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# The Role of Public Reason in *Obergefell v. Hodges*

Robert Katz<sup>\*</sup>

In *Obergefell v. Hodges*,<sup>1</sup> the United States Supreme Court held in a 5-4 decision that same-sex couples have a constitutional right to obtain a civil marriage. The decision yielded five opinions: the majority opinion, written by Justice Anthony Kennedy and joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, and four separate dissents written by Chief Justice Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito, respectively. When read together, the five opinions are unsatisfying because they mostly talk past one another. Kennedy's opinion locates the right to same-sex marriage (SSM) in the Due Process and Equal Protection clauses of the Fourteenth Amendment.<sup>2</sup> The dissents condemn the majority for usurping democratic decision making<sup>3</sup> and threatening religious freedom.<sup>4</sup>

This Essay argues that despite appearances, Roberts' and Kennedy's *Obergefell* opinions share deep commonalities that can be discerned by reading them through the lens of public reason. Public reason is the idea that the "moral or political rules that regulate our common life be, in some sense, justifiable or acceptable to all those persons over whom the rules

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> *Id.* at 2597–2605.

<sup>3</sup> *See, e.g., id.* at 2612 (Roberts, C.J., dissenting) ("[This dissent is] about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law."); *id.* at 2627 (Scalia, J., dissenting) ("This practice of constitutional revision by an unelected committee of nine . . . robs the People of . . . the freedom to govern themselves."); *id.* at 2631 (Thomas, J., dissenting) (The Petitioners "ask nine judges on this Court to enshrine their definition of marriage in the Federal Constitution and thus put it beyond the reach of the normal democratic process for the entire Nation."); *id.* at 2642 (Alito, J., dissenting) ("Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.");

<sup>4</sup> *See, e.g., id.* at 2625 (Roberts, C.J., dissenting) ("Today's decision . . . creates serious questions about religious liberty."); *id.* at 2638 (Thomas, J., dissenting) ("[T]he majority's decision threatens the religious liberty our Nation has long sought to protect."); *id.* at 2642–43 (Alito, J., dissenting).

purport to have authority.”<sup>5</sup> Political philosopher John Rawls developed the idea of public reason to address the problem of stability in constitutional democracies.<sup>6</sup> “[H]ow is it possible,” he asks, “for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”<sup>7</sup> The term “comprehensive doctrine”<sup>8</sup> (a.k.a. “creed”) refers to a person’s views “about God and life, right and wrong, good and bad.”<sup>9</sup> Rawls describes the persistence of a certain kind of deep diversity as “the fact of reasonable pluralism.”<sup>10</sup>

Public reason isn’t just an idea; it is also an ideal.<sup>11</sup> As commentator Steven Mazie writes, “[i]t isn’t possible for anyone—even a Supreme Court Justice—to completely divorce herself from her religious or ideological commitments for the sake of political (or even legal) deliberation.”<sup>12</sup> In Rawls’ view, a supreme court serves as an “exemplar” of public reason (notwithstanding its members’ frailties) whose opinions can give the idea “vividness and vitality”<sup>13</sup> and “help model it for the rest of us.”<sup>14</sup>

This Essay aims to show the validity and value of using the idea of public reason to explore Roberts’ and Kennedy’s *Obergefell* opinions. Important elements of these opinions, it argues, draw heavily upon the idea of public reason or something akin to it.<sup>15</sup> Each relies on certain claims and assumptions about the nature, scope, and proper use of public reason in judicial decision making and public discussion. They disagree or diverge on certain points and engage in some back and forth.

Roberts accuses Kennedy of violating public reason by grounding the right to SSM on a sectarian creed, namely, the comprehensive liberalism espoused by John Stuart Mill.<sup>16</sup> Kennedy implicitly reproves citizens who

<sup>5</sup> Jonathan Quong, *Public Reason*, § 6, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2013), <http://plato.stanford.edu/archives/sum2013/entries/public-reason>.

<sup>6</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xvi–xviii (1995).

<sup>7</sup> *Id.* at xviii; *see id.* at xviii, 58–66 (discussing the distinction between simple pluralism and “reasonable” pluralism).

<sup>8</sup> *Id.* at 13.

<sup>9</sup> Leif Wenar, *John Rawls*, § 3.2, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Sept. 24, 2013), <http://plato.stanford.edu/archives/win2013/entries/rawls>.

