What Obergefell v. Hodges Should have Said

Connie S. Rosati
University of Arizona
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In Obergefell v. Hodges, Justice Anthony Kennedy, writing for the majority, held that under the Fourteenth Amendment, the States must license marriages between persons of the same sex and must recognize valid marriages of same-sex couples performed elsewhere. The landmark opinion strikes many of us as correct, not only morally but also constitutionally, at least in its outcome; and yet we would have welcomed more solid reasoning in support of it. The difficulty isn’t merely that Justice Kennedy’s reasoning is somewhat obscure; and it is not, as Justice John Roberts argues in his dissent, that it deviates from the Supreme Court’s doctrinal test under the Due Process Clause. Rather, the difficulty is that his reasoning, while rightly deviating from the Court’s problematic test, fails adequately to justify this departure, and most important, fails to put a clear and more plausible test in its place. Yet Justice Kennedy’s reasoning provides materials that might be used in formulating an improved test. In this article, I critically examine the Court’s test for fundamental rights under the Due Process Clause, as presented by Roberts in Obergefell v. Hodges, and develop a more plausible test that draws on elements of Kennedy’s suggestive opinion.

I take as my starting point several more or less controversial assumptions. The first is that the Court should aim to issue opinions in adjudicating constitutional cases that preserve both the legitimacy of our system of constitutional law and the authority of the Court itself, where success in reasonably achieving the latter aim should be understood to depend on success in reasonably achieving the former.

I shall not attempt to offer a theory of legitimacy herein, but my second assumption is that although constitutional legitimacy may not be merely a matter of moral legitimacy, enhancing moral legitimacy compatibly with the text of the Constitution and well supported precedent enhances the legitimacy of our system of constitutional law and the authority of

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1 Professor of Philosophy, University of Arizona; Ph.D. University of Michigan, 1989; J.D. Harvard Law School, 1999. An early version of this paper was presented at the Australian National University, June 18, 2017. Many thanks to those in attendance, and special thanks to Nick Southwood, James Willoughby, David Sobel, and Janice Dowell for helpful discussion of the paper. Work on this paper was generously supported by a visiting fellowship at the Australian National University.


3 “Reasonably achieving” because constitutional interpretation is contestable and so neither the legitimacy of the Constitution nor the authority of the Court can depend on its always rendering the most plausible decisions possible.
the Court. For present purposes, we can understand “well supported precedent” as precedent that is consistent with constitutional text and history, supported by valid reasoning, supported by any legally pertinent and rationally defensible normative principles, and appropriately informed by available and relevant nonlegal facts. As between two outcomes consistent with the text of the Constitution and relevant, well-supported precedent, the Court ought to favor the outcome that enhances moral legitimacy, in the sense that it better accords with what morality really requires, forbids, or permits. My inquiry thus presupposes some version of moral realism, though for present purposes, we need not settle on any particular version of moral realism (nonnaturalist, naturalist, or constructivist; consequentialist or nonconsequentialist).

Third, I assume that the Ninth Amendment licenses recognition of rights in addition to the “enumerated rights” specified in the Bill of Rights, but that it does not establish anything stronger, such as a “presumption of liberty” that underwrites a system limited to right-libertarian (that is, negative or liberty) rights. I take this to be a relatively weak, though not uncontroversial, reading of the Ninth Amendment, but one that at least takes the Ninth Amendment seriously, rather than treating it as akin to an inkblot on a page of text.

Fourth, I assume, in keeping with current Court doctrine, that the textual home for implied fundamental rights is the liberty protected by the Due Process Clause of the
Fourteenth Amendment. In fact, the prevailing view among legal scholars and theorists is that the Privileges or Immunities Clause is the textual basis for implied rights and that the Court erred when, in the *Slaughterhouse Cases*, it interpreted the latter clause as protecting a class of rights limited to those of national citizenship.\(^{10}\) Petitioners or respondents in some recent cases have invited the Court to revisit its interpretation of the Privileges or Immunities Clause.\(^{11}\) And some justices have clearly expressed their opposition to substantive due process analysis and their readiness to restore the clause to its proper place as the textual home for fundamental rights.\(^{12}\) Thus far, however, the Court has declined to reconsider its prior ruling. But even if the Court were to rectify the error in *Slaughterhouse*, we should be under no illusion that recognizing the Privileges or Immunities Clause as the textual home for constitutionally protected rights would obviate the need to decide which liberty interests not enumerated in the Constitution may not be infringed and what test to apply in determining unconstitutional infringement. Given the Ninth Amendment, it’s reasonable to think that the most appropriate test for applying the Due Process Clause would also be the appropriate test under the Privileges or Immunities Clause.

Fifth, I shall accept the Court’s basic distinction between mere liberty interests and fundamental rights, as well as its tests, respectively, of rational basis review and strict scrutiny for governmental actions, that unconstitutionally infringe on them, though the latter tests are themselves in need of clarification and refinement. The distinction between liberty interests and fundamental rights is controversial for several reasons. First, some reject the distinction as contrary to either the original meaning or the best construction of the Constitution.\(^{13}\) But the second concerns the Court’s specific manner of drawing the distinction, and here the problem would seem to lie with the Court’s test for fundamental

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\(^{10}\) See *The Slaughterhouse Cases*, 83 U. S. (16 Wall) 36 (1873).

\(^{11}\) See, e.g., *McDonald v. City of Chicago, Illinois* 561 U.S. 742, XX (2010) (“Petitioners argue that the Second Amendment right is one of the ‘privileges or immunities of citizens of the United States.’ There is no need to reconsider the Court’s interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases* because, for many decades, the Court has analyzed the question whether particular rights are protected against state infringement under the Fourteenth Amendment’s Due Process Clause”).

\(^{12}\) See, e.g., *Timbs v. Indiana*, U.S. (2018) (Gorsuch, J., concurring in the judgment, “the appropriate vehicle for incorporation might well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause”; Thomas, J., concurring in the judgment, but writing that “I cannot agree with the route the Court takes to reach this conclusion. Instead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with ‘process,’ I would hold that the right to be free from excessive fines is one of the ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment.”) See also Randy Barnett, *Restoring the Lost Constitution*, p. (arguing that the Court erred in its interpretation of the Privileges or Immunities Clause but that, having done so, the next best textual home for rights is the Due Process Clause).

rights. A more plausible test would help to address these worries. As concerns the former reason, I doubt that this distinction is contrary to the original meaning or best construction of the Constitution, as some such distinction is necessary to balance concerns about individual liberty on the one hand with the needs of a functional democracy on the other. Our Constitution lays out the essentials of a constitutional democracy, which attempt to ensure individual liberty, while enabling democratic decision making.

Sixth, I assume that the bare fact that persons have a moral right to \( \Phi \) does not entail that they have a fundamental right to \( \Phi \) under the Constitution. As a consequence, we cannot simply consult our best theory of moral rights to determine whether a claimed liberty interest rises to the level of a fundamental right under the Constitution. This assumption does not commit me to any particular position in the debate between natural law theorists and legal positivists. Both accept the assumption: legal positivists, because rules or provisions needn’t comport with morality at all in order to be law, and natural law theorists, because on their view, comporting with morality is only a necessary condition for a rule or provision to be a part of the law.

Finally, I assume that there are facts about what the Constitution requires, forbids, or permits, and that the aim of doctrinal tests developed by the Court is to guide judges in discovering these facts. That is to say, I assume that constitutional realism is true, though we need not, for present purposes, settle on a particular version of constitutional realism. If they are to guide judges in discovering constitutional facts, doctrinal tests must not violate separation of powers and rule of law values, as reflected in the Constitution, at least on a plausible understanding of what these involve.

