


5-29-2020

## "Terms of Heart": Judicial Style in *Obergefell v. Hodges*

Eliza S. Walker

Boston College Law School, [eliza.walker@bc.edu](mailto:eliza.walker@bc.edu)

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>

 Part of the [Legal Writing and Research Commons](#), [Sexuality and the Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Eliza S. Walker, "*Terms of Heart*": *Judicial Style in Obergefell v. Hodges*, 61 B.C.L. Rev. 1935 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss5/8>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# “TERMS OF HEART”: JUDICIAL STYLE IN *OBERGEFELL* v. *HODGES*

**Abstract:** The law lives in language. The Supreme Court issues written opinions to inform the parties, the bar, and the public of its decision in each case. But the content of the decision cannot be divorced from the way it is written—that is, the style. Fundamental rights cases present a singular stylistic challenge both because they must reduce some ineffable liberty to language, and because they are the cases most likely to be read by the public. Justice Anthony Kennedy’s 2015 opinion in *Obergefell v. Hodges* was criticized not only for its outcome, but also for its supposedly non-legal style. This Note traces the style of Supreme Court decisions throughout history, and summarizes the reactions to *Obergefell* in both the legal and public audiences. This Note then outlines the Law and Literature movement, and argues it is an appropriate lens through which to analyze the style of *Obergefell*. To interpret a judicial opinion, the Law and Literature movement looks at two relationships the opinion creates: that with the parties it speaks about, and that with its audience. This Note argues that *Obergefell* exemplifies the Law and Literature ideal, by creating an empathetic relationship with its plaintiffs and speaking to a reader who values principled decision making over technical legal tests.

## INTRODUCTION

In the summer and fall of 2015, almost 100,000 gay couples were married in the United States.<sup>1</sup> That year, the legitimacy of same-sex marriages had finally been recognized by the Supreme Court in the landmark decision, *Obergefell v. Hodges*.<sup>2</sup> At many of these weddings, that summer and later, the ceremony included a reading of a passage from *Obergefell*.<sup>3</sup> As the couple stood at an altar ready to begin their lives together, the officiant read Justice Anthony Kennedy’s words: “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.”<sup>4</sup>

---

<sup>1</sup> Quentin Fottrell, *1 in 10 Weddings Were Same-Sex Couples in Summer of 2015*, MARKETWATCH (Nov. 7, 2015), <https://www.marketwatch.com/story/1-in-10-weddings-were-same-sex-couples-in-summer-of-2015-2015-11-06> [<https://perma.cc/P2S2-SRRL>] (noting that 96,000 same-sex couples were married between July and October 2015 in the United States).

<sup>2</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015).

<sup>3</sup> See Natalie Schachar, *Justice Kennedy’s Gay Marriage Opinion Is Celebrated Again—in Wedding Vows*, L.A. TIMES (Aug. 28, 2015), <https://www.latimes.com/nation/la-na-couples-justice-kennedy-20150828-story.html> [<https://perma.cc/2JFS-THBT>] (noting the last passage of the *Obergefell* opinion has been used in wedding ceremonies around the country).

<sup>4</sup> *Obergefell*, 135 S. Ct. at 2608.

There was something about this passage. On the day the opinion was released, a screenshot of it went viral on the internet followed by the hashtag #lovewins.<sup>5</sup> Millennials who had never so much as glanced at the writing of a legal opinion before posted it on Facebook and Instagram.<sup>6</sup> Journalists, too, were captivated, calling the closing paragraph “one of the most beautiful passages you’ll likely read in a court case.”<sup>7</sup> Jia Tolentino, a *New Yorker* staff writer, wrote that on the day the opinion was released, she was so ecstatic she went to a club, took psychedelic mushrooms, and read the decision’s final paragraph “over and over as [she] cried.”<sup>8</sup> It wasn’t just the result of the opinion—the recognition of a fundamental right to marry for gay people—but something about its writing that resonated with people as well.<sup>9</sup>

Not everyone, though, was so enamored. In his dissent, Justice Antonin Scalia called the writing of the majority opinion “straining-to-be-memorable,” full of “showy profundities,” and wrote that if he ever joined an opinion with such language he would “hide [his] head in a bag.”<sup>10</sup> Justice Scalia was not alone: other journalists thought the style was excessive<sup>11</sup> and legal scholars

<sup>5</sup> Yasmin Aslam, *#LoveWins on the Internet*, MSNBC (June 27, 2015), <http://www.msnbc.com/msnbc/love-wins-the-internet> [<https://perma.cc/E2U2-GMM6>] (noting that a screenshot of the last paragraph went viral and the hashtag #lovewins was trending).

<sup>6</sup> See Nick Corasaniti, *On Social Media, an Outpouring of Support*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/live/supreme-court-rulings/on-facebook-an-outpouring-of-support> [<https://perma.cc/E9S2-469M>] (noting that in the hour after the decision was released, 3.8 million people in the United States made 10.1 million Facebook likes, posts, comments, and shares about the opinion); see also KAREN PETROSKI, *FICTION AND THE LANGUAGES OF LAW 1* (2018) (describing the online reaction to *Obergefell*).

<sup>7</sup> Jordan Weissmann, *The Beautiful Closing Paragraph of Justice Kennedy’s Gay Marriage Ruling*, SLATE (June 26, 2015), <https://slate.com/news-and-politics/2015/06/supreme-court-legalizes-gay-marriage-kennedy-s-decision-ends-beautifully.html> [<https://perma.cc/ER9W-JH3W>].

<sup>8</sup> JIA TOLENTINO, *TRICK MIRROR: REFLECTIONS ON SELF-DELUSION 284* (2019) (“On the Friday that the decision was handed down, I’d planned on staying in, but then the news electrified me with such happiness that I went out, and ended up at the club on mushrooms. I remember standing still, people dancing all around me, my heart like Funfetti cake, reading the decision’s final paragraph on my phone screen over and over as I cried.”).

<sup>9</sup> See, e.g., Aslam, *supra* note 5 (noting the decision brought social media users to “virtual tears” as they commented on what they saw as a beautiful definition of marriage); Jay Yarrow, *This Paragraph from the Supreme Court on Marriage Is One of the Most Beautiful Things We’ve Ever Read*, BUS. INSIDER (June 26, 2015), <https://www.businessinsider.com/supreme-courts-beautiful-description-of-marriage-2015-6> [<https://perma.cc/3MKK-M46M>].

<sup>10</sup> *Obergefell*, 135 S. Ct. at 2628, 2630 & n.22 (Scalia, J., dissenting). Justice Scalia went on to say: “The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.” *Id.* at 2630.

<sup>11</sup> See, e.g., Michael Cobb, *Opinion, The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES, (June 30, 2015), <https://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html> [<https://perma.cc/HVL3-2ZUM>]. In the *New York Times* Opinion Section, Michael Cobb wrote:

Certainly Justice Kennedy’s sense of marital “dignity” is over the top. But it’s not just sentimental rhetoric: It’s a kind of legal “term of heart” that can keep you up at night.

who agreed with the result worried that the style of the opinion had eclipsed its content because it did not contain a rigorous explanation of the due process or equal protection rights upon which it based the decision.<sup>12</sup>

Arguments concerning the style of judicial opinions are not new.<sup>13</sup> The law lives in and through language, and thus many lawyers, judges, and legal scholars have traced the evolution of the style of U.S. Supreme Court opinions over its history and wondered whether style was merely the "dressing" of an opinion or if it had some impact on the meaning of the law and precedent being written.<sup>14</sup>

Fundamental rights cases present a singular stylistic challenge, both because they require reducing some ineffable right or liberty to language, and because they are the cases that the public is most likely to pay attention to.<sup>15</sup> Many judges and scholars have pointed out that the public is a possible audience of U.S. Supreme Court opinions, and thus opinions should be accessible to the layperson.<sup>16</sup> Scholars have posited that written opinions legitimize the power of unelected judges to write and change laws in a democracy: the need

---

The words and the value they communicate are impossible to avoid, and often difficult to resist. It's as if the words of Justice Kennedy and my grandmother, who, on her deathbed, begged me to get married, have melded together in my head, declaring my life lacking emotions meet law and then throw me into a state of emotional insecurity.

*Id.*

<sup>12</sup> See, e.g., Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm\\_term=.2c1cb8ebb62c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.2c1cb8ebb62c) [<https://perma.cc/26JE-QDE2>] (agreeing with *Obergefell*'s result but worrying that it was based on questionable reasoning).

<sup>13</sup> See generally, e.g., BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* (1931) (discussing stylistic choices in judicial opinions). By "style," this Note refers to anything in an opinion that cannot be paraphrased. See WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 143 (2007) (defining style as "whatever in the judicial opinion seeks to persuade beyond the paraphrasable content of the decision"); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1422 (1995) (defining style as "what is left out by paraphrase").

<sup>14</sup> See, e.g., CARDOZO, *supra* note 13, at 6 (arguing that form "make[s] it what it is"); Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2010 (2002) (arguing that analyzing the rhetoric of U.S. Supreme Court opinions is central to understanding American constitutional law); James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995) ("The excellence of the opinion is not one of 'mere style,' but an excellence of thought, represented and enacted in language in such a way as to live in the minds of others.").

<sup>15</sup> See, e.g., Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 155 (2018) (calling substantive due process cases a "bullshit magnet"). Fundamental rights cases—also known as substantive due process cases—deal with fundamental liberties such as "protecting family autonomy, procreation, sexual activity and sexual orientation, medical care decision making, travel, voting, and access to the courts" as well as "[f]reedom of speech and religious freedom." ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 949 (5th ed. 2017).

<sup>16</sup> For example, Justice Breyer said in his Supreme Court confirmation hearings that he strived to write opinions that a high school student would be able to understand. BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING: SELECTED ESSAYS AND SPEECHES OF BRYAN A. GARNER* 428 (2009).

to write and explain their decision puts a necessary constraint on their power.<sup>17</sup> Yet despite this ideal that judicial opinions—and especially those by the Supreme Court—should be publicly accessible, in years past it was infrequent, at best, that a layperson ever found herself reading a legal opinion.<sup>18</sup>

What is the relationship between Supreme Court opinions and the public? The Law and Literature movement, popular in the end of the twentieth century, provides one possible answer.<sup>19</sup> The movement argues that tools of literary theory and criticism can help us understand legal texts, and moreover, that legal texts can be understood as creating community.<sup>20</sup> In this Note, I analyze *Obergefell* through the lens of the Law and Literature movement.<sup>21</sup> The Law and Literature movement is an appropriate framework because Justice Kennedy has stated his own concern with the audience of his opinions, and the Law and Literature movement looks at the audience of an opinion to understand its stylistic choices.<sup>22</sup> I argue that under the Law and Literature framework, *Obergefell* creates an empathetic relationship with the petitioners and speaks to a reader who will respect a decision based on principle rather than on the application of a technical legal test.<sup>23</sup>

In Part I of this Note, I provide an overview of the evolution of writing styles of U.S. Supreme Court opinions and look at the legal and public reactions to Justice Kennedy's opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Obergefell*.<sup>24</sup> In Part II, I give an overview of the Law and Literature movement.<sup>25</sup> In Part III, I apply the theories of the Law and Literature movement to *Obergefell* and argue that the opinion speaks to an audience that prioritizes principle over technical legal doctrine.<sup>26</sup>

---

<sup>17</sup> See, e.g., Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 244 (2008) (noting that written opinions serve an important role in democracy).

<sup>18</sup> See Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1463–64 (1995) (noting that most Americans do not read judicial opinions and that the only daily American newspaper that prints excerpts from judicial opinions is the *New York Times*); see also Chemerinsky, *supra* note 14, at 2030 (speculating that more people may read judicial opinions now that they are widely available online).

<sup>19</sup> See generally, e.g., JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990) (using literary theory in legal analysis and analyzing legal texts' community-building function).

<sup>20</sup> See *id.* at 100.

<sup>21</sup> See *infra* Part III.

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See *infra* Part I.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part III.

