the Equal Protection Clause, to a Colorado state constitutional amendment forbidding the protection of gays and lesbians from discrimination on the basis of sexual orientation.<sup>22</sup> The state had adopted this amendment after several progressive cities had passed local ordinances protecting them from such discrimination.<sup>23</sup>

In *Romer*, decided in 1996, the Court does not even consider certain familiar equal protection arguments that were available at the time. First, it does not consider whether discrimination on the basis of sexual orientation, like that on the basis of race, embodies a “suspect classification” that would trigger “strict scrutiny.”<sup>24</sup> Under this most stringent form of review, courts would require that to be valid, laws employing classifications on the basis of sexual orientation must promote a “compelling governmental interest” and must be “narrowly tailored” to furthering that interest.<sup>25</sup> Relatedly, the Court does not inquire whether the legal measure being challenged, like measures discriminating on the basis of race, reflects “prejudice” against a “discrete and insular minority.”<sup>26</sup> Under conventional analysis, such prejudice reflects bigotry or irrational hostility toward such minorities.

Second, the Court does not address whether discrimination on the basis of sexual orientation is impermissible discrimination on the basis of gender that would invoke “intermediate scrutiny.”<sup>27</sup> Under this relatively stringent form of review, courts would require that laws, to be upheld, must promote an “important governmental objective” and must be “substantially related” to

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<sup>21</sup> *Romer*, 517 U.S. at 632, 634 (omission in original) (quoting *Moreno*, 413 U.S. at 534).

<sup>22</sup> *Id.* at 623.

<sup>23</sup> *Id.*

<sup>24</sup> JAMES E. FLEMING ET AL., *GAY RIGHTS AND THE CONSTITUTION* 114 (2016).

<sup>25</sup> *Id.* (discussing applicability of strict scrutiny to laws discriminating against gays and lesbians).

<sup>26</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>27</sup> FLEMING ET AL., *supra* note 24, at 114.

furthering that objective.<sup>28</sup> On this view, the constitutional flaw in laws discriminating against gays and lesbians is that they aim to enforce traditional gender roles upon gays and lesbians and therefore represent a form of discrimination on the basis of gender.

Why did Justice Kennedy's opinion of the Court in *Romer* not take either of these two available doctrinal routes? My view is that Justice Kennedy was not about to take the first route: he wanted not only to avoid taking the big and controversial step to holding that sexual orientation is a "suspect classification" analogous to race, but also to avoid implying that opposition to gay and lesbian rights is analogous to prejudice or bigotry against "discrete and insular minorities" like racial minorities.<sup>29</sup> Justice Kennedy presumably also was not prepared to take the second route: not only because he did not wish to take the big and controversial step to holding that sexual orientation discrimination is a somewhat suspicious classification on the basis of gender, but also because he wanted to avoid resting the holding upon a complex and controversial normative theory about sexual orientation discrimination and the enforcement of gender roles not likely to have been acceptable (or even comprehensible) to many people in 1996.

These were the two main doctrinal roads to protecting gay and lesbian rights not taken in *Romer*. Were there any other roads available at the time? There was an emerging line of cases dealing with classifications that were not quite "suspect classifications" but toward which the Court was somewhat suspicious out of concern that majorities might be treating disfavored minorities unequally out of lack of concern for, fear of, or hostility toward them.<sup>30</sup> *Department of Agriculture v. Moreno*<sup>31</sup> involved denying food stamps to needy individuals who were living together but were "unrelated persons."<sup>32</sup> The law, the Court held, was intended to prevent "hippies" and "hippie communes" from participating in the food stamp program.<sup>33</sup> The Court further held that a "bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>34</sup> *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>35</sup> a prominent case building upon *Moreno* in this line of decisions leading up to *Romer*, involved discrimination against developmentally disabled persons.<sup>36</sup> The Court stated that "mere negative attitudes" of the majority of property owners based on prejudice against developmentally disabled persons was not an

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<sup>28</sup> *E.g.*, *Craig v. Boren*, 429 U.S. 190, 199 (1976).

