JUDICIAL WORDS MATTER

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This special issue addresses the role of appellate judges in addressing hotly contested social-political issues. Despite our limited judicial role, we are often called on to make legal decisions that pertain to such issues, often in constitutional challenges. This article focuses on an aspect of appellate judging that has the potential either to inflame or calm the broader debate. Judges can inspire respect for people on either side of a controversy and their respective concerns, or they can take sides, not in the sense of reaching a result that favors one party, but in using words that are harsh or dismissive to one side. Judges can either disparage judicial colleagues with whom they disagree or focus on legal disagreement while expressing respect for colleagues who disagree and their point of view. The language we use in our opinions (and in public writing and speaking) can project partiality or worse, partisanship and ideology. Our words can, in the alternative, project openness, an ability to listen and a nonpartisan and impartial state of mind.

Simply put, persuasion by denigration does not turn the temperature down on matters that deeply divide us. Incivility in judicial writing does not advance thoughtful discourse among citizens who have strongly held, competing views. It encourages stridency in public discourse and mutual hostility between disputants. It undermines the willingness of the losing side to accept as legitimate

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decisions they do not like. And it undermines public trust in the impartiality of the judiciary and public commitment to the rule of law. The corollary is that language reflecting some understanding of the concerns of litigants on both sides of a dispute may open some minds on either side of a social divide and will at least avoid salting a wound.

In recent decades, one hotly contested set of issues that have made their way into the courts concerns LGBTQ civil rights and conflicting claims based on moral and religious beliefs. In a number of Supreme Court opinions in those cases, which I will use to illustrate my points, some Justices have appeared to take sides in the broader public dispute. They have been harsh and dismissive of one side or the other, and bitter toward their fellow Justices and accused each other of abusing judicial power. Especially in today's polarized social and political era, this kind of rhetoric undermines public trust in the judicial branch and understanding of its importance in a constitutional democracy.

In short, my message is that words matter and that we as judges should use them wisely. Failure to do so poses one more threat to our democratic form of government.

I. A BRIEF REVIEW OF THE SUPREME COURT'S LANGUAGE IN CASES INVOLVING LGBTQ ISSUES

This section outlines some of the key LGBTQ rights decisions decided in the last three to four decades. This selection of cases is not exhaustive. To the extent these cases focused on the legal issues, the opinions are unobjectionable. Where the Justices ventured into dangerous territory is when they characterized people, their concerns, motives, views, and beliefs.

A. Bowers v. Hardwick[1]

In 1986, the United States Supreme Court, in a 5–4 decision authored by Justice White, upheld a Georgia statute criminalizing consensual sodomy against a challenge by a gay man who was criminally charged for private sexual acts with another man.[2] The Court defined the issue presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[3] Having thus defined the right at stake, the Court observed that only "those liberties that are 'deeply rooted in this Nation's history and tradition'" qualified for heightened judicial protection as "fundamental liberties."[4] Asserting that "[p]roscriptions against [homosexual sodomy] have ancient roots," the Court considered the "claim that a right to engage in such conduct" is fundamental "at best, facetious."[5]

Distinguishing its prior liberty and privacy decisions affording heterosexual couples the right to make decisions about private sexual activity, the Court thought it obvious "that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[6] "No connection between family, marriage and procreation on the one hand and homosexual activity on the other has been demonstrated."[7]

In a concurring opinion, Chief Justice Burger referred to the "ancient roots" of laws against sodomy "throughout the history of Western civilization" and "firmly rooted in Judeao-Christian moral and ethical standards."[8] To hold that "homosexual sodomy is

1. 478 U.S. 186 (1986).
2. *Id.*
3. *Id.* at 190.
4. *Id.* at 192.
5. *Id.* at 192, 194.
6. *Id.* at 190–91.
7. *Id.* at 191.
8. *Id.* at 196 (Burger, C.J., concurring).

somehow protected as a fundamental right," he said, "would be to cast aside millennia of moral teaching."[9]