<sup>10</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–66 (1977) (The “fact of reasonable pluralism” denotes “the fact that a plurality of conflicting reasonable comprehensive doctrines . . . is the normal result of its culture of free institutions.”).

<sup>11</sup> JOHN RAWLS, *COLLECTED PAPERS* 576 (Samuel Freeman ed., 1999).

<sup>12</sup> STEVEN V. MAZIE, *AMERICAN JUSTICE 2015: THE DRAMATIC TENTH TERM OF THE ROBERTS COURT* 5 (2015).

<sup>13</sup> RAWLS, *supra* note 6, at 235.

<sup>14</sup> MAZIE, *supra* note 12, at 5.

<sup>15</sup> For convenience, I also use the term “public reason” to refer to the analyses in Kennedy’s and Roberts’ opinions that resemble or call to mind Rawls’ idea of public reason.

<sup>16</sup> *See infra* notes 37–41 and accompanying text.

support SSM bans on religious grounds, perhaps gesturing towards a civic duty or etiquette to refrain from supporting laws based solely on one's creed.<sup>17</sup> Roberts in turn criticizes Kennedy for unfairly applying the demands of public reason to ordinary citizens.<sup>18</sup> In these ways, Roberts and Kennedy act less like exemplars of public reason and more like whistleblowers of others' violations and misapplications of the idea.

This Essay aims simply to explore the role that the idea of public reason plays in Roberts' and Kennedy's *Obergefell* opinions. It does not attempt to answer the many challenging questions it raises about the idea on the merits.

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According to Stephen Macedo, a leading liberal theorist, "the idea of public reason focuses on public deliberative forums when legislators and other public officials are deciding for all matters that touch on basic principles of justice."<sup>19</sup> We rightly expect public officials—and a supreme court above all—to defend their decisions by appealing to reasons that all reasonable persons could endorse.<sup>20</sup> In deciding cases, writes Rawls, justices cannot "invoke their own personal morality, nor the ideals and virtues of morality generally."<sup>21</sup> Rather, "they must view [these] as irrelevant."<sup>22</sup>

Not all justices embrace the idea of public reason. Consider the 2015 open letter written by the Honorable Roy S. Moore, Chief Justice of the Alabama Supreme Court. Moore wrote:

The laws of this state have always recognized the Biblical admonition stated by our Lord [that] "from the beginning of the creation God made them male and female. For this cause shall a man leave father and mother, and cleave to his wife; And they twain shall be one flesh."<sup>23</sup>

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<sup>17</sup> See *infra* notes 42–61 and accompanying text.

<sup>18</sup> See *infra* notes 62–68 and accompanying text.

<sup>19</sup> Stephen Macedo, *Why Public Reason? Citizens' Reasons and the Constitution of the Public Sphere* 20 (Aug. 23, 2010) (unpublished manuscript), <http://ssrn.com/abstract=1664085>.

<sup>20</sup> Quong, *supra* note 5, § 6 (citing RAWLS, *supra* note 11, at 576–77).

<sup>21</sup> RAWLS, *supra* note 6, at 236.

<sup>22</sup> *Id.*

<sup>23</sup> Letter from Roy S. Moore, Chief Justice, Alabama Supreme Court, to Hon. Robert Bentley, Gov. of Alabama (Jan. 27, 2015), [http://media.al.com/news\\_impact/other/Read%20Chief%20Justice%20Moore%20letter.pdf](http://media.al.com/news_impact/other/Read%20Chief%20Justice%20Moore%20letter.pdf) (quoting Mark 10:6–9). Moore's letter also quotes from an 1870 Alabama Supreme Court opinion describing marriage as "a divine institution" that imposes upon spouses "higher moral and religious obligations than those imposed by any mere human institution or government." *Id.* (quoting *Hughes v. Hughes*, 44 Ala. 698, 703 (1870)).