## I. UNITED STATES SUPREME COURT WRITING STYLE

Nothing in the U.S. Constitution requires that judges issue written opinions.<sup>27</sup> Nonetheless, our legal system has evolved to be based on often lengthy opinions explaining a judge's reasoning that can be cited in future cases.<sup>28</sup> Section A of this Part outlines a brief history of how U.S. Supreme Court opinions have evolved from the 1790s to the present.<sup>29</sup> Section B explores existing academic analyses of legal opinions.<sup>30</sup> Finally, Section C discusses the singular style of Justice Anthony Kennedy's opinions.<sup>31</sup>

### A. *A Short History of the Evolution of United States Supreme Court Written Opinions*

In the early days of the U.S. Supreme Court, the justices only released written opinions in a small percentage of cases.<sup>32</sup> Scholars have cited *Marbury v. Madison* as the first source to explicitly state the need for written judicial opinions.<sup>33</sup> *Marbury* not only holds that it is "emphatically the province and duty of the judicial department to say what the law is," but also lays bare a requirement to "expound and interpret" as one does it.<sup>34</sup> Chief Justice John Mar-

<sup>27</sup> See GARNER, *supra* note 16, at 440.

<sup>28</sup> See *infra* Part I.A.

<sup>29</sup> See *infra* Part I.A.

<sup>30</sup> See *infra* Part I.B.

<sup>31</sup> See *infra* Part I.C.

<sup>32</sup> See GARNER, *supra* note 16, at 440 (noting that in the Court's early years it issued written opinions in only the most consequential cases). For a detailed history of the evolution of U.S. Supreme Court writing style, see *id.* at 439–47. For a detailed account of the evolution of the written opinion dating back to its English roots, see POPKIN, *supra* note 13, at 6–32. See generally DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963) (giving a history of legal language). In the early English legal system, each judge issued a separate oral opinion from the bench where he explained his reasoning to his colleagues. See Patricia M. Wald, "How I Write" Essays, 4 SCRIBES J. LEGAL WRITING 55, 62 (1993) (calling early English oral opinions "stream-of-consciousness" style). The practice of regularly issuing written opinions slowly evolved from that custom. POPKIN, *supra* note 13, at 37. French courts, in contrast, issued anonymous and unanimous written opinions that contained short and obscure statements of reasons. *Id.* at 33–34; see also Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 84 (1994) (contrasting French opinions that are "uninformative syllogism[s] of a few hundred words" with American opinions that emphasize "reason and candor").

<sup>33</sup> 5 U.S. (1 Cranch) 137, 177 (1803); see, e.g., POPKIN, *supra* note 13, at 57–58 (contextualizing *Marbury*'s notion of "judicial power" within a discussion of the evolution of American written opinions).

<sup>34</sup> *Marbury*, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule."); see Lebovits et al., *supra* note 17, at 243–44 (noting that *Marbury* dictates that judges must give reasoned opinions). Others have cited later Court orders and rules as requiring written opinions. See, e.g., POPKIN, *supra* note 13, at 83. Some scholars cite to a Supreme Court order from 1834 that the reporter must "deliver opinions of the Court to the clerk for safekeeping" as an implicit requirement that the justices issue written opinions. *Id.* Ultimately, it became standard for the Supreme Court to issue written opinions, though to this day no authority explicitly requires them to. *Id.* at 84. U.S. Supreme Court Rule 41 requires "the Clerk of the Court to 'release' opinions immedi-

shall also influenced the practice of issuing a single “opinion of the Court,” as opposed to the separate opinions favored by English judges.<sup>35</sup> He often encouraged the other members of the Court to join his majority opinions, eager to create the appearance of a strong, unified Court.<sup>36</sup>

Since *Marbury*, the dominant style of Supreme Court decisions has evolved and fluctuated.<sup>37</sup> In the first half of the nineteenth century, the “grand style” or “magisterial” style was popular.<sup>38</sup> This style is exemplified in the opinions of Chief Justice Marshall, and characterized by grand pronouncements, a lack of explanation, and a view of judges as the “mouthpiece[s] of divinity.”<sup>39</sup> Chief Justice Marshall is often considered one of the best judicial stylists.<sup>40</sup> After 1850, a more formal style became popular; it prioritized reason and precedent and resulted in opinions that were reliant on jargon and long string citations.<sup>41</sup> Elements of the formal style live on today, for example, in the form of complex three- and four-part tests and standards.<sup>42</sup>

At the turn of the twentieth century, Justice Oliver Wendell Holmes’s personal style emerged.<sup>43</sup> Justice Holmes was known for memorable, quotable language such as “[t]hree generations of imbeciles are enough.”<sup>44</sup> Although some critics have lauded Justice Holmes’s pithy style, others have criticized it as reliant on rhetoric at the expense of clear reasoning.<sup>45</sup>

Beginning in the early twentieth century, the popularity of the formal style waned and was replaced by opinions heavily influenced by the Legal Re-

ately after their announcement and to cause them to be issued in ‘slip form,’” which scholars have noted may implicitly require written opinions. *Id.*

<sup>35</sup> GARNER, *supra* note 16, at 441; POPKIN, *supra* note 13, at 70–71.

<sup>36</sup> GARNER, *supra* note 16, at 441; POPKIN, *supra* note 13, at 70–71.

<sup>37</sup> See GARNER, *supra* note 16, at 439–45 (summarizing the evolution of Supreme Court style); POPKIN, *supra* note 13, at 86–178 (same).

<sup>38</sup> CARDOZO, *supra* note 13, at 10; GARNER, *supra* note 16, at 439.

<sup>39</sup> CARDOZO, *supra* note 13, at 10–16 (describing the “magisterial or imperative” and “grand” style as one that forgoes explanation in favor of grand pronouncements and that makes the reader “feel the mystery and the awe of inspired revelation”); GARNER, *supra* note 16, at 439 (describing the “grand style”).

<sup>40</sup> GARNER, *supra* note 16, at 445.

<sup>41</sup> *Id.* at 439.

<sup>42</sup> *Id.*; see also Morton J. Horwitz, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 98–99 (1993) (objecting to “three or four ‘prong’ tests everywhere and for everything”).

<sup>43</sup> GARNER, *supra* note 16, at 439. Judge Posner cited Holmes’s opinions as examples of “im-pure” style, because they are “personal and exploratory.” POPKIN, *supra* note 13, at 152. Justice Cardozo, too, characterized Holmes’s style as “personal” and wrote that it “make[s] us partners in the deliberative process.” *Id.*

<sup>44</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927); see, e.g., POPKIN, *supra* note 13, at 155 (characterizing Holmes’s style as “pithy aphorisms to summarize legal conclusions”).

<sup>45</sup> GARNER, *supra* note 16, at 445. The literary critic Edmund Wilson called Holmes’s style “perfect.” *Id.* In contrast, Judge Posner thought that Holmes’s rhetorical devices merely eclipsed the lack of rigorous legal reasoning. *Id.*

alism movement.<sup>46</sup> The Legal Realists rejected the formalist reliance on abstract principles, and instead acknowledged the impact of political, social, and economic pressures on judges' decisions.<sup>47</sup> Critics have cited the Legal Realist movement as one factor influencing the increasing length of legal opinions and the increasing number of separate opinions.<sup>48</sup>

Indeed, over the last century, opinions have become more lengthy, and separate opinions have become more prevalent.<sup>49</sup> In addition to the advent of Legal Realism, critics have attributed the shift toward lengthier opinions to the increase of cases about controversial issues and the fact that opinions are increasingly written by inexperienced law clerks who tend to overwrite.<sup>50</sup> Scholars attribute the growing prevalence of separate opinions to the appearance of increasingly complicated cases, an ideologically divided Court, the rise in constitutional cases, and the modern style, which requires judges to address and explain every possible issue.<sup>51</sup>

<sup>46</sup> POPKIN, *supra* note 13, at 116–17 (describing the shift to Legal Realism and summarizing the Legal Realist movement).

<sup>47</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10, 19–20 (1921) (noting that a judicial decision should be a combination of precedent, consistency, custom, social welfare, and common morality); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907) (rejecting "legal monks" who lived in an "atmosphere of pure law" in favor of examining how law relates to the real world); see also POPKIN, *supra* note 13, at 116–18 (summarizing legal realism).

<sup>48</sup> POPKIN, *supra* note 13, at 116 (noting that Legal Realism encouraged separate opinions because its emphasis on political, social, and economic influences accounted for the idea that judges could disagree about the law because it was not based on unchanging legal principle).

<sup>49</sup> See Chemerinsky, *supra* note 14, at 2021 ("My sense of opinions today is that they are much longer than they used to be, far more extensively footnoted, and generally less well-written than those from earlier times."); Lebovits et al., *supra* note 17, at 254 (noting that between 1960 and 1980 the average word count of opinions from federal courts of appeals increased from 2,863 to 4,020); Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1358 (1988) (noting that, in 1920, the average U.S. Supreme Court opinion was seven pages, and in 1989 it had grown to twenty pages); see also POPKIN, *supra* note 13, at 114 (noting there has been a considerable increase in separate opinions in the modern Court). Before 1940, only about 20% of Supreme Court cases resulted in separate opinions, but now about 60–80% of cases result in separate opinions. POPKIN, *supra* note 13, at 114.

<sup>50</sup> See GARNER, *supra* note 16, at 444 (noting commentators have attributed lengthening of opinions to the increase of "complex and ideologically heated issues"); Lebovits et al., *supra* note 17, at 255 (quoting one judge's criticism that law clerks tend to overwrite opinions). Many critics have noted the impact of law clerks on the style of judicial opinions, blaming the law clerks' indoctrination to so-called "law review style." See, e.g., GARNER, *supra* note 16, at 443 (noting that because clerks are often former law review editors, clerk-written opinions often contain the most negative traits of law review style, namely, they are "diffuse, loaded with footnotes, impersonal in tone, and unimaginative in presentation"); RICHARD A. POSNER, *LAW AND LITERATURE* 13 (1988) (noting that the literary style of opinions is dwindling because they are commonly written by law clerks who are generally not "capable of literary expression"); Lebovits et al., *supra* note 17, at 304–07 (noting that modern law clerks generally write the first draft of an opinion and discussing the ethical implications); Mikva, *supra* note 49, at 1366 (blaming the lengthening of opinions on law clerks among other factors).

<sup>51</sup> GARNER, *supra* note 16, at 433, 442, 444 (explaining possible reasons for an influx of concurrences and dissents and noting that modern judges value writing that explicitly demonstrates each step in its analysis).



In the second half of the twentieth century, a new rhetorical movement that prioritized “plain language” became popular.<sup>52</sup> The movement advocated for a departure from legalese, and instead promoted the idea that legal documents should be written in language that was accessible not only to a lawyer, but also to any ordinary person of average intelligence.<sup>53</sup> Legalese does not refer to terms of art such as “habeas corpus” or “indemnity” that have precise meanings that cannot be paraphrased.<sup>54</sup> Rather, legalese refers to unnecessary jargon such as “hereinbefore stated,” “instant case,” or “such claims” that has no precise referent, but rather serves only to make the document sound legal.<sup>55</sup> Although the Plain Language Movement applied to all types of legal writing, it focused predominately on documents that ordinary people would most often need to interpret, such as statutes, contracts, and jury instructions.<sup>56</sup>

### B. Academic Studies of Legal Opinions

The style of judicial opinions has increasingly become an area of academic study.<sup>57</sup> In 1995, the *University of Chicago Law Review* published a symposium issue entitled *Judicial Opinion Writing*.<sup>58</sup> In the introduction, legal scholar James Boyd White asked whether it matters how judicial opinions are written, and if so, why.<sup>59</sup> The symposium issue also contained Judge Richard Posner’s definitions of “pure” and “impure” style, which have since been adopted by other critics.<sup>60</sup> Posner defined style as that which cannot be paraphrased.<sup>61</sup> He noted that “pure” style is characterized by serious and polished rhetoric, as well as the use of technical legal terms without explaining them in layperson’s terms.<sup>62</sup> In contrast, the less common “impure” style is addressed to “a hypo-

---

<sup>52</sup> See generally MELLINKOFF, *supra* note 32 (arguing there is no reason for legal language to differ from ordinary language); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (5th ed. 2005) (noting the legal writing reforms of the late twentieth century and arguing for use of plain English).

