

# Judicial Neutrality Awash with Ideology: Justice Scalia, Sexual Orientation, and Rhetorical Personae

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It is hard to admit that one's political opponents are not  
monsters . . . .<sup>1</sup>

## I. INTRODUCTION

Issues related to sexual orientation have generated great  
controversy in both the public and legal spheres<sup>2</sup> in the United States,<sup>3</sup>

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For thoughts on prior versions of this Article, the author thanks Tim Pierce, Craig Rich, and Jack Sammons. The author presented earlier versions of this Article at the Southeastern Association of Law Schools annual conference on August 6, 2013; the Association for the Study of Law, Culture, and the Humanities annual conference on March 10, 2014; and the National Communication Association annual meeting on November 22, 2014. © 2016 by Carlo A. Pedrioli.

<sup>1</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Scalia, J., dissenting).

<sup>2</sup> The legal sphere is a type of technical sphere. For a discussion of the public and technical spheres,

and the U.S. Supreme Court has not managed to avoid such controversy.<sup>4</sup> Indeed, the Supreme Court has been at the center of some of the controversy.<sup>5</sup> Since 1986, the Court has heard and decided several major cases related to sexual orientation and the Fifth and Fourteenth Amendments.<sup>6</sup> Despite restricting sexual minority rights in *Bowers v. Hardwick*,<sup>7</sup> the Court expanded such rights in the more recent cases *Romer v. Evans*,<sup>8</sup> *Lawrence v. Texas*,<sup>9</sup> *United States v. Windsor*,<sup>10</sup> and *Obergefell v. Hodges*.<sup>11</sup>

One member of the Court who did not agree with the Court's development of constitutional rights for sexual minorities was Justice Antonin Scalia, an appointee of President Ronald Reagan<sup>12</sup> and an

see G. Thomas Goodnight, *The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation*, 18 J. AM. FORENSIC ASS'N 214 (1982).

<sup>3</sup> This phenomenon is not new. See generally DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004) (unpacking the controversy over sexual minorities in the federal government that became public during the 1950s).

<sup>4</sup> See, e.g., Jess Bravin, *Historic Win for Gay Marriage: High Court Rulings Lift Bans on Federal Same-Sex Benefits, Weddings in California*, WALL ST. J. (June 26, 2013), <http://www.wsj.com/articles/SB10001424127887324520904578553500028771488>, <<https://perma.cc/5882-MNDQ>>; Bill Chappell, *Supreme Court Declares Same-Sex Marriage Legal in All 50 States*, NPR (June 26, 2015), <http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages>, <<https://perma.cc/5AST-EV6Z>>.

<sup>5</sup> See, e.g., Bravin, *supra* note 4; Chappell, *supra* note 4.

<sup>6</sup> In the 1970s, the Court "dismissed for want of a substantial federal question" an appeal from the Minnesota Supreme Court regarding a denial of a civil marriage license to a gay couple. Baker v. Nelson, 409 U.S. 810 (1972). The opinion contained only one complete sentence. *Id.*; see also Baker v. Nelson, 291 Minn. 310 (1971) (holding that Minnesota law did not provide for same-sex marriage and that such law did not offend the U.S. Constitution).

Sexual orientation-related issues that the Court has heard have not been limited to those under the Fifth and Fourteenth Amendments. See, e.g., *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (considering First Amendment right of the Veterans Council, a private group that organized its own St. Patrick's Day parade in Boston each year, to expressive association and not forcing the Veterans Council to allow the Irish-American Gay, Lesbian, and Bisexual Group to participate in the parade); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (considering the First Amendment right of the Boy Scouts to expressive association, which involved not having gay members).

<sup>7</sup> 478 U.S. 186 (1986). In the 1970s, the Supreme Court had affirmed, without opinion, a district court's upholding of a sodomy statute in Virginia. *Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901 (1976). See also *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975).

<sup>8</sup> 517 U.S. 620 (1996).

<sup>9</sup> 539 U.S. 558 (2003).

<sup>10</sup> 133 S. Ct. 2675 (2013). On the same day that it decided *Windsor*, the Supreme Court decided *Hollingsworth v. Perry*, which addressed the constitutionality of a California proposition, Proposition 8, that had changed the state constitution to ban same-sex marriage. 133 S. Ct. 2652 (2013). However, because the Court decided that the petitioners in the case, proponents of Proposition 8, lacked standing, the Court did not reach a decision on the merits.

<sup>11</sup> 135 S. Ct. 2584 (2015).

<sup>12</sup> Harold J. Spaeth, *Scalia, Antonin*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 882 (Kermit L. Hall ed., 2d ed. 2005). Before Reagan nominated Scalia to U.S. Supreme Court, Scalia served on the U.S. Court of Appeals for the District of Columbia, also as a Reagan appointee. *Id.* at 883. Before becoming a judge, Scalia had been a law professor and had worked in both the Nixon Administration and the Ford Administration. *Id.* Scalia remained on the Supreme Court for almost thirty years until his sudden death in mid-February 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>, <<https://perma.cc/6R78->

outspoken formalist jurist.<sup>13</sup> Although not on the Court until shortly after it issued the decision in *Bowers*, Scalia was a supporter of the spirit of *Bowers* and a consistent critic of the Court's move toward constitutional rights for sexual minorities. Indeed, Scalia penned several sharp dissents in the sexual orientation cases that the Court has decided.

In light of Scalia's dissenting from the Court's trajectory in sexual orientation cases decided under the Fifth and Fourteenth Amendments, this Article, drawing upon rhetorical theory, considers Scalia's rhetoric of sexual orientation. In his dissents in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, Scalia performed and constructed various rhetorical personae, or roles, including the first, second, and third personae, that produced rhetorical hypocrisy grounded in a heteronormative ideology.<sup>14</sup> The first persona, or speaker of the dissents,<sup>15</sup> that Scalia performed was that of a neutral justice. The second persona, or the audience implied in the dissents,<sup>16</sup> that Scalia constructed would receive appeals to tradition and majoritarian rule favorably and, ignoring the possibility of change in tradition and likewise ignoring minority rights, be susceptible to the alleged political threat of sexual minorities. The third persona, or the marginalized party in the dissents,<sup>17</sup> that Scalia constructed consisted of the sexual minority as a criminal or other individual not thought highly of, such as a person with a drug addiction, a polygamist, or a prostitute. Although Scalia's performance of a neutral justice was skillful, his construction of the second and third personae undermined his performance of the first persona. Essentially, a justice who claimed neutrality was appealing to an implied audience that ignored minority rights and irrationally feared a small minority group. Meanwhile, the justice constructed sexual minorities as criminals or other poorly regarded individuals.

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MAUY>; Nina Totenberg, *Justice Antonin Scalia, Known for Biting Dissents, Dies at 79*, NPR (Feb. 15, 2016), <http://www.npr.org/2016/02/13/140647230/justice-antonin-scalia-known-for-biting-dissents-dies-at-79>, <<https://perma.cc/DJ8Z-KPK9>>.

<sup>13</sup> R. Randall Kelso & Charles Kelso, *How the Supreme Court Is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 977–78 (1996). For an overview of four major judicial philosophies, including formalism, Holmesianism, instrumentalism, and natural law, see *id.* at 976–83.

<sup>14</sup> The term *heteronormativity* references “the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent—that is, organized as a sexuality—but also privileged.” Lauren Berland & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 548 n.2 (1998). The “coherence [of heteronormativity] is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment.” *Id.* Heteronormativity “consists less of norms that could be summarized as a body of doctrine than of a sense of rightness produced in contradictory manifestations—often unconscious, immanent to practice or to institutions.” *Id.* Moreover, heteronormativity is different from heterosexuality in that, unlike the latter, the former does not have a parallel or opposite. *Id.* Homosexuality functions as the parallel or opposite of heterosexuality. *Id.*

<sup>15</sup> Paaige K. Turner & Patricia Ryden, *How George Bush Silenced Anita Hill: A Derridian View of the Third Persona in Public Argument*, 37 ARGUMENTATION & ADVOC. 86, 88 (2000).

<sup>16</sup> Edwin Black, *The Second Persona*, 56 Q.J. SPEECH 109, 112 (1970).

<sup>17</sup> Philip Wander, *The Third Persona: An Ideological Turn in Rhetorical Theory*, 35 CENT. STATES SPEECH J. 197, 209 (1984).

To advance this argument about rhetorical hypocrisy grounded in heteronormative ideology, the Article will begin by providing some background on *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. Then the Article will discuss persona theory, with particular focus on the first, second, and third personae. Because of its consideration of those who are marginalized in discourse, third persona analysis is especially appropriate for judicial rhetoric regarding sexual minorities, who have experienced historical and continuing discrimination.<sup>18</sup> Finally, the Article will offer a persona analysis of Scalia's dissents in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. The analysis should contribute toward a deeper understanding of both the anatomy of marginalizing legal discourse, discourse in this case ultimately damaging to the dignity of sexual minorities, and also the credibility<sup>19</sup> problem that incongruence among personae in one's rhetoric can cause.

## II. BACKGROUND ON *ROMER*, *LAWRENCE*, *WINDSOR*, AND *OBERGEFELL*

This section of the Article offers some background information on *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. Discussion of each case will include the basic facts of the case, the Court's reasoning, and Scalia's reasoning. Reference is made to the occasional other non-majority opinion, but the section does not review all concurrences and dissents.

In 1996, the Supreme Court decided *Romer v. Evans*.<sup>20</sup> The case concerned Amendment 2, a statewide constitutional referendum that the people of Colorado had passed in 1992.<sup>21</sup> Voters had passed Amendment 2 in response to ordinances in cities such as Aspen, Boulder, and Denver that had provided protection from sexual-orientation-based discrimination in areas like "housing, employment, education, public accommodations, and health and welfare services."<sup>22</sup> Amendment 2 read as follows:

"No Protected Status Based on Homosexual, Lesbian or

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<sup>18</sup> As of this writing, the U.S. Congress had not added sexual orientation to the list of protected classes under key federal civil rights statutes. See 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (2015) (employment discrimination); 1968 Fair Housing Act, 42 U.S.C. § 3604 (2015) (housing discrimination). Thus, outside of a state or local municipality with a law against discrimination based on sexual orientation, an employer could fire someone based on the employee's sexual orientation, and a prospective seller could fail to sell a house to someone based on the prospective buyer's sexual orientation.

<sup>19</sup> One way to think of credibility is as "the image of the source [of a message] in the minds of receivers." James C. McCroskey & Jason J. Teven, *Goodwill: A Reexamination of the Construct and Its Measurement*, 66 COMM. MONOGRAPHS 90, 90 (1999). The study of credibility dates back to classical times, and the concept has been of great rhetorical importance ever since. *Id.*

<sup>20</sup> 517 U.S. 620 (1996).

<sup>21</sup> *Id.* at 623.

<sup>22</sup> *Id.* at 623–24.

Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”<sup>23</sup>

Justice Anthony Kennedy delivered the opinion of the Court that struck down Amendment 2, and Justices John Paul Stevens, Sandra Day O’Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer joined Kennedy’s opinion.<sup>24</sup> While Colorado claimed that Amendment 2 put sexual minorities “in the same position as all other persons,”<sup>25</sup> Kennedy noted that Amendment 2 “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class.”<sup>26</sup> Indeed, Amendment 2 withdrew from sexual minorities, and no other groups, legal protection from discrimination.<sup>27</sup> Kennedy even pointed out that a fair reading of Amendment 2 was that the provision deprived sexual minorities of the protection of general laws against arbitrary discrimination.<sup>28</sup> With such “a special disability” imposed upon them, sexual minorities faced majoritarian “animosity.”<sup>29</sup> Given the lack of rationality that Kennedy described, Amendment 2 violated the Equal Protection Clause of the Fourteenth Amendment.<sup>30</sup>

Justice Scalia, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, dissented.<sup>31</sup> Scalia read Amendment 2 as denying sexual minorities only “*preferential* treatment.”<sup>32</sup> He cited *Bowers v. Hardwick*<sup>33</sup> for the principle that a state could criminalize same-sex sexual conduct and argued that, if a state could criminalize such conduct, the state could “merely prohibit[ ] all levels of state government from bestowing *special protections* upon homosexual conduct.”<sup>34</sup> As Scalia read the case, Amendment 2 merely involved

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<sup>23</sup> *Id.* at 624 (citation omitted).

