

# RELIGIOUS ARGUMENTS, RELIGIOUS PURPOSES, AND THE GAY AND LESBIAN RIGHTS CASES

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## I. INTRODUCTION

The Supreme Court's four major gay and lesbian rights decisions—*Romer v. Evans*,<sup>1</sup> *Lawrence v. Texas*,<sup>2</sup> *United States v. Windsor*,<sup>3</sup> and *Obergefell v. Hodges*<sup>4</sup>—were not cases about the First Amendment or religion. But collectively, often implicitly and sometimes explicitly, these cases teach us something about the role which religion should play in questions of constitutional equality and liberty.

These gay and lesbian rights cases, especially the first three, have been understood to stand for the principle that government may not enact laws aimed at expressing moral disapproval, or “animus,” toward homosexuality or same-sex relationships.<sup>5</sup> In turn, this association between animus and opposition to gay and lesbian equality has led some commentators (and dissenting justices) to accuse the Court's majority of imposing an “orthodoxy”<sup>6</sup> and of demonstrating hostility toward Americans whose religious views lead them to oppose homosexuality or legal rights for gays and lesbians.

This criticism, however, misses the mark, because it confuses religious belief and advocacy by private persons and organizations, on the one hand, with the imposition of religion-based policies by government, on the other. In *Lawrence* and *Obergefell* in particular, the Court went out of its way to acknowledge that many people supported laws restricting gay and lesbian liberty and equality out of good-faith religious convictions.<sup>7</sup> But religious *arguments* in the public square are

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<sup>1</sup> 517 U.S. 620 (1996).

<sup>2</sup> 539 U.S. 558 (2003).

<sup>3</sup> 570 U.S. 744 (2013).

<sup>4</sup> 135 S. Ct. 2584 (2015).

<sup>5</sup> See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 188 (2013) (arguing that *Romer*, *Lawrence*, and *Windsor* “cumulatively make it clear that the perceived social harm of homosexuality, along with simple moral disapproval of it, is no longer a proper basis on which to carve out gay people from legal protection”).

<sup>6</sup> *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

<sup>7</sup> See *Lawrence*, 539 U.S. at 571; *Obergefell*, 135 S. Ct. at 2594. See also Michael J. Perry, *Religion in Politics*, 29 U.C. DAVIS L. REV. 729, 756 (1996); *Who We Are*, ALLIANCE DEFENDING FREEDOM, <https://www.adflegal.org/about-us> (last visited Mar. 7, 2019).

different from government-imposed religious *purposes*. The former must be freely allowed; the latter violate the Constitution.

We cannot and should not seek to banish religion-based arguments from the public square. After all, religious beliefs may inform the positions of individual citizens and lawmakers on a wide variety of public policy questions—protecting the environment, punishing sex crimes, or granting asylum to refugees, just to name a few. Yet in such cases, the laws themselves are not understood to be enacting religion. Persuasive and non-hypothesized secular rationales are available to describe the government's purpose and interest in the law. Such was not the case for laws punishing homosexuality and disadvantaging homosexuals.

My purpose in this Essay is to illuminate the difference between religious *arguments* and religious *purposes* in the gay and lesbian rights cases; to demonstrate how the Court rejected laws which lacked plausible secular purposes, without disparaging the convictions of conscience which had led citizens and lawmakers to support those laws.

Although they are grounded as a formal matter in the Constitution's guarantees of equal protection and due process, the gay and lesbian rights decisions are informed by the Establishment Clause value that government must make law only on the basis of secular, rationally understandable and defensible reasons, not religious doctrine or beliefs.<sup>8</sup> Nothing about that idea suggests that arguments arising from personal religious conscience should not be part of public debate. But it does suggest that as a matter of Fourteenth Amendment doctrine, only secular government purposes should satisfy review under the Equal Protection Clause or the Due Process Clause.