In dissent, Justice Blackmun, joined by three other Justices, objected to the majority's narrow characterization of the right at stake as the "right to engage in homosexual sodomy" noting that in earlier cases about similar matters, the Court had described the right at stake in broader terms as "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[10] "[T]he fact that the acts described [in the statute] 'for hundreds of years, if not thousands, have been uniformly condemned as immoral'" was not "a sufficient reason to permit a State to ban them today."[11] Nor could "[t]he assertion that 'traditional Judeo-Christian values" alone "provide an adequate justification."[12] Justice Stevens wrote a dissent similar in substance.[13]

B. Romer v. Evans[14]

Just ten years later, in a 6–3 decision, the Supreme Court held a statewide referendum measure, known as Amendment 2, violated the Equal Protection Clause.[15] The measure amended the Colorado Constitution to repeal municipal ordinances banning sexual orientation discrimination and to prohibit any government action protecting LGBTQ people from discrimination.[16]

Writing for the majority, Justice Kennedy described the change wrought by the amendment as "[s]weeping and comprehensive."[17] The amendment put "[h]omosexuals, by state decree, . . . in a solitary class with respect to transactions and relations in both private and

9. *Id.* at 197.
10. *Id.* at 199 (Blackmun, J., dissenting); *see also id.* at 208.
11. *Id.* at 210.
12. *Id.* at 211.
13. *See id.* at 214 (Stevens, J., dissenting).
14. 517 U.S. 620 (1996).
15. *Id.* at 621, 635.
16. *Id.* at 623–24.
17. *Id.* at 627.

governmental spheres," by "withdraw[ing] from [them], but no others, specific legal protection from the injuries caused by discrimination."[18] It applied to Colorado's public accommodations laws, which prohibited discrimination on the basis of many characteristics; "nullifie[d] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education and employment"; and forbid laws and policies protecting "gays and lesbians" from discrimination at every level of Colorado government.[19]

The Court rejected the state's claimed rationale for the measure, which was "respect for other citizens' freedom of association, and . . . the liberties of landlords or employers who have personal or religious objections to homosexuality," finding "the breadth of the amendment . . . so far removed from these particular justifications" that it was "impossible to credit them."[20] It concluded, "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[21]

Justice Scalia dissented, joined by the Chief Justice and Justice Thomas, leaning into *Bowers* and urging that if a State may "make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[22] The dissent described the measure as a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority."[23]

The dissent did not agree that "'animus' or 'animosity' toward homosexuality" was "un-American."[24] Having

18. *Id.*
19. *Id.* at 628–29.
20. *Id.* at 635.
21. *Id.*
22. *Id.* at 641 (Scalia, J., dissenting).
23. *Id.* at 636.
24. *Id.* at 644.

repealed its criminal sodomy law, Colorado faced repercussions if "moral and social disapprobation of homosexuality is meant to be retained."[25] Specifically, "those who engage in homosexual conduct . . . . possess political power much greater than their numbers," which they "devote . . . to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."[26] The dissent accused the majority of imposing on others the values of the "lawyer class from which the Court's members are drawn."[27]

C. Lawrence v. Texas[28]

In 2003, in another closely decided opinion, the high Court overruled *Bowers*, struck down Texas's same-sex sodomy prohibition, and held the constitutional protections of liberty and privacy apply to same-sex sexual intimacy.[29] Justice Kennedy wrote the majority opinion, framing the issue as "whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause."[30] Tracing the history of its cases invalidating laws that interfered with decisions about sexual intimacy, the Court rejected the reasoning of *Bowers*, which had failed to "appreciate the extent of the liberty at stake."[31] The statute purported "to do no more than prohibit a particular sexual act," but its consequences were broader.[32] "When 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."[33] The sodomy statute sought "to control a personal relationship that . . . is

25. *Id.* at 645.
26. *Id.* at 645–46.
27. *Id.* at 652.
28. 539 U.S. 558 (2003).
29. *Id.* at 561, 579.
30. *Id.* at 564.
31. *Id.* at 564–67.
32. *Id.* at 567.
33. *Id.*

within the liberty of persons to choose without being punished as criminals."[34]

The court acknowledged that, as stated in *Bowers*, there had long "been powerful voices to condemn homosexual conduct as immoral," and many people still held such religious and moral beliefs, but opined, "These considerations do not answer the question before us, however."[35] It adopted Justice Stevens' dissent in *Bowers*, and quoted his conclusion: "'[T]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"[36]