<sup>53</sup> See, e.g., WYDICK, *supra* note 52, at 2–3 (noting issues that arise when jurors do not understand jury instructions, or parties to a contract do not understand the terms).

<sup>54</sup> GARNER, *supra* note 16, at 308.

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

<sup>56</sup> See, e.g., PETER M. TIERSMA, *LEGAL LANGUAGE* 211–40 (1999) (analyzing plain language in statutes, consumer documents, and jury instructions).

<sup>57</sup> See generally, e.g., ROBERT A. LEFLAR, *APPELLATE JUDICIAL OPINIONS* (1974) (collecting wisdom of great jurists on opinion writing); POPKIN, *supra* note 13 (discussing the evolution of judicial opinion style); Symposium, *Judicial Opinion Writing*, 62 U. CHI. L. REV. 1363 (1995) (discussing style of judicial opinions).

<sup>58</sup> Symposium, *supra* note 57.

<sup>59</sup> White, *supra* note 14, at 1363.

<sup>60</sup> Posner, *supra* note 13, at 1421–32. See generally, e.g., Lebovits et al., *supra* note 17, at 250–52 (discussing the ethical questions posed by Posner’s “pure” and “impure” style).

<sup>61</sup> Posner, *supra* note 13, at 1422 (defining “style”).

<sup>62</sup> *Id.* at 1429.

thetical audience of laypersons,” and replaces legal jargon with a candid, conversational tone.<sup>63</sup>

Critics have also noted the disparate audiences for judicial opinions.<sup>64</sup> Frequently cited audiences for Supreme Court opinions are lower courts, members of the bar, the litigants from the case, professional critics, and the public.<sup>65</sup> Many scholars have cited the democratic process as a justification for the need for written opinions: the need to explain the reasoning behind one’s decision making lends credibility to the power of an unelected judiciary.<sup>66</sup> Further, scholars have noted that the idea that an opinion should be readable by a layperson is uniquely American.<sup>67</sup> In years past, however, the idea of the public as an audience for opinions was largely hypothetical.<sup>68</sup> Before the age of the internet, it was relatively rare that a member of the public would come across the text of a judicial opinion.<sup>69</sup> Critics have noted, however, that the advent of the internet has increased the accessibility of written opinions, and

---

<sup>63</sup> *Id.* at 1430; see also GARNER, *supra* note 16, at 429 (noting that impure style has been called the “mystery-novel approach”).

<sup>64</sup> See, e.g., Lebovits et al., *supra* note 17, at 246–48 (discussing possible audiences).

<sup>65</sup> GARNER, *supra* note 16, at 428 (describing possible audiences); Chemerinsky, *supra* note 14, at 2022–23 (same); Lebovits et al., *supra* note 17, at 246 (same).

<sup>66</sup> See, e.g., POPKIN, *supra* note 13, at 83 (noting that written opinions give public accountability for judges’ decisions); Lebovits et al., *supra* note 17, at 244 (quoting George R. Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 200–01 (1967)) (“Above all else to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent.”).

<sup>67</sup> See, e.g., Lebovits et al., *supra* note 17, at 247 (contrasting U.S. judicial style of accountability to the public with the English belief that the judiciary is accountable primarily to the litigants); see also Mikva, *supra* note 49, at 1365 (“[T]he provisions for written opinions seem also to have reflected popular antagonism toward judges—the public’s desire to enforce intellectual honesty on the bench and to ensure that judges did their job.”) Erwin Chemerinsky describes prominent judges and professors who have based their theories of constitutional interpretation on the Court’s need to safeguard its legitimacy with the public. Chemerinsky, *supra* note 14, at 2028. Chemerinsky goes on to note, however, that this concern is largely baseless: the modern Court’s credibility has been consistently high, and even the controversy surrounding *Bush v. Gore* showed that the Court’s credibility is not fragile. *Id.* at 2029–30. Chemerinsky concludes that, though the public’s support of the Court is not fragile, the public is nonetheless an important audience and important rulings on controversial issues should be written such that the public will understand them. *Id.* at 2030. *But see* Schauer, *supra* note 18, at 1462–63 (arguing the opinions serve a function similar to written statutes or regulations, and need not be accessible to the public).

<sup>68</sup> Mikva, *supra* note 49, at 1365 (noting that until the late twentieth century, it was unlikely that members of the public ever read judicial opinions). Judge Posner notes that the primary “implied audience” of the “impure” style includes laypeople who can “see through” the artifice of judicial pretension.” Posner, *supra* note 13, at 1431. Judge Posner goes on to describe Justice Holmes’s stance that he wrote for the “one in a thousand.” *Id.* Garner describes the tendency to write to an “ordinary reader”—that is a person of average intelligence—“as a useful fiction.” GARNER, *supra* note 16, at 428.

<sup>69</sup> Schauer, *supra* note 18, at 1463–64 (noting that, at the time, the only daily American newspaper that printed excerpts from judicial opinions was the *New York Times*).

thus has perhaps increased numbers of laypeople who read opinions, or at least excerpts from them.<sup>70</sup>

In recent years, scholars have begun to study public understandings of judicial opinions—not just in theory, but in practice—and have asked whether written court decisions affect public opinion.<sup>71</sup> In 2011, two researchers conducted a study specifically about how the style of a decision affected public opinion of the issue.<sup>72</sup> In that study, non-lawyers were presented with judicial opinions containing different modes of argument, and were asked to assess the legitimacy of the opinion.<sup>73</sup> The study found that participants tended to give high scores to opinions where they agreed with the outcome, and low scores to those with which they disagreed.<sup>74</sup> In other words, they found that the opinion's style and mode of reasoning did not have a strong impact on the public's agreement or disagreement with the decision.<sup>75</sup>

Another popular method of analysis of judicial style in recent years has been quantitative analysis.<sup>76</sup> In the field of literary analysis, scholars have long used computer programming to analyze the prevalence of certain words or phrases in novels.<sup>77</sup> In recent years, the legal community has sought to apply this method to judicial texts, using coding to identify certain linguistic devices.<sup>78</sup> The methodology has even appeared in popular media: in 2014, *Slate* published an article that used a quantitative analysis to compare the vocabulary of various Supreme Court justices to that of famous rappers.<sup>79</sup>

<sup>70</sup> See, e.g., Chemerinsky, *supra* note 14, at 2030 (speculating that the internet will increase the number of people who actually read Supreme Court opinions); see also Lebovits et al., *supra* note 17, at 246–47 (noting that keeping the public in mind as an audience is especially important now that opinions are widely accessible via the internet).

<sup>71</sup> See, e.g., VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003) (studying media reporting and public opinion about four Supreme Court cases in the region where each controversy took place); Nicholas Scurich, *Styles of Argumentation in Judicial Opinions (Legitimizing Judicial Decisions)*, 14 ANN. REV. L. & SOC. SCI. 205, 205 (2018) (“The study of public reactions to judicial opinions is important and in its infancy.”).

<sup>72</sup> See generally Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL L. STUD. 709 (2011).

<sup>73</sup> Simon & Scurich, *supra* note 72, at 712–13. The study did not examine writing styles specifically, but rather modes of reasoning: it compared opinions that avowed unequivocal endorsement for a certain side with ones that are honest about the difficulty and indeterminacy of the legal question. See *id.* at 710. Namely, it compared four disparate modes of reasoning: (1) no reasoning supporting the decision; (2) a single reason supporting the decision; (3) multiple reasons supporting the decision; and (4) multiple reasons that supported both sides of the issue. *Id.* at 712.

<sup>74</sup> *Id.* at 709.

<sup>75</sup> *Id.*

<sup>76</sup> See Keith Carlson et al., *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461, 1472–73 (2016) (summarizing scholarship in the area).

<sup>77</sup> *Id.* at 1471 n.59 (giving an overview of the history of quantitative literary analysis).

<sup>78</sup> *Id.* at 1472–73.

<sup>79</sup> See Adam Chilton et al., *Rappers v. SCOTUS: Who Uses a Bigger Vocabulary, Jay Z or Scalia?*, SLATE (June 12, 2014), <https://slate.com/news-and-politics/2014/06/supreme-court-and-rappers->

With the increased scrutiny on writing style has come strong opinions about the styles of contemporary Supreme Court justices.<sup>80</sup> Justices John Roberts, Antonin Scalia, Ruth Bader Ginsburg, and Stephen Breyer are commonly considered the most effective writers.<sup>81</sup> Justice Scalia is known for his clear language and biting wit.<sup>82</sup> Recently, Justice Gorsuch has made waves by using contractions in majority opinions.<sup>83</sup> Though Justice Anthony Kennedy’s writing style is the topic of frequent debate, he is generally not considered a great—or even a good—writer.<sup>84</sup>

### C. Justice Anthony Kennedy’s Writing Style

Justice Kennedy is known not only for his place as the swing vote, but also for a grandiose writing style that is sometimes sparse in traditional legal analysis.<sup>85</sup> His rhetoric is often criticized—and quite harshly.<sup>86</sup> The word “phi-

---

who-uses-a-bigger-vocabulary-jay-z-or-scalia.html [https://perma.cc/MCR7-SQ5L] (finding, among other things, that Justice Scalia had a more complex vocabulary than Shakespeare).

<sup>80</sup> See, e.g., Adam Liptak, #GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html [https://perma.cc/4YJ3-5LKK] (noting that the Twitter hashtag #GorsuchStyle is used to mock Justice Gorsuch’s proclivity to make grand pronouncements).

<sup>81</sup> GARNER, *supra* note 16, at 434.

<sup>82</sup> Ann Gerhart & Philip Rucker, *Kagan Has Many Achievements, but Her World Has Been Relatively Narrow*, WASH. POST (June 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060906240.html [https://perma.cc/9YVT-MGQN]. Justice Kagan once called Justice Scalia “the most colorful, most intellectually playful, the most provocative member of the [C]ourt, and he is indubitably its greatest writer.” *Id.*

<sup>83</sup> Liptak, *supra* note 80. Bryan Garner, in his first book with Justice Scalia, has also advocated for the use of contractions in legal writing: “You might well have heard that contractions don’t belong in legal writing. The view seems to be that they aren’t professional. But that’s just a shibboleth. In fact, the decision whether to use a contraction often boils down to this: do I want to sound natural, or do I want to sound stuffy?” ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 115 (2008).

<sup>84</sup> See, e.g., Ed Whelan, *Justice Kennedy and Ernest Hemingway*, NAT’L REV. (Oct. 9, 2014), https://www.nationalreview.com/bench-memos/justice-kennedy-and-ernest-hemingway-ed-whelan [https://perma.cc/V58H-TDSW] (“Anthony Kennedy is a painfully bad writer. I’d think that’s a proposition that would earn a consensus across the ideological spectrum.”).

<sup>85</sup> See HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* 4, 181 (2009) (noting that Justice Kennedy was known as the swing vote and that he was known for “elitist” and “pompous” writing); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 66 (2007) (“Kennedy had a weakness for high-flown, sometimes rather meaningless rhetoric . . .”).