<sup>29</sup> *Carolene Prods.*, 304 U.S. at 152-53 n.4.

<sup>30</sup> FLEMING ET AL., *supra* note 24, at 114-15 (describing shift from deferential approach to rational basis scrutiny with "bite" in analyzing justifications for nonsuspect classifications).

<sup>31</sup> 413 U.S. 528 (1973).

<sup>32</sup> *Id.* at 531-32.

<sup>33</sup> *Id.* at 534.

<sup>34</sup> *Id.*

<sup>35</sup> 473 U.S. 432 (1985).

<sup>36</sup> *Id.* at 435-37.

adequate reason to deny a permit to establish a home for such persons in a residential neighborhood.<sup>37</sup> McClain richly shows how the challengers of the state constitutional amendment in *Romer* drew upon this line of precedents in formulating their arguments.<sup>38</sup>

In *Romer*'s majority opinion, Justice Kennedy argued that the state constitutional amendment being challenged, which discriminated on the basis of sexual orientation, likewise reflected illegitimate "animus" and "bare . . . desire to harm."<sup>39</sup> Thus, in the first case to protect gay and lesbian rights in U.S. constitutional law, Justice Kennedy invoked cases involving discrimination, not on the basis of race or gender—which might have seemed analogous to sexual orientation—but against needy "hippies" and developmentally disabled persons. This might not seem an auspicious beginning for gay and lesbian rights! Taking this route, the Court did not have to reach the controversial decision that sexual orientation is like race or gender and warrants "strict scrutiny" or "intermediate scrutiny." On the other hand, the Court did not simply defer to and uphold the legislation if one might reasonably conclude that the legislation was rationally related to a legitimate governmental objective (the least stringent form of judicial review in U.S. constitutional law). Instead, the Court applied what has come to be known as "rational basis scrutiny" with "bite."<sup>40</sup> That is, the Court put some teeth into the requirement that a law be rationally related to a legitimate governmental objective—be justified by an adequate reason—and it found the state constitutional amendment unconstitutional under that standard.<sup>41</sup>

The good news is that Justice Kennedy's opinion in *Romer* took a doctrinal route that he quite reasonably might have thought would avoid the controversial insinuation that opposition to gay and lesbian rights was as objectionable as racial bigotry. Let us pause to observe, however, that "animus" may amount to "prejudice" "lite" and that "bare . . . desire to harm a politically unpopular group" sounds like "prejudice against discrete and insular minorities" "lite."<sup>42</sup> Furthermore, "rational basis scrutiny" with "bite" may turn out to be a "lite" version of relatively stringent "intermediate scrutiny."<sup>43</sup>

The bad news is that Justice Kennedy's opinion in *Romer* nevertheless prompted Justice Scalia to object in dissent that the Court was "equating the

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<sup>37</sup> *Id.* at 448.

<sup>38</sup> See McCLAIN, *supra* note 1 (manuscript at 163-67).

<sup>39</sup> *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) (omission in original) (quoting *Moreno*, 413 U.S. at 534).

<sup>40</sup> See FLEMING ET AL., *supra* note 24, at 115 (comparing rational basis scrutiny with "bite" to "toothless" review of rational basis scrutiny).

<sup>41</sup> See *Romer*, 517 U.S. at 635.

<sup>42</sup> Compare *id.* at 632, 634 (omission in original) (quoting *Moreno*, 413 U.S. at 534), with *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

<sup>43</sup> See JAMES E. FLEMING & LINDA C. McCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 169 (2013).

moral disapproval of homosexual conduct with racial and religious bigotry.”<sup>44</sup> Justice Kennedy’s opinion, by giving a central role to “animus” and a “bare . . . desire to harm a politically unpopular group”<sup>45</sup>—instead of avoiding the charge that he is implying that opponents of gay and lesbian rights are bigots—practically invites that charge. We should apply a principle of interpretive charity to Justice Kennedy’s opinion: he did the best he could with the doctrinal tools available at the time. Like a good common law constitutional interpreter, he reached for the precedents available—*Cleburne* and *Moreno*—and, since they used the terms “animus” against and a “bare . . . desire to harm a politically unpopular group,” he applied that formulation to the denial of rights to gays and lesbians.<sup>46</sup> Understandably, Justice Kennedy may have thought that taking this route would avoid analogies to prejudice against racial minorities and thus to bigotry. But to no avail. Justice Scalia wailed that Justice Kennedy was charging opponents of gay and lesbian rights with bigotry anyway!

