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THE RIGHT TO SAME-SEX MARRIAGE: FORMALISM, REALISM, AND SOCIAL CHANGE IN *LAWRENCE* (2003), *WINDSOR* (2013), & *OBERGEFELL* (2015)

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My work to date has centered on the process through which individual rights have developed under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Thus far, I have explored the question of why a "conservative-moderate" Supreme Court in a conservative political age (since the 1990s) has expanded implied fundamental rights to sexual intimacy for homosexuals and sustained the fundamental right of women to choose whether to have an abortion.[1] Since 1969, when President Nixon named Warren Burger as Chief Justice, through 2005, when President George W. Bush appointed Chief Justice John Roberts and nominated Justice Samuel Alito for the Supreme Court, Republican presidents have made twelve of fourteen appointments to the Supreme Court, thus constituting a clear majority of appointees in any given year.[2]

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1. *See* Ronald Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development:* Lochner, Plessy, Bowers, *but Not* Roe, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 67, 67–116 (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter Kahn, *Social Constructions*]; *see also* Ronald Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?:* Lawrence v. Texas *(2003) in Legal and Political Time*, *in* 44 STUDIES IN LAW, POLITICS AND SOCIETY, SPECIAL ISSUE: CONSTITUTIONAL POLITICS IN A CONSERVATIVE ERA 173, 173–217 (Austin Sarat ed., 2008) [hereinafter Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*].

2. President Nixon appointed Chief Justice Burger in 1969, Justice Blackmun in 1970, Justice Powell and Justice Rehnquist in 1972. President Ford appointed Justice Stevens in 1975. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 7, 2015). Democratic President Carter had no appointees to the Supreme Court. President Reagan appointed Justice O'Connor in 1981, reappointed Justice Rehnquist as Chief Justice in 1986 and appointed Justice Scalia in 1986 and Justice Kennedy in 1988. President George Herbert Walker Bush appointed Justices Souter in 1990 and Thomas in 1991. Democratic President Bill Clinton appointed Justices Ginsburg in 1993 and Breyer in 1994. *Id.* Not until 2005, eleven years later, would any President make additional appointments to the Supreme Court. In 2005, Republican President George W. Bush appointed John Roberts as Chief Justice. One year later, Bush appointed Justice Alito. For a list of all Supreme Court nominations from 1789 to the present, including those listed above, see *U.S. Senate, Supreme Court Nominations 1789–Present*, UNITED STATES SENATE,

Yet during the Rehnquist Court, the Supreme Court reaffirmed the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] and, in *Lawrence v. Texas*,[4] overturned *Bowers v. Hardwick*,[5] extending the implied fundamental rights of privacy and personhood to homosexuals regarding the right of sexual intimacy.[6] Additionally, in *Romer v. Evans*,[7] a 6-3 decision, the Rehnquist Court invalidated a Colorado constitutional amendment that required all laws relating to homosexuals to be valid only through the process of amending Colorado's constitution.[8] The Court said this initiative was invalid because it was based on pure animus against homosexuals and, thus, was a violation of the Equal Protection Clause.[9]

Most significantly, in *United States v. Windsor*[10] the Roberts Court refused to backtrack on the expansion of homosexuals' rights under the Due Process Clause in *Lawrence*[11] and under the Equal Protection Clause in

http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Aug. 7, 2015).

3. 505 U.S. 833, 846 (1992). To ascertain whether or not *Casey* upheld *Roe* technically or was in fact rights expansive, one must do more than an analysis in policy terms of whether the Pennsylvania abortion law has made it more difficult or easier in the short run to obtain an abortion; one would have to explore whether the right itself is more or less fundamental by reviewing the evolution of Supreme Court decisions addressing this issue. In this regard, I argue that the *Casey* decision upheld the fundamental right to choose an abortion, and in important ways made the right more fundamental. The jettisoning of the trimester framework in *Casey* was a significant step in expanding the right of abortion choice because it did away with medical science as the framework within which the right to choose abortion rested. Arguably, *Casey* removed the collision course that would undermine the right to choose, as medical science now allows fetuses to be kept alive closer to conception, albeit with scientific aids, and women likewise have safer abortions closer to term.

In *Gonzales v. Carhart*, the most recent Supreme Court case addressing "partial birth abortions," the Supreme Court reinforced the fundamentality of the right to choose, but also recognized that certain abortion methods carry greater risks. 550 U.S. 124, 156–57 (2007). Justice Kennedy openly recognized the practice of lethal injections for fetuses. *Id.* at 136. Moreover, as both *Roe* and *Casey* seem to suggest, there remains the possibility that a state could pass a law today that would permit women to choose an abortion up to term, as long as the law takes into consideration those standards of humanity espoused in *Gonzales*.

4. 539 U.S. 558 (2003).

5. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

6. *See Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* . . . demeans the lives of homosexual persons.").

7. 517 U.S. 620 (1996).

8. *Id.* at 623, 627.

9. *Id.* at 632, 635.

10. 133 S. Ct. 2675 (2013).

11. *Id.* at 2694.

Romer,[12] instead choosing to *expand* homosexuals' rights under the Constitution[13] by declaring the nation's Defense of Marriage Act ("DOMA") unconstitutional, as it violated basic due process and equal protection principles.[14]

Thus, the Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law for gay men and lesbians during a period of political dominance by social conservatives, evangelical Christians, and other groups who view the protection of their definition of family values as a central mission of government. I have argued that the Supreme Court surprisingly—or, more accurately, unsurprisingly—has either sustained doctrine in opposition to the core values of the Republican Party or expanded individual rights in these doctrinal areas.[15]

In order to explain first why a "conservative-moderate"[16] Supreme Court has expanded implied fundamental rights for homosexuals; second, to make sense of the extraordinary decisions by lower federal courts and state courts overturning state bans on same-sex marriage even though not specifically required by *Windsor* to do so; and finally, to understand the most recent Supreme Court case relating to same-sex marriage, *Obergefell v. Hodges*,[17] we must focus on the relationship between formalism and realism in Court decisionmaking, as well as how Court decisionmaking relates the social, economic, and political factors outside of the Court to principles such as due process and equal protection that operate within the Court's internal discourse. Such an analysis will explain why most social scientists

12. *Id.* at 2692.

13. *Cf. id.* at 2697 (Roberts, C.J., dissenting) ("The majority emphasizes that DOMA was a 'systemwide enactment with no identified connection to any particular area of federal law,' but a State's definition of marriage 'is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" "And the federal decision undermined (in the majority's view) the 'dignity [already] conferred by the States in the exercise of their sovereign power,' whereas a State's decision whether to expand the definition of marriage from its traditional contours involves no similar concern." (internal citations omitted) (quoting *id.* at 2697, 2693–94 (majority opinion))).

14. *Id.* at 2693 (majority opinion) (holding that "impos[ing] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States" violates due process and equal protection principles).

15. *See* Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*, *supra* note 1, at 173–74.

16. Citizens and many scholars have viewed the Rehnquist and Roberts Court eras as moderate or conservative, in comparison to the Warren Court era that is usually viewed as liberal. I seek to refute the analytic usefulness of this moniker or like monikers because such bottom-line descriptions of Court eras belie the fact that the bidirectionality between formalism and realism in Court decisionmaking leads the Rehnquist and Roberts Courts at times to be progressive and the Warren Court to be conservative or moderate because of the nature of the legal process.

17. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

and many legal experts in constitutional law have failed to predict or account for the expansion of privacy rights and other individual liberties.[18]

In Part I, I present two primary models through which scholars seek to explain Court decisions. These models differ based on whether or not scholars accept that there is a divide between formalism and realism in explaining Court decisionmaking. That is, the models differ based on whether scholars accept what Brian Z. Tamanaha calls the "formalist-realist divide."[19] Scholars who rely on Model 1 accept this divide, seeking to explain Court decisionmaking in *unidirectional* terms, either internally—from text or precedent—*or* externally—that is, directly from the social, economic, and political realities of the world outside, or directly from other factors, such as the attitudes toward public policy of justices before they reach the Court or the Court's response to historical events.[20]

Model 2 explanations of Court decisionmaking and doctrinal change reject this divide between formalism and realism, emphasizing that there is

18. *See, e.g.*, Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality and Marriage* 2 (John M. Olin Law & Econ. Working Paper No. 196, 2003) ("My principal suggestion here is that the Court's remarkable decision in *Lawrence v. Texas* is best seen as a successor to *Griswold v. Connecticut*: judicial invalidation of a law that had become hopelessly out of touch with existing social convictions. So understood, *Lawrence*, like *Griswold*, reflects an American variation of the old English idea of desuetude." (footnotes omitted) (citing Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479 (1965))).

19. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 1–3 (2010) (noting that the formalist-realist divide has permeated legal circles and political science and has also shaped general historical understandings).

20. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2015), who seek to explain and justify Court decisionmaking in terms of the importance of the originalist text, while under certain conditions support precedents which are based on non-originalist principles, such as *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (arguing that *Brown v. Board of Education* can be explained by the nation's need to be on higher moral ground in its Cold War with communism); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998) (arguing that the Supreme Court establishes new individual rights primarily due to efforts by legal advocacy groups to secure them); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (arguing that Court reacts the politics outside the Court when making landmark decisions and can't sustain such decisions if political elites and the public oppose them); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (arguing that Court decisionmaking can be explained by Justices' views on policy and political philosophies before they joined the Court); Howard Gillman, *Jurisprudential Regimes and Unenumerated Rights*, 9 J. CONST. L. 1, 107–19 (2006) (arguing that Court decisionmaking and changes in individual rights can be explained as response to the policy wants of the majority coalition in power); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35, 35–74 (1993) (same). All of these approaches seek explanations of Court action based on factors outside of the Court and refuse to see the importance of law, precedent, and the legal process in the Court as explanatory of Court action and explore how the realist elements that each emphasizes is related to formalist principles.

a *bidirectional* relationship between the formalism of doctrinal analysis and the realism of the world outside the Court—that is, that the Court applies legal principles and precedents in light of the social, economic, and political climate outside its walls.[21] I argue that Supreme Court decisionmaking must be understood as bidirectional, and I use the Court's jurisprudence with regard to gay rights as my lens.