I shall begin by considering the disagreement between Justices Kennedy and Roberts, explaining Kennedy’s reasoning and Roberts’ chief reasons for rejecting it. Next, I explore certain problems with the Court’s tests for fundamental rights. Drawing on Kennedy’s opinion, I propose an alternative test. Finally, I explain how this test supports the Court’s holding in Obergefell v. Hodges.

14 For example, Justice Souter suggests a different test in his concurrence in Washington v. Glucksberg, 521 U.S. 702 (1997).
15 For related discussion, see Robert Bork, The Tempting of America (New York: The Free Press, 1990), Ch. 6. describing what he calls the “Madisonian Dilemma.”
17 As I explain in “Constitutional Realism,” the label ‘constitutional realism’ should not be understood the way the label ‘legal realism’ is understood. Whereas the latter is the unfortunate name for a certain skeptical position about law (a kind of “get real” view), the former is the name for a nonskeptical view about constitutional law, namely, the view that there are constitutional facts, or facts about what a constitution requires, forbids, or permits.
As will become clear, Justices Kennedy and Roberts disagree in quite fundamental ways in *Obergefell v. Hodges*. They differ in their views about the judicial role in identifying implied fundamental rights. They differ in their understandings of marriage. They differ about the appropriate way to decide the case before them. And they differ in their reading of precedent and history.

**Justice Kennedy’s Reasoning**

Kennedy’s opinion sets forth a particular view of the Supreme Court’s role, at least with respect to the discovery of implied fundamental rights, and understanding this view will be important both to understanding his reasoning and in working toward an alternative test of these rights. The Court, as Kennedy describes it, has a pivotal role to play in determining which liberty interests rank as fundamental rights. “The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”

Kennedy emphasizes that what may call for the exercise of this duty, in a particular case, is a new understanding about the requirements of justice and the nature of liberty.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all 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. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Kennedy does not here minimize separation of powers considerations, which would leave matters of policy to legislatures and restrict the courts to resolving cases and controversies. Rather, he stakes out a particular view about what the judiciary’s separate powers include, suggesting that new moral insights may trigger exercise of the duty to identify and protect fundamental rights. Unfortunately, he does not explain how he thinks the judiciary is to distinguish a new moral insight from the moral views that happen to be held by its

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18 Ibid., 10.
19 Ibid., 11.
members. This may partly explain Roberts’ comparison of the majority opinion in Obergefell to the Court’s disreputable opinions in Dred Scott v. Sandford and Lochner v. New York.

Kennedy begins the majority opinion with a brief and rather breezy discussion of the history of marriage. His take on this history is that it is “one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.” Among the changes he notes are the shift from marriage as an arrangement made by the parents of a male and female based on political, religious, and financial considerations to a voluntary contract, modifications to marriage as a result of changes in the legal status of women, and the removal of bans on interracial marriage. He observes that “changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations…"

Of course, Kennedy acknowledges that the history of marriage has been of the union of a male and female and that the Court’s marriage precedents finding a fundamental right to marry and removing restrictions on who could exercise that right assumed marriage to be such a union. The puzzle, then, would seem to be how same-sex marriage could be an instance of the same right—a right to marry, rather than a new right—the right to same-sex marriage. Kennedy, in contrast to Roberts, treats the right claimed by the petitioners as the former right, rather than the latter. An immediate problem is that what may be the Court’s chief test for fundamental rights, as articulated by the Court in Washington v. Glucksberg, requires, in part, that a claimed liberty interest be “deeply rooted in the nation’s history and traditions”—call this part of the test “DR”—but the history of marriage is of the union of male and female. The nation’s history and traditions thus seem to exclude a right of same-sex partners to marry.

Without rejecting the relevance of history and tradition to the question of whether same-sex partners have a right to marry, Kennedy denies that the Court’s test is the

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20 See Rosati, “The Moral Reading of Constitutions,” for reflections that provide the beginnings of an answer.
21 Roberts, Dissent, 11-14 (referencing Dred Scott v. Sandford, 60 U.S. 393 (1856) and Lochner v. New York, 198 U.S. 45 (1905)). The comparison is unfair, as I will explain later.
22 Kennedy, Opinion, 6.
23 I say “male and female,” because one of the things Kennedy doesn’t discuss is the age of parties to arranged marriages, or even to marriage once it was treated as a matter of contract. See also note 39.
24 Ibid., 7.
25 Ibid., 11.
26 Ibid., 18.
27 Glucksberg, 521 U.S. at 720-721. The Court has clearly not applied a single test across all of its fundamental rights cases. Compare Glucksberg with Griswold v. Connecticut, for example. And we would do well to keep in mind that the Glucksberg test is not itself constitutionally mandates. Yet it, or something close to it, has been used frequently enough that for purposes of discussion herein, we may treat it as the doctrinal test.
appropriate one in this context. He observes that the fundamental rights protected by the Fourteenth Amendment Due Process Clause include most of the rights specified in the Bill of Rights. Citing Eisenstadt v. Baird and Griswold v. Connecticut, he observes that “these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”

He insists, following Justice Harlan’s dissent in Poe v. Ullman, that the Court’s responsibility in identifying and protecting fundamental rights “has not been reduced to any formula.” Instead, he contends, courts must exercise “reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.” The process of identifying fundamental rights “is guided by many of the same considerations relevant to the analysis of other constitutional provisions that set forth broad principles rather than specific requirements.” History and tradition play a role in the exercise of reasoned judgment, in that they “guide and discipline” inquiry that seeks to identify “interests of the person so fundamental that the State must accord them its respect.” But they do not set its outer boundaries. Kennedy describes the method he follows as one that “respects our history and learns from it without allowing the past alone to rule the present.”

Kennedy thus reserves a role for history and tradition, while departing from the requirement that fundamental rights be deeply rooted in the nation’s history and traditions. Unfortunately, he does not explain what he means by “reasoned judgment” or what constraints the exercise of reasoned judgment must observe. He does not identify the “considerations relevant to the analysis of other constitutional provisions that set forth broad principles.” And he does not explain what it is for history and tradition to “guide and discipline” a court’s inquiry into whether a liberty interest is a fundamental right. As a consequence, he does not make sufficiently clear the contrast he envisions with DR, or with the Court’s test as a whole. Kennedy’s remark about history and tradition not setting “outer boundaries” to the inquiry into fundamental rights, and his description of his approach as not “allowing the past alone to rule the present,” seem to suggest that a key contrast concerns whether being deeply rooted in the nation’s history and traditions places a necessary condition on the existence of an implied fundamental right or merely a sufficient condition. Under the Court’s test, as we will see, being deeply rooted in the nation’s history and traditions would seem to be necessary for the existence of an implied fundamental right, whereas on Kennedy’s approach, being deeply rooted in the nation’s history and traditions is perhaps sufficient but not necessary. As Kennedy observes, “The right to marry is

29 Ibid. (citing Poe v. Ullman, 367 U.S. 497, 542 (1961)).
30 Ibid.
31 Ibid., 11.
fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”\footnote{Ibid., 18-19 (emphasis added).} Just this much still leaves us without a full explanation of what it is for history and tradition to guide and discipline inquiry into fundamental rights. For this would presumably involve history and tradition playing some role in reasoned judgment, even after it has been determined that a liberty interest is not deeply rooted in the nation’s history and traditions.

Kennedy’s approach in Obergefell to exercising reasoned judgment in identifying whether the right to marry encompasses same-sex partners proceeds by discussing what he characterizes as the “essential attributes” of the right to marry, “based in history, tradition, and other constitutional liberties inherent in this intimate bond,” as they have been identified in the Court’s right to marry cases.\footnote{Kennedy, Opinion, 12 (referencing Loving v. Virginia, 388 U.S. 1 (1967)). Kennedy mentions Baker v. Nelson, 409 U. S. 810 (offering a summary dismissal on the grounds that denial of the right to marry to same-sex couples did not present a substantial federal question), but he does not discuss it further on the grounds that there are “more instructive precedents.”} He writes alternately about these as attributes of the right, as principles and traditions, and as reasons why marriage is treated as a fundamental right under the Constitution. But as his aim is to show that the reasons why the Court has recognized the right to marry as fundamental equally apply to same-sex couples, it will be clearest to talk in terms of reasons for treating the right to marry as fundamental.