Political theorist Leif Wenar anticipated statements like these. “[A] Supreme Court justice deciding on a gay marriage law would violate public reason,” wrote Wenar in 2013,

were she to base her opinion on God’s forbidding gay sex in the book of Leviticus, or on a presentiment that upholding such a law would hasten the end of days. Not all members of society can reasonably be expected to accept Leviticus as stating an authoritative set of political values, nor can a religious premonition be a common standard for evaluating public policy. These values and standards are not public.<sup>24</sup>

Moore’s approach is the antithesis of Roberts’ *Obergefell* dissent, and the idea of public reason helps explain why. Roberts invokes Justice Oliver Wendell Holmes, Jr.’s admonition that “the Constitution ‘is made for people of fundamentally differing views.’”<sup>25</sup> For this reason, Roberts believes that courts should apply what he calls “neutral principles of constitutional law.”<sup>26</sup> This approach helps judges resist the temptation, in his words, “to confuse our own preferences with the requirements of the law.”<sup>27</sup> In a similar vein, Kennedy refers to “the judicial duty [of courts] to base their decisions on principled reasons and neutral discussions.”<sup>28</sup> These statements resonate with Rawls’ claim that public officials, especially justices, are obliged to explain their decisions in publicly reasonable terms and to refrain from deciding matters on the basis of comprehensive doctrines.

Public reason does not restrict what everybody can say about anything. “[T]he limits imposed by public reason do not apply to all political questions,” Rawls writes, but only those involving certain matters—most notably the “constitutional essentials” of a constitutional democracy.<sup>29</sup> These include “equal basic rights and liberties of citizenship that legislative majorities are to respect.”<sup>30</sup> *Obergefell* effectively decides that the ability of same-sex couples to marry is a constitutional essential in this sense.<sup>31</sup>

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In Roberts’ view, Kennedy’s opinion violates public reason by justifying the right to SSM based on a form of comprehensive or sectarian

<sup>24</sup> Wenar, *supra* note 9, § 3.6.

<sup>25</sup> *Obergefell v. Hodges*, 135 S. Ct. 1584, 2612 (2015) (Roberts, C.J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2597.

<sup>29</sup> RAWLS, *supra* note 6, at 227.

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g., Obergefell*, 135 S. Ct. at 2598 (citations omitted) (“[T]he Court has reiterated that the right to marry is fundamental under the Due Process Clause.”).

liberalism, the class of which, Rawls writes, “include[s] conceptions of what is of value in human life, ideals of personal virtue and character that are to inform our thought and conduct as a whole.”<sup>32</sup> Rawls distinguishes comprehensive liberalism from political liberalism, the scope and aims of which are more modest. The latter seeks to provide “a political framework that is neutral between . . . controversial comprehensive doctrines,” including comprehensive liberalism.<sup>33</sup> By grounding the right to SSM on the creed of comprehensive liberalism, charges Roberts, Kennedy’s opinion violates the demands of public reason. The five members of the majority, he asserts, have “enacted their own vision of marriage as a matter of constitutional law,”<sup>34</sup> and this vision is grounded in turn on a “moral philosophy” that “elevat[es] . . . the fullest individual self-realization over the constraints that society has expressed in law.”<sup>35</sup> Although this vision “may have [force] as a matter of moral philosophy,”<sup>36</sup> it is not neutral as between competing visions of marriage espoused (as it were) by competing creeds.

To support this charge, Roberts cites Kennedy’s appeal to the famous “harm principle” formulated by John Stuart Mill, whom Rawls counts as one of the foremost expounders of a comprehensive liberalism.<sup>37</sup> Mill famously declared that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>38</sup> The cases at bar in *Obergefell*, writes Kennedy, “involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.”<sup>39</sup> Kennedy’s “assertion

<sup>32</sup> RAWLS, *supra* note 11, at 427.

<sup>33</sup> Gerald Gaus, Shane D. Courtland & David Schmitz, Liberalism, § 3.1, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2015), <http://plato.stanford.edu/archives/spr2015/entries/liberalism>.

<sup>34</sup> *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting); *see also id.* at 2621 (Roberts, C.J., dissenting) (“The truth is that today’s decision rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry because they want to, and that ‘it would disparage their choices and diminish their personhood to deny them this right.’”).

<sup>35</sup> *Id.* at 2622 (Roberts, C.J., dissenting).

<sup>36</sup> *Id.*

<sup>37</sup> RAWLS, *supra* note 11, at 427.

<sup>38</sup> JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978).