<sup>86</sup> See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017) (Alito, J., dissenting) (refusing to join the majority opinion because of Justice Kennedy’s “undisciplined dicta”); *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia, J., dissenting) (“The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”); Jeffrey Rosen, *Strong Opinions*, NEW REPUBLIC (July 28, 2011), https://newrepublic.com/article/92773/elena-kagan-writings [https://perma.cc/9TKA-YSN9] (“[Justice Kennedy is] arguably, the most painful writer. His prose alternates between bureaucratic and grandiose, resulting in sentences that manage to be pompous and clueless at the same time.”); see also Michael

losopher king” is thrown around pejoratively.<sup>87</sup> His flowery language has sometimes been tied to a concern with audience and his explicit goal of using his opinions to “teach” the Constitution to the public.<sup>88</sup> Justice Kennedy has also spoken publicly about his pet peeves in writing, and among those who care about this kind of thing, he is known for a hatred of adverbs.<sup>89</sup> His signature writing style is most evident in his fundamental rights opinions.<sup>90</sup> This Section will outline the existing analysis and criticism of Justice Kennedy’s writing style in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Obergefell v. Hodges*.<sup>91</sup>

A frequently cited example of Justice Kennedy’s grandiose language is the opinion in *Casey*.<sup>92</sup> *Casey*, decided in 1992, reaffirmed the central holding of *Roe v. Wade* that women have a fundamental right to seek an abortion.<sup>93</sup> Though the majority opinion was jointly authored by Justices O’Connor, Kennedy, and Souter, critics have attributed both the first line and the “mystery of human life” passage to Justice Kennedy.<sup>94</sup> The opinion begins: “Liberty finds

---

C. Dorf, *Jeffrey Rosen on Justice Kennedy*, DORF ON LAW (June 16, 2007, 8:45 AM), <http://www.dorfonlaw.org/2007/06/jeffrey-rosen-on-justice-kennedy.html> [<https://perma.cc/5ZBF-NPUB>] (noting that Rosen’s criticism is “so over the top that one wonders whether Rosen believes that Kennedy personally harmed Rosen in some way”).

<sup>87</sup> *Justice Kennedy’s Writing Style* at 00:09:09, C-SPAN (Oct. 10, 2018), <https://www.c-span.org/video/?452172-3/justice-kennedys-writing-style> [<https://perma.cc/LD7E-PW57>].

<sup>88</sup> See *infra* notes 117–121 (discussing Justice Kennedy’s concern with audience).

<sup>89</sup> See *Justice Anthony M. Kennedy*, 13 SCRIBES J. LEGAL WRITING 79, 92–93 (2010) (stating that Justice Kennedy thinks adverbs are a “cop-out”); see, e.g., Jacob Gershman, *Why Adverbs, Maligned by Many, Flourish in the American Legal System*, WALL ST. J. (Oct. 8, 2014), <https://www.wsj.com/articles/why-adverbs-maligned-by-many-flourish-in-the-american-legal-system-1412735402> [<https://perma.cc/YQ6R-SHGB>] (noting Justice Kennedy’s dislike of adverbs); Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES (May 20, 2011), <https://nytimes.com/2011/05/21/us/politics/21court.html> [<https://perma.cc/G6WL-WSV4>] (same); Whelan, *supra* note 84 (noting that Justice Kennedy instructs his clerks to avoid using adverbs).

<sup>90</sup> See, e.g., TOOBIN, *supra* note 85, at 56 (noting Justice Kennedy’s writing style was “at his airy best (or worst) in *Casey*”); see also, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (affirming that abortion is a fundamental right).

<sup>91</sup> See *infra* notes 92–149 and accompanying text.

<sup>92</sup> 505 U.S. at 833; KNOWLES, *supra* note 85, at 182 (noting that Part II of *Casey* consisted of the type of “grand phrases and philosophical musings . . . that drive[] conservatives bananas”).

<sup>93</sup> *Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113, 113 (1973).

<sup>94</sup> *Casey*, 505 U.S. at 833; see KNOWLES, *supra* note 85, at 181 (Justice Kennedy authored the first sentence of the joint opinion in *Casey*); Trent L. Pepper, *The “Mystery of Life” in the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence*, 51 HOW. L.J. 335, 338 n.21 (2008) (noting Justice Kennedy supposedly wrote the mystery passage). Before analyzing the writing style of Justice Kennedy’s opinions, it is also worth noting the role of law clerks in crafting Supreme Court opinions. See *supra* note 50 (citing sources that discuss the impact of law clerks on judicial style). Critics have pointed out, however, that despite the substantial latitude he gives to his law clerks, Justice Kennedy’s signature writing style is a product of him, not his clerks. See KNOWLES, *supra* note 85, at 14–15 (comparing the writing style of Justice Kennedy’s opinions to that of his speeches and noting that Justice Kennedy is known to give freedom to his clerks when drafting). Further, James Boyd White posited that the *Casey* opinion was written predominately by the

no refuge in a jurisprudence of doubt."<sup>95</sup> Critics have tried to dissect what exactly this line is supposed to mean.<sup>96</sup> Justice Scalia shared this skepticism, and mocked the phrase in his dissent, stating, "[r]eason finds no refuge in this jurisprudence of confusion."<sup>97</sup>

An even more paradigmatic example of Justice Kennedy's rhetorical style from *Casey* is the "mystery passage."<sup>98</sup> It reads:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>99</sup>

The passage was later cited in *Washington v. Glucksberg*<sup>100</sup> and *Lawrence v. Texas*,<sup>101</sup> as well as in various lower court cases.<sup>102</sup> *Lawrence*, decided in 2003 and authored by Justice Kennedy, held that a Texas statute criminalizing sodomy was unconstitutional.<sup>103</sup> In his biting dissent in *Lawrence*, Justice Scalia called the mystery passage the "famed sweet-mystery-of-life passage" and contended that it "casts some doubt upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all."<sup>104</sup> Critics, too, had a field day with the passage, calling it, for example, "a bad freshman philosophy paper"<sup>105</sup> and an "embarrassing muddle."<sup>106</sup>

Not only did members of the legal community criticize the passage's flowery rhetoric, but they also attempted to figure out what the passage actual-

justices themselves, and not by their clerks. JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 168 n.19 (1994) (arguing *Casey* was likely written by the justices themselves due to the importance of the issue, the difficulty of the negotiations, and the fact that it is written in easily distinguishable voices).

<sup>95</sup> *Casey*, 505 U.S. at 844.

<sup>96</sup> See, e.g., Kolber, *supra* note 15, at 164–65 (wondering what exactly the "jurisprudence of doubt" refers to, and arguing both that it would have been more clear to note that the jurisprudence surrounding reproductive rights was *in* doubt and further, that actually liberty *does* find some refuge in the jurisprudence of doubt).

<sup>97</sup> *Casey*, 505 U.S. at 984, 993 (Scalia, J., dissenting).

<sup>98</sup> *Justice Kennedy's Writing Style*, *supra* note 87, at 00:00:56 (noting the "mystery of human life" passage is Justice Kennedy's most famous, or infamous, passage).

<sup>99</sup> *Casey*, 505 U.S. at 851.

<sup>100</sup> 521 U.S. 702, 726–27 (1997).

<sup>101</sup> 539 U.S. 558, 574 (2003).

<sup>102</sup> See Pepper, *supra* note 94, at 343 nn.44–46 (citing lower court cases that quote the mystery passage).

<sup>103</sup> 539 U.S. at 558.

<sup>104</sup> *Id.* at 588 (Scalia, J., dissenting) (internal quotation marks omitted).

<sup>105</sup> John H. Garvey, *Control Freaks*, 47 *DRAKE L. REV.* 1, 3 (1998).

<sup>106</sup> Richard D. Mohr, *The Shag-a-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 *CARDOZO WOMEN'S L.J.* 365, 379 (2004); see also Pepper, *supra* note 94, at 335 (quoting Mohr, *supra*, at 379).

ly meant.<sup>107</sup> For example, the plain words of the passage seem to state that what is at stake is the right to define a concept, not the right to actually do anything based on that concept.<sup>108</sup> But, as Justice Scalia noted in his dissent in *Lawrence*, a case that protected only people's right to define concepts would be relatively meaningless, while a case that protected any actions based on a self-defined concept would be incomprehensibly broad.<sup>109</sup>

Despite the seemingly singular ire the "mystery passage" has inspired, Justice Kennedy's baroque style may not be so unusual among Supreme Court opinions.<sup>110</sup> One scholar compared the mystery passage to Justice Brandeis's dissent in *Olmstead v. United States* where he also sought to explain just what the word "liberty" signified.<sup>111</sup> Others have compared Kennedy's writing style to that of Justice David Souter and Judge Posner.<sup>112</sup>

Indeed, the mystery passage exemplifies not only Justice Kennedy's magniloquent language, but also a judicial philosophy that some argue under-relies on traditional legal doctrine.<sup>113</sup> Professor Michael Dorf, a former Kennedy clerk, posited that Justice Kennedy's opinions are characterized both by

<sup>107</sup> Kolber, *supra* note 15, at 142–43 (analyzing the mystery passage and calling it an example of "judicial bullshit").

<sup>108</sup> *Casey*, 505 U.S. at 851; see Kolber, *supra* note 15, at 143 ("If *Casey* were merely about rights to define concepts, it would be of greater interest to metaphysicians than actual physicians.").

<sup>109</sup> See 539 U.S. at 588 (Scalia, J., dissenting) ("I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate actions based on one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law.").

<sup>110</sup> See, e.g., Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 119 (comparing the mystery passage to a passage by Brandeis).

<sup>111</sup> See *id.* (noting that the lineage of the mystery passage is rarely recognized and comparing the passage to Brandeis's dissent in *Olmstead v. United States*). In *Olmstead*, Justice Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting) (quoting Brandeis's dissent in *Olmstead* and calling it "[p]erhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution"); WHITE, *supra* note 94, at 172 (comparing the mystery passage to Harlan's opinion in *Poe* in which Harlan refused to reduce due process to a code).

<sup>112</sup> See *Justice Kennedy's Writing Style*, *supra* note 87, at 00:32:50–00:34:10, 01:00:15–01:00:45 (positing that Justice Kennedy hid behind doctrine in a way similar to Judge Posner and wondering why Justice Souter never received as much criticism for using baroque language as Justice Kennedy did); see also PETROSKI, *supra* note 6, at 2 (arguing that *Obergefell's* rhetoric was not unique among judicial style).

<sup>113</sup> See, e.g., FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE, at ix (2009) (noting scholars frequently criticize Justice Kennedy's opinions for being under-theorized); KNOWLES, *supra* note 85, at 2 (noting that Justice Kennedy's opinions are considered deficient in their use of judicial tests frequently used by the Court).

their grandiose rhetoric and their deviation from standard doctrine.<sup>114</sup> Others have criticized Justice Kennedy for deciding more from his gut or his heart than from a rigorous application of precedent.<sup>115</sup> Not everyone, though, agrees with this criticism, and some critics have argued that, despite his reputation for being unpredictable, Justice Kennedy's opinions showcase a consistent and coherent judicial philosophy based on liberty, dignity, and the limits of government power.<sup>116</sup>

In addition to his soaring language and departure from traditional legal doctrine, another signature trait of Justice Kennedy's opinions—at least in cases of public importance—is a concern with audience.<sup>117</sup> In his interview with legal writing expert and plain language advocate Bryan Garner, Justice Kennedy gave a hint of how he thinks about the audience of his opinions:

[G]ood writing—great writing—is one which captures the imagination and allows you, the reader, to become part of the text. Now, I think it would be presumptuous and arrogant to say that this is what we can do or should do with judicial opinions . . . . And if it's a case of public importance, you have a different and much more difficult objective. You must command allegiance to your opinion. You must command allegiance to the judgment of the Court. This is the common-law tradition. It is quite different in this respect than the Continental tradition. If you read a judgment of a European court in the civil-law tradition in a civil-law jurisdiction, it would strike you as being rather uninteresting. It is digested. It is almost like a headnote in West Digest, whereas if you look at an opinion of the Supreme Court, say in a case of public importance, it has a rhetorical, almost an emotive quality about it designed to instill this allegiance of which I speak.<sup>118</sup>

Not only has Justice Kennedy stated that in cases of public importance he believes emotional rhetoric can be important in eliciting public allegiance to a

<sup>114</sup> Michael C. Dorf, *Justice Kennedy's Writing Style and First Amendment Jurisprudence*, DORF ON LAW (Oct. 5, 2018, 10:36 AM), <http://www.dorfonlaw.org/2018/10/justice-kennedy-and-first-amendment-and.html> [https://perma.cc/Q6AF-N4SX].

<sup>115</sup> See, e.g., Jeffrey Rosen, *Supreme Leader: On the Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 16, 2007), <https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy> [https://perma.cc/BG7C-XMFX] (criticizing Justice Kennedy's opinions for being based more on his instincts about fairness than on strict legal analysis).