First, Kennedy tells us that, according to the Court’s precedent, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”\footnote{Kennedy, Opinion, 12.} He does not explain how marriage choice is inherent in the concept of autonomy, instead, reporting that the “connection between marriage and liberty is why Loving invalidated anti-miscegenation statutes.”\footnote{Ibid., 12.} Having appealed to both autonomy and liberty, he next remarks on the intimacy of the choice regarding marriage: “like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate an individual can make.”\footnote{Ibid.} He goes on to describe the nature of marriage as involving an “enduring bond” in which the partners “can find other freedoms, such as expression, intimacy, and spirituality.”\footnote{Ibid., 13.} This is as true, he reasons, of same-sex couples as opposite-sex couples.

Kennedy says that according to the Court’s marriage precedent, a second reason why the right to marry is fundamental is that it “supports a two-person union unlike any other in
its importance to the committed individuals."\textsuperscript{38} For this reasons, the Court held that “prisoners could not be denied the right to marriage because their committed relationships satisfied the basic reasons why marriage is a fundamental right.”\textsuperscript{39} The same holds true for same-sex partners. Kennedy doesn’t explain why exactly this is a reason for recognizing marriage as a fundamental right. Is it the uniqueness of the two-person union, or its importance to the committed individuals, or both? But there may be other unions, or things other than unions, that are unlike anything else in their importance to the individuals committed to them that would not rise to the level of fundamental rights.

A third reason for “protecting marriage” is that, although marriage isn’t conditioned on the having of children, “it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”\textsuperscript{40} Same-sex partners, as the parties to the case agree, can provide loving homes for the rearing of children. Denying same-sex couples the right to marry denies them and their children the “recognition, stability, and predictability,” as well as the financial benefits, that marriage affords.\textsuperscript{41}

Finally, marriage is a “building block” of our society. For that reason, society offers support to couples that includes not only social and legal recognition, but also various “material benefits to protect and nourish the union.”\textsuperscript{42} Kennedy lists some of the benefits that marital status confers, discussing how, in particular, the States “have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”\textsuperscript{43} He concludes, “There is no difference between same- and opposite-sex couples with respect to this principle.”\textsuperscript{44} Kennedy’s thinking here isn’t entirely clear, but his discussion seems to suggest that marriage, whether between opposite-sex partners or same-sex partners can play the same role in providing the foundations of society, and so same-sex partners, because they are excluded from marriage, lack the benefits accorded to opposite-sex partners. They are thus harmed, materially and otherwise, by being denied the right to marry, while their being allowed to marry would “pose no risk of harm to themselves or third parties.”\textsuperscript{45}

Kennedy concludes that

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the
fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.\textsuperscript{46}

Here, he invokes the idea of the “central meaning” of the fundamental right to marry, rather than appealing to attributes of marriage or principles and traditions or reasons why the Court has recognized the right.

Having presented his reasoning in support of the right of same-sex couples to marry, Kennedy goes on to address certain objections. Respondents contend that the Court’s opinion in \textit{Washington v. Glucksberg} calls for a “careful description” of the claimed fundamental right.\textsuperscript{47} But a careful description of the claimed right in \textit{Obergefell} would not be of the right to marry but of a right to same-sex marriage. Applying DR, the result would be that, although the right to marry is deeply rooted in the nation’s history and traditions, the right to same-sex marriage is not; hence, it is not a fundamental right.

Kennedy allows that \textit{Glucksberg} “did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.”\textsuperscript{48} But he contends that although the Court perhaps appropriately adopted that approach in \textit{Glucksberg}, which concerned the claimed right to physician-assisted suicide, it has not adopted that approach when it comes to other fundamental rights, such as the right to marry. \textit{Loving v. Virginia}, for example, asked about the right to marry “in its comprehensive sense,” not about a right to interracial marriage. Each of the Court’s marriage cases concerned whether a particular class of persons could be excluded from the former, comprehensive right. “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”\textsuperscript{49} Kennedy’s insistence that we must distinguish between the nature of a right and who gets to exercise it suggests that he rejects the dissent’s view that marriage just is (by definition) the union of a man and a woman. In light of the reasons that Kennedy claims support recognition of a right to marry, we might describe that right as the right of two adult persons, in the exercise of their autonomy, to form an enduring, intimate, legally recognized bond, with whatever benefits and burdens, rights and responsibilities, the State may legitimately accord to it.\textsuperscript{50}

\textsuperscript{46} Ibid., 17-18.
\textsuperscript{47} Glucksberg, 521 U.S. at 721.
\textsuperscript{48} Ibid., 18.
\textsuperscript{49} Ibid., 18.
\textsuperscript{50} For related discussion, see Connie S. Rosati, “What is the ‘Meaning’ of ‘Marriage’?” \textit{San Diego Law Review} 42 (2005): 1003-1021. Roberts (dissent: 20-21) argues that Kennedy’s reasoning would apply just as well to plural marriage, though he allows that there may be differences between plural marriage and same-sex marriage. What Roberts neglects to consider is that the purported definition of marriage as the union of a
**Justice Roberts’ Dissent**

Justice Roberts’ dissent expresses a competing view of the judicial role when it comes to the finding and protecting of fundamental rights. He advocates what he describes as a “more modest and restrained” role for the Court, one that is “more skeptical that the legal abilities of judges also reflect insight into moral and philosophical issues.” He describes this role as “more sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment.” He also claims that it is “more attuned to the lessons of history, and what it has meant for the country and the Court when Justices have exceeded their proper bounds.” With regard to the issue at hand in *Obergefell*, he insists that confining the Court to the judicial role as he sees it is “less pretentious than to suppose that while people around the world have viewed an institution in a particular way for thousands of years, the present generation and the present Court are the ones chosen to burst the bonds of that history and tradition.”

Roberts’ view of the judicial role neglects to consider that the exercise of legal judgment may sometimes call for the exercise of moral judgment, given the broad moral clauses of the Constitution, such as the Eighth Amendment bar on cruel and unusual punishment, the Due Process clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth (and Fifth) Amendment. He assumes that he has correctly grasped the “proper bounds” in which Justices must operate, and that he correctly discerns the “lessons of history” from those instances in which legal scholars widely agree that the Justices have exceeded their proper bounds. Roberts’ characterization of the judicial role is both more underspecified and more controversial than he acknowledges. If Kennedy doesn’t sufficiently clarify the Court’s role in identifying fundamental rights, Roberts’ seems content to severely constrain it in a way that, as we will see from examining the Court’s test of fundamental rights, is quite problematic.

Roberts claims that what *Obergefell* really concerns is who has the right to alter the definition of marriage, the Court or the States. “Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make

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51 Roberts, Dissent, 2.
a State change its definition of marriage.” As Roberts sees it, the petitioners in this case are really seeking a right that they do not have, namely, the right to make States that have not embraced same-sex marriage change their definition of marriage. Of course, if the right to marry includes the right of same-sex partners to marry, then States that adhere to a traditional view of marriage needn’t change their definition; they need only recognize what falls within its scope. So whether Roberts’ is right in his claims depends on his arguments for concluding that the right to marry recognized by the Court does not extend to same-sex couples.

Roberts argues that the majority decision has no basis either in the Constitution or in precedent. The Constitution, he says, does not enact any one theory of marriage.” Rather it leaves it to the people of a State, acting through their democratically elected representatives, to either expand the definition of marriage to include same-sex couples or to “retain the historic definition.” As a consequence, in deciding that same-sex couples have a right to marry, the majority “seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.”