Concurring in the judgment, Justice O'Connor would have decided the question on equal protection grounds, because the Texas statute banned only same-sex sodomy.[37]

Justice Scalia again dissented. His opinion criticized the majority for overruling *Bowers* after only seventeen years.[38] It also criticized the majority opinion for failing to explicate whether it was applying rational basis review or holding there was a "fundamental right" meriting a higher form of scrutiny.[39] *Bowers*, the dissent argued, was correctly decided under the rational basis test and argued that longstanding laws against sodomy precluded any conclusion that homosexual sodomy is a fundamental right.[40] It disagreed that "promotion of majoritarian sexual morality is not even a *legitimate* state interest."[41]

34. *Id.*
35. *Id.* at 571.
36. *Id.* at 577.
37. *Id.* at 579 (O'Connor, J., concurring in judgment).
38. *Id.* at 586–87 (Scalia, J., dissenting).
39. *Id.* at 589–94.
40. *Id.* at 597.
41. *Id.* at 599.

D. Obergefell v. Hodges[42]

Finally in 2015 the Court held in a 5–4 decision, that same-sex couples have the fundamental right to marry protected by the Due Process and Equal Protection Clauses.[43] Describing the views of each side, Justice Kennedy wrote that allowing same-sex couples to marry:

To opponents:

> it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.[44]

To petitioners:

> it is the enduring importance of marriage that underlies [their] contentions. . . . Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.[45]

Chief Justice Roberts dissented, arguing the issue was one for legislatures, not the Court.[46] In his view, "The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent."[47] "Allowing unelected federal judges to select which unenumerated rights rank as 'fundamental'—and to strike down state laws on the basis of that determination—raises obvious concerns about the judicial role."[48] The Court had prevented the people from reaching a decision on this issue "through

42. 576 U.S. 644 (2015).
43. *Id.* at 648, 681.
44. *Id.* at 657.
45. *Id.* at 657–58.
46. *Id.* at 686 (Roberts, C.J., dissenting).
47. *Id.* at 687.
48. *Id.* at 695.

democratic means," putting a stop to the ongoing debate.[49]

The dissent accused the majority of "disparag[ing] people who, as a matter of conscience, cannot accept same-sex marriage."[50] The majority's statements that state laws excluding same-sex couples "'lock . . . out,' 'disparage,' 'disrespect and subordinate' and inflict '[d]ignitary wounds' upon" them amounted to "assaults on the character of fairminded people" and portray them "as bigoted."[51]

Justice Scalia penned a separate dissent, which also trained its ire on the majority and its opinion.[52] It attacked the decision as "lacking even a thin veneer of law" and as "a naked judicial claim to legislative—indeed, *super*-legislative—power."[53] It described the Court as "a select, patrician . . . panel of nine that is "strikingly unrepresentative" because it is comprised of "successful lawyers, who studied at Harvard or Yale," came from the East and West Coasts and lacked "a Southwesterner or even . . . a genuine Westerner (California does not count)" or "even a single evangelical Christian . . . or . . . Protestant."[54] The majority opinion is "social transformation without representation."[55] It is "pretentious," "egotistic" and full of "showy profundities [that] are often profoundly incoherent," and it will "diminish this Court's reputation."[56]

Justice Thomas filed a third dissent, arguing the majority's decision will have "potentially ruinous consequences for religious liberty."[57] Finally, Justice Alito wrote that the Court's decision "will be used to vilify Americans who are unwilling to assent to the new

49. *Id.* at 710.
50. *Id.* at 712.
51. *Id.*
52. *Id.* at 713–20 (Scalia, J., dissenting).
53. *Id.* at 717.
54. *Id.* at 717–18.
55. *Id.* at 718.
56. *Id.* at 719, 720.
57. *Id.* at 733, 735 (Thomas, J., dissenting).

orthodoxy."[58] Those who publicly expressed opposition to same-sex marriage would "risk being labeled as bigots and treated as such by governments, employers, and schools."[59] The Court had "facilitat[ed] the marginalization of the many Americans who have traditional ideas," a harm he equated with "the harsh treatment of gays and lesbians in the past."[60] Justice Alito accused the majority of "abus[ing]" the court's authority," portending a "corruption of our legal culture's conception of constitutional interpretation."[61]