<sup>116</sup> See, e.g., COLUCCI, *supra* note 113, at 7 (challenging the popular view of Justice Kennedy as inconsistent, and arguing that his opinions display a coherent approach to constitutional interpretation based on liberty, dignity, and limited government power); KNOWLES, *supra* note 85, at 2 (challenging the conclusion that Justice Kennedy's opinions do not demonstrate well-defined legal doctrine).

<sup>117</sup> See *Justice Anthony M. Kennedy*, *supra* note 89, at 80, 84–85 (describing how Justice Kennedy thinks about audience).

<sup>118</sup> *Id.*



court's decision, but he has also spoken about the justices' duty to "teach" the Constitution to the public.<sup>119</sup> Critics, too, have recognized Justice Kennedy's concern with an audience that includes not only the parties and members of the bar, but members of the public as well.<sup>120</sup> Professor Dorf noted Justice Kennedy's goal of communicating with those outside of the legal community, but wondered whether his ornate language actually achieved this effect, or whether plain language would have better communicated to the public.<sup>121</sup>

Critics have noted that each of Justice Kennedy's signature rhetorical quirks is apparent in his 2015 opinion in *Obergefell*: its doctrinal analysis is thin at best, it uses grand language, and it seems to be written with a greater public audience in mind.<sup>122</sup> Many critics—even those who agreed with *Obergefell*'s result—have criticized the opinion's doctrinal analysis, or lack thereof.<sup>123</sup> *Obergefell*'s holding is based on both due process and equal protection grounds.<sup>124</sup> Critics worry that the due process analysis is incoherent in its application of the test from *Glucksberg*, which identifies fundamental rights as based on their history and tradition.<sup>125</sup> Critics argue the equal protection analysis is similarly obscure, and criticize the opinion for not stating explicitly that sexual orientation is a suspect class subject to a higher level of scrutiny, and indeed, for not stating what level of scrutiny it applies at all.<sup>126</sup> Other academ-

---

<sup>119</sup> Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 (2008) (quoting Justice Kennedy); *Justice Anthony M. Kennedy*, *supra* note 89, at 80, 84–85. In 2008, Justice Kennedy responded to a student's question by saying: "The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach." Guinier, *supra*, at 7; *see also* Jane S. Schacter, *Obergefell's Audiences*, 77 OHIO ST. L.J. 1011, 1022 (2016) (citing Guinier, *supra*, at 7).

<sup>120</sup> *Justice Kennedy's Writing Style*, *supra* note 87, at 00:05:17 (noting that in cases of public importance, Justice Kennedy was writing to "the people," meaning readers of the *New York Times*).

<sup>121</sup> *See* Dorf, *supra* note 114 (noting Justice Kennedy's inclination towards highbrow rhetoric, and wondering whether he would have better connected with the public by valuing plain language).

<sup>122</sup> 135 S. Ct. at 2585. In *Obergefell*, the Supreme Court held that same-sex couples have the fundamental right to marry. *Id.* The decision came after intense political debate over marriage equality. *See* Schacter, *supra* note 119, at 1013–15 (summarizing the political context of *Obergefell*). In 2003, the Massachusetts Supreme Judicial Court had become the first state to hold there was a state constitutional right to same-sex marriage. *Id.* at 1013; *see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 941 (Mass. 2003). Interestingly, the Supreme Judicial Court's decision in *Goodridge* cited *Casey* in its definition of individual liberty. *See* Goodridge, 798 N.E.2d at 959 (citing *Casey*).

<sup>123</sup> Professor Laurence Tribe noted that in certain circles, it has been in vogue to speak of the *Obergefell* opinion with a "knowing condescension." Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015), [https://harvardlawreview.org/wp-content/uploads/2015/11/vol129\\_Tribe.pdf](https://harvardlawreview.org/wp-content/uploads/2015/11/vol129_Tribe.pdf) [<https://perma.cc/6TSL-CP2E>]; *see also* Somin, *supra* note 12 (agreeing with *Obergefell*'s result but worrying that it was based on questionable reasoning).

<sup>124</sup> 135 S. Ct. at 2602–03.

<sup>125</sup> *See, e.g.*, Somin, *supra* note 12 (noting the confusion of Justice Kennedy's due process analysis); *see also* *Glucksberg*, 521 U.S. at 720–21 (describing substantive due process framework).

<sup>126</sup> *See, e.g.*, Somin, *supra* note 12 (noting the confusion of Justice Kennedy's equal protection analysis). Laws that discriminate based on race or national origin are generally subject to strict scruti-

ics, though, have disagreed, arguing that *Obergefell* does important doctrinal work by exhibiting a new approach to fundamental rights cases.<sup>127</sup>

Critics have waged similar criticisms at *Obergefell* as they did at the "mystery passage" in *Casey*.<sup>128</sup> Justice Scalia famously analogized the majority opinion in *Obergefell* to "the mystical aphorisms of the fortune cookie," and wrote that the majority opinion was "couched in a style that is as pretentious as its content is egotistic."<sup>129</sup> Even the less scathing Chief Justice John Roberts accused the majority opinion of hiding behind a "shiny rhetorical gloss."<sup>130</sup>

In contrast to the legal community, though, much of the public was enamored with *Obergefell*'s style.<sup>131</sup> Journalists called it "one of the most beautiful passages you'll likely read in a court case"<sup>132</sup> and "one of the most beautiful things we've ever read."<sup>133</sup> Much of the focus was on the final paragraph, which read:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply

---

ny. See CHEMERINSKY, *supra* note 15, at 727. Those laws will only be upheld if the government can show that they are "necessary to achieve a compelling purpose." *Id.* Laws that discriminate based on gender are generally subject to intermediate scrutiny, meaning they will be upheld if they are "substantially related to an important government purpose." *Id.* Other forms of discrimination will be subject to rational basis review. *Id.* at 728. Those laws will be upheld if they are "rationally related to a legitimate government purpose." *Id.*

<sup>127</sup> See, e.g., Tribe, *supra* note 123, at 17 (arguing *Obergefell*'s combination of Due Process and Equal Protection into a doctrine of "equal dignity" is an achievement); Kenji Yoshino, *The Supreme Court, 2014 Term—Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 169 (2015) (arguing that *Obergefell* offers a new approach to fundamental rights, replacing the *Glucksberg* due process analysis with a framework based on Justice Harlan's dissent in *Poe*).

<sup>128</sup> See, e.g., Schacter, *supra* note 119, at 1017 (noting that *Obergefell* contains grandiose language).

<sup>129</sup> *Obergefell*, 135 S. Ct. at 2630, 2630 n.22 (Scalia, J., dissenting) ("The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."). Justice Scalia went on to ridicule how incoherent the opinion's "showy profundities" were. *Id.* at 2630. In response to a line in the majority opinion stating "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality," Justice Scalia wrote, "Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie." *Id.*

<sup>130</sup> *Id.* at 2616 (Roberts, C.J., dissenting).

<sup>131</sup> See *infra* notes 133–136 and accompanying text.

<sup>132</sup> Weissmann, *supra* note 7.

<sup>133</sup> Yarrow, *supra* note 9.

that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.<sup>134</sup>

The final paragraph of Justice Kennedy's majority opinion described marriage in grandiose terms as the "highest ideal[] of love," that had the power to turn two people into "something greater than once they were."<sup>135</sup> The public shared the passage on Facebook and read it at marriage ceremonies.<sup>136</sup>

Despite the reverence with which the liberal media and much of the public regarded *Obergefell*'s style, there was one aspect of the opinion they could not quite get behind: are non-married people, of whatever sexual orientation, really "condemned to live in loneliness?"<sup>137</sup> Not only did the otherwise perfect last paragraph imply that the unmarried are necessarily lonely, but the middle of the opinion contained the following line: "Marriage responds to the universal fear that a lonely person might call out only to find no one there."<sup>138</sup> Critics bristled: yes, they wanted same-sex couples afforded the right to marry, but they did not want single people taken down in the process.<sup>139</sup>

Finally, scholars have analyzed *Obergefell*'s relationship to its audience.<sup>140</sup> Unlike in years past when Supreme Court opinions were largely inaccessible to members of the public, *Obergefell* was released in the age of social media, and within hours, passages of the opinion were liked, shared, tweeted,

<sup>134</sup> *Obergefell*, 135 S. Ct. at 2608.

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

<sup>136</sup> Schachar, *supra* note 3 (noting *Obergefell*'s use in wedding ceremonies); see Corasaniti, *supra* note 6 (noting *Obergefell*'s likes and shares on social media). *Obergefell* was not the first court case to find its way into marriage ceremonies. See Sasha Issenberg, *With These Words*, N.Y. MAG. (July 27, 2012), <http://nymag.com/news/intelligencer/goodridge-same-sex-marriage-2012-8> [<https://perma.cc/4JRZ-U49N>]. After the Massachusetts Supreme Judicial Court held in 2003 that there was a state constitutional right to same-sex marriage, many couples, both straight and gay, began reading passages from *Goodridge* at their wedding ceremonies. *Id.* Passages from *Loving v. Virginia*, the case declaring that bans on interracial marriage were unconstitutional, have also been a favorite for wedding ceremonies. See, e.g., Catherine Clark, *Stirring Quotes from Loving v. Virginia to Include in Your Ceremony*, OFFBEAT BRIDE (Mar. 6, 2017), <https://offbeatbride.com/quotes-from-loving-v-virginia/> [<https://perma.cc/26C2-ZBMR>] (suggesting passages from *Loving* for a wedding ceremony).

<sup>137</sup> See *Obergefell*, 135 S. Ct. at 2608; see also *supra* notes 7–9 (citing examples of journalists' love for *Obergefell*).

<sup>138</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>139</sup> See, e.g., Lisa Bonos, *Hey, Justice Kennedy: You Don't Need to Shame Singles to Uphold Marriage*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/news/soloish/wp/2015/06/26/hey-justice-kennedy-you-dont-need-to-shame-singles-to-uphold-marriage/?utm\\_term=.400685768e10](https://www.washingtonpost.com/news/soloish/wp/2015/06/26/hey-justice-kennedy-you-dont-need-to-shame-singles-to-uphold-marriage/?utm_term=.400685768e10) [<https://perma.cc/5DDX-VX4L>] (arguing *Obergefell* engages in single-shaming). See generally Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017) (arguing legal scholarship has largely ignored the way nonmarital relationships are regulated).

<sup>140</sup> See, e.g., Schacter, *supra* note 119, at 1012 (analyzing *Obergefell*'s relationship to both the legal community and the public at large).

and instagrammed by some ten million people.<sup>141</sup> The idea that a layperson would read a Supreme Court opinion was no longer largely hypothetical; it was a reality.<sup>142</sup> Critics have analyzed how the justices’ awareness of a public audience might have affected the way they crafted the majority and dissenting opinions.<sup>143</sup> One critic noted that Justice Kennedy’s emphasis on style over substance was likely an attempt to speak to the non-legal public.<sup>144</sup> The critic also noted how some passages of the majority opinion seem to be addressed to readers who would not have been as pleased with the outcome, for example, the line: “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable . . . premises.”<sup>145</sup> Not only did Justice Kennedy use grandiose language to energize and inspire those who would have agreed with the result, but he also seemed to address portions of the decision to those who did not agree, assuring them their beliefs were nonetheless based on a “decent and honorable” foundation.<sup>146</sup>

The majority opinion was not alone, however, in apparently addressing the general public.<sup>147</sup> Chief Justice Roberts’ dissenting opinion contained a passage that critics have noted is explicitly addressed to a portion of the public:

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a

---

<sup>141</sup> See *id.* at 1029 (noting that in the first hour after the opinion was released, 3.8 million people used Facebook to communicate about it, and between 9:30 am and 5:30 pm that day, there were over ten million Tweets about it); Schauer, *supra* note 18, at 1463–64 (noting that before the internet, the only daily newspaper that ever published Supreme Court opinions was the *New York Times*).

