# CHALLENGING THE LEVELS OF GENERALITY PROBLEM: HOW *OBERGEFELL V. HODGES* CREATED A NEW METHODOLOGY FOR DEFINING RIGHTS

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## INTRODUCTION

The Court's recent opinion in *Obergefell v. Hodges*[1] ushered in a number of dramatic changes, both socially and legally. Primarily, the holding established that the Due Process and Equal Protection Clauses of the Fourteenth Amendment demand that the fundamental right to marry be extended to same-sex couples, and that all fifty states recognize these unions.[2] It is an opinion clearly concerned with the broad protection of liberty interests, and it extended equal dignity to a class of people long treated with cruelty and neglect by the American legal system.

Along with answering one of the premier legal and political questions of our time, some features and ambiguities of Justice Kennedy's *Obergefell* majority opinion also raised new questions of their own,

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1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2607–08.

chief among them the status of substantive due process jurisprudence moving forward. The opinion diverged greatly from the previously dominant paradigm of substantive due process review established by *Washington v. Glucksberg*,[3] largely ignoring the rigid formula established there without explicitly overruling the case. While Justice Kennedy asserted that he does not believe substantive due process can ever be reduced to a particular formula,[4] there must be some substantive due process methodology future courts can apply—some guiding framework to replace the model Justice Kennedy pulled us away from.

The aim of this paper is to shed light on one particularly tricky area of Justice Kennedy's substantive due process jurisprudence: defining fundamental rights. When seeking to apply the Fourteenth Amendment's Due Process Clause, few choices can have as big an impact on the ultimate result of a case as what version of the right alleged is selected by the court as the relevant right to be evaluated. This was apparent in *Obergefell* itself, where the two parties disagreed about what right was really under consideration: was the case truly about the creation of a new right to same-sex marriage or was it about extending the more general, fundamental right to marriage to a new demographic?[5] While this dispute might at first sound pedantic, its consequences for the final holding are huge.

The already difficult task of defining the alleged right is further complicated by the "levels of generality problem": for any particular case, there seem to be a nearly limitless number of potential iterations of a right, all of them retaining some amount of the case's facts as relevant and abstracting away others. A right can exist at a lower level of generality, which would make it more narrow and specific to the facts of the case, or it can exist at a higher level of generality, removing additional case facts to make the resulting version much broader. Imagine a hierarchy of these potential versions of rights: in *Obergefell*, the lower level of generality version of the right would be the right to same-sex marriage, whereas the higher level of generality iteration would be the fundamental right to marriage itself. But navigating this ladder of rights and selecting the correct version of a right to focus on is a daunting task, one that judges have been struggling with for many years.

With his opinion in *Obergefell v. Hodges*, Justice Kennedy has quietly created a new methodology that favors defining alleged rights

3. 521 U.S. 702 (1997).

4. *Obergefell*, 135 S. Ct. at 2598 (quoting and discussing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

5. *See id.* at 2602.

broadly, at a relatively high level of generality. According to this approach, in any case where there is a dispute regarding what version of a right the court should focus on for its substantive due process analysis, judges should begin their evaluation with the broader, higher-level version; the one often associated with a preexisting, proximate legal tradition. The judges must closely examine the intrinsic principles of this general right and then make a determination: are the central meanings of the broad right—the primary reasons why our society respects it—clearly incompatible with the other more specific, less general iteration? In other words, the judge must inquire into whether the new application of the right considered in the present suit is consistent with the core values of the more general, traditional version of the right. If there is indeed a profound incompatibility between the two, then the court should switch its analysis to the narrower version and proceed with its substantive due process analysis from that vantage point. If, however, the two iterations of the right are compatible, the judges can continue their substantive due process review while only evaluating the higher-level, more abstract version of the right, without needing to consider the lower-level version any further. This approach simultaneously provides invaluable guidance for future judges while never infringing upon their ability to exercise reasoned judgment. And it is profoundly consistent with Justice Kennedy's own expansive view of liberty—something that can never be fully defined but is instead always growing and evolving along with our own understanding of the world around us.[6]

This paper will argue that Justice Kennedy's *Obergefell* opinion contains an innovative way of addressing the levels of generality problem in rights definition, one that systematically favors broad constructions of rights. This new methodology could have a transformative effect on substantive due process review in the years to come. Section I of this paper will provide an overview of substantive due process review generally, illustrating the major evolutions in the Court's approach over the past few decades and how rights definition fits into the overall process. Section II will specifically focus on rights definition and the problem of generality, exploring how the Supreme Court had previously tackled these questions and the numerous criticisms its former approach garnered. Section III will provide an in-depth exploration of how Justice Kennedy's *Obergefell* opinion fundamentally changed the process of rights definition, creating new strategies that attempt to solve old problems. Section IV will explore two other sig-

6. *See infra* Sections III–IV.

nificant opinions penned by Justice Kennedy on substantive due process review that help elaborate and reinforce his *Obergefell* methodology and provide further insight into his thoughts and priorities on the topic. The conclusion will offer some final thoughts on these issues.

## I.
## A Brief Overview of Substantive Due Process

Before launching into *Obergefell* and the perplexing issues surrounding the task of defining rights, it is important to first discuss substantive due process more broadly. This section will examine the evolution of substantive due process over the last half century, particularly focusing on three monumental opinions: a powerful dissent that will influence future justices for decades,[7] the majority opinion that created the dominant substantive due process framework until the arrival of *Obergefell*,[8] and finally *Obergefell* itself.[9] Exploring these cases and the judicial standards that they produced will give a better understanding of where the step of rights definition fits within the larger project of substantive due process and why correctly defining the right alleged is so important to the final outcome. This section is meant to provide an expansive, big-picture look at substantive due process, with a closer examination of rights definition and the problem of generality coming in the proceeding section.

A review of the evolution of substantive due process throughout the past few decades must begin in 1961 with Justice John Marshall Harlan II's deeply impactful dissent in *Poe v. Ullman*. *Poe* concerned the constitutionality, under the Fourteenth Amendment, of certain Connecticut statutes prohibiting both the use of, and the provision of medical advice about, contraceptives.[10] While the majority held that they could not reach the merits of the case due to the lack of a justiciable constitutional question,[11] Justice Harlan took the opportunity to provide a lengthy, detailed explanation of his construction of substantive due process under the Fourteenth Amendment, one that will prove extremely influential upon the material to come. He began the section of his opinion on due process by making it clear what substantive due process is not. According to Justice Harlan, due process exists as more than simply a guarantee of procedural fairness, but instead operates in

7. *Poe*, 367 U.S. at 498 (Harlan, J., dissenting).
8. Washington v. Glucksberg, 521 U.S. 702 (1997).
9. 135 S. Ct. 2584.
10. *Poe*, 367 U.S. at 498.
11. *Id.* at 508–09.

a broader fashion to effectively protect life, liberty, and property.[12] He emphasized that the Court repeatedly rejected the notion that the Fourteenth Amendment is nothing more than a quick reference to what is explicitly mentioned elsewhere in the Bill of Rights,[13] and that it exists instead as its own discrete concept.[14]

Even when defining what due process actually is, Justice Harlan continued in a broad manner. He wrote:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.[15]

Out of respect for judicial discretion, Justice Harlan rejected the idea of ever producing a precise formula for the administration or exact definition of due process. In order to achieve this described balance between respect for liberty and the demands of an organized society, judges must apply their best reasoning.

This approach mandates an awareness of our nation's history and traditions,[16] but it is not absolutely bound by the past; Justice Harlan wrote that tradition is a living thing constantly evolving, and while a judicial opinion draws legitimacy by anchoring itself in what has come before, there is still room for progress and innovation with the judge's discretion.[17] Justice Harlan suggested that:

> This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes what a reasonable and sensitive judgment must, that certain

12. *Id.* at 540–41 (Harlan, J., dissenting).

