

POLARIZATION AT THE SUPREME COURT? SUBSTANTIVE DUE PROCESS THROUGH THE PRISM OF LEGAL THEORY

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ABSTRACT

Much has been written about Obergefell v. Hodges, holding that same-sex marriage is protected by the Fourteenth Amendment. Virtually all commentators view the decision as an example of an increasingly polarized Supreme Court.

This article challenges that characterization by analyzing Kennedy's majority opinion and Roberts' dissent in Obergefell in light of the legal theories of H. L. A. Hart and Lon Fuller. The article argues that, from a legal theory perspective, Kennedy and Roberts exhibit numerous, often surprising commonalities. In addition, Kennedy's arguments seem to accurately reflect the methodology he explicitly endorses. Roberts, in contrast, seems to exaggerate his originalist commitment to the Constitution because he relies on public policy assumptions that he fails to recognize or defend. I conclude that Kennedy's substantive due process approach is constrained by explicit Court precedents, rather than being open-ended or idiosyncratic, and that Roberts relies in key respects upon public policy, which is obscured by his claim of originalism and his focus on the separation of powers.

The legal theory analysis thus reveals a more penetrating, yet more moderating, theoretical framework within which to discuss disagreements about individual rights, especially evolving claims to previously unrecognized rights, than is possible based upon constitutional theory alone.

INTRODUCTION

Much has been written about the landmark decision *Obergefell v. Hodges*, in which the Supreme Court held that same-sex couples have a right to marry protected by the Fourteenth Amendment of the Constitution.¹ These characterizations depict Justice Kennedy and Chief

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Justice Roberts as polar opposites. Chief Justice Roberts and the other dissenters² say they evaluate the issues from an originalist, textualist, or traditionalist constitutional perspective.³ Critics of Justice Kennedy's reasoning see him as enlarging the scope of substantive due process based upon personal preferences or public policy,⁴ while supporters characterize the majority opinion as grounded in the common law, living constitutionalism, or deliberate democracy.⁵

The present essay, which analyzes Kennedy's and Robert's opinions in light of the legal theories of H. L. A. Hart and Lon Fuller, undermines these characterizations in two ways. First, although the contrast between the constitutional theories of Roberts and Kennedy appears at first to mirror the famous debate about the concept of law between Hart and Fuller, a deeper examination of the legal theorists' writings reveals that the two Justices depart in significant ways from the theorists they resemble. As a consequence, the comparison ultimately narrows the theoretical divide between the Justices.⁶

The result, however, is not symmetrical. Through the prism of legal theory, Kennedy's arguments seem to accurately reflect the methodology he explicitly endorses. Roberts, in contrast, seems to exaggerate his originalist commitment to the Constitution because he relies on public policy assumptions that he fails to recognize or defend.

In addition, the jurisprudential analysis underscores that Kennedy and Roberts share a fundamental kinship in their fidelity to the constitutional design of the American legal system because both Justices adopt a view of judicial decision-making that rests on sources internal to the Constitution's

and other shortcomings are solely mine.

1. 135 S. Ct. 2584 (2015).

2. Usually I refer to "the dissent" or "Roberts." Justices Scalia and Thomas joined the Chief Justice's dissent. *Obergefell*, 135 S. Ct. at 2611. Justice Scalia also dissented separately (which Justice Thomas joined); Justice Thomas wrote a separate dissent (which Justice Scalia joined); and Justice Alito dissented (which Justices Scalia and Thomas joined). *Id.*

3. See D.M. DORSEN, THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS 45 (2017); William N. Eskridge, Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 CATO SUP. CT. REV. 111, 118 (2015).

4. This is the position of the dissenters, among others. See *infra* note 60 and accompanying text.

5. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 164, 174–75 (2015) [hereinafter Yoshino, *A New Birth*]; Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31, 32–34, 39–41 (2017). Some commentators, however, see Justice Kennedy's opinion as a type of originalism. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2382 (2015); Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569, 620, 623–30 (2017).

6. See *infra* Part IV. Although the present analysis maps Kennedy's and Roberts' opinions in *Obergefell* onto the theories of Fuller and Hart, I do not claim that either Justice deliberately adheres to a specific legal theory in this decision or that each Justice is consistent in his decisions more generally. Were the Justices to deliberately situate their constitutional decisions within a legal theory framework, their decisions would likely be more consistent from a theoretical perspective as a result. At present, Justice Thomas is probably the Justice who comes closest to following this approach.

basic framework, rather than injecting external sources of law into their interpretations, as Kennedy is frequently alleged to have done. The legal theory analysis reveals a more penetrating, yet more moderating framework within which to discuss disagreements about individual rights, especially evolving claims to previously unrecognized rights, than is possible based upon constitutional theory alone.

These distinctions matter, in practice as well as in theory. There is a tendency to emphasize the degree to which the Supreme Court is polarized, paralleling the political polarizations in the country as a whole. This tendency, which focuses on the polarity of outcomes in many constitutional cases, is accurate as far as it goes. The present analysis, in contrast, focuses on the logical structure and theoretical aspects of the Justices' arguments rather than the substantive outcomes. It recognizes the commonalities of the protagonists and provides a broader context often lacking in contemporary debates about polarization on the Supreme Court, and it suggests that the tendency of each side to dismiss the reasoning of the other as illegitimate is itself illegitimate. Relatedly, by revealing the public policy dimensions of Roberts' approach, this analysis calls into question the moral high ground that some of the dissenters claim when they accuse Kennedy of lacking fidelity to the law.

Part I sets forth the constitutional dimensions of the contrast between Kennedy and Roberts in *Obergefell*. It describes the differences in their positions and reasoning that have led to the Justices' opinions being considered diametrically opposed. This Part concludes that the Justices' disagreements about constitutional theory reflect a deeper disagreement about the concept of law, which is a theme of legal theory. Constitutional theory typically takes the founding documents of a specific nation as the starting point of analysis. Legal theory, in contrast, understands legal systems and constitutional structures in general, that is, it works from a perspective external to and independent of any specific legal system, although to some extent informed by knowledge of the laws of specific nations. A legal theory framework can situate judicial decisions such as *Obergefell* in a more comprehensive framework than does constitutional theory.

Part II describes the legal theory of H. L. A. Hart, who shares Roberts' insistence on the importance of protecting the integrity of law's core meanings by denying a role for judicial discretion when analyzing clear or standard instances of a legal text. Although Roberts does not refer either to Hart or the positivist tradition that he exemplifies, this Part discusses the striking similarities between aspects of Hart's legal theory and Roberts' constitutional argument in *Obergefell*. Both Hart and Roberts emphasize that law must have a fixed core meaning to preserve its integrity and

maintain the distinction between the rule of law and the rule of men.

Part III explores Fuller's purposive theory of law and compares it to the reasoning of Kennedy's majority opinion, which largely reflects Fuller's concept of law. In rejecting Hart's theory of core meanings, Fuller argues that adjudicating even core or standard instances of legal texts depends upon understanding their purpose, not just the semantic features or everyday meanings of the texts' terms. The heart of Kennedy's due process argument in *Obergefell* illustrates this aspect of Fuller's theory, since it relies on the purposes and rationales set forth by the Supreme Court in the decisions that developed the view that marriage is a fundamental right protected by the liberty prong of the Fourteenth Amendment.

Part IV qualifies the observations elaborated in Parts II and III in significant respects. Based on an analysis of Hart's legal theory, I argue that Roberts in fact exercises a significant amount of judicial discretion in his dissent and that, in so doing, he relies on public policy rather than constitutional norms. This narrows the divide separating Roberts and Kennedy. Further, I argue that Kennedy's reasoning in *Obergefell* represents a form of purposivism restrained by the methodology and doctrines of prior Supreme Court cases rather than a reliance on the secular natural law theory often attributed to Fuller. This fact further undermines the sharpness of the contrast usually drawn between the two Justices.

Part V develops the evidence in support of Kennedy's restrained purposivism by elaborating the pivotal distinction between political or judicial discourse that relies on sources external to a particular nation's legal framework and discourse that develops a nation's legal system through sources internal to its constitutional design. Chief Justice Roberts' reasoning in *Obergefell* is a clear example of the internal approach, as are originalist decisions in general. But Kennedy's reasoning in *Obergefell* also conforms—albeit less obviously—to the internal sources approach in that it resolves the issue of same-sex marriage not only in a way that is faithful to the foundational principles of the Constitution, but also to the doctrines and practices of previous Supreme Courts confronting contested rights claims. Despite the disagreements between Roberts and Kennedy as a matter of constitutional law, then, from a broader legal theory perspective, both Justices exemplify an internal sources approach. Their dueling decisions in *Obergefell* remain squarely within, and faithful to, the original constitutional design.

I. CONSTITUTIONAL DIMENSIONS

In *Obergefell*, both Kennedy and three of the dissenters agree that marriage is one of the personal and intimate choices that the concept of liberty in the Fourteenth Amendment embraces and the Amendment's due process clause protects. Of course, neither the Constitution nor the Fourteenth Amendment mentions marriage. The Supreme Court referred in *dictum* to marriage as a fundamental right encompassed within the liberty protected by the Fourteenth Amendment as early as 1923,⁷ yet in 1955 it declined to overturn a Virginia Supreme Court opinion upholding the state's miscegenation law.⁸ It was not until 1967, in *Loving v. Virginia*, that the United States Supreme Court held that marriage is a fundamental right protected by the Fourteenth Amendment and that preserving racial purity is not an acceptable state interest that justifies restrictions on that right.⁹ The *Loving* decision rested primarily on equal protection grounds; however, the last page of the opinion also declared that the Fourteenth Amendment due process clause protects marriage as "one of the basic civil rights of man" and "a vital personal right essential to the orderly pursuit of happiness by free men."¹⁰ This proposition is now uncontested in American constitutional doctrine.

Since the majority opinion and the three dissents in *Obergefell* agree that marriage is a protected fundamental right,¹¹ the only contested issue was whether that right includes the right to marry a member of one's own sex.

Justice Kennedy begins from the premise that the judiciary's obligation to interpret the Constitution requires it first to identify and

7. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a state law prohibiting private and public schools from teaching a modern language other than English to students that had not passed the eighth grade because the law denied fundamental rights implicit in the liberty protected by the Fourteenth Amendment, namely, the parents' right to educate their children and teachers' right to pursue the profession of teaching). The Court also referred in *dictum* to the right to marry in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating, on Equal Protection grounds, a state sterilization law because it denied the fundamental right to procreate).

8. *See Naim v. Naim*, 350 U.S. 891 (1955) (vacating and remanding Virginia decision upholding state's anti-miscegenation law); *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956) (affirming earlier decision); *Naim v. Naim* 350 U.S. 985 (1956) (stating that a federal question was not properly before it). *See also* Richard Delgado, *Naim v. Naim*, 12 NEVADA L.J. 525 (2012) (arguing, against justifications of the Court's ruling as prudential, that the decision was wrong at the time).

9. 388 U.S. 1 (1967).

10. *Id.* at 12. The opinion fails to note that the phrase beginning "essential . . ." is a quotation from *Meyer*, 262 U.S. at 399.

