Judicial Rhapsodies
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In Daniel Boorstin’s essay on Blackstone’s *Commentaries on the Laws of England*, he writes that law’s sublimity is created in part by its obscurity, not only the obscurity of its slow historical emergence and alterations but the obscurity of prophecy, “the indefiniteness of an institution which had to adapt itself to the indefinable necessities of the future.” When the Court first asserted its authority to review state court decisions in *Cohens v. Virginia* (1821), Chief Justice John Marshall included the following paean to the immortality of constitutions in his opinion for a unanimous Court:

A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.3

In *McCulloch v. Maryland* (1819), Marshall had similarly written that the Constitution did not have the properties of a code but was “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs,” not to provide, “by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly.”3 Justice Marshall’s metaphor of an immortal constitution exposed to storms and tempests participated in a broader ship of state metaphor most often attributed to the Greek lyric poet Alcaeus of Mytilene of the late
seventh and early sixth century BCE and developed by Plato, Horace, and many modern authors. The epideictic register of the passage is reflected in its thematic metaphor of *storms and tempests* as a constitution navigates a “course” destined to encounter “perils” and “dangers,” as well as in the figure of exergasia which develops the theme through similar statements in different forms, along with the specific repetition of the word *approach* in the opening sentence.

The passage magnified the value of the Constitution and the of Court’s authority to review challenges to the constitutionality of state court decisions by using the gnomic aspect and addressing what it means for something to be called a constitution rather than a specific constitution such as that of the United States. Marshall did not use the simple present to discuss the meaning of a constitution to Americans in the early nineteenth century or even a hypothetical constitution, but used the unbounded present to address constitutionalism itself, infusing the United States Constitution with immortality. The unqualified opening phrase captures this quality: “A constitution is framed for ages to come.” These features converge to amplify the subject beyond the reader’s ability to perceptually encompass it, elevating it to the level of the sublime as a foundation of the Court’s authority in response to a situation in which the Court inaugurated constitutional change with broad social consequences.

In the centuries since *Cohens*, Justice Marshall’s paean to the Constitution’s immortality has been cited and quoted in many judicial opinions, including *Weems v. United States* (1910), in which the Court held that a criminal sentence imposed in the Philippines that was disproportionate to the sentences imposed for more serious crimes was unconstitutionally cruel and unusual punishment, a conclusion which required the Court to consider its interpretation of cruel and unusual punishment under the Eighth Amendment to the United States Constitution. In his opinion for the majority in *Weems*, Justice Joseph McKenna used an epideictic register to amplify the Court’s interpretive authority by drawing on Marshall’s immortal constitution metaphor, without citing *Cohens* specifically but attributing authorship to Marshall:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a
principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.6

Justice Louis Brandeis used this passage of Weems to thematically organize his dissenting opinion in Olmstead v. United States (1928), in which the Court held that the warrantless wiretapping of telephones used to convict defendants under the National Prohibition Act did not violate the Fourth or Fifth Amendments of the Constitution because the wiretaps had been made without physically trespassing on the defendants’ property.7 Brandeis’s dissenting opinion in Olmstead is widely regarded as an early source of the Court’s jurisprudence recognizing a constitutional right of privacy, although Brandeis and Samuel Warren had advocated a right of privacy as the basis of civil actions in an 1890 law review article which they coauthored.8 In Olmstead, Brandeis argued that the authors of the Constitution sought to protect the spiritual and intellectual need to be left alone:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.9

The phrase “the right to be let alone” from Brandeis’s opinion in Olmstead has been quoted at least 423 times in later judicial opinions in the United States.10 Brandeis also wrote in Olmstead that “experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent,” because “the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”11
a sentence quoted at least 105 times in later judicial opinions in the United States.\textsuperscript{12}

At the beginning of Justice Brandeis’s opinion in \textit{Olmstead}, however, he also quoted Justice McKenna’s opinion in \textit{Weems} excerpted above and restated several sentences and phrases without attribution as he amplified the importance of the Constitution adapting to a changing world, beginning with the following passage in which Brandeis quoted McKenna’s statement that constitutional language should not be “confined to the form that evil had theretofore taken”:

