The "End of All Morals Legislation": The Legacy of the Lawrence Dissent in Obergefell

"I think that Lawrence catalyzed for our society, was it put gay and lesbian couples, gay and lesbian people, in a position for the first time in our history to be able to lay claim to the abiding promise of the Fourteenth Amendment in a way that was just impossible when they were marginalized and ostracized. And you're right, Mr. Chief Justice, this is about equal participation, participation on equal terms in a State--conferred, a State--conferred status, a State institution."

Solicitor General Donald Verrilli, *Obergefell v. Hodges* oral argument

JUSTICE KENNEDY: Haven't we learned a tremendous amount since -- well, since Lawrence, just in the last 10 years?

SOLICITOR GENERAL VERRILLI: Yes. And, Your Honor, I actually think that's quite a critical point that goes to the questions that Your Honor was asking earlier. I do think Lawrence was an important catalyst that has brought us to where we are today. And I think what Lawrence did was provide an assurance that gay and lesbian couples could live openly in society as free people and start families and raise families and participate fully in their communities without fear.

A Look to the Past, *Obergefell* and the Impact of *Lawrence*

The *Obergefell* decision is a case that defines a generation. Marriage equality and LGBTQ rights are poised for a victory untenable for generations past. Just twelve years ago, the Supreme Court of the United States overturned *Lawrence v. Texas* and, as Justice Scalia argued in the dissent, doomed the "end of all morals legislation." *Lawrence* created a legacy evident in tribute during the *Obergefell* oral arguments, and will serve as a historical bookend, a pioneering case that demonstrates the Court's transformation and progress. The legacy of the *Lawrence* decision, and the importance of the dissent, is best appreciated through a wider lens. The *Lawrence* dissent should be closely examined as a majority of the Justices who decided *Obergefell* also presided over *Lawrence*.

A dissent is valuable in that it records a counter majority narrative for history; it demonstrates an alternative thinking the Court should have adopted, and provokes perspective of another view. A powerful dissent can rewrite history and provide reasoning for a potential future reversal. In short, dissents magnify the gravity of a case. *Lawrence* separated LGBTQ conduct from other morality legislation and banned the linkage to criminal activity for conduct and status, eradicating "morality legislation" created to oppress and criminalize LGBTQ conduct and identity. The *Lawrence* legacy is considered seismic in impact, and LGBTQ rights in front of the Court have seen an arc of justice from eradicating "all morals legislation" and ending criminalization of behavior in *Lawrence*, to supporting marriage equality. The most poignant assertion of the *Lawrence* dissent provides insight into how dissenters in *Obergefell* may have argued.

In short, the *Lawrence* dissent argued that the Court, by striking down state laws criminalizing homosexual conduct, had effectively ended all morality legislation. Justice Scalia evaluated *Lawrence* under the reasoning of the *Bowers* majority, and his dissent cast an ominous tone towards same-sex marriage. *Bowers v. Hardwick* was a 1986 case upholding a state law criminalizing homosexual sodomy. The Majority in *Bowers* interpreted the issue as one of a fundamental right to homosexual sodomy, which it denied.[1] The *Lawrence* decision overruled that decision and reasoning. LGBTQ rights proponents read *Bowers* as an inherently wrong decision memorialized in correction through *Lawrence*. To evaluate if the holding was truly the end of all morals legislation, one must delineate what Justice Scalia meant by morals legislation, and measure that against the antithesis of criminalization. Through this standard, same-sex marriage is the definitive answer to the Dissent's claim of the "end of all morality legislation."

> *"The Court embraces instead Justice Steven's declaration in his Bowers dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," **This effectively decrees the end of all morals legislation**. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review."* Justice Scalia, Dissenting, *Lawrence v Texas*