13. *Id.* at 541 (Harlan, J., dissenting) (citing The Slaughter-House Cases, 83 U.S. 36 (1872); Walker v. Sauvinet, 92 U.S. 90 (1871); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886); In re Kemmler, 136 U.S. 436 (1890); Twining v. New Jersey, 211 U.S. 78 (1908); Palko v. Connecticut, 302 U.S. 319 (1937)).

14. *Id.* at 542 (Harlan, J., dissenting).

15. *Id.*

16. *Id.* ("A decision of this Court which radically departs from [national tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.").

17. *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 150 (2015) ("[Harlan's methodology] always occurred against the backdrop of tradition, but was not shackled to the past . . . .").

> interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.[18]

With such a broadly construed definition of liberty, it is unsurprising that Justice Harlan's approach to substantive due process was similarly expansive, if somewhat nebulous. According to this approach, substantive due process is guided by two factors: the "compelling traditions of the legal profession," moderated by the judge's own use of reason.[19]

Moving on to another landmark decision in the history of substantive due process, *Washington v. Glucksberg* provided the dominant substantive due process paradigm for years. Here, the Supreme Court considered whether or not Washington's statute banning assisted suicide violated the Fourteenth Amendment's Due Process Clause.[20] Chief Justice Rehnquist, authoring the majority opinion, wrote that the asserted right of assistance in committing suicide was not one of the fundamental liberties protected by due process, and Washington's ban was rationally related to legitimate government interests. The Chief Justice provided his own methodology for substantive due process review, one that appeared to be far more mechanical than Justice Harlan's now-famed dissent written over thirty years earlier.

Justice Rehnquist's approach to substantive due process review contained a number of important similarities to Justice Harlan's dissent in *Poe*. Justice Rehnquist's opinion in *Washington v. Glucksberg* acknowledged that the Due Process Clause guarantees more than simply fair process of law, and its inherent concept of liberty far exceeds protection against physical restraint;[21] it also protects certain fundamental rights and liberties from government interference by way of heightened standards of review.[22] Additionally, the list of what rights and liberties are considered sufficiently fundamental is reasonably expansive. Citing numerous prior opinions, the Chief Justice made it clear that substantive due process protection goes beyond those rights explicitly guaranteed in the Bill of Rights and includes, inter alia, the right to marry,[23] to control the education and upbringing of one's own

18. *Poe*, 367 U.S. at 543.

19. *See id.* at 542, 544 (quoting Rochin v. California, 342 U.S. 165, 170–71 (1952)).

20. Washington v. Glucksberg, 521 U.S. 702 (1997).

21. *Id.* at 719.

22. *Id.* at 720.

23. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967) for the right to marriage).

children,[24] to marital privacy,[25] to use contraception,[26] to bodily integrity,[27] and to an abortion.[28]

The critical difference between Justice Harlan's opinion in *Poe* and Justice Rehnquist's in *Glucksberg* is their respective methodologies for identifying "fundamental" rights. Whereas Justice Harlan believed that substantive due process is incapable of being reduced to a mere formula,[29] Justice Rehnquist took the opposite approach. He wrote that the established method of substantive due process analysis occurs in two distinct stages. First, there is a test of history. The Due Process Clause only protects fundamental rights and liberties that are "objectively . . . 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed . . . .'" The judge must examine relevant national history and traditional views on the subject matter of the alleged due process-protected right.[30] Second, the judge requires a "'careful description'" of the right or liberty asserted.[31] At that point, the judge will determine whether the Due Process Clause protects the right alleged in step two, using the historical traditions explored in step one to "direct and restrain" the analysis.[32] The central difference between this approach and that outlined in the *Poe* dissent is the question of how big a role to grant tradition. According to Justice Rehnquist, even if the full limits of the Fourteenth Amendment's Due Process Clause are incapable of exact definition, a right still must be deeply rooted in the relevant national, legal traditions in order to qualify for protection.[33]

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24. *Id.* (citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) for the right to have children and both Meyer v. Nebraska, 262 U.S. 390 (1923) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) for the right to direct education and upbringing of one's children).

25. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965) for the right to marital privacy).

26. *Id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) for the right to use contraception).

27. *Id.* (citing Rochin v. California, 342 U.S. 165 (1952) for the right to bodily integrity).

28. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) for the right to have an abortion).

29. Poe v. Ullman, 367 U.S. 497, 542 (1961).

30. *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

31. *Id.* at 720–21.

32. *Id.* at 721.

33. *See also* Yoshino, *supra* note 17, at 149–52 (discussing Justice Rehnquist's *Glucksberg* framework and his intentional departure from Justice Harlan's *Poe* approach).

It might sound like the ordering of these two steps is somewhat peculiar, and that careful, precise definition of the right would surely occur before an in-depth examination of the national history related to that right. To this point, it is important to emphasize that the scope of inquiry in the first stage is broad, whereas the right defined in the second is precise and narrow. When the Court examines the national traditions connected to the right, the variety of types of information under review is considerable. For example, when applying the above methodology to the facts of *Glucksberg*, Justice Rehnquist was not merely interested in specific scraps of old legislature, but claimed to be examining all the "enduring themes of our philosophical, legal, and cultural heritages" pertaining to the general topic of suicide.[34] Justice Rehnquist toured over 700 years of common-law attitudes on the general topic of suicide,[35] using this wealth of history to analyze the facts at hand. Ideally, the scope of inquiry is sufficiently vast that an exact definition of the alleged right being asserted is unnecessary at this stage because it will surely fall somewhere within the breadth of the subject matter covered. Judges were instructed to evaluate the traditions relevant to the general subject of the right and then define what precise form of the right is under consideration in the present case. The level of discretion offered by the justice was reduced substantially in an effort to increase the level of objectivity offered compared to Justice Harlan's approach. However, despite these factors, judges still do have to make significant definition decisions at the tradition stage as well; even if they look at a variety of types of historical information, they still have to make important decisions about what subject matter to review. This point will be revisited in later sections.

Nearly two decades after *Washington v. Glucksberg*, the Supreme Court decided *Obergefell v. Hodges*.[36] When considering the constitutionality of bans on same-sex marriage in multiple states, the Court was forced to enter the evolving realm of substantive due process to determine the right to same-sex marriage, one of the foremost civil rights issues to arise in generations. Writing for a five-justice majority, Justice Kennedy held that the right to marry is fundamental, inherent in personhood itself, and protected by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and

34. *Glucksberg*, 521 U.S. at 711 (citing generally Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQUESNE L. REV. 1, 148–242 (1985)); N.Y. STATE TASK FORCE ON LIFE & THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 77–82 (May 1994).

35. *Glucksberg*, 521 U.S. at 711.