Part II analyzes *United States v. Windsor* as an example of the Supreme Court engaging in a bidirectional decisionmaking process. I first look at what polity and rights principles are raised in the case, and how they are applied through what I call a social construction process, which has been an important part of Court decisionmaking since its establishment. I ask whether both liberal and conservative justices employ arguments that are based on a bidirectionality between principles and the lived lives of individuals. I also ask whether the polity and rights principles articulated and applied in *Windsor* make sense in light of the principles and social constructions in prior cases involving the rights of privacy and personhood, and then consider the impact of this finding on the conditions under which individual rights are expanded or disestablished.

In Part III, I argue against the forcefulness and staying power of arguments against same-sex marriage used by justices in the minority in *Windsor*, in part because of the distance between the principles they advocate and the lived lives of persons. I explore this distance in light of how polity and rights principles have been defined in past cases, the social constructions used in support of such principles, and the conditions under which the Court has chosen to overturn landmark rights decisions in the past.

In Part IV, I conclude by demonstrating that *Obergefell v. Hodges*, the case in which the Supreme Court established a right to same-sex marriage under the Constitution and outlawed states from banning such marriages, was a natural outcome of my analysis in Parts I-III, which were completed well before *Obergefell* was decided.

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21. *See, e.g.*, Ronald Kahn, *Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining* Lawrence v. Texas, 67 MD. L. REV. 25, 35 (2007) (noting that "bi-directionality between the internal Court and the world outside occurs at several levels, at the level of the lived lives of citizens as the Court makes decisions about rights of privacy and personhood as we see in the [social construction process], and at the level of politics itself"). This Paper will center on the use of both models to explain doctrinal change on the Supreme Court. Nevertheless, these models may also be applied to decisionmaking and doctrinal change in lesser federal and state courts.

These two models are distinguishable in other respects as well. For example, political scientists applying Model 1 use quantitative methods and those applying Model 2 use interpretive methods to study the Supreme Court and doctrinal change. Further, both models adopt conflicting assumptions about the importance of Court institutional norms and process on the preference formation of Justices.

I. UNIDIRECTIONAL AND BIDIRECTIONAL EXPLANATIONS OF COURT DECISIONMAKING

A. The Formalist-Realist Divide and "Balanced Realism"

To understand why Model 1 dominates the analysis of Supreme Court decisionmaking, especially among most social scientists, and why Model 2 is superior in explaining Court action and doctrinal change, we need to explore the nature of this divide: specifically, whether the divide between formalism and realism was ever valid historically as justices made decisions, and whether it remained valid when *Windsor* was decided.[22]

The divide narrative maintains that the 1870s through the l920s should be viewed as the heyday of legal formalism, asserting that "the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions."[23] The formalist vision, as described by legal realists, includes the following premises: "(1) the law is rationally determinate, and (2) judging is [deductive in a] mechanical [way] . . . (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome [and] no . . . non-legal reasons [are] demanded or required;"[24] (4) the process is formal, in the sense "that right answers [can] be derived from [an] autonomous, logical working out of the system"; and (5) legal thought is "*conceptually ordered* in that ground-level rules [can] all be derived from a few fundamental principles."[25]

The other side of the divide narrative places an emphasis on legal realist conceptions of judging and the study of courts, which are viewed as counter to conceptions of judicial formalism.[26] During the 1920s and 1930s, legal realists were charged with discrediting legal formalism; this is due in part to the insights of Justice Oliver Wendell Holmes, Roscoe Pound, and Justice Benjamin Cardozo.[27]

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22. Brian Tamanaha, at least, suggests that the divide is a "stranglehold. It consists of a web of interlocking misinterpretations and confusions bundled in a mutually reinforcing package that is now virtually taken for granted. The consequences of this collection of errors are ongoing and pernicious." TAMANAHA, *supra* note 19, at 3.

23. TAMANAHA, *supra* note 19, at 2 (quoting MATHIEU DEFLEM, SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION 98 (2008)).

24. *Id.* at 160 (quoting Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999)).

25. *Id.* (quoting Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999)).

26. *Id.* at 1.

27. *Id.* ("[T]he legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate. . . . The realists argued that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome.").

For the realists, legal formalism, principles, and precedents—that is, the law and legal method—do not explain what justices and judges do. For the realist narrative one must look outside the law and legal process, into the ideologies of justices and the social, economic, and political world outside the Court, to explain what courts do. The law and legal process is indeterminate, not bound in a disciplined way, and clearly cannot be explained by the Court applying principles and precedents.

In reality, however, the Court engaged—and engages—in what Tamanaha calls "balanced realism" in its decisionmaking, which rejects simply formalist or realist bases for Court decisions.[28] The key components include: 1) the acceptance of the "openness of law and the limitations of human judges," 2) the realization that the U.S. legal culture has been "consummately realistic about these matters," and 3) the proposition that legal rules should be followed by judges.[29] Tamanaha chooses the term "balanced realism" because of the negative connotations of the term "balanced formalism."[30] Factors in this decisionmaking process include judges (1) engaging in the process of cognitive framing, (2) looking at purposes behind legislation and common law rules as they apply them,[31] (3) resolving differences among interpretations of a statute or the Constitution, and (4) resolving conflicts, gaps, and ambiguities in the law.[32] In doing so, judges accept that there are formalist elements that impact and influence Court decisionmaking as well.

The history of Supreme Court decisionmaking demonstrates that unidirectional, formalist models explaining the Court's decisionmaking simply do not fit with what the Court does in practice. Judges in the so-called formalist age knew that law was indeterminate at times, involved notions of policy considerations, and that principles had to be reconciled with cus-

28. See *id.* at 193–94 for a discussion of how "balanced realism" requires the Court to bring the realist social, political, and economic world into its decisionmaking.

29. *See id*. at 179.

30. *Id.* at 179–80 (explaining that "[a] balanced realism *accepts* (indeed embraces) that social factors and considerations play into judicial decisionmaking in various ways").

31. Tamanaha and other scholars of the Court view the impact of common law principles and ways of deciding cases as a major reason why the formalist-realist divide must be rejected. *See generally, e.g.*, DOUGLAS E. EDLIN, JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW (2008) (discussing how common law tradition gives judges the dual mandate of applying law and developing law); JAMES R. STONER, JR., COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM (2003) (arguing that common law is key to unlocking fundamental principles of the U.S. Constitution and is a guide for judges deciding contemporary constitutional matters). Also, see DAVID A. STRAUSS, THE LIVING CONSTITUTION (University of Chicago Press, 2012) and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996), for a theory of constitutional interpretation which accepts the bidirectional relationship between formalism and realism.

32. *See* TAMANAHA, *supra* note 19, at 193.

toms, norms, opinions in the community, and a sense of rights and social interests in a changing world.

The components of Tamanaha's "balanced realism" mirror the major components of what I have called Model 2 bidirectional Supreme Court decisionmaking. In such a decisionmaking process, both formalist (legal rights principles and process norms) and realist (involving the political, social, and economic world) elements are included. Tamanaha demonstrates that the scholars who were identified as on either side of the formalist-realist divide actually rejected the divide when they analyzed Supreme Court decisionmaking as a process or the cases that are the product of that decisionmaking.[33] Thus, the divide narrative is a myth when we explore the nature of judging since the birth of the nation. A rigorous analysis of the expressed thoughts of justices and other jurists shows that, throughout the history of U.S. law, the vision of "judge as formalist" was never descriptive of adjudication.[34] Furthermore, contemporary efforts to construct a viable new formalism, including the new originalist approaches to interpreting the Constitution, have absorbed the major insights of balanced realism, leaving nothing distinctive to the claim of being formalistic.[35]

However, the myth of "[f]ormalism possesses a great potential for confusion with no compensating, redeeming theoretical value."[36] The most demanding constructions of formalism impose conditions that are impossible for judges to meet and poorly articulate basic practices found in common law and constitutional judging. Tamanaha argues that there was a strong overlap between the views of nineteenth- and twentieth-century historical jurists and legal realists on their views of judging and the relationship of law and society.[37] We see an absence of the divide by the fact that jurists, well before the rise of the realists, accepted core insights that would later be labeled as realist approaches to judging. As Tamanaha writes, "[v]irtually every one of the core insights about judging now associated with the realists was prominently stated decades before, often by historical jurists."[38] For example, "[h]istorical jurists believed that judges brought society's values and sense of justice into law, subconsciously (via the inter-

33. *Id.* at 159–80.

34. *Id.* at 89–90.

35. *See* JACK M. BALKIN, LIVING ORIGINALISM (2011) (discussing "new originalism"); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

36. TAMANAHA, *supra* note 19, at 162.

37. *Id.* at 89.

38. *Id.* at 79.

nalization of social values by judges) as well as consciously (by deliberately seeking to derive or produce or match society's sense of right)."[39]

B. Implications of the Supreme Court Engaging in "Balanced Realism"

At the core of the Supreme Court's "balanced realism" is a process of construction, one that employs principles and precedents and their application to actions of persons and institutions in social, economic, and political worlds outside the Court. Tamanaha asserts that "a balanced realism holds that many corners of the law are always in the making through judicial construction, in ways large and small, which does not defeat the broader enterprise of rule-bound judicial decision making."[40]

Tamanaha also emphasizes the special qualities of legal institutions and their decisionmaking processes, noting that, "[j]udges also uniformly hasten to emphasize, however, that, notwithstanding the openness of law and the limitations of judges, their decisions are substantially determined by the law."[41] In Tamanaha's description of "balanced realism," which describes the basic elements of Supreme Court and lesser federal and state court decisionmaking from the eighteenth century to today, one can see the importance of institutional norms, including what it means for the justice to be professional:

> Judges are unique individuals with bents, biases, and various strengths and limitations, as well as differences in moral and political views, and differing views of judging . . . [that] combine to create a zone of uncertainty and variation in judicial decisionmaking. It has always been so. Nonetheless, legal rules frequently work and judges frequently render rule-bound decisions.[42]

Accepting the bidirectionality between formalism/law and realism, and between the Court and the world outside, suggests a more filigreed approach to the question of whether the Supreme Court is autonomous of society.[43] The preceding social factors come into play in the law within a

39. *Id.* at 87.

40. *Id.* at 195.

41. *Id.* at 184–85 (noting that even Judge Posner admits that judges should "stick pretty close to statutory text and judicial precedent in most cases . . . to enhance their self-esteem and to earn the accolades and respect of their judicial colleagues and legal audiences" (quoting RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 209 (1999))).

