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THE RHETORICAL CULTURE OF 'LIBERTY' IN *OBERGEFELL v. HODGES*

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Abstract

On June 26th, 2015, the Supreme Court of the United State of America announced its decision in the consolidated case of *Obergefell v. Hodges.* It ruled that the right of same-sex couples to marry was within the concept of liberty, and therefore States which prohibited same-sex marriage violated the Due Process and Equal Protection Clauses of the Constitution. This thesis analyzes the majority opinion in the consolidated case of *Obergefell v. Hodges*.

First, I discuss my methodology. Then, I ground the thesis in three theoretical frameworks, a selected history of the concept of liberty, and the rhetorical situation of *Obergefell* v. *Hodges*. Finally, I analyze the rhetorical manner in which Justice Anthony Kennedy advocates for certain conceptions of liberty, ultimately contributing to the ongoing dialogue of American liberty.

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Chapter 1

Introduction

America's culture is a culture of liberty. America has symbols, such as the Liberty Bell and the Statue of Liberty. America has promises, of "liberty and justice for all" and "life, liberty, and the pursuit of happiness." America has long held liberty as the "master narrative" in its history.[1] However, due to theoretical reasons discussed later, liberty remains an undefined concept. Though Americans may feel they share liberty with their fellow citizens, they may not share the same definition of this "strange but elusive word."[2] As one French historian noted, "the idea of liberty is one which each epoch reshapes to its own liking."[3] In this thesis, I analyze how the majority opinion in the Supreme Court's 2015 *Obergefell v. Hodges* case reshapes liberty. I examine the rhetorical manner in which the opinion contributes to the ongoing discussion of what constitutes American liberty.

When I use the term liberty, I am referring both to liberty and its synonymous concept freedom. Some scholars do differentiate between liberty and freedom, but the vast majority do not, and English is the only language that contains both the Latin *liberté* and the Germanic *Freiheit*.[4] I primarily use the word liberty because it appears in the Fourteenth Amendment of the United States

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[1] Eric Foner, *The Story of American Freedom* (New York: Norton, 1998), at xiv.

[2] Carl Becker, *New Liberties for Old* (New Haven: Yale University Press, 1941), at 3.

[3] Marc Bloch, *The Historian's Craft* (New York: Knopf, 1953), at 173.

[4] Ian Carter, "Positive and Negative Liberty," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2019), https://plato.stanford.edu/archives/win2019/entries/liberty-positive-negative/. For examples of scholars who differentiate between liberty and freedom, see Pitkin, H., 1988, 'Are Freedom and Liberty Twins?', *Political Theory*, 16: 523–52; Williams, B., 2001, 'From Freedom to Liberty: The Construction of a Political Value', *Philosophy and Public Affairs*, 30: 3–26; and Dworkin, R., 2011, *Justice for Hedgehogs*, Cambridge, Mass.: Harvard University Press.

Constitution, and it appears with more frequency in the *Obergefell v. Hodges* opinion than freedom does.

Only in the past fifty years have law and rhetoric started to converge as topics of mutual inquiry. The specific subject of rhetoric and the Supreme Court received very little scholarly attention until the 1970s.[5] Since then, the scholarship on both rhetoric and the Supreme Court specifically and rhetoric and law generally has increased, but it remains an understudied topic.[6] This lack of scholarship is unfortunate for three reasons. First, the law can be viewed entirely as a branch of rhetoric rather than conceptualizing law as a set of "authoritative commands" or as an "institutional machine."[7] If scholars view the law as "the particular set of resources made available…on those occasions…we think of as legal,"[8] then the whole system of law fits within Aristotle's definition of rhetoric: "the faculty of discovering in the particular case [i.e., that which we think of as legal] what are the available means of persuasion [i.e., the resources of law]."[9]

Second, the Supreme Court's only power is its persuasion.[10] "The Court is constrained by the fact that it has no guns, no planes, no troops, and no power of appropriation to enforce its judgments."[11] Therefore, rhetoric determines its effectiveness as a political entity.[12] When the Supreme Court has failed to convince others, people have called its outcomes into question. For example, the decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) failed to convince

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[5] Malthon Anapol, "Rhetoric and Law: An Overview," *Today's Speech* 18, no. 4 (1970), at 12.

[6] Linda L. Berger, "Studying and Teaching 'Law as Rhetoric': A Place to Stand," *Scholarly Works* (2010).

[7] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" *University of Chicago Law Review* 52, no. 3 (Summer 1985), at 684-702.

[8] *Ibid.*, at 689.

[9] Aristotle, *Rhetoric*, trans. W. Rhys Roberts, The Internet Classics Archive, Massachusetts Institute of Technology, http://classics.mit.edu/Aristotle/rhetoric.1.i.html, at I.2.

[10] Michael Kleine and Clay Robinson, "The Dialogic Rhetoric of the Supreme Court: An Interdisciplinary Analysis," *Rhetoric Review* 27, no. 4 (2008), at 415.

[11] Robert A. Prentice, "Supreme Court Rhetoric," Arizona Law Review 25, no. 1 (1983), at 88.

[12] *Ibid.*, at 85.

President Andrew Jackson, and he stated: "[Chief Justice] John Marshall has made his decision; now let him enforce it!" In cases when Justices tried to rely exclusively on legal reasoning as a source of power rather than combining it with persuasive strategies, the opinions failed to gain legal traction and diminished the authority of the Court.[13]

Third, beyond just its effectiveness, the Supreme Court's legitimacy is dependent on rhetoric. Most facets of the Supreme Court fly in the face of representative democracy. Justices are unelected lawyers anointed to their role for life. As individuals, no Justice has ever faced political accountability for a specific decision.[14] The Court is also not representative. When the Supreme Court decided *Obergefell*, the nine Justices were from four states (California, New York, New Jersey, and Georgia), graduated from three law schools (Yale, Harvard, and Columbia), and practiced three religions (Roman Catholicism, Irish Catholicism, and Judaism). Only one was black, three were women, and none identified as members of the LGBT community. To maintain legitimacy, the Court must employ several rhetorical features: framing decision so that change seems incremental, acting as if it merely judges based on others' arguments, being transparent, explaining its reasoning, and engaging in an ongoing conversation with itself and the public.[15] Since the Court depends on rhetoric to maintain its legitimacy, studying both law and rhetoric together sheds additional light on judicial opinions.

With this thesis, I hope to contribute to the emerging field of rhetoric and law. In the chapter that follows, I ground this thesis in three considerations. First, I explain three theoretical

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[13] *Ibid.*, at 87.

[14] Some Justices have faced political accountability for personal or professional conduct. However, even this is rare. Only one Supreme Court Justice has ever been formally impeached, Justice Samuel Chase, who was acquitted in 1803. Justice Abe Fortas resigned to avoid impeachment, and a resolution of impeachment in the House has, as of April 2020, been referred against Justice Brett Kavanaugh. No action has yet been taken on it.

[15] Kleine and Robinson, at 415-417, 419.

considerations to the concept of 'liberty.' Then, I provide a selected history of the rhetorical culture of the term 'liberty' in American history. In the third section, I describe the rhetorical situation surrounding *Obergefell v. Hodges* and why the case is especially ripe for rhetorically analysis surrounding 'liberty.' The following chapter analyzes the majority opinion for its rhetorical features and for how Kennedy conceptualizes liberty.

Chapter 2

Groundwork

Theoretical Framework

If we understand the law as rhetoric, then lawyers constantly remake and redefine all terms they use. However, 'liberty' is my focus because it can be remade and redefined within and beyond the law. Three theoretical frameworks ground the selection of 'liberty' and this thesis. The first is Richard Weaver's idea of "ultimate terms." Weaver distinguishes between two types of ultimate terms: good or "god terms"[16] and bad or "devil terms."[17] A god term is an ultimate term: it is the highest of all terms, and no one can argue another term above it.[18] These terms act as rhetorical trump cards because once someone evokes the term, the opponent will struggle to argue against the term itself. Instead, the opponent must work to argue with a different god term or distinguish the topic from the god term. God terms do not remain static over time. In the world generally, and America particularly, people do not share one way of living or one prescribed value system. Therefore, a term fluctuates in status as a god term or a term that may be subject to an even higher term.[19] For example, in the 16th and 17th centuries, English Protestants may have used the term 'purity' as a god term to define their society. If something were to go toward the 'purity' of the colony, no one could argue against it. In current American society, the term 'purity' does not carry an equivalent weight. God terms reach their status at a particular time in history and reach their

[16] Richard M. Weaver, *The Ethics of Rhetoric* (Brattleboro: Echo Point, 1953), at 212.
[17] *Ibid.*, at 222.
[18] *Ibid.*, at 212.
[19] *Ibid.*

ultimate term status due to a historical transformation or evolution.[20] However, some powerful god terms retain their status as an ultimate term for hundreds of years.

Weaver sets out criteria to classify terms as god terms. For Weaver, the "surest indicator" that a term is a god term is its "capacity to demand sacrifice."[21] If people are willing to die for "America," for "progress," or for "liberty," then there is a high probability that term is a god term. He also notes that many people hypostatize god terms.[22] They use terms that reflect abstract ideas as concrete subjects. Weaver supplies examples such as "facts tend to show," "science says," and "history proves."[23] These god terms become active subjects in our vocabulary and our life, which increases their ability to go uncontended. If "facts tend to show" something, then it becomes harder for someone to argue against it, especially if they give the same weight to the term "facts." Another indicator of a god term is its ability to "satisfy a primal need."[24] "Science" is a god term since people yearn for knowledge in their life.[25] "Safety" and "security" could similarly be viewed as god terms because one must have both in order to live comfortably. A god term needs to seem innate to the identity or life of the person.

Weaver further identifies a sub-category of god terms. Like god terms, this sub-category contains potent terms in society.[26] However, these "charismatic terms" refer to concepts that cannot be readily "discover[ed] or construct[ed] through imagination."[27] These terms differ from regular god terms in two other ways. First, regular god terms derive their rhetorical power from

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[20] *Id*., at 212-214.
[21] *Ibid.*, at 214.
[22] *Ibid.*, at 215.
[23] *Ibid.*, at 214, 215, 220.
[24] *Ibid.,* at 216.
[25] *Ibid.*
[26] *Ibid*., at 227.
[27] *Ibid.*

evidence or circumstance.[28] One can see the advancement of science or the notions of progress. Charismatic terms operate without evidence and with no real subject.[29] The general public gives a charismatic term its power through common consent and the will that the term carries weight.[30] The term 'democracy' serves as an example. 'Democracy' satisfies the criteria of a god term: many have died in battle for 'democracy.' It appears throughout history as something that 'gives' people power or 'shows' the right method of action. It also appears to satisfy a primal need to rule over oneself, or at least have a say in rules which apply to oneself. But one cannot point to a concrete example or physical representation of 'democracy' like one can with 'progress' or 'science.' People also argue over the definition of 'democracy.' Therefore, 'democracy' goes beyond just being a god term and becomes a charismatic term. Aside from having no direct representation or definition, charismatic terms also appear less often in any given time period when compared to the more general god terms.[31] 'Liberty' acts as a god term and charismatic term.