36. 135 S. Ct. 2584 (2015).

therefore same-sex couples cannot be deprived of that right on the basis of their sexual orientation.[37]

Although later parts of the opinion dealt with equal protection analysis, most of the early work done by Justice Kennedy here was within the familiar ground of substantive due process. And, before making any attempts at explicitly defining a formula or rule for this inquiry, he began with a step in the analysis shared by both *Poe v. Ullman* and *Washington v. Glucksberg*: an examination of the relevant traditions and history of marriage generally. He remarked on the unique, "transcendent importance" that marriage has in our society, claiming that it rises from our most basic human needs, that it is essential for the fulfillment of profound hopes and aspirations, and that it promises dignity to people of all classes and faiths.[38] He first explored how the institution of marriage has undergone deep, structural transformations over the years, particularly as women gained increased legal, political, and property rights.[39] For example, the centuries-old law of coverture, under which women were legally under the control of their husbands, was abandoned as society gained a better understanding of the equal dignity due to women.[40] Justice Kennedy described this kind of change as being characteristic of the United States' approach to rights in general, illustrating that "new dimensions of freedom become apparent to new generations."[41] This assertion paved the way for much of the work that the justice did later in the opinion, helping to justify his refusal to let what he considers the mistakes of history overly constrain substantive due process.[42]

Justice Kennedy then explored the historical evolution of views on homosexuality. He described the persecution of gay and lesbian Americans: same-sex intimacy was a crime in many states until relatively recently, and gays and lesbians could be fired from government employment, barred from serving in the military, excluded under immigration laws, specifically targeted by the police, and burdened in their rights to associate.[43] Finally, Justice Kennedy provided a summary of how the legal status of LGBT rights has progressed over the

37. *Id.* at 2604–05.
38. *Id.* at 2593–94.
39. *Id.* at 2595–96.
40. *Id*.
41. *Id.* at 2596.
42. *Id.* at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times.") (citation omitted).
43. *Id.* at 2596.

last few decades, discussing both the prior major Supreme Court decisions on the topic[44] as well as numerous other federal and state court decisions, leading directly up to the Constitutional marriage question presented in *Obergefell*.[45]

It is important to note that, in both of these investigations into the traditional views on marriage and homosexuality, Justice Kennedy did not limit himself to strictly legal precedent. Much like the majority opinion in *Washington v. Glucksberg*, the scope of Justice Kennedy's historical examination was significantly broader. Justice Kennedy directly engaged both philosophical[46] and medical writings,[47] where appropriate. After exploring the relevant historical traditions, Justice Kennedy's opinion would seem poised to follow Justice Rehnquist's model of substantive due process analysis, which was controlling up until this time. After completing a general review of the history of the subject, he could have simply chosen to define the right alleged and determine if it could reasonably be said to be a fundamental right deeply rooted in our legal traditions.

However, after his exploration of history draws to a close and the opinion switches to constitutional analysis, Justice Kennedy makes it clear that he instead drew inspiration from none other than Justice Harlan's dissent in *Poe v. Ullman*. Arguing that the responsibility of identifying and protecting fundamental rights "'has not been reduced to any formula,'" Justice Kennedy opined that this inquiry "requires courts to exercise reasoned judgment in identifying interests so fundamental that the State must accord them respect."[48] Clearly rejecting the more mechanical approach established by Justice Rehnquist, Justice Kennedy claimed that history and tradition serve as guides in substantive due process analysis, but cannot set its boundaries; his methodology refuses to allow the past to overly constrain the present.[49] He asserted that this position was more in line with the intent

44. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186 (1986), Romer v. Evans, 517 U.S. 620 (1996), Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

45. *Id.* at 2596–97.

46. *Id.* at 2594 (discussing the writings of Confucius and Cicero on the institution of marriage).

47. *Id.* at 2596 (discussing the pathologization of homosexuality in the psychiatric community).

48. *Id.* at 2598 (quoting and discussing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

49. *Id.* at 2598. *See also id.* at 2603 ("[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."); Yoshino, *supra* note 17, at 162–63 (describing how Justice Kennedy's *Obergefell* opinion "transformed the role *Glucksberg* assigned to tradition").

of the drafters of both the Bill of Rights and Fourteenth Amendment, and that the ambiguities within these documents regarding protected rights were always meant to allow additional input from future generations.[50]

After endorsing this standard of observing history while refusing to be overly burdened by it, Justice Kennedy applied this position to the facts of *Obergefell*. He listed four main principles in support of his argument that marriage is a fundamental right under the Constitution, for both straight and gay couples alike. Each of these principles was in turn based upon tradition and legal precedent. First, the right to personal choice in relation to marriage is inherent in individual autonomy.[51] Second, the right to marry is fundamental because it supports a two-person union unparalleled in significance to individuals wanting to show romantic commitment.[52] Third, protecting the right to marry helps safeguard children and families, and therefore marriage is inextricably linked to the rights of childrearing, procreation, and education.[53] And finally, both Supreme Court precedents and the country's longstanding traditions make it abundantly clear that marriage is a keystone of social order.[54] Justice Kennedy was eager to use whatever historical precedent he could to support his main holding that the fundamental right to marry cannot be abridged on the basis of sexual orientation. By citing these principles, Justice Kennedy shows that his opinion is not wholly inconsistent with tradition, but rather is merely selective regarding which historical principles it embraces. Justice Kennedy's use of these sources helps bolster the legitimacy of his opinion.

But what about when historical precedent is undeniably contrary to granting protection to the Constitutional right alleged? Earlier in his opinion, when writing about the persecution of gays and lesbians in

50. *Obergefell*, 135 S. Ct. at 2598 ("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."); *see also* Yoshino, *supra* note 17, at 163 (calling this "the problem of the blindness of each generation").

51. *Obergefell*, 135 S. Ct. at 2599 (discussing how Loving v. Virginia, 388 U.S. 1 (1967), recognized the fundamental connection between marriage and liberty and the privacy interests brought up in Lawrence v. Texas, 539 U.S. 558 (2003)).

52. *Id.* at 2599 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)).

53. *Id.* at 2600 (discussing related legal precedents). Importantly, while discussing this particular point, Justice Kennedy is careful to highlight that the desire or capability to produce children has never existed as a prerequisite for marriage, once again using historical tradition to support his ultimate holding. *Id.* at 2600–01.

54. *Id.* at 2601.

the United States,[55] Justice Kennedy paused to expound on the kind of emotional damage being excluded from marriage can inflict. He argued that, because of the immensely special status placed on the concept of marriage in our society, the exclusion of same-sex couples from that institution has the effect of demeaning them and imposing a kind of stigma that is Constitutionally prohibited.[56] In other words, the fact that this discrimination against same-sex couples inflicts significant psychological harm justifies ignoring our nation's history of LGBT discrimination in the context of marriage, treating it as a part of our history that deserves to be discarded. Justice Kennedy learned from the past, but did not dedicate himself to strict adherence to its convictions when doing so would have had a demonstrably negative outcome.

When explaining this approach to tradition, Justice Kennedy explicitly invoked *Poe v. Ullman* while never actually mentioning *Washington v. Glucksberg* by name. However, when arriving at the analytical stage of carefully describing the supposed fundamental right, he engaged with Justice Rehnquist's opinion directly and openly for the first time in *Obergefell*.[57] He described the respondents' argument that the petitioners were not seeking to exercise the long-established right to marry, but instead were trying to create a new right more specific to the factual circumstances: the right to same-sex marriage.[58] Justice Kennedy wrote that the *Glucksberg* approach, which the respondents had cited in order to support their argument, "may have been appropriate for the asserted right there involved (physician-assisted suicide), [but] it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[59] He proceeded to cite various major cases, such as *Loving v. Virginia*, in which the level of inquiry was about marriage comprehensively and whether there was a sufficient justification for disallowing it in the context of interracial couples.[60] The distinction Justice Kennedy was attempting to draw here is unclear. If there is some categorical difference between the subject matters of physician-assisted suicide and marriage that makes it acceptable to apply *Washington v. Glucksberg* to one and not the other, Justice Kennedy refused to describe it outright. However, it also remains a distinct

55. *See id.* at 2596–97.
56. *Id.* at 2601–02.
57. *Id.* at 2602.
58. *Id.*
59. *Id.*
60. *Id.*

possibility that Justice Kennedy had no intention of retaining Justice Rehnquist's substantive due process analysis at all, for any rights, and this was just one step in overruling the case altogether.[61] Without further elaboration, the legal community has been left with significant open questions about the process of rights definition, which will be discussed in the next section of this paper.

## II.
## Rights Definition and the Levels of Generality Problem

Now that Section I has established a basic understanding of the general landscape of substantive due process, Section II focuses on the problem of rights definition more specifically. This section will explain why these issues are so pivotal to the application of substantive due process, analyzing in particular a case that had a large impact on Justice Rehnquist's approach in *Washington v. Glucksberg*. It will then look at some of the key criticisms of this approach towards rights definition, concerns that will lead us to the creation of Justice Kennedy's alternative method, described in the following section.