## II. THE COURT'S REJECTION OF RELIGIOUS PURPOSES FOR ANTI-GAY LAWS

### A. Background

During the period from *Romer* to *Obergefell*, 1996 through 2015, the opposition to gay and lesbian political advancement and legal equality was defined almost exclusively by religious arguments and religious-political organizing. The major political and legal organizations opposing gay and lesbian rights at the state or national levels typically defined themselves by reference

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<sup>8</sup> As the Court explained in one of its canonical Establishment Clause cases, to avoid conflict with the Religion Clauses, a law "must have a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

to some religious mission.<sup>9</sup> Beginning in the 1970s, opposition to rights for gays and lesbians was “central” to the “political practice and social vision” of American religious conservatives (which usually meant Christian conservatives).<sup>10</sup> While it is certainly true that “individual men and women who happen to be secular can be homophobic to varying degrees,” the opponents of marriage equality and other gay and lesbian rights “are, for the most part, uniformly religious” and come to their positions “in large part, as a result of their religion.”<sup>11</sup> In the United States today, “in terms of political mobilization, social movement activity, and organized public outcry, there is no secular mobilization opposing equal rights for gays and lesbians.”<sup>12</sup>

It is not surprising, then, that the laws struck down by the Supreme Court in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, laws which enacted various forms of punishment against homosexuality or disfavored treatment against gays and lesbians, all were impelled by identifiable religious purposes. To be clear, this is not to say that every legislator or voter who supported these laws did so for religious reasons. But the genesis and justifications for all of the laws at issue in these cases can be traced to religiously based views about homosexuality and same-sex relationships, or to the derivative belief that gays and lesbians present a moral threat to society.

Admittedly, these religious purposes are almost never meaningfully explored in the Court’s opinions. Yet understanding how religion drove the laws at issue in these cases requires little more than basic familiarity with the social and political history of the times. The Court’s opinions in these cases often seem diffident about the role of religion in laws punishing or disadvantaging gays and lesbians. While the Court sometimes nods respectfully toward religious beliefs and arguments about homosexuality,<sup>13</sup> it says little if anything about the underlying religious rationales behind the laws struck down in these cases. Nor does it comment on the religious-political activism operating

<sup>9</sup> See LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 105 (1998); Michael Booth, *Colorado: Gay-Rights Battlefield*, DENVER POST, Sept. 27, 1992, at A7; *Who We Are*, supra note 7; *Our Work*, NAT’L ORG. FOR MARRIAGE, <https://nationformarriage.org/main/ourwork> (last visited Mar. 7, 2019).

<sup>10</sup> DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 4–5 (1997).

<sup>11</sup> Phil Zuckerman, *Religion, Secularism, and Gay Marriage*, PSYCHOL. TODAY (June 8, 2015), <https://www.psychologytoday.com/us/blog/the-secular-life/201506/religion-secularism-and-gay-marriage>.

<sup>12</sup> *Id.*

<sup>13</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

in the background of these laws. Moreover, the religious impetuses behind these laws often were obscured because the government lawyers defending them eschewed discussing the actual history behind the laws and devoted their energies instead to hypothesizing non-religious purposes to attempt to justify them. As a result, the analysis in these cases can seem opaque. But at least this much is clear: in all four cases, the challenged laws ultimately foundered on their lack of any actual, discernible, non-hypothesized secular purpose.

### *B. Romer*

Colorado's Amendment 2, the issue in *Romer*, was a state constitutional amendment which rolled back all existing non-discrimination protections for gays and lesbians in Colorado municipalities and prohibited the enactment of any new such laws at the state or local level.<sup>14</sup> Colorado for Family Values ("CFV"), which sponsored Amendment 2, was formed by religious-conservative activists who were inspired by the views that "America has deteriorated because it has turned away from literal interpretations of the Bible, and fundamentalist church teachings must play a bigger role in government."<sup>15</sup> Amendment 2 was a "by-product of what religious right leaders had labeled a national 'cultural war' over whose 'family values' would be preeminent in society."<sup>16</sup> The authors of a study of the campaign to enact and defend Amendment 2 described it as "the first statewide test of a new prototype for antigay initiatives resulting from the collaboration of national and local conservative organizations seeking to secure a role for religion in government."<sup>17</sup> CFV told the Court in its amicus brief in *Romer* that the measure was impelled by concern over "the effect that government legitimization of homosexuality would have on the traditional family and community morality."<sup>18</sup>

In defending Amendment 2, the State of Colorado acknowledged these religious purposes only obliquely. It claimed that its state interests in the law were "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality," along with an "interest in conserving resources to fight discrimination against other groups."<sup>19</sup>

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<sup>14</sup> *Romer v. Evans*, 517 U.S. 620, 623–24 (1996).

<sup>15</sup> Booth, *supra* note 9, at A7.

<sup>16</sup> KEEN & GOLDBERG, *supra* note 9, at 105.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> Brief for Colorado for Family Values as Amicus Curiae Supporting the Petitioners, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008427 at \*2.