42. *Id.* at 187.

43. *Id.* at 193–94 (noting that "[l]aw has its own internal language, concepts, practices, and imperatives that shape its operation and development, but the legislators, judges, and jurists who produce the law in the United States do so in connection with social values, social problems, social situations, social concerns, and social interests").

context suffused with and structured by legal factors that lend it a rule-based quality.[44] Multiple legal layers, the group nature of judging, the stable hierarchy of the legal system, and the presence of a legally trained audience of participants and observers, as Tamanaha explains:

> [S]tabilize[] legal interpretation sufficiently for judges to see law and decide cases in much the same way most of the time regardless of differences in personal backgrounds, values, and preferences. This is what the legal realists meant when they insisted that legal rules *in isolation* do not decide cases.[45]

C. Model 1: Unidirectional Models for Explaining and Justifying Court Action

The legalist strand of Model 1 unidirectional explanations and justifications of Court decisionmaking assumes that judging can be explained through the study of judges applying principles and precedents in a formalistic way, without looking into the outside world of the lived lives of persons. Under this strand of Model 1, it is assumed that doctrinal change comes from a completely internal process of justices applying precedents and principles. The objective for legalist scholars is to influence this process, or train lawyers to do so through the reading of their scholarship. The most famous and influential theory of constitutional interpretation that is characteristic of this internal-looking, unidirectional strand of Model 1 is originalism. However, while advocates of originalism view their theory of how to interpret the Constitution as formalist, and not political or realist, there are many reasons to believe that there are realist elements in the originalist interpretation of the Constitution.[46]

Constitutional scholars, conservative and liberal alike, who argue for their version of what the constitutional text does or should mean are unidirectional in their goals, whether or not such unidirectionality is possible or not.[47] Thus, constitutional theories that argue that the Constitution should be interpreted based on a particular theory of rights or polity principles are also unidirectional, even when that theory makes the argument that the Supreme Court is only one of many important venues for making constitutional choices, and perhaps not the best one at that.[48] The reason for this is that,

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44. *Id.* at 194 (citing LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 53–57 (2006)).

45. *Id.* at 195.

46. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (examining the Second Amendment's right to bear arms as an example of social construction processes undertaken by originalist as well as non-originalist justices).

47. BALKIN, *supra* note 35; ANTONIN SCALIA, A MATTER OF INTERPRETATION 7–8 (1997).

48. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (advocating for "taking the Constitution away from the courts").

like originalism, theories that are justificatory, no matter on what basis, are formalist, while the Court is simultaneously formalist and realist in its decisionmaking. A theory that advocates a particular set of polity or rights principles on which the Court should decide cases can neither explain what the Court does nor be a model for how the Court should act. Thus, unidirectional approaches used by legalists would include the originalist approach, as well as constitutional theories that argue for one approach to what the Constitution means.[49]

The formalist vision of law as rationally determinate, judging as deductive in a mechanical way, and legal reasoning as autonomous from society is not a valid description of decisionmaking by the Supreme Court. Right answers cannot be derived from an autonomous, logical working of the system. Legal thought is not conceptually ordered to the point that ground-level rules could be derived from a few fundamental principles. Therefore, unidirectional Model 1 approaches for explaining Court actions, or for advocating normative bases for its actions, accept the divide between formalism and realism, and in so doing are not based on an understanding of what the Court has done throughout its history. Tamanaha writes:

> The story about formalism promotes the unrealistic image of self-applying legal rules; skeptical realism promotes the equally unrealistic opposite image of human judges pursuing their personal preferences beneath a veneer of legal rules. . . . If legal rules were perfectly preexistent and judges were calculating machines, these situations [of difference in opinion among justices, negotiation, and changes of opinion] *would be* indications of flaws. But mechanical jurisprudence is impossible. It is a mistake, therefore to think of these unavoidable aspects as flaws rather than as inherent conditions of law and judging.[50]

Social science explanations of Court decisionmaking, the second strand of unidirectional explanations and justifications of Court action, are also decidedly one-sided; however, here the unidirectionality is on the side of realism. We see the acceptance of the divide by attitudinalists who emphasize that the Court decides cases based on the ideology and policy interests of the justices, or behavioral political scientists who emphasize that jus-

49. *See, e.g.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 2–3 (2004); RONALD DWORKIN, FREEDOM'S LAW: A MORAL READING OF THE AMERICAN CONSTITUTION (1996); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the Court should intercede into the political system to help individuals and groups secure equal rights when the political system cannot do so because of prejudice).

50. TAMANAHA, *supra* note 19, at 195.

tices act strategically to get the best decision they can get in line with their ideologies.[51]

An acceptance of the divide and the reliance on unidirectional explanations for Court decisions is also seen in the scholarship of the leading modern-day neo-Dahlians, Howard Gillman and Mark Graber, who are now called "regime theorists."[52] There is a divide between formalist and realist explanations of Court action, even though these contemporary regime theorists accept the theoretical underpinnings of bidirectional explanations found in the historical institutional/American political development approach to the study of law and courts. Therefore, although the Court has engaged in bidirectional decisionmaking and rejected the formalist-realist divide, scholars choose to accept the divide in the study of the Court, and this acceptance is at the core of why political scientists, social scientists, and most historians are unable to explain the development of individual rights on the Rehnquist and Roberts Courts.

Analysis to date has found that there is a distinctiveness to Supreme Court decisionmaking in its institutional norms and practices and how it relates to the social, political, and economic world outside. For example, I argue elsewhere that the unique qualities of Supreme Court decisionmaking and the Court's relationship to turning points in individual rights when compared to political institutions mean that the "legal time" of the Court is unlike what Stephen Skowronek has called the "political time" of the presidency. Notably, Skowronek has emphasized that there is an increase in the "waning of political time" with each new president—that is, the window during which a president can make substantial policy changes decreases.[53] Bidirectional Supreme Court decisionmaking, with its social construction process and comparison of principles and social constructions at issue in a case before the Court with those in precedents, has occurred throughout the life of our nation. In contrast to what presidents face—a waning of political time in which to secure change—there is no increase in the waning of legal time with each new Supreme Court era.

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51. *See id.* at 115–21.

52. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of a "Living Constitution" in the Course of American State-Building*, ST. AM. POL. DEV. 191, 191–247 (1997) (arguing that before 1937, the Court was originalist and can be understood as making formalist decisions, and after 1937, Court decisions can primarily be explained as realist in its decisionmaking); *see also* Graber, *supra* note 20, at 35 (arguing that because of complexities in the political system, the Court follows politics or makes decisions in favor of individual rights that political elites really want, but cannot publicly support).

53. *See* Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*, *supra* note 1, at 202–04; STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 76–78 (2d ed., 2011).

D. Model 2: Bidirectional Models for Explaining Court Action: The Mutual Construction of Formalism and Realism

Scholars who reject the formalist-realist divide employ Model 2 understandings of Supreme Court decisionmaking. Under Model 2, doctrinal change, including the development of individual rights, is caused by a constitutive Supreme Court decisionmaking process that is bidirectional: the internal decisionmaking process by which principles and precedents are applied in a case interacts with the social, economic, and political world outside the Court, but not in the unidirectional way that is assumed by both legalist scholars and social scientists. Moreover, explanations of Court action must also be explained in bidirectional terms. Unlike Model 1, Model 2 scholars do not see the outside world as one "X factor" causing Court decisions; they do not see internal values and norms as deciding cases in a closed system either. Thus, bidirectionality occurs at two levels—at the level of the relationship between formalist and realist elements in internal Court decisionmaking, and at the level of this internal decisionmaking process interacting with the realism of the social, economic, and political world outside the Court.

Scholars who study Supreme Court decisionmaking and seek to explain doctrinal change over time make the following assumptions:

1. Court decisionmaking rests on a bidirectional relationship between the formalist elements of cases, such as legal principles and precedents, and the social, economic, and political world outside the Court.

2. This bidirectional decisionmaking on the part of the Supreme Court involves a mutual construction process between text, precedent, and principles and the social, political, and historical realities of the world outside the Court. "Realities" that are important to the Court are the lived lives of persons. Decisionmaking does not simply result from the realities of the institutional world outside the Court as regime theorists have argued, or the impact of historical events on Court decisionmaking as argued by historians.[54]

3. Court decisionmaking is influenced by institutional processes and norms, and the education and socialization of justices as lawyers. Thus, preference formation occurs within the decisionmaking process.

4. Justices are respectful of the importance of the wider historical, institutional, and political context in which institutions operate. They conceptualize legal principles and processes, categories of analysis, and institu-

54. *See* Gillman *supra* note 52 and accompanying text; Graber, *supra* note 20 and accompanying text; *see also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 104 (2011) (arguing that the Court decided to end school segregation in *Brown v. Board of Education* because of concerns that having race segregation undermined our nation's position during the Cold War).

tional norms as factors that structure Court decisionmaking over time—that is, in a historical context.[55]

As a Model 2 scholar, I reject the premises of Model 1; I reject the assumption of unidirectional causation for explaining Court decisionmaking, whether that is from the mechanical application of principles and precedents, or from institutional and historical moments outside the Court. I accept the importance of both the clash of polity and rights principles on the Court when it decides individual rights cases and the Court's dialogue with the interpretive community. Most importantly, I find that Supreme Court decisionmaking has a more direct, bidirectional relationship through its engagement in a social construction of the lived lives of citizens as it applies polity and rights principles through an analogical process.

II. *UNITED STATES V. WINDSOR*: FORMALISM AND REALISM IN JUSTICE KENNEDY'S MAJORITY OPINION

Justice Kennedy's majority opinion compares polity and rights principles and social constructions in precedents—such as *Romer* and *Lawrence*—with those polity and rights principles and social constructions that he himself defines in *Windsor*.[56] The opinion also illustrates the definition of polity and rights principles in light of the reality of the lived lives of persons. There is a mutual construction of formalist principles and realism—a key indicator that Justice Kennedy rejects the formalist-realist divide. In constructing the opinion, Justice Kennedy must continually go outside the walls of the Constitution to apply polity and rights principles in *Windsor*. The role of precedent is key to the decision, which asks whether the national government's denial of recognition for state-defined marriages violates equal protection and due process liberty principles as established in *Romer* and *Lawrence.* Through this analysis, we can better understand the responses by Justice Scalia, Chief Justice Roberts, and Justice Alito to Justice Kennedy's decision, and whether the Court will decide that it is unconstitutional to ban same-sex marriages, as explored, respectively, in Parts III and IV of this Paper.