In his concurring opinion to *Washington v. Glucksberg*, Justice Souter discussed how the definition and framing of the right at issue could be dispositive of the case's ultimate holding.[62] This is a hard conclusion to argue with. After all, one of the decisive turning points of Justice Kennedy's *Obergefell* opinion was the discussion of which right was really in question: the right to same-sex marriage or the right to marriage more generally.[63] Though it may seem like those two options are essentially rewordings of the same concept, especially in context, the truth is that the chosen definition of the right alleged is crucial. The right to same-sex marriage would have been a legal novelty, whereas the right to marriage generally has long been regarded as a fundamental right. If the former, the *Obergefell* Court would have debated the creation of a new right; this proposition would have invoked fears of *Lochner*-ization, the creation of a supposed right without the necessary constitutional basis.[64] By choosing the latter option,

61. Yoshino, *supra* note 17, at 165.

62. Washington v. Glucksberg, 521 U.S. 702, 769–70 (1997) (Souter, J., concurring in judgment) ("When identifying and assessing the competing interests of liberty and authority [during substantive due process analysis] . . . the breadth of expression that a litigant or judge selects in stating the competing principles will have much to do with the outcome and may be dispositive.").

63. *Obergefell*, 135 S. Ct. at 2602.

64. *See also id.* at 2615–16 (Roberts, J., dissenting) (citing Lochner v. New York, 198 U.S. 45 (1905)) (discussing the majority's attempts to distinguish the present case

the analysis switched to questioning why a previously existing fundamental right should be denied to a particular demographic.

The question of how to define the right engages both of the two components of the *Washington v. Glucksberg* formula: tradition and specificity. The impact on specificity is immediately apparent, but the effect on the inquiry into history and tradition can be impactful as well by deciding which national traditions are considered relevant to the assessment of the case.

An earlier case can assist in understanding *Washington v. Glucksberg*'s "careful description" stage in identifying substantive due process rights and illustrate how critical these questions of definition can be to the final result of a case:[65] the 1989 Supreme Court case *Michael H. v. Gerald D.*,[66] a case that had a huge impact on Justice Rehnquist's *Glucksberg* formula. In that case, a woman was married to one man but conceived a child with a different man. Under review were the parental rights of both men, given a California statute that presumes that a child born to a married woman living with her husband is a child of that marriage.[67] The child's natural father claimed that the statute violated his substantive due process rights, although the Court, in an opinion penned by Justice Scalia, held this was not the case.[68] While investigating whether any fundamental rights are at stake here, Justice Scalia engaged in a substantive due process inquiry that foreshadows that of *Washington v. Glucksberg*. He placed a large emphasis on the examination of tradition, concluding that he could not find any examples of a state awarding substantive parental rights to the biological father of a child conceived within an existing marital union. Justice Scalia stated that this is a strike against the existence of a fundamental right.[69]

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from the widely discredited *Lochner*, a case notorious for holding that a right to contract was implicit in the Fourteenth Amendment before ultimately being overturned as an erroneous analysis of constitutional law).

65. Yoshino, *supra* note 17, at 154–55 (arguing that an understanding of Michael H. v. Gerald D., 491 U.S. 110 (1989), is required for a complete understanding of *Glucksberg's* "careful description" requirement). The two cases have often been cited together as precedent in discussions of substantive due process analysis. *See, e.g.*, Hernandez v. Robles, 26 A.D.3d 98, 110 (N.Y. App. Div. 2005) (Catterson, J., concurring); State v. Burnett, 755 N.E.2d 857, 864, 93 Ohio St. 3d 419, 426–27 (2001); Johnson v. City of Cincinnati, 310 F.3d 484, 495 (6th Cir. 2002); Cook v. Rumsfeld, 429 F. Supp. 2d 385, 393 n.9 (D. Mass. 2006).

66. 491 U.S. 110 (1989).

67. *Id.* at 113 (discussing CAL. EVID. CODE. § 621 (West Supp. 1989)).

68. *Id.* at 129.

69. *Id.* at 127.

Justice Scalia's approach was certainly not without its vocal critics. In his dissenting opinion, Justice Brennan took issue with the plurality's methodology, arguing that Justice Scalia's conception of tradition was too narrow and only truly engaged with historical resources that already support its holding.[70] He argued that it was important to recognize tradition as an inherently malleable concept, just as elusive and difficult to define as liberty itself, and not something that automatically lends itself to objective and neutral analysis.[71] Justice Brennan wrote that Justice Scalia's approach artificially reduced the rightful scope of the Fourteenth Amendment's guarantee of liberty by arbitrarily focusing on the traditions relating to a natural father's relationship with a child whose mother is married to someone else instead of on traditions of parenthood more broadly.[72] He stated that, had the Court conducted its review of tradition at such a low level of abstraction, failing to identify a tradition much broader than the facts of the case themselves, numerous past cases dealing with a variety of subject matters would have come to different results.[73] Justice Brennan viewed Justice Scalia's promises of objectivity as illusory, and that by failing to view the issues of this case at a higher level of abstraction and instead focusing on the more unseemly facts present, Justice Scalia selected the final result he wanted ahead of time. Justice Brennan warned that the plurality's approach would substantially curtail the protection of fundamental due process rights.[74]

Justice Scalia responded to Justice Brennan's attack with characteristic vigor. He included a lengthy footnote defending his focus on historical traditions specifically relating to the rights of adulterous natural fathers, rather than on paternity at a more general level.[75] Here, he explicitly addressed one of the most central questions in the project of defining alleged rights: how to choose between competing levels of generality or abstraction, or the "levels of generality problem." He argued that it was really Justice Brennan's approach that was arbitrary and unprincipled, and laid out his formula for selecting the level of generality at which to examine a supposed right: "refer to the most

70. *Id.* at 137–38 (Brennan, J., dissenting).

71. *Id*. at 137. *See also* Laurence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090 (1990) ("Legally cognizable 'traditions' . . . tend to mirror majoritarian, middle-class conventions.").

72. *Michael H.*, 491 U.S. at 139.

73. *Id.*

74. *Id.* at 141. ("[The Constitution of the plurality] is not the living charter that I have taken [it] to be . . . it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.").

75. *Id.* at 127 n.6.

specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[76] If there were no societal traditions commenting either way on the rights of a natural father of a child born as the result of adultery, Justice Scalia said they would go to one level of abstraction higher, further away from the facts of the case, and consult the relevant traditions of natural fathers generally. Justice Scalia implied that there exists only a single ladder or hierarchy of potential rights at play in *Michael H.*, making it easy for judges to jump from one level of analysis to the next as necessary. Moving from the most specific to the most general version, Justice Scalia listed a natural father's rights to a child whose mother is married to someone else, natural fathers, parenthood, family relationships, personal relationships, and finally the supremely nebulous "emotional attachments in general."[77] Here, Justice Scalia found dispositive negative traditions at the first, lowest level of generality, negating the need to move any higher to greater levels of abstraction.[78]

The degree to which Justice Scalia's answer to the levels of generality problem is actually objective and devoid of judicial bias depends largely on how well-founded his assumptions on the nature of abstraction were. When looking at a particular case, is there really only one hierarchy of levels of generality? Put another way, when a judge is attempting to follow Justice Scalia's formula and needs to move to a higher level of generality due to a failure to find any relevant traditions at the current one, is there truly only one correct next level? Justice Scalia seemed to believe this is the case—that it is reasonably easy to identify the different levels of generality and that his somewhat mechanical approach really will limit personal discretion.