The second theoretical framework is the argument from definition. As Weaver explains, an argument from definition includes an argument from the nature of the thing discussed.[32] Weaver applies the argument from definition to Abraham Lincoln,[33] but the notion developed alongside the development of classical rhetoric. In Plato's Phaedrus, Socrates remarks that an orator should begin by distinguishing between terms that can be easily defined (such as 'iron') to those that have harder definitions (such as 'good').[34] The orator should then define these terms relative to the

[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.,* at 228.
[32] *Ibid*., at 87.
[33] *Ibid*., at 85-114.
[34] Plato, *Phaedrus*, trans. Robin Waterfield (Oxford: Oxford University Press, 2002), at 263a-b.

thesis of the speech.[35] Thus, the classical rhetorical design of a speech must include a definition and distinction of terms. The speaker arguing from definition shows why one thing should be classified within a specific definition, such as 'friendship' being defined as 'the good.'

The argument from definition and god terms link themselves closely. 'Liberty,' as a god term and charismatic term, has an ambiguous definition. It would fall under the distinct category of things with no particular definition, such as the 'good.' Therefore, arguments from definition can be used to classify something as 'liberty' or not—as a god term or not. Since an orator cannot argue against a god term, opponents must use arguments from definition to show that the idea is not a part of the god term. Conversely, proponents of the god term must show the idea does fall under the god term's definition.

The justices could argue from definition and rhetorically frame different concepts as 'liberty' because 'liberty' is an "essentially contested concept."[36] People contest the general concept of "essentially contested terms" rather than whether the statement as a whole.[37] For example, people would likely contest the statement "this desk is wood" if the desk were plastic. The statement would likely not be contested based on disagreement over what constitutes a 'desk' or what constitutes 'wood.' However, "there is no liberty without economic equality" would likely be contested based on the definition and scope of 'liberty,' or perhaps 'economic equality.'

Since the term itself is subject to disagreement, the use of 'liberty,' or another essentially contested concept, "means to use it against other uses and to recognize that one's own use of it has to be maintained against these other uses."[38] By focusing on the term 'liberty,' I can understand

[35] *Ibid*., at 266a-b.
[36] W.B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society*, n.s., 56 (1955).
[37] *Ibid*., at 167.
[38] *Ibid*., at 172.

how the majority opinion in *Obergefell* uses different conceptions of liberty. Ultimately, these three theories illuminate why there is an ongoing dialogue of American liberty and how the opinion in *Obergefell* can contribute to it.

Selected History of the Rhetorical Culture of 'Liberty' in America

America inherited its early conceptions of liberty from England. However, like in England, liberty encompassed different ideas for different individuals. Predominant among the early colonies was a spiritual concept of liberty, rather than a political or a civil concept. The New Testament states, "Where the Spirit of the Lord is, there is liberty,"[39] and many early Americans focused on ensuring that the new colonies were where the Spirit of the Lord was. John Winthrop, the Massachusetts colony governor, argued for the "moral liberty" in the colonies, defining it as "liberty to do only what is good." He differed this spiritual liberty with "natural liberty," which he defined as "a liberty to evil."[40] Others agreed with Winthrop and argued against non-spiritual liberty, which would only "prejudice the public good."[41] This concept of moral liberty would emerge again in the late twentieth century, with the Christian Right defining liberty as the ability to live a moral life--whether voluntary or mandated.[42]

As the American colonies became more independent and more secular, the concept of a "natural liberty" took hold. In the Declaration of Independence, Jefferson argues that birth endows all men with liberty.[43] With the idea of liberty being natural to all white males, liberty became a

[39] 2 Corinthians 3:17

[40] Perry Miller and Thomas H. Johnson, *The Puritans* (2 vols. New York, 1963), I, at 205-07.

[41] Hooker in Allen Carden, "The Communal Ideal in Puritan New England, 1630–1700," *Fides et Historia* (Fall-Winter 1984), 25-38.

[42] Foner, at 318.

[43] US Declaration of Independence, 1776.

rallying cry. Instead of merely entrusting limited privileges, or being available to those with social class or heritage, liberty became a "universal, open-ended entitlement." [44] Though the Declaration of Independence seemed to cast aside other concepts of liberty, Americans remained keenly aware of how multiple concepts of liberty could coexistence and threaten each other. In *Federalist*, James Madison wrote that "Liberty may be endangered by the abuses of liberty as well as the abuses of power."[45]

After Americans fought the Revolutionary War and created their nation, liberty continued to be a point of discourse in politics. When the first two American political parties developed, the Federalists and anti-Federalists, both claimed liberty as a centerpiece. George Washington believed that the Federalists could uphold the true "spirit of liberty."[46] He thought those who used the term against him, like Whiskey Rebellion members, degraded the term into "licentiousness."[47] The Jeffersonian Republicans also believed that they were upholding the "boisterous sea of liberty" with policies that mostly went against Federalist ideas.[48] Even just years after colonialists came together under the same banner of liberty, Americans did not have a national consensus on what the concept of liberty meant.

Historically, debate existed on even the most basic distinctions of liberty. A common divide, dating back to the work of Kant but popularized by Isaiah Berlin, split liberty into positive and negative liberty. Negative liberty means freedom from constraint in deciding one's choices.

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[44] Foner, at 15

[45] Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke. (Middletown, Conn.: Wesleyan University Press, 1961) at 422.

[46] James Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (10 vols. Washington DC, 1896-99), I, at 48.

[47] *Ibid*., at 58.

[48] David Hackett Fischer, *The Revolution of American Conservatism* (New York: Harper & Row, 1969), at 236.

Positive liberty means freedom to act in deciding one's choices. [49] In American history, the debate has primarily rested on the size and responsibilities of the government. With a negative conception of liberty, the government should be small and relatively weak so that individuals are free from government regulation and constraint. A positive conception requires a more extensive and stronger government empowered to ensure all citizens can exercise self-determination. Different points of American history showed different preferences for one conception over the other. For example, during the Civil War, liberty was "understood to be the absence of government from private affairs."[50] However, during World War I, President Woodrow Wilson advocated for a positive conception of liberty, instead of a solely negative one.[51] During World War II, citizens hailed the government as liberty's "protector" rather than its existential threat.[52]

A lack of national consensus concerning the concept of liberty allowed the dialogue to continue throughout American history. During the Civil War, "Abolitionists of the Garrisonian persuasion...extended the definition of freedom as person self-direction to a critique of all coercive institutions, including government, the church, and, on occasion, the family."[53] President Abraham Lincoln even made the continuing dialogue explicit by noting that "We all declare for liberty, but in using the same word we do not all mean the same thing."[54] The question continued into the next age when President Woodrow Wilson stated: "Of course, we want liberty, but what is liberty?" [55] In this section, I attempt to answer his question by tracing certain concepts of liberty through

[49] Carter.
[50] Foner, at 54.
[51] *Ibid.,* at 159
[52] *Ibid.*, at 235.
[53] *Ibid.,* at 85.
[54] Basler, et al., *Lincoln Works*, at IV, 301-02
[55] Woodrow Wilson, *The New Freedom* (New York, 1913), at 284.

American history. These concepts either reappear in the majority opinion of *Obergefell v. Hodges* or aid in understanding the dialogue to which the Justices contribute.

Liberty as Privilege

Liberty has often been viewed as an entitlement to privilege. Those with liberty had access to certain rights and advantages that society denied to those without liberty. This concept of liberty "was the lineal descendant of an understanding of liberty derived from the Middle Ages, when 'liberties' meant formal privileges such as self-government or exemption from taxation granted to particular groups by contract, charter, or royal decree."[56]

These privileges most often took the form of rights. The government elevated particular abilities, such as the ability to speak one's mind, the ability to print one's thoughts, and the ability to be tried by a jury, from the status of mere privileges to that of a right--guaranteed along with liberty just by the nature of citizenship. When the original Constitution did not protect these rights, Anti-Federalists objected and demanded the inclusion of the Bill of Rights. For Anti-Federalists, without the guarantee of "those unalienable and personal rights of men…there can be no liberty."[57] Abolitionists took up a similar mantel. They "developed an alternative, rights-oriented constitutionalism, grounded in the universalistic understanding of liberty."[58] Liberty not only allowed people to be free from slavery, but it also gave them universal access to rights and privileges afforded to other men. In the 1920s, this rights-oriented view of liberty grew even more significant. Liberty transgressed just the community and became centered largely on liberty for the individual. Thanks to the work of the ACLU and other civil rights groups, the 1920s birthed a

[56] Foner, at 6.

[57] *The Address and Reasons of Dissent of the Minority Convention of the State of Pennsylvania to Their Constituents* (Philadelphia, 1787), at 52.

[58] Foner, at 87.

"coherent concept of civil liberties" and ensured "meaningful legal protection" from the government for many rights, such as the freedom of speech.[59]

In antebellum America, liberty also entailed the privilege of denying liberty to others. This concept of liberty emerged throughout Western history. In Ancient Greece, "one element of freedom was the freedom to enslave others."[60] During the time of America's founding and participation in the Atlantic slave trade, America joined other countries such as Holland, France, and Britain in both touting the liberty of their people while actively enslaving and trading other people[61] Many Americans did not see the odd juxtaposition of slavery and liberty as we do today. In fact, some Americans understood that for America to guarantee liberty to all white men, it needed slavery: By enslaving a whole sect of people, it freed poor white men from being forced to tend the fields and gave every white male an avenue to economic autonomy once thought necessary for liberty.[62]

Voting marked one of the essential rights gained with liberty. During the Revolutionary War, as men fought against "taxation without representation," they began to question whether they could consider themselves free British subjects at all without the right to vote. One colonist asked, in [1]778, "how can a Man be said to [be] free and independent when he has not a voice allowed him."[63] After the Revolutionary War, suffrage increased drastically—states replaced property requirements, significantly reduced voting qualifications, and granted many soldiers liberty.[64]

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[59] Foner, at 183, quoting Murphy, *World War I* passim.
[60] Moses I. Finley, *Economy and Society in Ancient Greece* (New York, 1983), at 12.
[61] Foner, at 32.
[62] *Ibid.*
[63] *Ibid.*, at17.
[64] *Ibid.*, at 18.

Voting became a physical manifestation of liberty, and those who could vote were those who had the privilege of liberty. Voting was "the first mark of liberty, the only true badge of the freeman."[65]

People often tasked the government with protecting the privileges of liberty. Government protection varied based on the privilege itself. Though the government cannot take away a platform to speak as an individual or a poster to protest, the government does not have to protect it by ensuring one can exercise it, i.e., by giving a platform or way in which to protest. However, other rights saw explicit state action to ensure citizens could exercise them, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Earlier, President Woodrow Wilson even remarked on this transition from a concept of liberty as negative to a concept of liberty as positive. In discussing the 'New Freedom,' he remarked that "[f]reedom today is something more than being let alone. The program of a government of freedom must in these days be positive, not negative merely."[66] In 1936, a writer in a Christian newspaper wanted to remind readers that because Americans had been "so busy defending a traditional…concept of freedom from governmental control" they had forgotten that liberty could be protected "by the state" rather than needing protection from it.[67]

Liberty as Equality

Since the birth of American liberty, the concept has linked itself with the idea of equality.[68] As Thomas Paine advocated for American liberty, he said, "whenever I use the words freedom or rights I desire to be understood to mean a perfect equality of them…the floor of freedom is level as water." [69] Early America situated itself well for equality among white men. Hereditary titles did

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[65] William B. Scott, *In Pursuit of Happiness: American Conceptions of Property from the Seventeenth to the Twentieth Century* (Bloomington, 1977), at 76-78.