I take it that in claiming that the Constitution does not enact a particular theory of marriage, Roberts should be understood as follows. First, the constitutional text does not explicitly define marriage or explicitly specify a right to marry. “The Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with ‘[t]he whole subject of the domestic relations of husband and wife.’” Second, although the Court has historically recognized rights besides those that are explicitly mentioned in the Constitution, as part of the liberty protected from deprivation without due process of law by the Fourteenth Amendment’s Due Process Clause, it has done so subject to self-imposed constraints. The claimed right of same-sex couples to marry cannot be arrived at while faithfully observing these constraints. The matter is thus effectively left to the States. The problem with the second step in this line of thought is that Court applies its own tests in identifying fundamental rights, such as the right to marry, not tests set out in or mandated by the Constitution itself. What is at issue is the propriety of its tests.

Under the Court’s precedent, Roberts write, the Constitution protects a right to marry, and States must “apply their marriage laws equally.” “For all those millennia, across

52 Ibid. Suppose that the State of Virginia, at the time Loving was being decided, had defined marriage as the union of a man and woman of the same race. Does Roberts’s reasoning entail that the right to marry would not have included a right to make Virginia change its definition of marriage?
53 Ibid., 3.
54 Ibid.
55 Ibid., 2.
56 Ibid., 3.
57 Ibid., 6 (quoting Windsor, 570 U. S., at __ (slip op., at 17) (quoting In re Burris, 136 U. S. 586, 593–594 (1890))).
58 Ibid., 4.
all those civilizations, ‘marriage’ referred to only one relationship: the union of a man and a woman.”59 Most people have assumed until recently that the very definition of the term ‘marriage’ and the function of marriage “throughout the history of civilization” limits it to the union of a man and a woman.60 The “universal definition” of marriage—the definition accepted in the U.S. and in every state since the nation’s founding—came about because of the need to ensure that children are “conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.”61 Procreation, which occurs through heterosexual sexual relations, is needed for the human race to survive. The marriage bond enhances the prospects of children, and so “for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.”62 Society encourages this by conferring on married couples a special status, replete with various rights and benefits. The Court’s precedents, Roberts argues, assumed the traditional understanding of marriage and “described marriage in ways that are consistent only with its traditional meaning.”63 For example, they connect the right to marry with the right to procreate. The changes in marriage that have taken place, as noted by Kennedy, have not altered the basic definition of marriage, and none of the Court’s precedents, on which the majority relies, involved laws that changed the “core definition of marriage as the union of a man and a woman.”64 Roberts thus reads the Court’s precedents differently than does Kennedy. Whereas for Kennedy, the precedents established a fundamental right to marry and then removed bars to marriage, understood as an enduring and intimate bond given legal recognition and accorded a special status, for Roberts the precedents merely struck down laws that erected barriers to marriage as traditionally understood. “Neither petitioners nor the majority,” Roberts insists, “cites a single case or other legal source providing any basis for such a constitutional right. None exists, and that is enough to foreclose their claim.”65

Roberts observes that the majority decision rests “almost entirely on the Due Process Clause.”66 But the majority’s reasoning, he contends, “has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York.*”67 Addressing Kennedy’s invocation of Justice

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59 Ibid.
60 Ibid.
61 Ibid., 4-5.
62 Ibid., 5.
63 Ibid., 7.
64 Ibid., 16.
65 Ibid., 16-17.
66 Ibid., 10.
67 Ibid., 10.
Harlan’s claim that “due process has not been reduced to any formula,” Roberts sees his Harlan and raises him a Harlan.

The majority also relies on Justice Harlan’s influential dissenting opinion in Poe v. Ullman... As the majority recounts, that opinion states that ‘[d]ue process has not been reduced to any formula.’ But far from conferring the broad interpretive discretion that the majority discerns, Justice Harlan’s opinion makes clear that courts implying fundamental rights are not ‘free to roam where unguided speculation might take them.’... They must instead have ‘regard to what history teaches’ and exercise not only ‘judgment’ but ‘restraint.’... Of particular relevance, Justice Harlan explained that ‘laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up... form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.’

If Kennedy cites only the opening line of this paragraph in Harlan’s Poe dissent, Roberts cites bits of the paragraph rather selectively. Harlan remarks that throughout the course of the Court’s decisions under the Due Process Clause, due process has represented the Nation’s balance between “liberty of the individual” and “the demands of organized society.” He then writes:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Harlan does advise restraint and attention to history and tradition. But contrary to Roberts, he resists the idea that restraint requires that the Court follow a strict test and that the Due Process Clause could be faithfully applied by following such a test.

Roberts discusses how the Court’s precedents have emphasized the need for judicial restraint in identifying implied fundamental rights, in order to avoid judges imposing their own policy preferences, as they did in Lochner and in Dred Scott, to disastrous effect. “Our

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68 Ibid., 18.
69 Poe, 367 U.S. at 542.
precedents have required that implied fundamental rights be ‘objectively, deeply rooted in this Nation’s history and tradition’ (DR), and ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’ The Court’s test adds to DR the requirement that a claimed right be “implicit in the concept of ordered liberty, such that neither liberty and justice would exist” without it. Call this LJ. The right to same-sex marriage, Roberts thinks, fails DR; it is not deeply rooted.

Roberts emphasizes the importance of history. Although, the Court must look beyond the particular law under scrutiny, “so that every restriction does not supply its own constitutional justification,” history places more meaningful limits on the inquiry into fundamental rights than would a test that does not rely on history. “The only way to ensure restraint in this delicate enterprise is ‘continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers.” According to Roberts, instead of following doctrine, the majority adopts the kind of “unprincipled approach” that it did in Lochner.

Roberts does not consider the problems of determining just what history teaches or how best to specify the basic values that underlie our society or of how best to understand the doctrines of federalism and separation of powers. History teaches us a good many things, and to be guided by the teachings of history is not the same thing as requiring that a right (let alone a very specifically described right) be deeply rooted in the nation’s history and traditions. The doctrines of federalism and separation of powers are subject to competing interpretations. None of the factors that Roberts rightly suggests should guide inquiry into implied fundamental rights is as straightforward as his opinion seems to suggest.

As for the requirement that an asserted right be such that neither liberty nor justice would exist without it (LJ), presumably Roberts thinks a right to same-sex marriage does not meet this requirement either. In commenting upon some of the precedent to which the majority decision appeals, namely, the line of cases that invokes an implied right of privacy, he concludes that

Neither Lawrence nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no

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70 Ibid., 13-14 (citing Glucksberg 521 U.S. at 720-721, omitting internal quotation marks).
71 Ibid., 14.
72 Ibid., 15 (citing Griswold v. Connecticut, 381 U. S. 479, 501 (1965) (Harlan, J., concurring in judgment)).
73 Ibid.
74 He also does not consider that whereas Dred Scott and Lochner undercut rights and, in the case of Dred Scott, denied recognition of people’s equal standing before the law, Obergefell would extend rights and recognition.
government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit...At the same time, the laws in no way interfere with the ‘right to be let alone.’

It would seemingly follow, then, that liberty and justice could exist without a right to same-sex marriage. Whether this is so depends on how we are to understand LJ. Roberts does not explain how we are to understand it, and as we will see, there are difficulties for LJ.

Roberts concludes that the majority decision deviates from tests established by precedent—indeed, he suggests that the majority opinion “requires it to effectively overrule Glucksberg, the leading modern case setting the bounds of substantive due process.” He argues that it finds no support either in the Court’s right to marry cases, all of which were premised on and left unchanged the traditional understanding of marriage, or in its privacy cases, all of which, unlike the present case, involved intrusions on liberty by the State. It rests, he contends,

on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that ‘it would disparage their choices and diminish their personhood to deny them this right.’...Whatever force that belief may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in Lochner.