Was there an alternative route that Justice Kennedy could have taken in *Romer* that might have avoided holding that “animus” against and a “bare . . . desire to harm a politically unpopular group” were the constitutional flaws?<sup>47</sup> Was there any other ground for the decision that might have averted Justice Scalia’s accusation that the majority was tarring the opponents of gay and lesbian rights with the brush of bigotry? In fact, there was another route—which provides a bridge to *Lawrence*, the next decision protecting gay and lesbian rights—and Justice Kennedy arguably took it as well in *Romer*. He quoted Justice Harlan’s famous dissent in *Plessy v. Ferguson*<sup>48</sup> that the Constitution “neither knows nor tolerates classes among citizens.”<sup>49</sup> This principle—the core of an anti-class or anti-caste principle—forbids government to “deem a class of persons a stranger to its laws” by branding them as pariahs, outlaws, or outcasts.<sup>50</sup> The state constitutional amendment had done precisely that to gays and lesbians.<sup>51</sup> It was a “status-based . . . classification of persons” that was not rationally related to a legitimate governmental purpose.<sup>52</sup>

Under this principle, the constitutional flaw in the state amendment was that it denied the status of equal citizenship, including the benefits and protections afforded to other citizens, to a group of persons who were worthy of those benefits and protections. Taking this route, what matters is not the illegitimate

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<sup>44</sup> *Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

<sup>45</sup> *See id.* at 632, 634 (majority opinion) (omission in original) (quoting *Moreno*, 413 U.S. at 534).

<sup>46</sup> *See id.* (applying principles from *Cleburne* and *Moreno*).

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

<sup>48</sup> 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>49</sup> *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

<sup>50</sup> *Id.* at 635.

<sup>51</sup> *See id.* (“We must conclude that Amendment 2 classifies homosexuals . . . to make them unequal to everyone else.”).

<sup>52</sup> *Id.*

emotions animating the denial of equal citizenship—“animus” against and “a bare . . . desire to harm [them as] a politically unpopular group”<sup>53</sup>—but the social meaning of the denial—that gays and lesbians are pariahs, outlaws, or outcasts. And what undergirds the holding that the state amendment is unconstitutional is the normative judgment to the contrary that gays and lesbians are worthy of the status, benefits, and protections of equal citizenship. Thus, normative judgments that there are no adequate reasons for denying these protections to gays and lesbians are an alternative—and superior—basis for protecting gay and lesbian rights.

II. *LAWRENCE*: DEMEANING THE EXISTENCE OF GAYS AND LESBIANS  
IS AN INADEQUATE REASON FOR DENYING THEM BASIC LIBERTIES

In *Lawrence*, the Supreme Court held that laws criminalizing intimate sexual conduct between same-sex persons denied basic liberty in violation of the Due Process Clause of the Fourteenth Amendment.<sup>54</sup> The Court dropped the inquiry into “animus” and “a bare . . . desire to harm,”<sup>55</sup> replacing it with an inquiry into the social meaning of a practice—laws that deny the right of intimate association to gays and lesbians “demean their existence” and are not rationally related to a legitimate governmental objective.<sup>56</sup> In previous decisions, the Court had recognized a right to autonomy and intimate association for straights.<sup>57</sup> According to Justice Kennedy, same-sex intimate association is analogous to opposite-sex intimate association.<sup>58</sup> And gays and lesbians engage in intimate association for the same purposes and to pursue the same moral goods as straights.<sup>59</sup> Thus, Justice Kennedy concluded that gays and lesbians are entitled to “respect for their private lives.”<sup>60</sup> Accordingly, he determined that the State may not “demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>61</sup> Justice Kennedy implicitly judged gays’ and lesbians’ sexual intimacy and way of life to be as morally worthy and entitled to respect as that of straights.<sup>62</sup> This normative judgment underpins the conclusion that laws prohibiting sexual intimacy between same-sex persons demean the existence of gays and lesbians. At the time, Justice Kennedy wrote *Lawrence* as