[66] Wilson, at 284.

[67] Frederick Heimberger, "Our Outworn Civil Liberties," *Christian Century*, April 22, 1936.

[68] *Ibid.*

[69] Foner, at 16.

not exist as they did in Britain, and the vast expanse of land allowed more men to have property than before. Thus, more men felt they deserved equal standing before the law and equal participation in all the rights and privileges afforded to those with liberty.

During the Revolution and its aftermath, equality also emerged as an element of liberty. Freemen were entitled to many things: the right to speak openly, the right to own property, the right to vote. However, they also felt being entitled to equality since it was an essential part of their concept of liberty. Noah Webster remarked that "equality is the very soul of a republic," and it was "more important than the other palladia of freedom," [70] such as free speech or press. Equality was not just something that went along with liberty or a prerequisite to liberty. Equality was an integral part of the concept of liberty itself.

This relationship continued well past the Revolutionary War. After the Civil War and the ratification of the Thirteenth Amendment, the government recognized people of color as citizens. However, the guarantee of citizenship did not entail the guarantee of liberty. By 1866, the Republican Party generally agreed that civil equality was an essential attribute of liberty.[71] In advocating for the Fourteenth Amendment, abolitionist, Republicans, and other activists sought to define liberty and establish the core rights that all American citizens could enjoy. [72] They introduced the novel concept of equality before the law, no matter the color of the citizen, which had been absent to prior American jurisprudence.[73] The ratification of the Fourteenth Amendment

[70] James L. Hutson, "The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765-1900," *American Historical Review*, 98 (October 1993), 1079-84.

[71] Foner, at 105.

[72] *Ibid.*, at 87.

[73] *Ibid.*

enshrined into the Constitution the concept of liberty espoused by political philosopher Francis Lieber: "Civil liberty is a state of unions with equals." [74]

The concept of liberty encompassing equality reemerges in American history often. During the Gilded Age, many Americans railed against the unequal distribution of wealth by claiming the inequality infringed on their liberty. Henry George, a prominent political economist during the Gilded Age, declared that "freedom [is] the synonym of equality."[75] Other social reformers of the Gilded Age and then Progressive Age agreed with the close link between liberty and quality.[76]

Plessy v. Ferguson and the case which effectively overturned it, *Brown v. Board of Education*, are perhaps the largest displays of the inherent link between liberty and equality.[77] In *Plessy*, Homer Plessy sued the State of Louisiana and later Judge John Howard Ferguson, who ruled in favor of Louisiana. Plessy contended that law mandating separate railway cars for separate races violated the Thirteenth and Fourteenth Amendments. The Court largely dismissed the claim arising under the Thirteenth Amendment. It focused on Plessy's claim that Louisiana denied him the "equal protection of the laws."[78] The Court concluded that the Fourteenth Amendment existed to "enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color."[79] Although Justice John Marshall Harlan dissented, declaring the Constitution to be "color-blind,"[80] the controlling opinion of the Court solidified that people of equal liberty were not entitled to the same, exact privileges—and therefore not truly equal.

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[74] Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago, 1995), at 83.
[75] Henry George, *Progress and Poverty* (New York, 1884), at 493.
[76] Foner, at 119.
[77] 163 U.S. 537 and 347 U.S. 483.
[78] Ibid., at 556.
[79] Ibid., at 543.
[80] *Plessy*, at 559 (Harlan, J., dissenting).

This scenario would end in 1954 when the Supreme Court issued its unanimous decision in *Brown v. Board of Education*. *Brown*, much like *Plessy*, did not deal with the Due Process Clause of the Fourteenth Amendment: it dealt with the Equal Protection Clause. The decision established that the *Plessy* doctrine of "separate but unequal" did not align with the Fourteenth Amendment and was inherently unequal when it came to public education.[81] Through *Brown*, and subsequent actions such as the Civil Rights Act of 1964 and *Loving v. Virginia*, America made clear that liberty and equality were linked: free people should have equal choice and treatment regardless of their skin color. The concept of liberty as equality characterized the rhetoric of the Civil Rights Movement. In his "I Have A Dream" speech of 1963, Martin Luther King, Jr. asserted that the lack of equality for black citizens meant that "one hundred years [after emancipation], the Negro still is not free."

Liberty and Wartime

Veterans and active military members traditionally have a special relationship with liberty. This relationship developed in the colonies, where state militia demanded the ability to elect their representatives even if they did not meet the age and property requirements.[82] By fighting for their state, soldiers felt they deserved the full benefits of liberty and, therefore, full enfranchisement. In some states, rather than carving an exception to current property requirements, they enfranchised veterans of the War of Independence by rewarding them with three hundred acres of land a slave.[83] Slaves during the War of Independence flocked to fight for the British after the royal governor of

[81] 397 U.S. at 493

[82] Foner, at 17

[83] Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York, 1975), at 380-385.

Virginia promised liberty to all slaves in America who joined the royal forces.[84] The War of Independence established two long-standing traditions. First, wars were generally fought for and thought of in terms of liberty and freedom. Second, the war generally expanded liberty.

Both sides claimed to have fought for the Civil War for liberty.[85] The North worked to ensure that the nation remained whole and, as one Indiana sergeant wrote, "the beacon light of liberty and freedom to the human race."[86] President Lincoln also made clear the North fought to give liberty to the slaves, since "in giving freedom to the slave, we assure freedom to the free."[87] The South also viewed liberty as its cause. Though the Confederacy's Vice President, Alexander H. Stephens, made clear that slavery was the "cornerstone" of his new nation, the men of the confederacy considered themselves in a "struggle for liberty." [88] One Alabama corporal wrote that he was "engaged in the glorious cause for liberty and justice" when fighting for the South.[89] The result of the Civil War and Reconstruction Era expanded liberty to all male citizens.

Advertisements and literature promoting America's involvement in World War I touted it as the "the great cause of freedom."[90] The government often used the Statue of Liberty as a motif, sometimes accompanied by the phrases "You came here seeking Freedom. You must now work to help preserve it."[91] Freedom also served as a "masterword" for the Cold War.[92] American soldiers

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[84] Sylvia R. Frey "Between Slavery and Freedom: Virginia Blacks in the American Revolution," *The Journal of Southern History* 49, no. 3 (1983).

[85] Foner, at 95.

[86] James M. McPherson, *What They Fought For*. (Louisiana State University Press: Louisiana, 1994).

[87] Baslert, at V, 37.

[88] Foner, at 95.

[89] *Ibid.*

[90] Stephen Vaughan, *Holding Fast the Inner Lines: Democracy, Nationalism, and the Committee on Public Information* (Chapel Hill, 1980), at 186.

[91] Rudolph J. Vecoli, "The Lady and the Huddled Masses: The Statue of Liberty as a Symbol of Immigration," in *The Statue of Liberty Revisited: Making a Universal Symbol*, ed. Wilton S. Dillon and Neil G. Kotler (Washington, DC, 1994), at 53.

[92] Foner, at 260.

fought in Vietnam ensure the "survival of liberty,"[93] and military involvement in the Middle East during the twenty-first century was officially called "Operation Enduring Freedom."[94] Other motifs surrounding liberty, such as Liberty Bonds, further sparked American support for the war. One newspaper with primarily black readership urged its readers to enlist so that they could eventually "make our own America a real land of the free."[95]

As a result of World War I and women's participation in the war effort, women would soon after achieve suffrage.[96] A similar expansion of liberty followed the war in Vietnam: eighteen-year-olds won the right to vote after participating in the war. [97] Veterans of World War II saw their economic liberty expand in the form of the GI Bill. This concept reemerged in the Post-9/11 Veterans Educational Assistance Act of 2008.

America touted the Allies of World War II as an alliance of "freedom-loving nations," and its goal to liberate Europe and craft it into a free society once more.[98] President Franklin D. Roosevelt's emphasis on the Four Freedoms pitted liberty as a central concept in America's place on the world stage. It also worked to, as he claimed, translate liberty into "modern terms" and create "new freedoms."[99] Like World War II, the Cold War also reshaped the meaning of liberty. It drew focus on liberty as a guarantee to free enterprise and as something to preserve, as opposed to earlier rhetoric, which focused on fighting for liberty.[100] Freedom became a rallying cry against the tyranny of communism, and its defining feature became the ability to choose.[101]

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[93] *Ibid.,* at 291.
[94] "Operation Enduring Freedom Fast Facts." (*CNN*. Cable News Network, December 24, 2019).
[95] *The Crisis*, September 1917.
[96] Foner, at 97.
[97] *Ibid*.
[98] *Ibid.*, at 221.
[99] *Ibid.*, at 234.
[100] *Ibid.*, at 252.
[101] *Ibid.*, at 264.

Liberty as Property

Earlier conceptions of liberty required men to have property to be considered free. To be free, one also had to have mastery over land or people. If one depended on another for a livelihood, such as wives or servants, one could not genuinely have liberty. As James Wilson, a Pennsylvania jurist, wrote, in 1774, "freedom and dependence are opposite and irreconcilable terms."[102] Further, servants, though not slaves to any man, were considered "a middle rank between slaves and freeman."[103] While servants had freedom to move and do as they please, they depended on other men to earn a wage and subsist. Therefore, the colonial concept of liberty did not include them.

As equality and voting had done at specific points in American history, property became a defining feature of liberty. The right to property was "the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty."[104] Many colonists, especially from the South, viewed the very idea of abolition as an assault on their liberty: slaves were their property, and abolition would strip them of their slaves without consent. As long as physical property tied itself tightly to liberty, slaveholders could firmly latch slavery to liberty.

However, as concepts of liberty evolved, so did concepts of property. Rather than viewing property as physical ownership of land or people, colonialists started to accept that people could own intangible property. At the Constitutional Convention of 1787, James Madison declared that "A man has property in his opinions and the free communication of them, he has property in…the safety and liberty of his person."[105] Therefore, liberty did not have to entail physical property. By

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[102] Foner, at 8

[103] *Ibid.*

[104] Sylvia R. Frey, "Liberty, Equality, and Slavery: The Paradox of the American Revolution," in *The American Revolution: Its Character and Limits*, ed. Jack P. Greene (New York, 1987), 241-42.

[105] Foner, at 50.

1860, every state had eliminated property requirements to vote.[106] Political philosophers, like Francis Lieber, argued that there were "thousands of men without property who have quite as great a stake in the public welfare as those who may possess a house or enjoy a certain amount of revenue."[107]

Eventually, the concept of liberty as property reemerged. Edward Bellamy writes: "I am aware that you called yourself free in the nineteenth century…the meaning of the word could not then, however, have been at all what it is at present."[108] In the nineteenth century, liberty had lost its connections to property. However, activists in the Gilded and Progressive Ages reintroduced the concept. If citizens had "personal dependence upon others as to the very means of life,"[109] then they did not indeed have liberty. The government worked to protect the liberty of its citizens. If property were an element of liberty, then the government should work to ensure that its citizens have property.