<sup>19</sup> *Romer*, 517 U.S. at 635.

The Court treated Amendment 2 as essentially a political-process problem. Making no reference to the religious impetus behind Amendment 2 or to CFV's explanation for the measure it had developed and advocated, the Court professed a certain amount of bewilderment about the law, calling it "at once too narrow and too broad" and observing that it "confounds [the] normal process of judicial review."<sup>20</sup> The Court found Amendment 2 to be "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>21</sup> The Court briefly considered the state's purported interests in Amendment 2—protecting certain landlords and employers, and conserving resources to fight other types of discrimination—but rejected them as "so far removed" from the broad and harsh consequences of Amendment 2 that "we find it impossible to credit them."<sup>22</sup> The Court suggested that the lack of serious and substantial government purposes behind Amendment 2 gave rise to an inference that the measure's real purpose was "animus toward the class it affects."<sup>23</sup> But it did not discuss the campaign to enact Amendment 2 and did not describe the animus as being grounded in religion.

Acknowledging the state's professed concern for landlords and employers with "personal or religious objections to homosexuality" is the closest the majority opinion came to acknowledging the religiously infused purposes behind Amendment 2. Yet it is implausible to imagine that the justices were unaware of the religious politics behind Amendment 2 and similar initiatives. The majority's reticence stands in contrast with Justice Scalia's dissent, which tellingly and accurately identified Amendment 2 as the product of a "Kulturkampf"<sup>24</sup> (a term denoting cultural struggle that was coined in reference to the battles between secular and religious forces in Germany in the late 19th century).

*Romer* treated homosexuality, in effect, as a morally neutral phenomenon, and it discussed gays and lesbians as essentially just another minority group entitled to use the political process to advance its interests. Amendment 2, the Court said, could not be reconciled with the principle, stemming both from the Equal Protection Clause and the "idea of the rule of law" itself, that "government and each its parts [should]

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<sup>20</sup> *Id.* at 633.

<sup>21</sup> *Id.* at 635.

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

<sup>23</sup> *Id.* at 632.

<sup>24</sup> *Id.* at 636 (Scalia, J., dissenting).

remain open on impartial terms to all who seek its assistance.”<sup>25</sup> In so doing, and by pointedly ignoring CFV’s explanation of the religious purposes behind Amendment 2, the Court implicitly but unmistakably signaled that the question of legal and political rights for gays and lesbians should be resolved on secular terms.

### C. *Lawrence*

Sodomy laws, the issue in *Lawrence*, historically were grounded in the religious view that homosexual conduct is unnatural. The core religious objection to homosexuality is that it supposedly violates the design and purpose of sexuality for humans as God created them. On this view, homosexual conduct is “a clear perversion of, or turning away from, the core activity of human sexuality, which is male-female marital intercourse,”<sup>26</sup> and thus is “a crime against the nature of the people involved.”<sup>27</sup> This religious view was long embedded in law. William Blackstone, the great expositor of the common law, denounced homosexuality as a “disgrace to human nature” and inconsistent with “the express will of God.”<sup>28</sup>

In *Lawrence*, the State of Texas, unlike Colorado in *Romer*, did not shrink from forthrightly discussing the religious purposes behind its sodomy law. Texas told the Court that the criminal prohibition on homosexual conduct represented “the continued expression of the State’s long-standing moral disapproval of homosexual conduct, and the deterrence of such immoral sexual activity,” and asserted that this was a legitimate state interest.<sup>29</sup> The Court did not comment on, or even acknowledge, the state’s moral justifications. It simply concluded that the Texas sodomy law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>30</sup> The Court “examined the conduct at issue to see if it was properly an aspect of liberty (as opposed to license), and then asked the government to justify its restriction, which it failed to do adequately.”<sup>31</sup> As in *Romer*, the Court insisted on applying a secular legal framework—in this case, substantive due process—to a law with an obvious religious pedigree.

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<sup>25</sup> *Id.* at 633.

<sup>26</sup> ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 25 (1995).

<sup>27</sup> *Id.* at 29.

<sup>28</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*215–16 (1860).

<sup>29</sup> Brief for Respondent at 41, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470184.

<sup>30</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>31</sup> Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO SUP. CT. REV. 21, 40 (2003).