When the Fourth and Fifth Amendments were adopted, “the form that evil had theretofore taken,” had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of “the sanctities of a man’s home and the privacies of life” was provided in the Fourth and Fifth Amendments by specific language.\textsuperscript{13}

Continuing his thematic development of Justice McKenna’s opinion in \textit{Weems}, Justice Brandeis quoted without attribution McKenna’s gnomic saying “time works changes, brings into existence new conditions and purposes”:

But “time works changes, brings into existence new conditions and purposes.” Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.\textsuperscript{14}

To conclude his development, Brandeis quoted without attribution McKenna’s statement that “in the application of a constitution, our contemplation cannot be only of what has been but of what may be”:

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been but of what may be.” The progress of science
in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.\textsuperscript{15}

Although Justice Brandeis did not explicitly reference Justice Marshall’s metaphor of an immortal constitution from \textit{Cohens}, he incorporated its influence in his dissenting opinion in \textit{Olmstead} by relying heavily on Justice McKenna’s elaboration of the metaphor in \textit{Weems}. In both instances and in the influence that Brandeis’s paean to privacy in \textit{Olmstead} has had in the development of the Court’s privacy jurisprudence, the intertextual power of Marshall’s immortal constitution metaphor played a crucial role. It also served as a precursor to Justice William Douglas’s metaphor of “emanations” of the Bill of Rights which form “penumbras” of those rights to support a constitutional right of privacy forty years after \textit{Olmstead} in \textit{Griswold v. Connecticut} (1965).\textsuperscript{16} Both Marshall’s and Douglas’s metaphors are important figurations of living constitutionalism—the view that constitutional interpretation must adapt to the times rather than be limited to the conditions of the Constitution’s original enactment—which is particularly important to the Court’s authority to recognize a right such as privacy that is not explicitly enumerated in the Constitution.

This chapter examines the epideictic registers in the Court’s privacy jurisprudence as the right of privacy was found to inhere in the penumbras of the Bill of Rights and in the liberty protected by the Due Process Clause of the Fourteenth Amendment, proceeding by means of an analysis of Justice Anthony Kennedy’s majority opinion in \textit{Obergefell} and a genealogy of the leading cases on which he relied, particularly \textit{Lawrence v. Texas} (2003), \textit{Griswold v. Connecticut} (1965), \textit{Loving v. Virginia} (1967), and related cases. I argue that Chief Justice John Marshall’s immortal constitution metaphor, which viewed the Constitution as a vessel designed to weather “storms and tempests,” and Justice William Douglas’s metaphor of “emanations” of the Bill of Rights which form “penumbras,” serve as important foundations of the Court’s privacy jurisprudence, functioning as central figurations in epideictic registers that amplify the basis of judicial authority to recognize rights such as privacy that are not explicitly
enumerated in the Constitution. The often expansive intertextual power of epideictic registers is at its height in the Court’s privacy cases, I argue, as the Court’s affective commitments to the relationship between liberty and privacy accrue and take on new meanings across a wide range of subjects from searches and seizures to wiretapping, contraceptive use, sexual relations, and marriage. I argue that this jurisprudence and the metaphors on which it relied magnified the value of figurative reasoning itself to a sublime level as a premise of the Court’s interpretive authority.

Obergefell’s Wedding Speech

The third-century CE rhetorician Pseudo-Dionysius of Halicarnassus advises speakers to include the following topics in wedding speeches:

Marriage is...helpful in facing the pains and hardships of life; it lightens these burdens, so to speak, when we share our troubles with our wives and are comforted by their companionship. Then, too, pleasures are bound to seem more gratifying when we do not enjoy them all by ourselves, but have children, wives, and relatives to celebrate and be joyful with us.17

One of the most expansive examples of an epideictic register in the Court’s fundamental rights jurisprudence is Justice Anthony Kennedy’s paean to marriage in his majority opinion in Obergefell v. Hodges (2015), in which the Court held that the right to marriage is guaranteed to same-sex couples by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.18 The opening sentence of Kennedy’s opinion stated that “the Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express their identity,”19 a sentence Justice Antonin Scalia described derisively in his dissenting opinion as a descent from the “disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”20

Consistent with Pseudo-Dionysius of Halicarnassus’s advice on wedding speeches, by the end of Obergefell Justice Kennedy had described marriage not only as a relationship that “allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons,”21 but as a response to the “universal” fear that “a lonely
person might call out only to find no one there.” He added the polysyn-
deton that marriage “offers the hope of companionship and understanding
and assurance that while both still live there will be someone to care for
the other.”