Liberty and the Oppressed

Throughout the history of American liberty, the concept of liberty has been exclusive. Colonialists, and their British compatriots, viewed liberty as exclusively English. The famous poet John Dryden claimed that liberty in any other land would not thrive, and "freedom [was] an English subject's sole prerogative." [110] Yet, the symbolism of liberty pervaded through American culture, and the yearning for liberty was evident. Eventually, everyone wanted equal rights under the law

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[106] *Ibid.*, at 52.
[107] Francis Lieber, *On Civil Liberty and Self-Government* (Philadelphia, 1859), at 176-177.
[108] Edward Bellamy, *Looking Backward, 2000-1887* (New York, 1986), at 284.
[109] *Ibid.*
[110] James Kinsley, ed., *The Poems of John Dryden* (4 vols. Oxford, 1958), at I, 450.

and equal access to the privileges that came with liberty. Historically marginalized adopted liberty for their own purposes. [111]

During Manifest Destiny, American settlers traveled west and forced Native American tribes off their land. American settlers violated basic concepts of Native American's liberty. Settlers took control of Native American property and land, and they denied Native Americans the ability to determine the course of their own life. Sitting Bull, a Native American resistance leader during the nineteenth century, exclaimed that "the life my people want is a life of freedom." [112] In the early twentieth century, when the United States passed measures against Chinese immigration and naturalization, Chinese people claimed liberty for their own. One activist argued that "liberty and greatness" depended on "whether this statute against the Chinese or the statue of Liberty will be the more lasting monument."[113]

Black liberation—both in its early stages of emancipation from physical slavery and in its later stages of equal liberty—used and reshaped the rhetoric of liberty. When advocating discussing the idea of black liberation, one journalist remarked that "the whites seem wholly unable to comprehend that freedom for the negro means the same thing as freedom for them. They readily admit that the Government has made him free, but appear to believe that they have the right to exercise the same old control."[114] Abolitionists fought for the liberty provided to them by the government to be extended to all males, regardless of skin color. After the Civil War and the ratification of the Reconstruction Amendments, liberty seemed within reach of all Americans. However, claims still arose that black Americans did not truly comprehend the concept of liberty.

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[111] Foner, at 79-80.
[112] Foner, at 51.
[113] Vecoli, at 45.
[114] Foner, at 51.

In 1901, future President Woodrow Wilson wrote that black Americans were "unpracticed in liberty" and "excited by a freedom they did not understand." [115] As Reconstruction ended and the Gilded Age emerged, blacks Americans and poor Americans started to understand the blessing of liberty to demand the security of their rights and economic abilities. The mere promise of liberty provided by the Constitution failed to bring black Americans up to an equal status with other liberated men. W. E. B. Du Bois declared the current freedom provided to black Americans a "mockery" and decided that "liberty [was] a lie." [116] The "new day" of liberty would only come into reach when the government ensured black Americans economic security and jobs. [117] Thus, when President Roosevelt enacted the New Deal, black Americans finally thought they had a chance to reach "the promised land of liberty." [118] Black citizens further celebrated Roosevelt's Four Freedoms but wanted to ensure equal liberty, i.e., that the freedoms would "apply to black Americans as well as to the brutalized people of Europe and to the other underprivileged peoples of the world."[119]

Liberty was a defining feature of the rhetoric of the Civil Rights Movement. As if taking black activist Ella Baker's suggestion to allow the oppressed to define their own liberty,[120] black activists elevated the word from the propaganda which had tied itself to liberty throughout the twentieth century and cast aside standard assumptions about liberty. [121] They imagined it as a word

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[115] Woodrow Wilson, "The Reconstruction of the Southern States," *Atlantic Monthly*, 87 (January 1901), at 6.

[116] W.E.B. Du Bois, *The Souls of Black Folk* (New York, 1903), at 219.

[117] David Howard-Pitney, *The Afro-American Jeremiad: Appeals for Justice in America* (Philadelphia, 1990), at 111.

[118] *Ibid.*

[119] Rayford Logan, ed., *What the Nego Wants* (Chapel Hill, 1944).

[120] Foner, at 279.

[121] Foner, at 275-277.

entailing both the positive and negative conception, as well as many other conceptions like equality, dignity, and power.[122]

Liberty as More than Constraint

One of the most common definitions of liberty is "freedom from bondage…or imprisonment."[123] However, the American conception of liberty has traditionally meant more than mere freedom of movement or freedom from enslavement. In the colonial period, John Adams asserted that liberty meant more than just freedom from restraint. He claimed that "individual liberty is individual power," and, therefore, liberty only existed when one could achieve one's goals and determine one's life. [124]

The concept of liberty entailing more than freedom of movement gained quick acceptance in the Reconstruction Era. Future President James Garfield questioned, "What is freedom? Is it the bare privilege of not being chained? If this is all, then freedom is a bitter mockery, a cruel delusion."[125] After the states and Congress ratified the Thirteenth Amendment in 1865, slavery no longer existed, and all males in the country had, at least legally at the federal level, freedom from bondage. But they did not have liberty. It was clear to advocates of the Fourteenth Amendment that liberty meant "both escaping the myriad injustices of slavery…and collective empowerment, a share in the rights and entitlements of American citizens."[126] Just because the Thirteenth Amendment gave black Americans the freedom to move and live as humans, rather than as slaves, does not mean that it gave them liberty.

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[122] Foner, at 275-277.

[123] "liberty, n.1". OED Online. March 2020. Oxford University Press. https://www-oed-com.ezaccess.libraries.psu.edu/view/Entry/107898?rskey=tM85tx&result=1.

[124] Adrienne Koch and William Peden, eds., *Selected Writings of John and John Quincy Adams* (New York, 1946), 342.

[125] Burke A. Hinsdale, ed., *The Works of James Abram Garfield* (2 vols. Boston, 1882-83), I, 86.

[126] Foner, at 101

The Fourteenth Amendment answered the question of whether "the United States [will] give [former slaves] freedom or its shadow?"[127] The Due Process Clause of the Fourteenth Amendment guaranteed every citizen due process before states infringed on their right to life, liberty, or property.[128] In the words of one Senator, its adoption made sure "that the man made free by the Constitution of the United States" was "a freeman indeed." [129] The liberty contained within the Fourteenth Amendment reflected the fact that liberty went beyond mere freedom from bondage. It also went beyond other conceptions of liberty, such as liberty as property. Years after the Fourteenth Amendment's ratification, Supreme Court Justice Louis Brandeis would remark that he "cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[130] The Fourteenth Amendment guarantee of liberty had long been interpreted to apply to the broad conceptions of liberty that existed during its ratification and now.

Domestic Liberty

Family rights have long been a centerpiece of conceptions of liberty. When America permitted slavery, the inability to have control over their own family marked one of the cruelest aspects of not having liberty. [131] Owners could sell off members of the family, as punishment or merely for profit, and slaves had no control over protecting or providing for their relatives. For slaves advocating for their freedom and then newly liberated slaves, the ability to form stable families became a defining attribute of liberty. [132]

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[127] H.S. Beals to Samuel Hunt, December 30, 1865, American Missionary Association Archives, Amistad Research Center, Tulane University.

[128] US Const. 14 Amend.

[129] Foner, at 110.

[130] Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, MA, 1984), at 314-320.

[131] Foner, at 110.

[132] *Ibid.*

However, some viewed marriage itself as a form of slavery. George Fitzhugh, a pro-slavery social theorist, worried that the eradication of slavery would drive with it the eradication of marriage since "marriage is too much like slavery not to be involved in its fate."[133] The Reconstruction Era did not usher in a new concept of liberty involving women. However, the Progressive Era a few decades later did. Charlotte Perkins Gilman, a feminist theorist, advocated for communal spaces often dominated by females—nurseries, cafeterias, and laundries. If women could exist in the domestic sphere and enter the workforce as independent economic agents, they could achieve "domestic liberty" and enjoy the true blessings of liberty. [134]

Activists continued to strive for liberty and continued to champion a new definition of the concept. One activist Crystal Eastman explained that women "are really after…freedom," a concept she thought entailed "emotional freedom" and sexual autonomy rather than just being the right to vote or the "industrial freedom" often touted in the age. [135] The feminist and anarchist Emma Goldman argued that liberty included "unlimited freedom of expression" and "freedom in love and freedom in motherhood." [136]

In the sixties, as sexual freedom ran rampant through the counter culture of the times, women started to change how they approached the concept of liberty.[137] After reading *The Feminine Mystique*, one Atlanta woman wrote that "freedom was a word I had taken for granted" until she realized that she "had voluntarily enslaved herself."[138] But while youth remained committed to "free love," feminists acknowledged that "women's liberation went far beyond

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[133] Stephanie McCurry, "The Two Faces of Republicanism: Gender and Proslavery Politics in Antebellum South Carolina," *Journal of American History*, 78 (March 1992), 1251-55.

[134] Foner, at 241.

[135] Blanche W. Cook, ed., *Crystal Eastman on Women and Revolution* (New York, 1978), at 53.

[136] Alice Wexler, *Emma Goldman: An Intimate Life* (New York, 1984), at 209-15.

[137] Foner, at 294-5.

[138] Foner, at 295.

sexuality."[139] In redefining liberty in their own terms and calling out the unequal relationship within the home, second-wave feminists proved that liberty involved even the most private areas of life.[140]

Economic Liberty

The link between liberty and property, and the idea that one needed property to enjoy liberty, was forged during the time of American colonies. But it reached its peak in American political life during the twentieth century. Advocates for economic liberty used liberty's common antithesis, slavery. They urged President Franklin D. Roosevelt to "be another Lincoln" and free them from the economic slavery of the times. If liberty meant the harsh poverty faced by many Americans, some began to wonder "if there's something different men can mean by Liberty."[141] President Roosevelt acknowledged during his presidency that the Great Depression meant "life was no longer free; liberty no longer real."[142] In exclaiming freedom from want as one of his Four Freedoms, President Roosevelt recognized "economic security…as a political condition of personal freedom." [143] New Deal politics ushered in a new mentality of social and industrial liberty gaining more attention than political liberty. [144] One CIO organizer explained the focus on non-political liberties by exclaiming that "political liberty for which our forefathers fought is made meaningless by economic inequality."[145] Others agreed that the most significant restrictions of

[139] Foner, at 299.
[140] Foner, at 298-299.
[141] *Ibid.*
[142] *Ibid.*
[143] Irwin Edman, *Fountainheads of Freedom* (New York, 1941), at 7, 186.
[144] Francis L. Broderick, *Right Reverend New Dealer: John A. Ryan* (New York, 1963), at 195.
[145] Foner, at 199.

liberty were economic rather than political, [146] and political liberty depended upon the achievement of industrial freedom. [147]

This focus on economic liberty birthed the concept of liberty of contract. American political Horace White claimed, "the right of each man to labor as much or as little as he chooses, and to enjoy his own earnings, is the very foundation stone of…freedom."[148] Liberty of contract meant the ability to enter into any voluntary contract, and the liberty of contract soon became, in the words of one economist, "the be-all and end-all of personal freedom."[149]

Judicial Concept of Liberty

The liberty to contract, like some other liberties, emerged primarily from a judicial interpretation of liberty. In *Lochner v. New York*, the Supreme Court ruled with a bare majority that New York's law requiring bakers work less than a certain amount of hours was "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."[150] The Court's decision sparked a span of thirty years, known as the *Lochner* era, in which the Court consistently invalidated programs to aid the working class in favor of the liberty to contract. The *Lochner* decision has not been viewed favorably by history, and most people across the political spectrum, view it as a miscarriage of justice.[151] Later, Supreme Court Justice Louis D. Brandeis insisted that social welfare itself (which

[146] Walter E. Weyl, *The New Democracy* (New York, 1912), at 3, 164.
[147] Basil Manley in Pease, ed., *Progressive Years*, at 157-60.
[148] Horace White in Cohen, "Problem of Democracy," 86.
[149] Foner, at 119.
[150] Lochner v. New York, 198 U.S. 45 (1905) at 57.