However, numerous legal academics were unconvinced by Justice Scalia's attempt at solving the levels of generality problem, chief among them Professors Laurence Tribe and Michael Dorf. They wrote a lengthy piece in reaction to Justice Scalia's opinion in *Michael H.*, arguing that there was no single dimension of specificity for Justice Scalia's abstraction hierarchy, and this fact presents a fatal flaw for his formula.[79] Justice Scalia insisted in his *Michael H.* opinion that, if there were no relevant societal traditions regarding the rights of the

76. *Id.*

77. *See id*.

78. It is worth pointing out that what started as a debate between Justices Scalia and Brennan over which traditions actually require examination in this substantive due process review has quickly evolved into a discussion on how to define the alleged right. This progression helps demonstrate how deeply the question of rights definition can affect the "tradition" stage of substantive due processes.

79. Tribe & Dorf, *supra* note 71, at 1090.

natural father of a child conceived with a woman married to someone else, the court should abstract out the adultery aspect and look at the rights of natural fathers more generally.[80] Tribe and Dorf asked, why is this the one and only correct move? Why, instead of abstracting out the relationship between the biological parents, does the court not abstract out the father's sex and look at the traditions regarding parental rights of children conceived out of wedlock? Or why not abstract away the mother's husband and closely examine the traditions associated with unmarried fathers?[81] Either of these moves seem equally natural as the one suggested (although never undertaken) by Justice Scalia.

Furthermore, Tribe and Dorf explained that Justice Scalia's characterization of the first, lowest level of generality was problematic as well. Surely, if he really wanted to, Justice Scalia could have provided a level of analysis even more fact specific, such as "the rights of the natural father of a child conceived in an adulterous but longstanding relationship, where the father has played a major, if sporadic, role in the child's early development."[82] Taking Tribe and Dorf's argument to its logical conclusion, at the lowest level of generality a judge would just have to list every possible fact about the current case and all of its participants. Surely this would be incredibly laborious and unhelpful.[83] But even then the judge would be tasked with abstracting some facts away to reach the next level of generality and would immediately run into the problems described above.

These complexities play out at even the lowest level of generality and the first step upwards to a more abstract stage. As a judge employing Justice Scalia's method proceeds upward to higher levels of abstraction, these issues only compound. Whatever a judge decides to abstract away at one stage will necessarily affect what elements are available to consider or abstract later on. If two judges applied Justice Scalia's methodology to the same fact pattern, it seems likely they could end up relying on very different sets of historical traditions; each decision they make when defining their levels of generality would create increasingly divergent paths. Imagine Justice Scalia's model as a ladder, with each rung constituting a different level of gen-

80. *Michael H.*, 491 U.S. at 127 n.6.

81. Tribe & Dorf, *supra* note 71, at 1090.

82. *Id.* at 1092.

83. No two situations in human history are ever completely the same in every conceivable detail, so there would never be any relevant traditions either supporting or denying the existence of a fundamental right at this hypothetical, most specific level possible.

erality[84]: not only will the individual rungs change greatly based on the decisions of the judges regarding what elements to abstract away when climbing the ladder, but the entire direction of the ladder will change with it, leading to vastly different higher-level rights. Tribe and Dorf argued this point quite clearly, stating that "there is no universal metric of specificity against which to measure an asserted right" and "no single dimension or direction along which to measure the abstraction or generality."[85] Given that the choice of how to define an alleged right can be dispositive in relation to whether or not that right ultimately qualifies for protection, this unguided methodology is deeply troubling.

Tribe and Dorf rejected Justice Scalia's hierarchy of generality approach as an ineffectual attempt to constrain judicial value choices, one that claims to be value-neutral while still allowing judges to import their biases.[86] The professors nonetheless recognize that identifying abstract, unenumerated rights is a vital step in judging what is and is not protected by the Due Process Clause of the Fourteenth Amendment. To help guide the seemingly standardless process of generalization, Tribe and Dorf relied on a familiar alternative to the formulaic approach of *Michael H.* and *Glucksberg*: Justice Harlan's dissent from *Poe v. Ullman*. They described Justice Harlan's approach as proscribing a "rational continuum," identifying unenumerated due process rights through interpolation and extrapolation from enumerated rights[87]:

> From a set of specific liberties that the Bill of Rights explicitly protects, [Justice Harlan] inferred unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense . . . . Moreover, . . . Justice Harlan indicated that rights make more sense if abstracted from the particular spheres of life they protect. Free speech is an empty freedom if not possessed by a free mind.[88]

Simply put, the existence of a rational continuum of rights can help guide the process of rights definition. By looking at which freedoms are made explicit, a judge can determine which broader rights are necessary to give those protections actual meaning. The existence

84. *See* Yoshino, *supra* note 17, at 155 (describing Justice Scalia's approach in footnote 6 of *Michael H.* as a ladder of potential rights).

85. Tribe & Dorf, *supra* note 71, at 1086, 1092.

86. *Id.* at 1095–96 (stating that Justice Scalia's approach "imports values surreptitiously").

87. *Id.* at 1068.

88. *Id.* at 1068–69.

of those higher-level, unenumerated rights can, in turn, provide guidance for individual due process cases. Judges still have to employ their personal, reasoned judgment, but at least it is no longer being done under the guise of objectivity. And it is worth recalling that even under Justice Harlan's approach judges are still somewhat constrained by tradition.[89]

Professors Tribe and Dorf are certainly not alone in their rejection of Justice Scalia's due process jurisprudence as described in *Michael H*. Multiple scholars have focused on what they perceive to be the false pretense of objectivity characteristic of Justice Scalia's approach. Professor Edward Gary Spitko heavily criticized Justice Scalia's *Michael H.* formula for its failure to achieve true neutrality, writing that it provides "neither a theoretical nor practical restraint on the judiciary."[90] Spitko argued that the justice's methodology failed to function as a truly neutral principle because of its unfounded assumptions on what level of generality is most important to substantive due process review.[91] Justice Scalia enunciated a preferred level of generality, supposedly reflecting the most specific relevant traditions, but without sufficient justification in either the text of the Fourteenth Amendment or any other Constitutional authority.[92] Spitko wrote that because of the fact that these narrow interpretations are more likely to result in protection of the rights being denied, Justice Scalia's formula limits the rightful scope of the Fourteenth Amendment protections without any justification based on the text or history of the amendment.[93]

Somewhat similarly, Professor Steven Greenberger attacked Justice Scalia's commandment of specificity as not being truly neutral as he claims it to be.[94] Greenberger suggested that Justice Scalia's in-

89. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

90. Edward Gary Spitko, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1339 (1990).

91. *Id.* at 1344 (describing Justice Scalia's main argument as deriving from the "neutral principles" theory, which states that "citizens of our democracy are best protected from the arbitrary exercise of judicial power by requiring that judges consistently apply a principle across all cases unless the case at hand can be meaningfully distinguished from the previous case in which that principle was applied").

92. *Id.* at 1344–45 (arguing that "[a] 'neutral' judge not only must explain why a principle applies to one case and not to another, but that he also must explain why the principle is a proper principle to be applied at all," and that Justice Scalia's method "fails as a limitation on arbitrary decision-making precisely because it is itself arbitrary").

93. *Id.*

94. Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1029–30 (1992).

tense focus on the adultery aspect of the case[95] connotes personal bias. He argued that Justice Scalia was biased in favor of the unitary family, leading him to abandon any real attempt at neutrality and to overemphasize the marriage of the child's biological mother to her husband over the biological father's parental rights.

Clearly, this is an extremely complex topic, and it is challenging to imagine an approach to rights definition that perfectly addresses all of these issues. Moving forward, it is important to keep these criticisms in mind when considering Justice Kennedy's *Obergefell* methodology in order to determine the degree to which it can be considered an improvement over Justice Scalia's *Michael H.* approach.