<sup>142</sup> See Schacter, *supra* note 119, at 1024 (noting the internet’s role and the public interest towards the *Obergefell* opinion).

<sup>143</sup> See generally *id.* (providing a comprehensive study on the effect of audience on *Obergefell*’s style); see also PETROSKI, *supra* note 6, at 2 (noting that *Obergefell* was one of the unusual instances in which the rhetorical style of an opinion mattered to a wider public audience, and arguing that this audience affected how the justices crafted their opinions).

<sup>144</sup> Schacter, *supra* note 119, at 1022.

<sup>145</sup> *Obergefell*, 135 S. Ct. at 2602; Schacter, *supra* note 119, at 1022–23. Schacter also posits that Justice Kennedy’s purpose in addressing a public audience was similar to Chief Justice Earl Warren and Justice Felix Frankfurter’s decision in *Brown v. Board of Education*, where they intended to address the general public. Schacter, *supra* note 119, at 1022–23; see also JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 58 (1992) (noting that Chief Justice Warren wrote a memo to fellow members of the Court urging that the desegregation opinions be “short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory”).

<sup>146</sup> *Obergefell*, 135 S. Ct. at 2602; Schacter, *supra* note 119, at 1022–23.

<sup>147</sup> Schacter, *supra* note 119, at 1022.

partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.<sup>148</sup>

The Chief Justice's dissent explicitly addressed the celebrating public—the thousands of people getting married, dancing in the streets, putting a rainbow filter on their Facebook photo—and rebuked them.<sup>149</sup>

## II. THE LAW AND LITERATURE MOVEMENT

The Law and Literature movement, which was born in the early 1970s and popular through the late twentieth century, provides one frame of reference for the analysis of judicial opinions.<sup>150</sup> The movement advocated for the application of the tools of literary theory and criticism to legal texts, and argued that studying literature was useful for understanding the ethical dimension of law.<sup>151</sup>

The genesis of the Law and Literature movement is commonly traced to the 1973 publication of *The Legal Imagination* by James Boyd White.<sup>152</sup> White advocated for the inclusion of the “great books” of literature in the law curriculum, and argued that the tools of literary theory and criticism had something to bear on the study and interpretation of legal texts.<sup>153</sup> *The Legal Imagination* is structured as a textbook for law students, interweaves legal texts with poetry and fiction, and gives students written assignments to complete.<sup>154</sup>

Critics have posited that the beginning of the movement was catalyzed by the Law and Economics movement, the influence of late twentieth century literary theory, and the transfer of graduate students in the humanities to law school.<sup>155</sup> The Law and Literature movement arose in part in reaction to the then-popular Law and Economics movement, which sought to apply economic

<sup>148</sup> *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting); see, e.g., Schacter, *supra* note 119, at 1022–23 (noting Chief Justice Roberts is explicitly addressing the public with this passage).

<sup>149</sup> *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting); see Alex Dickinson, *Here's How America Celebrated the Supreme Court Gay Marriage Decision*, BLOOMBERG (June 26, 2015), <https://www.bloomberg.com/news/photo-essays/2015-06-26/here-s-how-america-celebrated-the-supreme-court-gay-marriage-decision> [<https://perma.cc/K8PX-DQKY>] (showing celebration after *Obergefell* was released).

<sup>150</sup> GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 149 (1995) (noting that the Law and Literature movement began in 1973 with the publication of *The Legal Imagination* by James Boyd White).

<sup>151</sup> *Id.*

<sup>152</sup> See *id.*; JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

<sup>153</sup> See MINDA, *supra* note 150, at 149–50 (describing “great books” approach); WHITE, *supra* note 152, at xxxi–xxxv.

<sup>154</sup> WHITE, *supra* note 152, at xxxi–xxxv.

<sup>155</sup> See Peter Brooks, *Literature as Law's Other*, 22 *YALE J.L. & HUMAN.* 349, 349–50 (2010) (noting the influence of the law and economics movement, literary theory, and humanities graduate students).

concepts such as efficiency and maximization to the study of law.<sup>156</sup> In response to an understanding of the world that worshipped efficiency, proponents of Law and Literature argued the tools of literature might assist us in understanding something about what it means to be human, and argued that understanding was crucial to the study of law.<sup>157</sup> In addition, twentieth century literary theory, which deals with themes of language, meaning, and semiotics, led legal scholars to begin to analyze their application to legal texts.<sup>158</sup> Finally, around this time many graduate students in the humanities were faced with dismal job prospects and transferred to law school, and in doing so they brought the spirit of the humanities with them.<sup>159</sup>

The Law and Literature movement has often been subdivided into two separate categories: law *in* literature and law *as* literature.<sup>160</sup> The law *in* literature faction argued for the inclusion in the law school curriculum of literary classics that depicted legal proceedings, such as Kafka's *The Trial* or Melville's *Billy Budd, Sailor*.<sup>161</sup> These scholars argued that the study of such literature could teach students about ethical themes that would be important to the practice of law.<sup>162</sup>

In contrast, the law *as* literature perspective advocated for using the methods of literary criticism to interpret legal texts.<sup>163</sup> These scholars were less concerned with literature per se, but rather with the understanding of law as a creative art and legal texts as "aesthetic, ethical, and political."<sup>164</sup> James Boyd White, the author of *The Legal Imagination*, was one of the foremost proponents of the law *as* literature approach, and focused only secondarily on law *in*

<sup>156</sup> See Brooks, *supra* note 155, at 349 (noting that the Law and Literature movement was born in reaction to the law and economics movement). See generally, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (6th ed. 2012) (arguing that fundamental economic concepts such as maximization, equilibrium, and efficiency are essential to understanding and explaining the law).

<sup>157</sup> MINDA, *supra* note 150, at 152.

<sup>158</sup> See, e.g., IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 15 (1995) (noting that law journals began to publish articles about figures such as Derrida, Foucault, Heidegger, and Wittgenstein); Brooks, *supra* note 155, at 350 (calling late twentieth century literary theory an "export commodity").

<sup>159</sup> POSNER, *supra* note 50, at 12 (noting that in the 1970s many humanities graduate students without good job prospects went to law school); Brooks, *supra* note 155, at 349.

<sup>160</sup> MINDA, *supra* note 150, at 150; WARD, *supra* note 158, at 3. Other scholars, however, have rejected the subdivision into the dichotomy of "law *in* literature" versus "law *as* literature." See, e.g., Richard H. Weisberg, *Family Feud: A Response to Robert Weisberg on Law and Literature*, 1 *YALE J.L. & HUMAN.* 69, 76 (1988).

<sup>161</sup> See MINDA, *supra* note 150, at 150 (describing "great books" approach of law *in* literature"); Robert Weisberg, *The Law-Literature Enterprise*, 1 *YALE J.L. & HUMAN.* 1, 1 (1988) (describing "law *in* literature" as regarding legal themes or actors in fiction or drama).

<sup>162</sup> MINDA, *supra* note 150, at 150.

<sup>163</sup> WARD, *supra* note 158, at 3, 16.

<sup>164</sup> See, e.g., *id.* at 19 (noting White saw legal texts as "aesthetic, ethical, and political"); JAMES BOYD WHITE, *HERACLES' BOW*, at ix–xiv (1985) (analogizing law to drama, poetry, rhetoric, and narrative).

literature.<sup>165</sup> White applied literary theory to the study of law, and argued that reading legal texts is a “shared process” similar to the study of literature.<sup>166</sup>

White applied his theory to the analysis of judicial opinions, asking how we should judge the writing of legal opinions.<sup>167</sup> In *Justice as Translation*, White analyzes the writing style of several Supreme Court opinions that focused on the rights of the disempowered.<sup>168</sup> He looks at the way each opinion created community through analysis of the “Ideal Reader” it conjured.<sup>169</sup> The ideal reader is not whomever the actual readers of the opinion may be, but rather, the hypothetical reader the opinion invokes—and who the opinion will invite its actual readers to become.<sup>170</sup> White believed that through the implicit invocation of an ideal reader, legal texts—and especially judicial opinions—could create community.<sup>171</sup>

White exhibited his theory through close readings of Supreme Court opinions.<sup>172</sup> His reading of Chief Justice Marshall’s opinion in *McCulloch v. Maryland* demonstrates his notion that a judge must be in some sense a poet.<sup>173</sup> White notes that in *McCulloch*, Chief Justice Marshall is making a claim for the power of the judiciary by arguing that the Court can give the nation a body

<sup>165</sup> WARD, *supra* note 158, at 18 (noting that White was the most committed to the law as literature approach).

<sup>166</sup> *Id.*; WHITE, *supra* note 19, at 91 (“I will be making a claim for the character of law itself, as a way of reading, comparing, and criticizing authoritative texts, and, in so doing, as a way of constituting, through conversation, a community and a culture of a certain kind.”).

<sup>167</sup> WHITE, *supra* note 19, at xv (“My hope is to work out a way of talking about what we should admire and condemn in judicial opinions, which is also a way of asking more generally how we should criticize—how [we should] understand and judge—what judges do.”).

<sup>168</sup> *See id.* at 102–80 (analyzing various Fourth Amendment cases as well as cases dealing with the Fugitive Slave Act).

<sup>169</sup> *Id.* at 100 (“The kind of community a text creates can range from the relationship of two that is implied in the making of any text to a set of relationships that create a whole world.”).

<sup>170</sup> *Id.* (defining ideal reader as “the version of himself or herself that [the opinion] asks each of its readers to become”).

<sup>171</sup> *Id.* at 101 (“I am thus suggesting a way of reading a text as rhetorically constitutive: as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community, directly with its reader and indirectly with those others in the world about whom it speaks (or towards whom it invites its reader to take one attitude or another) . . . Is this an authoritarian text, one that demands simple and total obedience of its reader, or does it define the reader as a person with a mind, with a heart—as a free agent—who in reading the text is encouraged to activate these capacities in certain ways?”); James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 435 (1982) (“[W]e can ask what it means in a different way: how would the ideal reader contemplated by this document, indeed constituted by it, understand its bearing in the present circumstances?”).

<sup>172</sup> *See, e.g.*, WHITE, *supra* note 94, at 153–83 (reading *Planned Parenthood of Southeastern Pennsylvania v. Casey*); WHITE, *supra* note 19, at 141–214 (reading various Fourth Amendment cases); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 231–74 (1984) [hereinafter WHITE, WORDS] (reading *McCulloch v. Maryland*).

<sup>173</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *see* WHITE, WORDS, *supra* note 172, at 269 (“[T]he judge must intend to be something of a poet. He must speak as one who has something to learn.”).

of discourse that will unite its audience and create community.<sup>174</sup> Further, Chief Justice Marshall defines the very nature of a constitution not as a lengthy and technical legal code, but as something intelligible to the public: Chief Justice Marshall notes, famously, that “[W]e must never forget that it is a *constitution* we are expounding.”<sup>175</sup> White notes that one aspect of Justice Marshall’s “expounding” is his magisterial voice, in which his reasoning sounds more like decisive axioms.<sup>176</sup> Finally, White looks at Chief Justice Marshall’s reading of the word “necessary” in the Necessary and Proper Clause, and argues that the word should be understood not strictly—i.e. “absolutely necessary”—but instead figuratively or in accordance with its common usage.<sup>177</sup> White argues this shows that Chief Justice Marshall regards the Constitution and judicial opinions not as existing in a distinct sphere of life, but rather as a part of the culture in which they sit.<sup>178</sup> In that sense, then, White argued that judicial opinions can work to constitute a community.<sup>179</sup>

Another emphasis of the Law and Literature movement has been on literature’s ability to teach empathy, and that this empathy creates better lawyers.<sup>180</sup> For example, Professor Martha Nussbaum argued that one can engage in “poetic judging” by recounting the facts of a case in an empathetic way, because it gives the reader an opportunity to genuinely imagine what it would feel like to be in the plaintiff’s shoes.<sup>181</sup> Nussbaum argued that the incorporation of literature into the legal curriculum would teach students the empathy necessary to engage in this work.<sup>182</sup>

As popular as the Law and Literature movement was, it was not without its critics.<sup>183</sup> Judge Richard Posner famously critiqued the movement—specifically the law *in* literature contingent—arguing the legal and literary texts should be read in fundamentally different ways, and that conflating the two would add no value to our understanding of the law.<sup>184</sup> Judge Posner did, however, find some merit in the law *as* literature segment, and noted that a

<sup>174</sup> WHITE, WORDS, *supra* note 172, at 251.