[151] Thomas Colby and Peter J. Smith, The Return of Lochner (2015). 100 Cornell L. Rev. 527 (2015); GWU Legal Studies Research Paper No. 2015-10; GWU Law School Public Law Research Paper No. 2015-10. 5

Lochner and subsequent decisions largely overturned) was part of the concept of liberty enshrined in the Fourteenth Amendment.[152]

The *Lochner* case was not the first instance of the judiciary attempting to define the Fourteenth Amendment's guarantee of liberty. The process of incorporating the Bill of Rights, which started in the late 1800s with *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,[153] largely set the stage for judicial interpretations of liberty. Before the ratification of the Fourteenth Amendment, the Supreme Court understood the Bill of Rights to only apply to the federal government and its actors.[154] Even after the states and Congress ratified the Fourteenth Amendment, the Supreme Court continued to hold that its guarantee of liberty did not require states to uphold traditional liberties like free speech and press.[155] However, in *Gitlow v. New York*, the Supreme Court held that the rights of free speech and press were "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."[156]

The Supreme Court would continue to interpret what the Fourteenth Amendment's guarantee of liberty meant. It interpreted it to incorporate more rights explicitly mentioned in the Bill of Rights and even expanded the definition of some of those rights. For example, in *Whitney v. California*, it ruled that state laws against red flags were "repugnant to the guaranty of liberty contained in the Fourteenth Amendment."[157] The Supreme Court also crafted new interpretations of liberty not found in the Bill of Rights, such as expanding the definition of civil liberties:

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[152] Foner, at 158.
[153] 166 U.S. 226 (1897).
[154] *Barron v. Baltimore*, 32 U.S. 243
[155] *United States v. Cruikshank*, 92 U.S. 542 (1876)
[156] *Gitlow v. New York*, 268 U.S. 652 (1925).
[157] *Whitney v. California,* 274 U.S. 357 (1927).

defendants have a constitutional right to effective counsel, and states cannot systematically exclude blacks from juries.[158] In one instance, it decided that "liberty" required "the protection of the law against the evils which menace the health, safety, morals, and welfare of the people."[159] This concept birthed the new judicial defense of liberty. The Warren Court expanded the concept and entitled Americans to new rights placed beyond the jurisdiction of the legislative branch.[160] It also discovered new rights within the Fourteenth Amendment, such as the right to privacy, which, while the Constitution never mentions "privacy," was ruled to be within the concept of the liberty contained in the Fourteenth Amendment.[161] The Court would later declare in 1992 that "at the heart of liberty is the right to define one's own concept of existence,"[162] throwing into jeopardy the emerging conservative viewpoint on moral liberty which disproved "of homosexuality, premarital sex, looser divorce laws, and contraception."[163] The justice who wrote about the "heart of liberty," Anthony Kennedy, would author *Obergefell v. Hodges* twenty-three years later.

The Rhetorical Situation of *Obergefell*

Exigence

There are three aspects of the rhetorical situation. The first is exigence, which Bitzer defines as "an imperfection marked by urgency; . . . a defect, an obstacle, something waiting to be done, a thing which is other than it should be."[164] For the Supreme Court to act, there must be

[158] Dan T. Carter, *Scottsboro: A Tragedy of the American South* (Baton Rouge, 1969).
[159] Rudolph J. R. Pertiz, *Competition Policy in America 1888-1992* (Ney York, 1996), 163.
[160] Foner, at 300.
[161] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[162] *Planned Parenthood v. Casey*, 505 U.S. 833 (2003).
[163] Foner, at 319.
[164] Lloyd F. Bitzer, "The Rhetorical Situation," *Philosophy and Rhetoric* 1 (1968), at 6.

exigence. The Founders created the Supreme Court as a reactionary branch. In order to be heard before the Court, an issue must already exist, and, usually, one must have already been harmed. Typically, every argument before the Supreme Court has already been argued before one or more other courts, and the Supreme Court is tasked with affirmed or remanding the prior opinion. By accepting a case, the Supreme Court acknowledges that an imperfection possibly exists and should be reviewed.

In *Obergefell v. Hodges*, the exigence emerged from the issue of marriage equality. The Supreme Court had been mainly absent from the cause for gay rights. Its first decision to directly impact gay rights came in 1958 when it decided that the U.S. Post Office could not treat a magazine published for gay people differently, as they did not consider the magazine to be obscene.[165] After that, it stayed silent on the issue of marriage equality, even denying a case in 1971 "for want of a federal question."[166] Though the Court did accept cases involving gay rights, notably the 2003 *Lawrence v. Texas* case, which struck down Texas's law banning "homosexual conduct,"[167] the question of whether marriage could include same-sex couples, and by nature whether liberty included the right to marry whomever you choose, mostly fell to state courts and the legislature.

Different state courts and legislatures produced different results. In 1993, the Hawaii Supreme Court hinted at the possibility that denying marriage licenses to same-sex couples could be an "unnecessary abridgments of constitutional rights."[168] In response, the federal government passed the Defense of Marriage Act in 1996, which reserved federal recognition of marriage to

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[165] *One Inc.* v. *Oleson* 355 U.S. 371 (1958).

[166] "Baker v. Nelson: The Legal Briefs," *The New York Times* (The New York Times Company, May 16, 2015), https://www.nytimes.com/interactive/2015/05/13/us/document-baker-vs-nelson-case.html.

[167] 539 U.S. 558 (2003).

[168] *Baehr* v. *Miike*, 80 Haw. 341, 910 P.2d 112 (1996).

only different-sex couples. In 2003, the Massachusetts Supreme Judicial Court ruled that denying same-sex marriage licenses violated the Massachusetts Constitution,[169] and in 2004 Massachusetts became the first state to issue and recognize same-sex marriage licenses.[170] In 2009, Vermont became the first state to legalize same-sex marriage through legislation rather than litigation.[171]

By the time *Obergefell* reached the Supreme Court, four states had legalized same-sex marriage through a state court decision, two through legislation passed after a state court decision, nine by legislation, three by legislation passed after a federal court decision, one by ballot initiative, and sixteen by federal court decisions. Moreover, three federal circuit court of appeals ruled that bans on same-sex marriage were unconstitutional, and one ruled that the bans were constitutional. The split circuit decisions further emphasized the imperfection in constitutional interpretation and triggered Supreme Court review.[172]

Audience

The audience is Bitzer's second element of a rhetorical situation. "Since rhetorical discourse produces change by influencing the decision and action of persons who function as mediators of change, it follows that rhetoric always requires an audience. . .."[173] Scholar Robert Prentice identifies certain audiences common in the rhetorical situation of Supreme Court cases: other Justices, the litigants, lower courts and administrative agencies, the President and Congress, and the American public.[174]

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[169] *Goodridge v. Department of Public Health,* 798 N.E.2d 941 (Mass. 2003).

[170] Pam Belluck, "Massachusetts Arrives at Moment for Same-Sex Marriage," *The New York Times* (The New York Times Company, May 17, 2004).

[171] Szep, Jason, "Vermont Becomes 4th U.S. State to Allow Gay Marriage," *Reuters* (Thomson Reuters, April 7, 2009).

[172] *Obergefell v. Hodges*, 576 U.S. 644, ___ (2015) (slip op., at 26).

[173] Bitzer, at 7 – 8.

[174] Prentice, at 95-98.

The audience of *Obergefell* was unusually large. Rather than having just two litigants, *Obergefell v. Hodges* was a consolidation of cases that represented forty-one people and an adoption agency.[175] Six lower courts had already heard arguments for and against bans on same-sex marriage.[176] The case set the record for most amicus briefs filed.[177] Almost four hundred companies signed onto an amicus brief urging the Supreme Court to find in favor of the complainants,[178] and companies reacted to the case by rebranding in celebration of marriage equality.[179] Over ten million Tweets referencing the decision appeared the day of its announcement.[180]

The reactions from the White House and Congress were also notable. President Obama stated that the *Obergefell* decision "affirms what millions of Americans already believe in their hearts. When all Americans are treated as equal, we are all more free."[181] The White House lit up in a rainbow pattern to celebrate the decision.[182] Representative Steve King of Iowa, and eighteen other co-sponsors, introduced a Resolution to the House of Representatives stating that it disagreed with the majority opinion.[183]

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[175] Amanda Terkel, Kate Abbey-Lambertz, and Christine Conetta. "Meet The Couples Fighting To Make Marriage Equality The Law Of The Land." *HuffPost* (Huffington Post. December 7, 2017).

[176] *Ibid.*

[177] Totenberg, Nina, "Record Number Of Amicus Briefs Filed In Same-Sex-Marriage Cases," *NPR* (National Public Radio, April 28, 2015).

[178] *Obergefell*, at ___ (slip op. at 29) (Roberts, C.J., dissenting).

[179] Kim, Susanna, and Alexa Valiente, "Same-Sex Marriage: How Companies Responded to Supreme Court's Decision," *ABC News* (ABC News Internet Ventures, June 26, 2015).

[180] Twitter Data (@TwitterData), "Update: There have now been over 10 million Tweets about the Supreme Court's #MarriageEquality ruling. #LoveWins," Twitter, June 26, 2015, 17:55.

[181] Mollie Reilly, "Obama: SCOTUS Gay Marriage Ruling Is 'A Victory For America'," *HuffPost* (Huffington Post, June 26, 2015).

[182] Karl de Vries, "White House Lights with Rainbow Colors – CNNPolitics," *CNN* (Cable News Network, June 30, 2015).

[183] Steve King, "H.Res.359 - 114th Congress (2015-2016): Providing That the House of Representatives Disagrees with the Majority Opinion in Obergefell Et Al. v. Hodges, and for Other Purposes," *Congress.gov* (Library of Congress, July 29, 2015).