II. LEGAL ISSUES AND DEBATE

These cases, decided over three decades and involving a changing cast of Justices, reflect a consistent line of disagreements on legal issues, and the opinions contain much appropriate argumentation on those issues. Among them are the questions whether and when tradition, morality, and religion can justify laws restricting the liberty of all citizens and whether and in what ways substantive due process and the related concept of autonomy privacy are limited by tradition and historic practices. The arguments about these issues implicate the debate about the nature of the federal Constitution as either a broad set of principles to be applied to new claims and modern conditions or a document which extends no further than the understandings of those who drafted it. There is also discussion, though less so, about equal protection jurisprudence and what level of protection it affords to people treated differently on grounds other than race.

58. *Id.* at 736, 741 (Alito, J., dissenting).
59. *Id.* at 741.
60. *Id.* at 742.
61. *Id.*

III. PROBLEMATIC RHETORIC

A. Portraying Parties and Sides

1. Religious Believers and Their Views

Justice Blackmun's dissent in *Bowers* was powerful and persuasive in its arguments that criminalizing same-sex intimacy violates constitutional norms. But in addressing the religious underpinnings of sodomy laws, Justice Blackmun went astray. He argued that religious condemnation of behavior is not enough to justify secular legislation.[62] Making that legal point was not problematic. But consider the following excerpt:

> A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect." No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[63]

Characterizing moral and religious views as "intolerance" and comparing them to "racial animus" was unlikely to make those holding such views believe their concerns were fairly understood. This could have been handled differently; in the next paragraph, the same dissent states, "Reasonable people may differ about whether particular sexual acts are moral or immoral."[64] This neutral treatment would have sufficed. But, as will be seen, characterization of religious beliefs as

62. Bowers v. Hardwick, 478 U.S. 186, 211–12 (1986) (Blackmun, J., dissenting).

63. *Id.* (citation omitted).

64. *Id.* at 212.

"intolerance" set the stage for disputation that might otherwise be dismissed as beside the point.

In contrast to Justice Blackmun's dissent in *Bowers*, Justice Kennedy's later opinions, albeit majority opinions, were consistently respectful of the moral and religious objectors whose interests were asserted as the basis for the law. In *Lawrence*, he acknowledged that condemnation of homosexuality had "been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" and that "[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."[65] Without disparaging the people or their beliefs, he made the same legal point as Justice Blackmun: that "the majority may [not] use the power of the State to enforce these views on the whole society through the operation of the criminal law."[66]

In *Obergefell*, Justice Kennedy's fair explication of the position of those opposing marriage of same-sex couples is quoted above.[67] After discussing the tangible and dignitary harms caused by excluding same-sex couples from marriage, the court again refrained from disparaging the opponents, noting

> [t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. . . . Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon

65. Lawrence v. Texas, 539 U.S. 558, 571 (2003).

66. *Id.*

67. See discussion of *Obergefell*, *supra* text accompanying notes 44–45, quoting 576 U.S. at 657.

> demeans or stigmatizes those whose own liberty is then denied.[68]

At the end of the opinion, the majority again addressed religious beliefs and believers.

> [R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.[69]

Notwithstanding Justice Kennedy's even-handed approach in *Obergefell*, the above-quoted thread from Justice Blackmun's opinion in *Bowers* may have come home to roost in the dissents. Chief Justice Roberts's dissent accuses the majority of "sully[ing] those on the other side of the debate" by pointing out that "'the necessary consequence' of laws codifying the traditional definition of marriage is to 'demea[n] or stigmatiz[e]' same-sex couples."[70] According to his dissent, these statements are "assaults on the character of fairminded people" and "portray everyone who does not share the majority's 'better informed understanding' as bigoted."[71]

This argument, echoed in Justices Scalia's and Alito's separate dissents,[72] is not fair criticism of the Court's opinion, which nowhere ascribes the *intent* to demean, stigmatize, or harm to those who oppose marriage for same-sex couples. The dissenters distort the opinion by conflating statements about the *consequences* of the exclusion for gay people with the idea—never suggested

68. *Obergefell*, 576 U.S. at 670–72.
69. *Id.* at 679–80.
70. *Id.* at 712 (Roberts, C.J., dissenting).
71. *Id.*
72. *Id.* at 718–19 (Scalia, J., dissenting), 741–42 (Alito, J., dissenting).

by the majority—that those who oppose marriage for gay people *intend* to harm them.