If the other examples of morals legislation listed by the Dissent (incest, bestiality, polygamy, etc.) were truly similar to LGBTQ conduct, the easiest qualitative evaluation would be the flood of uplifting state bans against the list of comparable conduct. In the absence of such action, it is easy to determine that the Majority's holding did not lead to the end of all morals legislation, nor for that matter the criminalization of sexual acts, or ending the legislature's ability to regulate public safety. In fact, Romeo and Juliet laws—prohibitions against statutory rape, incest, bestiality, and polygamy—stand on the books and have not been seriously challenged with the same framework. The Dissent's hyperbolic rhetoric spotlights insight into

the upward battle faced by civil rights activists. The grouping of LGBTQ conduct with the criminalized conduct lent more weight to the Majority's argument of the invidious nature of the Majority using "the power of the State to enforce these views on the whole society through operation of the criminal law." The consequences of LGBTQ conduct and identity defined under statute as criminal, clearly is exclusionary to the participation in the democratic process. The weight of the state's power to utilize a prosecutorial process to stop and punish conduct is one that cannot be understated. The operation of criminal law against a conduct that is linked to the identity is the most oppressive tool in the state's ability to discriminate and oppress a group, let alone a conduct.

However if the ends of morals legislation is interpreted to mean the end of legislation against LGBTQ inclusion, closing the gap between the arc of conduct and status, the prediction is seemingly correct in the limited application to conduct and identity. *Lawrence* held that adults have a protected liberty interest in deciding to conduct their private lives "in matters pertaining to sex," and the laws and traditions of the past half century have indicated an emerging awareness of that liberty. Twelve years following the "emerging awareness" of the right to liberty under the Due Process Clause, it seems conduct is now inseparable from status. Sexual orientation is inherently a part of one's identity, and thus triggers status protections.

In adopting Justice Scalia's framework, the state legislature's reactions must be considered. There exists a stark difference in differing generations' concepts of morals legislation. Justice Scalia proposed a solution while scolding the Court as "impatient of democratic change" to task later generations experiencing changed opinion in morals legislations with correcting wrongs through the normal democratic process. For many young Americans, LGBTQ rights and marriage equality are perceived as an equal protection matter,

and the morality question is absent. The liberty question has been answered, and LGBTQ "conduct" has moved towards "status." The debate over sodomy laws has been replaced by the state's regulation of marriage, adoption rights, and property and tax rights.

The civil rights case for equal recognition of marriage rights, even the concept of sexual liberty, is a relatively new campaign. In hindsight, the opinion in *Bowers* is a cruel testament to a past of discrimination, of using morality laws to exclude and discriminate. The argument made by the *Bowers* Majority and *Lawrence* Dissent that striking "morality laws" prohibiting homosexual conduct as equitable to stripping all moral choices from lawmaking is now seen as hyperbolic.

> *"The law … is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."* Justice White for the Majority, *Bowers v Hardwick*

The *Lawrence* decision seems underwhelming in comparison to the swift trajectory of progress seen in LGBTQ rights over the last decade. If *Lawrence* effectively determined the "end of all morals legislation," under that reasoning, the decision should be the key to the liberty argument for marriage equality, an institutionally recognized practice that confers thousands of federal rights. [2]

The Majority in *Lawrence* held that a state cannot "demean [homosexuals'] existence or control of their destiny by making their private sexual conduct a crime" without violating their "right to liberty under the Due Process Clause."[3] Wording such as "control of destiny" and "demean" pose the question of whether the Majority would have been open to considering a higher scrutiny standard, and thus conduct as an identity. The Dissent's prediction is best supported by the standards the Court used in evaluating the constitutionality of the Texas Anti-LGBTQ Conduct Law by an enhanced rational standards basis. This reasoning hints at fears of

conduct as inferring status, and thus the totality of the end of morality legislation based on the Majority's careful use of an enhanced rational basis test creating a slippery slope towards a higher standard of scrutiny.

A general consensus was that the rational basis standard used was enhanced to be purposefully flexible. Justice Scalia may perceive the Court's approach as sweeping, but the Majority's precise maneuvering in utilizing a rational basis test and avoiding addressing the question of a fundamental liberty demonstrates that the Majority was cautiously using a scalpel, not a hammer, to effect change in the Court's overruling of *Bowers*. Perhaps what signaled the "end of all morals legislation" to Justice Scalia was the uncertainty of the shroud of the protection of liberty afforded under the decision—it was clear he saw a pathway to a marriage equality argument that is realized in *Obergefell* . The exchange between Solicitor General Verrilli and Justice Kennedy over dignity during *Obergefell* oral arguments seems to have been a nod to the Majority's reasoning in *Lawrence*.