<sup>175</sup> *McCulloch*, 17 U.S. at 407; WHITE, WORDS, *supra* note 172, at 255.

<sup>176</sup> WHITE, WORDS, *supra* note 172, at 256.

<sup>177</sup> *Id.* at 260.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 271.

<sup>180</sup> See, e.g., MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 99–121 (1995) (arguing that thinking of people’s lives with the specificity and empathy of a novelist is an important tool for judges).

<sup>181</sup> *Id.* (analyzing two opinions that are successful examples of poetic judging).

<sup>182</sup> *Id.* at 11–12.

<sup>183</sup> See *infra* notes 184–188 and accompanying text.

<sup>184</sup> POSNER, *supra* note 50, at 302 (“The literary should be a sphere apart.”); WARD, *supra* note 158, at 11–12 (describing Posner’s attack on law and literature theorists); Brooks, *supra* note 155, at 351 (describing Posner’s view that interpretation of legal texts should be attentive to context and the “explicit or implicit original intent of the Constitution, of statutes, and of prior decisionmaking,” whereas “literary criticism should be free to construe texts in a ‘New Critical’ manner”).



more valuable direction for the Law and Literature movement would be the literary analysis of judicial opinions.<sup>185</sup> Academic Robert Weisberg echoed and expanded upon Judge Posner's critique, arguing that the Law and Literature movement was unduly precious, and that a judge's deftness with language did not necessarily correlate with a deftness in making moral judgments.<sup>186</sup> Indeed, he argued that a well-described plaintiff or recitation of the facts might not only be irrelevant to the ethical issues in the case, but that by creating the impression of a just decision, it might disguise a decision lacking sound reasoning.<sup>187</sup> Weisberg also argued that White's work was ahistorical and did not adequately address the power relations within which each category of texts is written.<sup>188</sup>

Other critics worried that Law and Literature might be unduly academic, and not adequately take on power dynamics or genuine political struggles.<sup>189</sup> Indeed, according to some, this is what became of the movement: it provoked excitement and debate between legal scholars in the 1980s and 1990s, but ultimately failed to effect any substantive change in the legal world and was relegated to the halls of academia.<sup>190</sup> The movement had fractured, unable to identify a common purpose or agenda.<sup>191</sup> In recent years, though, some scholars have attempted to resurrect the movement, noting despite the follies and missteps it took in the past, the general thrust of the movement and its concern with textual interpretation is still relevant.<sup>192</sup>

---

<sup>185</sup> POSNER, *supra* note 50, at 17. Robert Weisberg noted that the analysis of judicial rhetoric was the one area where Posner "falls prey to the preciousness of the general run of law-and-literature writing that he otherwise so properly criticizes." Weisberg, *supra* note 161, at 37 n.126.

<sup>186</sup> To illustrate this point, Weisberg describes Cardozo's writing. Weisberg, *supra* note 161, at 38. Cardozo's style has often been praised, but Weisberg argues that "align[ing] linguistic precision with sensitivity to moral value . . . is not a compellingly necessary alignment." *Id.* He pointed out that abstract moral reasoning could display just as much as, if not more, ethical power. *Id.*

<sup>187</sup> *Id.* at 39-40.

<sup>188</sup> *Id.* at 54-55.

<sup>189</sup> WARD, *supra* note 158, at 11 (describing West's critique of Law and Literature as "a distraction from real political struggles"); ROBIN WEST, NARRATIVE, AUTHORITY AND LAW 96 (1993) (noting that the Law and Literature movement does not engage in "a truly radical critique of power").

<sup>190</sup> Brooks, *supra* note 155, at 349 ("Others have already written the obituary of a movement that seems to have lost its original radical force, to become one more academic field."). Many scholars had forewarned such a fate: for example, in 1995, Ian Ward noted that Law and Literature was "haunted by a very familiar ghost" of the Critical Legal Studies movement, which had begun with a promise of radical transformation to the legal system but ended "by going round in ever-decreasing circles, using up its dissipating energies in a multitude of various internecine disputes, and in the invention of increasingly pretentious and ultimately useless language which, rather than educating, serves only to mystify and then to alienate all but the most fervent of believers." WARD, *supra* note 158, at 22.

<sup>191</sup> See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1061-62 (1999) (arguing that the Law and Literature movement has become so fractured so as to "undermine itself from within").

<sup>192</sup> See, e.g., Brooks, *supra* note 155, at 349, 352-53 (noting that despite the fact that the movement had "strayed from its most productive paths of inquiry" it should nonetheless matter, and applying its principles to an interpretation of the "torture memo" as well as several recent Supreme Court cases).

### III. A LAW AND LITERATURE READING OF *OBERGEFELL V. HODGES*

The Law and Literature movement provides a fitting framework with which to analyze *Obergefell v. Hodges* because it brings style to the forefront.<sup>193</sup> Much of the tension between the majority opinion and the dissents of *Obergefell* is explicitly about style.<sup>194</sup> Justice Scalia analogized Justice Kennedy's opinion to "the mystical aphorisms of the fortune cookie."<sup>195</sup> Even the more level-headed Chief Justice Roberts accused the majority opinion of hiding behind "shiny rhetorical gloss."<sup>196</sup> Therefore, to understand what *Obergefell* means, one must not solely analyze the substantive impact of the decision, but also the style.<sup>197</sup> In Section A of this Part, I engage in a Law and Literature reading of *Obergefell*, and I examine the relationship the opinion creates with both the plaintiffs and the audience.<sup>198</sup> In Section B, I examine the implications of the *Obergefell* style.<sup>199</sup>

#### A. *The Relationships Obergefell Creates with the Plaintiffs and Its Readers*

Legal scholar James Boyd White argues that it is not the paraphraseable message of an opinion that is most important, but rather the experience of reading it creates through its style.<sup>200</sup> Under White's rubric, then, what experience does *Obergefell* create for its reader?<sup>201</sup> White looks at two sets of relationships an opinion creates: the relationship with the people the opinion talks about, and the relationship with the opinion's reader.<sup>202</sup>

<sup>193</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015); see, e.g., JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in HERACLES' BOW, *supra* note 164, at 107, 117 (arguing that the experience style creates for the reader is more important than the main idea).

<sup>194</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2630 n.22 (Scalia, J., dissenting) (criticizing the style of the majority opinion).

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

<sup>196</sup> *Id.* at 2616 (Roberts, C.J., dissenting).

<sup>197</sup> See, e.g., White, *supra* note 14, at 1367 ("The excellence of the opinion is not one of 'mere style,' but an excellence of thought, represented and enacted in language in such a way as to live in the minds of others."). For compelling analyses of the substantive impact of *Obergefell*, see Yoshino, *supra* note 127, at 148 (analyzing the "intertwined nature of liberty and equality" apparent in *Obergefell*) and Tribe, *supra* note 123, at 16–17 (responding to Yoshino and arguing *Obergefell* combined equal protection and due process analysis into a new doctrine of "equal dignity").

<sup>198</sup> See *infra* Part III.A.

<sup>199</sup> See *infra* Part III.B.

<sup>200</sup> See WHITE, *supra* note 193, at 117 ("It is therefore never enough to read a poem or an opinion for its main idea, which is often, when simply stated, simply trite or meaningless . . . . It is not the restatable message that is the most important meaning of the poem or the judicial opinion, but the reader's experience of the life of the text itself.").

<sup>201</sup> See *id.*

<sup>202</sup> WHITE, *supra* note 19, at 216.

First, the facts section of *Obergefell* creates an empathetic relationship with the people it describes: the plaintiffs.<sup>203</sup> *Obergefell* was the consolidation of multiple lower-court cases from states that did not allow same-sex marriage.<sup>204</sup> Justice Kennedy's recitation of the facts from the lower-court cases exhibits his empathy towards the petitioners, and therefore enacts what Professor Martha Nussbaum called "poetic judging."<sup>205</sup> Justice Kennedy's description of the named petitioner's circumstances merits quoting at length:

Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for the rest of time."<sup>206</sup>

Petitioner Obergefell's story is heart-wrenching: he and his partner of twenty years were married on a medical transport plane three months before his partner's death.<sup>207</sup> Justice Kennedy's rendition of their experience both shows his own empathy toward the petitioners, as well as elicits empathy from the reader.<sup>208</sup>

---

<sup>203</sup> See 135 S. Ct. at 2594–95 (reciting facts); NUSSBAUM, *supra* note 180, at 99–120 (describing "poetic judging" as containing empathy).

<sup>204</sup> 135 S. Ct. at 2593.

<sup>205</sup> See NUSSBAUM, *supra* note 180, at 99–120 (describing one feature of "poetic judging" as allowing the reader to imagine what it would be like to be in the complainant's shoes).

<sup>206</sup> *Obergefell*, 135 S. Ct. at 2594–95; see also *id.* at 2595 (describing plaintiffs April DeBoer and Jayne Rowse's journey adopting two foster children with special needs and Ijpe DeKoe and Thomas Kostura's difficulty being deployed for the U.S. Army when some states did not recognize their marriage). In contrast, consider, for example, the decidedly un-empathetic recitation of facts in *Buck v. Bell*: "Carrie Buck is a feeble-minded white woman who was committed to the State Colony . . . in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child." 274 U.S. 200, 205 (1927).

<sup>207</sup> See *Obergefell*, 135 S. Ct. at 2594–95.

<sup>208</sup> See *id.*; NUSSBAUM, *supra* note 180, at 99–120 (illustrating the importance of judicial empathy). Justice Kennedy did not, however, invent this rhetoric entirely on his own. Teresa Godwin Phelps, *The Evolving Rhetoric of the Gay Rights and Same-Sex Marriage Debate*, in RHETORICAL PROCESSES AND LEGAL JUDGMENTS 54, 82 (Austin Sarat ed., 2016). Phelps details how gay activists'

Second, *Obergefell*'s style conjures an "ideal reader" much like the one White theorized.<sup>209</sup> White uses the hypothetical "ideal reader" as a method of understanding the meaning of an opinion.<sup>210</sup> The ideal reader is the version of the reader, not as she is, but as the text invites her to become.<sup>211</sup> By identifying the ideal reader of an opinion, for example, White argues, we can learn something about the text itself.<sup>212</sup> He argues that the relationship the text establishes between itself and its readers also serves to create a textual community among its readers.<sup>213</sup>

Thus, who is the ideal reader conjured by *Obergefell*? As discussed in Part I, Justice Kennedy seemed to have a particular concern with audience.<sup>214</sup> And yet *Obergefell* is not apparently written in the "plain language" that legal scholars posit is most intelligible to the non-legal audience.<sup>215</sup> Indeed, it is written in a lofty style, speaking of "the highest ideals of love, fidelity, devotion, sacrifice, and family."<sup>216</sup> It is akin to Chief Justice Marshall's opinions of the eighteenth century, in which the justice spoke as the "mouthpiece of divinity."<sup>217</sup> It is not written in the more casual, "impure" style that critics assert will resonate with popular audiences.<sup>218</sup> One of Justice Kennedy's former clerks, Professor Michael Dorf, posited that the Justice might have better achieved his goal of connecting with non-lawyers if he wrote not in lofty rhetoric but in plain English.<sup>219</sup>

---

intentional rhetorical choices impacted the way the Court viewed the plaintiffs in each case. *Id.*; see also PETROSKI, *supra* note 6, at § 6.3.2 (discussing Justice Kennedy's recitation of the facts in *Obergefell*).

<sup>209</sup> See WHITE, WORDS, *supra* note 173, at 271 (explaining the "ideal reader").