## III.
## JUSTICE KENNEDY'S *OBERGEFELL* METHODOLOGY FOR DEFINING RIGHTS

Ultimately, the most important rejection of Justice Scalia's *Michael H.* formula came from Justice Kennedy himself. Although Justice Kennedy joined the rest of the plurality opinion in *Michael H.*, he specifically declined to join the footnote in which Justice Scalia explained his formulaic approach to the levels of generality problem of rights definition.[96] And as discussed in Section I, Justice Kennedy's majority opinion in *Obergefell* indicates a strong preference for the substantive due process approach laid out in Justice Harlan's *Poe v. Ullman* dissent over the *Washington v. Glucksberg* method. Still, how did Justice Kennedy actually select the relevant version of the right alleged in *Obergefell*, choosing among all the possible abstractions and levels of generality? How does he go about defining the version of that right that will receive substantive due process review? When citing Justice Harlan's *Poe* dissent in *Obergefell*, Justice Kennedy stated that both the "identification and protection of fundamental rights" could not be reduced to any "formula."[97] However, by focusing less on what Justice Kennedy said about substantive due process review and more on the way he actually applied it to the facts of this case, there is additional guidance. Justice Kennedy's methods here may not be directly explained with sufficient exactness to label it a bona fide formula. Nonetheless, a closer examination of the way he wrote his

95. *Id.* at 1030 (stating that Justice Scalia refers to the child's biological father in *Michael H.* no fewer than six times).

96. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989) ("[I]n all but footnote 6 of which Justice O'CONNOR (sic) and Justice KENNEDY (sic) join [Justice Scalia's opinion].")

97. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

majority opinion is revealing and provides new hope in producing comprehensive, satisfactory methods for dealing with the levels of generality problem.

The core feature of Justice Kennedy's approach here is the inverse of the main rule of Justice Scalia's *Michael H.* formula. Instead of moving from a narrow definition of a right to more abstract, general interpretations as needed, Justice Kennedy began with a higher-level description of the right at issue and moved downward to more narrow versions only as necessary. Simply put, whereas Justice Scalia took a bottom-to-top approach, moving from low to high generality versions of the rights,[98] Justice Kennedy took a top-to-bottom approach.[99] Additionally, each approach has different factors triggering a change in level of generality. Instead of moving to a higher level of generality in response to an absence of relevant traditions on the lower-level right, like Justice Scalia,[100] Justice Kennedy would have judges move to the lower versions of the right only after inspecting the innate, intrinsic principles of the broader and historically acknowledged right, and determining whether the central meanings of the generalized right, the core reasons that we as a society respect it, are clearly incompatible with the alternative lower-level version.[101] Only then should the court switch its analysis to the narrower incarnation of the right alleged. Otherwise, restricting analysis to the higher level, more abstract right is appropriate for carrying out substantive due process review, just as it was in *Obergefell*.

This approach comes directly from the text of Justice Kennedy's opinion, even if he never presents it as an explicitly defined test. After describing Justice Harlan's *Poe* opinion and the undetermined nature of unenumerated rights, the very next thing Justice Kennedy discussed is the broad fundamental right to marry.[102] He explained that when dealing with restrictions on marriage in the past, whether those restrictions took the form of bans on interracial marriage,[103] bans on fathers behind on child support from marrying,[104] or bans on prison inmates being allowed to marry,[105] courts had previously inquired as to the "right to marry in its comprehensive sense, asking if there was a suffi-

98. *Michael H.*, 491 U.S. at 127 n.6.
99. *Obergefell*, 135 S. Ct. at 2598.
100. *Michael H.*, 491 U.S. at 127 n.6.
101. *Obergefell*, 135 S. Ct. at 2598–99, 2602.
102. *Id.* at 2598.
103. Loving v. Virginia, 388 U.S. 1 (1967).
104. Zablocki v. Redhail, 434 U.S. 374 (1978).
105. Turner v. Safley, 482 U.S. 78 (1987).

cient justification for excluding the relevant class from the right."[106] Significantly, these cases did not inquire about the specific right of certain races to marry, or delinquent payers to marry, or inmates to marry; they instead focused on the higher-level right, the right to marry generally, and asked whether these groups should be denied access to it. None of those prior cases had restricted their focus on narrower versions of the right to marriage, like the right to interracial marriage, so Justice Kennedy followed their example. Rather than evaluating the proposed right to same-sex marriage here, which would very likely be the most specific level at which a relevant tradition either granting or denying protection could be found and the correct focus of analysis according to Justice Scalia's *Michael H.* approach, Justice Kennedy essentially began his inquiry of the right broadly defined, in its more general and legally recognized state.

Justice Kennedy then explored whether there were any reasons to switch to a narrower construction of the right. In the absence of such justification, he restricted his analysis to the broader version of the right and enforced the protections traditionally offered to it. There is evidence of this approach multiple times throughout his opinion: he acknowledged that the issue of same-sex couples added a new fact to analyze, one not considered in most previous cases discussing the right to marriage,[107] but then rejected any assertions that the new element should alter the holding here.[108] He failed to find any rationale for moving down a step in his hierarchy of rights, from the right of marriage to the right of same-sex marriage.

When it comes to identifying the crucial trigger to switch focus and evaluate a more narrow construction of the right, Justice Kennedy's approach is somewhat vague. However, he made numerous statements throughout the opinion that suggest he believes a judge should make this decision only after a thorough examination of the fundamental principles associated with the more general right. Justice Kennedy argued that the Court's past cases emphasized constitutional principles of significant breadth and identified the constitutional liberties inherent in marriage.[109] He explained that "in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the *basic reasons why the right to marry has been*

106. *Obergefell*, 135 S. Ct. at 2598–2602.

107. *Id.* at 2598 (admitting that, in prior right to marriage cases, the Court has presumed a relationship between individuals of the opposite sex).

108. S*ee, e.g.*, *id.* at 2602 (rejecting respondents' assertion that petitioners seek to exercise a supposedly novel and nonexistent right to same-sex marriage, claiming that the correct level of analysis is the right to marriage more generally).

109. *Id.* at 2598–99.

*long protected*."[110] And in perhaps his most revealing passage on the subject, he declared that the "limitation of marriage to opposite-sex couples . . . [is] inconsisten[t] with the *central meaning* of the fundamental right to marry."[111] All of these comments offer clear signals that judges are supposed to consult the broad, historically protected version of rights first, reinforcing the top-down nature of the methodology, and allowing us to extrapolate the next crucial phase in his approach. The narrower interpretations of the right are to be considered only in the shadow of the more general version, to see whether or not they align with the "central meaning" of the greater right. In *Obergefell*, nothing about the presence of same-sex couples provided a sufficient rationale to negate the protections owed by the fundamental right to marriage. Phrased differently, nothing about same-sex marriage is intrinsically inconsistent with the core spirit of the general right to marriage.[112] Justice Kennedy's final holding did not create a new right, but extended an old, long-acknowledged one to a historically persecuted population.[113]

Yet, there is a significant problem that we need to address with Justice Kennedy's process. While attempting to extrapolate a methodology (if not a precise formula, as Justice Kennedy would disapprove of that), the thorniest question about Justice Scalia's approach to rights definition remain: at what level of generality should a judge begin her analysis? Even if it is clear that judges are supposed to start at the relatively higher level of generality in their analysis, there remain countless potential formulations of the right to choose from. Just like in *Michael H.*, there is no guidance regarding which facts of the case under consideration are essential to judicial analysis and which ones should be abstracted away. This complicates the choice of where to being one's analysis, and the fact that Justice Kennedy's method makes it more difficult to alternate between levels of generality makes the task of choosing a correct starting point more important. Additionally, these same issues will once again affect moving between levels. To determine whether the higher and abstract or lower and specific versions of the right are to be the main focus of substantive due process review, the judge must thoroughly define both of them ahead of time in order to search for critical inconsistencies between the two.