11. Justice Thomas does not endorse a theory of substantive due process. *See infra* note 29. Throughout this article, "fundamental rights" refers to rights protected by the due process clause of the Fourteenth Amendment, which include the rights in the Bill of Rights that have been incorporated into the Fourteenth Amendment and other rights deemed fundamental. Courts and commentators disagree as to the meaning of the phrase. *See* MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* (2001).

protect the fundamental rights encompassed in the meaning of the liberty guaranteed by the Fourteenth Amendment's due process clause.¹² The heart of Kennedy's analysis is that this concept of liberty is not fixed; rather it has acquired new meanings throughout the nation's history.¹³ Thus, when the Court interprets the meaning of the fundamental right to marriage, it must take into account "new insights" into the "nature of injustice" that have developed in recent decades.¹⁴ Therefore, in addition to the rights specified in the Bill of Rights, the protected rights "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."¹⁵ These are the rights that "allow persons, within a lawful realm, to define and express their identity."¹⁶

While conceding that marriage had always been understood as a relationship between a man and a woman, Kennedy argues that this limitation is not inherent in the idea of marriage.¹⁷ First, he establishes that the meaning of marriage has undergone transformation in profound ways throughout history by recounting several legal and social changes that have occurred in the previous centuries. For example, arranged marriages have given way to voluntary ones, and women no longer lose property rights upon marrying (coverture).¹⁸ Kennedy attributes these changes to changing social attitudes, especially as regards the status and "dignity" of women.¹⁹ He then outlines a series of other developments—medical, social, and legal—that support the position that attitudes toward same-sex relationships have so evolved in recent decades as to favor understanding the dignity and associated rights sought by same-sex individuals as within the purview of the constitutionally protected freedom to marry.²⁰

12. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015). Toward the end of the opinion, Kennedy also argues that same-sex marriage is protected under the Fourteenth Amendment's equal protection clause. *Id.* at 2604–05. This aspect of the opinion has been criticized, even by those who do not criticize the due process analysis. In contrast, Peter Nicolas analyzes the case in a way that emphasizes the importance of the equal protection rationale. Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 *YALE J.L. & FEMINISM* 331, 343–52 (2016) (arguing that the due process clause protects primarily negative liberty rights, while the equal protection clause protects primarily affirmative liberty rights).

13. *See Obergefell*, 135 S. Ct. at 2598.

14. *Id.* at 2596, 2598.

15. *Id.* at 2597; *see infra* notes 99–105 and accompanying text.

16. *Id.* at 2593.

17. *See id.* at 2594.

18. *See id.* at 2595.

19. *Id.*

20. *Obergefell*, 135 S. Ct. at 2596–97.

Although these reflections buttress the proposition that there have been significant changes in attitudes toward the nature of the marital relationship in general, as well as attitudes toward the status of homosexuals, they do not in themselves compel the view that same-sex marriage should be considered the type of fundamental right that is guaranteed by the substantive due process clause. Nor does Kennedy presume that they do. Rather than resting the majority's constitutional holding exclusively on these changing social attitudes and legal developments, Kennedy seeks to establish it by analyzing the principles or reasons why marriage has been treated as a fundamental right in the first place for so long and by so many. While he accepts that "[h]istory and tradition guide and discipline this inquiry," Kennedy also asserts that they "do not set its outer boundaries."²¹ Kennedy's method thus "respects our history and learns from it without allowing the past alone to rule the present."²² At the same time, although he rejects the dispositive character of social and cultural history and tradition, Kennedy limits his expansion to views anchored in the Court's own precedents and pronouncements.

Chief Justice Roberts' dissent presents the issue in the first instance as one of the separation of powers and the role of the judiciary.²³ He emphasizes that the majority's decision may be correct as a matter of public policy, but public policy is the province of legislatures, not courts, because the latter are limited to interpreting, rather than creating, law.²⁴ Even if the legislatures of some states enact unwise policies into law, it is for the people, adhering to democratic practices, to right such wrongs.²⁵ If a court disregards this fact, it will erode the rule of law and substitute the rule of men in its stead.²⁶ For Roberts, then, the integrity of the Constitution and democracy in the United States depend upon the judiciary observing and safeguarding the boundary between the two branches.

Although Roberts argues that the issue dividing him and the majority is the role of the judiciary, not the merits or desirability of same-sex marriage, the bulk of his dissent implicitly concedes that the merits of the majority's position regarding same-sex marriage is paramount. This is because, as Roberts knows, the judiciary's proper role is derivative of the

21. *Id.* at 2598.

22. *Id.*; see *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (stating that, in substantive due process decisions, "history and tradition are the starting point, but not necessarily the ending point" of the inquiry).

23. *Obergefell*, 135 S. Ct. at 2611–12, 2616, 2624–25; see also *id.* at 2629 (Scalia, J. dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2642 (Alito, J., dissenting).

24. *Id.* at 2611.

25. *Id.* at 2612.

26. *Id.* at 2611.

constitutional status of the marriage right at issue. If that right is a fundamental right, then the Constitution requires the Court to ascertain whether that right has been accorded due process of law, i.e., whether the government has a compelling interest in infringing it. Fundamental rights warrant constitutional protection regardless of what majorities or legislatures prefer and do not depend on democratic processes for their protection.²⁷ Therefore, although Roberts states that his disagreement with the majority is merely structural, it actually depends, as a matter of logic, on the portions of the lengthy dissent that follow in which Roberts defends the proposition that the fundamental right of marriage is limited to opposite-sex marriage.²⁸ If he is correct about the meaning of the marriage right, and accepting his position about the Court's role, extending the right to marry to same-sex couples would be a matter of personal preference or public policy, which should be decided by legislatures. If the majority is correct that same-sex marriage is encompassed in the fundamental right of marriage, then the role of the judiciary is to determine if the denial of that right can be justified by a state's compelling interests.

Roberts' and the other dissenters' objections to considering same-sex unions fundamental under the substantive due process standard²⁹ derives in large part from their view that the plaintiffs are claiming constitutional protection for the right to same-sex marriage, rather than the right to marriage simply.³⁰ Their view is based on doctrines elaborated in a series of cases that seek to circumscribe the situations in which a court can discover a "new" fundamental right. According to one of the most cited of such cases, *Washington v. Glucksberg*, to warrant due process protection, fundamental rights must have two characteristics. First, they must be limited to those values that are "objectively, deeply rooted in this Nation's history and tradition"³¹ and "implicit in the concept of ordered liberty . . . such that neither justice nor liberty would exist if they were sacrificed."³²

27. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Obergefell*, 135 S. Ct. at 2605–06 (majority opinion); *Griswold v. Connecticut*, 381 U.S. 479, 496–97 (1965) (Goldberg, J., concurring) (rejecting Stewart's position that the state's contraception ban, though "uncommonly silly," was a matter of social policy for the legislature to decide and arguing instead that the question was for the Court to decide because marital privacy is a fundamental personal right).

28. *Obergefell*, 135 S. Ct. at 2616–21 (Roberts, C.J., dissenting).

29. All the Justices except Thomas accept some version of substantive due process. Thomas would confine the Fourteenth Amendment's due process clause to procedural due process, and he argues that the only freedom protected by the liberty provisions of the due process clause is freedom from physical restraint and government intrusion. See *id.* at 2632–35.

30. See *id.* at 2614–15, 2619–20 (Roberts, C.J., dissenting) (stating the core meaning of marriage, i.e., marriage as traditionally defined, is the right protected by the due process clause and Supreme Court precedents); *id.* at 2628 (Scalia, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

31. *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

32. *Glucksberg*, 521 U.S. at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)). See also *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Lawrence v. Texas*, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (asserting that the two quoted formulations constitute two different

While the right to marry can be seen as qualifying from the perspective of history and tradition, according to Roberts, the right to same-sex marriage cannot.

Second, to qualify for protected fundamental status, a right must have “a careful description.”³³ Although the meaning of this expression is unclear,³⁴ the requirement is intended to constrain judges in the way they formulate new fundamental rights. In 1989, in *Michael H. v. Gerald D.*, Justice Scalia stated this specificity requirement narrowly as requiring a court to find “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”³⁵ In *Michael H.*, a biological father claimed that the state was denying his rights as a parent, at a time when parental rights had already been recognized as fundamental for Fourteenth Amendment purposes by the Court.³⁶ Scalia reframed the parent’s claim as the alleged fundamental right of a biological father of a child born during an adulterous relationship with a married woman to prove paternity or be allowed visitation. Then, relying upon his asserted “most specific level” methodology, Scalia rejected the parent’s claim because there was no established historical tradition for a right thus described.³⁷ Although three other Justices joined Scalia’s plurality opinion, two of them wrote a concurrence to reject his “most specific right” methodology because it demanded more specificity than the Court’s precedents required and it could prove excessively narrow in particular situations.³⁸ Subsequent substantive due process decisions have avoided using Scalia’s “most specific right” language. Several have framed the right seeking constitutional protection in quite specific terms,³⁹ while others have not. Scalia, however, continued to employ his version of the second

standards). Cf. *McDonald v. City of Chicago*, 561 U.S. 742, 909 (2010) (Stevens, J., dissenting) (disputing the “deeply rooted” requirement and pointing out that the right to interracial marriage in *Loving* was not deeply rooted in the American tradition).

33. *Glucksberg*, 521 U.S. at 721.

34. See *Reno v. Flores*, 507 U.S. 292, 302 (1993) (originating the phrase). At a minimum, it seems to demand that the new right be particularized and concrete. On the *Glucksberg* two-step approach and the “careful description” condition, see Nicolas, *supra* note 12, at 336–41.

35. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion). See Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 U. PA. J. CONST. L. 387, 392 (2008) (questioning Scalia’s formulation); Yoshino, *A New Birth*, *supra* note 5, at 156–57 (describing the academic criticism of Scalia’s “most specific” standard).

36. See *Michael H.*, 491 U.S. at 118–21.

37. *Id.* at 124–27.

38. *Id.* at 132 (O’Connor, J., concurring in part).

39. See, e.g., *Cruzan v. Missouri*, 497 U.S. 261 (1990); *Reno v. Flores*, 507 U.S. 292 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 733 (1997) (rejecting the claim as “the right to determine the time and place of one’s own death,” and framing it instead as “the right to physician-assisted suicide”). But see *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (framing the issue as whether the right of adults to have consensual sexual intimacy in their home is a protected liberty interest).

Glucksberg criterion in other substantive due process cases.⁴⁰

The disagreement between the majority and the dissent raises many of the perennial questions regarding the nature of law: Does law have a settled or core meaning? If so, what criteria determine which aspects of existing legal materials are settled or core? Is the settled or core meaning settled for all time, or can it develop? If it can develop, under what conditions can, or should, this occur? If an issue to be decided falls under what some jurists call the “penumbra,” rather than the core meaning of a provision or precedent, what method should a judge use to decide the controversy? In adjudicating a new case, can a judge decide the outcome based solely on the core meanings of existing decisions, or can he or she also draw on the penumbras of earlier decisions? Once a controversy located in the penumbra of existing law is decided, will that new decision affect the core or settled meaning in future cases? These and related questions form the heart of the debate over what used to be called the “concept of law.”

Although Kennedy and Roberts are in the first instance presupposing different understandings of constitutional theory and the separation of powers, on a deeper level their positions reflect a disagreement about the concept of law itself. This fact is apparent in the case of their competing notions of the nature of substantive due process. As is detailed in what follows, both Justices’ statements reveal their awareness that how broadly or narrowly one views the reach of substantive due process is a function of one’s theory of law. However, both formulate that insight largely in terms of constitutional law rather than the broader perspective of legal theory or jurisprudence. In contrast, the relation between their respective views of the role of the judiciary is less obviously connected to a concept of law. The reason is that both Justices see the separation of powers as a structural premise of the Constitution or uncontested axiom of constitutional reasoning. However, as is discussed below, how one interprets the meaning of that constitutional norm is itself dependent upon a concept of law.