55. *See* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991) (providing particularly useful examples of this approach with regard to the study of the Supreme Court and judicial review); Gillman, *supra* note 52, at 191–247; Karen Orren, *Ideas and Institutions*, 28 POLITY 97–101 (1995); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

56. United States v. Windsor, 133 S. Ct. 2675 (2013).

A. The Relationship of Polity and Rights Principles in Windsor

Polity principles are central to this case for all of the justices. Parts I and III of the Kennedy decision center on, respectively, the standing to sue and the key polity principle in the case: that throughout our nation's history, it has been traditional for states to decide who can marry and most issues of family law.[57] Justice Kennedy provides evidence of the traditional deference that the national government and the courts have given to states to define who can marry when he emphasizes the following: (1) "[t]he definition of marriage is the foundation of the States's broader authority to regulate the subject of domestic relations with respect to . . . offspring, property interest, and enforcement of marital responsibilities;"[58] (2) "at the time of adoption of the Constitution, [states] possessed full power over . . . marriage and divorce;"[59] (3) the Constitution did not delegate authority over marriage and divorce to the federal government; and (4) federal courts defer to states on regulation of marriage and divorce even in diversity of citizenship cases.[60]

In Parts III and IV, Justice Kennedy considers the merits of the case. In doing so both polity and rights principles are explored, and it is the relationship between these elements that is at the core of the decision. Most importantly, in discussing what eleven states and the District of Columbia had done in recognizing same-sex marriages, Justice Kennedy uses language that is informed by substantive values that the Court has defined in prior gay rights cases.[61] Here and throughout the case, polity principles of deference to states on defining marriage are considered in light of rights principles constructed in prior cases, including *Lawrence*.[62]

Justice Kennedy begins with a general reference to substantive values at issue in state recognition of same-sex marriage.[63] The polity principle of deference to states in deciding who can marry is more than just a starting point for deciding whether DOMA is valid under the Constitution because the rejection of this polity principle by the federal government informs sub-

57. *Id.* at 2682–93.

58. *Id.* at 2691 (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

59. *Id.* (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

60. *Id.*

61. *Id*. at 2692. Justice Kennedy describes sexual intimacy as "but one element in a personal bond that is more enduring," as he did in *Lawrence*, and then links up these rights to the right to marry. *Id.*

62. *Id*. at 2694 (referencing *Lawrence* once again).

63. *Id.* at 2689 ("New York, in common with, as of this writing, [eleven] other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.").

stantive reasons as to why DOMA is unconstitutional as a matter of rights. Justice Kennedy emphasizes in his opinion that this polity principle of deference, along with equal protection and substantive due process principles, will be central to exploring whether DOMA is valid under the Constitution.[64]

In another look at the application of polity and rights principles to the lived lives of persons, Justice Kennedy argues that DOMA is different from "these discrete examples [that] establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy[.] DOMA has a far greater reach [than specific laws], [because] it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[65] The polity principle of deference to state decisions on domestic relations and family is violated because of the wide effect DOMA has on whether states can honor the values and policies they have chosen to recognize with regard to same-sex marriage. Justice Kennedy emphasizes that this case is not to be decided on the principle of federalism—that is, the idea that DOMA is a violation of the Constitution's traditional polity principle of deference to state decisions on marriage—even though he could have rested his opinion on this idea and nothing more. In a key passage, Justice Kennedy writes:

> Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.[66]

The state's use of its power to define who can marry "enhanced the recognition, dignity, and protection of the class in their own community": an enhancement directly undermined by DOMA.[67] The case, then, turns on whether this undermining action is, in fact, a denial of substantive rights protected by the Constitution.[68] Moreover, given the relationship of polity and rights principles, the violation of individual rights by DOMA is even more pronounced—that is, the state's decision, and the national government's failure to recognize that decision, is questioned both in terms of the

64. *Id.* at 2689–90.
65. *Id.* at 2690.
66. *Id.* at 2692.
67. *Id.*
68. *Id.*

substantive values at issue in the decision *and* the expectation that such decisions are to be made at the state level. Justice Kennedy is saying that the "reach" of DOMA is so wide that it not only violates the power of states to define marriage, but also violates rights principles—constitutional, substantive due process and equal protection rights that the Supreme Court defined in landmark gay rights cases. Thus, while Justice Kennedy's opinion does not rest solely on polity principles, violation of such principles adds to the violation of rights principles of liberty and equal protection by DOMA, as will be explored below.

B. Equal Protection of the Law in Windsor *After* Romer v. Evans

The Court could have decided *Windsor* on polity principles—that is, on whether or not states traditionally have been the proper venue to decide family law in general, and the right to marry in particular. Instead, the Court draws on equal protection principles in *Romer* v. *Evans*.[69] Justice Kennedy writes, "[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[70] In *Romer*, the unusual change in procedure that triggered Supreme Court action was a referendum in Colorado that asserted that all laws involving the status and privileges of gay men and lesbians, including executive orders by governors and mayors, would no longer be decided by normal legislative and executive processes. Rather, they had to be put before the people of Colorado in a referendum as part of an amendment process to the state constitution.

With regard to DOMA, the "discrimination of an unusual character" was the decision by Congress to change from the usual practice of deference to states in defining who can marry; this change imposed restrictions and disabilities on a state-defined class and raised constitutional questions. Like Colorado's decision to change the process through which the rights of homosexuals are defined as compared to other groups, the Court in *Windsor* is asking whether the change from the usual deference to state definitions of marriage is also a denial of equal protection. Most importantly, the violation of the polity principle of deference is again linked to rights of liberty as defined by the Court in *Lawrence* and, considered in this light, "is a deprivation of an essential part of the liberty protected by the Fifth Amendment."[71]

69. 517 U.S. 620 (1996).

70. *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

71. *Id.*

C. *Individual Rights Principles and Social Constructions: The Bonds of Intimacy in* Lawrence *Compared to the Bonds of Marriage in* Windsor

In a key passage in *Windsor*, Justice Kennedy links DOMA's denial of federal deference to state decisions on marriage to rights protected in *Lawrence v. Texas*. In *Lawrence*, the Supreme Court said anti-sodomy laws are unconstitutional because, by making sexual intimacy (sodomy) a crime, gay men and lesbians, unlike heterosexuals, were not allowed to foster more enduring personal bonds.[72] Justice Kennedy links same-sex marriage to this right for gay men and lesbians to have deep and enduring personal bonds, writing:

> By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. . . . This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.[73]

Here we see the Court socially constructing what marriage is in light of how sexual intimacy was socially constructed—as central to the government honoring personal bonds, which become more enduring because of the ability to marry. It is quite clear, then, that the Court here is not resting its decision that DOMA is unconstitutional only on equal protection grounds.

D. *The Relationship of Equal Protection Equality and Due Process Liberty*

Justice Kennedy begins Part IV by applying the equal protection principles in *Romer*, asking whether DOMA is based on an improper animus or purpose, and thus not permitted.[74] For Kennedy, DOMA is unusual because it violates the polity principle that states decide who can marry, and, looking outside the walls of the Constitution to the lived lives of persons, this decision by states has a substantial impact on the daily lives and customs of their citizens. Kennedy writes:

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72. *Id.* at 2692 ("The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'" (quoting Lawrence v. Texas, 539 U.S. 558, 567 (2003))).

73. *Id.* at 2692–93.

74. *Id.* at 2693.

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. . . . The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[75]

Justice Kennedy is not simply alluding to the benefits denied to gay couples or to the stigma felt by gays from DOMA; he is writing to the prejudices against gays by the rest of the population, as he did when he discussed in *Lawrence* how state prohibitions on sodomy caused prejudice against gays, even if states were prohibiting all citizens from engaging in sodomy.[76]

In overturning *Bowers v. Hardwick*,[77] the *Lawrence* Court stated that reliance on Judeo-Christian values is not a permissible reason for denying rights to gays and lesbians.[78] In discussing *Romer*, Kennedy emphasizes that the rationale for a law cannot simply be the moral disapproval of something, as this *is* pure animus. Kennedy notes that animus in DOMA is indicated by the reality that the purpose of the law was to influence states not to pass same-sex marriage laws, which violated the polity principle of deference by treating same-sex marriages as "second-class marriages for the purposes of federal law."[79]

Why is this choice by Congress based on animus? To answer this question one must look within the Due Process Clause of the Fifth Amendment, which protects our citizens from a denial by the federal government of due process and equal protection of the law.[80] The Court asks whether DOMA denies equal protection of the law; Kennedy answers "yes," as New York sought to eliminate inequality by allowing same-sex marriages, and DOMA sought inequality in the application of all federal laws as applied to individuals in same-sex marriages. Moreover, DOMA does so by transcribing inequality into the entire United States Code, and provides "no identified connection to any particular area of federal law."[81]

75. *Id.*
76. *Lawrence*, 539 U.S. at 575.
77. 478 U.S. 186 (1986).
78. *Lawrence*, 539 U.S. at 571–72.
79. *Windsor*, 133 S. Ct. at 2693–94.
80. U.S. CONST. amend. V.
81. *Windsor*, 133 S. Ct. at 2694.

However, federal law treats individuals in very different ways. Why should the different treatment by the federal government of those in same-sex marriages raise constitutional questions? Justice Kennedy writes:

> By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.[82]

In perhaps the most important sentence in this paragraph, Kennedy writes, "Responsibilities, as well as rights, enhance the dignity and integrity of the person."[83] When the federal government takes away the responsibilities and rights of a class of citizens, especially when states choose not to do so, then the dignity and integrity of certain persons is undermined. This is substantive rights talk, which gains even more credibility from its linkage to the polity principle of deference to states in deciding who may marry. As Justice Kennedy explains, "By this dynamic DOMA . . . tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage."[84]

E. The Dignity That DOMA Denies to Same-Sex Couples Involves a Denial of Protected Liberties

But why is state sanctioning of same-sex marriage and the federal rejection of such sanctioning significant constitutionally? Why is this unequal treatment of state-defined same-sex marriages by the federal government unconstitutional? To answer this question, Justice Kennedy looks to personal rights as defined in *Lawrence*. The failure of the federal government to recognize same-sex marriages also undermines the integrity and closeness of a family, and thus undermines enduring personal relations. Justice Kennedy writes:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its con-

82. *Id.*
83. *Id.*
84. *Id.*

> cord with other families in their community and in their daily lives.[85]

We can see from the passages above that the Court is not just exploring equal protection rights, but is viewing the right to marry as a right similar to substantive due process rights of personhood and privacy. That is, the choice of whether to be in a same-sex marriage has both public and private components. When Kennedy writes "whose moral and sexual choices the Constitution protects," he is couching the right to marriage in private rights terms—in terms of the choices that homosexuals can make about the nature of bonds they want to have with their spouses.