<sup>24</sup> *Id.* at 621. *Romer* was the first opinion from the U.S. Supreme Court that defended the civil rights of sexual minorities. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 70 (2013).

<sup>25</sup> *Romer*, 517 U.S. at 626.

<sup>26</sup> *Id.* at 624.

<sup>27</sup> *Id.* at 627.

<sup>28</sup> *Id.* at 630.

<sup>29</sup> *Id.* at 631, 634.

<sup>30</sup> *Id.* at 631, 635–36.

<sup>31</sup> *Id.* at 621.

<sup>32</sup> *Id.* at 638–39 (Scalia, J., dissenting) (emphasis in original).

<sup>33</sup> 478 U.S. 186 (1986).

<sup>34</sup> *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (emphasis in original).

majoritarian protection of sexual morality.<sup>35</sup> Accordingly, he found that the Amendment had a rational basis.<sup>36</sup>

In 2003, seven years after deciding *Romer*, the Supreme Court decided *Lawrence v. Texas*.<sup>37</sup> The case concerned a police response in Houston, Texas, to a report of a weapons disturbance.<sup>38</sup> The exact facts of what happened on the night in question remained somewhat unclear.<sup>39</sup> As the police told the story, upon entering the apartment of John Geddes Lawrence, they had seen Lawrence and Tyron Garner engaged in what the Court later described as “a sexual act.”<sup>40</sup> Whether Lawrence and Garner were engaged in sexual conduct with each other was later disputed.<sup>41</sup> Regardless, the Court claimed that apparently no one had questioned the right of the police to enter the apartment.<sup>42</sup> Authorities charged Lawrence and Garner under the Texas Penal Code, which provided as follows: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”<sup>43</sup> The Penal Code defined “[d]eviate sexual intercourse” as the following: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.”<sup>44</sup>

The facts of *Lawrence*, as the Court understood them, were remarkably similar to those in *Bowers v. Hardwick*,<sup>45</sup> which the Court had decided seventeen years earlier. In *Bowers*, Michael Hardwick and another man had been charged with sodomy that had occurred in Hardwick’s bedroom.<sup>46</sup> Apparently, the arresting officer had gone to Hardwick’s home with an expired warrant and, according to Hardwick, claimed he could enter Hardwick’s home since the officer “was acting under good faith.”<sup>47</sup> The Georgia law had provided that “[a] person

<sup>35</sup> *Id.* at 648.

<sup>36</sup> *Id.* at 640.

<sup>37</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>38</sup> *Id.* at 562.

<sup>39</sup> See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1475–514 (2004) (discussing and analyzing conflicting narratives of the case).

<sup>40</sup> *Lawrence*, 539 U.S. at 562–63. The particulars of *Lawrence* may not have presented the best example of a committed romantic relationship. One commentator noted that Kennedy did “a thorough job of domesticating John Lawrence and Tyron Garner—Lawrence an older white man, Garner a younger black man, who for all we know from the opinion, might have just been tricking with each other.” Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004). Indeed, the nature of the relationship may have been “quite fleeting, lasting only one night and lacking any semblance of permanence or exclusivity.” Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904 (2004).

<sup>41</sup> Carpenter, *supra* note 39, at 1489–90.

<sup>42</sup> *Lawrence*, 539 U.S. at 563.

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

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

<sup>45</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>46</sup> *Id.* at 187–88.

<sup>47</sup> Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1438–40 (1992). The expired warrant was for a \$50 fine that Hardwick already had paid. *Id.* at 1438. Hardwick claimed that the officer previously had been harassing him because of his sexual orientation and that three of

commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”<sup>48</sup> Eventually, the district attorney had opted not to present the case to the grand jury, but Hardwick had sued the government in federal court on constitutional grounds.<sup>49</sup>

Justice Byron White had delivered the opinion of the Court, joined by Chief Justice Warren Burger and Justices Lewis Powell, Rehnquist, and O'Connor.<sup>50</sup> Powell had been the deciding vote.<sup>51</sup> White had framed the legal issue as “whether the Federal Constitution confer[red] a fundamental right upon homosexuals to engage in sodomy.”<sup>52</sup> Commenting that proscriptions against sodomy had “ancient roots,”<sup>53</sup> he had provided what had seemed to be exhaustive lists of state sodomy laws in effect when the Bill of Rights and the Fourteenth Amendment had been ratified in 1791 and 1868.<sup>54</sup> With no support from his historical account for protection of the conduct in question, White had declined to find a new right under the Due Process Clause.<sup>55</sup> He also had accepted as a rational basis for the statute what he assumed was a belief of the majority of Georgia residents “that homosexual sodomy [was] immoral and unacceptable.”<sup>56</sup>

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the officer's associates had beaten up Hardwick outside of his home. *Id.* at 1437–39. When arresting Hardwick, the officer had refused to leave the bedroom or even turn his back while Hardwick and the other man dressed. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1425 (2d ed. 1988).

<sup>48</sup> *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

<sup>49</sup> *Id.* at 188.

<sup>50</sup> *Id.* at 187.

<sup>51</sup> See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 525 (1994). At conference, Powell had voted to strike down the Georgia sodomy statute. KLARMAN, *supra* note 24, at 36. However, the idea of a fundamental right to intimate same-sex conduct bothered him. *Id.* at 37. Powell had a hard time understanding the concept of homosexuality, and, in the course of discussing the case with one of his law clerks, Powell stated that he did not know anyone who was gay. JEFFRIES, *supra*, at 521. The clerk attempted to explain the concept to Powell. *Id.* at 521–22. Although not out, the clerk with whom Powell shared his comment was gay and delivered “a ‘very emotional’ speech urging Powell to support sexual freedom as a fundamental right.” *Id.*

Despite eventually voting to uphold the Georgia law, Powell admitted in 1990 that he had made a mistake with his vote in *Bowers*. *Id.* at 530. Powell noted that when he had re-read the opinions several months after the Court issued *Bowers*, he had thought that the dissenting perspective was better than that of the Court. *Id.*

<sup>52</sup> *Bowers*, 478 U.S. at 190. Hardwick had never claimed a fundamental right to same-sex sodomy. Tribe, *supra* note 40, at 1953.

<sup>53</sup> *Bowers*, 478 U.S. at 192. The “ancient roots” claim has come into question as being incomplete and misleading. For instance, in at least some of the city-states of classical Greece, same-sex relationships were not illegal; rather, the culture expected free male citizens to have same-sex relationships with younger males. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1444 (1993). Although not formally marriages, the transgenerational same-sex relationships may have been the “functional equivalents” of marriages. *Id.* In classical Rome, long-term same-sex relationships and, at least prior to the third century A.D., marriages existed. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 70–71, 82 (1980). The emperor Nero himself was involved in more than one same-sex marriage. *Id.* at 82. Because virtually all Roman authors were men, most accounts of same-sex relationships in classical Rome are of men, but some accounts of same-sex relationships that involved women do exist. *Id.* at 82–84.

<sup>54</sup> *Bowers*, 478 U.S. at 192 n.5, 193 n.6.

<sup>55</sup> *Id.* at 195.

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

Burger had offered a brief concurring opinion that added to the majority opinion.<sup>57</sup> In it, he had maintained that condemnation of the conduct in question was “firmly rooted in the Judeo-Christian moral and ethical standards.”<sup>58</sup> Moreover, Burger had claimed, the Romans had considered the conduct “a capital crime.”<sup>59</sup> In terms of how same-sex relations had been considered under English common law, Burger had quoted William Blackstone regarding the “the infamous *crime against nature*,” whose mention had been “a disgrace to human nature” and “a crime not fit to be named.”<sup>60</sup> With such precedents, Burger had maintained, holding “that the act of homosexual sodomy [was] somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”<sup>61</sup>

Two dissents had challenged the reasoning of the *Bowers* Court vigorously. Justice Harry Blackmun had filed one such dissent, joined by Justices William Brennan, Thurgood Marshall, and Stevens.<sup>62</sup> In his dissent, Blackmun had moved away from tradition, quoting Justice Oliver Wendell Holmes for the idea “that [i]t 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.”<sup>63</sup> As Blackmun noted in his opinion, Holmes had continued, “It is still more revolting if the grounds upon which [the rule of law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>64</sup> Instead of tradition, Blackmun had focused on a right to privacy,<sup>65</sup> noting that the conduct in question had taken place in Hardwick’s home, to which the Fourth Amendment had given “special significance.”<sup>66</sup> Majoritarian offense at private behavior would not be sufficient to justify the law.<sup>67</sup>

Stevens, joined by Brennan and Marshall, had filed the other

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<sup>57</sup> *Id.* at 187. At conference, Burger had “led off with a tirade.” JEFFRIES, *supra* note 51, at 522. If the Court declared sodomy a fundamental right, the chief justice feared, then “incest, prostitution, and the like would surely follow.” *Id.*

<sup>58</sup> *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring). The story of Sodom and Gomorrah in *Genesis* frequently has been used to justify these standards; the assumption has been that same-sex relations explained why God destroyed the cities. JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 42 (1993). See *Genesis* 18:16–19:29. However, disagreement regarding the nature of the sin of Sodom and Gomorrah exists, and an alternative perspective has suggested that the sin was lack of hospitality to strangers. MCNEILL, *supra*, at 42–50. From such a perspective, Christianity, having missed a lesson in hospitality found in one of its own sacred texts, eventually failed to extend hospitality to sexual minorities. *Id.* at 50.

<sup>59</sup> *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring). Burger presumably had not been referencing an era of ancient Rome prior to the third century A.D., when same-sex marriage had been legal. See BOSWELL, *supra* note 53, at 70–71.

<sup>60</sup> *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (emphasis in original).

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

<sup>62</sup> *Id.* at 187.

<sup>63</sup> *Id.* at 199 (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

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

<sup>65</sup> *Id.* at 203.

<sup>66</sup> *Id.* at 206.

<sup>67</sup> *Id.* at 213 (noting that “the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest”).

dissent.<sup>68</sup> Stevens had observed that the statute on its face applied to both heterosexuals and sexual minorities, and he had found a liberty interest that the law threatened.<sup>69</sup> Stevens had been unable to find a valid reason why the state could enforce the statute selectively against sexual minorities.<sup>70</sup> Given this reading of the case, *Hardwick* had possessed a constitutional claim.<sup>71</sup>

With *Bowers* as the key Supreme Court precedent that hung over the Court in *Lawrence*, Kennedy once again delivered the opinion of the Court, this time joined by Stevens, Souter, Ginsburg, and Breyer.<sup>72</sup> O'Connor concurred in the judgment.<sup>73</sup> Kennedy noted that the foundations of *Bowers* were not as solid as the *Bowers* Court had made them seem.<sup>74</sup> He observed that sodomy laws originally had applied both to sexual minorities and heterosexuals, not just to sexual minorities, and that laws against only same-sex sodomy had not developed until the last third of the twentieth century.<sup>75</sup>

Kennedy also noted recent trends away from the thinking in *Bowers*. For instance, many of the anti-sodomy laws that the *Bowers* Court had cited were not enforced, which Powell had pointed out in 1986.<sup>76</sup> In 1986, anti-sodomy laws had been in effect in twenty-five states, but the number shrank to thirteen by 2003.<sup>77</sup> Additionally, Supreme Court case law was moving away from *Bowers*. For instance, *Romer* had recognized that discrimination “born of animosity toward the class of persons affected” was a violation of the Equal Protection Clause.<sup>78</sup> Kennedy believed that *Bowers* as precedent “demean[ed] the lives of homosexual persons.”<sup>79</sup>

Drawing on the liberty interest under the Due Process Clause of the Fourteenth Amendment, as Stevens had in his *Bowers* dissent, Kennedy said that the view of Stevens should have controlled in *Bowers*.<sup>80</sup> Accordingly, Kennedy overruled *Bowers*, noting that the case had been

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<sup>68</sup> *Id.* at 187.