<sup>53</sup> *Id.* at 632, 634 (omission in original) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>54</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>55</sup> *Romer*, 517 U.S. at 632, 634 (omission in original) (quoting *Moreno*, 413 U.S. at 534).

<sup>56</sup> *Lawrence*, 539 U.S. at 578.

<sup>57</sup> *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>58</sup> *Lawrence*, 539 U.S. at 574 (“Persons in a homosexual relationship may seek autonomy for [intimate and personal choices], just as heterosexual persons do.”).

<sup>59</sup> *See FLEMING & McCLAIN, supra* note 43, at 13 (identifying moral goods of intimate association to include commitment, nurture, and intimacy).

<sup>60</sup> *Lawrence*, 539 U.S. at 578.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

a due process holding rather than an equal protection holding (although there were unmistakable intimations of a concern for equality in his due process arguments).<sup>63</sup> In *Obergefell*, Justice Kennedy looked back and stated that *Lawrence* intertwined due process and equal protection.<sup>64</sup>

Thus, the Court held that gays and lesbians, far from being pariahs, outlaws, or outcasts, were entitled to equal dignity and respect. This significant shift in the inquiry—from whether a law (1) embodies animus against gays and lesbians and a bare desire to harm them to whether it (2) demeans their existence—represents a transition from a focus on illegitimate emotions to an emphasis on the social meaning of the law. The latter provides a better grounding for gay and lesbian rights. To recapitulate *Lawrence*'s better justification: laws criminalizing intimate sexual conduct between same-sex persons demean the existence of gays and lesbians, denying them basic liberties extended to other persons without any adequate justification for doing so. Affording these liberties is necessary to secure the status and benefits of equal citizenship. These formulations were prefigured in *Romer*'s alternative route, forbidding laws treating certain classes of persons as pariahs or strangers to the law.<sup>65</sup>

With this better justification on hand, we can see that Justice Scalia's objections that the majority tarred the opponents of same-sex intimate association with the brush of bigotry are overwrought and inapt. Holding that the laws forbidding same-sex couples from engaging in intimate sexual conduct deny such couples equal dignity and respect in no way impugns the motivations or character of opponents. It does not charge opponents with "animus" against or a "bare . . . desire to harm a politically unpopular group."<sup>66</sup> It simply recognizes that the social meaning of such laws—even if based on sincerely and conscientiously held religious convictions—is to deny equal dignity and respect to gays and lesbians. The fact that opponents act out of sincerely and conscientiously held religious views is not an adequate reason to deny gays and lesbians the basic liberties and status and benefits of equal citizenship already afforded to straights. The recognition of this fact became central in *Obergefell*.

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<sup>63</sup> *Id.* at 575, 578 (recognizing that equality of treatment and due process are "linked in important respects" but basing holding on due process grounds); see also FLEMING & McCLAIN, *supra* note 43, at 265-67 (exploring development of due process doctrine in *Lawrence*).

<sup>64</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) ("In *Lawrence* the Court acknowledged the interlocking nature of [due process and equal protection] in the context of the legal treatment of gays and lesbians.").

<sup>65</sup> See *Romer v. Evans*, 517 U.S. 620, 635 (1995) ("Amendment 2 classifies homosexuals . . . to make them unequal to everyone else. . . . A State cannot so deem a class of persons a stranger to its laws.").