Justice Kennedy is also saying that the decision by the national government not to honor the right to marry created by states is a denial of fundamental rights. This is important, because the Court is saying that the problem with DOMA is not simply about unequal treatment of homosexual and heterosexual marriages. It is about the denial of protected rights of liberty. It is not just that different classes of citizens are recognized by states and the national government; it is that the national government allows two classes of citizens with regard to the right to marry—a right that is central to values protected by the Constitution. Moreover, in many cases the Court has said that the right to marry is a fundamental right;[86] what is new to *Windsor* is the specific link between the right to sexual intimacy to ensure enduring personal ties for gays and lesbians, as recognized in *Lawrence*, and the right to marry, which the federal government refuses to recognize.

F. The Burdens, Duties, and Responsibilities of Marriage and Equal Respect

Justice Kennedy asks whether DOMA burdens same-sex couples, with regard to their married and family life, "in visible and public ways," noting that DOMA "prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive," "forces them to follow a complicated procedure to file their state and federal taxes jointly," and "prohibits them from being buried together in veterans' cemeteries."[87] Moreover, DOMA brings financial harm to children of same-sex couples by " rais[ing] the cost of health care for families by taxing health bene-

85. *Id.*

86. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374, 383 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

87. *Windsor*, 133 S. Ct. at 2694 (citing 5 U.S.C. §§ 8901(5), 8905 (2012); 11 U.S.C. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15) (2012); Technical Bulletin TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); National Cemetery Administration Directive 3210/1, at 37 (June 4, 2008)).

fits provided by employers to their workers' same-sex spouses" and by "den[ying] or reduc[ing] benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security."[88]

DOMA also "divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force."[89] These include the requirement that a married person take into "consideration a spouse's income in calculating a student's federal financial aid eligibility" "because it is expected that spouses will support each other as they pursue educational opportunities."[90] Kennedy is emphasizing that meeting responsibilities under federal law leads to equal respect for same-sex couples by the wider public and treats them as equal before the law. Responsibilities, not only benefits from government, support enduring ties.

When Justice Kennedy explores the burdens that DOMA places on same-sex couples with regard to their married and family life, he looks outside the walls of the Constitution to document the law's impact on the daily lives of same-sex couples, demonstrating why DOMA is a denial of equal protection of the law and of liberty to secure enduring personal relations. The law violates these principles "in visible and public ways"—an important phrase because it suggests that DOMA leads to disrespect by the wider public for those in same-sex marriages.

In the concluding paragraphs of the decision, Kennedy restates the principles that drive the discussion of the case on its merits. He again emphasizes that DOMA denies due process liberty rights, not simply equal protection before the law, and that there is a close relationship between due process and equal protection rights. Justice Kennedy writes:

> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. . . . The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes

88. *Id.* at 2695 (citing 26 U.S.C. § 106 (2012); Treas. Reg. § 1.106-1, 26 CFR § 1.106-1 (2012); I.R.S. Priv. Ltr. Rul. 6850011 (Sept. 10, 1998); SSA, *Social Security Survivors Benefits* (2012)).

89. *Id.*

90. *Id.* (citing 20 U.S.C. § 1087nn(b) (2012)).

> that Fifth Amendment right all the more specific and all the better understood and preserved.[91]

The above quotation makes very clear that DOMA violates the due process component of the Fifth Amendment. Such liberties that all persons have and that have been granted to gays and lesbians in *Lawrence* clearly apply to same-sex couples, given the place of marriage in society—to support the durability of individual and family relationships. The role of the equal protection guarantees of the Fourteenth Amendment as applied to states only adds specificity, understanding, and preservative qualities to the nature of the rights of liberty that DOMA denies in not allowing national government recognition of state-sanctioned same-sex marriages.

III. THE FORCEFULNESS OF DISSENTING ARGUMENTS AGAINST SAME-SEX MARRIAGE AND THE TEST OF TIME

A. Introduction

An analysis of the dissenting opinions by Justices Scalia and Alito and Chief Justice Roberts provides additional evidence that *Windsor* will stand the test of time. A comparison of the majority and dissenting opinions reveals that Justice Kennedy engages in classic Model 2, bidirectional decisionmaking, while the dissenting opinions do not. In so doing, the dissenting opinions unsuccessfully attempt to maintain a formalist-realist divide, which decreases the staying power of their decisions.

Because Justice Kennedy's decision can rest on both the polity principle of deference to states and DOMA's lack of respect for that principle, *as well as* evidence of rights violations, it is far stronger than Justice Scalia's dissent, as well as those of Chief Justice Roberts and Justice Alito. Justice Scalia forcefully demonstrates that the Kennedy decision rests on rights principles—and not only on the rights principles in *Lawrence*, but also on equal protection principles as well—and so he must fall back to weaker, more general arguments such as trust of political institutions when the Constitution does not specifically grant certain rights. Either this, or he must fall back on his argument that was rejected in *Romer*, as well as in *Lawrence*—that members of political institutions may craft legislation prejudicial to gay men and lesbians simply because they believe homosexuality is immoral.[92]

It is difficult for Justice Scalia and the other dissenters to make the argument that DOMA's lack of recognition of same-sex marriage does not

91. *Id.* (citing Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217–18 (1995)).

92. *Id.* at 2707.

harm same-sex couples or socially construct what marriage does and is, as it is quite clear that, by not recognizing marriage equality, DOMA undermines enduring social relations; indeed, a major reason why the national government provides so many incentives for people to marry is to establish this enduring relation, and denying entrance into this relation for a certain group of people constitutes a distinct construction of the right—as well as a distinct denial. The argument that a democratic majority can ban same-sex marriages and only permit opposite-sex marriages because it favors traditional marriage is a difficult one to make and sustain, especially when the right to marry is at the core of so many landmark decisions, including *Meyer v. Nebraska*,[93] *Skinner v. Oklahoma*,[94] *Griswold v. Connecticut*,[95] *Zablocki v. Redhail*,[96] and *Turner v. Safley*,[97] to name but a few. It is difficult to maintain the argument that DOMA is not based on pure animus, because no reason other than the opposition to same-sex marriage is given as to why DOMA was passed, and this reason has been rejected by the Court in prior cases.

B. Tiers of Equal Protection Scrutiny

The mutual construction of the relationship between equality and liberty becomes clearer because Justice Kennedy is not speaking the language of "tiers of scrutiny;"[98] he is writing about the denial of equal protection of the law as explored in *Romer*—that it is pure animus if no relationship is offered between the ends and means of a law. However, although not formally stated, both *Romer* and *Lawrence* provide clear indications that sexual orientation classifications will be subjected to heightened Court scrutiny; the reasons the majority used in *Bowers v. Hardwick* to allow an anti-sodomy law to stand—such as history and tradition, Judeo-Christian belief systems, and a simple decision by government that sodomy was immoral—are no longer acceptable reasons to deny liberty and equality to gay men and lesbians.[99]

In Justice Scalia's case, arguing for DOMA's constitutionality on the view that sexual orientation classifications are subject only to minimal Court scrutiny[100]—rather than the test of strict scrutiny as with race classifi-

93. 262 U.S. 390, 399 (1923).
94. 316 U.S. 535, 541 (1942).
95. 381 U.S. 479, 486 (1965).
96. 434 U.S. 374, 383 (1978).
97. 482 U.S. 78, 95 (1987).
98. United States v. Winsdsor, 133 S. Ct. 2675, 2706 (2013) (Scalia J., dissenting).
99. Lawrence v. Texas, 539 U.S. 558, 567–72 (2003).
100. Windsor, 133 S. Ct. at 2706.

cations or intermediate scrutiny as with gender classifications—is problematic, especially when it extends to a rejection of the right to marry for same-sex couples. This is because there is clear evidence that the Court has subjected sexual orientation classifications to heightened scrutiny without formally mandating such a strict examination. Justice Scalia notes that DOMA meets the minimal scrutiny test, as it allows the government to avoid difficult choice-of-laws issues and preserves the intended effects of prior legislation against then-unforeseen changes in circumstance.[101] However, many justices on the Court, both liberal and conservative, have rejected a simple, tiered approach to equal protection analysis—and the Court acknowledged this rejection in *Romer* and again in *Lawrence*.[102]

C. Chief Justice Roberts, Justice Alito, and Justice Scalia's Rearguard Action to Stop the Right to Same-Sex Marriage

Justice Scalia recognizes the writing on the wall—that *Windsor* is based on substantive due process rights principles, which, if allowed to stand, will lead to a constitutional right to same-sex marriage—even though he notes that lower federal courts could distinguish *Windsor* on polity principle grounds. Justice Scalia's astonishing example of the easy transportability of the *Windsor* decision is clear evidence of his fears as to the force of the arguments used by Justice Kennedy.[103]

At the end of his opinion, Justice Scalia is forced back into the view that political branches should settle this issue. However, most jurists (as well as scholars), disfavor Court decisions being made primarily on originalist grounds because this leads to a limitation on social constructions that makes the Constitution too separate from the lived lives of our nation's citizens—a limitation that is not lessened or countered by any potential difficulty of citizens to understand why we leave decisions about their constitutional rights to nine justices of the Supreme Court.

Justice Roberts also offers his views on why *Windsor* should not be understood as leading to a constitutional right of same-sex marriage. There are strategic elements in the opinion, especially in his muted chastising of Justice Scalia for ridiculing the veracity of Justice Kennedy's disclaimer that this case only applies to DOMA and not to a right to same-sex marriage. Chief Justice Roberts accepts Justice Kennedy's disclaimer that this

101. *Id.* at 2708.