<sup>69</sup> *Id.* at 214, 217–18 (Stevens, J., dissenting). While the law facially applied to both heterosexuals and sexual minorities, because of the nature of intimate sexual conduct as a function of one’s sexual orientation, the ban had a much greater impact on sexual minorities. See Peter Odell Campbell, *The Procedural Queer: Substantive Due Process, Lawrence v. Texas, and Queer Rhetorical Futures*, 98 Q.J. SPEECH 203, 217 (2012).

<sup>70</sup> *Bowers*, 478 U.S. at 218–20.

<sup>71</sup> *Id.* at 220.

<sup>72</sup> *Lawrence v. Texas*, 539 U.S. 558, 561 (2003).

<sup>73</sup> *Id.* Although voting with the majority, O’Connor disagreed with Kennedy on the reasoning. She would not have overruled *Bowers*, whose majority she had joined. *Id.* at 579 (O’Connor, J., concurring). However, she found that the statute in *Lawrence* was a violation of the Equal Protection Clause of the Fourteenth Amendment because the statute discriminated against sexual minorities. *Id.* at 579, 582.

<sup>74</sup> *Id.* at 571.

<sup>75</sup> *Id.* at 568, 570.

<sup>76</sup> *Id.* at 572.

<sup>77</sup> *Id.* at 573.

<sup>78</sup> *Id.* at 574.

<sup>79</sup> *Id.* at 575.

<sup>80</sup> *Id.* at 577–78.

wrong when the Court had issued it.<sup>81</sup> Of note, Kennedy did not articulate a standard of review for the due process analysis.<sup>82</sup>

Scalia, again joined by Rehnquist and Thomas, dissented.<sup>83</sup> Scalia believed that U.S. society had relied on *Bowers* and that the Court should not overrule the precedent.<sup>84</sup> In terms of history, sodomy, whether involving an opposite-sex or same-sex couple, was illegal, so banning some type of sodomy had a historical basis.<sup>85</sup> Seeing no tradition of protection for same-sex relations, Scalia found no protection for a fundamental right, so rational basis review would apply to the Texas statute.<sup>86</sup> Majoritarian sentiment “that certain forms of sexual behavior are ‘immoral and unacceptable’” provided a rational basis for the law.<sup>87</sup>

In 2013, a decade after *Lawrence*, the Court decided *United States v. Windsor*.<sup>88</sup> In this case, Edith Windsor and Thea Spyer, who were lesbian, had known each other since 1963.<sup>89</sup> Both residents of New York State, they registered as domestic partners with that state in 1993, and they married lawfully in Ontario, Canada, in 2007.<sup>90</sup> New York recognized the Canadian marriage.<sup>91</sup> At her death in 2009, Spyer left all of her estate to Windsor, who claimed an estate tax exemption for herself as a surviving spouse.<sup>92</sup> However, federal law, specifically what Congress had called the Defense of Marriage Act (DOMA) when the law had been passed in 1996, barred Windsor’s claim.<sup>93</sup> Although Windsor paid the tax of \$363,053, she then sued the federal government on constitutional grounds.<sup>94</sup>

Section 3 of DOMA provided the following:

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<sup>81</sup> *Id.* at 578. Before he joined the Supreme Court, Kennedy had shown signs that he would be open to the overturning of *Bowers*. Tribe, *supra* note 40, at 1954.

<sup>82</sup> Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1578 (2004).

<sup>83</sup> *Lawrence*, 539 U.S. at 561.

<sup>84</sup> *Id.* at 589–92 (Scalia, J., dissenting).

<sup>85</sup> *Id.* at 595–96.

<sup>86</sup> *Id.* at 598–99.

<sup>87</sup> *Id.* at 599. In response to O’Connor’s equal protection argument, Scalia maintained that the law banned everyone, whether heterosexual or not, from engaging in same-sex sodomy, so no equal protection violation resulted. *Id.* at 599–600.

<sup>88</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>89</sup> *Id.* at 2682–83.

<sup>90</sup> *Id.* at 2683.

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

<sup>92</sup> *Id.* at 2682.

<sup>93</sup> *Id.* at 2682–83. DOMA had come into existence during the politically charged atmosphere of an election year. In 1996, Republican presidential candidate Senator Bob Dole had courted religious conservatives in his party by co-sponsoring the bill that became DOMA. KLARMAN, *supra* note 24, at 60–61. Dole had dared Democrat President Bill Clinton to sign the bill if Clinton really were opposed to same-sex marriage, as Clinton had claimed to be during the 1992 presidential election. *Id.* at 46, 62. Congressional debate on the bill had involved attacks on sexual minorities. *Id.* at 61. The bill had passed the House by a vote of 342 to 67 in July of 1996 and the Senate by a vote of 85 to 14 that September. *Id.* at 63. Despite supposedly having been the most pro-sexual minority president to his time, Clinton had signed the bill. *Id.* at 46, 63. Of note, when Clinton had signed the bill in September 1996, he had done so after midnight and without any ceremony. *Id.* at 63.

<sup>94</sup> *Windsor*, 133 S. Ct. at 2682–83 (citation omitted).

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>95</sup>

The provision of the statute implicated over 1,000 federal laws that involved marital status.<sup>96</sup>

During the litigation, the Department of Justice, at the direction of President Barack Obama, announced that it would not defend Section 3 of DOMA because of doubts about the provision’s constitutionality.<sup>97</sup> Still, the Executive Branch expressed an intent to continue to enforce Section 3.<sup>98</sup> Based on the Executive’s decision, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives intervened in the case to defend Section 3.<sup>99</sup>

Kennedy again delivered the opinion of the Court, joined by Ginsburg and Breyer, as well as Justices Sonia Sotomayor and Elena Kagan.<sup>100</sup> Although procedural issues complicated the case, the majority found them surmountable. Despite its lack of interest in defending Section 3 of DOMA, the Executive met the requirements of Article III standing before the Court because the district court had ordered a refund of Windsor’s money, which was a real injury to the Executive.<sup>101</sup> Moreover, BLAG offered “substantial argument” in favor of Section 3’s constitutionality to satisfy prudential concerns regarding adversity over Section 3.<sup>102</sup>

In terms of the substance of the case, Section 3 violated the Due Process Clause of the Fifth Amendment, including the equal protection principles found therein.<sup>103</sup> Section 3, Kennedy argued, sought to injure a class of people, sexual minorities, that New York wished to protect.<sup>104</sup> The provision “impose[d] a disadvantage, a separate status, and so a stigma upon all who [sought to] enter into same-sex marriages made

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<sup>95</sup> *Id.* at 2683. National argument over same-sex marriage had begun after the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (vacating a trial court decision that had dismissed a constitutional challenge to Hawaii’s heterosexual-only marriage statute and remanding the case so that the government could have an opportunity to provide a compelling state interest for discriminating against same-sex couples). Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 869–70 (2006).

<sup>96</sup> *Windsor*, 133 S. Ct. at 2683.

<sup>97</sup> *Id.* at 2683–84.

<sup>98</sup> *Id.* at 2684.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 2681.

<sup>101</sup> *Id.* at 2686.

<sup>102</sup> *Id.* at 2687–88.

<sup>103</sup> *Id.* at 2695.

<sup>104</sup> *Id.* at 2695–96.

lawful by the unquestioned authority of the States.”<sup>105</sup> Moreover, a House report contemporaneous with DOMA showed that such an effect was not an accident. The report noted “that DOMA express[ed] ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comport[ed] with traditional (especially Judeo-Christian) morality.’”<sup>106</sup> Burdens that Section 3 placed on same-sex couples included loss of government healthcare benefits, certain bankruptcy protection, and a right to joint burial in veterans’ cemeteries, as well as having additional complications with joint filing of state and federal taxes.<sup>107</sup> Of note, Kennedy did not articulate a standard of review for his due process/equal protection analysis.<sup>108</sup>

Scalia dissented, joined in full by Thomas and on the procedural matter by Chief Justice John Roberts.<sup>109</sup> On that procedural matter, Scalia saw no controversy between Windsor and the Executive because the latter felt the lower court’s decision should be affirmed.<sup>110</sup> Despite seeing no controversy, Scalia offered his view on the merits of the case, and he reviewed Section 3 for rationality.<sup>111</sup> The government could meet rational basis review through having attempted “to enforce traditional moral and sexual norms,” avoid complicated choice-of-law issues, or promote stability in federal law, he argued.<sup>112</sup>

In 2015, just two years after deciding *Windsor*, the Court decided *Obergefell v. Hodges*.<sup>113</sup> *Obergefell* was the leading case among four cases that came from Michigan, Kentucky, Ohio, and Tennessee.<sup>114</sup> In these cases, fourteen same-sex couples and two men whose same-sex partners had died challenged their respective states’ restricting of civil marriage to only opposite-sex couples.<sup>115</sup> By the time *Obergefell* arrived at the Supreme Court, numerous lawsuits that sought marriage for same-sex couples had worked their way through the federal district and appellate courts.<sup>116</sup>

Kennedy yet again delivered the opinion of the Court, joined once more by Ginsburg, Breyer, Sotomayor, and Kagan.<sup>117</sup> Kennedy noted

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<sup>105</sup> *Id.* at 2693.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 2694.

<sup>108</sup> Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 483 (2014). At least for the equal protection component of due process, because of the history of discrimination against sexual minorities, heightened scrutiny may have been appropriate. See Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 7 (2004) (noting under what circumstances the Court has adopted heightened scrutiny for equal protection analysis).

<sup>109</sup> *Windsor*, 133 S. Ct. at 2681, 2697.

<sup>110</sup> *Id.* at 2699 (Scalia, J., dissenting).

<sup>111</sup> *Id.* at 2706.

<sup>112</sup> *Id.* at 2707, 2708.

<sup>113</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>114</sup> *Id.* at 2593.

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

<sup>116</sup> *Id.* at 2597.

<sup>117</sup> *Id.* at 2591.

that, for decades, the Court had held that the right to civil marriage was a fundamental right under the Due Process Clause of the Fourteenth Amendment.<sup>118</sup> The justice then elaborated upon “four principles and traditions” that explained why marriage was a fundamental right for opposite-sex couples and why marriage should be a fundamental right for same-sex couples.<sup>119</sup> First, the right to choice about marriage was inherent in individual autonomy.<sup>120</sup> Second, marriage was “a two-person union unlike any other in its importance to the committed individuals.”<sup>121</sup> Third, marriage afforded families legal protections and facilitated meaning and significance among family members.<sup>122</sup> Fourth, marriage was “a keystone of our social order.”<sup>123</sup> Here, Kennedy listed various “rights, benefits, and responsibilities” associated with marriage such as those regarding taxation, inheritance, property, hospital access, medical decision-making, adoption, health insurance, child custody, and other important matters.<sup>124</sup> Kennedy pointed out that restricting the fundamental right<sup>125</sup> of marriage for same-sex couples imposed “stigma and injury” on same-sex couples.<sup>126</sup>

In addition to considering restrictions on marriage to same-sex couples under the Due Process Clause, Kennedy remained within the Fourteenth Amendment and also considered restrictions on marriage under the Equal Protection Clause. Previously, the Court had upheld the right to marriage for opposite-sex couples under the Equal Protection Clause as well as under the Due Process Clause.<sup>127</sup> In limiting marriage to opposite-sex couples, states were denying same-sex couples, whose relationships long had received social disapproval, the benefits of marriage available to opposite-sex couples.<sup>128</sup> This type of classification based on sexual orientation “serve[d] to disrespect and subordinate” sexual minorities.<sup>129</sup> Nonetheless, Kennedy did not identify sexual minorities as members of a suspect class that would warrant a heightened level of judicial review for purposes of equal protection analysis.<sup>130</sup>

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<sup>118</sup> *Id.* at 2598–99.