<sup>66</sup> See *id.* at 632, 634 (omission in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

III. *OBERGEFELL*: THE STATE MAY NOT DENY EQUAL DIGNITY OR THE STATUS AND BENEFITS OF EQUAL CITIZENSHIP TO GAYS AND LESBIANS

In *Obergefell*, ruling that the fundamental right to marry extends to same-sex couples, Justice Kennedy writes the majority opinion in the same vein as in *Lawrence* rather than in that of *Romer*. *Obergefell* completes *Lawrence*'s shift away from illegitimate emotions with a more fully articulated justification for why laws denying basic liberties to gays and lesbians lack any adequate justification. Here I briefly encapsulate the reasoning of *Obergefell*.

Gays and lesbians are entitled to the rights to autonomy, to intimate association, and to marry, all of which are already protected for straights. The state may not demean the existence of their morally legitimate way of life by denying them these rights. They are entitled to equal dignity and respect. The state has created an important institution—civil marriage—to promote certain noble purposes and moral goods. In *Obergefell*, Justice Kennedy quotes the stirring language from *Griswold v. Connecticut*<sup>67</sup> about the noble purposes of marriage: promoting intimacy, harmony, and loyalty within a worthy relationship.<sup>68</sup> He also quotes the Massachusetts Supreme Judicial Court's formulation concerning moral goods in *Goodridge v. Department of Public Health*<sup>69</sup>: because marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."<sup>70</sup> The *Goodridge* court also mentions the moral goods of commitment, "mutuality, companionship, intimacy, fidelity, and family."<sup>71</sup> Same-sex couples are similarly situated to opposite-sex couples with respect to the pursuit of such moral goods and the need for the benefits of marriage. There is no adequate reason for denying them this right and these benefits. Not extending the fundamental right to marry to same-sex couples demeans their existence and humiliates them and their children, denying them the status and benefits of equal citizenship.<sup>72</sup>

Justice Kennedy's majority opinion in *Obergefell* was based primarily on the ground that the law denied the fundamental right to marry in violation of the Due Process Clause rather than on the ground that it violated the Equal Protection Clause. Again, Justice Kennedy may have primarily grounded the decision on the Due Process Clause instead of the Equal Protection Clause to avoid the need to draw analogies between discrimination on the basis of sexual orientation and discrimination on the basis of race. He presumably does so to avoid implying that opponents of gay and lesbian rights are analogous to racial or religious bigots. Nonetheless, Chief Justice Roberts and Justices Scalia and

<sup>67</sup> 381 U.S. 479 (1965).

<sup>68</sup> *Obergefell*, 135 S. Ct. at 2599-600 (quoting *Griswold*, 381 U.S. at 486).

<sup>69</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>70</sup> *Obergefell*, 135 S. Ct. at 2599 (quoting *Goodridge*, 798 N.E.2d at 955).

<sup>71</sup> *Goodridge*, 798 N.E.2d at 954.

<sup>72</sup> *Obergefell*, 135 S. Ct. at 2604, 2608.

Alito in their dissents in *Obergefell* contended that the majority opinion had portrayed those who did not share its understanding of marriage as bigoted.<sup>73</sup> For example, Justice Alito warned that the majority's decision would be "used to vilify Americans who are unwilling to assent to the new orthodoxy," and that, while "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, . . . if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."<sup>74</sup>

As McClain clear-headedly demonstrates, these charges ignore what Justice Kennedy's opinion in *Obergefell* says and does.<sup>75</sup> In fact, Justice Kennedy nowhere refers to those who oppose allowing same-sex couples to marry as bigots; to the contrary, he stresses that he does not doubt the sincerity of opponents of same-sex marriage. Moreover, he emphasizes that he is not disparaging their conscientious religious convictions: "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."<sup>76</sup> He also states: "[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."<sup>77</sup> But he explains that "when that sincere, personal opposition becomes enacted into law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."<sup>78</sup>

This passage reflects important constitutional limits upon the legal enforcement of morality in a pluralistic constitutional democracy: however sincere their beliefs, citizens may not use the vehicle of the law to exclude others from basic civil institutions. Saying that a law which is sincerely defended by people of conscience denies gays and lesbians equal dignity—by denying them the status and benefits of equal citizenship where a basic civil institution like marriage is concerned—is hardly to tar those people with the brush of bigotry. In any case, nothing in Justice Kennedy's opinion precludes states from enacting measures or using existing laws to protect religious liberty, provided they do not

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<sup>73</sup> See *id.* at 2626 (Roberts, C.J., dissenting) ("Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate."); *id.* at 2630 (Scalia, J., dissenting) (criticizing majority opinion for implying that limiting marriage to one man and one woman "cannot possibly be supported by anything other than ignorance or bigotry"); *id.* at 2642-43 (Alito, J., dissenting) ("In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.").