Following his opening paragraph and a brief three-paragraph proce-
dural history, Justice Kennedy extolled marriage’s role in history in order
to “note the history of the subject now before the Court”:

From their beginning to their most recent page, the annals of human his-
tory reveal the transcendent importance of marriage. The lifelong union
of a man and a woman always has promised nobility and dignity to all
persons, without regard to their station in life. Marriage is sacred to those
who live by their religions and offers unique fulfillment to those who find
meaning in the secular realm….Rising from the most basic human needs,
marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising
that the institution has existed for millennia and across civilizations. Since
the dawn of history, marriage has transformed strangers into relatives,
binding families and societies together….There are untold references to
the beauty of marriage in religious and philosophical texts spanning time,
cultures, and faiths, as well as in art and literature in all their forms.

In these passages, Kennedy not only used the superlatives transcendent,
most basic, essential, most profound, central, and untold, but he used
exergasia, parallelism, mesodiplosis, the gnomic aspect, and affirmative
modality to magnify the value of marriage.

Following his introductory treatment of marriage’s transcendent role
in history, Justice Kennedy wrote that the history he outlined was “the
beginning of these cases,” but that the respondents said “it should be the
end as well.” He acknowledged that “to them, it would demean a timeless
institution if the concept and lawful status of marriage were extended to
two persons of the same sex,” based on the long-held view that marriage is
“by its nature a gender-differentiated union of man and woman.” The peti-
tioners, on the other hand, Kennedy wrote, “acknowledge this history but
contend that these cases cannot end there.” It is “the enduring importance
of marriage that underlies the petitioners’ contentions,” wrote Kennedy,
and “far from seeking to devalue marriage, petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities.” Same-sex marriage, he noted, was their “only real path to this profound commitment” given the “immutable nature” of marriage. After recounting the facts of the cases for the next few paragraphs, Kennedy concluded by stating that the petitioners’ stories “reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses’ memory, joined in its bond.”

Justice Kennedy then recited historical developments in legal and societal perspectives on marriage and homosexuality before he addressed relevant legal precedent, beginning with what he called the Court’s first “detailed consideration of the legal status of homosexuals” in Bowers v. Hardwick (1986), in which the Court upheld the constitutionality of laws criminalizing consensual sodomy between either heterosexual or gay couples but which were only enforced against gay couples, and Lawrence v. Texas (2003), in which the Court overruled Bowers to hold that state laws criminalizing intimate sexual conduct between members of the same sex were unconstitutional. With this precedent as background, Kennedy then summarized previous cases that had addressed same-sex marriage, noting that a substantial body of law existed which had almost unanimously held that it was unconstitutional to exclude same-sex couples from marriage.

Intimate Choices

Justice Kennedy also wrote the majority opinion in Lawrence, and in Obergefell he cited his opinion in Lawrence extensively, quoting among other passages Lawrence’s acknowledgment that “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” and its conclusion that the state “cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Compared to Kennedy’s opinion in Obergefell, Kennedy only used brief epideictic registers in Lawrence, but much as he did in Obergefell, he began Lawrence with an epideictic register describing the liberty at stake as transcendent:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not
omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.30

Robert Tsai notes that three of the four illustrations of liberty in the penultimate sentence of this passage of Lawrence are First Amendment freedoms. He argues that Kennedy hoped by citing rights at the beginning of his opinion which had already enjoyed broad support and then adding “the more contested right of sexual autonomy,” the right of sexual autonomy “would gain something from its association with expressive rights.”31