<sup>119</sup> *Id.* at 2599.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2600.

<sup>123</sup> *Id.* at 2601.

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

<sup>125</sup> Although Kennedy did not say so in his *Obergefell* opinion, when a fundamental right is at issue, the government generally must show a compelling state interest for restricting the right and that the means used for promoting the state interest are necessary for achieving that interest. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 831 (2015). In barely considering state interests and the associated means used to promote the interests, Kennedy failed to offer an example of careful strict scrutiny analysis regarding the abridgement of the right to marriage for same-sex couples.

<sup>126</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>127</sup> *Id.* at 2603 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>128</sup> *Id.* at 2604.

<sup>129</sup> *Id.*

<sup>130</sup> After *Windsor*, some clarification was needed regarding whether sexual orientation constituted a suspect class. See generally Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must*

Based on violations of both the Due Process Clause and the Equal Protection Clause, Kennedy held that same-sex couples had the right to civil marriage in all states and that each state had to recognize same-sex marriages performed in other states.<sup>131</sup> To do otherwise, Kennedy determined, would violate the dignity of sexual minorities.<sup>132</sup>

Scalia dissented, joined by Thomas.<sup>133</sup> In his dissent, Scalia warned against what he called the “Court’s threat to American democracy.”<sup>134</sup> He observed that the Supreme Court had put an end to the public debate on same-sex marriage.<sup>135</sup> Despite the Court’s action, no provision of the Constitution prohibited state restrictions on marriage, especially since states long had regulated domestic relations.<sup>136</sup> Regardless, the Court, an elite body unrepresentative of the U.S. public, had forced its view of same-sex marriage on the people.<sup>137</sup> As Scalia saw it, the Court’s course of action was really a case of hubris.<sup>138</sup>

### III. PERSONA THEORY

Persona theory addresses the roles, or *personae*, that communicators, or *rhetors*, perform or create through discourse.<sup>139</sup> At least four types of *personae*, including the first, second, third, and fourth *personae*, can be present in discourse. Such *personae* can be present in the same discourse.<sup>140</sup> Since they are directly relevant to the present study, this section of the Article will focus on the first, second, and third *personae*, but, for theoretical completeness, the section also will address the fourth *persona*.<sup>141</sup>

The first *persona* is “the constructed speaker/writer or ‘I’ of discourse.”<sup>142</sup> Such a *persona* is “the created personality put forth in the

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*Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL’Y 493 (2015). However, Kennedy declined to provide such clarification in *Obergefell*.

<sup>131</sup> *Obergefell*, 135 S. Ct. at 2607–08.

<sup>132</sup> *Id.* at 2608.

<sup>133</sup> *Id.* at 2591.

<sup>134</sup> *Id.* at 2626 (Scalia, J., dissenting).

<sup>135</sup> *Id.* at 2627.

<sup>136</sup> *Id.* at 2627–28.

<sup>137</sup> *Id.* at 2628–29.

<sup>138</sup> *Id.* at 2629–30.

<sup>139</sup> Turner & Ryden, *supra* note 15, at 88.

<sup>140</sup> See generally Brenden E. Kendall, *Personae and Natural Capitalism: Negotiating Politics and Constituencies in a Rhetoric of Sustainability*, 2 ENVTL. COMM. 59 (2008) (analyzing the second and third *personae* in PAUL HAWKEN, AMORY LOVINS & L. HUNTER LOVINS, NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (1999)).

<sup>141</sup> The discussion of the first *persona* in this section of the Article is an abridged version of a discussion of the first *persona* that initially appeared in Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701, 704–06 (2012). The author of that article has retained copyright to the article.

<sup>142</sup> Turner & Ryden, *supra* note 15, at 88.

act of communicating”<sup>143</sup> and allows the rhetor to identify with the audience.<sup>144</sup> In literature, the first persona is the speaker or character a writer creates in the course of crafting writing like poetry or fiction.<sup>145</sup> In a way, a first persona is a rhetorical mask that the rhetor chooses to wear as he or she performs rhetorically,<sup>146</sup> and because the persona at issue is a mask, the persona is not necessarily the rhetor himself or herself.<sup>147</sup>

Several examples of first personae that rhetors have adopted will help illustrate these principles. For instance, in 1916, Marcus Garvey, the then-unknown leader of the new Universal Negro Improvement Association, faced the problem of leading members of an outsider racial group against social injustice.<sup>148</sup> In part, Garvey met the challenge by assuming a Black Moses persona.<sup>149</sup> In his rhetoric, Garvey relied upon subjects like election, captivity, and liberation, calling to mind Moses and the Jewish experiences from the Old Testament.<sup>150</sup> While Garvey was not actually Moses, he did assume the Moses persona. A more recent rhetor who adopted the Moses persona, among other personae, was Louis Farrakhan. In his Million Man March speech, delivered on October 16, 1995, in Washington, D.C., Farrakhan attempted to enhance his credibility, or *ethos*,<sup>151</sup> which had suffered due to Farrakhan’s prior inflammatory racial rhetoric, by assuming a prophetic persona, specifically that of Moses.<sup>152</sup> In a related example, Martin Luther King, Jr. assumed in his rhetoric against civil rights violations the general persona of a prophet, although despite his skillful rhetoric, King was not necessarily an actual prophet.<sup>153</sup>

Regardless of which first persona or personae a rhetor assumes, the notion of the first persona comes from Greek and Roman theater and in Latin suggests the idea of a “mask” or a “false face.”<sup>154</sup> In this theatrical context, the actor would put on a mask and assume the persona of the mask.<sup>155</sup> Such a historical understanding gives rise to the notion that the persona is pre-existing and that the actor only needs to assume the

<sup>143</sup> Paul Newell Campbell, *The Personae of Scientific Discourse*, 61 Q.J. SPEECH 391, 394 (1975) (quoting WALKER GIBSON, *PERSONA: A STYLE STUDY FOR READERS AND WRITERS* xi (1969)).

<sup>144</sup> Walter G. Kirkpatrick, *Bolingbroke and the Opposition to Sir Robert Walpole: The Role of a Fictitious Persona in Creating an Audience*, 32 CENT. STATES SPEECH J. 12, 12 (1981).

<sup>145</sup> Emory B. Elliott, Jr., *Persona and Parody in Donne’s The Anniversaries*, 58 Q.J. SPEECH 48, 49 (1972); Campbell, *supra* note 143, at 391.

<sup>146</sup> Thomas O. Sloan, *The Persona As Rhetor: An Interpretation of Donne’s Satyre III*, 51 Q.J. SPEECH 14, 14 (1965).

<sup>147</sup> *Id.* at 26.

<sup>148</sup> B. L. Ware & Wil A. Linkugel, *The Rhetorical Persona: Marcus Garvey As Black Moses*, 49 COMM. MONOGRAPHS 50, 52–53 (1982).

<sup>149</sup> *Id.* at 61.

<sup>150</sup> *Id.* at 56–61.

<sup>151</sup> *Ethos* is Aristotle’s term for credibility. McCroskey & Teven, *supra* note 19, at 90. Aristotle believed that credibility was the strongest means of persuading. *Id.*

<sup>152</sup> John L. Pauley II, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62 W.J. COMM. 512, 522–23 (1998).

<sup>153</sup> Campbell, *supra* note 143, at 394.

<sup>154</sup> Ware & Linkugel, *supra* note 148, at 50.

<sup>155</sup> *Id.*

role.<sup>156</sup> Much of the existing scholarship on persona theory takes for granted that an advocate assumes a role from a selection of cultural archetypes, or original models or prototypes.<sup>157</sup>

In addition to helping to explain the personae advocates can adopt for themselves, persona theory also addresses the roles, as the rhetor constitutes them, that audiences play in the communication process.<sup>158</sup> These roles that audiences play are the second, third, and fourth personae; respectively, the personae are idealized, marginalized, and collusive in nature.

Discussion of audience-based personae begins with the second persona. In discourse, critics can identify ideological appeals and in turn locate an “implied auditor,” who is supposed to respond to the given appeals.<sup>159</sup> In this sense, *ideology* refers to “the network of interconnected convictions that functions in a [person] epistemically and that shapes his [or her] identity by determining how he [or she] views the world.”<sup>160</sup> This implied auditor is the “‘you’ of a discourse who is ideologically positioned.”<sup>161</sup> Thus, by identifying the ideological appeals of the rhetor, critics “can see in the auditor implied by a discourse a model of what the rhetor would have his [or her] real auditor become.”<sup>162</sup> This manner of reading discourse can make moral judgment of the discourse feasible.<sup>163</sup>

An example illustrates how the second persona can play out in discourse. One reading of some of Governor Ronald Reagan’s 1980 presidential election speeches suggests that at times Reagan’s rhetoric was unethical. For instance, Reagan spoke at Stone Mountain, Georgia, where the Ku Klux Klan historically had burned crosses, and declared that Jefferson Davis was one of his heroes.<sup>164</sup> Also, Reagan spoke in Philadelphia, Mississippi, where three civil rights workers had been killed in 1964, and expressed his belief in states’ rights.<sup>165</sup> In this case, the ideological appeals, implicit as well as explicit, of segregation, the Confederacy, and states’ rights would sit well with certain demographics in the South that were hostile to civil rights. Hence, an analysis of the

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* But see Carlo A. Pedrioli, *Constructing Modern-Day U.S. Legal Education with Rhetoric: Langdell, Ames, and the Scholar Model of the Law Professor Persona*, 66 RUTGERS L.J. 55, 79–80 (2013) (noting that communicators can construct first personae as opposed to simply adopting pre-existing first personae).

<sup>158</sup> Turner & Ryden, *supra* note 15, at 88–89; Charles E. Morris, *Pink Herring & The Fourth Persona: J. Edgar Hoover’s Sex Crime Panic*, 88 Q.J. SPEECH 228, 230 (2002) [hereinafter *Pink Herring*].

<sup>159</sup> Black, *supra* note 16, at 112.

<sup>160</sup> *Id.*

<sup>161</sup> Turner & Ryden, *supra* note 15, at 89.

<sup>162</sup> Black, *supra* note 16, at 113.

<sup>163</sup> *Id.*

<sup>164</sup> *Historians Discuss Reagan’s Legacy*, PBS NEWSHOUR (June 7, 2004), [http://www.pbs.org/newshour/bb/remember-jan-june04-historians\\_06-07/](http://www.pbs.org/newshour/bb/remember-jan-june04-historians_06-07/), <<http://perma.cc/FCA4-ZUAG>> (comments of Roger Wilkins).

<sup>165</sup> *Id.*

artifacts, including the symbolic contexts of the remarks,<sup>166</sup> would reveal an ugly ideology and an ugly implied audience, which would indicate that the discourse itself was unethical.

Such discourse can have material consequences. The second persona “may be an invitation turned down; it may even be an offensive invitation; but it is an invitation which can be heard and responded to here and now.”<sup>167</sup> The second persona is “an invitation to act,” and when the actual audience of the discourse assumes the second persona, consequences may result. For instance, voting for a candidate with a subtly racist ideology can help lead to racially insensitive government policies.

In addition to the second persona, another potential aspect of the rhetor’s view of the audience upon which persona theory can shed light is the third persona. The third persona is the audience that is absent, rejected, or negated in a particular communication.<sup>168</sup> While the first persona is the assumed “I” and the second persona is the assumed “you,” the third persona is “the ‘it’ that is not present, that is objectified in a way ‘you’ and ‘I’ are not.”<sup>169</sup> This persona reflects the marginalization of members of groups based on race, sex, sexual orientation, class, religion, or similar categories.<sup>170</sup> What is said and what is not said are both relevant to understanding the third persona.<sup>171</sup>

The creation of the U.S. Constitution in the summer of 1787 offers several such examples. The fifty-five individuals who met in Philadelphia and framed the document were prosperous men.<sup>172</sup> The majority of the Framers had enjoyed training in the law and accordingly held a great degree of social privilege.<sup>173</sup> The Framers were able to voice their own perspectives in the creation of the Constitution, but no women or racial minorities were present to voice their own perspectives. Also, men without property lacked voice. This marginalization became part of the Constitution, which, for example, originally did not allow women or Blacks to vote.<sup>174</sup> In creating the Constitution, then, the Framers crafted a host of third personae: women, racial minorities like Blacks and Native Americans, and men from the lower classes.