102. Both Justice O'Connor's equal protection argument as to why anti-sodomy laws are unconstitutional, as well as Justice Kennedy's belief that at the core of equal protection and due process liberty are substantive values that are not so distinct when applied to the case of sexual intimacy in *Lawrence*, help to explain the staying power of *Lawrence* and, by extension, *Windsor*.

103. *Windsor*, 133 S. Ct. at 2709–10.

opinion is confined to DOMA's failure to apply federal laws to lawful marriages that states have already recognized. Therefore, Roberts views the disclaimer as "a logical and necessary consequence of the argument the majority has chosen to adopt."[104] By this he means that Justice Kennedy's decision is based on respect for the polity principle that states have the power to decide who can marry—and nothing more. Chief Justice Roberts writes, "there is no such departure [from the polity principle] when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would 'vary, subject to constitutional guarantees, from one State to the next.'"[105]

He continues, "[t]he State's power in defining the marital relation is of central relevance" to the majority's decision to strike down DOMA and notes that "that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions."[106]

Thus, Chief Justice Roberts supports his argument that there is no right to same-sex marriage under the Constitution by emphasizing that, unlike in DOMA where the national government demonstrated its disrespect towards same-sex couples through its failure to recognize state-sanctioned same-sex marriages, there is no such disrespect when states choose not to allow same-sex marriages. This is because states, not the federal government, are the traditional venues for the definition of who can marry. Chief Justice Roberts writes:

> The majority emphasizes that DOMA was a "system-wide enactment with no identified connection to any particular area of federal law," but a State's definition of marriage "is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[107]

Chief Justice Roberts cannot stop at a discussion of the polity principle, even though that will be at the center of distinguishing *Windsor* from a case involving the right to marry under the Constitution. Therefore, who can marry should be left up to politics and not unelected justices, at least until the right to same-sex marriage is more securely embedded in our nation's history and tradition, even though it is not clear what he believes is evidence of being embedded.

In his argument, Chief Justice Roberts rejects the legitimacy of precedents, such as *Romer* and *Lawrence*, because they engage in Model 2 bidi-

104. *Id.* at 2697 (Roberts, CJ., dissenting).
105. *Id.* (quoting *id.* at 2692 (majority opinion)).
106. *Id.*
107. *Id.* (quoting *id.* at 2690, 2693–94 (majority opinion)).

rectional decisionmaking and consider polity and rights principles, the relationship between them, and social constructions in support of rights principles in past cases.[108]

Windsor is built upon the rights principle of liberty to secure enduring personal relationships and on the social construction of marriage as supporting such relationships. DOMA's refusal to defer to state definitions of marriage is used by Justice Kennedy to further the argument as to why DOMA denies liberty and equality to same-sex couples.[109] An argument against the right to same-sex marriage based on a narrow focus on deference to states, or on history and tradition—or even the notion that we should trust politics, not courts, when no specific right in the Constitution is violated—does not have the same force because it is not linked to the lived lives of persons. This is why the rights identified in *Windsor* led to the right to same-sex marriage under the Constitution in *Obergefell*, as explored below.

D. The Relation of Formalism to Realism in Originalist Arguments

The dissenting arguments are weaker because they separate out foundational, formalist arguments and realism when no such separation is possible. We see this clearly in Justice Alito's dissent. Justice Alito builds on many of the arguments used by Justice Scalia and Chief Justice Roberts as to why DOMA is constitutional and why *Windsor* should not be viewed as leading to a right to marry. At the core of Justice Alito's reasoning is his agreement with the other dissenters on how the Constitution should be interpreted, on a history and tradition in support of heterosexual marriage, and on the polity principle that the Court should leave individual rights not specified by the Constitution to politics.[110]

Along with his fellow dissenters, Alito rejects Model 2, bidirectional decisionmaking that employs a comparison of polity and rights principles (and social constructions) in prior cases as the Court decides the case at hand. At the center of the Alito decision is the view that one can decide whether one wants to define marriage as "conjugal-based" or "consent-based."[111] Those viewing marriage as "consent-based" support the right to same-sex marriage; those viewing marriage as "conjugal-based" support only heterosexual marriage.[112]

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108. *Id.* at 2707.

109. *Id.* at 2692–93.

110. *Id.* at 2715–20 (Alito, J., dissenting).

111. *Id.* at 2718 (Alito J., dissenting).

112. *Id.* For a scholarly argument against the use of social constructions about same-sex marriage some of which were later used in *Lawrence*, *Windsor*, and *Obergefell*, see, for example, Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State*

The Court should not constitutionalize one particular view of marriage, argues Justice Alito, for the reasons listed above. Justice Alito emphasizes that we do not know the long-term consequences of the recognition of same-sex marriages on society, children, or heterosexual marriages.[113] Courts are not as capable as political institutions to recognize difference of opinion among the population over marriage rights. Nor are they particularly capable of considering the empirical evidence as to the impact of same-sex marriage on society.[114] However, allowing a political majority to choose between "conjugal-based" or "consent-based" marriages does not respect the equal right of persons to decide what will make their personal relations enduring. Thus, not allowing same-sex marriage is a denial of equal protection of the law in an area of protected liberties—and thus violates constitutionally-protected rights. The fact that most reputable studies show no differences between same-sex or opposite-sex marriages with regard to childrearing or social impact—and given that a right, defined in prior cases, is involved and applied in *Windsor*—suggested that the right to same-sex marriage was on the horizon.[115]

Arguments based on an originalist interpretation of the Constitution, leaving decisions up to politics when the Constitution is not clear as to rights principles, are not as strong as arguments based on Model 2 decisionmaking because, as applied to the right to same-sex marriage, they do not delve deeply into the lived lives of persons. Arguments about the relationship between rights principles and lived lives are much stronger than those based on polity principles alone. Arguments that show the bidirectional relationship among polity and rights principles are the strongest, especially when they are built on precedents, as is *Windsor*.

Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 799 (2001) ("Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of 'anything goes' in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility.").

113. *Id.* at 2718–19.

114. *Id.* at 2716.

115. *See* Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (arguing that there is no evidence that the adoption of children by homosexuals is more supportive or damaging to children than adoption by heterosexuals); *see also* Frances Goldscheider, *Rescuing the Family from the Homophobes and Antifeminists: Analyzing the Recently Developed and Already Eroding "Traditional" Notions of Family and Gender*, 64 CASE WESTERN RESERVE L. REV. 1029 (2014); Helen M. Alvare, *Same-Sex Marriage and the "Reconceiving" of Children*, 64 CASE WESTERN RESERVE L. REV. 829 (2014) (discussing whether being in same-sex families is hurtful to children).

The dissenters want to leave the right to same-sex marriage up to more directly accountable political institutions—that is, to the states or to the national government. However, the Court had already decided in *Lawrence* that all persons have the right to sexual intimacy as part of their right to enduring personal relations.[116] Since marriage makes personal relations even more enduring, it should not be left to the states and the federal government to deny same-sex marriage. The Supreme Court had no choice but to decide that there is a right to same-sex marriage in *Obergefell* because failure to do so would have denied same-sex couples the enjoyment of equal rights. Finally, "leaving it up to politics" under a polity principle of deference, or disregarding rights of liberty already defined for those in homosexual relationships, make little sense, because to do so is to disregard the importance of the process of analogy relating principles and social constructions at issue in *Windsor* with those found in prior cases.

The majority opinion in *Windsor* is a classic example of Model 2, bidirectional decisionmaking. The principles and social constructions that produced a liberty of sexual relations in *Lawrence* led to the principles and social constructions behind the *Windsor* decision, establishing why DOMA's refusal to recognize the right to same-sex marriage established by the states constitutes an even greater denial of liberty than that present in *Lawrence*—and equally important, laying the groundwork for an actual right to same-sex marriage.

Most importantly, throughout the case, the polity principle of deference to state choices in deciding who can marry is related to denial of equal protection rights principles in *Romer* and due process liberty and equal protection principles in *Lawrence*. While at one level, polity and rights principles are analytically distinct as ideas, the importance of the polity and rights principles that are violated assume a greater forcefulness in the Kennedy opinion as the bidirectional impact of the principles and social constructions reinforce each other. Does denial of equal protection and due process rights by DOMA indicate disrespect for the polity principle of deference to state definitions of marriage? Yes. Does DOMA's lack of respect for state decisions on marriage indicate a similar lack of respect for equal protection and due process principles in *Romer* and *Lawrence*? Yes. This bidirectionality between polity and rights principles adds to the potency of Justice Kennedy's argument and makes it more difficult to overturn—adding to the staying power of rights defined in *Windsor*.

116. *See Windsor*, 133 S. Ct. at 2692–93 (describing sexual intimacy as "but one element in a personal bond that is more enduring").

E. The Windsor *Decision Should Not Have Been Unexpected*

One way to understand why the right to same-sex marriage will be recognized as a constitutional right is to compare such a right with rights of liberty that have or have not been overturned in the past. *West Coast Hotel Co. v. Parrish*[117] overturned *Adkins v. Children's Hospital*[118] and *Lochner v. New York*,[119] which established the right to make economic contracts as a protected liberty under the Due Process Clause. *Lochner* was overturned because this liberty, and the social construction on which it was based, no longer made sense to the Court and the nation when one analyzed the economic and social world outside the Court. No longer was it assumed that an individual employer and employee were in an equal bargaining position to decide wages and working conditions, and no longer was it assumed that laissez-faire economics was best for the nation, given the costs to workers and the wider public of constitutionalizing such a theoretical viewpoint.[120]

Similarly, the principles and social constructions in support of the constitutionality of segregation in *Plessy v. Ferguson*[121] were no longer viewed as viable in *Brown v. Board of Education*.[122] No longer did the Court believe the social construction in *Plessy*—that segregation was only social and did not carry an imputation of racial inferiority for African Americans by the government, which was prohibited by the Fourteenth Amendment's Equal Protection Clause. And no longer did the Court believe that the feelings of inferiority felt by African Americans were personal or individual, rather than caused and imposed by state action.[123]

In contrast, *Roe v. Wade*[124] was *not* overturned in *Planned Parenthood v. Casey*[125] because both the right to liberty under the Due Process Clause of the Fourteenth Amendment—with regard to personal, not economic, matters—was still very much alive and had been expanded upon by the Court, and the social constructions regarding the importance of abortion in light of failed contraception were even more necessary as more women were active in the economic, social, and political sphere in 1992 compared to 1973.[126]

117. 300 U.S. 379 (1937).
118. 261 U.S. 525 (1932).
119. 198 U.S. 45 (1905).
120. *See* Kahn, *Social Constructions*, *supra* note 1, at 67–75.
121. 163 U.S. 537 (1896).
122. 347 U.S. 483 (1952).
123. *See* Kahn, *Social Constructions*, *supra* note 1, at 67–75.
124. 410 U.S. 113 (1973).
125. 505 U.S. 833 (1992).
126. *See* Planned Parenthood of SE Pa. v. Casey, 505 U.S. 833, 856 (1992). Justices O'Connor, Kennedy, and Souter write:

Arguments that link polity and rights principles and bring the world outside the Court in as part of that linkage through a social construction process "that makes sense," as Justice Kennedy's *Windsor* opinion does, are even *more* forceful and believable. The right to enduring personal bonds is a cocoon around personal relations built on a social construction of what the family is, and what supports or does not support it. Thus, the right of liberty for same-sex couples and the social construction of that right in the lived lives of these families has far more moral force than polity principles alone. The social construction of what a family is and why it needs liberty interests will stand the test of time; therefore, it was simply a matter of time before the establishment of a right to same-sex marriage under the Constitution—and not too long a period of time at that.