In Lawrence, Justice Kennedy framed the issue as one of determining “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.” He noted that there were “broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases,”32 the most pertinent of which was Griswold v. Connecticut (1965), in which the Court recognized a constitutional right of privacy to support its holding that a state law prohibiting the use of contraceptives or medical advice about their use was unconstitutional because it violated the privacy of marital relationships.33 Kennedy wrote that both Griswold and Eisenstadt v. Baird (1972), in which the Court held that a state law prohibiting the distribution of contraceptives to unmarried people was no more constitutional than the contraceptive law invalidated in Griswold,34 had formed the basis for Roe v. Wade (1973), in which the Court held that the Constitution limited the ability of states to restrict access to abortion,35 and Planned Parenthood v. Casey (1992),36 which reaffirmed Roe.37 These cases, Kennedy wrote in Lawrence, “confirmed that the reasoning of Griswold could not be confined to the protection of rights of married adults.”38 In Lawrence, Justice Kennedy also noted that Casey and Romer v. Evans (1996), both decided after Bowers, had cast the decision in Bowers “into even more doubt.”39 In Romer, the Court invalidated as unconstitutional a state constitutional amendment which excepted gays, lesbians, and bisexuals from protection under antidiscrimination laws.40

Accordingly, Justice Kennedy concluded in Lawrence that the Court in Bowers failed to appreciate “the extent of liberty at stake.” The penalties
and purposes of the laws criminalizing intimate sexual relations between same-sex couples involved in *Bowers* and *Lawrence*, Kennedy wrote, impacted “the most private human conduct, sexual behavior, and in the most private of places, the home,” and “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”

In Justice Harry Blackmun’s dissenting opinion in *Bowers*, joined by Justices William Brennan, Thurgood Marshall, and John Paul Stevens, Blackmun also used epideictic registers to magnify the value of privacy in intimate sexual relations, beginning his opinion by quoting Justice Brandeis’s dissenting opinion in *Olmstead* to state that *Bowers* was about “‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’” According to Blackmun, the right of privacy was based on the value of individual autonomy rather than public welfare. “We protect those rights not because they contribute, in some direct and material way, to the general public welfare,” wrote Blackmun, “but because they form so central a part of an individual’s life.” They embody “‘the moral fact that a person belongs to himself and not others nor to society as a whole.’”

Justice Blackmun then expounded on the importance of individual autonomy through a series of antitheses:

We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. The Court recognized in *Roberts* [*v. United States Jaycees* (1984)] that the “ability independently to define one’s identity that is central to any concept of liberty” cannot truly be exercised in a vacuum; we all depend on the “emotional enrichment from close ties with others.”

Blackmun concluded that “only the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.’”

In *Lawrence*, Kennedy also quoted the following epideictic passage from the Court’s plurality opinion in *Casey*, in which Kennedy joined
Justices Sandra Day O'Connor and David Souter to write the plurality opinion regarding constitutional limits on abortion restrictions:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\textsuperscript{46}

The \textit{Casey} opinion used substantial epideictic registers beyond this passage as well, beginning with the gnomic opening sentence: “Liberty finds no reference in a jurisprudence of doubt.”\textsuperscript{47} The plurality not only used epideictic registers to amplify the value of precedent to support its reaffirmation of the essential holding of \textit{Roe} regarding a woman’s right to abortion, but to magnify the value of privacy on which both \textit{Roe} and \textit{Casey} depended.

In its description of women’s right to abortion, the \textit{Casey} plurality magnified the value of liberty by dwelling on the sacrifices women make to give birth:

The liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.\textsuperscript{48}

In this passage, the plurality used praise, exergasia, antithesis, asyndeton, the gnomic aspect, and a relatively affirmative modality to magnify the stakes of abortion rights for women, and in a particularly curious example
of unbounded terminology the plurality even shifted from using the count nouns *the woman* and *the mother* to the uncountable noun *woman* in the third sentence of the passage, referring not to a specific or generic woman but to womankind.

**Due Process in Obergefell**

After addressing the legal precedent regarding the right of same-sex marriage and intimate relations, Justice Kennedy began his legal analysis in *Obergefell* by addressing the liberty protected by the Due Process Clause of the Fourteenth Amendment. The “fundamental liberties” protected by the clause, Kennedy wrote, include most of the rights enumerated in the Bill of Rights and “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs,” citing *Griswold*, *Eisenstadt*, and Justice John Harlan’s dissenting opinion in *Poe v. Ullman* (1961), in which the Court held that plaintiffs who wanted to use contraceptives lacked standing to seek a declaratory judgment challenging the constitutionality of the same Connecticut statutes later held unconstitutional in *Griswold*.49 Citing *Lawrence*, Kennedy wrote that “history and tradition guide and discipline this inquiry but do not set its outer boundaries,” because “the nature of injustice is that we may not always see it in our own time.”