But the seeds for the dissenters' argument that those who disagree with the majority will be treated as bigots arguably may be found in Justice Blackmun's dissent in *Bowers*. And the problem with those seeds, and the *Obergefell* dissents in which they sprouted,[73] is that they raise the stakes in the broader debate. They encourage opponents of marriage rights to see themselves as threatened—as people who, if LGBTQ people are accorded rights, will be ostracized. Relatedly, they encourage those on the losing side to believe their concerns were not fairly understood by the Court.

Justice Blackmun's words also resonated in the broader debate. In Proposition 22, a ballot measure adopted by California voters in 2000 to preclude marriage of same-sex couples, the proponents argued, "Opponents say anybody supporting traditional marriage is guilty of extremism, bigotry, hatred and discrimination towards gays, lesbians and their families. That's unfair and divisive nonsense."[74]

2. Gay People

Justice Scalia's dissents in *Romer* and *Lawrence* are problematic in their treatment of gay people. His rhetoric trivialized gay people and their relationships and made

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73. *See also* United States v. Windsor, 570 U.S. 744, 813 (2013) (Scalia, J., dissenting) (stating that acceptance of argument that Defense of Marriage Act is subject to and violates strict scrutiny "would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools"); *id.* at 798 (accusing majority of "impos[ing] change by adjudging those who oppose it hostes humani generis, enemies of the human race"); Davis v. Ermold, 141 S. Ct. 3, 4 (2020) (Mem.) (statement of Justice Thomas, joined by Justice Alito, respecting denial of certiorari) ("*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots" and "will continue to have 'ruinous consequences for religious liberty.'").

74. Dana S. Kruckenberg, Board Member-California School Board Leadership Council, *Rebuttal to Argument Against Proposition 22*, http://vigarchive.sos.ca.gov/2000/primary/propositions/22norbt.htm (last visited on Feb. 24, 2021).

plain his view that gay people and gay intimacy are immoral, criminal, and threatening to American families.

The *Romer* dissent characterized homosexuality as an "optional" "life style" consisting of criminal conduct.[75] It argued laws disfavoring gay people are permissible just like laws that disfavor "drug addicts, or smokers or gun owners or motorcyclists."[76] He characterized gay people's efforts to avoid being targeted for discrimination as seeking "*preferential* treatment," "*special protections* upon homosexual conduct" and "special favor and protection to those with a self-avowed tendency or desire to engage in [criminal] conduct."[77]

The *Lawrence* dissent likewise trivialized gay people's interests, stating Texas's sodomy law targeted gay people in the same way "[a] law against public nudity targets 'the conduct that is closely associated with being a nudist.'"[78] It compared the constraints the Texas law imposed on gay people's liberty with constraints imposed by "laws prohibiting prostitution, recreational use of heroin and, for that matter, working more than 60 hours per week in a bakery."[79]

While he viewed the interests of gay people as insignificant, Justice Scalia suggested their relationships were heinous and threatened others. Animus against them, he argued, was no different than the view that "murder, polygamy or cruelty to animals" are reprehensible.[80] He compared same-sex sexual intimacy to bigamy, incest, prostitution, bestiality, obscenity, and child pornography to support his argument that it thus may be punished.[81] The *Romer* dissent argued, "Coloradan's are . . . *entitled* to be hostile toward homosexual

75. Romer v. Evans, 517 U.S. 620, 642, 645 (1996) (Scalia, J., dissenting).
76. *Id.* at 647.
77. *See id.* at 638, 641, 642.
78. Lawrence v. Texas, 539 U.S. 558, 600–01 (2003) (Scalia, J., dissenting).
79. *Id.* at 592.
80. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).
81. *Lawrence*, 539 U.S. at 590, 598 (Scalia, J., dissenting).

conduct."[82] So, apparently, are other "Americans," "many" who

> 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.[83]