A more recent example of the third persona comes from President George H. W. Bush’s handling of his controversial 1991 U.S. Supreme Court nomination of Clarence Thomas, in which Bush framed Professor

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<sup>166</sup> Jeffrey B. Kurtz, *Condemning Webster: Judgment and Audience in Emerson’s “Fugitive Slave Law,”* 87 Q.J. SPEECH 278, 280 (2001).

<sup>167</sup> Wander, *supra* note 17, at 209.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 216.

<sup>171</sup> *Id.* at 210.

<sup>172</sup> LINDA R. MONK, *THE WORDS WE LIVE BY: YOUR ANNOTATED GUIDE TO THE CONSTITUTION* 10, 12 (2003); Leonard W. Levy, *Introduction: The Making of the Constitution, 1776–1789*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* xxxiv (Leonard W. Levy ed., 1987).

<sup>173</sup> CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 147 (1966).

<sup>174</sup> MONK, *supra* note 172, at 12–13.

Anita Hill as a third persona. During the confirmation hearings in the Senate, Hill, who was Black as well as female, accused Thomas of having sexually harassed her in the workplace.<sup>175</sup> In his press conferences on the controversy, Bush employed several tactics to support his nominee: opting to discuss Thomas and his virtues rather than Hill and her charges, marginalizing Hill's supporters, and focusing on the allegedly inappropriate nature of the charges instead of the sexual harassment nature of the charges.<sup>176</sup> In doing so, Bush constructed a role for Hill that was "irrelevant, unimportant, [and] incredible," but Bush never explicitly said anything bad about Hill herself.<sup>177</sup> In this rhetorical situation,<sup>178</sup> Bush discursively crafted Hill into the third persona.

To date, the final audience-related persona is the fourth persona, which prior scholarship has considered in the study of sexual minority communication, particularly with regard to passing.<sup>179</sup> Although this persona will not play a role in the analysis section of the present Article, this section of the Article offers some background on the fourth persona for theoretical completeness. The fourth persona is "a collusive audience constituted by the textual wink."<sup>180</sup> Like the second persona, the fourth persona is an implied auditor of a given ideological position, but a key distinction between these two personae is that the discourse that creates the fourth persona operates at two levels: the level of those in the know, or the clairvoyants, and the level of those who do not understand the double entendre, or the dupes.<sup>181</sup> Like the third persona, the fourth persona is partially constituted by silence, but the fourth persona's silence works in a constructive manner rather than a marginalizing manner.<sup>182</sup>

The fourth persona has been used in studying the performance of F.B.I. Director J. Edgar Hoover during the 1930s, including his close relationship with Clyde Tolson, another bachelor, which lent itself to a gay reading.<sup>183</sup> This reading maintained that Hoover, having felt the pressures of heteronormativity from a society that feared and even persecuted sexual minorities, used the pink herring of persecuting sexual minorities to distract the public from his arguably gay performances.<sup>184</sup> This pink herring, which in sexual minority communication functions

<sup>175</sup> Turner & Ryden, *supra* note 15, at 86, 94.

<sup>176</sup> *Id.* at 95.

<sup>177</sup> *Id.*

<sup>178</sup> See Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968). *But see* Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154 (1973).

<sup>179</sup> See generally Morris, *Pink Herring*, *supra* note 158, at 228.

<sup>180</sup> *Id.* at 230.

<sup>181</sup> *Id.* Although the "epistemological scaffolding" of a passing performance may be convincing to a straight audience, a sexual minority audience often realizes that such scaffolding is nothing more than "a queer house of cards." Charles E. Morris, *Richard Halliburton's Bearded Tales*, 95 Q.J. SPEECH 123, 126 (2009) [hereinafter *Bearded Tales*].

<sup>182</sup> Morris, *Pink Herring*, *supra* note 158, at 230. Silence is often found in the study of sexual minority history. Charles E. Morris, *Archival Queer*, 9 RHETORIC & PUB. AFF. 145, 147 (2006).

<sup>183</sup> Morris, *Pink Herring*, *supra* note 158, at 231.

<sup>184</sup> *Id.* at 231, 234-35.

like the better known red herring in traditional argumentation, allowed Hoover the opportunity to avoid detection by the public.<sup>185</sup> Nonetheless, the fourth persona constituted in Hoover's discourse would have been able to read between the lines of the famous F.B.I. director's rhetoric.<sup>186</sup> In Hoover's case, the fourth persona proved menacing rather than comforting.<sup>187</sup>

As this section of the Article has noted, a rhetor can perform and construct various personae in his or her discourse. Specifically, a rhetor can perform a first persona and construct second, third, and fourth personae. This study will focus on the first, second, and third personae in Scalia's dissents on issues related to sexual orientation.

#### IV. A PERSONA ANALYSIS OF SCALIA'S DISSENTS IN *ROMER*, *LAWRENCE*, *WINDSOR*, AND *OBERGEFELL*

With the above theoretical material as a guide, this section of the Article presents a persona analysis<sup>188</sup> of Scalia's dissents. Respectively, the section considers the first, second, and third personae that Scalia performed or constructed through his dissents. As noted above, the analysis will show that second and third personae in the discourse undermined a skillful first persona performance and resulted in rhetorical hypocrisy grounded in a heteronormative ideology.

##### A. The First Persona

In his dissents, Scalia performed the first persona of a neutral justice who simply would apply the law in an evenhanded manner. This neutral justice was the "mask" or "false face" that he adopted.<sup>189</sup>

In *Romer*, Scalia performed a first persona free of bias against sexual minorities. Scalia stated, "Of course it is our moral heritage that one should not hate any human being or class of human beings."<sup>190</sup> To that he added, "I do not mean to be critical of these legislative successes [of sexual minorities]; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society."<sup>191</sup> After referencing an 1885 Supreme Court opinion on voting

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<sup>185</sup> *Id.* at 235, 241.

<sup>186</sup> *Id.* at 231, 241.

<sup>187</sup> *Id.* at 241.

<sup>188</sup> Craig R. Smith, *The Persona of Jesus in the Gospel According to St. Matthew*, 14 J. COMM. & RELIGION 57, 64 (1991); Turner & Ryden, *supra* note 15, at 90.

<sup>189</sup> Ware & Linkugel, *supra* note 148, at 50.

<sup>190</sup> *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

<sup>191</sup> *Id.* at 646.

rights and polygamy in the U.S. territories, which extolled the virtues of heterosexual marriage, Scalia claimed, “I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.”<sup>192</sup> In other words, Scalia’s persona would be fair to everyone, including the socially less-favored minority group in the case at hand.

Scalia continued this performance in *Lawrence*, attempting to demonstrate his evenhandedness toward sexual minorities. “Let me be clear,” he stated, “that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.”<sup>193</sup> Scalia suggested that everyone, regardless of sexual orientation, should have a chance to persuade others of his or her views.

In *Windsor*, Scalia again performed a neutral jurist first persona. He noted the importance of procedural democracy, “a system of government that permits us to rule *ourselves*.”<sup>194</sup> He observed that, since the start of the controversy over same-sex marriage, citizens of various views had earned victories and suffered defeats.<sup>195</sup> The way for the public argument to unfold was for it to continue through “plebiscites, legislation, persuasion, and loud voices—in other words, democracy.”<sup>196</sup> Scalia, of course, would not impose his personal views on the public debate, as he played the neutral jurist who merely observed procedural democracy in action.

Scalia’s performance of the neutral jurist first persona continued in *Obergefell*. In the second paragraph of his opinion, Scalia stated, “The substance of today’s decree is not of immense personal importance to me.”<sup>197</sup> He added, “So it is not of special importance to me what the law says about marriage.”<sup>198</sup>

While performing the first persona of a neutral justice, Scalia, in all four dissents, critiqued Kennedy’s majorities for bias, which implied neutrality for Scalia’s first persona. In *Romer*, the Court had “take[n] sides in the culture wars,” commented the dissenting justice.<sup>199</sup> Indeed, the Court had “verbally disparag[ed] as bigotry adherence to traditional attitudes.”<sup>200</sup> Scalia then pointed to the elite standing of the Court’s members and their apparent interest in pleasing the elites who operated the Association of American Law Schools, which had promulgated an

<sup>192</sup> *Id.* at 651–52 (citing *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

<sup>193</sup> *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

<sup>194</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) (emphasis in original). Procedural democracy reflects the preferences of the voting majority. FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 34–38 (1999). In contrast, substantive democracy comes with particular rights guaranteed against majoritarian voting preferences. *Id.* at 16–18.

<sup>195</sup> *Windsor*, 133 S. Ct. at 2710–11.

<sup>196</sup> *Id.* at 2710.

<sup>197</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

<sup>198</sup> *Id.* at 2627.

<sup>199</sup> *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

<sup>200</sup> *Id.*

anti-discrimination policy that included sexual orientation.<sup>201</sup>

In *Lawrence*, Scalia vigorously critiqued the bias of Kennedy's majority. With great flourish, he proclaimed the following:

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.<sup>202</sup>

Apparently, the temptation of the sexual minority rhetoric was too great for the majority to resist. Not done yet, Scalia continued in this manner:

It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.<sup>203</sup>

Rather than from "a governing caste that knows best," change should come from the people.<sup>204</sup>

In *Windsor*, Scalia likewise focused on what he viewed as the bias of Kennedy's majority and, by implied comparison, suggested his own evenhandedness. In the first few lines of his dissent, Scalia observed, "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former."<sup>205</sup> He added, "The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case."<sup>206</sup> In Scalia's rhetoric, Kennedy's majority was on a mission to explain why DOMA was morally wrong.

Scalia proceeded in *Windsor* to critique the Court additionally for grabbing power not allocated to it under the Constitution so that the Court could further its bias. He described "a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."<sup>207</sup>

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<sup>201</sup> *Id.* at 652–53.

<sup>202</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 603–04.

<sup>205</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting).

<sup>206</sup> *Id.* at 2698 (emphasis in original).

<sup>207</sup> *Id.*

Such an “image of the Court would have been unrecognizable to those who wrote and ratified our national charter.”<sup>208</sup>

However unappealing limits on the Court’s ability to hear cases might be, particularly in a case in which the Court allegedly wanted to pronounce DOMA unconstitutional, one such limit included the need for a live controversy in a given case. Scalia did not see such a controversy between *Windsor* and the executive branch.<sup>209</sup> Reaching back to the early years of the Court, Scalia pointed out, “That is why, in 1793, we politely declined the Washington Administration’s request to ‘say what the law is’ on a particular treaty matter that was not the subject of a concrete legal controversy.”<sup>210</sup> Poking fun at the *Windsor* majority, Scalia suggested, “The majority must have in mind one of the foreign constitutions that pronounces such primacy for its constitutional court and allows that primacy to be exercised in contexts other than a lawsuit.”<sup>211</sup>

Not only critiquing the *Windsor* majority for overextending its power to resolve the case in a biased manner, Scalia also critiqued the Court for a lack of honesty about furthering its bias. Referring to *Lawrence*, he observed, “When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with ‘whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’”<sup>212</sup> However, by striking down DOMA, the Court in *Windsor* had backed away from that promise, Scalia observed. Likewise, when parties to a same-sex marriage case from one of the states had the appropriate standing, the Court’s reaching a conclusion in favor of proponents of same-sex marriage would be easy.<sup>213</sup> “As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe,” Scalia predicted.<sup>214</sup> The jurist claimed, “I promise you this: The only thing that will ‘confine’ the Court’s holding is its sense of what it can get away with.”<sup>215</sup>

In *Obergefell*, Scalia again focused on what he viewed as the bias of Kennedy’s majority and, by implied comparison, again suggested his own evenhandedness. By deciding the case, the Court had stopped public debate on same-sex marriage, thus interfering with “American democracy at its best.”<sup>216</sup> The members of the majority were not “functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 2701.