Commenting on the majority’s observation that allowing same-sex couples to marry would “pose no risk of harm to themselves or third parties,” he remarks that this appeal to John Stuart Mill’s harm principle “sounds more in philosophy than law,” and admonishes that the judicial role does not “confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of ‘due process.’”

The majority’s approach to due process, he contends, is “dangerous for the rule of law.”

Summary

75 Ibid., 17.
76 Ibid., 19.
77 Ibid., 19-20.
78 Kennedy, Opinion, 27.
79 Roberts, Dissent, 22. “As Justice Henry Friendly once put it, echoing Justice Holmes’s dissent in Lochner, the Fourteenth Amendment does not enact John Stuart Mill’s On Liberty any more than it enacts Herbert Spencer’s Social Statics....And it certainly does not enact any one concept of marriage.”
80 Ibid.
Kennedy and Roberts, in short, differ in their views of the judicial role in identifying implied rights; they also see the case before them in starkly different terms and would resolve it using strikingly different approaches. Whereas Kennedy emphasizes the Court’s pivotal role in identifying implied rights and sees that role as triggered by fresh understandings of what liberty and justice require, Roberts views the judicial role in this area as subject to strong constraints, and he expresses both skepticism about the capacity of judges to distinguish the requirements of liberty and justice from their own views of them, and disapproval of judicial efforts to put such determinations in place of democratic decisions. Whereas Kennedy sees the case as raising the question of whether the general right to marriage extends to same-sex couples, Roberts sees it as inviting the Court to find a wholly new right—the right to same-sex marriage, and by implication, the right to make States give up the traditional definition of marriage. Whereas Kennedy insists on the limited relevance of the Court’s test as articulated in Glucksberg, emphasizing instead the exercise of reasoned judgment and what he takes to be the rationale for recognizing the right to marry in the first place, Roberts insists that only by adhering to the Court’s test and a narrow reading of precedent will the justices properly keep themselves within the confines of the judicial role and adhere to the rule of law.

Problems with the Court’s Test

The Supreme Court has expressed its test (or tests) of implied fundamental rights in various ways. In striking down a law prohibiting teaching any subject in languages other than English, the Court wrote that the liberty protected by the Due Process Clause included not merely freedom from bodily restraint, but also the 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...The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.\(^{81}\)

In finding that a trial judge’s refusal to allow a criminal defendant to be present at a viewing

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\(^{81}\) Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (emphasis added).
of the crime scene did not violate the criminal’s due process rights, the Court indicated that “The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\(^{82}\) In striking down a Connecticut law that made it illegal to use contraceptives, the Court wrote, “We deal with a right of privacy older than the Bill of Rights,” and it sees the law as intruding on "the traditional relation of the family—a relation as old and as fundamental as our entire civilization."\(^{83}\) In recognizing a right of family integrity, in a case involving an Ohio zoning ordinance that prevented a grandmother from living with her grandchild, the Court wrote, "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."\(^{84}\) In striking down a Virginia law barring interracial marriage, the Court observed that the right to marry “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness.”\(^{85}\) And in a case concerning incorporation of the bill of rights against the States as it pertains to the constitutional prohibition against double jeopardy, the Court observes that certain immunities in the Bill of Rights have been found to apply against the States through the Fourteenth Amendment because they were “found to be implicit in the concept of ordered liberty.” Insofar as the Court has found the Fourteenth Amendment to incorporate privileges and immunities contained in the Bill of Rights, this “has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed.”\(^{86}\)

In several of these cases, what seems to have weighed with the Court is longstanding recognition of certain rights, though it isn’t clear whether the Court in these cases treats this as a necessary or a sufficient condition for finding an implied right. In some, the Court appeals not to liberties or rights that have long been recognized, but to principles of justice long rooted in our tradition and conscience. In some, the Court appeals to the idea of what is implicit in the concept of ordered liberty, or to what is necessary to liberty and justice, or to what is “essential to the orderly pursuit of happiness.” These are, of course, not equivalent tests for implied fundamental rights, even if there are recurrent themes.

Particular Justices have sometimes followed different tests, or even urged an alteration in the Court’s test. For example, Justice Douglas, in *Griswold v. Connecticut*, mindful of the disrepute into which substantive due process analysis had fallen post *Lochner*, rejected that form of analysis. He appealed instead, in an opinion that has met with a fair

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\(^{82}\) Snyder v. Massachusetts, 291 U. S.97, 105 (1934) (emphasis added).
\(^{83}\) *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (Douglas, J. opinion of the Court) and 495-495 (Goldberg, J. concurring) (1965) (emphasis added).
\(^{85}\) *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
bit of derision, to “emanations” from and “penumbras” of explicitly protected rights to find a general right of privacy. And Justice Souter, while concurring in the judgment in Glucksberg, writes that the question posed by the case is whether Washington’s law barring physician-assisted suicide sets up one of those “arbitrary impositions” or “purposeless restraints” that is in conflict with the liberty protected by the Due Process Clause of the Fourteenth Amendment.

What now seems to be treated, at least by many, as the canonical test for implied fundamental rights is the test presented by the Court in Washington v. Glucksberg. But the Glucksberg opinion suggests two, importantly different, characterizations of the test. The first characterization of the test is conjunctive:

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," ... and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed...."

According to this characterization of the test, a liberty interest (or claimed right) must satisfy both DR and LJ: it must both be deeply rooted in the nation’s history and traditions and implicit in the concept of ordered liberty such that liberty and justice wouldn’t exist without it.

But the Court also, at one point, characterizes its test disjunctively. Referring to the Brief for the respondents, which quoted a passage from Planned Parenthood v. Casey, the Court remarks of the passage that

By choosing this language, the Court's opinion in Casey described, in a general way and in light of our prior cases, those personal activities and

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87 Griswold, 381 U.S. 479, 479-486 (Douglas, J., opinion of the Court).
88 Glucksberg, 521 U.S. at 752 (Souter, J. concurring opinion, quoting Poe, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). The majority rejects this alternative approach: “In our view, however, the development of this Court's substantive due process jurisprudence, described briefly above...has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.”
89 Glucksberg, 521 U.S. at 720-721 (emphasis added).
decisions that this Court has identified as so deeply rooted in our history and
traditions, or so fundamental to our concept of constitutionally ordered
liberty, that they are protected by the Fourteenth Amendment.91

According to this characterization of the test, a liberty interest (or claimed right) must satisfy
either DR or LJ: it must either be deeply rooted in the nation’s history and traditions or
implicit in the concept of ordered liberty such that liberty and justice wouldn’t exist without
it.