The Justices were certainly aware of the widespread audience engaged in this case. Many of the decisions contain rhetorical methods that draw attention to the fact that the opinions would be read by more people than the traditional lawyers, judges, and law students who read legal opinions. In his concluding paragraph, Chief Justice John Roberts writes:

> 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 partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[184]

Constraints

The final element of a rhetorical situation are constraints which are "made up of persons, events, objects, and relations which are part of the situation because they have the power to constrain decision and action needed to modify the exigence."[185] Prentice identifies common constraints in Supreme Courts as beliefs and attitudes, the facts of the case, traditions and precedent, the rhetor, the Court's legitimacy, accepted patterns of legal reasoning, and the decision-making process and writing style of the Court.[186]

In *Obergefell*, religious and historical beliefs about the traditional definition of marriage constrained the opinion. Other attitudes about liberty, equality, religious freedom, judicial activism, and democracy further constrained the opinion, and Justice Kennedy, writing for the majority, had to consider each in crafting a persuasive opinion. Furthermore, tradition had long viewed marriage as a religious institution and a union between man and women—something the

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[184] *Obergefell*, at ___ (slip op. at 29; Roberts, C. J., dissenting)
[185] Bitzer, at 8.
[186] Prentice, at 98-102

dissents in the case pointed toward.[187] The Court also previously denied to review a 1971 case concerning marriage equality.[188] Under the principle of *stare decisis*, the concept which urges Justices to let prior decisions stand and follow precedent, the denial of review in *Baker v. Nelson* further constrains the Justices.

Justice Kennedy, in writing for the majority, also limits the opinion. Justices have an interest in being viewed as logical and consistent judges, and the legal reasoning Kennedy chooses to include in the majority opinion will reflect legal opinion he views sound and persuasiveness. For example, Justice Kennedy was known for having an affinity for the concept of dignity in deciding cases.[189] Though the term does not appear in the Constitution, Kennedy included it nine times in the majority opinion of *Obergefell* and ends the opinion by stating that petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right."[190] Thomas argues against dignity as guiding jurisprudence in his dissent.[191]

The process of the Supreme Court further constrained the majority opinion. To be a controlling opinion, the opinion must gain approval from at least five justices, including its author. Therefore, the rhetoric of the opinion cannot only prescribe to one Justice's judicial philosophy or legal reasoning. It must cast a wide enough net to encompass the opinions of four colleagues while not straying from the author's reasoning. Even rhetorical decisions about the framing and wording of the decision can call the majority into question. In his dissent, Justice Scalia notes:

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[187] *Obergefell*, at ___ (slip op. at 4 and 7; Roberts, C. J., dissenting) (slip op. at 4; Scalia, J., dissenting) (slip op. at 12 ft. 5; Thomas, J., dissenting)

[188] *Baker* v. *Nelson* 409 U.S. 810 (1972).

[189] Liz Halloran, "Explaining Justice Kennedy: The Dignity Factor," *NPR* (National Public Radio. June 28, 2013).

[190] *Obergefell*, at ___ (slip op. at 3,6, 7, 10, 13, 21, 26, and 28).

[191] *Obergefell*, at ___ (slip op. at 2, 16-17; Thomas, J., dissenting).

"If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. 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."[192]

[192] *Obergefell*, at ___ (slip op. at 7 ft. 22; Scalia, J., dissenting).

Chapter 3

The Majority Opinion

General Rhetorical Considerations

Justice Kennedy's judicial philosophy acted as a considerable constraint in the decision of *Obergefell*. He was the most conservative Justice in the majority. Therefore, he hardly needed to work hard to persuade the more liberal Justices, essential members of his audience, to join his opinion. As is often the case, the majority of Justices decided to assign the case to the Justice most likely to switch sides. By having Justice Kennedy author the opinion, he was sure to agree with the legal reasoning and framing of the issue. This method proved effective, and Justice Kennedy almost single-handled crafted the Supreme Court's approach to LGBT rights. Kennedy authored *Romer v. Evans*,[193] *Lawrence v. Texas*,[194] *Obergefell v. Hodges*,[195] and *Masterpiece* v. *Colorado Civil Rights Commission*.[196]

Given its large audience and the anticipation of it, the Court employed other rhetorical means before even deciding the case. The majority opinion's conclusion will apply to the nation as a whole. Though the Supreme Court of the United States is just that, a court for the entire United States, the consolidation of cases from four different states, Michigan, Kentucky, Ohio, and Tennessee,[197] helps to bolster the majority's opinion by framing its definition of liberty as a definition for the entire United States. The opinion is not discussing just one case or striking down the law of just one state. Instead, it contributes to the entire nation's conception of liberty and

[193] 517 U.S. 620 (1996)
[194] 539 U.S. 558 (2003)
[195] 576 U.S. 644 (2015)
[196] 584 U.S. ___ (2018)
[197] *Obergefell*, at ___ (slip op. at 2).

applies to all states. By dealing with cases from multiple states, the opinion reinforces its application and scope.

Kennedy contributes to the ongoing dialogue of liberty by conceptualizing liberty as dignity. However, Kennedy works to couch his interpretation of liberty as dignity in historical conceptions of liberty and prior judicial definitions. The myriad of ways liberty has been conceived throughout American history often reappear in the majority opinion, and Kennedy uses these to give his opinion historical weight and institutional legitimacy while still introducing a broader concept of liberty as dignity.

Liberty as Privilege

A prevailing theme in American history and Kennedy's opinion is the idea of liberty as privilege.[198] In the opening of the majority decision, Kenney writes that "the Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex."[199] Kenney draws upon a positive conception of liberty, viewing it as certain rights that include an ability *to* do something, namely define and express identity. Kennedy frames liberty such that it affords citizens certain privileges by the nature of their citizenship. Among these privileges is the ability to seek liberty by marrying a same-sex partner. Kennedy decides to forgo explicitly defining liberty as entailing certain privileges and chooses not to explain his rationale. In fact, at no point during his opinion does he engage at all with the direct question of what liberty precisely means, whether it is only a positive or negative variation, or anything of the like. Constrained by the narrow issue of the case and the need to speak

[198] *Supra*, at 12.
[199] *Obergefell*, at ___ (slip op. at 12)

to a broad public audience awaiting the decision, Kennedy chooses to start with a rhetorical flourish rather than dense legalese. In doing so, he opens the opinion speaking primarily to the general audience.

Though he chooses not to include rationale for a positive conception of liberty, Kennedy remains consistent in his conception of liberty entailing privileges. Kennedy acknowledges that "the petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition."[200] Kennedy does not frame the argument as the government infringing on rights by taking action and petitioners advocating for liberty *from* the government's actions. Instead, he frames the issue as the government failing to grant their right to marry or give full recognition of marriages performed in other states. Kennedy commits himself to a positive conception of liberty as access and entitlement to privileges.

Kennedy explicitly links marriage to the entitlement of benefits. He writes that "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[201] He notes that these benefits are not required, and "States are in general free to vary the benefits they confer on all married couples."[202] However, he also notes that historically marriage, like liberty, entailed a citizen to "an expanding list of governmental rights, benefits, and responsibilities."[203] In this way, he not only furthers the conception of liberty as privileges but also creates a synonymous equation in which both liberty and marriage achieve the same goals. Therefore, in stating that "by virtue of their

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[200] *Ibid.*, at ___ (slip op. at 2).
[201] *Ibid.*, at ___ (slip op. at 16).
[202] *Ibid.*, at ___ (slip op. at 17).
[203] *Ibid.*

exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage,"[204] he implies that those benefits linked to marriage should be afforded to any married citizen, regardless of the sex of the partner.

Liberty as Equality

Kennedy also continues the tradition of liberty as equality. In the opening paragraph, Kennedy immediately links the petitioners' drive for liberty as a simultaneous drive for equality. They want "their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex."[205] Kennedy frames the denial of liberty as an inherently unequal scenario, and to achieve liberty, the petitioners must concurrently achieve equality by having the same terms and conditions as different-sex marriages.

Kennedy reengages with the concept of liberty as equality towards the second half of the opinion. He writes that "as the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects."[206] Kennedy frames the states' decision to afford special privileges and significance to marriage as a requirement also to afford an equal opportunity for all people to access those special privileges and significance. Since states do not afford those same privileges and significance to people who enter into unions with same-sex partners, the state unequally treats same-sex marriages. For members of the LGBT community to truly gain the liberty Kennedy believes the Fourteenth Amendment guarantees them, states must uphold equal treatment in the privileges and opportunities that citizens gain through marriage.

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[204] *Ibid.*
[205] *Ibid.*, at ___ (slip op. at 2).
[206] *Ibid..*, at ___ (slip op. at 17).

Although courts usually view the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment as separate guarantees, Kennedy works to persuade readers that liberty can be conceptualized as equality, and equality as liberty, by converging the two clauses. Kennedy writes that "under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples" and "the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[207] Kennedy, for the first time in his LGBT jurisprudence, finds LGBT rights derived from both the Due Process and Equal Protection Clauses. In his first LGBT case, *Romer v. Evans*, Kennedy struck down a clause targeting members of the LGBT community unconstitutional because it violated the Equal Protection Clause.[208] In his next case to deal with gay rights, *Lawrence v. Texas*, Kennedy used the Due Process Clause to strike down a law outlawing sodomy.[209] In this case, certainly more expansive that the *Romer* case, which dealt exclusively with a Colorado amendment, and *Lawrence*, which dealt with a rarely enforced Texas law, Kennedy uses both clauses of the Fourteenth Amendment as means of persuasion.

Kennedy argues that the relationship between liberty and equality, and the interrelation of liberty as equality and equality as liberty, "furthers our understanding of what freedom is and must become."[210] Kennedy crafts equality as an informative measure to help discover and further interpret the guarantee of liberty. He believes that "each concept—liberty and equal protection—leads to a stronger understanding of the other."[211] This strengthens his argument that the

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[207] *Ibid.*, at ___ (slip op. at 19).

[208] 517 U.S. 620

[209] 539 U.S. 558. Justice Sandra Day O'Connor concurred with the judgment but argued that the law violated the Equal Protection Clause and not the Due Process Clause.

[210] *Obergefell*, 576 U.S., at ___ (slip op., at 19).

[211] *Ibid.*, at ___ (slip op., at 21).

petitioners, in fighting for equality, are actually fighting for equal liberty. Denying them this equality, the principle "at the heart of the Fourteenth Amendment," deprives them of not only equal treatment but also "of liberty without due process."[212]

Though Kennedy claims a strong link between liberty and equality, he still crafts the opinion so both hold independent persuasive power. Kennedy writes that "the challenged laws burden the liberty of same-sex couples" and then goes on to "further acknowledge[] that they abridge central precepts of equality."[213] By arguing for both, jointly and independently, Kennedy allows liberty to be conceived as equality while also maintaining the argument that not allowing same-sex marriage violates liberty, whether conceptualized as equality or not.