<sup>210</sup> *Windsor*, 133 S. Ct. at 2699.

<sup>211</sup> *Id.* at 2698–99 (citing Basic L. Fed. Republic Ger. art. XCIII).

<sup>212</sup> *Id.* at 2709.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 2710.

<sup>215</sup> *Windsor*, 133 S. Ct. at 2709.

<sup>216</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

understood to proscribe the traditional definition of marriage.”<sup>217</sup> Instead, regardless of the people’s understanding of liberty, the majority felt entitled to define liberty from its own viewpoint.<sup>218</sup> Indeed, the Court was using rhetoric to promote “those freedoms and entitlements that th[e] Court *really* like[d]” while restricting law that “th[e] Court really dislike[d].”<sup>219</sup> Overall, this approach that Scalia outlined was “judge-empowering.”<sup>220</sup>

In his performance of a neutral justice first persona, Scalia presented a speaker who wanted to allow the democratic process to play out so that all groups could have their say in the public controversy over sexual minority issues. In contrast, he took the Court to task for what he saw as its bias and dishonesty. Overall, this was a skillful rhetorical strategy that built up the persona of the dissenting justice, yet Scalia’s construction of the second and third personae would compromise such a strategy.

## B. The Second Persona

Scalia’s rhetoric in his dissenting opinions suggested a particular audience, or “implied auditor,”<sup>221</sup> that would be receptive to the ideology ultimately expressed. Such a second persona was one that would be responsive to traditional views on sexual culture, in particular mainstream heterosexual culture, and receptive to majoritarian appeals. The implied audience would not be particularly interested in the possibility of change in tradition or consideration of minority rights. Also, this second persona would be likely to fear a perceived sexual minority threat. As such, Scalia’s construction of this heteronormative second persona undermined his performance of a neutral justice first persona.

Scalia’s appeals to tradition and majoritarian preferences were particularly prominent, and the lack of any serious consideration of change in tradition or the importance of minority rights was notable. In *Romer*, Scalia asserted that Colorado’s Amendment 2 stood for “moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.”<sup>222</sup> Having made another favorable reference to *Bowers v. Hardwick*,<sup>223</sup> Scalia stated that if intimate same-sex conduct were a

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<sup>217</sup> *Id.* at 2629 (emphasis in original).

<sup>218</sup> *Id.* at 2628.

<sup>219</sup> *Id.* at 2630 (emphasis in original).

<sup>220</sup> *Id.* at 2628.

<sup>221</sup> Black, *supra* note 16, at 112.

<sup>222</sup> *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

<sup>223</sup> 478 U.S. 186 (1986).

crime, a state could pass other laws that disfavored such conduct.<sup>224</sup> Appealing to mainstream tradition, Scalia offered, “Coloradans are . . . entitled to be hostile toward homosexual conduct . . . .”<sup>225</sup> As such, “Amendment 2 [was] designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans . . . .”<sup>226</sup>

In *Lawrence*, Scalia’s rhetoric continued to imply an auditor that would be receptive to an appeal to traditional majoritarian sexuality. The dissenting justice observed, “Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation.”<sup>227</sup> Intimate same-sex conduct was such behavior. “The Texas statute,” Scalia stated, “undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable,’ . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”<sup>228</sup>

Scalia further constructed the second persona in *Lawrence* by critiquing the majority of the Court for being out of touch with majoritarian values. In a long passage, he asserted the following:

So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously “mainstream”; that in most States what the Court calls “discrimination” against those who engage in homosexual acts is perfectly legal; that proposals to ban such “discrimination” under Title VII have repeatedly been rejected by Congress . . . ; that in some cases such “discrimination” is *mandated* by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the Armed Forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such “discrimination” is a constitutional right, see *Boy Scouts of America v. Dale* . . . .<sup>229</sup>

In addition to congressional action, ironically even the Supreme Court’s precedent in *Boy Scouts of America v. Dale*,<sup>230</sup> decided only three years prior to *Lawrence*, recognized such tradition. Without majoritarian support, the minority could not do away with tradition, as the Court apparently was trying to do. Scalia concluded in an assuring manner, “[P]ersuading one’s fellow citizens is one thing, [but] imposing

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<sup>224</sup> *Romer*, 517 U.S. at 640–41 (Scalia, J., dissenting).

<sup>225</sup> *Id.* at 644 (emphasis in original).

<sup>226</sup> *Id.* at 653.

<sup>227</sup> *Lawrence v. Texas*, 539 U.S. 558, 589 (2003) (Scalia, J., dissenting).

<sup>228</sup> *Id.* at 599.

<sup>229</sup> *Id.* at 602–03 (emphasis in original).

<sup>230</sup> 530 U.S. 640 (2000).

one's views in absence of democratic majority will is something else."<sup>231</sup>

Scalia offered a warning that the second persona of his dissents would appreciate. Based on then-recent Canadian history, Scalia expressed concern over "judicial imposition of homosexual marriage."<sup>232</sup> Although the Court had counseled against any concern, Scalia advised, "Do not believe it."<sup>233</sup> He continued with the following:

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring[ ]" . . . ; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution[ ]" . . . ?<sup>234</sup>

In *Windsor*, Scalia continued the construction of a similar second persona that would favor tradition, although without his appeals to majoritarian sentiment, perhaps because, by 2013, his majority was disappearing.<sup>235</sup> Specifically, Scalia took note of the "traditional moral disapproval of same-sex marriage (or indeed same-sex sex)" in U.S. culture.<sup>236</sup> Consequently, the Court majority could "not argue that same-sex marriage [was] 'deeply rooted in this Nation's history and tradition[ ]' . . . , a claim that would of course be quite absurd."<sup>237</sup> Calling upon his dissent in *Lawrence*, Scalia stated, "As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. . . . I will not swell the U.S. Reports with restatements of that point."<sup>238</sup> DOMA was "an Act that did no more than

<sup>231</sup> *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

<sup>232</sup> *Id.* at 604.

<sup>233</sup> *Id.* Scalia was correct that, although not the main issue in *Lawrence*, same-sex marriage was an underlying issue in the case. Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447, 1458–59 (2004). In offering its assurances about not addressing same-sex marriage, the Court may have been aware that, at that time, two-thirds of people in the United States disapproved of same-sex marriage. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 450 (2005). Public opinion can be relevant in the determination of whether a constitutional right exists. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)).

<sup>234</sup> *Lawrence*, 539 U.S. at 604–05 (citations omitted).

<sup>235</sup> Laurie M. Phillips, *Libelous Language Post Lawrence: Accusations of Homosexuality as Defamation*, 46 FREE SPEECH Y.B. 55, 58–59 (2012) (reviewing various polls that reflected changing public opinions about sexual minorities and their rights).

<sup>236</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

<sup>237</sup> *Id.* at 2706–07.

<sup>238</sup> *Id.* at 2707.

codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history.”<sup>239</sup> In Scalia’s apparent view, whether a majority now appreciated that tradition no longer mattered; tradition should have prevailed.

In *Obergefell*, Scalia yet again continued the construction of a second persona that would favor tradition. For instance, he observed that, “through our history,” regulating domestic relations had been left to the states.<sup>240</sup> At the time of the ratification of the Fourteenth Amendment in 1868, all states had restricted civil marriage to a man and a woman.<sup>241</sup> Indeed, marriage as an opposite-sex institution bore “the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment’s ratification.”<sup>242</sup> Moreover, such marriage was “an institution as old as government itself” and, until fifteen years earlier, had reflected “the unanimous judgment of all generations and all societies.”<sup>243</sup>

Scalia pointed out how, over the years, virtually no one had recognized in the Fourteenth Amendment a right to same-sex marriage. “[E]very person alive at the time of ratification [of the Amendment], and almost everyone else in the time since” had failed to see such a right.<sup>244</sup> Scalia became more specific, noting that famous jurists such as “Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly” had not seen a right to same-sex marriage in the Fourteenth Amendment.<sup>245</sup> Again, tradition should control.

Beyond the appeals to tradition and majority values, which failed to address seriously the possibility of change in tradition or the importance of minority rights, another aspect of the construction of the second persona was fear of sexual minorities. Scalia appealed to this fear in his *Romer* dissent. As Scalia observed the situation, sexual minorities constituted “a politically powerful minority.”<sup>246</sup> The dissenting justice was so adamant about this observation that he repeated it several pages later.<sup>247</sup> Additionally, he observed that sexual minorities had “high disposable income” and political power “much greater than their

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<sup>239</sup> *Id.* at 2709.

<sup>240</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* Scalia’s history of marriage as a heterosexual-only institution that enjoyed “unchallenged use” in the United States was problematic. Rather, challenges, both in and out of court, to heterosexual-only marriage emerged during the 1970s. JASON PIERCESON, *SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT* 27-37 (2013).

<sup>243</sup> *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting). Regarding Scalia’s history of “the unanimous judgment” in favor of heterosexual-only marriage, see *supra* note 53, particularly with regard to classical Rome before the third century A.D.

<sup>244</sup> *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

<sup>245</sup> *Id.*

<sup>246</sup> *Romer v. Evans*, 517 U.S. 602, 636 (1996) (Scalia, J., dissenting).

<sup>247</sup> *Id.* at 648.

numbers.”<sup>248</sup> Indeed, despite laws like those at issue in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, sexual minorities enjoyed “enormous influence in American media and politics.”<sup>249</sup>

Somehow, this apparently powerful minority group had threatened the majority in Colorado, which had needed to take action to protect itself. Voters had responded to the sexual minority “menace.”<sup>250</sup> “That is where Amendment 2 came in,” Scalia explained, offering reassurance to an audience likely to fear sexual minorities.<sup>251</sup> Amendment 2 “sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides.”<sup>252</sup>

This construction of a second persona that would fear the alleged political power of sexual minorities was ironic in light of Scalia’s construction of sexual minorities as third personae. The discussion of the third persona that follows below shows that Scalia constructed sexual minorities as criminals and other poorly regarded individuals, including people with drug addictions, polygamists, and prostitutes. Such poorly regarded individuals were hardly likely to be politically threatening to anyone. However, construction of the second persona is not limited to logical appeals,<sup>253</sup> and Scalia employed an emotional appeal to majoritarian fear of sexual minorities.

Scalia’s construction of a second persona that would be receptive to appeals to traditional sexuality and majoritarian rule, as well as one that would be likely to fear the thought of politically powerful sexual minorities as a menace to members of the sexual majority, undermined his artful performance of a neutral justice first persona. While tradition is often relevant to constitutional decision-making, tradition is not necessarily dispositive since it can change. Scalia did not discuss seriously how tradition may have changed. Moreover, consideration of

<sup>248</sup> *Id.* at 645–46.

<sup>249</sup> *Id.* at 652.

<sup>250</sup> See Morris, *Pink Herring*, *supra* note 158, at 233–34. A panic can set in following a perceived sexual minority “menace.” *Id.* In the United States, this occurred during the 1930s, beginning with the kidnapping of Charles Lindbergh’s baby. *Id.* Likewise, another panic occurred during the 1950s. Senator Joseph McCarthy claimed that Communists and sexual minorities had infiltrated the U.S. State Department, and then, during a public appearance on Capitol Hill, Deputy Undersecretary for Administration John Peurifoy admitted that the State Department had removed ninety-one employees because of their sexual minority status. JOHNSON, *supra* note 3, at 15–19. See also *Employment of Homosexuals and Other Sex Perverts in the Government*, S. Interim Rep. No. 241, at 3 (1950) (maintaining that sexual minorities were “not proper persons to be employed in Government” because they were “generally unsuitable” and “constitute[d] security risks”); Exec. Order No. 10,450 § 8(a)(1)(iii), 3 C.F.R. 936, 938 (1949–1953) (document from President Dwight Eisenhower that instructed that “sexual perversion,” among other matters, be considered in assessing whether employees of federal departments and agencies constituted threats to national security).