IV. *OBERGEFELL V. HODGES* (2015)

A. The Mutual Construction of Formalism and Realism

As I predicted after *U.S. v. Windsor* was decided, the right to same-sex marriage under the Constitution was not long in coming. It came in *Obergefell v. Hodges*.[127] *Obergefell* confirms and builds upon the Supreme Court decisionmaking process I discussed with regard to *Windsor*, *Lawrence*, and prior cases involving the rights of gay men and lesbians to privacy and personhood. The Supreme Court reaffirmed and expanded implied fundamental rights to liberty and equal protection found in prior cases—and did so while the conservative coalition on the Court, and political institutions outside of it, failed to do so.[128]

In *Obergefell*, as in *Windsor* and other precedents in this doctrinal area, the Court engages in a bidirectional decisionmaking process through which there is a mutual construction of formalist and realist elements; spe-

> While neither respondents nor their amici in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for Roe's holding, such behavior may appear to justify no reliance claim. . . . To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.

Id.

127. 135 S. Ct. 2584 (2015).

128. *Id.*

cifically, *Obergefell* cannot be explained only on the basis of either formalist or realist elements. For example, it cannot be explained by external factors that are emphasized by political scientists employing the attitudinal and regime approach to explain Court decisionmaking and why rights change. Similarly, simple application of formalist rights or polity principles falls short as well. In *Obergefell*, as in *Windsor* and other precedents, we see the importance of both polity and rights principles, and the relationship between them. Both majority and minority justices write to the importance of polity principles, including the deference of the federal government to state decisions on marriage and, more generally, the legitimacy of the Supreme Court in establishing new fundamental rights under the Constitution.[129] In *Obergefell*, the Court was faced with the decision of whether the polity principle of deference to state determination of marriage is at the core of the issue, as minority justices argue, or whether rights of liberty under the Due Process Clause and equality under the Equal Protection Clause, as defined in *Windsor*, apply to the constitutionality of state bans on same-sex marriage.

At the core of the decisionmaking in *Obergefell*, as in prior cases, is the importance of the social construction process, through which rights principles gain meaning and specificity. As in all individual rights cases, the Court explores polity and rights principles and social constructions at issue in the case before the Court. In *Obergefell*, the social construction includes principles and social constructions found in *Windsor* and other precedents. However, the majority and minority justices in this case have quite different views of whether liberty and equality principles are being violated and whether or not the polity principle of deference to state definitions of marriage should trump fundamental rights as defined in prior cases. In *Obergefell*, the minority justices continue to emphasize the polity principle of deference to state definitions of marriage, along with polity principles about the role of the Supreme Court in establishing fundamental rights under the Constitution.[130]

As in *Windsor*, the minority arguments against establishing the right to same-sex marriage are weaker than those of the majority in *Obergefell*—and for similar reasons. The most important of these reasons is the same in both cases: showing the effects of the denial of marriage rights to same-sex couples by way of a social construction of the rights in terms of the lived lives of gay men and lesbians and their children is *much* more forceful and relatable than a social construction of the alleged hurt suffered by hetero-

129. *Id.*

130. *Id.* at 2611 (Roberts, CJ., dissenting); *id.* at 2626 (Scalia, J., dissenting); *id.* at 2631 (Thomas, J. dissenting); *id.* at 2640 (Alito, J., dissenting).

sexual individuals and couples who oppose same-sex marriage on religious or secular grounds. Thus, at the core of the decisionmaking process in *Obergefell*, as in prior decisions, is an analogical process through which the principles and social constructions among the cases are compared.

Because the rights principles involving liberty and equality at issue in *Obergefell* are no different than those in *Windsor*, the majority of justices refused to reject them.[131] As we see throughout the *Obergefell* majority opinion, state bans on same-sex marriage, like the national government's failure to recognize state-defined, same-sex marriages, involve the same unconstitutional refusal to provide dignity, equality, liberty, and personhood to same-sex couples and their children as was found in *Windsor*—conclusions based on rights principles and social constructions ultimately stemming from *Lawrence* and prior due process and equal protection cases. Thus, there is little difference between the rights violations committed at the federal level through the passage of DOMA, as explored in *Windsor*, and the rights violations committed at the state level through same-sex marriage bans, as explored in *Obergefell*.

In *Obergefell*, as in *Windsor* and *Lawrence*, the Court emphasizes the importance of marriage in fostering deep, enduring personal relations deserving of protection; the hurt and loss of dignity to children and parents in same-sex families caused by the prejudice of the wider society towards them; and the rejection of simple, moral disapproval against gays as a basis for legislation.[132] Thus, as with DOMA, the failure of states to recognize same-sex marriages undermines the integrity, stability, and closeness of the family, and thus undermines enduring personal and social relations.[133]

The importance of the Supreme Court's decisionmaking process, in which there is a mutual construction of rights principles in light of the lived lives of persons, is demonstrated by the *Obergefell* decision—as well as by the fact that, based on *Windsor*, most federal district and circuit courts, and many state courts, found state bans on same-sex marriage to be unconstitutional under the Constitution, even though no such right was established by *Windsor*. This is a testament to the acceptance of the proposition that Court decisionmaking is bidirectional—that rights and social constructions, while analytically distinct, are mutually constructed to determine whether rights exist.

These decisions by the Supreme Court, lesser federal courts, and state courts, with regard to same-sex marriage also speaks to the important question of when courts choose to establish, disestablish, or expand implied

131. *Id.* at 1 (majority opinion).

132. *Id.* at 2593.

133. *Id.*

fundamental rights. As in *Planned Parenthood v. Casey*[134] *c*ompared to *Roe v. Wade*[135]—but unlike *Plessy v. Ferguson* compared to *Brown v. Board of Education*[136] and *Adkins v. Children's Hospital*[137] compared to *West Coast Hotel Co. v. Parrish*[138]—when the social, economic, and political constructions in support of rights principles endure in their relevancy, the right is sustained or expanded upon, not overturned. The rights principles and social constructions undergirding the decision in *Obergefell* over whether state bans on same-sex marriage are constitutional are the same rights and constructions that supported the finding of federal government wrongdoing through DOMA in *Windsor*. The relationship between marriage and the enduring personal relations of same-sex couples is fundamental, regardless of whether it is the federal government or a state failing to recognize that relationship.

In *Obergefell*, Justice Kennedy continues the theme of the relationship between marriage and a) its importance to the wider, social world; b) the protection of enduring, personal bonds; and c) the stability and dignity of same-sex couples and their families.[139] Justice Kennedy also continues another theme found in *Lawrence*—that both liberty and equal protection principles in the Fourteenth Amendment are applicable to the question of whether there is a right to same-sex marriage; the relationship between liberty and equality is demonstrated through Kennedy's social construction process.[140] This reinforcement of liberty and equality principles is the basis for Kennedy's robust argument for the constitutionality of same-sex marriage. Justice Kennedy is arguing that the social construction of marriage should not be based on a separate analysis of liberty and equality principles because to do so would not allow the Court to see the full impact of state marriage bans on the lived lives of same-sex couples and their families. The loss of liberty informs a loss of equality, and a loss of equality informs a loss of liberty. Strict segmentation of analysis into due process liberty or equal protection equality would not permit the Court to identify the full nature of injustice to same-sex couples and their families that is caused by state bans on same-sex marriage. Therefore, principles of liberty and equality must be applied synergistically and symbiotically to see why bans on same-sex marriage are unconstitutional.

134. 505 U.S. 833 (1992).
135. 410 U.S. 113 (1973).
136. 347 U.S. 483 (1952).
137. 261 U.S. 525 (1923).
138. 300 U.S. 379 (1937).
139. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
140. *Id.*

At issue here is not simply the right to privacy—the right to be left alone—as a liberty interest. The concept of liberty and personhood, going as far back as *Griswold v. Connecticut*,[141] is much more filigreed as to person, family, and enduring, personal bonds than simply the right to be left alone. This is so because state action to ban the use of contraceptives by married persons in *Griswold* or the non-married in *Eisenstadt v. Baird*[142] affects not simply the physical intrusion of the home: it also involves the psychological encroachment into the minds of persons affected by such bans.[143]

The Court in *Obergefell* is refusing to be pigeonholed into looking at liberty and equality separately, as if the loss of one does not impact the other. It refuses to see doctrinal principles as separate and distinct when they inform the same acts by government. The Court is bidirectional in showing that liberty and equality principles reinforce each other when the Court engages in the social construction of what it means for government to ban same-sex marriage. The Court rejects hollow formalism, where liberty and equality principles may remain separate, when its real-life application of these principles to the lived lives of persons demonstrates that they function together. These mutually reinforcing principles and their application reveal even greater injustices to same-sex couples and their families. The Court demonstrates this point through its discussion of "the synergy between the two protections" in numerous precedents, with the discussion focusing in particular on *Loving v. Virginia*[144] and *Lawrence v. Texas*.[145] In other words, the social construction of a denial of same-sex marriage, accomplished through the synergistic application of due process liberty and equal protection equality principles, is not new to the Court's jurisprudence.