II. ROBERTS’ DISSENT AND THE LEGAL THEORY OF H. L. A. HART

How can we understand and evaluate the difference of opinion between Kennedy and Roberts regarding the nature of substantive due process? To begin, there is an obvious parallel between their disagreement and the debate between H. L. A. Hart and Lon Fuller as to the correct interpretation of the concept of law. Hart was one of the foremost legal positivists, and Fuller famously argued against positivism’s insistence that

40. See, e.g., *Lawrence*, 539 U.S. at 594–96 (Scalia, J., dissenting) (framing the petitioner’s claim in terms of a fundamental right to engage in homosexual sodomy).

law and morality are conceptually distinct ideas. Hart and Fuller conducted a much-discussed debate on the relationship between morality and law that was initially published in 1958 in the *Harvard Law Review* and expanded on in their later writings.⁴¹

Roberts argues that there has always been a core definition of marriage and that the changes that have occurred in society's understanding of marriage over the centuries have not altered the core meaning.⁴² The Chief Justice establishes that the core meaning of marriage only entails a union of one man and one woman in several ways.⁴³ Marriage, he points out, has always been associated with procreation and the need to provide children with a stable and enduring family.⁴⁴ Second, every state since the Constitution's ratification has assumed that marriage has this biological basis.⁴⁵ Roberts also cites three dictionaries that define marriage in terms of one man and one woman as well as the Court's own precedents to support his position.⁴⁶ Finally, he observes that the man in the street would not view one of Kennedy's allegedly transformational developments, such as decoupling married women's property rights from those of their husband's, as altering the definition of marriage.⁴⁷ Thus, he concludes that the changes viewed by Kennedy as transformational did not actually affect the core meaning of marriage, which continues to presuppose the union of one man and one woman.

Roberts' emphasis on constitutional terms having a fixed core meaning recalls the theory of law elaborated by Hart. According to Hart, legal terms and rules contain a core meaning or standard case as well as a penumbra, or area in which it is unclear if a general rule or meaning applies, because the facts at issue exhibit some but not all of the features of the standard case.⁴⁸ In the core or standard case, there is no ambiguity

41. See *infra* note 48, at 55. See also articles about the Hart-Fuller debate in *Symposium: Fifty Years Later*, 83 N.Y.U. L. REV. 993 et seq. (2008).

42. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2614, 2619, 2621 (2015) (Roberts, C.J., dissenting).

43. Roberts does not say whether there are additional core components beside procreation.

44. *Obergefell*, 135 S. Ct. at 2613. Roberts does not address the fact that, under state law, entitlement to marriage has never required couples to be able or willing to having children. Nor does he note that often members of same-sex couples contribute one-half of the genetic endowment of their children and other same-sex couples create families by adopting children.

45. *Id.* at 2614.

46. *Id.*

47. *Id. Cf.* *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting) (noting that changing notions of marriage and the family can have "profound effects" and "far-reaching consequences").

48. See H. L. A. HART, *THE CONCEPT OF LAW* 12–13, 123, 126–29 (2d ed. 1994) [hereinafter HART, *CONCEPT OF LAW*]; H. L. A. Hart, *Positivism and the Separation of Law and Morals: Reply to Hart*, 71 HARV. L. REV. 593, 607–15 (1958) [hereinafter Hart, *Positivism*]. The second edition of Hart's *Concept of Law* contains a "Postscript" that was added posthumously based upon an incomplete chapter that Hart had intended to include in a new edition of the original work, which was published in

as to the meaning of the term or rule. In the penumbra, however, the application of the standard case is not obvious or mechanical. Hart illustrates the distinction between core and penumbra with the example of a prohibition against “vehicles” in a park. While an automobile, motorcycle, or bus is clearly barred by the prohibition, Hart questions whether the application of the rule to bicycles, roller skates, or electrically propelled toy cars is equally obvious.⁴⁹ Although Hart’s purpose in this passage is to elaborate how judges should treat the penumbra or non-standard case, he concludes that “the hard core of settled meaning is law in some centrally important sense and . . . even if there are borderlines, there must first be lines.”⁵⁰ This echoes Roberts’ concern that without clear and precise limits on the values recognized as fundamental by the Fourteenth Amendment, the rule of law will dissolve into the rule of men.⁵¹ Hart cautions further that “to suggest that all legal questions are fundamentally like those of the penumbra” amounts to asserting that “there is nothing in the nature of a legal rule inconsistent with *all* questions being open to reconsideration in the light of social policy.”⁵²

Relatedly, Roberts and Hart agree on another aspect of the concept of law. For Hart, the concept of law properly includes only what has been adopted by designated lawmaking authorities. These authorities create the rules whose core meanings are the fixed elements of law. It follows, for Hart, that as a conceptual matter, the validity of law depends upon its pedigree, rather than its content or substance.⁵³ For Hart, then, the essence of law can, and should, be understood entirely without reference to how law ought to be in the moral sense of “ought.”⁵⁴ However, he does not deny that laws can in fact serve moral or just ends or that communities may specifically include moral norms in their constitutions or statutes. For example, Hart acknowledges in the “Postscript” to *The Concept of Law* that a nation may make substantive principles of justice or moral values criteria of law internal to the legal system, as the United States has done in several of the amendments to its constitution.⁵⁵ Absent such

1961. Because the themes developed in this article are discussed in the *Postscript*, I cite throughout the second edition. Hart also speaks of the “core of certainty” and the “penumbra of doubt.” HART, CONCEPT OF LAW, *supra* note 48, at 123.

49. *Id.* at 129; Hart, *Positivism*, *supra* note 48, at 607.

50. Hart, *Positivism*, *supra* note 48, at 614.

51. See *Obergefell*, 135 S. Ct. at 2622–23 (2015) (Roberts, C.J., dissenting); see also *id.* at 2643 (Alito, J., dissenting).

52. Hart, *Positivism*, *supra* note 48, at 615; see HART, CONCEPT OF LAW, *supra* note 48, at 152 (stating that “though every rule may be doubtful at some points, it is a necessary condition of a legal system existing, that not every rule is open to doubt on all points”).

53. *But see*, however, *infra* notes 55 and 56 and accompanying text. For the way in which this works in the penumbra, see *infra* notes 120–22 and accompanying text.

54. See Hart, *Positivism*, *supra* note 48, at 606, 612–15.

55. HART, CONCEPT OF LAW, *supra* note 48, at 247, 250–51, 258 (stating that he rejects “plain fact” Positivism in favor of “soft” Positivism, which admits criteria of legal validity other than

circumstances, law is what is determined by an authoritative institution or source, rather than by its content, justification, or function.⁵⁶ Therefore, as a conceptual matter, law and morality are separate; morality is not necessary for law to be law, even if law and morality often coincide. To support this position Hart notes that evil laws can and do exist.⁵⁷

Similarly, Roberts begins his dissent by noting the strength of the petitioners' claims in terms of "social policy" and "fairness," but counters that "judges have power to say what the law is, not what it should be."⁵⁸ He thus rejects Kennedy's reliance on principles and reasons that explain or justify existing laws, in addition to relying upon the laws themselves, established traditions, and settled precedents. For Kennedy, in contrast, the concept of law itself includes the principles and justifications for enacted or other conventional legal materials, so that the foundations of the right to marriage are part of the right itself and may be used to determine the full extent of the right's meaning. Roberts' response is blunt. Kennedy's claim is pure *Lochnerism*⁵⁹: In his view, Kennedy's position enables the majority of the Court to elevate its personal view of wise treatment for same-sex couples to the status of a constitutional norm.⁶⁰

At the same time, Roberts does not deny the possibility of the judiciary creating new rights, apparently approving changes to core meanings under certain circumstances. To narrow the scope of this departure from strict adherence to the separation of powers, Roberts would limit new rights to values that are "objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered

pedigree). He clarifies further that there are "variable standards" in legal systems in addition to "near-conclusive rules." He likens the former to what Ronald Dworkin calls "principles," and he appears not to be referring specifically to legal reasoning in the penumbra because his illustrations are situations in which lawmakers deliberately craft legislation using general or vague terms because of the nature of the subject area to be regulated. *See id.* at 130–33, 263. Hart also does not seem to be referring to the principles of fairness or justice, mentioned in the text, that individual legal systems may choose to incorporate. *See also infra* note 56.

56. This is the point of Hart's theory of rules of recognition, which identify the sources of legal rights and obligations. *See* LON FULLER, *THE MORALITY OF LAW* 192 (rev. ed. 1969) [hereinafter FULLER, *THE MORALITY OF LAW*]; Brian Bix, *Jules Coleman, Legal Positivism, and Legal Authority*, 16 QUINNIPIAC L. REV. 241, 245 (1996). In addition to "pedigree," Hart speaks of law's "social sources," which include legislation, the decisions of courts, and "social customs." *See* HART, *CONCEPT OF LAW*, *supra* note 48, at 101, 269.

57. *See* Hart, *Positivism*, *supra* note 48, at 596 (quoting Austin). For Hart and other positivists, the claim that law must have a moral dimension is not only inaccurate; it is also dangerous. *See id.* at 598.

58. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015).

59. For a pungent critique of Roberts' *Lochner* claim, see Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 124–26 (2015).

60. *See Obergefell*, 135 S. Ct. at 2612, 2616–19, 2621 (Roberts, C.J., dissenting); *see also id.* at 2630–31 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting).

liberty.”⁶¹ This would protect the law’s core meanings by cabining judicial discretion by anchoring it to longstanding and widely accepted beliefs. Although Roberts and the other Justices express the forgoing concerns in many areas of law, they seem especially anxious in connection with family law, fearing that Kennedy’s methodology will undermine any basis for states to continue prohibiting plural or incestuous marriages.⁶²

Both Roberts and legal positivism voice concern that linking the legitimacy of law to its moral character could have dangerous consequences. Yet, their fears are not parallel. One of the consequences mentioned by Hart is the potential for anarchy if individuals can dismiss as invalid laws lacking the moral norms they espouse or embodying moral norms at odds with their moral views.⁶³ In that event, people’s expectation that law must be moral to be valid could lead them to acts of disobedience based upon their own moral views. To the extent that Roberts focuses on the potential for “anarchy,” his concern is that Supreme Court Justices will demand that constitutional doctrine embody their personal notions of justice and morality.⁶⁴ At most, Roberts may allude to Hart’s concern indirectly when he says that the majority’s holding is dangerous for the rule of law.⁶⁵ Since in the United States, it is axiomatic that there is a multiplicity of divergent views on most matters of moment, legitimacy and, therefore, stability depends upon respect for the rule of law. That respect, Roberts argues, depends on people’s faith in the democratic processes, and the legitimacy of the courts depends upon judges rendering judgments consistent with the integrity of those processes.

61. *Id.* at 2618 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)) (Roberts, C.J., dissenting). Roberts concludes that Kennedy’s opinion “effectively overrule[s] *Glucksberg*.” *Id.* at 2621 (Roberts, C.J., dissenting).

62. *See id.* at 2621–22 (Roberts, C.J., dissenting) (asking how to distinguish plural marriage from same-sex marriage and stating that plural marriages might “compel different legal analysis”); *see* *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting); *see* Transcript of Oral Argument at 5, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556 Question 2) (Scalia wondering if a state would have to recognize the marriages of a man who had married multiple wives in a country permitting polygamy); *see also* Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L.J. 79 (2017); Y. Carson Zhou, *The Incest Horrible: Delimiting the Lawrence v. Texas Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187 (2016) (arguing that there is no legal basis for excluding incestuous relationships from the fundamental right to intimacy in many cases and suggesting that norms against such relationships are in the process of changing).

63. *See* Hart, *Positivism*, *supra* note 48, at 597–98. The second danger of denying the separability of law and morality noted by Hart goes in a different direction; it is the general weakening of citizens’ moral beliefs when duly enacted laws of their country reflect questionable or even reprehensible moral norms. The fear expressed by legal positivists is that because of their expectation that law necessarily reflects morality, unjust laws will undermine citizens’ moral compass—something that some observers claim contributed to citizen apathy in Nazi Germany. *See id.* at 597–99, 616. Roberts and the other dissenters do not mention this concern in their opinions. Justice Scalia mentioned the potential for anarchy as a reason not to employ the compelling reason standard to regulation in *Emp’t Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 888 (1990).