The *Romer* dissent underscored the threat, characterizing "those who engage in homosexual conduct"[84] as "a politically powerful minority"[85] that "enjoys enormous influence in American media and politics,"[86] is comprised of people who "have high disposable income,"[87] and was using its power to "achiev[e] . . . full social acceptance, of homosexuality."[88] It had enlisted an "elite class,"[89] which was part of a "law-profession culture" and included the Court's majority, to sign on to its "homosexual agenda."[90] No longer confined to places like "New York, Los Angeles, San Francisco, and Key West," by the time of Amendment 2, "homosexuals' quest for social endorsement" had reached three of Colorado's cities—Aspen, Boulder, and Denver—and "[t]he phenomenon had even appeared statewide."[91]

No LGBTQ person reading Scalia's dissents could view him or those who joined him as fair and impartial in these cases or trust they would be so in future cases. Moreover, the tropes employed by Justice Scalia about gay people both echoed earlier ballot measures and resounded in later ones. In Proposition 8, for example,

82. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).
83. *Lawrence*, 539 U.S.at 602 (Scalia, J., dissenting).
84. *Romer*, 517 U.S. at 645.
85. *Id.* at 648.
86. *Id.* at 652.
87. *Id.* at 645.
88. *Id.* at 646.
89. *Id.* at 636.
90. *Id.* at 602.
91. *Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

proponents referred to "gays living the lifestyle they choose."[92] The "special rights" and "homosexual political agenda" tropes he embraced, and his comparison of homosexuality to bestiality and child pornography echoes 1988 and 1992 Oregon ballot measure campaigns seeking to override a sexual orientation discrimination ban and recognize homosexuality as "abnormal, wrong, unnatural and perverse."[93]

The dissents in the Supreme Court's most recent decision addressing LGBTQ civil rights, *Bostock v. Clayton County*,[94] provide reason for hope. In that case, the dissenters strongly disagreed with the majority opinion holding that discrimination on the basis of sexual orientation or transgender status amounts to sex discrimination under Title VII. But their disagreement did not extend to treating LGBTQ people in the same disrespectful way as earlier dissents. The dissenters' argument against interpreting Title VII to encompass sexual orientation and transgender status within the meaning of "sex" focused in part on a discourse about society's mistreatment of LGBTQ people during the twentieth century, around the time Title VII was enacted.[95] The dissenters argued these societal norms informed what Congress meant when it enacted Title VII and showed it could not have intended to protect LGBTQ people.[96] However, their discussion of this history did not demean LGBTQ people or suggest the mistreatment was justifiable. To the contrary, the passage covering that history stated in concluding that "To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to 'update' Title VII."[97]

92. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 965 (N.D. Cal. 2010).

93. R. Blazak, *Oregon Citizen's Alliance*, OR. ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/oregon_citizens_alliance/#.YACtu-hKhPQ (last visited Apr. 27, 2021).

94. 140 S. Ct. 1731 (2020).

95. *Id.* at 1767–72 (Alito, J., dissenting).

96. *Id.* at 1771–72.

97. *Id.* at 1771.

B. Characterizing the Views of Judicial Colleagues

Another way that opinions undermine public confidence in the court and its decisions concerns the way judges express disagreement with the opinions of their colleagues. Justice Blackmun's dissent in *Bowers* was respectful of the court and specifically, the majority with which he disagreed. The same cannot be said of the dissents penned by Chief Justice Roberts and Justices Scalia and Alito in *Obergefell*.

Justice Blackmun concluded his *Bowers* dissent with the observation regarding an earlier case concerning the mandatory flag salute that "[i]t took but three years for the Court to see the error in its analysis" and his

> hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.[98]

Having criticized his colleagues' reasoning, Justice Blackmun nonetheless projected respect for the Court, observing it had changed its mind before and could do so again.

Compare that with the dissents from *Obergefell*. Chief Justice Roberts criticized the Court's decision as "an act of will, not legal judgment" and accused the majority as acting out of "its desire to remake society according to its own 'new insight' into the 'nature of injustice.'"[99]

Justice Scalia attacked the court's opinion as "lacking even a thin veneer of law,"[100] "unabashedly based not on law, but on the 'reasoned judgment' of a bare

98. Bowers v. Hardwick, 478 U.S. 186, 213–14 (1986) (Blackmun, J., dissenting).

99. Obergefell v. Hodges, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

100. *Id.* at 716

majority" of the "strikingly unrepresentative" Court,[101] "a naked judicial claim to legislative . . . power" that is "fundamentally at odds with our system of government,"[102] and a "judicial Putsch."[103] Justice Alito's dissent described it as "a bare majority of Justices . . . invent[ing] a new right and impos[ing] that right on the rest of the country" and accused the Court of "abus[ing]. . . its authority."[104]

These dissents included personal attacks on the majority opinion and portrayed the Court's decision as illegitimate. Such arguments are unnecessary, fail to advance reasoned debate, and undermine public trust in the Court and its decisions.