110. *Id*. at 2599 (emphasis added).
111. *Id*. at 2602 (emphasis added).
112. *Id*. at 2599 ("The . . . principles and traditions . . . discussed demonstrate that the reason marriage is fundamental under the Constitution apply with equal force to same-sex couples.").
113. *Id.* at 2608 (stating that same-sex couples could not constitutionally be excluded from the broader institution of marriage).

The lower-level form of the right, even if not ultimately the main focus of the court's substantive due process analysis, still needs to be fully defined in order to be even considered, or else it could not be compared to the "central meaning" of the broader right as Justice Kennedy's approach requires.

One potential solution, which appears consistent with Justice Kennedy's *Obergefell* opinion, is to let the parties decide themselves. When, like in *Obergefell*, one party is arguing that the case is really about the protection of a broad, preexisting right and the other replies that it is really about a narrow, historically unprotected right, this part of the judge's work is done. Whichever right between the two seems more general serves as the starting point for analysis, and the judge can follow Justice Kennedy's method of comparing the two rights, looking for fundamental discrepancies.

However, even if this approach fits the particular facts of *Obergefell*, it seems like a poor guiding principle for future cases. As soon as litigants realize that Justice Kennedy's top-to-bottom method will be the dominant substantive due process paradigm moving forward, they may begin to artfully plead their cases and will likely aim to define the right in question in the broadest way possible that is both plausible and advantageous to their arguments.

This change in strategy for future litigants is, in itself, not necessarily a bad thing. After all, artful pleading is certainly nothing new, and just because lawyers attempt to frame a dispute in terms that benefit their arguments does not mean they are engaged in any deceitful behavior, just effective lawyering. However, what this does illustrate is that the court cannot blindly rely on the definitions of the right handed to them by the parties in all cases. Once you have litigants competing to define the conflict in overly general ways, the case will reach a point where the pleadings from each party can no longer guide the court's rights definition. In *Obergefell*, Justice Kennedy decided that extending the fundamental right to marriage to same-sex couples was not inconsistent with the central meaning of that fundamental right.[114] But instead of arguing that the central issue of the case was the right to marriage, the respondents could have also argued that the true issue was some other broad concept, like the right of legislatures to define societal institutions or religious liberty, then Justice Kennedy's approach ceases to function. One right alleged will not always be the direct, more general version of the other, and this fact complicates the analysis.

114. *Id.* at 2602.

Therefore, in cases where the parties seem to be talking past one another, asserting more disparate and tenuously connected rights, the court must decide for itself what rights should be the subject of its substantive due process inquiry. However, there is strategy here that can provide some much needed guidance, one equally consistent with *Obergefell v. Hodges* itself: look to tradition and determine whether there exists a proximate recognized right in the already existing precedent that would dispose of the case. This could serve as the starting point, the higher level version of the right that will be contrasted to the lower level, more specific right invoked by the facts of the case.

Much like elsewhere in Justice Kennedy's approach to substantive due process review, history and tradition serve as guideposts.[115] As previously discussed, the justice relied upon prior legal precedent when rejecting the applicability of the *Glucksberg* framework for *Obergefell*, arguing instead that previous landmark cases that expanded the right to marriage "inquired about the right to marry in its comprehensive sense."[116] The existence of a recognized higher-level right may provide the differentiating factor we need to justify Justice Kennedy's treatment of *Glucksberg*; existing precedent provided us with a clear, higher-level right to focus on in marriage cases, but no obvious higher-level right for the facts in *Washington v. Glucksberg* like the right to commit suicide.[117] So if Justice Kennedy relies upon legal tradition to justify his choice of methodology in *Obergefell*, then he can just as easily employ it to help guide one of the trickiest steps in implementing his new approach. If there exists a pre-recognized right for the subject matter of the case, that can serve as an intuitive starting point for Justice Kennedy's *Obergefell* approach to substantive due process.

However, there are a few difficulties with this solution to the starting point question as well. Primarily, there may simply be no clear, proximate recognized right for the facts of a particular case. Furthermore, this practice does not provide much assistance at all in choosing the equally important lower level version of the right. It seems that, by their very nature, these incarnations of the right will be

115. *Id.* at 2598.

116. *Id.* at 2602.

117. Washington v. Glucksberg, 521 U.S. 725 (1997) ("The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection."); Yoshino, *supra* note 17, at 165 ("The distinction [between the right to physician-assisted suicide and the right to marry] may be that in the context of physician assisted suicide, there was no more general right that had been recognized—such as the 'right to commit suicide.'").

somewhat new and unfamiliar to the court. One of the main draws of Justice Kennedy's *Obergefell* methodology is that it provides judges with an opportunity to provide further definition to fundamental rights, comparing one version to the central meaning of a more generalized version and determining just how far our Constitution's substantive due process protections reach. If the lower-level version of the right was already firmly supported in existing legal doctrine, the whole enterprise becomes superfluous.

Even if the decision to use legal precedent as a guide for selecting the starting point of Justice Kennedy's methodology is not completely comprehensive, it still provides us with a more compelling approach than letting the litigants decide on their own, and it can be quite helpful in certain cases where there is a clear, universally recognized right. In other instances, judges will just have to rely on their discretion. But really, this result is consistent with Justice Kennedy's treatment of tradition: it should be a guide, not an absolute restraint. Justice Kennedy has embraced a certain amount of less restrained, judicial discretion as being healthy to the project of substantive due process,[118] so this problem is in no way fatal to the whole enterprise. Certainly, it is no more problematic than in the more rigid alternative presented by Justice Scalia, as the same issues of where to begin the analysis pop up in both methods. If anything, these issues are more troubling in the *Michael H.* context, because Justice Scalia presented his formula as mechanical, objective, and self-executing.

## IV.
## Justice Kennedy's Other Revealing Substantive Due Process Opinions

To gain further insight into Justice Kennedy's views on rights definition and the levels of generality problem, as well as to clarify some of the murkier elements of his response to these issues in *Obergefell*, it is instructive to examine Justice Kennedy's other opinions relating to substantive due process review. Specifically, this section examines two cases that demonstrate that Justice Kennedy's preference for rights defined at a relatively higher level of generality has been consistent over the years. These additional opinions show that Justice Kennedy has been hinting at his top-to-bottom approach to

118. *Obergefell*, 135 S. Ct. at 2598 (explaining how the identification and protection of fundamental rights cannot be reduced to any formula and requires "courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect").

rights definition for years, only to reveal it more fully with his *Obergefell* opinion.

*Lawrence v. Texas*,[119] in addition to being a landmark case for the progression of gay rights in this country, is highly illustrative of Justice Kennedy's approach to substantive due process and foreshadowed his *Obergefell* opinion in a number of significant ways. Justice Kennedy penned the *Lawrence* majority opinion as well, holding that a Texas statute criminalizing sexual acts between members of the same sex violated the Fourteenth Amendment, and overturned *Bowers v. Hardwick*, in which the Supreme Court had held that the Federal Constitution did not confer any fundamental right upon same-sex couples to engage in sodomy or other intimate acts.[120] Similar to his opinion in *Obergefell* over a decade later, Justice Kennedy treated the Equal Protection and Due Process Clauses of the Fourteenth Amendment as innately related protections,[121] extolled the value of liberty as a protection against unwarranted government intrusion,[122] and diverged from *Washington v. Glucksberg's* formula in its treatment of tradition.[123] But, most relevant to this topic are passages in *Lawrence* that relate to the question of defining the alleged right. Justice Kennedy criticized the *Bowers* majority for defining the issue presented as whether or not the right of "homosexuals to engage in sodomy" was protected by the Constitution.[124] He wrote in *Lawrence* that this definition of the central issue disclosed the Court's prior failure to appreciate the full extent of the liberty at stake: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[125] Similar to the debate between the petitioners and respondents in *Obergefell*, Justice Kennedy rejected an ar-

119. 539 U.S. 558 (2003).

120. *Id.* at 577 (discussing Bowers v. Hardwick, 478 U.S. 186 (1986)).