64. *See supra* note 60 and accompanying text.

65. *See Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

III. KENNEDY'S OPINION AND THE LEGAL THEORY OF LON FULLER

Kennedy's method for determining which rights are fundamental, especially his recourse to the meaning of marriage based on a combination of its history and justifications advanced in Supreme Court precedents that consider marriage fundamental, bears an obvious resemblance to Lon Fuller's understanding of the concept of law. Similarly, the criticism leveled against Kennedy, that he has imported his subjective ideas of justice or morality, parallels the criticisms leveled against Fuller for his purposive theory of law.

Fuller argues that law cannot be understood adequately without understanding it as a purposeful enterprise and that individual legal precepts are fully intelligible only by taking into account their purposes when elucidating their terms.⁶⁶ He contrasts his view with that of Hart and other positivists who try to define law in terms of the authority of the lawmaking body that created it.⁶⁷ Hart's theory of the core and penumbra, according to Fuller, reflects the positivist perspective because it posits that a word or rule's standard instance can be understood solely in terms of its semantic features rather than as reflecting the context or purpose that explains, justifies, or otherwise renders the term or rule meaningful.⁶⁸ Fuller counters that the purpose is always an essential ingredient of a legal text, but that we frequently do not refer to its purpose because the purpose,

66. See FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 145–51; see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 662–69 (1958) [hereinafter Fuller, *Positivism and Fidelity*].

67. See FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 137, 192. Hart acknowledges that moral values can also be part of this process, but only if a lawmaking authority has incorporated such values into the legal materials. See *supra* note 55 and accompanying text.

68. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 661–64. The connection implied between semantic inquiries and preoccupation with institutional authority seems to be that focus on the originator of laws leads to a parallel focus on what the originator's legal product means rather than focusing on why the originator chose to create that product. For a useful discussion of purposive interpretation of statutes and a short history of its role in twentieth century Supreme Court decisions, see Donald G. Gifford et al., *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation: Bruesewitz v. Wyeth*, 64 *S.C. L. REV.* 221, 231–35 (2012).

and thus the sense of the text, is obvious.⁶⁹ This has led people to assume, wrongly, that there are standard instances of a term or a rule that are fixed and can be understood without reference to their purpose—what Fuller calls “an inert datum of meaning,”⁷⁰ namely, a self-sufficient axiom of legal reasoning.

To bring home his objection, Fuller returns to Hart’s example of the prohibition against vehicles in a park. For Hart, the core meaning or standard instance of “vehicle” was a car or similar conveyance. Fuller offers a hypothetical in which “local patriots” want to create a memorial to World War II by placing a working military truck in the park. Fuller asks whether others who use the park and find the proposed monument an eyesore could convince a judge to bar it as a clear example of the standard case of the prohibition, given that the truck has all the features of the vehicles clearly banned.⁷¹ Fuller’s point is that even a single, everyday word contained in a rule may not be correctly understood without recourse to the purpose of the rule, since the outcome of the patriots’ truck hypothetical would depend upon the goal of the prohibition,⁷² i.e., whether the purpose was to reduce noise, preserve clean air, create a pastoral environment, assure a safe place for children to play, etc.

As previously noted, Hart supported his theory that law and morality are fundamentally separate ideas, in part, by observing that evil laws can and do exist.⁷³ Fuller does not deny this fact. His position is not that laws must promote an objective or extrinsic good to be law, as natural law theory is thought to require.⁷⁴ Rather, he argues that law must embody an “inner morality,” which includes requiring legal rules to observe certain canons, such as being general in scope, public or transparent, feasible to

69. Fuller, *Positivism and Fidelity*, *supra* note 66, at 663.

70. Fuller, *Positivism and Fidelity*, *supra* note 66, at 669. See FULLER, THE MORALITY OF LAW, *supra* note 56, at 156 (calling vacuous “the view that law simply expresses a datum of legitimated social power”). Fuller directs this critique at Hart’s account of the core or standard instance. He acknowledges that Hart agrees that judges rely on the purpose of a rule or term in the penumbra. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 662, and *infra* notes 73–75 and accompanying text. In FULLER, THE MORALITY OF LAW, *supra* note 56, at 146, in contrast, Fuller appears to recognize that positivists accept the idea of individual rules as purposeful, but not institutions or legal systems as a whole.

71. Fuller, *Positivism and Fidelity*, *supra* note 66, at 663.

72. See *id.* He illustrates his point with two other examples where the meaning of a term varies greatly depending upon the surrounding context. See *id.* at 664–67.

73. See *supra* note 57 and accompanying text.

74. See FULLER, THE MORALITY OF LAW, *supra* note 56, at 153 (stating that the inner morality of law may be “indifferent to the substantive aims of law”), 155–56 (distinguishing between law, which exhibits an “inner morality,” and good law); LON L. FULLER, THE LAW IN QUEST OF ITSELF 100–01, 110 (1940); Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 467 (1954) [hereinafter Fuller, *American Legal Philosophy*]; see also Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All*, 20 CAN. J.L. & JURIS. 201, 202 (2007) (distinguishing between natural law theorists who believe that immoral laws are not legally binding and those who believe that they may be legally binding, but not morally obligatory).

obey, consistent with each other, clearly stated, and stable over time.⁷⁵ Although norms of this kind may be observed by regimes that enact evil laws, Fuller claims that the inner morality of law cannot be construed as merely stating procedural norms required for law to be effective.⁷⁶ Rather, he says, a legal system is impossible without “general acceptance” by those subject to the law, which presupposes “an appreciation of the reasons why these rules [of law] are necessary.”⁷⁷ The “habit of obedience” to laws⁷⁸ that some believe can ensure a regime’s stability itself depends on people possessing certain attitudes. In other words, “it is clear that the obligation of fidelity to positive law cannot itself be derived from positive law.”⁷⁹ In short, for Fuller, law can command specific behaviors, and reinforce those commands with sanctions, but it cannot command willing law-abidingness without itself containing the inner morality of law.⁸⁰

Fuller makes a further, more questionable assertion, namely that a legal system that observes the inner morality of law will tend toward promoting outcomes that meet an external moral standard, by “working itself pure.”⁸¹ In this regard, he notes that many of the worst excesses of the Nazis occurred when they disregarded the requirements or content of their own enacted laws.⁸² More generally, he expresses doubts that an “evil monarch” pursuing “the most iniquitous ends” would consistently observe

75. See FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 33–41. These standards are elaborated in *id.* at 46–91. In addition, Fuller believes that laws must usually, though not invariably, be prospective and must be administered consistent with their terms to be valid. He adds that “a total failure” of any of the canons he lists would cause a “legal system” to cease to be valid, i.e., to command our obedience as a moral obligation. *See id.* at 39.

76. See FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 200–04.

77. *Id.* at 463.

78. *Id.* at 465.

79. *Id.* at 468.

80. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 656. See also Fuller, *American Legal Philosophy*, *supra* note 74, at 462 (observing that “[m]any Americans” believe law is grounded in physical force and “resist strongly any suggestion” that rests upon “a moral power, reflecting the persuasive force of accepted rules”), 484 (stating that “[l]egal positivism has been unable out of its own resources to construct any justification or explanation for the obligatory force of law”); FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 39. Some commentators have disputed Fuller’s claim that the standards he lists create a moral basis for obeying the law. See Marshall Cohen, *Law, Morality and Purpose*, 10 VILLANOVA L. REV. 640, 650–54 (1965).

81. See Fuller, *Positivism and Fidelity*, *supra* note 66 at 636–37; FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 157–59. The phrase was used by Lord Mansfield, when he was Solicitor-General, in reference to the common law. Fuller, *Positivism and Fidelity*, *supra* note 66, at 668. Fuller calls the inner morality of law a “morality of aspiration,” which he explains as the challenge of excellence, FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 170, which he contrasts with the morality of duty. *Id.* at 5–8, 170. Yet he also asserts that the inner morality of law is a continuum, at the lower end of which is a duty of obedience. *Id.* at 42.

82. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 650–55. If it is true that the Nazis were reluctant to make public the more reprehensible methods they used to terrorize the population, this fact may suggest that the regime would have committed fewer atrocities if it had felt bound to observe the usual processes for lawmaking and adjudication.

the “principles of legality.”⁸³ With this claim, Fuller appears to seek to reach a natural law outcome indirectly, without endorsing natural law principles or methods.⁸⁴

Fuller thus sees the connection between his understanding that views purpose as an essential ingredient of law and the concept of law as inherently moral. As a consequence, he appreciates that positivists seem to fear “anarchy” if core meanings are open to purposive interpretation, that is, judges could manipulate the meaning of laws by appealing to their own interpretation of a law’s unstated purpose.⁸⁵ This would enable each judge to inject his or her personal moral preferences into what will become codified as law.⁸⁶ In fact, Fuller agrees that positivists are right to fear potential abuses of purposive interpretations because “interpretation may be pushed too far” and judges could conceivably use the underlying rationale of a statute to reach results inconsistent with the obvious meaning of a literal text.⁸⁷

Fuller argues that what positivists fear the most, however, is “tyranny,” that is, the potential for coercive rulings that would threaten “human freedom and human dignity.”⁸⁸ He illustrates this threat by depicting a jurisdiction that prohibits golf on Sundays in order to encourage people to attend church, a result he seemingly dislikes, but labels merely an “inconvenience.”⁸⁹ Some people, he adds, may fear that the purposive approach to interpretation could also encourage more objectionable measures to force people to attend church, such as expressly requiring them to attend church or even to “kneel and recite prayers.”⁹⁰ For Fuller, this phenomenon, which he calls “impressed purpose,” is in fact “a crucial one in our society,” and he cites as examples the National Labor Relations Act’s directive to bargain in good faith and a state statute compelling students to salute the American flag, which was initially

83. FULLER, THE MORALITY OF LAW, *supra* note 56, at 154.

84. See *supra* note 74 and accompanying text; see also *infra* note 94 and accompanying text.

85. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 670–71.

86. See *id.* at 670. Fuller, however, believes that the positivists’ deepest fear is otherwise. See *infra* notes 88–94 and accompanying text.

87. See Fuller, *Positivism and Fidelity*, *supra* note 66, at 669–70. Fuller’s example of the latter is a hypothetical ruling that a statute prohibiting the sale of absinthe could be interpreted as requiring the sale of absinthe because the goal of the statute is to promote health and it is well established that absinthe promotes health. See *Church of the Holy Trinity v. United States*, 134 U.S. 457 (1892). Fuller himself approves of courts interpreting the constitutional prohibition against “impairing the obligation of contracts” to include a prohibition against *enhancing* contractual obligations because, in his view, the reason for the constitutional provision was opposition to retroactive legislation. FULLER, THE MORALITY OF LAW, *supra* note 56, at 103.

88. Fuller, *Positivism and Fidelity*, *supra* note 66, at 670–71. Fuller says that, although the threat is real, a better solution to the problem is for judges to be constrained by the “structural integrity” of a statutory or common law rule. See *id.* at 670 (equating this with the intent of a statute and conceding that his answer lacks precision).

89. *Id.* at 671.