Conduct, Status and the End of Morality Legislation

There are many ways to propose how the Dissent thought the Majority's absence of moral judgment could lead to barring all further morals legislation. The most clearly evidenced approach to Justice Scalia's thinking is found in the linkages of his dissent to marriage equality and hints that perhaps the conduct tied to the liberty argument would someday augment to status and, as mentioned in his dissent, marriage equality. Justice Scalia's dissent is gripping. Reading from the bench, as he would in *Windsor*, his voice booms foreboding and critical. When the constitutional claims presented determine the livelihood of a group, the Court is expected to "take sides in the Culture War" and serve as a greater authority than the state legislatures when a group lacks political power to advocate for themselves. For Justice Scalia, the Majority in

Lawrence curtailed a democratic process and may have created a right to liberty incompatible with the Court's selection of evaluative tests. The Majority's abstention from mentioning the law's failure to comply with heightened scrutiny, and instead rely on a hybrid of rational basis, seems to truly concern the Dissent as an intentional step to marriage equality.

In arguing, voters—unlike judges—need not "carry things to their logical conclusion." Perhaps Justice Scalia feared the Court would pursue conduct interpreted in the future as equitable treatment and scrutiny as status. He posed the question in his dissent "what justification could there possibly be for denying the benefits of marriage to same-sex couples exercising "the liberty protected by the Constitution?" The Dissent argues the Texas Anti-Homosexual Sodomy Law did not infringe on a protected fundamental right and did not deny equal protection of the laws. The legitimate state interest supporting the law was the intent of the state of Texas to protect citizens through morality legislation.

This argument ignores how intrusive the law was in regulating behavior and identity. Scalia's dissent details the difficulty of prosecuting a sodomy charge with closed doors, but fails to address that petitioners were not inviting the police into their home or acting in a means of political advocacy to challenge existing law and purposefully be caught. In *Bowers* and *Lawrence*, the fact pattern seemed almost comically intrusive with the state literally invading and policing the bedrooms of citizens. Without the safety of liberty in the most private of spaces, a reasonable person could not successfully argue that the LGBTQ community had as much franchise in any space, public or private, nor comparable power as an average citizen to convince his or her legislature to decriminalize conduct intrinsically tied to identity. Space is intrinsically tied to agency. At the *Obergefell* oral argument, an older participant had a button reminding the younger crowd "The first pride parade was a riot." It is easy to overlook

disenfranchisement in public, but even more so, the invidious nature of private disenfranchisement. There is a different level of exclusion from the democratic process if the group is already criminalized and excluded, and the Majority's mention of that exclusion should be considered in understanding *Obergefell* as it was in *Lawrence.*

There was no such "normal democratic means" available for gay rights supporters at the time of the *Lawrence* decision. Instances of political clout and advancement under normal democratic means came only in slight moments of national recognition, such as the political activity following the horrific murder of Matthew Shepard. At the time of the decision, it was many years until LGBTQ servicemembers would rise to national prominence to speak out against Don't Ask Don't Tell policies. Lambda Legal's decision to take the case to the Supreme Court could be considered incredibly risky in that *Lawrence* was factually similar to *Bowers*. The potential of *Lawrence* could have been very detrimental to LGBTQ rights.

Even in celebration of progress following *Lawrence,* some hesitancy is required. The Majority's decision was not a clear victory for LGBTQ rights. It only expunged state laws criminalizing behavior. The "end of morality legislation" was achieved for the conduct of sexuality and perhaps the status of sexuality between consenting adults, but this was not an Equal Rights Amendment case or a case that created a fundamental right. *Lawrence* stopped the policing of LGBTQ bodies and sexuality by the state, and distinguished the Constitution perceives equal footing between LGBTQ citizens and their heterosexual counterparts in the areas of liberty under the Due Process Clause. The Texas Anti-Homosexual Conduct Statute was waged in a way to criminalize the livelihoods of Texans deliberately, similar to the insidious nature of the police power used in *Bowers* to harass**,** exclude and criminalize a community. The depth of discrimination indicated the law's true intention; a more fitting name would have been

the Texas Anti-Homosexual Statute. The Majority's use of diction such as "criminalization," "discrimination" and "demeaning" shows an understanding of this concept.