<sup>39</sup> *Obergefell*, 135 S. Ct. at 2606–07. The majority noted:

The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple’s decision-making processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.

of the ‘harm principle,’” writes Roberts,

sounds more in philosophy than law . . . . But a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of “due process.” . . . [T]he Fourteenth Amendment does not enact John Stuart Mill’s *On Liberty* . . . . And it certainly does not enact any one concept of marriage.<sup>40</sup>

By invoking the “harm principle,” Roberts contends, “the majority offers perhaps the clearest insight into its decision”<sup>41</sup>—namely, that it is grounded on sectarian liberalism. It is the smoking gun that kills any pretense of neutrality among competing comprehensive doctrines.

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At several points in his opinion, Kennedy discusses comprehensive doctrines that disapprove of SSM and their followers. One such doctrine holds that marriage “is by its nature a gender-differentiated union of man and woman.”<sup>42</sup> Kennedy professes respect for this position and its adherents. “This view,” he writes, “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”<sup>43</sup> In a similar vein, he writes that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”<sup>44</sup>

From Kennedy’s perspective, there is nothing problematic *per se* about religiously-grounded disapproval of SSM. Problems arise, however, when such disapproval is enacted into law. “[W]hen that sincere, personal opposition becomes enacted law and public policy,” he writes, “the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.”<sup>45</sup>

But what exactly is problematic about SSM bans? Such bans of course inflict material<sup>46</sup> and non-material<sup>47</sup> harms to same-sex couples and their

<sup>40</sup> *Id.* at 2622 (Roberts, C.J., dissenting).

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

<sup>42</sup> *Id.* at 2594.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2603; *see also id.* at 2597 (referring to “the judicial duty [of courts] to base their decisions on principled reasons and neutral discussions, *without scornful or disparaging commentary*”) (emphasis added).

<sup>45</sup> *Id.* at 2602.

<sup>46</sup> Bans on SSM exclude same-sex couples and their families from the many of the legal rights and benefits to which different-sex married couples are entitled. The incidents of marital status under state law typically include:

families. Yet there is another problem with such bans, one that is harder for Kennedy to articulate but which is suggested by the following passage. “[I]t must be emphasized,” writes Kennedy,

that religions, and those who adhere to religious doctrines, may continue to *advocate* with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to *teach the principles* that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to *continue the family structure* they have long revered. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential . . . *may engage those who disagree with their view in an open and searching debate*. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.<sup>48</sup>

Kennedy here speaks directly to religiously-motivated SSM opponents who are asking themselves where to go from here. How do they move forward now that SSM is the law of the land? They should shift their energies away from lawmaking forums, Kennedy suggests, and instead seek wider acceptance of their beliefs about traditional marriage in the marketplace of ideas.<sup>49</sup> They may teach these beliefs diligently to their children, speak of them when they walk by the way,<sup>50</sup> and live their lives according to these precepts. Yet they must henceforth refrain from seeking to enact SSM bans or other laws aimed at thwarting same-sex couples from exercising their right to SSM.

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taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.

*Id.* at 2601 (citations omitted).

<sup>47</sup> Non-material harms include the legal instability experienced by same-sex couples and their families, and the implicit message that gays and lesbians are unequal in important respects. *Id.* at 2601–02.

<sup>48</sup> *Id.* at 2607 (emphases added).

<sup>49</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>50</sup> See Deuteronomy 6:7 (King James), [www.kingjamesbibleonline.org/Deuteronomy-6-7](http://www.kingjamesbibleonline.org/Deuteronomy-6-7). It is surely not the case, as Alito suggests, that SSM opponents might only express their views when they sit in their houses. See *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting) (“I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”).

Kennedy's remarks here, I submit, signal or suggest a reproof to ordinary citizens who support SSM bans on the basis of their religious beliefs.<sup>51</sup> It isn't just the harms such bans inflict on same-sex couples and their families that count. In a constitutional democracy, Kennedy suggests, there is something independently troubling about pushing for a law that denies a basic civil right on grounds that one's creed countenances or even demands such advocacy or enactments. This reproof presupposes the breach of some duty—perhaps a duty to refrain from advocating and voting for laws that cannot be justified on grounds that are intelligible or potentially acceptable to fellow citizens who do not share one's creed.