Liberty and Wartime

The third case that joined *Obergefell* centers around Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura.[214] DeKoe and Kostura married in New York before the army deployed DeKoe for a year in Afghanistan.[215] Upon his return, DeKoe started working full-time for the Army Reserve in Tennessee, where he decided to live with Kostura.[216] Kennedy describes how their "lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines."[217] He not only makes the pathetical appeal by describing a couple's marriage being "stripped" from them as they travel freely in the country but also states that "DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden" with the current state of marriage laws.[218]

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[212] *Ibid.*, at ___ (slip op., at 19 – 21).
[213] *Ibid.*, at ___ (slip op., at 22).
[214] *Ibid.*
[215] *Ibid.*
[216] *Ibid.*, at ___ (slip op., at 5 – 6).
[217] *Ibid.*, at ___ (slip op., at 6).
[218] *Ibid.*

As a result of consolidating *Obergefell* with a military case, Kennedy can bring the history of LGBT service members into the opinion and the link between liberty and military service. As he notes in the opinion, members of the LGBT community have been "barred from military service."[219] Usually, participation in the armed forces brought guarantees of liberty, and the denial of service meant gays and lesbians were shut out from one avenue toward liberty.[220] Traditionally, those who served in the army, often fighting wars for liberty, received the benefits of liberty when they returned home.[221] Kennedy writes that "DeKoe, who serves this Nation to preserve the freedom the Constitution protects, must endure a substantial burden."[222] Kennedy implicitly contrasts DeKoe's situation and the situation of so many other veterans who earned different aspects of liberty after service. When liberty mostly meant mastery and property, Revolutionary War veterans gained land and slaves; when liberty meant freedom from bondage, Civil War veterans, and every American, gained emancipation; when liberty meant voting, women and eighteen-year-olds gained liberty after World War I and the Vietnam War.[223] Kennedy frames this case a chance to guarantee the evolving concept of liberty to veterans once again and ensure that the liberty DeKoe fought to preserve is a liberty DeKoe can enjoy.

The DeKoe and Kostura case also draws parallels to the 1857 case of *Dred Scott v. Sandford*.[224] The *Dred Scott* case focuses on a slave whose master took him across state lines into free territory in between 1834 and 1838.[225] After being brought back into slave territory, Scott sued his owner, claiming that he should be granted freedom because he was taken into a free

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[219] *Ibid.*, at ___ (slip op., at 7).
[220] *Supra*, at 17.
[221] *Supra*, at 17 – 18.
[222] *Obergefell*, 576 U.S., at ___ (slip op., at 6).
[223] *Supra*, at 18.
[224] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[225] *Ibid.*, at 397-398.

territory.[226] Historian largely view *Dred Scott* as one of the worst decisions ever rendered by the Supreme Court. In *Dred Scott*, Scott's freedom is stripped from him whenever he resides in Missouri, returning and disappearing as he travels across state lines. In *Obergefell*, Kennedy writes that DeKoe's and Kostura's "lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines."[227] By invoking a covert reference to *Dred Scott*, as opposed to the overt one later discussed in Robert's dissent, Kennedy reminds the Court and the nation of the mistake the Court has made before by denying liberty to someone and tries to prevent repeating it.

Liberty and the Oppressed

Similar to the plight of other marginalized groups, members of the LGBT community flocked toward liberty as a saving grace. Kennedy works to characterize their situation in similar ways as other marginalized groups who have achieved conceptions of liberty. Kennedy notes that "gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate."[228] This list exposes ripe analogies to groups that have been similarly excluded under immigration laws, such as the Chinese, and targeted by police, such as black Americans. The Court has evolved to guarantee those oppressed groups' liberty with cases such as *Brown* v. *Board of Education*. Kennedy's decision to draw attention to the marginalization of members of the LGBT community enables him to link it to past cases when the Court extended marriage laws to include marginalized people, such as the right to intermarry.

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[226] *Ibid.*, at 398.
[227] *Obergefell*, 576 U.S., at ___ (slip op., at 6).
[228] *Ibid.*, at ___ (slip op., at 7).

Domestic Liberty

Beyond just conceptualizing liberty as entitlement to privileges, Kennedy presents those issues as sensitive matters of personal life. When describing the lack of recognition for James Obergefell's and John Arthur's marriage, Kennedy laments that "they must remain strangers even in death" and notes that Obergefell "brought suit to be shown as the surviving spouse on Arthur's death certificate."[229] This pathetic appeal not only couches the liberty sought as a profoundly personal, domestic ordeal, but it also minimizes the perceived harm: unless he chose to remarry, the extent of Obergefell's marriage equality would only be the liberty to be recognized as Arthur's surviving partner. By choosing Obergefell as the leading plaintiff, the plaintiffs displayed the benefits to domestic liberty of the case while diminishing the perceived harm.

Kennedy also chose to discuss the case of DeBoer and Rowse, a same-sex couple who were unable to both be recognized as parents of their children. DeBoer and Rowse's case reflects common themes before the Court: domestic liberty and parental rights. Since 1920, the Court has heard over a dozen cases directly arguing about parental rights.[230] The Court had already expanded the concept of liberty in the Fourteenth Amendment to incorporate the freedom to parent children in the way parents see fit: "in a long line of cases, [the Supreme Court has] held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children."[231] By tethering the case of same-sex marriage to the past cases of domestic liberty, Kennedy gains credibility to expand the concept of liberty by basing it, in part, on cases that previously expanded

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[229] *Ibid.*, at ___ (slip op., at 5).
[230] "Parental Rights Cases to Know," *American Bar Association*. February 1, 2016.
[231] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

the concept of liberty. Kennedy even explains his use of domestic liberty: " protecting the right to marry…safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[232] He further notes that these rights are conceptualized as one, "the right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."[233]

Judicial Concept of Liberty

To maintain legitimacy, Kennedy had to show that the Supreme Court had the jurisdiction to interpret, and redefine, liberty. Kennedy attempts to do this by claiming the "generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[234] To further his claim of the judiciary's ability to conceptualize liberty, Kennedy spent space in the opinion discussing and framing the Court's prior conceptions of liberty in similar cases. The Court had previously extended the concept of liberty in the Fourteenth Amendment to "most of the rights enumerated in the Bill of Rights" and "to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[235]

Kennedy also used the Court's experience with the concept of liberty to protect legitimacy. He cites the unanimous Court in *Loving* v. *Virginia*, which invalidated race-based restrictions on marriage and declared marriage to be "one of the vital personal rights essential to the orderly

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[232] *Obergefell.*, at ___ (slip op., at 14).
[233] *Ibid.*
[234] *Ibid.*, at ___ (slip op., at 11).
[235] *Ibid.*, at ___ (slip op., at 10).

pursuit of happiness by free men."[236] He also cites two additional cases in which the Court defined the concept of liberty within the context of marriage. By citing *Zablocki v. Redhail*, which allowed a father behind on child support to marry,[237] and *Turner v. Safley*, which overruled restriction on inmates marrying,[238] Kennedy builds the Court's credibility to determine how liberty should be interpreted as it applies to marriage.

Furthermore, Kennedy attempts to ground his decision in "history, tradition, and other constitutional liberties inherent in [the right to marry]" by citing these and additional cases, as well as respecting the "basic reasons why the right to marry has long been protected."[239] He tries to strip away the complexities of each case and argue that the Court ruled on the "right to marry in its comprehensive sense" rather than on a "right to interracial marriage" in *Loving*, "right of inmates to marry" in *Turner*, and a "right of fathers with unpaid child support duties to marry" in *Zablocki*.[240] By leaning on the history of past cases, Kennedy builds a case for the Court having the ability to determine the right to marriage holistically. Furthermore, by citing cases giving the Courts the duty to redress the violation of rights and reminding readers that "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections,"[241] Kennedy sets the stage for the judiciary to conceptualize liberty.

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[236] 388 U. S. 1, 12 (1967).
[237] 434 U. S. 374, 384 (1978).
[238] 482 U. S. 78, 95 (1987)
[239] *Ibid.*, at ___ (slip op., at 12).
[240] *Ibid.*, at ___ (slip op., at 24).
[241] *Ibid.*

Liberty as Dignity

Diverting largely from American history and judicial precedent, but staying quite close to his jurisprudence,[242] Kennedy framed liberty as dignity in *Obergefell*. From the beginning of the opinion, Kennedy conveys marriage as a dignified institution, noting that the "the lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life."[243] He is only willing to consider marriage as liberty if those who yearned for it also accepted the dignity of the institution. If "their intent [were] to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But, that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions."[244]

In *Windsor*, Kennedy argued that "responsibilities, as well as rights, enhance the dignity and integrity of the person."[245] In *Obergefell*, Kennedy found that the same-sex couples did not seek "to devalue marriage" but to "seek it for themselves because of their respect--and need--for its privileges and responsibilities."[246] Thus, the responsibilities of marriage would enhance the dignity of the individual. If liberty is conceptualized as dignity, then access to marriage is a quality of liberty.

Kennedy provides historical justification for the entwinement of marriage, dignity, and liberty. Kennedy considers "changed understandings of marriage" as "characteristic of a Nation where new dimensions of freedom become apparent to new generations."[247] He focuses on

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[242] Noah Feldman, "Justice Kennedy's Legacy Is the Dignity He Bestowed," *Bloomberg.com* (Bloomberg, June 27, 2018).

[243] *Ibid.*, at ___ (slip op., at 3).

[244] *Ibid.*, at ___ (slip op., at 4).

[245] 570 **U.S.** 744, at 766 (2013).

[246] *Obergefell.*, at ___ (slip op., at 4).

[247] *Ibid.*, at ___ (slip op., at 7).

freedom becoming apparent after the struggle for dignity. For example, he writes that "as women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned,"[248]which gave women more liberty. Kennedy uses dignity as an element of liberty, and, in attempting to persuade others in the majority opinion, he tracks the LGBT struggle for dignity.

After centuries of same-sex intimacy being immoral and often criminalized, "many persons did not deem homosexuals to have dignity in their own distinct identity.[249] Without dignity, members of the LGBT community had no avenue through which to attain liberty. Times developed, but at a slow pace. Kennedy notes that "even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions."[250] Same-sex intimacy largely remained a crime, and society marginalized members of the LGBT community. Strides toward LGBT liberation emerged in the late twentieth century, and "same-sex couples began to lead more open and public lives and to establish family."[251]

When Kennedy later describes the nature of marriage, he again reinforces marriage as a dignified institution that empowers people to "find other freedoms, such as expression, intimacy, and spirituality."[252] By describing this as a condition of marriage regardless of sexual orientation, Kennedy elevates members of the LGBT community to a dignified status, stating that "there is dignity in the bond between two men or two women who seek to marry and in their autonomy to

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[248] *Ibid.*, at ___ (slip op., at 6).
[249] *Ibid.*, at ___ (slip op., at 7).
[250] *Ibid.*
[251] *Ibid.*, at ___ (slip op., at 8).
[252] *Ibid.*, at ___ (slip op., at 13).

make such profound choices."[253] Continuing to frame the concepts of dignity and marriage as conceptions of liberty, Kennedy states that "the right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[254]

Kennedy's decision to frame liberty as dignity further enables him to employ additional rhetorical methods. By invoking *Lawrence* v. *Texas*, Kenney bases his decision, in part, on a case which "drew upon principles of liberty and equality to define and protect the rights of gays and lesbians" while securing dignity for members of the LGBT community by ruling the state "cannot demean their existence or control their destiny by making their private sexual conduct a crime."[255] Kennedy uses *Lawrence* v. *Texas* as an example of when the Court "confirmed a dimension of freedom," but asserts that "outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[256] In order to achieve that, Kenney essentially returns to his argument for the dignity of the couple itself, "for the recognition, stability, and predictability marriage offers," and for dignity for the children of same-sex couples, who may face "harm and humiliation" with unmarried parents.[257]

Kennedy further elevates dignity to the status of liberty by not only acknowledging "that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter,"[258] but by also framing the classifications as denying "the equal dignity of men and women."[259] Kennedy even frames the harm as one arising solely from dignity. Unlike in historical denials of liberty, the common rhetoric of citizens as slaves is absent. By

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[253] *Ibid.*
[254] *Windsor*, at 766.
[255] *Lawrence*, at 578.
[256] *Obergefell.*, at ___ (slip op., at 14).
[257] *Ibid.*., at ___ (slip op., at 15).
[258] *Ibid.*, at ___ (slip op., at 17 – 18).
[259] *Ibid.*, at ___ (slip op., at 21).

arguing liberty as dignity, the past denial of liberty created "dignitary wounds [that] cannot always be healed with the stroke of a pen."[260] Petitioners asked for the liberty to marry the partner they chose. However, to Kennedy, who rhetorically framed liberty as dignity, "they ask[ed] for equal dignity in the eyes of the law. The Constitution grant[ed] them that right."[261]

[260] *Ibid.*, at ___ (slip op., at 25).
[261] *Ibid.*, at ___ (slip op., at 28).