Justice Kennedy also cited *Loving v. Virginia* (1967), in which the Court held miscegenation laws to be unconstitutional, for the proposition that the Court had “long held the right to marry…protected by the Constitution.” Although Kennedy acknowledged that the right had previously presumed a relationship involving opposite-sex couples, he argued that four “principles and traditions” demonstrated that the reasons freedom in marriage was fundamental under the Constitution applied with equal force to same-sex couples: (1) it inheres in the concept of individual autonomy;50 (2) it supports a two-person union “unlike any other in its importance to the committed individuals;”51 (3) it “safeguards children and families,” drawing from “related rights of childrearing, procreation, and education,”52 and (4) it is a “keystone of our social order.”53

To support his conclusion that the freedom to marry whoever one chooses inheres in the concept of individual autonomy, Justice Kennedy wrote that “the abiding connection between marriage and liberty is why
Loving invalidated interracial marriage bans under the Due Process Clause,” and that decisions concerning marriage are “among the most intimate that an individual can make,” similar to choices concerning contraception, family relationships, procreation, and childrearing, all of which were protected by the Constitution. “Choices about marriage shape an individual’s destiny,” Kennedy wrote, and he quoted the epideictic registers of the Massachusetts Supreme Court’s opinion on same-sex marriage in Goodridge v. Department of Public Health (2003), in which Justice Margaret Marshall wrote that because marriage “fulfils yearnings for security, safe haven, and connection that express our common humanity,” it is “an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” Through marriage’s “enduring bond,” Kennedy wrote, “all persons, whatever their sexual orientation,” “can find other freedoms, such as expression, intimacy, and spirituality” together. “There is dignity in the bond between two men or two women,” he affirmed, “who seek to marry and in their autonomy to make such profound choices.”

With regard to the principle that marriage supports a two-person union “unlike any other in its importance to the committed individuals,” Justice Kennedy began by noting that this principle was central to Griswold and he quoted in its entirety the concluding mesodiplosis from Justice William Douglas’s majority opinion for the Court in Griswold:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

The eloquence of this passage from Douglas’s opinion in Loving began with its appeal to anteriority using the anaphora and asyndeton that repeat older at the beginning of successive clauses and concluded with the mesodiplosis surrounding the successive antitheses a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects, which framed marriage as transcending commercial and political life. It is in this section of his opinion that Kennedy wrote that
marriage responds to the “universal” fear that “a lonely person might call out only to find no one there,” offering “the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other,” and he concluded that although Lawrence confirmed a measure of freedom, “outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”

Justice Kennedy wrote that the Court had recognized the connection between marriage and childrearing, procreation, and education “by describing the varied rights as a unified whole,” because the right to marry, establish a home, and raise children form a central part of the liberty protected by the Due Process Clause of the Fourteenth Amendment:

Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Marriage also affords the permanency and stability important to children’s best interests.

Finally, Kennedy supported the conclusion that both the Court and the nation’s traditions had established marriage as a “keystone of our social order” by quoting the following passage of Alexis de Tocqueville’s Democracy in America, in which Tocqueville exalts the “order and peace” of American family life as an important feature of politics:

There is certainly no country in the world where the tie of marriage is so much respected as in America….When the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace….He afterwards carries [that image] with him into public affairs.

Kennedy wrote that the Court had echoed Tocqueville’s remarks in Maynard v. Hill (1888) when it explained that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress,” an institution that gave “character to our whole civil polity.” This idea had been reiterated, Kennedy noted, even
as the institution evolved, and “marriage remains a building block of our national community.”

Text and Penumbra

Because *Griswold* holds a central place in the development of the constitutional right of privacy which protects intimate relations and marriage, Justice Kennedy cited *Griswold* and its progeny many times in *Obergefell*. In *Griswold*, the Court considered a challenge to the constitutionality of Connecticut statutes that prohibited the use of contraceptives and medical advice relating to their use brought by the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician and professor at Yale Medical School who served as Medical Director for Planned Parenthood in New Haven, both of whom were arrested by Connecticut authorities for providing medical advice to married persons relating to the use of contraceptives. Before *Griswold*, the law had only protected the right of privacy between individuals as a private right of action rather than one guaranteed by the Constitution. As Bernard Schwartz notes, the constitutional right of privacy recognized in *Griswold* “proved as consequential as any constitutional right recognized by the Supreme Court,” making it among the most important cases decided by the Warren Court.