Roberts uses the conjunctive formulation. As a matter of doctrine, this would seem
to be the correct approach, given that the Glucksberg Court calls the conjunctive formulation
its “established method of substantive due process analysis.” But both formulations of the
test are problematic, even if there is at least some reason to prefer the disjunctive test.92

Consider first LJ, the requirement that claimed rights be “implicit in the concept of
depicted liberty, such that neither liberty nor justice would exist if they were sacrificed.” The
test is, to understate the point, exceedingly vague. First, it isn’t clear how to understand the
concept ORDERED LIBERTY; nor is it clear just which rights are “implicit in” that concept.
The Court does not offer any analysis, and it does not attempt to spell out the parameters of
ordered liberty beyond listing some of the rights that it takes ordered liberty to
uncontroversially include.93 Second, the rights protected by liberty under the Due Process
clause are supposed to be those implicit in the concept of ordered liberty such that liberty
and justice “would not exist if they were sacrificed.” But depending on how we understand
it, ordered liberty may include many rights the loss or curtailment of which would not be
such that liberty and justice would cease to exist. For example, the Court has held that the
right to freedom of speech under the First Amendment extends to flag burning. But surely
it is false to conclude that were the Court to reverse itself and uphold a flag burning statute,
liberty and justice would pop out of existence. This clause could plausibly apply, at best, to
depicted rights understood at a pretty high level of generality. But ordinarily what the Court is trying
to determine is whether a more specifically described right, such as the right to burn the flag,
or a right to use birth control, is protected. And ordered liberty likely includes many more

91 Glucksberg, 521 U.S. at 727 (emphasis added).
92 Ibid., 13-14, “Our precedents have required that implied fundamental rights be ‘objectively, deeply rooted
in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty, such that neither
liberty nor justice would exist if they were sacrificed’” (citing Glucksberg 521 U.S. at 720-721, omitting internal
quotation marks). According to Roberts, “Although the Court articulated the importance of history and
tradition to the fundamental rights inquiry most precisely in Glucksberg, many other cases both before and
after have adopted the same approach” (14).
93 See Meyer, 262 U.S. at 399: “While this Court has not attempted to define with exactness the liberty thus
guaranteed, the term has received much consideration and some of the included things have been definitely
stated.”
specific rights the loss of which would not cause liberty and justice to cease existing.\textsuperscript{94} So the test would seem to be consistent with the exclusion of many rights, unless perhaps the concept of ordered liberty is something like a Rawlsian ideal of the most extensive liberty consistent with a like liberty for all; but then the appeal to the idea that liberty and justice wouldn’t exist without a right would be doing no real work.\textsuperscript{95} So how we understand JL determines whether more or fewer claimed rights rise to the level of implied fundamental rights.

Of course, in assessing specific claims, it is not as if the Court would have nothing to go on. It could consider the relationship between the claimed right and those rights expressed in the Bill of Rights. It could compare claimed rights with rights already recognized in its precedents. It could look to whether a right would have been recognized historically. But these are merely rough heuristics that would require further specification, and the application of them would require an exercise of the sort of “reasoned judgment” that Kennedy embraces, but that Roberts eschews as an invitation to judicial legislating.

Consider next DR, which appeals to history and tradition. Whether a claimed right is “objectively, deeply rooted in this Nation’s history and tradition” depends on how one characterizes that history and tradition, including the level of generality at which one describes it. We might describe history and tradition at a low level of generality. Justice Scalia prescribed, in \textit{Michael H. v. Gerald D.}, that we look to the “most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”\textsuperscript{96} The test assumes, of course that there is such a thing as the “most specific level” at which to describe a tradition. It also seems to assume that only one tradition is relevant to assessing a claimed right. Even if there were just one relevant tradition and even if there were a most specific level of description of the tradition, the test is objectionably stingy. True, the test might constrain judges, but it would do so at the cost of failing to protect rights that are plausibly a part of ordered liberty. Suppose instead that judges were to follow a test that prescribed looking to the most general level at which a tradition protecting, or denying protection to, the asserted right can be identified, assuming that there is a most general level of description.\textsuperscript{97} Without some further restraints, many liberty interests might rise to the


\textsuperscript{97} This idea borrows from Ronald Dworkin’s claim that he would “favor stating the constitutional principles [expressed by the abstract moral clauses of the Constitution] at the most general level possible....” See Ronald Dworkin, “The Moral Reading and the Majoritarian Premise,” in \textit{Freedom’s Law} (Cambridge: Harvard University Press, 1996), 7.
level of fundamental rights, leaving problems about how to resolve conflicts among rights, as well as make room for democratic decision-making (at least given the Court’s strict scrutiny test). So how we understand DR determines whether more or fewer claimed rights count as fundamental rights.

Additional problems with DR bear mention. When we look to history and tradition, what properly demarcates the relevant period of time? Justice Blackman, observed, in Roe v. Wade, that

It is not generally appreciated that restrictive criminal abortion laws in effect in the majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt any time during pregnancy except when necessary to preserve the pregnant woman’s life are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.98

So is the relevant tradition the one that existed prior to these statutory changes or the one due to these statutory changes?99 And if only a majority of States has such laws, is that enough to determine the content of the relevant tradition? How large a majority? We might ask as well about the relevance of historical traditions outside of our own. Although only U.S. tradition would seem to be relevant, both Blackmun in Roe and Roberts in Obergefell, consider traditions outside of (and well before) ours. Justice Roberts reports, for example, writes about how marriage came about historically and calls the traditional definition of marriage “universal.” He admonishes the Courts’ decision on the grounds that “it invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”100 It’s worth noting that the Court does not appeal to history and tradition in the same way in its 8th Amendment jurisprudence. Is there a principled basis for invoking “evolving standards of decency” when it comes to determining whether a form of punishment is “cruel and inhuman,” but not when it comes to determining whether a previously unrecognized right is constitutionally protected?101

What happens when we put DR and LJ together, either as a conjunctive test or a disjunctive test? Consider first the conjunctive test. Depending on how we further specify

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99 I owe this observation to students in my Law and Legal Theory Course at the University of Arizona in the Spring of 2018.
100 Roberts, Dissent, xx*
101 cases
each part of the test, a claimed right might fail to be objectively, deeply rooted, while also being implicit in the concept of ordered liberty. Alternatively, it seems possible that a claimed right might be objectively, deeply rooted, while failing to be implicit in the concept of ordered liberty. It seems likely that only if both parts of the test are construed narrowly or both are construed more expansively will they point in the same direction. One remaining question about the conjunctive test would concern precisely how each part of the test is meant to operate, given a specification of the other part. For example, JL might be meant to limit rights by excluding some rights that are deeply rooted in the nation’s history and traditions on the grounds that they are not implicit in the concept of ordered liberty. Perhaps this would exclude from the category of implied fundamental rights such liberties as the right to burn the American flag or the right to ride a horse on public roads.\textsuperscript{102}

Consider next the disjunctive test. Many of the same problems that we found for the conjunctive test would also apply to the disjunctive test, given that they have the same components. We would still face problems about how to understand DR and JL. Yet the test understood disjunctively would seem to have a key advantage over the conjunctive test. The natural way to understand the disjunctive test would be that satisfying either DR or JL would be sufficient for a claimed right to count as fundamental. This would have the result that being deeply rooted in the nation’s history and traditions is sufficient for a liberty interest to count as an implied fundamental right. But it would allow that the category of implied fundamental rights might include some rights that are not deeply rooted. Consider the right of same-sex partners to marry, and suppose that we adopt a restrictive construal of rights that are deeply rooted along the lines of Scalia’s test of traditions or Roberts’ appeal to the supposed traditional definition of marriage. Same-sex partners might nevertheless have a fundamental right to marry, as that right might be implicit in the concept of ordered liberty. The disjunctive test might be less constraining of judicial decision-making, but it would have the virtue of recognizing the existence of rights that were beyond the framers’ and ratifiers’ ken. A remaining problem with the test would be that some rights that satisfy DR would count as fundamental even though they are not implicit in the concept of ordered liberty, which would, under the Court’s current tests, give them a level of protection that they may not warrant.