With regard to the Court and social change, when principles in two lines of doctrine reinforce each other in terms of the lived lives of persons, as in *Obergefell*, there is a greater likelihood that rights will be established or expanded. Therefore, principles inform the social construction process—and of equal importance, social constructions through time pull on principles and their meanings, such as what the denial of liberty and the denial of equality mean. These findings raise important questions about what to make of legal scholars who argue that a right—in this case, the right to same-sex marriage—should be based on equal protection or due process

141. 381 U.S. 479 (1965).
142. 405 U.S. 438 (1972).
143. *Obergefell*, 135 S. Ct. at 2603.
144. 338 U.S. 1 (1967).
145. 539 U.S. 558 (2003); *Obergefell*, 135 S. Ct. at 2602.

liberty grounds.[146] If the Court refuses to be formalist in choosing only one set of principles to decide a right to same-sex marriage because of what is required by justices engaging in a bidirectional, social construction process, then questions need to be raised about scholarship that seeks to make the case for or against same-sex marriage on *exclusively* liberty-based or *exclusively* equality-based grounds.

B. An Important Difference Between Kennedy's Windsor *and* Obergefell *Decisions: The Right to Marry and The Supreme Court as a Venue for Social Change*

The major difference between *Obergefell* and *Windsor* is Justice Kennedy's rather thorough analysis in the former of when the Supreme Court should establish a fundamental right and be a venue for social change. A response to this analysis is the cornerstone of Chief Justice Robert's eloquent dissenting opinion, as well as those of the other dissenting justices. When Justice Kennedy explores the question of what role history and tradition should play in the Court's deciding whether there is a constitutional right to same-sex marriage, we see how principles, social constructions, and time relate to each other.[147]

Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970s and 1980s. Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage.[148]

In his opinion, Justice Kennedy applies the historical and analytical frameworks of past Court jurisprudence to the case at hand:

> [A] long history of disapproval of [same-sex] relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohib-

146. *See* Andrew Koppleman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) and *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145 (1988).

147. *Obergefell*, 135 S. Ct. at 2602–05.

148. *Id.* at 2603–04 (first citing Kirchberg v. Feenstra, 450 U. S. 455 (1981); then Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); then Califano v. Westcott, 443 U.S. 76 (1979); then Orr v. Orr, 440 U S. 268 (1979); then Califano v. Goldfarb, 430 U.S 420 (1977) (plurality opinion); then Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); and then Frontiero v. Richardson, 411 U. S. 677 (1973)).

> its this unjustified infringement of the fundamental right to marry.[149]

Therefore, principles of liberty and equality with regard to a right to *same-sex* marriage change over time and inform each other—as they did within issues of heterosexual marriage in the past. A long-term tradition of inequality is not a reason to continue the tradition. Justice Kennedy is arguing that rights should not be defined as they were in the past. Fundamental rights are not fixed if change is to come to society. Nor should they be defined solely by those who exercised them in the past. The Court, in other words, has a key role in deciding whether new rights are warranted.

Most importantly, Justice Kennedy emphasizes that the Supreme Court should not wait for democracy to act when fundamental rights principles already known to courts will be abridged in doing so. When rights principles have been established, as they were in *Lawrence* and *Windsor*, and the conditions of the social constructions underpinning them continue to exist—or are even greater than in the past—the Supreme Court has a duty to act: to define or expand implied fundamental rights. It is the role of the Supreme Court, engaging in a bidirectional legal process, to determine implied fundamental rights, not political institutions directly accountable to the electorate. Kennedy writes:

> The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.[150]

Moreover, the Court is saying that the decision over a constitutional right to same-sex marriage is not contingent on some crystallization of momentum for or against same-sex marriage. This is because the legal process has a different set of considerations than those of political institutions. Social change on the Supreme Court is decided as the result of a bounded, but bidirectional, legal process in which the rights and polity principles and social constructions in a given case take form through a process of analogy with precedents—not through mindless subservience to the purported political moods of the nation. Emerging fundamental rights develop through a process that is, importantly, *legal* and *bidirectional*. Legal norms and process are important, in themselves, and because of their interaction with the real world outside the Court.

149. *Id.* at 2604.
150. *Id.* at 2605.

Justice Kennedy emphasizes that he does not want minimalism by the Court in *Obergefell* to lead to a similar situation as that found in the time period between *Bowers v. Hardwick* (1986) and *Lawrence v. Tex*as (2003), where there was an unfounded denial of protected liberty interests.[151] Kennedy argues convincingly that the situation of the post-*Bowers* period is similar to that faced by scores of same-sex couples in the country at the time of *Obergefell*. One can see this when Kennedy lists the rights that are denied to the petitioners in the case.[152] To require a minimalist, case-by-case determination of the constitutionality of specific benefits that the states deny same-sex couples would fail to recognize how they are intertwined with rights and responsibilities that are central to what constitutes marriage—and why the Court, over many years, has viewed marriage as central to the liberty of persons and equal protection of the law.

Finally, the Court asks whether outlawing bans on same-sex marriage will damage heterosexual marriage; they find the argument is "counterintuitive" given the reasons for why heterosexual couples choose to marry. Kennedy writes that, "[d]ecisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so."[153]

The question as to whether and when the Court should establish individual rights or leave it up to political branches dominates Chief Justice Roberts's dissenting opinion. Chief Justice Roberts argues that the Court should not decide whether same-sex marriage is constitutional; in doing so, he argues same-sex marriage is not rooted in the traditions and conscience of our people.[154] Moreover, for the Court to decide the constitutionality of same-sex marriage would be to do what the Court did in *Lochner*—decide and define public policy rather than leaving it to political institutions.[155] Chief Justice Roberts writes, "Rejecting *Lochner* does not require disavowing the doctrine of implied fundamental rights, and this Court has not done so. But to avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern sub-

151. *Id.* at 2606 ("Although *Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.").

152. *Id.*

153. *Id.* at 2607.

154. *Id.* at 2616 (Roberts, CJ., dissenting).

155. Lochner v. New York, 198 U.S. 45 (1905).

stantive due process cases have stressed the need for 'judicial self-restraint.'"[156]

Key for Justice Roberts is the distinctions between *Obergefell* and the cases that precede it. One distinction he makes is on the concept of "marriage," arguing that the precedents on which the majority justices build the case for a right to same-sex marriage were decided on the *significantly different and distinct* premise that a marriage is between a man and a woman. Alternatively, Roberts tries to distinguish *Obergefell* from *Griswold* and *Lawrence* by saying the right to same-sex marriage does not involve an intrusion into the privacy of the home under a criminal statute.[157]

At the core of this viewpoint, and Chief Justice Robert's' entire dissenting opinion, is a very different view of the principle of liberty and social constructions of privacy. Chief Justice Roberts sees privacy as related to government intrusion in the home, rejecting the notion that the Court has treated liberty in personal relations differently from liberty in, for example, economic relations. He sees the Court as arbitrarily deciding what benefits same-sex couples should receive, rather than involving rights of privacy and personhood:

> [T]he privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.[158]

Chief Justice Roberts rejects Justice Kennedy's language relating liberty principles to the social constructions in *Lawrence* and *Windsor* concerning the implications of failing to recognize same-sex marriages for enduring, personal bonds and the harm suffered by same-sex parents and their children; he does this because of his philosophy of judicial review, because of what level of scrutiny he believes the Court should deploy when exploring the question of the constitutionality of same-sex marriage bans. This is due to an acceptance of the polity principle of judicial self-restraint—regardless of whether implied fundamental

156. *Obergefell*, 135 S. Ct. at 2618 (Roberts, CJ., dissenting).

157. *Id.* at 2620 ("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 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. No one is 'condemned to live in loneliness' by the laws challenged in these cases—no one.").

158. *Id.*

rights issues are involved—and a far narrower reading of what liberty and personhood mean based on precedents. The Court, as a venue for social change, should be minimalist. New insights by justices as to what constitutes injustice should not inform Court decisionmaking. Chief Justice Roberts writes:

> The truth is that today's decision rests 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.[159]

In contrast to the view by Justice Kennedy—that, when implied fundamental rights are denied to persons, the Court has a responsibility to vindicate those rights and not acquiesce to political branches, lest harm being done to those individuals should continue—Chief Justice Roberts asserts that the Court should not engage in a social construction process that explores such harms:

> Then and now, this assertion of the "harm principle" sounds more in philosophy than law. The elevation of the fullest individual self-realization over the constraints that society has expressed in law may or may not be attractive moral philosophy. But a Justice's commission 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." There is indeed a process due the people on issues of this sort—the democratic process.[160]

At the core of whether rights are established, disestablished, or changed, however, is not simply what principles mean, but most importantly, the social construction process on which rights are built. Even when Chief Justice Roberts says the main issue in *Obergefell* is the proper role of the Court in a democracy, that question cannot be answered without engaging in a social construction process—a process in which he and his fellow minority justices engage in their dissents, despite any explicit disavowals of such decisionmaking. Therefore, engaging in the social construction process is an important part of the decisionmaking of all justices, and under-

159. *Id.* at 2621.

160. *Id.* at 2622. This language is reminiscent of the majority justices in *Lochner*-era cases such as *Carter Coal*, in which the Court argued that "hurt" to miners, their families, and the nation should not be the basis on which to decide the constitutionality of the Bituminous Coal Act. The only question for majority justices was whether mining had a direct effect on commerce, which they defined as goods in transit. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

standing this, among other things, is key to understanding why rights change.

V. CONCLUSION

The Supreme Court's decisions in the area of gay rights and marriage equality—from *Romer* through to *Obergefell*—reveal the robust process that lies at the heart of so many of the Court's most significant decisions. The Court engages in a bidirectional, mutual construction process, examining the facts in the case at hand, bringing them into dialogue with past principles in precedents, and looking beyond the walls of the courthouse into the reality of citizens' lives in order to understand the issues at work. Through this reasoned, analogical process, the Court is at once bounded by the law and unshackled by rigid theories or doctrines. The process of bringing law into communication with reality, allowing a mutually informative dialogue to occur, strengthens the staying power of a decision and grounds it with a legal faithfulness and social relevance of precedential value. The Court's gay rights jurisprudence is a sterling example of such decisionmaking, and the process grounding these decisions is the reason they will stand the test of time and continue to positively impact the lives of American citizens.