That is not to say the Court did not acknowledge that sodomy laws have been defended with religious arguments. “[F]or centuries,” it said, “there have been powerful voices to condemn homosexual conduct as immoral,” condemnation that was shaped at least in part by “religious beliefs.”<sup>32</sup> The Court said it respected that “[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.”<sup>33</sup> But the critical passage of the opinion came next:

These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>34</sup>

In short, in a pluralistic society, religious beliefs and arguments must be respected, but such a society may not impose religious doctrine through civil law.

#### *D. Windsor*

Laws prohibiting same-sex marriage were driven almost entirely by religious-political activist groups seeking to “defend” marriage and roll back gay and lesbian political and legal advancements. This was true both of the federal Defense of Marriage Act (“DOMA”), which was invalidated in *Windsor*, and the state marriage bans which were struck down in *Obergefell*.

For example, The Alliance Defending Freedom, the legal group which defended California’s Proposition 9 in the first federal lawsuit against a state marriage equality ban and which has been active in a large number of other cases opposing gay rights, describes its mission as helping “Christians . . . unite in order to defend religious freedom before it [is] too late.”<sup>35</sup> The National Organization for Marriage, one of the leading national groups that fought against marriage equality (and, now, other matters of equality for gays, lesbians, bisexuals, and transgender

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<sup>32</sup> *Lawrence*, 539 U.S. at 571.

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

<sup>34</sup> *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

<sup>35</sup> *Who We Are*, *supra* note 7.

persons), describes itself as “working to defend marriage and the faith communities that sustain it.”<sup>36</sup>

Gary Simson has argued that both DOMA and the state marriage bans could be “readily understood as examples of lawmakers . . . , consciously or unconsciously, incorporating into law their religious beliefs or . . . the religious beliefs of many of their constituents.”<sup>37</sup> Thus, Simson argued, “regardless of what lawmakers opposed to same-sex marriage may be willing to state publicly as their reasons for voting against same-sex marriage, courts should find that laws prohibiting same-sex marriage violate the Establishment Clause.”<sup>38</sup>

In enacting the federal DOMA, Congress aligned itself squarely and expressly with those who opposed same-sex marriage for reasons of religion. As the House of Representatives put it in the official Judiciary Committee report on DOMA:

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. As

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<sup>36</sup> *Our Work*, NAT'L ORG. FOR MARRIAGE, <https://nationformarriage.org/main/ourwork> (last visited Mar. 7, 2019).

<sup>37</sup> Gary J. Simson, *Religion's Role in Bans on Same-Sex Marriage*, NAT'L L.J. (Apr. 14, 2014, 12:00 AM), <https://www.law.com/nationallawjournal/almID/1202650757393/Religions-Role-in-Bans-on-SameSex-Marriage/> [<https://advance.lexis.com/api/permalink/ddd32880-51e9-46b2-a7b5-120793e8785d/?context=1000516>].

<sup>38</sup> Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 135 (2012).



Representative Henry Hyde, the Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396: “[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate . . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval . . . on a union that many people . . . think is immoral.” It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government’s legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.<sup>39</sup>

In *Windsor*, the Court treated this language about morality and religion as, in essence, a smoking gun which confirmed that DOMA was not grounded in any constitutionally proper secular purpose. As it had in *Romer*, the Court raised the likelihood of “animus” lurking behind DOMA.<sup>40</sup> But unlike *Romer* and *Lawrence*, the Court in *Windsor* was more direct in its rejection of religious purposes. Citing to the above passage of the House Judiciary Committee report, the Court observed that “[t]he history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”<sup>41</sup>

In the *Windsor* litigation, something called the Bipartisan Legal Advisory Group of the House of Representatives (“BLAG”) had stepped in to defend DOMA when the Obama administration declined to. BLAG in effect disavowed the actual purposes Congress had set forth for DOMA by not addressing them. Instead, BLAG devoted most of its merits brief in the Supreme Court to setting forth a list of benign sounding

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<sup>39</sup> H.R. REP. NO. 104-664, at 15–16 (1996) (internal footnote omitted).

<sup>40</sup> U.S. v. *Windsor*, 570 U.S. 744, 770 (2013).

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

hypothesized secular purposes it said supported the law, such as “ensuring that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside”<sup>42</sup> and “avoid[ing] uncertain and unpredictable (but presumed negative) effects on the federal fisc.”<sup>43</sup> But the Court’s opinion completely ignored BLAG’s post-hoc rationalizations for DOMA.

Thus, *Windsor* suggests that not only must a law stand on secular, rather than purely religious, purposes, those secular purposes also must be plausible and genuine, not simply made up for use in litigation.