<sup>251</sup> *Romer*, 517 U.S. at 647. This was an appeal to an audience with “deep-seated homophobic anxiety.” Charles E. Morris, *Passing by Proxy: Collusive and Convulsive Silence in the Trial of Leopold and Loeb*, 91 Q.J. SPEECH 264, 278 (2005) [hereinafter *Passing by Proxy*].

<sup>252</sup> *Romer*, 517 U.S. at 647.

<sup>253</sup> Celeste M. Condit, *Pathos in Criticism: Edwin Black’s Communism-As-Cancer Metaphor*, 99 Q.J. SPEECH 1, 7–9, 12–16 (2013).

majoritarian interests without any consideration of minority rights in a constitutional case is problematic because, in addition to coming with procedural rights that generally benefit the majority, representative democracy comes with substantive rights that protect members of minority groups.<sup>254</sup> As Alexander Hamilton observed, one role of the courts is to protect members of minority groups from the “ill humors” of the majority.<sup>255</sup> Scalia did not discuss minority rights seriously. Even more to the point, he employed scare tactics regarding the supposed threat of sexual minorities in a country that is overwhelmingly heterosexual.<sup>256</sup> These appeals to the heteronormative auditor implied in Scalia’s dissents compromised the neutrality of Scalia’s neutral justice first persona.

### C. The Third Persona

In his dissents, Scalia constructed sexual minorities as third personae, or those negated,<sup>257</sup> in several ways. He did so with negative association, repeatedly comparing sexual minority romantic relationships or intimate same-sex conduct to individuals or acts that were dangerous, undesirable, unattractive, or simply trivial. Regardless of more recent social developments, he focused heavily on the tradition of same-sex sexual conduct as a crime. Moreover, without addressing sexual minority concerns, Scalia paid attention to the supposed inconvenience of overruling *Bowers v. Hardwick*,<sup>258</sup> a precedent he believed to be controlling, to people in government who allegedly had relied upon the case for administrative reasons. Additionally, he declined to recognize, or even consider, evidence of an ulterior legislative purpose against sexual minorities. Finally, in his last dissent that this Article considers, Scalia omitted references to sexual minorities as people and instead spoke merely about same-sex marriage as an abstract matter of public policy. This construction of sexual minorities as third personae seriously undermined Scalia’s performance of a neutral justice first persona.

As noted above, Scalia repeatedly compared sexual minority romantic relationships or intimate same-sex conduct to individuals or

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<sup>254</sup> MICHELMAN, *supra* note 194, at 16–18, 34–38.

<sup>255</sup> THE FEDERALIST NO. 78, at 494–95 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>256</sup> In the past, sexual minority demographics in the United States had not been well understood, often because major federal surveys did not ask respondents about sexual orientation. *LGBTs Are 10% of US Population? Wrong, Says Demographer*, NPR (June 8, 2011), <http://www.npr.org/2011/06/08/137057974/-institute-of-medicine-finds-lgbt-health-research-gaps-in-us>, <<http://perma.cc/X6ZE-N3L8>> (comments of demographer Gary J. Gates). In more recent times, a major Gallup study indicated that 3.4% percent of the adult U.S. population self-identified as having sexual minority status. Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx>, <<http://perma.cc/9K4V-EV82>>.

<sup>257</sup> Wander, *supra* note 17, at 210.

<sup>258</sup> 478 U.S. 186 (1986).

acts that were dangerous, undesirable, unattractive, or simply trivial, thereby dismissing sexual minorities. The dissenting justice began his comparisons in *Romer*. For instance, he said, “[O]ne could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”<sup>259</sup> Thus, sexual minorities, whose intimate conduct had been banned, were similar to murderers, polygamists, and individuals who were cruel to animals. Likewise, sexual minorities were similar to people with drug addictions,<sup>260</sup> and Scalia repeated the comparison with polygamists.<sup>261</sup> Also, if the state could bar the hiring of methadone users as transit employees, it could ban intimate same-sex conduct without the problem of an Equal Protection Clause violation.<sup>262</sup> Being a sexual minority was like taking a drug and apparently turned someone into one of the people with drug addictions previously noted. Moreover, just as the long-term roommate of a deceased straight person would not receive death benefits through the deceased, the long-term partner of a sexual minority would not receive death benefits through a partner.<sup>263</sup> As Scalia saw it, for a sexual minority, having a long-term significant other was like having the same university roommate for several years.

Scalia’s use of the negative comparisons continued in *Lawrence*. Scalia associated same-sex romantic relationships with a parade of what he saw as horrors, including “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,” all of which states could ban in light of *Bowers*.<sup>264</sup> As Scalia viewed it, intimate conduct within a same-sex relationship was akin to buying or selling sex or having physical relations with other species. Scalia was quite taken by the prostitution analogy and returned to it later in his opinion. The government could restrain various liberties, he stated, including “prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery.”<sup>265</sup> Thus, in addition to being like buying or selling sex or having a drug addiction, being in a same-sex romantic relationship was as important as making bread. If that analogy did not suffice, being in such a relationship was also like engaging in acts of public nudity.<sup>266</sup> The possibilities for analogies so abounded that one might have had a hard time picking one’s favorite.

In *Windsor*, Scalia again relied upon negative association to construct sexual minorities as third personae. He compared same-sex

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<sup>259</sup> *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Scalia’s reference to murderers was hardly the first time someone had compared sexual minorities with violent criminals. For instance, during the 1930s, sexual minorities were compared with rapists and other violent offenders. *Morris*, *Pink Herring*, *supra* note 158, at 234.

<sup>260</sup> *Romer*, 517 U.S. at 647.

<sup>261</sup> *Id.* at 648.

<sup>262</sup> *Id.* at 642.

<sup>263</sup> *Id.* at 638.

<sup>264</sup> *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

<sup>265</sup> *Id.* at 592.

<sup>266</sup> *Id.* at 601.

marriage with no-fault divorce, polygamy, and alcohol consumption.<sup>267</sup> While many people do believe in divorce, few seem to celebrate it the way people celebrate marriage. Moreover, polygamy can involve the exploitation of underage females.<sup>268</sup> Although alcohol consumption is enjoyable for many people, many people nonetheless experience problems with drinking too much alcohol, and negative legal consequences, such as losing one's driver's license, can follow the abuse of alcohol. As Scalia read it, the Constitution did not require or forbid no-fault divorce, polygamy, or alcohol consumption, and the same was true for same-sex marriage.<sup>269</sup> Much as before, being in a same-sex romantic relationship was like being a polygamist or abusing drugs, and this time it was also like no-fault divorce.

Of note, Scalia was somewhat more restrained in his use of negative association in *Windsor* than he had been in *Romer* and *Lawrence*. Perhaps he thought he had been detailed enough with analogies in his prior dissents. The issue of whether there was a live controversy to satisfy the requirements of Article III may have taken up a good portion of an opinion that otherwise would have been devoted to additional negative association.<sup>270</sup> Perhaps Scalia became more aware that demonizing sexual minorities was becoming less socially acceptable.<sup>271</sup> Regardless, he offered several negative associations in his *Windsor* dissent.

Building on negative association, Scalia relied in *Lawrence* upon the tradition of intimate same-sex conduct as a crime to construct sexual minorities as criminals. He noted that the *Bowers* Court had recognized

<sup>267</sup> United States v. Windsor, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

<sup>268</sup> Kiah Collier, *Polygamist Ex-Bishop Guilty of Officiating Underage Marriage*, REUTERS (Nov. 7, 2011), <http://www.reuters.com/article/2011/11/07/us-polygamist-marriage-idUSTRE7A65MK20111107>, <<http://perma.cc/HDN6-TMS6>>; Wade Goodwyn, *Texas Town Wary of Polygamist Sect's Arrival*, NPR (May 4, 2005), <http://www.npr.org/2005/05/04/4629743/texas-town-wary-of-polygamist-sects-arrival>, <<http://perma.cc/EQ6U-7SUL>>.

<sup>269</sup> *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).

<sup>270</sup> See *id.* at 2698–703.

<sup>271</sup> What one might have called the “closet culture” of the United States had been changing as more sexual minorities were open about their sexuality, and such openness became more socially acceptable. See Morris, *Passing by Proxy*, *supra* note 251, at 267 (observing that “sexual difference in a closet culture is a collusive, open secret”); Morris, *Bearded Tales*, *supra* note 181, at 139, 141 (noting that U.S. closet culture extended well back in time); Phillips, *supra* note 235, at 58–59 (reviewing various polls that reflected changing public opinions about sexual minorities and their rights).

Without doubt, the culture had changed from the early 1970s, when both the American Psychiatric Association and the American Psychological Association held that homosexuality was per se a mental disorder, and even from the mid-1980s, when, at the time of *Bowers*, public disapproval of homosexuality was strong. Fred E. Jandt, *Gay Liberation As Ideological Conflict*, 8 J. APPLIED COMM. RES. 128, 129 (1980); KLARMAN, *supra* note 24, at 39. In the early 2010s, polls were beginning to show that most people in the United States supported same-sex marriage. KLARMAN, *supra* note 24, at 196; PIERCESON, *supra* note 242, at 239. Of note, younger people were particularly supportive of same-sex marriage. PIERCESON, *supra* note 242, at 239.

One likely influence on shifting public opinion was the experience of personally knowing a sexual minority. KLARMAN, *supra* note 24, at 198. In 1985, only 25% of people in the U.S. reported that a relative, friend, or co-worker had come out to them. *Id.* at 197. In 2000, 75% of people in the U.S. reported knowing someone who was open about being a sexual minority. *Id.*

that sodomy was a crime at common law and forbidden in the original thirteen states.<sup>272</sup> This information so impressed Scalia that he repeated it two pages later.<sup>273</sup> He added that, when the Fourteenth Amendment had been ratified in 1868, thirty-two of thirty-seven states had banned sodomy.<sup>274</sup> Moreover, sodomy had been illegal in all fifty states until 1961.<sup>275</sup> Historically, sodomy had been banned for both straight people and sexual minorities, so apparently such a ban was not a matter of discrimination based on sexual orientation.<sup>276</sup>

Since “homosexual sodomy” historically had been a criminal act, there was no tradition of recognizing it as a fundamental right, Scalia maintained.<sup>277</sup> Indeed, he observed, the government had prosecuted individuals for sodomy. Records existed of twenty sodomy prosecutions and four executions during the colonial period.<sup>278</sup> From 1880 to 1995, 203 prosecutions for consensual, same-sex sodomy had taken place.<sup>279</sup> Scalia added, “States continue to prosecute all sorts of crimes by adults ‘in matters pertaining to sex’: prostitution, adult incest, adultery, obscenity, and child pornography.”<sup>280</sup> The dissenting justice maintained that states could continue to do the same for sodomy.<sup>281</sup> Given the criminal status of the conduct, the conduct could not receive the protection due a fundamental right.<sup>282</sup>

In his *Lawrence* opinion, Scalia did not consider the implications of this historical reading. He did not ask whether the prosecutions had been appropriate. He did not ask whether four executions for sodomy in the colonial period had been justified. He also did not consider the modern trend away from sodomy prosecutions that Kennedy noted.<sup>283</sup> One limitation with looking at the past is that the past may not be a good guide for the present. Just as tradition can offer good counsel, tradition can offer poor counsel, particularly when culture has changed. By drawing upon a history of prosecution and even execution, and not considering whether this history made any sense in a contemporary world, or even in past worlds, Scalia constructed sexual minorities as criminals, some of the least in society, and thus as third personae.

Beyond using negative association and focusing on the criminal history of sodomy, Scalia employed other rhetorical strategies to construct sexual minorities as third personae. At one point in *Lawrence*, Scalia, without reference to sexual minority concerns, insisted that

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<sup>272</sup> *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (Scalia, J., dissenting).