90. *Id.*

upheld by the Supreme Court.⁹¹ He concludes that the problem of government directives requiring people to act in a certain way, as contrasted with requirements to refrain from acting in certain ways,⁹² is increasingly acute because of the government's growing role in economic affairs.⁹³ Elsewhere Fuller explains the positivist's fear more simply, namely, as the suspicion that introducing natural law concepts into law could lead to "fastening on society some all-embracing orthodoxy."⁹⁴ If he is correct about their fears, Fuller's inner morality of law would not appear to create a threat of that kind.⁹⁵

Assuming that Fuller is correct about the impetus for Hart's rejection of purposive interpretations of the core or standard instance of a term or rule, how likely is such a situation to arise? Is Kennedy's reasoning in *Obergefell* an example of Fuller's purposive interpretation, and if so, does it create the type of coercive result that Fuller believes is problematic? The key passage in the decision is Kennedy's analysis of the "basic reasons why the right to marry has been long protected."⁹⁶ These reasons, Kennedy says, are revealed through the Court's precedents that "have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond."⁹⁷ Four "principles and traditions," he argues, ground those precedents and they "apply with equal force to same-sex couples."⁹⁸

The first principle that Kennedy discusses is that the ability to get married is a right "inherent in the concept of individual autonomy."⁹⁹ The

91. *Id.* The Court's flag salute holding was overturned three years later. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

92. Fuller thus anticipated the distinction made by contemporary theorists between Fourteenth Amendment liberty understood as negative rights, i.e., rights protected from government interference, and affirmative rights, i.e., rights that "requir[e] . . . the active participation of the state." See Susan Frelich Appleton, *Obergefell's Liberties—It's All in the Family*, 77 OHIO ST. L.J. 919, 931–32 (2016).

93. Fuller, *Positivism and Fidelity*, *supra* note 66, at 672. See Luke P. Norris, *Constitutional Economics: Lochner, Labor, and the Battle for Liberty*, 28 YALE J. LAW & HUMANITIES 1 (2016) (arguing that the courts' substantive due process jurisprudence in economic affairs laid the foundation for the non-economic substantive due process rulings in *Griswold v. Connecticut* and the Fourteenth Amendment personal liberty cases decided after that); see also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

94. Fuller, *American Legal Philosophy*, *supra* note 74, at 463. Fuller labels the positivist's desire to conceive of law as "ideologically neutral" as itself a "moral motivation." *Id.*

95. Fuller associates external notions of morality with what he calls "the morality of aspiration," while the inner morality of law seems to demand only a minimal degree of "the morality of duty." See FULLER, *THE MORALITY OF LAW*, *supra* note 56, at 4–5, 40–46. For a concise summary of those who argue that Fuller's inner morality amounts to the conditions of efficiency, not morality, see Peter P. Nicholson, *The Internal Morality of Law: Fuller and His Critics*, 48 ETHICS 307 (1974).

96. 135 S. Ct. 2584, 2599 (2015).

97. *Id.* at 2598.

98. *Id.* at 2599.

99. *Id.*

two precedents he cites for the relationship between autonomy and the decision to marry are *Loving v. Virginia*¹⁰⁰ and *Zablocki v. Redhail*.¹⁰¹ *Loving* struck down a state's prohibition of interracial marriage; *Zablocki* invalidated a state statute that attempted to prevent persons in arrears in child support from marrying. In *Loving*, although the state statute was invalidated primarily on equal protection grounds, the Court also stated that it violated the due process clause because it inhibited a person's "freedom of choice to marry," "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and "the freedom to marry or not marry . . . resides with the individual."¹⁰² *Zablocki* repeated the language of *Loving* and subsequent cases based on it.¹⁰³ The *Zablocki* Court noted that the *Loving* Court could have decided the case exclusively on equal protection grounds, but deliberately chose to include the due process dimension of the right in question.¹⁰⁴ The *Zablocki* Court also quoted the reference in *Cleveland Board of Education v. LaFleur* to precedents recognizing "the freedom of personal choice in matters of marriage and family life" as part of the liberty protected by the Fourteenth Amendment.¹⁰⁵

All of these decisions focus on the importance of individuals' ability to make choices that bear directly on the personal relationships that are central to their identity. Thus, they rely on the purpose they attribute to the liberty prong of the Fourteenth Amendment due process clause, as it relates to the decision to marry. Kennedy then argues that same-sex couples are similarly protected because the choice to marry shapes their destiny and contributes to their identity in the same way as for

100. 388 U.S. 1 (1967).

101. 434 U.S. 374 (1978). These two cases discuss liberty, not autonomy, but Kennedy appears to equate the two. See *Obergefell*, 135 S. Ct. at 2599; *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion by Justices O'Connor, Kennedy, and Souter, JJ.)). In *Lawrence*, Kennedy states that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." 539 U.S. at 562. Philosophers and political theorists sometimes distinguish freedom and autonomy. See, e.g., Thomas Nys, *Re-Sourcing The Self? Isaiah Berlin and Charles Taylor and the Tension Between Freedom and Autonomy*, 11 ETHICAL PERSPECTIVES 215 (2004); John Christman, *Saving Positive Freedom*, 33 POL. THEORY 79 (2005).

102. 388 U.S. at 12. The second quotation derives from *Meyer v. Nebraska*, which upheld the rights of teachers, students, and parents to have German taught in public schools on the grounds that the Fourteenth Amendment guarantee of liberty included:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 399, 399 (1923)

103. See *Zablocki*, 434 U.S. at 383–87.

104. *Id.* at 383.

105. *Id.* at 385 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

heterosexual couples.¹⁰⁶ Kennedy does not assert the purpose underlying the precedents out of whole cloth, given that the precedents he cites make explicit the underlying purposes of liberty in the Fourteenth Amendment and its connection to the right to marry. Rather, Kennedy applies the principles enunciated in the earlier cases to a new set of facts that arguably are comprehended by the principles stated.¹⁰⁷ At the same time, Kennedy's opinion illustrates how earlier decisions articulating general and abstract principles underlying their holdings, allow, if not invite further expansions of the meanings of the terms in question, e.g., liberty and marriage, without offering guidance as to the limits of such expansions.

Shifting from the significance of the right to marry for human agency to the unique character of the object of choice at issue, Kennedy's second principle relies upon Supreme Court precedents emphasizing the characteristics of the marital relationship when they strike down state laws that interfere with the right to marry or the right to obtain contraception.¹⁰⁸ These decisions justify their holdings based upon the intimacy and nobility that a committed marriage makes possible. In addition to *Griswold v. Connecticut*,¹⁰⁹ the pioneering contraception decision, Kennedy relies upon *Turner v. Safley*, which held the right of prisoners to marry without a warden's permission was protected by the liberty provision of the Fourteenth Amendment because such marriages are "expressions of emotional support and public commitment" as well as "personal dedication," even though they cannot be consummated while the prisoner is incarcerated.¹¹⁰ Thus, although prisoners are the archetype of persons who cannot claim the autonomy and personal choice protected for citizens in general, *Safley* found their claim to marry was fundamental because of the nature of the spiritual bond fostered by the relationship they were seeking. Kennedy then concludes that the rationale of these precedents, namely, the uniqueness of the marital relationship, applies with equal force to unions between same-sex parties.

The third justification for classifying marriage a fundamental right is its role in creating a union that protects the rights of families, parents, and children. In particular, the Court has asserted these rights as fundamental alongside the right to marry in cases invalidating state laws interfering with parents' decisions regarding their children's education.¹¹¹ Similarly,

106. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

107. From Fuller's point of view, this may be a distinction without a difference, given that the result, as stated in what follows, is impressed coercion.

108. See *Obergefell*, 135 S. Ct. at 2599–600.

109. 381 U.S. 479 (1965).

110. See *Turner v. Safley*, 482 U.S. 78, 95–96 (1987).

111. See *Obergefell*, 135 S. Ct. at 2600–601 (citing *Meyer v. Nebraska*, 262 U.S. 399 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

when the Court in *Moore v. City of Cleveland* confronted a local housing ordinance preventing a grandparent from raising her grandchildren in her home, it said:

[U]nless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the *Fourteenth Amendment's Due Process Clause*, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.¹¹²

Kennedy emphasizes that the existence of marriage facilitates the emotional as well as the material well-being of family units, which increases the likelihood that children will experience a stable family life and not suffer stigma because of their parents' relationship.¹¹³ Here, too, Kennedy concludes that the Constitution's protection for traditional and other non-traditional family units applies equally to families created by same-sex couples.

Finally, the fourth rationale drawn upon by Kennedy emphasizes the role of marriage as a social institution. He cites *Maynard v. Hill*,¹¹⁴ in which the plaintiffs claimed that a state divorce law interfered with their rights protected by the contracts clause of the Constitution. In rejecting their claim, the Court argued that marriage is an institution, not simply a contract, and that "it is the foundation of the family and of society, without which there would be neither civilization nor progress."¹¹⁵ Kennedy reinforces the institutional significance of marriage with the statistic that "over a thousand provisions of federal law" reference the marital status of those affected.¹¹⁶ He concludes that same-sex unions have the same social significance as heterosexual ones and, thus, the rights and obligations conferred upon traditional married couples should also benefit and bind same-sex partners to one another and their children.¹¹⁷

Kennedy's analysis is clearly an example of purposive interpretation because he looks to the purpose of protecting marriage under the liberty provision of the Fourteenth Amendment, as elaborated in numerous precedents, to arrive at his determination that same-sex marriage deserves the same protections as marriage between opposite-sex couples. Further, it seems to align with what Fuller called impressed purpose because, as Fuller foresaw, *Obergefell's* holding will force all state and federal

112. *Moore v. City of Cleveland*, 431 U.S. 494, 501 (1977) (emphasis added).

113. See *Obergefell*, 135 S. Ct. at 2600–601 (citing *United States v. Windsor*, 570 U.S. 744 (2013)).

114. 125 U.S. 190 (1888).

115. *Obergefell*, 135 S. Ct. at 2601 (citing *Maynard*, 125 U.S. at 211).

116. *Id.* (citing *Windsor*, 570 U.S. at 764–68).

117. See *Obergefell*, 135 S. Ct. at 2600–601. The Court in *Safley*, 482 U.S. at 96, relied upon a similar argument, which Kennedy's *Obergefell* reasoning closely tracks.

authorities to abide by what is arguably an “all-embracing orthodoxy.”¹¹⁸ Unlike the examples Fuller criticizes,¹¹⁹ in which the state imposes specific behavior on individuals, Kennedy’s opinion avoids requiring individuals to engage in or even endorse gay marriage themselves. At the same time, the *Obergefell* holding has raised concerns that private parties will be coerced into affirmative actions that contradict their own moral or religious beliefs as a result of the decisions, e.g., being forced to provide commercial services for gay marriages.¹²⁰ Since the Supreme Court has not yet decided if *Obergefell*’s conclusion protecting the right of same-sex couples to marry will require commercial entities to treat gay marriages identically to heterosexual ones, it is too soon to know whether Fuller’s fear of impressed orthodoxy will be a result of the decision.

Kennedy’s recourse to the purpose of the marriage precedents under the Fourteenth Amendment’s liberty prong also appears to leave him open to the claim made by Roberts and Scalia that his reasoning provides no justification for preventing the possible expansion of the right to marry to plural marriages.¹²¹ As Scalia noted in his dissent in *Lawrence*, it may no longer be possible to uphold government restrictions on behavior because of moral norms.¹²² This concern is not frivolous: It is likely that plaintiffs will have standing to challenge anti-polygamy laws before the Supreme Court,¹²³ and it is not obvious that today’s Court would adopt the reasoning employed at the end of the nineteenth century to uphold anti-polygamy measures.¹²⁴

Kennedy’s reasoning in *Obergefell* thus can be considered an example of Fuller’s concept of law as inherently purposive. In contrast, Roberts’

118. See *supra* note 91 and accompanying text.

119. See *supra* notes 88–94 and accompanying text.

120. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (reversing the lower court decision requiring the baker to make a custom cake for a gay couple’s wedding, but without ruling on the merits of the state public accommodations law challenge); *Washington v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), vacated and remanded, 138 S. Ct. 2671 (2018) (requesting reconsideration in light of *Masterpiece Cakeshop*); see also Letter from John A. Koskinen, Commissioner, Internal Revenue Service, to E. Scott Pruitt, Attorney General [of Oklahoma] (July 30, 2015) (stating that the IRS “does not intend to change the standards that it applies to section 501(c)(3) organizations by reason of the *Obergefell* decision”), <http://www.ok.gov/oag/documents/IRS%20Response%20Letter%20Obergefell.pdf>.