IV. WRITING JUDICIAL OPINIONS: HOW (AND HOW NOT) TO AVOID FANNING THE FLAMES OF DIVISIVE SOCIAL ISSUES

The following are proposed guidelines for writing opinions on divisive issues in a way that addresses the particular dispute without taking sides in the broader social fray. These suggestions are rooted in the idea that conveying respect for the litigants, their points of view, one's colleagues and their points of view, and the court itself encourages activists on both sides of a social issue to carry out their own broader debate in a thoughtful and civil manner. Fairly and even generously describing competing points of view models the kind of broader social debate that in the end may lead to publicly accepted resolutions, whether through changing minds, accommodating opponents or simply accepting an outcome one does not favor.

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101. *Id.* at 717–18, 720.

102. *Id.* at 717.

103. *Id.* at 718; *see also* United States v. Windsor, 570 U.S. 744, 801 (2013) (Scalia, J., dissenting) (accusing majority of "pawn[ing] today" "a system of government that permits us to rule *ourselves*" in order "to buy its stolen moment in the spotlight").

104. *Obergefell*, 576 U.S. at 742 (Alito, J., dissenting).

- **Focus on the relevant legal and constitutional issues and the reasoning behind the decision you have reached.** Ask yourself whether everything in your opinion is necessary to your legal points and eliminate extraneous comments. Peroration risks engagement in the broader social debate.
- **Describe facts and parties from a sympathetic or neutral standpoint and fairly describe the arguments on both sides.** Avoid disparaging either party or side or trivializing either's interests. Be generous to both. Assess the emotionality in your language. How will it be viewed by interested parties and others?
- **Don't generalize or characterize persons or groups on either side.** Remember that people who share a characteristic are not all alike, whether that characteristic is race, ethnicity, religious affiliation, gender, sexual orientation, or gender identity. We don't all think or act alike, even in regard to the characteristics we share. When a judge generalizes or characterizes a group (even internally), it can perpetuate stereotypes causing the judge and her readers to think of the people comprising that group as "other," "different," "not like me" and maybe even "not human."
- **Assure that the attention you give to the parties' competing arguments is balanced. Lay out the views of both sides in the dispute, giving roughly equal attention to both.** A litigant whose arguments are ignored in the opinion is unlikely to feel that he or she has been heard and allowed to participate equally in the adjudication process.
- **Refrain from attacking judicial colleagues. Don't ascribe improper motives or agendas to other judges. Fairly criticize reasoning but avoid personal**

attacks. Don't exaggerate the harmful consequences that may follow from another's position. In short, remain detached and disagree without being disagreeable. Doing otherwise can undermine the losing side's belief that they were heard and fairly treated and public confidence that the judicial system operates fairly and impartially.

- **Don't undermine the legitimacy of the court's decisions.** Relatedly, one can disagree about the proper boundaries of a court's role without suggesting the court has abused its power. If you are a judge, presumably you believe in the judicial system and the importance of its role in a constitutional democracy. Fidelity to our branch and our system of government demands that we show respect for the court as an institution, even when we disagree with the majority's decisions.

V. CONCLUSION

Americans have always had differences, and courts have played a role in resolving disputes that touch on issues of deep and abiding social disagreement. The public discourse has deteriorated in recent decades and one can debate whether judicial, even (or especially) Supreme Court, discourse has deteriorated along with it. But judges are role models, and the tone and content of what we write contributes to the dialogue, for better or worse. If we cannot write and speak respectfully toward disputants and judicial colleagues and their arguments, we must simply accept that contests over ideas among citizens will continue on the path they are on, devolving into public shouting matches. If our own discourse is one-sided and uncivil, the public will be justified in viewing the judicial branch as just a group of fellow shouters—people in robes with their own axes to grind, undemocratically imposing their views at the expense of democracy.