121. *Id.* at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

122. *Id.* at 562 (stating in the very first sentence of the opinion that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places").

123. *Id.* at 572 (citing County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)) (internal quotation marks omitted) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."). *See also* Yoshino, *supra* note 17, at 154 (observing that Justice Kennedy's *Lawrence* opinion never actually cites *Glucksberg* at all, creating some confusion on the status of *Glucksberg* at the time).

124. *Bowers*, 478 U.S. at 190.

125. *Lawrence*, 539 U.S. at 566–67.

gument to define a right more narrowly, insisting that doing so would fail to protect the broader liberty interests at issue.

Unfortunately, Justice Kennedy's *Lawrence* opinion is even more ambiguous than his *Obergefell* opinion in many respects: much of it focused more on the myriad reasons why *Bowers* should be overturned than clearly defining a right and defending why it should garner constitutional protection. He did not explicitly adopt the *Obergefell* framework, directly comparing a more general version of a right with a more specific version and searching for any fundamental inconsistencies that would demand further substantive due process analysis be restricted to the latter. Nonetheless, the general approach of both opinions is the same: invalidating certain laws that focus on behavior more narrowly through appeals to more universal, abstract principles. In *Lawrence*, Justice Kennedy rejected the argument that these statutes only target certain sexual behaviors, claiming instead that they represent an attempt to regulate private personal relationships.[126] Justice Kennedy also argued that the Constitution demands protection of personal autonomy and dignity, or the ability to make decisions of the most intimate and personal kind, and persons in same-sex relationships deserve all the same protections in this realm as opposite-sex couples.[127] Even without the clear contrasting of two types of rights like in *Obergefell*, Justice Kennedy still placed heavy emphasis on broad principles of liberty and autonomy, and he rejected the more focused legislation at issue because of its violation of these more general values.

*Lawrence v. Texas* is not Justice Kennedy's only opinion that aligns with his *Obergefell* substantive due process approach. A few years before *Lawrence*, the Supreme Court decided *Troxel v. Granville*, a case that determined in what scenarios could a court issue visitation rights against a parent's wishes.[128] Justice O'Connor penned the majority opinion, holding that the lower court's actions, granting paternal grandparents increased visitation rights against the will of the child's mother, violated the mother's Fourteenth Amendment substan-

126. *Id.* at 567 ("The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.").

127. *Id.* at 573–74 (discussing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

128. *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

tive due process rights.[129] Justice Kennedy wrote a dissenting opinion in which he cited the general liberty interest guaranteed by the Fourteenth Amendment's Due Process Clause as being an essential element of his deliberations.[130]

Crucially, Justice Kennedy argued that the main parental rights at issue here exist in an expansive sense, and courts should be reluctant to define them more narrowly, writing that "[t]he principle exists . . . in broad formulation; yet courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right.[131] This passage reemphasized that, within the arena of substantive due process, Justice Kennedy favors broad constructions of rights. He is hesitant to formulate more precise definitions, fearing that this will inevitably lead to the shrinking of Constitutional protections. Like his *Lawrence* opinion, Justice Kennedy's *Troxel* opinion does not engage in the kind of substantive due process exercise seen in *Obergefell*, directly comparing two competing definitions of a particular right. But *Lawrence* and *Troxel* nonetheless reinforce Justice Kennedy's views on substantive due process generally, which serve as the foundation for the top-to-bottom methodology of rights definition he creates in *Obergefell*.

One other important thing to recognize about these two cases is that they both feature proximate high-order rights that had been previously recognized by legal precedent. In *Lawrence*, there was a right to sexual intimacy that even *Bowers* had recognized in a few different forms, all derived from the broader right to privacy.[132] And for *Troxel*, the sparring opinions analyzed the right to keep an extended, nonnuclear family together, which *Moore v. East Cleveland* recognized.[133] Justice Kennedy cites to these rights in some manner in both

129. *Id.* at 66–67.

130. *Id.* at 94–95 (Kennedy, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Stanley v. Illinois, 405 U.S. 645, 651–52 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972); Santosky v. Kramer, 455 U.S. 745, 753–54 (1982)) ("The parental right [to determine how to best raise, nurture, and educate the child without undue state interference] stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.") .

131. *Troxel*, 530 U.S. at 95–96 (Kennedy, J., concurring).

132. Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (discussing the constitutional protections on family relationships, procreation, contraception, and abortion).

133. 431 U.S. 494, 505 (1977) (holding that a housing ordinance that limited occupancy of a dwelling unit to a single "family" violated due process because it defined the persons who can constitute a "family" too narrowly).

his *Lawrence*[134] *and Troxel*[135] opinions. Strengthened by the knowledge of these legally established rights, Justice Kennedy had additional support to advocate for expansive due process protections in each case. These examples reinforce the argument that Justice Kennedy has a preference for interpreting tradition in a way that favors expansive conceptions of rights. They also show that, if he had made his top-to-bottom *Obergefell* framework explicit earlier and applied it to these cases, he could have used these proximate recognized rights as his starting position and arrived at the same result. This fact further supports the notion that precedent can often serve as a useful guide to selecting the level of generality at which to begin substantive due process review.

Based on his consistent opinions, Justice Kennedy clearly believes in a broad, far-reaching conception of liberty, and he helps protect that conception by favoring general definitions of rights when engaging in substantive due process. This consistent desire to let fundamental rights remain broad may explain Justice Kennedy's dislike of precise formulas in this subject matter: anything precise enough to be labeled a formula, removing a great deal of discretion from judges themselves, seems more likely to create artificial contours around a right. Justice Kennedy's goal of expansive fundamental rights necessitates discretion, a very human reluctance to confine a right more narrowly because of what that will mean to the real-world liberty interests at stake. Part of this motive is built into his approach in *Obergefell*: the top-to-bottom approach strongly favors more general constructions of rights, just as Justice Scalia's *Michael H.* formula favors relatively narrow definitions. Also, the fact that the *Obergefell* approach is not a "formula" per se is significant in its own right. The requirements for moving from a high level of generality to the narrower version of a right are left somewhat ambiguous. This feature ensures that substantive due process does not become a mechanical endeavor because it demands that justices apply their very human discretions to determine the "central meaning" of the right at issue. If this process results in a right being constrained, it will be the result of reasoned judgment, not the methodology itself.

## Conclusion

Justice Kennedy believes in an expansive and somewhat elusive concept of liberty, undoubtedly grounded in the Due Process Clause

134. Lawrence v. Texas, 539 U.S. 558, 566–67, 573–74 (2003).
135. *Troxel*, 530 U.S. at 98.

but resistant to precise definition. Indeed, Justice Kennedy suggests that to attempt to draw the boundaries with any final exactitude would do a disservice to the principle itself, overly limiting what protections it can offer the nation's denizens.

This mindset becomes especially apparent in his answer to the levels of generality problem. Justice Kennedy would have courts begin with a right defined at a relatively higher level of generality, only switching analysis to narrower iterations upon finding a categorical incompatibility between these two competing versions of the right, where the more specific iteration of the right somehow betrays the central meaning of the fundamental right. By adopting this strategy, Justice Kennedy does not vanquish all the worries that plagued Justice Scalia's *Michael H.* formula—the hierarchy of potential rights is still dauntingly vast, intricate, and offers countless versions for a court to sift through. But, if nothing else, Justice Kennedy creates a framework that grants increased discretion to the judges themselves, gifting them with the ability to more freely use their reasoned judgment and better navigate that warped ladder of rights, likely in a more effective manner than any supposedly objective formula would allow. Substantive due process review will doubtless continue to evolve, and new complexities will likely be added to Justice Kennedy's rights definition methodology in future opinions. But for now, *Obergefell v. Hodges* has provided a new way to look at an old problem, one that does more justice to a broad conception of liberty.