<sup>74</sup> *Id.* at 2642-43 (Alito, J., dissenting).

<sup>75</sup> See McClain, *supra* note 1 (manuscript at 177-80).

<sup>76</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>77</sup> *Id.* at 2607.

<sup>78</sup> *Id.* at 2602.

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run afoul of the Court's holding that same-sex couples must be allowed to exercise the fundamental right to marry in all states and that states must allow them to marry on the same terms and conditions as opposite-sex couples. McClain's analysis in Chapter Seven of *Who's the Bigot?* more fully elaborates all of these points than I have in this brief Essay.<sup>79</sup>

To recapitulate: What are the benefits of *Lawrence* and *Obergefell*—recognizing that denials of equal respect and dignity along with the status and benefits of equal citizenship to gays and lesbians are not justified by adequate reasons—over *Romer*—forbidding illegitimate emotions such as “animus” and a “bare . . . desire to harm a politically unpopular group”?<sup>80</sup> First, *Lawrence* and *Obergefell* avoid the insinuation that citizens (and justices) who oppose gay and lesbian rights are bigots. To be sure, the dissenters in these cases nonetheless charge the majority with branding opponents as bigots. This objection was strained in *Romer*, though understandable given the majority's invocation of “animus” and “bare desire to harm.” The objection is completely off the mark in *Obergefell* given the shift from forbidding illegitimate emotions to securing equal dignity and the status and benefits of equal citizenship.

Second, *Lawrence* and *Obergefell* focus on the social meaning of a state of affairs in the world for those discriminated against—that laws demean the existence of and deny the status and benefits of equal citizenship to gays and lesbians—not a state of emotions in the minds of opponents of those rights. Justice Scalia, in dissent in *Romer*, contended that the majority had mistaken a “Kulturkampf,” or culture war, for a “fit of spite.”<sup>81</sup> *Lawrence* and *Obergefell* set limits on the “culture war” itself: majorities may not deny basic liberties and the status and benefits of equal citizenship for gays and lesbians. To recall *Romer*, majorities may not create inferior classes and brand them as pariahs, outlaws, or outcasts.<sup>82</sup> As *Obergefell* put it, “[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty” and secure the status of equal citizenship.<sup>83</sup>

Finally, grounding gay and lesbian rights as *Lawrence* and *Obergefell* do promises to move beyond settling for “grudging” toleration for gays and lesbians, and toward aspiring to acceptance and respect for them—a more stable and worthy basis for justifying their rights as equal citizens. All in all, the *Lawrence* and *Obergefell* approach better captures the stakes in the movement for gay and lesbian rights—the aim is not to block illegitimate emotions but to secure fundamental rights, equal dignity and respect, and the status and benefits of equal citizenship for all.

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<sup>79</sup> See McClain, *supra* note 1 (manuscript at 177-80).

<sup>80</sup> *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) (omission in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

<sup>81</sup> *Id.* at 636 (Scalia, J., dissenting).

<sup>82</sup> See discussion *supra* Part I.

<sup>83</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

## CONCLUSION

The bottom line is that, no matter what arguments Justice Kennedy's majority opinions made for gay and lesbian rights, the dissenting justices cried that those opinions were tarring religious opponents of such rights with the brush of bigotry. This suggests that crying bigotry is a rhetorical strategy for mobilization in the culture war rather than a fair engagement with the arguments in the majority opinions. Thanks to McClain's rich and subtle analysis of bigotry, motives, and morality in the Supreme Court's gay and lesbian rights cases, we can see this clearly.