\textsuperscript{102} The latter example was suggested by some of the students in my Law and Legal Theory course at the University of Arizona in the spring of 2017. “Traffic laws in a few states, including Colorado, Michigan, and New Mexico, specifically state that horses have all the rights and obligations of other vehicles when they are being ridden or driven on a public highway. Everywhere else, except in states like Louisiana where it appears to be illegal to ride a horse on a paved road, riders and drivers probably enjoy similar rights and obligations by implication.” \url{http://cs.thehorse.com/blogs/horses-and-the-law/archive/2012/01/24/Rules-Of-The-Road.aspx}
Although Roberts adopts the conjunctive formulation, following one of the characterizations in Glucksberg, it is not uncommon for Justices to place greater weight on one or the other test in analyzing constitutional questions. Justice Blackmun, in Roe v. Wade, and Justice Kennedy, in Obergefell, seem to favor the ordered liberty component over the history and traditions component. Kennedy, as noted earlier, seems to treat DR as a sufficient rather than a necessary condition on the existence of an implied fundamental right, and so he might plausibly be viewed as adopting a disjunctive view of the test. The fact that the Court’s formulations of its test for fundamental rights are vague and conflicting undercuts, in my view, Roberts’ insistence on the importance of abiding by the Court’s test as articulated in Glucksberg to restrain judicial decision-making. As far as I can see, the test offers little in the way of clear constraints, as it can readily be fleshed out in ways that reflect different justices favored views. If the Court is to have a test along the lines of the Glucksberg test that provides genuine guidance, it must make a clear and defensible choice about (1) how to understand each test and about (2) the relationship between the parts of its test. So contrary to what Roberts suggests, there is no single clear test as yet offered by the Court that judges must follow on pain of stepping outside of the judicial role and engaging in lawmaking.

One might argue that judicial restraint, separation of powers, and rule of law considerations counsel in favor of treating the Court’s test as conjunctive and interpreting DR and JL narrowly, for such an approach leaves the least room for judges to “roam at large” finding new rights and disabling democratic decision-making. But even assuming that these were the sole considerations at stake, there are competing ways of understanding what these notions come to. On one understanding of judicial restraint, separation of powers, and the rule of law, judges ought to proceed in a way that leaves as much as possible to be decided by democratic processes. But on another understanding of judicial restraint, separation of powers, and rule of law, judges are merely constrained to decide constitutional cases and controversies in accordance with what the Constitution requires, forbids or permits, rather than going beyond this in favor of preferred policies or outcomes. If we accept the latter view, what is really at issue between Kennedy and Roberts, and among those who advance competing theories of constitutional interpretation and adjudication, is which of the possible tests the Court might adopt, would (if applied accurately) result in decisions that accord with what the Constitution requires, forbids, or permits. One’s view about the proper test(s) will depend, at least in part, on one’s view about the function of the Constitution and specific clauses within it.103 For example, to the extent that one emphasizes the function of the Constitution in facilitating democratic processes, one might be inclined in one direction, but to the extent that one emphasizes the function of the Constitution in preserving

103 See Rosati, “Constitutional Realism.”
individual liberty, one might be inclined in a different direction. Of course, the Constitution has both functions (and others besides), and reconciling them is the problem that Judge Bork described as the “Madisonian Dilemma.”

One takeaway from the discussion thus far, I believe, is that in the area of implied fundamental rights, we should pretty much entirely discount charges by one justice against another (or by commentators against a justice) that he or she is engaged in judicial lawmaking or, to adopt the more common term, “judicial activism.” We should thus discount Roberts’ charge against Kennedy that his opinion is “an act of will, not legal judgment.” It is, in fact, possible for judges of equal intellectual honesty and commitment to the rule of law to favor competing approaches. In the absence of arguments that, as far as I am aware, the Court has never given for favoring one approach over the other on the grounds that that approach will better enable them to determine what the Constitution really requires, forbids, or permits, there is more than one prima facie defensible position. Acknowledging this is compatible with believing that there is a correct approach. The question is how we might show one of them to be correct, or more precisely, how we might identify a correct approach given the apparent impasse between conservative and progressive interpreters of the Constitution.

An Alternative Test for Fundamental Rights

Let us return to Kennedy’s idea that in order to assess claims about implied fundamental rights, the Court must engage in reasoned judgment. As noted early, Kennedy offers no account of what constraints on reasoned judgment should look like or even how reasoned judgment, as a general matter, should proceed. His own reasoning in Obergefell, however, suggest that it will, in part involve testing to see whether the considerations that support the existence of one fundamental right equally support either an extension of that right or the existence of another fundamental right. I want to offer what I take to be an intuitive approach to testing for implied fundamental rights that draws on this idea, as well as on the idea that the Court must in this area exercise reasoned judgment. Although I consider this approach distinct from the Court’s Glucksberg test, some may view it, rather, as a refinement of that test. I leave it to the reader to choose how to categorize my test’s relationship to the Glucksberg test; what ultimately matters is not the relationship it may or may not bear to that test but its content. The approach I offer leaves a role for history and tradition in determining whether a liberty interest rises to the level of a fundamental right, while limiting their adjudicative force.

105 Roberts dissent, 3.
For purposes of setting out this approach, I want to introduce a bit of terminological regimentation. Let’s distinguish between a claimed right, a right that is unenumerated, and a right that is implied. By ‘claimed right,’ I simply mean something that a person or persons claim to have a moral right to; they may or may not in fact have such a right. By ‘unenumerated right,’ I mean a genuine moral right, though one that is not expressly written into the text of the Constitution. (A claimed right that is a right is also, under this terminology, an unenumerated right.) By a right that is ‘implied,’ I mean a fundamental right that is not among the fundamental rights expressly mentioned in the Constitution, but one that can be inferred by proper practical reasoning from the relevant parts of the constitutional text and precedent, as well as the structure of the Constitution and the democratic government it sets forth. We might understand such rights either as falling within the liberty protected by the Due Process Clause, properly construed, as I have been assuming, or as being among the rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment, or the Privileges and Immunities Clause of the Fifth Amendment, for those who would not want to accept my third assumption.

As a starting point, let’s say that the fact that a unenumerated right has been recognized over a long period of the nation’s history—that it is “objectively, deeply rooted in the nation’s history and traditions”—establishes a defeasible presumption that the right is implied. Why a defeasible presumption rather than a sufficient condition or a necessary condition on the existence of a fundamental right? Not a sufficient condition, because the bare fact that a right is historically grounded seems insufficient to render it a fundamental right under the Constitution. After all, there are countless such rights that wouldn’t merit protection against governmental action that must meet the Court’s exacting test of Strict Scrutiny. Presumably this is why the Court’s conjunctive test includes JL in addition to DR. Not a necessary condition, because, as the disjunctive test would allow, there may be fundamental rights previously unrecognized and unrooted in history and tradition, at least, where history and tradition are described at a low level of generality. This, as we have seen, was an advantage of the disjunctive test. But that test, for the reason already given, would run into trouble insofar as it treats DR as setting a sufficient condition on an implied fundamental right.

But then why a presumption at all? Certain normative considerations favor it. First, the fact that a right is long-standing at least suggests that it has historically played an important role in people’s lives and that they therefore have some legitimate claim that they not be deprived of the substance of that right. Second, it would be problematic from the

106 Judge Bork suggested this in Hearings Before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, http://www.loc.gov/law/find/court-withdrawn.php#bork.
standpoint of both fairness and legitimacy to upset long-standing expectations without good reason. So the onus would be on the government and the Court to justify relegating the right to a mere liberty interest.

Notice that because DR is treated as establishing merely a presumption, we needn’t worry about the level of generality at which to specify a tradition of recognizing a right or specifics about relevant historical periods. Because DR doesn’t set a necessary condition, the fact that a claimed right is not a presumptive right in no way counts against it. So it won’t matter if history and tradition are described in quite specific or narrow terms. And because DR does not set a sufficient condition, it won’t matter if history are tradition are described at a high level of generality, because without more, a right rooted in history and tradition has its status merely as a presumption. So not only rights that satisfy DR can count as fundamental and not all rights that satisfy DR can count as fundamental.

If we are not going to follow the Court in adopting a version of the conjunctive test, what would defeat the presumption that an enumerated right is an implied right? To answer this question, we must consider what makes for an implied fundamental right and what process should be followed to discern whether a claimed right or an unenumerated right is indeed an implied fundamental right.