Kennedy's discussion of religiously-motivated supporters of SSM bans connects to a debate among liberal theorists as to “what duties, if any, . . . the idea of public reason impose[s] on individuals.”<sup>52</sup> In Rawls' view, public reason

imposes a moral, not a legal, duty . . . to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.<sup>53</sup>

Rawls calls this duty the “duty of civility.”<sup>54</sup> “For Rawls,” explains Mazie,

it is essential that people consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. It is a nonstarter to simply restate your personal religious or moral commitments, as others may not share them. Citizens need to give each other warrants for their claims that their friends, foes, and neighbors could accept without having to fundamental change who they are or where their metaphysical commitments may lie.<sup>55</sup>

This duty, Macedo writes, applies only to citizens discussing certain measures in certain venues.

Citizens take part in many deliberative settings—informally, or in civil society, in churches, over office water coolers, in bars, and at home—where norms of public reason have no proper role. The crucial venue for public reason is when some are deciding for all what the law will

<sup>51</sup> Kennedy's remarks may also apply to religiously-motivated supporters of other legal means for blocking same-sex couples from exercising their right to SSM.

<sup>52</sup> This is the question is addressed by Quong, *supra* note 5, § 6.

<sup>53</sup> RAWLS, *supra* note 6, at 217; *see also* Macedo, *supra* note 19, at 1 (“[T]he idea of public reason holds that those advocating laws and policies that touch on basic constitutional principles ought to offer adequate supporting reasons that could be shared by all reasonable members of the political community.”).

<sup>54</sup> RAWLS, *supra* note 6, at 217.

<sup>55</sup> MAZIE, *supra* note 12, at 5 (quotation omitted).

be concerning basic justice.<sup>56</sup>

The duty of civility calls upon citizens “to think of themselves as *if* they were legislators.”<sup>57</sup> When widely embraced, the duty of civility promotes the stability of constitutional democracy. (Alternatively, it helps “secure the blessings of liberty to ourselves and our posterity.”<sup>58</sup>) As Rawls writes:

When firm and widespread, the disposition of citizens to view themselves as ideal legislators, and to repudiate government officials and candidates for public office who violate public reason, is one of the political and social roots of democracy, and is vital to its enduring strength and vigor.<sup>59</sup>

In sum, in order to reprove ordinary citizens who support SSM bans based on religious grounds, Kennedy may need to presume that such persons are bound by something along the lines of Rawls’ duty of civility.

One wonders why Kennedy discusses ordinary citizens who oppose SSM *at all*. What does he hope his discussion to accomplish? Roberts more or less asks the same question. “Perhaps the most *discouraging* aspect of today’s decision,” he writes, “is the extent to which the majority feels compelled to sully those on the other side of the debate.”<sup>60</sup> For “discouraging,” one might substitute the word “perplexing.” Several sentences later, Roberts writes that “[i]t is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.”<sup>61</sup> Roberts has a point: Kennedy could have simply stuck to his knitting. No opponent of SSM asked him for advice on what she ought to do—or refrain from doing—next. Perhaps Kennedy’s aim in offering such advice was not, as Roberts insinuates, to smear or insult opponents of SSM, but to instruct them. (This can be its own insult of course because the would-be instructor presumes that he is qualified to offer such instruction and that the intended audience would benefit from following it.)

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Roberts says some harsh things about the *Obergefell* majority. To state the matter plainly, he denounces them as hypocrites and sectarian liberals. This is understandable. In Roberts’ view (as restated in terms of public

<sup>56</sup> Macedo, *supra* note 19, at 20.

<sup>57</sup> RAWLS, *supra* note 11, at 577 (emphasis in original).

<sup>58</sup> U.S. CONST. pmb1.

<sup>59</sup> RAWLS, *supra* note 11, at 577.

<sup>60</sup> *Obergefell v. Hodges*, 135 S. Ct. 1584, 2626 (2015) (Roberts, C.J., dissenting) (emphasis added).

<sup>61</sup> *Id.*

reason), the majority betray their judicial duty by justifying a right to SSM on the basis of their preferred creed, while disparaging ordinary citizens who support banning SSM on the basis of *their* preferred creeds. This is all the more *chutzpadik*<sup>62</sup> because ordinary citizens—unlike Supreme Court justices—are less obliged (if at all) to justify their stance on SSM bans in publicly reasonable terms. It is no coincidence, moreover, that the majority justices' preferred creed is liberal while the ban's supporters' creeds are not or may reflect a different conception of constitutional democracy.