Chapter 4

Conclusion

The Supreme Court speaks with relatively definitive authority. Aside from Constitutional Amendments, the Supreme Court is the only entity with the ability to modify or overturn Supreme Court opinions. In this case, the Court conceptualized liberty as dignity. There is no guarantee as to how the Supreme Court will choose to contribute to the American dialogue of liberty next. After *Obergefell*, the Justices considered *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, but the narrowly tailored decision written by Kennedy reiterated a neutral approach to religion and did not significantly impact LGBT rights.[262] The decision did mention the government's obligation to protect the "rights and dignity of gay persons," with Kennedy again focusing on dignity. However, Kennedy has since retired from the Court, and at the time of this thesis's submission, the American people are currently waiting for three decisions from the Supreme Court concerning LGBT rights.

Future Justices have no strict obligation to uphold Kennedy's conceptualization of liberty as dignity, and none have shown signs of incorporating it into their jurisprudence to the same degree which Kennedy did. However, as mentioned in Chapter 1, the Court has a vested interest in ensuring that the laws of the land are clear, consistent, and logical. Future conceptions of liberty by the Court would likely have to justify departing from the legacy Kennedy left with *Obergefell*.

Each time the Justices render an opinion concerning what exactly Americans get with their guarantee of liberty, it adds to the story of American liberty. Hopefully, future scholars can engage with the law as the rhetoric manifestation it is and analyze how that conception impacts us.

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[262] 584 U.S. ___ (2018)

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Daniel A. Zahn

EDUCATION

The Pennsylvania State University, *Schreyer Honors College* **May 2020**
Bachelor of Arts (B.A.) in English; B.A. in Philosophy; B.A. in Communication Arts & Sciences *University Park, PA*
Minors: French, History, Rhetoric, Jewish Studies, Linguistics; Certificate: Leadership & Ethics

Center for Applied Linguistics *(Centre de linguistique appliquée)* **May 2018 – July 2018**
Intensive French language courses – CEFR finishing level B2.2 *Besançon, France*

WORK EXPERIENCE

Penn State Hillel **August 2019 – Present**
Jewish Perspectives Intern *University Park, PA*
- Recruit student leaders from diverse backgrounds to travel to Israel/Palestine for 10 days during winter break
- Collaborate with Jewish and non-Jewish organizations to promote peaceful, educational Israeli programming
- Lead workshops on navigating dueling narratives and promoting coexistence with Israelis and Palestinians

Undergraduate Speaking Center **January 2018 – Present**
Speaking Mentor *University Park, PA*
- Mentor native and non-native English speakers one-on-one to help each step of the speech writing process, including brainstorming, creating outlines, memorizing, crafting visual aids, and performing the speech
- Present for groups and classes and conduct workshops on specific parts of the speech writing process
- Trained on best practices through a pedagogical course on peer tutoring for speech mentors

Foundation for Individual Rights in Education (FIRE) **May 2019 – August 2019**
Summer Intern *Philadelphia, PA*
- Published an op-ed against pending New York state legislation in the Albany Times Union and published an analysis of Colorado State University's Inclusive Language Guide on FIRE's website
- Researched community college free speech zones, university Twitter accounts, and prospective donors
- Presented at and organized a conference for 120+ college students interested in free speech and due process

Office of the Lehigh County District Attorney **May 2017 – August 2017**
Summer Intern *Allentown, PA*
- Orchestrated 2 research projects on contemporary legal topics with other interns and aided in trial preparations and courtroom proceedings to increase office knowledge and efficiency
- Drafted over 50 memorandums, extensions, and orders from templates for Superior and Supreme Court

RESEARCH EXPERIENCE

Empathy and Moral Psychology Lab **January 2019 – May 2019**
Rock Ethics Institute Undergraduate Research Fellow *University Park, PA*
- Contributed to weekly meetings focused on contemporary psychology research and current lab projects
- Publicized and attended 3 lectures on moral psychology as part of Expanding Empathy Lecture Series
- Designed survey to receive feedback from lecture attendees and improve the lecture series for future years

Linguistic Field Research—Embedded Course **May 2018**
Field Research Assistant *Benin, West Africa*
- Conducted research with 20 school students investigating linguistic contexts and language acquisition with nine other undergraduates and two professors
- Produced five films with local volunteers to document the language and traditions of Anii
- Observed a session which taught the Anii alphabet to children and spoke with developers of alphabet

Center for Language Studies **January 2017 – December 2017**
Research Assistant *University Park, PA*
- Analyzed acoustics of 1,000+ vowels from 3 speakers for longitudinal study of beginner and intermediate learners of Spanish measuring extent an acquired language influences speaker's native language
- Tested native Korean speakers and native English speakers to conclude mapping of labiodental fricatives

LEADERSHIP EXPERIENCE

Future Opportunities Reached by Mentorship (F.O.R.M.) Consulting **August 2016 - Present**
Co-Founder, President (Jan. 2018 – Apr. 2018) *University Park, PA*
- Cultivate relationships between college and high school students to help and encourage students to apply to college through one-on-one essay, resume, and application mentoring
- Work to expand organization to other colleges and high schools, as well as securing grants and partnerships
- Established organization and crafted constitution to ensure continued success and smooth transitions

Presidential Leadership Academy **April 2017 – Present**
Selected Member *University Park, PA*
- Collaborate with cohort of 30 diverse leaders from various disciplines during weekly sessions on critical thinking and creative problem solving led by Honors Dean and University President
- Gain perspective on socio-political issues and decisions by interacting with local leaders on 2 yearly trips

Penn State Mock Trial Association **August 2016 - Present**
President (May 2018 – 2020)
- Run 9-person Executive Board and 71-member organization in both educational and competitive aspects
- Secured partnerships and led crowdfunding campaign to raise over $13,00 toward $25,000 endowment
- Increased retention from 52% to 78%, membership from 45 to 71, and program's competitive performance

Education Director (May 2017 – May 2018) *University Park, PA*
- Restructured organization to create and direct over 10 classroom seminars educating new members on procedures and styles to improve organization retention, competitive skills, and depth of experience
- Collaborated with team captains and experienced members to design curricula and seminar content

University Park Undergraduate Association **December 2016 – Present**
Judicial Board Justice (since Oct. 2017) *University Park, PA*
- Resolve internal disputes and ensure constitutionality of undergraduate student government
- Oversee elections of presidential tickets and 20 at-large representatives by over 45,000 students

Student Conduct Advisor Interim Director (May 2019 – Present; May 2018 – Oct. 2018)
- Lead ongoing campaigns for adoption of Chicago Statement on Free Expression and Conduct Bill of Rights
- Worked one-on-one with administrators to change speech codes to more strongly support free speech
- Trained to help students and organizations through code of conduct issues and advise students in presentation of information at conferences, conduct board hearings, sanction reviews, and appeals trips

Scholar Ambassador Team **April 2018 – Present**
Founding Co-Chair (April 2018 – April 2019) *University Park, PA*
- Led merger of Recruitment Committee and Scholar Assistants to form more effective and skilled group
- Organized 2 prospective student days and 9 accepted student programs, oversaw training of 75 tour guides, and scheduled prospective and accepted student tours, parent tours, and panels
- Work to increase the philanthropic efforts and philanthropic student engagement in the Honors College

SERVICE EXPERIENCE

CAS 197.002: Legal Reasoning and the Law School Admissions Test (LSAT) **January 2020 – Present**
Instructor *University Park, PA*
- Design and implement curriculum for three-credit class focused on the LSAT and test-taking theories
- Teach class of 21 fellow undergraduates and provide LSAT preparation through the class and office hours
- Collaborate with Faculty Mentor and Schreyer Institute for Teaching Excellence to ensure student success

Future Opportunities Reached by Mentorship (F.O.R.M.) Consulting 501(c)(3) **September 2018 – Present**
Development Director *University Park, PA*
- File founding paperwork and maintain organization's tax-exempt status, financial viability, and spending log
- Contact potential partners and work with students to found chapters and expand F.O.R.M. to other colleges
- Work with 2 other governing board members to grow the organization and execute its strategic vision

Office of Student Conduct **September 2017 – Present**
University Conduct Board Student Representative *University Park, PA*
- Hear testimony, question witnesses, decide guilt, and levy sanctions in cases where student/student organization suspension or expulsion from the University is possible as 1 of 5 voting board members

Further Service: Student Organization Conduct Committee; Schreyer Honors College Diversity Task Force; Paterno Fellows Student Advisory Board; Schreyer Honors College Dean's Advisory Board; Office of Student Conduct Respondent Coordinator Search Committee

SELECTED AWARDS AND HONORS

Penn State: CAS Department Marshal; Douglas Honors Award; Schreyer Scholar Involvement Award; Richard Zimler Award in Jewish Studies; Evan Pugh Senior Scholar Award; Edward J. Nichols Memorial Award in Writing; Carey Lynne DeMoss, Esq. Memorial Award for Excellence in Building a Global Perspective; Student Affairs Leadership Award; Communication Arts & Sciences Community Leadership Award; Mary Lee Hobbs Steel Emerging Leader Award; Ann Good Moore and Howard R. Moore Jr. Undergraduate Scholarship in English; Harold O'Brien Memorial Award in Communication Arts & Sciences; President's Freshman Award; D & J Sherwin Professorship Scholarship; Riley Ridge Alumni Scholarship; Sharp Family Director's Scholarship; Lewis C. Cowley Academic Excellence Scholarship; Poole Travel Fund Scholarship; Student Engagement Network Grant

Other: Diller Teen *Tikkun Olam* Award ($36,000 awarded each year to only 15 Jewish teens by the Helen Diller Family Foundation for social justice activism;); Martin Phillip Memorial Scholarship (awarded by the Jewish Family Services of the Lehigh Valley to one senior male and female); Andy Grove Intel Scholarship (awarded by Intel)