<sup>273</sup> *Id.* at 596.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 586, 596.

<sup>278</sup> *Id.* at 597.

<sup>279</sup> *Id.* (referencing the West system and various official state reporters from that period of time).

<sup>280</sup> *Id.* at 598.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 597–98.

<sup>283</sup> *Id.* at 573.

government had relied on *Bowers* to such an extent that he counseled against overruling the case because of the inconvenience to some, presumably straight, individuals in government. He referenced case law that had upheld Alabama's prohibition on the sale of sex toys and a federal ban on those who engaged in "homosexual conduct" from participating in military service.<sup>284</sup> Also, Scalia referenced how *Bowers* had been used to uphold a police questionnaire that asked about applicants' "homosexual activity," as well as the Defense Department's conducting more thorough investigations into gay and lesbian applicants' backgrounds for certain security clearances.<sup>285</sup> To Scalia, that government officials had relied upon *Bowers* to discriminate against sexual minorities was a good reason for retaining the case as precedent, and changing the law might inconvenience government officials, such as those who did background checks. "What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails," Scalia lamented.<sup>286</sup> For him, attention to sexual minority concerns was unnecessary.

As a further way of constructing sexual minorities as third personae, Scalia also declined to recognize, or alternatively even consider, evidence of an ulterior legislative purpose against sexual minorities. Regardless of the wording of the statute in *Lawrence* that applied only to same-sex behavior, Scalia assured the reader that the purpose of the Texas Legislature that had passed the statute was pure, unlike the purpose of the Virginia Legislature that had passed a statute against interracial marriage, which the U.S. Supreme Court had found unconstitutional in *Loving v. Virginia*.<sup>287</sup> The purpose of the statute in *Loving* was to maintain White supremacy.<sup>288</sup> "No purpose to discriminate against men or women as a class can be gleaned from the Texas law,"

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<sup>284</sup> *Id.* at 589–90. The Alabama ban on the sale of sex toys generated a fair amount of litigation. Phillip Rawls, *High Court Lets Alabama Sex-Toy Ban Stand*, SEATTLE TIMES (Oct. 1, 2007), <http://www.seattletimes.com/nation-world/high-court-lets-alabama-sex-toy-ban-stand/>, <<http://perma.cc/4LNZ-A4DG>> (noting that, at that time, the U.S. Supreme Court refused to review a decision by the Eleventh Circuit that upheld the ban); Debra Cassens Weiss, *Love Stuff Loses Challenge to Sex-Toy Ban in Alabama Supreme Court*, ABA JOURNAL (Sept. 16, 2009), [http://www.abajournal.com/news/article/love\\_stuff\\_loses\\_challenge\\_to\\_sex-toy\\_ban\\_in\\_alabama\\_supreme\\_court/](http://www.abajournal.com/news/article/love_stuff_loses_challenge_to_sex-toy_ban_in_alabama_supreme_court/), <<http://perma.cc/8SMF-2KLM>>. Federal appeals courts have issued conflicting rulings on the issue of regulation of sex toys. Weiss, *supra*. Meanwhile, the federal government ended the military policy of official discrimination against sexual minorities. *See Senate Votes to Repeal 'Don't Ask, Don't Tell'*, NPR (Dec. 18, 2010), <http://www.npr.org/2010/12/18/132164172/-dont-ask-dont-tell-clears-vital-hurdle>, <<http://perma.cc/7N74-GM2G>>; Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (July 22, 2011), [http://www.nytimes.com/2011/07/23/us/23military.html?\\_r=1](http://www.nytimes.com/2011/07/23/us/23military.html?_r=1), <<http://perma.cc/2ZC3-9Z38>>.

<sup>285</sup> *Lawrence*, 539 U.S. at 590 n.2 (Scalia, J., dissenting). The Defense Department's conducting more thorough investigations into gay and lesbian applicants' backgrounds for certain security clearances had echoes of the Lavender Scare of the 1950s, during which factions within the federal government maintained that sexual minorities posed a risk to national security interests. JOHNSON, *supra* note 3, at 7–10.

<sup>286</sup> *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting).

<sup>287</sup> *Id.* at 600 (citing *Loving v. Virginia*, 388 U.S. 1, 6, 8, 11 (1967)).

<sup>288</sup> *Id.*

Scalia asserted, “so rational-basis review applies.”<sup>289</sup> Rational basis review is the most deferential form of judicial review of legislation.<sup>290</sup> Immoral sexual behavior was wrong, Scalia observed, noting, “This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.”<sup>291</sup> With a return to various participants in his parade of horrors, Scalia avoided any attempt to address the fact that, unlike the statute in *Bowers*, the statute in *Lawrence* explicitly discriminated against sexual minorities because it only covered same-sex conduct.

In *Windsor*, rather than trying to suggest that the legislative purpose was pure, Scalia refused even to consider legislative purpose. “And more importantly,” he observed, “[various rationales for DOMA] serve to make the contents of the legislators’ hearts quite irrelevant: ‘It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.’”<sup>292</sup> Rather than making a more complicated analysis of legislative purpose, Scalia was satisfied that Congress was interested in avoiding difficult choice of law issues or stabilizing federal law.<sup>293</sup> As those rationales were legitimate on their face, fear or persecution of a minority group apparently did not call for consideration.

Finally, in his *Obergefell* dissent, Scalia constructed sexual minorities as third personae through virtually complete omission. Scalia did not use the words *gay* and *lesbian*, or even the word *homosexual*, at all in this opinion. When Scalia once used the word *couple*, he was referring to heterosexual couples.<sup>294</sup> Although he used the term *same-sex marriage* four times, three of the uses were regarding a public policy debate,<sup>295</sup> and the other use was a historical reference to the Massachusetts Supreme Judicial Court’s opinion in *Goodridge v. Department of Public Health*,<sup>296</sup> the first state supreme court opinion in the United States to legalize same-sex marriage within a particular state.<sup>297</sup> Scalia made no references to sexual minorities as people. Rather, he was simply discussing in an abstract manner a public policy matter, apparently one that in no way concretely impacted any individuals historically marginalized by heteronormative laws. He may as well have

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<sup>289</sup> *Id.*

<sup>290</sup> CHEMERINSKY, *supra* note 125, at 699–700.

<sup>291</sup> *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

<sup>292</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)). Questions have lingered about illicit congressional motive regarding the Selective Service regulations at issue in *O’Brien*. TRIBE, *supra* note 47, at 824–25.

<sup>293</sup> *Windsor*, 133 S. Ct. at 2708.

<sup>294</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting).

<sup>295</sup> *Id.* at 2627–29.

<sup>296</sup> 440 Mass. 309 (2003).

<sup>297</sup> *Obergefell*, 135 S. Ct. at 2629.

been discussing a proposed tax on consumer goods that people bought with disposable income. Absence such as the absence in Scalia's *Obergefell* dissent is classically indicative of construction of third personae.<sup>298</sup>

In various ways, Scalia constructed sexual minorities as third personae throughout his dissents. He likened sexual minority romantic relationships and intimate same-sex conduct to individuals or acts that were dangerous, undesirable, unattractive, or simply trivial. Of particular note, Scalia argued that same-sex sexual conduct was historically a crime, and he ignored recent trends away from that position. The dissenting justice made much of the inconvenience of overruling *Bowers* to people in government who supposedly had relied upon the case for administrative reasons like doing background checks, and Scalia claimed that administrative convenience was more important than the impact upon sexual minorities of restrictions on private, intimate conduct. Scalia also declined to recognize, or alternatively even consider, evidence of an ulterior legislative purpose and, in doing so, turned a blind eye to claims of discrimination against sexual minorities. Finally, in his last dissent that this Article addresses, Scalia omitted references to sexual minorities as people and instead spoke only about same-sex marriage as an abstract public policy matter. As such, Scalia constructed sexual minorities as third personae. Given its frequent dismissive treatment of sexual minorities, this rhetoric seriously undermined Scalia's performance of a neutral justice first persona; a neutral adjudicator would not engage in rhetoric that marginalized a group to which litigants before the court belonged.

## V. CONCLUSION

By calling upon persona theory, this Article has argued that Justice Scalia's rhetoric of sexual orientation in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges* produced rhetorical hypocrisy grounded in a heteronormative ideology. While the first persona performed was one of a neutral justice, the second persona constructed would well receive appeals to tradition and majoritarian rule. Furthermore, this second persona, ignoring the possibility of change in tradition and likewise ignoring minority rights, would be wary of an alleged political threat of sexual minorities. Moreover, the third persona constructed consisted of the sexual minority as a criminal or other poorly regarded individual, such as a person with a drug addiction, a polygamist, or a prostitute. Although Scalia's performance of a neutral justice was a skillful one, the construction of the second and third personae compromised Scalia's performance of the first persona.

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<sup>298</sup> Wander, *supra* note 17, at 209.

Like any justice who heard the above cases, Scalia was entitled to read the U.S. Constitution how he felt most appropriate, whether, after balanced consideration of all aspects of the cases, that reading ultimately involved supporting minority rights or majoritarian concerns. However, Scalia did not offer balanced consideration of all aspects of the case, and making his arguments did not require marginalization of those who, from a heteronormative perspective, should have lost the cases. Scalia's own rhetoric undermined a supposedly neutral stance, and Scalia functioned as an ideological actor who used the power of law to further a particular social vision.<sup>299</sup> Other than perhaps for one's most devoted followers, hypocrisy generally fails rhetorically.<sup>300</sup> Hypocrisy undermines trustworthiness, one of the dimensions of credibility.<sup>301</sup> In addition to providing further insight into marginalizing judicial rhetoric, the above analysis of Scalia's dissents suggests the problems with incongruity among rhetorical personae in one's discourse.

Justice Oliver Wendell Holmes, writing in an opinion that reflected a significant change in his thinking about the First Amendment, observed, "[T]ime has upset many fighting faiths . . ."<sup>302</sup> As Holmes suggested, society evolves, and so do some of its beliefs. Despite his generally caustic rhetoric, even Scalia seemed to understand this evolution at some level, briefly admitting in *Lawrence*, "Social perceptions of sexual and other morality change over time . . ."<sup>303</sup> Still, Scalia ironically accused the *Windsor* majority of "declaring anyone opposed to same-sex marriage an enemy of human decency."<sup>304</sup> Scalia's rhetoric suggested that the justice himself may have been unable to deal with sexual difference through more civil rhetoric that, while advancing his position, also respected the dignity of others whose lives were less sexually privileged than his own. Fortunately for sexual minorities, the Supreme Court on several occasions chose another rhetorical path.

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<sup>299</sup> See John Louis Lucaites, *Between Rhetoric and "the Law": Power, Legitimacy, and Social Change*, 76 Q.J. SPEECH 435, 446-47 (1990) (reviewing MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); and ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986)); Marouf Hasian, Jr., Celeste Michelle Condit & John Louis Lucaites, *The Rhetorical Boundaries of "the Law": A Consideration of the Rhetorical Culture of Legal Practice and the Case of the "Separate But Equal" Doctrine*, 82 Q.J. SPEECH 323, 327, 335 (1996).

<sup>300</sup> Larry Powell & Eduardo Neiva, *The Pharisee Effect: When Religious Appeals in Politics Go Too Far*, 29 J. COMM. & RELIGION 70, 85-86 (2006).

<sup>301</sup> Although the terminology has varied, one can identify the dimensions of credibility as competence, trustworthiness, and goodwill. McCroskey & Teven, *supra* note 19, at 90.

<sup>302</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *But see* *Schenck v. United States*, 249 U.S. 47 (1919) (majority opinion also by Holmes). During the few months between the two opinions, Holmes received a copy of an article by Professor Zechariah Chafee of Harvard Law School that supported free speech during wartime, and the seventy-eight-year-old justice changed his mind on the topic. CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* 30, 32-34 (2007).

<sup>303</sup> *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

<sup>304</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).