Although Roberts intuits that Kennedy passes judgment on supporters of SSM bans, he perceives the judgment differently. He dismisses as “disclaimer” Kennedy's professed respect for creeds that support SSM bans and their followers. Kennedy's profession, writes Roberts:

is hard to square with . . . the majority's expla[nation] that “the necessary consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of millions of people who voted to reaffirm their States' enduring definition of marriage—have acted to “lock . . . out,” “disparage,” “disrespect and subordinate,” and inflict “[d]ignitary wounds” upon their gay and lesbian neighbors.<sup>63</sup>

Roberts accuses the majority of imputing bad motives to SSM ban supporters—a naked desire to harm and humiliate same-sex couples and their families—and of portraying them as bigoted.<sup>64</sup>

Roberts does not directly respond to Kennedy's implied criticism of religiously-motivated SSM ban supporters. He avoids doing so by focusing on state officials and the secular arguments they advance to defend SSM bans, rather than the religious reasons that some ordinary citizens invoke to defend their support of such bans. The states' arguments, writes Roberts, proceed from the obvious truth and empirical assertions that:

[t]he human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their

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<sup>62</sup> LEO ROSTEN, *THE NEW JOYS OF YIDDISH* 81 (2001) (Lawrence Bush ed., 2001) (*chutzpadik* (adj.)) (defining *chutzpah* (noun) as “[g]all, brazen nerve, effrontery, incredible ‘guts’; presumption plus arrogance such as no other word, and no other language, can do justice to”) (pronounced “KHOOTS-pah”).

<sup>63</sup> *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (citations omitted).

<sup>64</sup> *Id.* (citations omitted).

separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.<sup>65</sup>

Justice Alito also characterizes the state officials' arguments as secular.

[T]he States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse. Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children. They thus argue that there are *reasonable secular grounds* for restricting marriage to opposite-sex couples.<sup>66</sup>

Roberts asserts that the traditional definition of marriage is grounded on neither creed nor hatred. This definition, he claims,

did not come about as a result of a . . . religious doctrine, or . . . a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.<sup>67</sup>

Roberts' opinion evokes the idea of public reason in several ways. First, Roberts does not view the alleged right to SSM as a constitutional essential—or at least not a basic civil right guaranteed by the *federal* constitution. Thus the demands of public reason presumably do not apply. For this reason the U.S. Supreme Court should defer to a state's refusal to grant or recognize SSMs under the state's own law. Second, Roberts may believe that SSM bans satisfy public reason by virtue of the secular (and perhaps plausible) reasons advanced by state officials. This would be consistent with Roberts' view that SSM bans would withstand review under "neutral principles of constitutional law."<sup>68</sup> Lastly, Roberts may not believe that ordinary citizens who support SSM bans are obliged to defend their position in publicly reasonable terms. Stated differently, Roberts may simply reject Rawls' idea of a duty of civility.

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This Essay, if successful, has demonstrated the validity and value of exploring Roberts' and Kennedy's *Obergefell* opinions through the lens of

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<sup>65</sup> *Id.* at 2613 (Roberts, C.J., dissenting).

<sup>66</sup> *Id.* at 2641 (Alito, J., dissenting) (emphasis added).

<sup>67</sup> *Id.* at 2613 (Roberts, C.J., dissenting) (citations omitted).

<sup>68</sup> *Id.* at 2612 (Roberts, C.J., dissenting).

public reason. While it has identified many questions raised by a public reason reading of these opinions, it has not addressed them on the merits.

As a threshold matter, is the idea of public reason coherent? Is the distinction between political liberalism and comprehensive liberalism workable? Assuming the idea of public reason holds water, does Kennedy's opinion meet its demands? If the opinion makes both sectarian and publicly reasonable arguments, do the former thereby taint or undermine the latter? Could Kennedy's opinion be revised to rely exclusively on public reason and be persuasive? Is Rawls correct that ordinary citizens have a duty of civility to support only laws that are publicly reasonable? To speak out against proposed laws that are not? To resist such laws if enacted? To support the candidates most likely to enact laws that are publicly reasonable?

As for Roberts, to what extent does his critique of Kennedy's opinion rely on public reason as opposed to federalism, separation of powers, and judicial restraint? How, for example, would Roberts respond to a state supreme court's decision to strike down an SSM ban enacted by a state legislature or by referendum? Wouldn't such a decision also usurp democratic decision making? Would it matter if the state supreme court's justices were elected? I leave these and other critical questions for another day.