<sup>210</sup> *Id.* ("How would the ideal reader contemplated by this document, indeed, constituted by it, understand its bearing on the present circumstances?").

<sup>211</sup> WHITE, *supra* note 19, at 100. For example, White says, the Ideal Reader of an advertisement for men's cologne will buy and use the product it advertises. *Id.* The Ideal Reader of a novel might feel her sympathies extended, or might find herself holding contrasting positions in her mind. *Id.*

<sup>212</sup> *Id.* at 101 ("Of the opinion and statute alike, then, we can ask what relation it establishes with its reader: Is this an authoritarian text, one that demands simple and total obedience of its reader, or does it define the reader as a person with a mind, with a heart—as a free agent—who in reading the text is encouraged to activate these capacities in certain ways?").

<sup>213</sup> White, *supra* note 171, at 434 ("[A] legal text speaks directly to its reader, as other texts do, [but] the textual community it establishes with the individual reader is also a way of making another community, a community among its readers.").

<sup>214</sup> See *supra* note 118 and accompanying text (quoting Justice Kennedy's interview with legal writing scholar Bryan Garner in which he states that in cases of public importance, an opinion must command its readers' allegiance, and that sometimes this is best done in an emotive style).

<sup>215</sup> See, e.g., GARNER, *supra* note 16, at 428 (advocating for use of plain language so that an opinion may be intelligible to the non-legal audience).

<sup>216</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>217</sup> See *supra* note 39 and accompanying text (summarizing Justice Marshall's style).

<sup>218</sup> See *supra* notes 60–63 and accompanying text (describing Richard Posner's contrast of "pure" versus "impure" style).

<sup>219</sup> Dorf, *supra* note 114.

Professor Dorf, though, does not account for the simple fact that the *Obergefell* opinion *did* connect with countless non-specialists.<sup>220</sup> His hypothesis seems to be based on the principle that non-lawyers do not like magisterial rhetoric.<sup>221</sup> But Justice Kennedy does not subscribe to that idea.<sup>222</sup> James Boyd White drew attention to the line in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court states:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.<sup>223</sup>

With this passage, the Court is aware of the need for public acceptance of its decisions, especially in controversial cases.<sup>224</sup> It hypothesizes that the public will accept a decision if it sees it as a principled one, not the product of political compromise.<sup>225</sup> That is the same wager Justice Kennedy makes in *Obergefell*.<sup>226</sup> He writes to an ideal reader who respects a decision made on principle: in this case, on the lofty principle that marriage can make two people into something greater than they were individually.<sup>227</sup>

### *B. Implications of Justice Kennedy's Magisterial Style*

*Obergefell* models White's ideal of building community through language by laying bare its principled decision making.<sup>228</sup> In *Justice as Translation*, White analyzed a series of Supreme Court opinions and pointed out the ways that justices often avoid the difficulties of judging by resting their opinions on false grounds of authority.<sup>229</sup> As examples of what could be "false authority," he cites original intention, plain meaning of a statute, the clear commands of precedent, the facts of a case.<sup>230</sup> In other words—many of the things we typi-

<sup>220</sup> See, e.g., Schacter, *supra* note 119, at 1024–33 (noting the wide popular audience for *Obergefell*).

<sup>221</sup> See Dorf, *supra* note 114 (suggesting that the plain language of Mark Twain, Ernest Hemingway, and Harry Truman as opposed to the lofty rhetoric of John F. Kennedy, Martin Luther King, Jr., and the Gettysburg Address—is more accessible to the public).

<sup>222</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2608 (using elevated rhetoric to connect with an audience).

<sup>223</sup> 505 U.S. 833, 865–66 (1992); WHITE, *supra* note 94, at 176–77.

<sup>224</sup> See *Casey*, 505 U.S. at 865–66.

<sup>225</sup> See *id.*

<sup>226</sup> See *Obergefell*, 135 S. Ct. at 2608.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.* at 2599–601 (outlining four principles on which the decision is based); WHITE, *supra* note 19, at 101 (detailing the way a text can create a relationship with a reader, and thus establish a community among readers).

<sup>229</sup> WHITE, *supra* note 19, at 216.

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

cally think about when practicing law.<sup>231</sup> He argues that these grounds can be ways to avoid the real responsibilities of judging: that of creating an ethical relationship both with prior texts and with people in the world.<sup>232</sup> Justice Kennedy, then, writes to an ideal reader who is not won over by a three- or four-part test.<sup>233</sup> He wagers a bet that such tests will not forge a connection.<sup>234</sup> It is not that he is eluding traditional legal analysis, but it is that he worries that such analysis can tend to evade something more fundamental about the principled choice the Court is making.<sup>235</sup>

But is White's ideal—and Justice Kennedy's opinion—even something judges should strive for? On the one hand, *Obergefell* did build community in a real way: all those likes and shares on social media indicated more than just clickable content.<sup>236</sup> They were people engaging with the text, giving life to the opinion, saying this is not just some stuffy legalese that will never see the light of day outside the Supreme Court Reporter.<sup>237</sup> Marginalized people were able to read a text handed down by our nation's highest court and genuinely see themselves in it.<sup>238</sup> It is possible that this community-building function is more than feel-good, but could affect the life of an opinion: in the four years since *Obergefell* was released, talk of overturning it has all but dissolved.<sup>239</sup>

On the other hand, though, it may be naively optimistic to think that beautiful writing can change the world—or even want it to.<sup>240</sup> The nascent legitimacy studies field has shown that the style of an opinion only has an effect on

<sup>231</sup> See *id.*

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

<sup>233</sup> See *Obergefell*, 135 S. Ct. at 2608; see also WHITE, *supra* note 19, at 216 (noting that variables like original intention, plain meaning, precedent, and facts can all be "false grounds of authority" that judges cite to avoid "the true responsibilities of judging"); *supra* note 42 (describing the use of three- and four-part tests).

<sup>234</sup> See, e.g., WHITE, *supra* note 19, at 101 (describing how legal texts can construct a rhetorical community).

<sup>235</sup> See *Obergefell*, 135 S. Ct. at 2608 (deciding based on principal); cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 108 (1977) (arguing for judicial decision making based on principal). *But see*, e.g., Rosen, *supra* note 115 (criticizing Justice Kennedy's opinions for being based more on his instincts about fairness than on strict legal analysis).

<sup>236</sup> See Schacter, *supra* note 119, at 1029 (detailing the number of likes and shares of *Obergefell* on social media).

<sup>237</sup> See *id.*

<sup>238</sup> See *Obergefell*, 135 S. Ct. at 2608. The opinion noted that gay couples were no longer "excluded from one of civilization's oldest institutions," referring to marriage. *Id.* Yet the opinion also embodies the fact that they were no longer excluded from the language of the Supreme Court, another pretty old institution. See *id.*

<sup>239</sup> See Walter Olson, Opinion, *Gay Marriage Is Here to Stay, Even with a Conservative Court*, WALL ST. J. (July 8, 2018), <https://www.wsj.com/articles/gay-marriage-is-here-to-stay-even-with-a-conservative-court-1531074136> [<https://perma.cc/GT2H-YYCV>] (arguing that the Supreme Court will not overturn *Obergefell*, in part because of public acceptance of the decision, and noting that in the two years after *Obergefell* came out, public support for gay marriage increased from 55% in 2015 to 62% in 2017).

<sup>240</sup> See *infra* notes 241–243 and accompanying text.

those who already agree with its holding; it does nothing to change the hearts or minds of those who disagree with it.<sup>241</sup> Further, pointing to pretty language does little to defend against charges of judicial activism.<sup>242</sup> And most importantly, we should be wary of the potential for, and history of, appeals to emotion being used to produce dangerous results.<sup>243</sup>

But before reaching the question of whether beautiful writing in Supreme Court opinions is a laudable goal, we cannot forget to ask: is Justice Kennedy's opinion beautiful—or even good—writing? This is necessarily a question of taste, but this Note would not be complete without offering my personal view.<sup>244</sup> I was among those, on June 26, 2015, who were genuinely moved by the opinion's final paragraph when it showed up on my Facebook feed.<sup>245</sup> On the other hand, I cringed a couple years later, when as a 1L I sat down to read the whole decision, and found the line: "Marriage responds to the universal fear that a lonely person might call out only to find no one there."<sup>246</sup> *This is law?* I thought.

It is hard to write in a serious way about the meaning of life. And it is easy to tear down those who do it badly. But if law is seeking to regulate anything as monumental as one's right to marry,<sup>247</sup> to have an abortion,<sup>248</sup> to en-

---

<sup>241</sup> See Scurich, *supra* note 71 (finding that the public's perception of the legitimacy of a court opinion is based not on its style, but merely on whether the public agrees with the outcome of the decision). See generally HOEKSTRA, *supra* note 71 (examining the effect of Supreme Court decisions on public opinions of the issue).

<sup>242</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) (accusing the majority opinion of engaging in the "unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*"); *id.* at 2642 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.").

<sup>243</sup> See, e.g., Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 859–65 (1986) (noting that in *Buck v. Bell*, Justice Holmes used emotional rhetorical devices to arouse fear and appeal to the classism and racism of his era); cf. Jennifer Mercieca, *The Rhetorical Brilliance of Trump the Demagogue*, CONVERSATION (Dec. 11, 2015), <http://theconversation.com/the-rhetorical-brilliance-of-trump-the-demagogue-51984> [<https://perma.cc/RW2B-MDCW>] (noting that Donald Trump, like all demagogues, appeals to emotion rather than reason).

<sup>244</sup> Cf. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 39 (1936) ("One of the style quirks that inevitably detracts from the forcefulness and clarity of law review writing is the taboo on pronouns of the first person. An 'I' or a 'me' is regarded as a rather shocking form of disrobing in print. To avoid nudity, the back-handed passive is almost obligatory:—'It is suggested—,' 'It is proposed—,' 'It would seem—.' Whether the writers really suppose that such constructions clothe them in anonymity so that people can not guess who is suggesting and who is proposing, I do not know. I do know that such forms frequently lead to the kind of sentence that looks as though it has been translated from the German by someone with a rather meager knowledge of English.").

<sup>245</sup> See Schacter, *supra* note 119, at 1029 (noting that 3.8 million people used Facebook to communicate about *Obergefell* in the first hour after it was released).

<sup>246</sup> See *Obergefell*, 135 S. Ct. at 2600.

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

<sup>248</sup> *Casey*, 505 U.S. at 833.

gage in sexual intimacy,<sup>249</sup> to die<sup>250</sup>—the important moments of one's life—it cannot reduce them to math, and think that the reader will be fooled simply because it gives an air of technical precision.<sup>251</sup> We cannot forget, "it is a *constitution* we are expounding."<sup>252</sup> And Justice Kennedy knows that.<sup>253</sup>

### CONCLUSION

Though neither the Constitution nor statute requires the Supreme Court to issue written opinions, they have become part of the fabric of our legal community. Over time, the dominant style of Court opinions has evolved from the magisterial tone of Chief Justice John Marshall, to the so-called "law-review" style condemned by critics. Fundamental rights cases present a singular stylistic challenge, both because they require the justice to reduce some ineffable right or liberty to words and because they often present cases of public importance. In *Obergefell*, Justice Kennedy sought to describe the fundamental importance of marriage, and critics chastised him for using overwrought language. The Law and Literature movement, which was at its peak in the late twentieth century, provides an appropriate lens through which to examine *Obergefell*. *Obergefell* exemplifies the Law and Literature ideal because the decision uses language to generate empathy and build community.

ELIZA S. WALKER

---

<sup>249</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>250</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>251</sup> See WHITE, *supra* note 19, at 216 (noting that variables like original intention, plain meaning, precedent, and facts can all be "false grounds of authority" that judges cite to avoid "the true responsibilities of judging"); Horwitz, *supra* note 42, at 98–99 (objecting to "three or four 'prong' tests everywhere and for everything").

<sup>252</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>253</sup> See *supra* note 223 and accompanying text (describing Justice Kennedy's view about making decisions on principle).



Reproduced with permission of copyright owner.  
Further reproduction prohibited without permission.