121. See *supra* note 62 and accompanying text.

122. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting). However, Roberts appears to have laid the predicate for distinguishing plural marriage from same-sex marriage as a matter of constitutional law in his dissent in *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

123. See *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (invalidating Utah statute as applied to cohabitation and religious plural marriages but upholding it as applied to civil plural marriage), vacated *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016); see also *Bronson v. Swensen*, 500 F.3d 1099 (2007).

124. See *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Reynolds v. United States*, 98 U.S. (8 Otto.) 145 (1878). Gay marriage and polygamy can, however, be constitutionally distinguished. See Seidman, *supra* note 59, at 140.

dissent shares several features of Hart's positivist concept of law. The opposition between Kennedy and Roberts is not, however, as complete as the preceding discussion suggests. In Part IV, I argue that Roberts in fact exercises judicial discretion to a greater degree than appears initially. This narrows the divide separating Roberts and Kennedy. Further, in Part V, I argue that Kennedy's reasoning in *Obergefell* represents a restrained form of purposivism. If correct, this fact further undermines the sharpness of the contrast between the two Justices that commentators have noted and that the preceding legal theory analysis supports.

IV. THE HART-ROBERTS COMPARISON REVISITED

Although Hart and Roberts agree upon the importance of protecting core legal meanings and precepts, they would disagree about the proper method to guide judges operating in the penumbra, that is, when confronting new and potentially contested situations. Hart agrees with Roberts that judges should not exercise their discretion by making decisions in the penumbra based upon their personal opinions. Just as judges' decisions in the penumbra cannot be mechanical, they should also not be arbitrary.¹²⁵ Yet he disagrees with Roberts that a judge's discretion should be guided primarily or exclusively by precedent and established traditions. Rather, for Hart, in applying law to concrete facts in the penumbra, judges should be guided by social utility, i.e., "by the growing needs of society,"¹²⁶ which are reflected in "various aims and policies."¹²⁷ In other words, the judge should look forward, not backward.

The disagreement between Roberts and Hart is much deeper than whether a judge should look to the past or the future when confronting circumstances not obviously covered by an existing rule. Their disagreement is about the concept of law itself. For Hart, judges who imagine that they can avoid legislating by confining themselves to semantic features of terms or rules,¹²⁸ or to their meanings in "ordinary nonlegal contexts to ordinary men,"¹²⁹ are simply mistaken about the nature of law, which is inherently incomplete. Law's incompleteness obligates judges to assume a creative role when existing law does not clearly determine the holding in a given case.¹³⁰ Hart might then say that

125. See HART, CONCEPT OF LAW, *supra* note 48, at 204–05; Hart, *Positivism*, *supra* note 48, at 614 (labeling the opposite of mechanical decisions "intelligent and purposive" judgments).

126. See Hart, *Positivism*, *supra* note 48, at 612, 614.

127. *Id.* at 614. That social utility and public policy may be contested goals would not make the judge's recourse to them arbitrary or idiosyncratic in Hart's view. See *supra* note 125.

128. See HART, CONCEPT OF LAW, *supra* note 48, at 129–30.

129. Hart, *Positivism*, *supra* note 48, at 611.

130. See Hart, *Positivism*, *supra* note 48, at 608–13, 628–29; HART, CONCEPT OF LAW, *supra* note 48, at 272–76. Hart does not explicitly discuss limits to a judge's discretion in the penumbra, in

Roberts misunderstands the nature of law when he defends the conventional definition of marriage by citing three nineteenth century dictionaries and noting that the man in the street would not have recognized changes in women's property rights as an essential part of marriage.¹³¹

What Hart calls the "open-texture" of law is due to two things. First is the characteristics of language, which is "irreducibly open-textured" because of the necessity of rules to employ "general classifying terms in any form of communication concerning matters of fact."¹³² In addition, Hart attributes the open-texture of law to "the human predicament," which consists of people's relative ignorance of what the future will bring, that is, the "unenvisioned case."¹³³ Unenvisioned cases are fact patterns "continually thrown up by nature or human invention, which possess only some of the features of the plain cases but other features that they lack."¹³⁴ The combination of the indeterminacy of language and the indeterminacy of facts will require a judge to decide whether a new case resembles the settled or paradigm case in the relevant respects and to a great enough degree to justify including it as an instance of the existing law.¹³⁵ That decision, Hart insists, is a choice, although some judges prefer to disguise or minimize the element of choice involved.¹³⁶ The alternative, which Hart

part because his purpose is to counter the views of formalists, on the one hand, and those of natural law theorists, on the other. See BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 45–47 (6th ed. 2012); see also *supra* note 125 (describing the judge's decisions as "intelligent and purposive judgments"); *infra* note 146 and accompanying text (suggesting that penumbral decisions are relatively rare).

131. See *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting).

132. HART, CONCEPT OF LAW, *supra* note 48, at 128. Hart does, however, note that even "very general standards" produce "plain indisputable examples of what does, or does not, satisfy them." *Id.* at 131. For Madison's parallel lament over the imprecision of language, see FEDERALIST PAPERS No. 37 (noting several reasons for the ambiguity of laws and stating that even the utterances of God to mankind are rendered "dim and doubtful by the cloudy medium" of language). I am grateful to Sandy Levinson for noting the parallel with Madison.

133. HART, CONCEPT OF LAW, *supra* note 48, at 128–29. Nicos Stavropoulos points out that the indeterminacy caused by unenvisioned cases has two distinct sources: our inability to describe in advance all possible cases as well as our inability in the present to know how we will want to *judge* some new cases in the future. See Nicos Stavropoulos, *Hart's Semantics*, in HART'S POSTSCRIPT. ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 59, 93 (Jules Coleman ed., 2001). Stavropoulos also notes that Hart treats the effect of the law's indeterminacy in the different cases identically. See *id.* at 90.

134. HART, CONCEPT OF LAW, *supra* note 48, at 126.

135. See *id.* at 127, 129. Hart also cautions that the degree of indeterminacy varies by field within a particular legal system as well as between legal systems. See *id.* at 130–31. He singles out the standard of "due care" in tort law as an especially amorphous standard. *Id.* at 132–33.

136. See HART, CONCEPT OF LAW, *supra* note 48, at 129; see also Hart, *Positivism*, *supra* note 48, at 608–09 (quoting John Austin and Jerome Frank for recognizing the necessity for judges to legislate). Since one of the elements driving a judicial decision in the penumbra is the aim of the rule in question, Hart adds that the process of filling out the contours of the meaning of a rule can have the effect of making the nature of the end of the rule more determinate. See HART, CONCEPT OF LAW, *supra* note 48, at 128–29. Although he says this process makes the aim more determinate, the example

rejects, is to settle “in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified.”¹³⁷ Open texture thus potentially improves judicial decisions, at the same time that it makes them more difficult, because it enables judges to fine tune their judgments by including or excluding, in legal classifications, instances that promote rather than thwart a rule’s aims.¹³⁸

As a consequence of his view of the inherent incompleteness of law, Hart sees the decision of a judge to ignore changing societal needs as a “choice,” not a necessity. In fact, he says, judges who claim they avoid making policy judgments are in fact making policy judgments, only they make them in light of conservative social aims instead of contemporary needs.¹³⁹ This often occurs, for Hart, when a judge “disclaims any . . . creative function” and casts his search instead for “the intention of the legislature.”¹⁴⁰ The issue, then, for Hart is not whether judges choose or avoid injecting social policy into decisions in the penumbra, but *which* social policy they choose, conservative or contemporary. To critics who would castigate judges deliberately interpreting ambiguous or vague language in light of social policy for usurping the legislative function in violation of the separation of powers, Hart would reply that the incomplete nature of law may force judges, whenever existing law does not clearly dictate the outcome, to choose outcomes rather than merely discover what is latent in existing legal materials.¹⁴¹

Hart does, however, add that those penumbral judgments are not law in the same strong sense as the core or standard instances that they supplement.¹⁴² Hence, if one labels a judge’s creative acts in the penumbra “legislation,” as Hart does, it is legislation of a different kind than the enactments of legislatures. He calls this aspect of judicial activity, which occurs in the penumbra, “law-creating discretion,” and characterizes it as “a restricted law-making function” because it is legitimately exercised only where enacted or standard instances of law are inadequate to resolve an unanticipated case.¹⁴³ Courts “exercise a genuine though interstitial law-making power” in such gaps.¹⁴⁴ Sometimes Hart gives the impression

he gives seems to entail revising the aim to address changing circumstances. *See* Stavropoulos, *supra* note 133, at 93.

137. HART, CONCEPT OF LAW, *supra* note 48, at 130.

138. *See id.*

139. *See* Hart, *Positivism*, *supra* note 48, at 611. Similarly, some social scientists have argued that the justices tend to cite documents from the founding period more for ideological, rhetorical, or strategic reasons than because they are guided by the founders’ intent. *See* Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RESEARCH Q. 329 (2005).

140. HART, CONCEPT OF LAW, *supra* note 48, at 136.

141. *See supra* notes 130, 135–136.

142. *See* Hart, *Positivism*, *supra* note 48, at 612, 614–15.

143. HART, CONCEPT OF LAW, *supra* note 48, at 252; *see id.* at 272–73.

144. *Id.* at 259, 273, 274.

that core or standard instances dominate adjudication and, thus, that the penumbra—and judicial legislation—are relatively rare.¹⁴⁵ However, he also identifies “such variable standards as ‘due care’” that operate like “non-conclusive principles which merely point to a decision but may very frequently fail to determine it.”¹⁴⁶ He explicitly mentions the First, Fifth, and Fourteenth Amendments of the United States Constitution as containing examples of such standards that “function as non-conclusive principles.”¹⁴⁷ As a result, it seems that Hart would expect that resolving unanticipated applications of “liberty” in the Fourteenth Amendment would require a greater degree of judicial lawmaking discretion than do statutes with technical and concrete terms.¹⁴⁸

The distance between Hart’s theory of law and that of Roberts is revealed most starkly when, fleshing out the underlying logic of his concept of law, Hart states that “preoccupation with the separation of powers” is itself part and parcel of the erroneous belief that judges do not legislate.¹⁴⁹ He attributes the belief in the absolute separation between the judicial and legislative functions and the institutional theory of the separation of powers to Blackstone’s “childish fiction” that “judges only ‘find,’ never ‘make’ law.”¹⁵⁰ In short, only by ignoring or denying the consequences of the inherently incomplete nature of law in a variety of circumstances can someone take the position that it is possible for the judicial and legislative functions to be fundamentally separate. The existence of core meanings, however, will circumscribe the exercise of judicial lawmaking.¹⁵¹ The scope of the judiciary’s legislative function would also depend on the degree and domain of the law’s incompleteness, on the one hand, and the sources and methods judges are permitted to employ to fill the gaps thus identified, on the other.

In sum, Roberts charges Kennedy with undermining the rule of law and democratic institutions by usurping the role of Congress. Hart’s legal theory depicts Roberts’ position as depending upon several assumptions that Roberts does not acknowledge or defend. Roberts portrays as neutral or natural his preference for a rigorous separation of powers between the legislature and the judiciary and for denying the existence of new

145. See *id.* at 128, 133, 135, 263; Hart, *Positivism*, *supra* note 48, at 615. But see Hart, *Positivism*, *supra* note 48, at 629; HART, CONCEPT OF LAW, *supra* note 48, at 204.