A state cannot demean an individual's existence or control an individual's destiny by criminalizing his or her private sexual conduct. A person's right to liberty under the Due Process Clause prevents government intrusion, and affords social implications beyond the sexual liberty guarantees. The case opened a door for the legislative and litigation trek towards marriage, partner benefits, adoption rights, and parental rights, now that sexuality was seemingly free from the "banner of morality" and under the spotlight of policing. If *Lawrence v. Texas* ended morality legislation, it ended the practice of harnessing the law to discriminate against a class of individuals based on their conduct, and eventually led the path closer to a status argument.

Privacy is a constitutional right applicable to everyone, even those who do not fall under the "moral banner" of acceptable sexual behavior. The importance of *Lawrence* was the separation of LGBTQ sexuality from criminal sexual deviances with which it was previously grouped, such as incest and polygamy. Some may find this conduct disagreeable to their lifestyle and choices, and the many examples presented in the dissent demonstrate the Court's arc of justice bridges a way to Due Process that state legislatures cannot inhibit. The Dissent's recital of examples of allowed discrimination against LGBTQs may have been counterproductive. Citing the depth of exclusion under Defense of Marriage Act, Don't Ask, Don't Tell, and the Court's ruling in favor of the Boy Scouts of America's ban on LGBTQ members is compelling to the Majority's argument as it demonstrates the undeniable power of the state to exclude, criminalize, marginalize, and demean LGBTQ conduct and, in turn, identity. Although not mentioned anywhere in the Majority, (and vaguely alluded to in the Dissent) there is similar, almost historical knowing of suspect classification present in the Dissent's diatribe and imagery of Americans being able to deny

individual housing, a teaching position, a business partner, or service in the Armed Forces to LGBTQ Americans. This comparison would seem unconscionable today. Perhaps the Court was not "impatient of democratic change" as claimed, but languishing in comparison with democratic progress.

There is a difference between the holding, the reading and the historic meaning of a case. *Lawrence* expanded the substantive liberties protected by the Due Process Clause in the right of consenting adults to engage in intimate sexual behavior. This may seem like a limited impact, but when behavior is intrinsically tied to identity, perhaps the impact is broader, and Justice Scalia's prediction moves closer to truth. During *Obergefell v. Hodges* oral argument, Justice Kennedy, who delivered the Majority opinion in *Lawrence*, continuously circled around one word: "millennia." Perhaps he was considering the millennia of history of "traditional marriage" in light of a potential addition of a same-sex right. Perhaps, like in *Lawrence*, he was thinking of the potential Dissent's use of "millennia"—millennia of discrimination and exclusion of LGBTQ conduct and identity at the margins of society.

CONCLUSION

Before the *Obergefell* decision was announced, it was uncertain if *Lawrence* truly spelled the end of all morals legislation against LGBTQ conduct, and ergo, potentially the recognition and status of marriage equality. Despite the outcome of *Obergefell*, the Minority party read their dissent from the bench; their words and reasoning will be recorded in the tome of history, and present and future generations will decide if their reasoning supports or detracts from the monolithic voice of the Court. On the day of the *Obergefell* decision, the public faced the Court's entry, bearing the engraving "Equal Justice Under Law." Perhaps dissenting Justices should examine the alternative, carved into the Court's east façade: "Justice, the Guardian of

Liberty."

CITATIONS

OBERFEFELL v. HODGES, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf(last visited June 24, 2015).

[1] *BOWERS v. HARDWICK*, The Oyez Project at IIT Chicago-Kent College of Law,http://www.oyez.org/cases/1980-1989/1985/1985_85_140 (last visited June 24, 2015).

[2] *AN OVERVIEW OF FEDERAL RIGHTS AND PROTECTIONS GRANTED TO MARRIED COUPLES*, Human Rights Campaign, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited June 24, 2015).

[3] *LAWRENCE AND GARNER v. TEXAS*, The Oyez Project at IIT Chicago-Kent College of Law,http://www.oyez.org/cases/2000-2009/2002/2002_02_102 (last visited June 24, 2015).