### *E. Obergefell*

The fourth and most recent case in the Court’s gay/lesbian rights quadrilogy, *Obergefell*, held that state laws prohibiting same-sex marriage violate the fundamental right to marry under the Due Process Clause.

By the time *Obergefell* was briefed and argued, government lawyers defending the marriage bans were aware that it was untenable to rely on religious purposes to justify these laws. And so, faced with the fact that they could not acknowledge the *actual* (that is, religiously inspired) reasons why these laws were promoted and enacted, the states, like BLAG in *Windsor*, turned to hypothesized purposes—that is, purposes which were supposedly served by the laws, but which were constructed post-hoc, in an effort to save the laws. “It matters not,” Ohio’s brief told the Supreme Court, “if the reasons offered in court are [actually] the reasons why lawmakers (or voters) approved the law.”<sup>44</sup> The states relied mainly on the argument of “responsible procreation.” As Michigan’s brief to the Court explained this argument:

[M]arriage as a public institution—separate from other relationships that have an emotional connection—springs from a feature of opposite-sex relationships that is biologically different than all other relationships (including opposite-sex platonic friendships and same-sex relationships): the sexual union of a

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<sup>42</sup> Brief on the Merits of the Bipartisan Legal Advisory Group of the U.S. House of Representatives for Respondent at 33, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

<sup>43</sup> *Id.* at 38.

<sup>44</sup> Brief for Respondent at 52, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1384100 at \*52.

man and a woman produces something more than just an emotional relationship between two people—it produces, without the involvement of third parties or even a conscious decision, the possibility of creating a new life. Michigan’s marriage definition is designed to stabilize such relationships, to promote procreation within them, and to be the expected standard for opposite-sex couples engaged in sexual relations.

The Court did not buy it, dismissing the responsible-procreation rationale as “unrealistic” and “wholly illogical.”<sup>45</sup>

The Court did not seek to identify any other purposes behind the state marriage bans, religious or otherwise. But it did address the difference between religious advocacy in the public square, and state action which advances religious purposes, and it did so in a more candid and direct manner than it had in the three previous gay and lesbian rights cases. The Court acknowledged that many people “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>46</sup> But to respect religious arguments about public policy is not to acquiesce in the enactment of religious purposes. “[W]hen that sincere, personal opposition becomes enacted 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>47</sup>

### III. GAY RIGHTS, RELIGION, AND DEMOCRACY

The Court’s insistence in the gay and lesbian rights cases that laws must be justified by secular purposes rests on a sound and, frankly, mainstream understanding of the relationship between law and religion in a pluralistic democracy. After all, the requirement of a secular purpose, not a purpose to advance or impose religion, is a core principle of Establishment Clause jurisprudence. In the gay and lesbian rights cases, the Court

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<sup>45</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

<sup>46</sup> *Id.* at 2602.

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

applied the same principle through the Equal Protection and Due Process clauses. Yet at the same time, the Court tried to make clear that it had no intention to disparage or constrain religious argument and advocacy.

That latter point may be cold comfort for citizens and legislators who believe they were entitled to enact religious beliefs into law. But there is nothing unusual or objectionable about drawing a clear line, as the Court did in *Obergefell*, between religious arguments in public debate and religious purposes in state action. As the distinguished religion and law scholar Michael J. Perry has argued, in regulating human conduct, “neither legislators nor other public officials should rely on a religious argument about the requirements of human well-being unless a persuasive independent secular argument reaches the same conclusion.”<sup>48</sup> In the same vein, Douglas Laycock—like Perry, a scholar who is certainly not a strict separationist when it comes to the relationship between government and religion—argues that the Constitution “does not limit the arguments that a free people can make in political debate,” nor does it “limit what the people can do to influence government; rather, it limits what government can do to the people.”<sup>49</sup> Simply put, the Constitution “limits political outputs, the laws that government can enact—not political inputs, the arguments that citizens can make.”<sup>50</sup>

In this Essay, I have sought to demonstrate how the Court in the gay and lesbian rights cases worked within the sort of framework Laycock suggests. An enduring and important legacy of *Romer*, *Lawrence*, *Windsor*, and *Obergefell* is not only how they advanced the dignity of gays and lesbians, but also the lessons they provide about how First Amendment values can inform Fourteenth Amendment analysis of equality and liberty.

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<sup>48</sup> Perry, *supra* note 7, at 756.

<sup>49</sup> Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 795 (1996).

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