146. HART, CONCEPT OF LAW, *supra* note 48, at 263. See also Hart, *Positivism*, *supra* note 48, at 629 (suggesting that situations where mechanical deduction is possible are rare).

147. HART, CONCEPT OF LAW, *supra* note 48, at 261.

148. See *id.* at 274 (attributing to judges of great stature and “a host of other lawyers” the view that “many cases” can be decided “either way”).

149. Hart, *Positivism*, *supra* note 48, at 609–10.

150. *Id.* at 610 (attributing the phrase “childish fiction” to John Austin).

151. *Id.* at 629 (stating that “we live among uncertainties . . . and that existing law imposes only limits on our choice and not the choice itself”).

fundamental rights except to constitutionalize specific values supported by longstanding traditions. Hart would disagree with both these claims. Although Hart's hostility to judicial disregard for the text of laws and judges' imposition of their personal morality in the guise of adjudication is as strong as that of Roberts, Hart argues that the nature of law itself requires judges to *judge* when there are gaps in the law. Most strikingly, Hart argues that resort by judges to history or tradition to fill the gaps is just as biased and driven by policy as resort to contemporary social needs. For Hart, then, rigorous textualism, committed positivism, and fidelity to law are consistent with, and indeed demand, judicial legislation when judges are confronted with problems occasioned by the incompleteness of law. From this perspective, Roberts himself exercises judicial discretion when he chooses to limit judicial discretion by turning to history and established traditions rather than to orient himself by contemporary social needs. Were Roberts to evaluate the constitutionality of same-sex marriage in light of those needs, he might still disagree with Kennedy about the nature of society's needs and the weight of the parties' claims, as compared with other considerations. For example, Roberts might have argued that for political reasons or to reduce the likelihood of social disruptiveness, same-sex marriage should not be constitutionalized at that time. Indeed, Roberts makes such an argument in the course of his dissent, as part of his separation of powers analysis.¹⁵² If, however, he recognized his argument as one of policy rather than constitutional law, the exact nature of the divide between him and Kennedy would have been more transparent and the opposing views more clearly joined.

These conclusions accord with analysis of the constitutional law differences between the two justices. Kennedy's defense of the *Obergefell* holding, like Roberts' dissent, was based upon principles derived from the Court's own precedents, not from an abstract understanding of the meaning of marriage or moral principles independent of the Court's constitutional jurisprudence.¹⁵³ Both Justices relied upon the Court's precedents and traditions: for Roberts, the standard was what the Court's "precedents have repeatedly *described*,"¹⁵⁴ i.e., marriage as heterosexual, while Kennedy relied upon what the precedents have *presupposed* as justifications for the positions the Court reached. For Roberts, the law contains a fixed core not subject to change. For Kennedy, the law's core includes its rationales or purposes and, thus, it can evolve as the means to achieve those purposes undergoes change, as long as it changes in ways consistent with the underlying rationales. By proceeding in this fashion, Kennedy was following the very method employed by the Court in earlier

152. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624–25 (2015).

153. See the discussion *supra* notes 96–117 and accompanying text.

154. *Obergefell*, 135 S. Ct. at 2614 (emphasis added).

cases and in the precedents they relied upon, which declared marriage a fundamental right implicit in the Fourteenth Amendment's concept of liberty in the first place.¹⁵⁵

The jurisprudential culprit, if there is one, would seem to be the late nineteenth and twentieth-century decisions that read liberty in the Fourteenth Amendment to include affirmative rights and declined to find a fixed core meaning in the concept of liberty, leaving the meaning open, often explicitly, to further elaboration. For example, the *Meyer* decision declared that the Court "has not attempted to define with exactness the liberty thus guaranteed."¹⁵⁶ In *Malloy v. Hogan*, the Court argued further that it had "not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."¹⁵⁷ In short, since the Court's *practice* of finding evolving standards of personal freedom embedded in the Fourteenth Amendment's concept of liberty is itself "objectively, deeply rooted in this Nation's history and tradition,"¹⁵⁸ the burden of persuasion is, arguably, on those who would deny expanding the right to marry in circumstances that can reasonably be seen as involving "vital personal rights essential to the orderly pursuit of happiness by free men."¹⁵⁹

Kennedy also maintains that those who ratified the Fourteenth Amendment as well as the Bill of Rights "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."¹⁶⁰ Although Scalia castigates these words as legitimating unfettered judicial discretion,¹⁶¹ Roberts agrees with Kennedy that the Framers left the subject of domestic relations to future generations. For Roberts, however, the Framers intended these issues to be decided by the states rather than the federal government.¹⁶² The difference between the two Justices is thus not about the fact that the Constitution's

155. On family law affirmative rights, see Appleton, *supra* note 92.

156. *Meyer v. Nebraska*, 262 U.S. 399 (1923); see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (noting that "the Court has not assumed to define 'liberty' with any great precision," and equating liberty with "the full range of conduct which the individual is free to pursue").

157. 378 U.S. 1, 5 (1964); see also *Casey*, 505 U.S. at 848 (stating that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

158. The quoted language is from Roberts' dissent in *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting), although the idea expressed in the text is at odds with his dissent.

159. *Meyer*, 262 U.S. at 399.

160. *Obergefell*, 135 S. Ct. at 2598.

161. *Id.* at 2628 (Scalia, J., dissenting); see also *id.* at 2624 (Roberts, C.J., dissenting).

162. *Id.* at 2613–14 (Roberts, C.J., dissenting).

protection of marriage needs “filling in” by future generations. It is about who decides and in light of what standards the gaps are filled. As a matter of constitutional law, then, both Justices rely on arguments based upon inferences derived from precedents, given that the literal text of the Constitution does not confer fundamental status on marriage at all, regardless of sexual orientation. They disagree about which precedents should be controlling and, at times, about whether state or federal law should decide the outcome, but not whether old rights can be superseded or expanded by new rights. Roberts believes that democratic majorities in the states should decide the meaning of marriage in the case of same-sex marriage. As discussed above, his view presupposes what he is trying to prove, namely, that the right of same-sex couples to marry is not fundamental.¹⁶³ For, when Roberts believes a right is fundamental, he supports the Court overriding democratic majorities, e.g., in *Loving*, where the federal judiciary superseded democratically enacted state law regarding marriage¹⁶⁴ and in *Randall v. Sorrell*, where the federal judiciary rejected state campaign finance legislation enacted to combat corruption in state elections.¹⁶⁵

In sum, the opposition between Roberts and Kennedy is significant but less stark than first appears. Roberts rejects Kennedy’s recourse to the purposes and justifications for treating marriage as a fundamental right, as those purposes have been elaborated in earlier Supreme Court cases. That is not to say that Roberts always refrains from relying on the purpose of constitutional provisions.¹⁶⁶ But in *Obergefell*, his insistence on history and well-established traditions as the only sources for interpreting the scope of the right to marry is connected to his theory of law as limited to core meanings to the greatest extent possible, his belief that these are unchanging, and his assumption that looking backward to fill gaps in the law is the most effective way to protect the law’s core meanings. What the analysis of Hart’s legal theory clarifies, is that there are alternatives to history and tradition for filling in gaps in core meanings consistent with positivism and respect for core meanings and that Roberts has chosen to rely on these rather than alternatives, such as moral considerations or contemporary social policy normal. From this perspective, Roberts’ method is itself an exercise of judicial discretion based upon public policy.

163. See *supra* notes 27–28 and accompanying text.

164. See *Obergefell*, 135 S. Ct. at 2614.

165. See, e.g., *Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating state law campaign finance restrictions). Roberts joined the plurality opinion written by Justice Breyer.

166. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 376 (2010) (Roberts, C.J., concurring). In the area of statutory interpretation, Roberts frequently and explicitly consults purpose and legislative history. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2494–96 (2015); *Bond v. United States*, 572 U.S. 844, 856–58, 860–62 (2014).

Not only is Roberts' argument more dependent upon policy considerations than his dissent acknowledges, when considered through the lens of Hart's legal theory, but Kennedy's *Obergefell* reasoning is not as open-ended as some critics fear. As is argued in Part V, Kennedy's method is purposive, but in key respects it is a restrained purposivism. In particular, he is as wedded to the basic framework of the American constitutional system as Roberts, even though they pursue that commitment in different ways. As a consequence, the two Justices represent two poles on a fairly restricted continuum rather than the polar opposites they are thought to be.

V. THE FULLER-KENNEDY COMPARISON

Kennedy's decision to view law as incorporating the reasons underlying legal precepts as well as the precepts themselves is also a choice. Kennedy agrees with Roberts and the other dissenters that the fundamental rights protected by the liberty guarantee of the due process clause are circumscribed and must be constitutionally justified. He refers to them as "certain specific rights that allow persons, within a lawful realm, to define and express their identity."¹⁶⁷ Although these words seem vague, they closely track statements made in other Supreme Court decisions. For example, in *Roberts v. U.S. Jaycees*, the Court noted its long history of protecting "highly personal relationships" under the liberty prong of the Fourteenth Amendment so as to safeguard "the ability independently to define one's identity that is central to any concept of liberty."¹⁶⁸ As was discussed in Part III, Kennedy seeks to conform his interpretation of the scope of marriage to the standard of "within a lawful realm" by anchoring it to the justifications advanced in the precedents described above.¹⁶⁹

The character of Kennedy's reasoning can be appreciated by situating it within a framework elaborated by political theorist Paul Kahn, who argues that many debates within American constitutional law are best understood as disagreements between two conceptual models of the structure of a country's political regime. For one model, reason and political theory are central, alongside of consent and popular will; in the

167. *Obergefell*, 135 S. Ct. at 2593.

168. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) (upholding a state public accommodations anti-discrimination law as applied to a private organization). *See also* *Bowers v. Hardwick*, 478 U.S. 186, 204–205 (1986) (Blackmun, J., dissenting) (noting that certain personal rights are constitutionally protected "not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life"); *Kelly v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting) (connecting liberty in the Fourteenth Amendment to "the values of privacy, self-identity, autonomy, and personal integrity").

169. *See supra* notes 96–117 and accompanying text.

other model, consent and popular will are central, with reason and political theory playing at most a subordinate role.¹⁷⁰ According to the former model, a country's constitutional design may incorporate the findings of political science, experience, logic, and reason, both at the regime's inception or later, in response to problems that have arisen or circumstances that have changed over time.¹⁷¹ In contrast, the popular will or consent model considers an existing form of government as fixed once it is popularly adopted because of its origin in the consent of the governed. As a consequence, the form of government established at the founding of a constitutional order is viewed as both "self-contained and self-sustaining," that is, any legal developments that occur over time must maintain the original character or structure of the political order initially established and agreed to.¹⁷² This is possible if all developments "incorporate growth . . . but not change in the defining form."¹⁷³ Structural change in constitutional design, however, is permissible only through popular procedures that were themselves popularly approved.

Using the prism of the two models, constitutional decisions can be distinguished based upon whether or to what extent they draw on sources internal or external to the foundational design of the U.S. constitutional system. Internal sources would include all enacted laws, promulgated regulations, executive decrees, judicial decisions, and other guidance or rulings of institutions because and to the extent that they have been granted lawmaking authority by canonical legal texts, constitutional or otherwise. External sources, in contrast, would include natural law precepts, international law, the laws of other countries, social policy, political theory, moral theory, or some other theoretical enterprise, since these provide understandings that cannot be derived organically from canonical texts. Because the fundamental law of the United States contains

170. See Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 450–51, 452, 454–58 (1989). He calls the model based upon reason and political science as well as popular will the "technical model," and the one based primarily or exclusively upon popular will the "organic model." *Id.* at 450. Kahn argues that the former model was embraced by the founding fathers. See *id.* at 453–58. Because of the political and social attitudes at the time, the founders considered popular will and consent as critical for legitimating political authority based upon reason or political science. See *id.* at 450 (noting the twin foundational elements of reason and will). See *id.* at 458 (describing "the task of *The Federalist* [*Papers*]" as seeking "a convergence of reason and will, of political science and political legitimacy"). One piece of evidence that Kahn cites is the first page of FEDERALIST PAPERS No. 1, which asks "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force." *Id.* at 454. Kahn also argues that during the first half of the nineteenth century, the Justices on the Supreme Court gradually came to assume the model in which popular will dominates. See *id.* at 450, 490, 494.