Begin with the idea that an implied fundamental right is a claimed or unenumerated right that is supported by reasoned judgment. Call the test of whether a claimed or unenumerated right is an implied fundamental right the “Reasoned Judgment Test” or “RJT.” What RJT prescribes is that someone who is considering the question of whether a liberty interest or unenumerated right rises to the level of a fundamental right engage in the following inquiry.

First, consider whether ordinary or typical exercise of a claimed or unenumerated right would violate the enumerated or implied rights of others, or whether it would otherwise result in harm to others. Contrary to Roberts’ claims, I am suggesting that there is a plausible, if limited role, for something akin to Mill’s “harm principle.” Spelling this out will, of course, require an account of harm. For present purposes, we can limit harm to the paradigmatic cases—physical harm, emotional harm, or damage to or destruction of property. To illustrate, a person can use speech to engage in a conspiracy, to threaten, to commit fraud, and so on, but these aren’t the typical uses of speech. The typical exercise of the right to freedom of speech does not involve any violation of the enumerated or implied rights of others or inflict harm. Rather than not recognize a right to freedom of speech, given the

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107 One might appeal instead to whether ordinary exercise of a right would result in the violation of criminal laws, but this would have had the perverse result that that there is no fundamental right to engage in sex practices common (though not exclusive) to gays and lesbians, because at the time that Lawrence v. Texas, 539 U.S. 558 (2003), was decided, a number of states still criminalized oral and anal sex.
values such a right confers, the better route is to carve out exceptions to the right where speech does violate rights or inflict harm. This first step sets only a necessary condition on whether an unenumerated right is an implied fundamental right. Call this condition HARM.

Second, consider whether a claimed or unenumerated right is deeply rooted in the nation’s history and traditions. A deeply rooted unenumerated right that satisfies HARM is an implied fundamental right. An example of an unenumerated right that is deeply rooted in the nation’s history and traditions would be the right to marry. The latter right isn’t, except by stretching (say, the First Amendment right to peaceably assemble), an instance of or within the scope of an enumerated right. But it neither violates the enumerated or implied fundamental rights of others nor otherwise inflicts harm. Call this DEEPLY ROOTED.108

Third, consider whether a claimed or unenumerated right is plausibly an instance of an enumerated right or plausibly falls within the scope of an enumerated right or protection. For example, the First Amendment to the Constitution protects freedom of speech and freedom of the press. But it doesn’t say anything about private letters, postings on the internet, or twitter feeds. Determining whether an unenumerated right is an instance of an enumerated right will require understanding the purpose of the enumerated right or the values protection of it serves. Here we could look the actual intended purpose—what the framers and ratifiers actually intended protection of the right to accomplish, or to the values they believed that it served. The problem is that their actual intentions and beliefs may have been based on limited knowledge or the practical realities of the time in which they happened to live, so their actual intended purposes can be at most a starting point, at least if we are to take seriously liberty, legitimacy, and the text of the Ninth Amendment. We do better to understand the purpose of a claimed or enumerated right counterfactually: it is the purpose that would best explain why a rational person who was knowledgeable about human welfare and human nature, and who understood the nature of the right, would provide constitutional protection of that right.109 Call this PURPOSE. If an unenumerated right satisfies HARM and shares the purposes of an enumerated right thus understood, then it is an implied fundamental right. For example, private letters, internet postings, and twitter feeds plausibly share the purpose and serve the values promoted by the rights of free speech and press, and without detrimental impact on the enumerated or implied rights of others.

Finally, consider whether an unenumerated right is the functional equivalent of an implied fundamental right. This would be a matter of considering whether an unenumerated right plays the same role with respect to an individual’s well-being and

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108 Thus, contrary to what Roberts’ claims, See Daniel Jacobson... (arguing that the so-called harm principle is better understood as a liberty principle).
109 By constitutional protection, I mean protecting it from change by bare majoritarian processes.
exercise of her autonomy that is played by another implied fundamental right. Call this FUNCTIONAL EQUIVALENCE. If an enumerated right satisfies HARM and is functionally equivalent to an implied fundamental right, then it is also an implied fundamental right.

Pulling these threads together, the Reasoned Judgment Test for implied fundamental rights can be formulated as follows, letting UR to stand for an unenumerated right and IFR for an implied fundamental right:

A UR that satisfies HARM is an IFR iff that UR also satisfies
1. DEEPLY ROOTED,
2. PURPOSE, or
3. FUNCTIONAL EQUIVALENCE.

I am aware that the test will need further refinement. But I believe that something along the lines of this test would offer a more principled restraint on the Court than the Court’s current test. It is consistent with all of my starting assumptions. It provides guidance for reasoned judgment. It is protective of individual liberty, while respecting democratic processes. It does not violate separation of powers or the rule of law, reasonably understood. And it allows for moral learning to be reflected in the law without calling on justices to be moral philosophers.

How does the unenumerated claimed right of same-sex partners to marry fare by this test? It does not pass the harm test, because it is not deeply rooted in the nation’s history and traditions. It does not pass the purpose test, because the right to marry is not an enumerated right, and it apparently does not share the purpose or function of any other enumerated right. However, it does pass the functional equivalence test because it is functionally equivalent to an implied fundamental right, namely the right to marry. One advantage of the functional equivalence test, in this context, is that we need not worry about whether extending the right to marry to same-sex partners forces states to change their definitions of marriage, because we need not worry about whether the right same-sex partners claimed in Obergefell was the right to marry (as Kennedy claimed) or the right to same-sex marriage (as Roberts claimed). Another, I suspect, is that the levels of generality problem becomes less pressing. We can understand enumerated rights and history and traditions without invoking either the most specific level of description or the most general level of description, and so without inviting the problems for either approach.

At least two responses might be made to the argument that the right of same-sex partners to marry is functionally equivalent to the right of opposite-sex partners to marry. First, some would argue that, nevertheless, States have the right to restrict the term ‘marriage’ to opposite couples so long as it provides a parallel institution for same-sex couples with all
the same rights and responsibilities, benefits and burdens, of marriage. But it is hard to make the case that doing so would have any motivation other than to relegate marriages between same-sex partners to a second-class status, and so there would be other constitutional grounds for rejecting this response. Second, Roberts and others might argue that it is not the functional equivalent of the right of opposite-sex partners to marry because of the historical connection between marriage and procreation. But the right to marry has never been made conditional on either the intent to procreate or on success in procreating. Moreover, even if same-sex partners cannot procreate with each other, they can procreate or adopt and parent. And so the historical connection between marriage and procreation is not adequate grounds for denying the functional equivalence of marriage between same-sex partners and marriage between opposite-sex partners.

I have claimed that RJT offers more principled constraint than the Court’s current test. But some may worry that it still leaves judges too free to “roam at large” when identifying fundamental rights. I think not. Although judges can no doubt do better and worse at applying the test, the test does not allow them plausibly to arrive at just any conclusion they like. This claim is consistent, I think, with allowing that the test is in need of further refinement. The test is properly constraining, if not perfectly constraining. Given that the judicial role in constitutional cases is to decide cases and controversies consonant with what the Constitution requires, forbids, and permits, judges who would follow RJT are not violating the principle of separation of powers. And insofar as the test enables judges better to discern implied fundamental rights, they are not failing to uphold the rule of law.

Conclusion

If I am on the right track, Justice Kennedy’s holding in Obergefell v. Hodges in fact reaches the correct outcome, and a strong rationale can be provided for drawing this conclusion. It follows that Justice Roberts is simply mistaken when, in criticizing Kennedy’s approach, he suggests, in effect, that any approach other than one that follows the Glucksberg test amounts to unprincipled decision-making. Likewise Roberts is mistaken to think that if the Court fails to follow the Glucksberg test, it fails to stay within the judicial role and to respect separation of powers and the rule of law. Roberts declares that the Court’s holding has nothing to do with the Constitution. On the contrary, it has everything to do with it.