171. See Kahn, *Reason and Will*, *supra* note 170, at 450, 455–58.

172. *Id.* at 450–51.

173. See *id.* at 451, 452, n.6. At one point, Kahn states that some change is possible, "as long as that change is itself rooted in the history of the specific community," but he does not elaborate. *Id.* at 451, n.9.

general or abstract terms as well as concrete or particularized ones, how the former are interpreted will depend in large part upon the internal or external approach employed by the interpreter. Of course, in practice, legal systems are not simple, and the laws of many nations rely on a mixture of external and internal sources of law.

Supreme Court decisions have at times relied on precepts that are very general and not tied to the U.S. constitutional scheme. Some of these decisions also rely on traditional sources, i.e., explicit precedents and other materials internal to the legal structure as it has developed. For example, as noted earlier, in *Jaycees*, the Court sought to explicate two types of constitutionally protected association, intimate and expressive, even though freedom of association as such is not mentioned in the Constitution. The Court identified freedom of intimate association as protected by the Constitution because its existence is necessary “to define one’s identity that is central to any concept of liberty.”¹⁷⁴ “Any concept of liberty” is not a norm internal to the American constitutional scheme; had Publius written the decision in *Jaycees* at the time of the founding, it would have been obvious that he was relying on a general moral or political concept. Similarly, in his dissent in the *Slaughter-House Cases*, Justice Bradley proclaimed that the “rights of life, liberty, and property . . . are the fundamental rights which, I contend, belong to citizens of every free government.”¹⁷⁵ Like Marshall’s opinions, Bradley’s statement rests upon an understanding of citizenship in free governments as an abstract concept rather than resting upon the specific character of the American form of free government.

The reasoning by Chief Justice Marshall also affords numerous examples of looking to external sources to justify the substance of his holdings. In *Marbury*, for example, Marshall derives the power of the Supreme Court to invalidate laws enacted by Congress by arguing that, when a people has “an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness” and establishes a written constitution, it follows logically that the constitution must have priority over statutory law, or the result would be “absurd.”¹⁷⁶ Marshall’s argument is theoretical: given a constitutional scheme of a certain kind, certain consequences follow logically. Therefore, those consequences must be attributed to particular nations, like the United States, that have adopted a constitutional scheme

174. *Jaycees*, 468 U.S. at 619.

175. 83 U.S. 36, 116 (1872) (Bradley, J., dissenting) (interpreting the content of the privileges and immunities clause of the Fourteenth Amendment).

176. Kahn, *Reason and Will*, *supra* note 170, at 481 (quoting *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803)). Kahn characterizes this as an argument from first principles. *Id.*

of that kind. For Marshall, logic also dictates that, given the nature of the judicial function, it is the role of courts to enforce the supremacy of constitutional precepts over other types of law since resolving conflicts between constitutional law and ordinary legislation “is of the very essence of judicial duty.”¹⁷⁷ As Kahn notes, the judicial function that Marshall references is an abstract concept since the U.S. Constitution does not describe the judicial power that it authorizes.¹⁷⁸ Marshall’s subsequent statement, that the text of the United States Constitution “furnish[es] additional arguments” in support of judicial review, reinforces Kahn’s thesis.¹⁷⁹ Kahn describes a similar pattern of theoretical reasoning followed by textual confirmation in *McCulloch v. Maryland*.¹⁸⁰ These decisions of Chief Justice Marshall thus combine reasoning based upon both external and internal sources to establish fundamental precepts governing the role of the judiciary in the United States.

The Court also has had recourse at times to some kind of universal standard independent of American law in fundamental rights cases, especially, although not exclusively, in the area of criminal law. These include “notions of justice of English speaking people,”¹⁸¹ what is “implicit in the concept of ordered liberty,”¹⁸² a right “older than the Bill of Rights, older than our political parties, older than our school system,”¹⁸³ and “one of the basic civil rights of man.”¹⁸⁴

Frequently the Supreme Court’s reasoning is grounded less abstractly, but at a very high level of generality. For example, in *Meyer*, the Court attempted to elucidate the meaning of liberty in the Fourteenth Amendment by listing specific rights as well as “generally those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”¹⁸⁵ The common law referred to may be precedents of American courts, although the Court does not so limit it. Even if the reference is understood to mean the precedents of American courts, the standard is extremely indeterminate by virtue of depending upon what constitutes happiness in the eyes of free men, as a court understands those terms. Similarly, in *Griswold v. Connecticut*, Justice Goldberg asserted that the right of privacy is a fundamental personal right, emanating “from

177. *Id.* at 481–82 (quoting *Marbury*, 5 U.S. at 177, 178).

178. *Id.* at 481.

179. *Id.* at 483 (quoting *Marbury*, 5 U.S. at 178).

180. 17 U.S. (4 Wheat.) 316 (1819), discussed in Kahn, *Reason and Will*, *supra* note 170, at 483–86.

181. *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

182. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

183. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (referring to the right of privacy).

184. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

185. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

the totality of the constitutional scheme under which we live.”¹⁸⁶ So understood, the right to privacy is arguably a value internal to the American legal system, although not anchored to any specific provision of the system. In *Duncan v Louisiana*, the Court first based its conclusion about incorporating the Fifth and Sixth Amendments into the Fourteenth Amendment on “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”¹⁸⁷ and whether the right asserted was “basic in our system of jurisprudence.”¹⁸⁸ Both references were associated with the United States legal system, and both relied on the system’s underlying principles or justifications. The *Duncan* Court’s basis for its holding was thus arguably internal to the American constitutional order without relying exclusively on the text of the Constitution or judicial precedents. At the same time, the *Duncan* Court also based its decision on whether the right claimed by the plaintiff was “a fundamental right, essential to a fair trial.” To the extent that the idea of a fair trial referred to is independent of the American scheme of government, *Duncan* also relied upon principles external to the specifically American constitutional framework. It is possible, however, that the idea of a fair trial referred to was assumed to be a fair trial under the American Constitution, in which case it would be internal to the system, although at a high level of generality. Other examples of extremely general standards relied upon by the Court that are connected to the American constitutional system as a whole are “the American scheme of justice”¹⁸⁹ and “the principles upon which our Nation was built.”¹⁹⁰

In other decisions, the Court proceeds more narrowly, finding protected rights implicit in specific textual provisions, often the Bill of Rights. Famously, in *Griswold*, for example, the majority opinion derived the right of privacy at stake from the penumbra of several of the constitutional amendments that make up the Bill of Rights.¹⁹¹ The opinion also characterized the right as “older than the Bill of Rights—older than our political parties, older than our school system.”¹⁹² The *Griswold* Court thus relied upon principles both internal and external to the legal system. In *Jaycees*, the Court found freedom of expressive association to be implicit in the First Amendment guarantees of freedom of speech and

186. *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961)).

187. 391 U.S. 145, 148 (1968) (citing *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). *Powell* cited *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926), for this proposition.

188. *Duncan*, 391 U.S. at 148–49 (citing *In re Oliver*, 333 U.S. 257, 273 (1948)).

189. *Id.* at 149.

190. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting).

191. *Griswold*, 381 U.S. at 485.

192. *Id.* at 486.

assembly because the two explicit guarantees “could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”¹⁹³

In short, the Court has justified its expansions of existing rights on a wide assortment of grounds, including abstract principles of justice, liberty, happiness, or the civil rights of man. It has also justified its decisions based upon principles arguably implicit in the American constitutional design taken as a whole or inherent in its civil or political institutions. Kennedy’s due process argument in *Obergefell* resorts neither to notions external to and independent of the U.S. legal system nor to concepts arguably grounded in the regime, but extremely abstract or at a high level of generality. Rather, he limits himself to the purposes and principles connected to a specific liberty interest—marriage—and in each instance, he draws on the explicit statements of earlier Courts in explicating that interest’s importance. From this vantage point, Kennedy’s purposivism is restrained and his reasoning satisfies one of the basic requirements of a legal system that develops by “incorporat[ing] growth . . . but not change in the defining form.”¹⁹⁴ This is the hallmark of judging that respects the primacy of government deriving its legitimacy from the consent of the governed, because it reasons within the constitutional framework initially ratified by the public and developed by subsequent decisions that resolve disputes without resort to principles external to that framework.

CONCLUSION

Understandably, the majority opinion in *Obergefell* contributed to the perception that Supreme Court decisions, especially decisions endorsed by only five of the nine justices, reflect the polarization that America has increasingly witnessed in recent decades. Although same-sex marriage was legal in thirty-eight states and Washington, DC, when the decision was handed down, only eleven states and Washington, DC, authorized same-sex marriage by legislation or referendum,¹⁹⁵ and many states had banned same-sex marriage.¹⁹⁶ Although a majority of individuals polled

193. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). *See also* *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982) (holding the school board’s removal of certain books from the school library violated “the spirit of the First Amendment”).

194. *See supra* note 173 and accompanying text.

195. *Obergefell*, 135 S. Ct. at 2615 (Roberts, C.J., dissenting). Roberts’ dissent claims that the courts of an additional five states had ruled that same-sex marriage was a right under the state’s constitution. *Id.* However, other sources state that the courts in twenty-six states had ruled that same-sex marriage was legal. *See Same-Sex Marriage Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (NCSL) (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#1>.

196. By 2010, twenty-five states had banned same-sex marriage, but many of these bans were

avored legalizing same-sex marriage at that time, there were large differences in the percentages of those who favored or rejected same-sex marriage based upon such things as age and religious or political party affiliation.¹⁹⁷ These differences help explain why the decision was so controversial among certain groups.

The decision was also controversial within the legal community, where the lines were drawn more on institutional grounds than on the merits of the substantive issue decided. This essay has attempted to address the legal controversy by arguing that the prism of constitutional law, as presented by traditional constitutional scholarship, exaggerates the differences between the majority and the dissenters. In particular, the analysis offers a different perspective on the charges made by the dissenters that Kennedy's opinion was an instance of reprehensible judicial activism and an egregious violation of the separation of powers. Using the legal theories of H. L. A. Hart and Lon Fuller, as well as the work of Paul Kahn, I have argued that Kennedy took seriously the obligation to ground the majority's decision in precedent and tradition, even as he clearly expanded those precedents and traditions when he applied existing doctrine to same-sex marriage. I have also argued that, from those theoretical perspectives, Roberts's reasoning relies on some constitutional doctrines that may themselves be seen as products of public policy and that the structure of his dissent masks the conclusory nature of his assertion that the most basic issues in *Obergefell* are the separation of powers and the role of courts in a democracy. Although these reflections are unlikely to change anyone's opinions about the correctness of the decision,¹⁹⁸ hopefully they provide a more moderate, and possibly moderating, perspective from which to judge the protagonists and to frame future discussions about the legitimacy of evolving notions of human rights.

overturned in the years preceding the *Obergefell* decision. See *State-by-State History of Banning and Legalizing Gay Marriage, 1994 to 2015*, PROCON.ORG (Feb. 16, 2016), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857>.

197. See *Changing Attitudes on Gay Marriage*, PEW RESEARCH CENTER, <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/>.

198. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 555 (2012) (dismissing the view of economists that equate the effects of activity and inactivity on the grounds that the Framers "were 'practical statesmen,' not metaphysical philosophers").