Writing for the majority in *Griswold*, Justice Douglas wrote that the case raised “a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment.” He then addressed rights of association that the First Amendment had been construed to recognize but which were “not mentioned in the Constitution nor in the Bill of Rights,” including the right to educate a child in a school of the parents’ choice and the right to study a particular subject or foreign language. As Robert Tsai notes, it is an “underappreciated fact” that Douglas “opened and closed his discussion [in *Griswold*] by casting the right to privacy—the ‘intimate relation of husband and wife’—in First Amendment terms,” and devoted most of his opinion to First Amendment freedoms. Because the First Amendment rights Douglas identified were recognized despite not being mentioned in the First Amendment or the Bill of Rights, Douglas concluded that the First Amendment “has a penumbra where privacy is protected from governmental intrusion.” Such cases, he wrote, “suggest that
specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," a passage that has been quoted at least 196 times in later judicial opinions in the United States and generated substantial controversy.

Justice Douglas explained that "various guarantees create zones of privacy," and "the First Amendment is one." Others, he wrote, included the Third Amendment’s prohibition against the quartering of soldiers in time of peace, the Fourth Amendment’s protection of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the Fifth Amendment’s protection against self-incrimination—which Douglas wrote "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment"—and the Ninth Amendment’s provision that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Douglas supported his conclusion by quoting Justice Joseph Bradley’s statement in *Boyd v. United States* (1886) that the protection provided by the Fourth and Fifth Amendments “affect the very essence of constitutional liberty and security,” reaching “farther than the concrete form of the case then before the court, with its adventitious circumstances,” applying instead “to all invasions on the part of the government and its employés [sic] of the sanctity of a man’s home and the privacies of life.”

Justice Douglas also quoted the following epideictic passage from *Boyd*, which has been quoted eighty-nine times in other judicial opinions in the United States, exhibiting praise, a figurality which is particularly striking in the assonance and alliteration of the opening sentence, eloquence, the gnomic aspect, and a relatively affirmative modality:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of [the protection]. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within
the condemnation....In this regard the Fourth and Fifth Amendments run almost into each other.73

To conclude his opinion in Griswold, Justice Douglas recognized that the “penumbral rights of ‘privacy and repose’” that the case recognized had given rise to many cases which “bear witness that the right of privacy which presses for recognition here is a legitimate one.” He then ended the opinion with the mesodiplosis quoted by Justice Kennedy in Obergefell and eighty-four times in other judicial opinions in the United States as well as in judicial opinions of the supreme courts of Canada, India, and Ireland,74 that marriage is “an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects,” but one with “as noble a purpose as any involved in our prior decisions.”75 As with the beginning of Douglas’s discussion of privacy in Griswold, he concluded by casting the right of privacy in terms of associational rights typically protected by the First Amendment.

It is no surprise that Justice Douglas opened and closed his discussion of the constitutional right of privacy in Griswold by casting the right to privacy in First Amendment terms, as Robert Tsai notes,76 because Douglas’s first draft opinion in Griswold did not rely on the right of privacy at all but on the First Amendment right of association, comparing the marital relationship to other forms of association protected by the First Amendment.77 In Douglas’s draft opinion, his mesodiplosis on the marital “right of association” (or “right of privacy” in the published version) did not end the opinion. The draft opinion continued the epideictic register as follows:

Yet it flourishes on the interchange of ideas. It is the main font of the population problem; and education of each spouse in the ramification of that problem, the health of the wife, and the well-being of the family, is central to family functioning. Those objects are the end products of free expression.

The draft opinion then concluded with what forms part of the penultimate paragraph of the published opinion, noting that the prospect of police searching the “sacred precincts of marital bedrooms for telltale signs of the use of contraceptives” was “repulsive to the idea of privacy and of association that make up a goodly part of the penumbra of the Constitution
and Bill of Rights.” The references to privacy and a penumbra of rights in this final clause of the draft opinion are the only references to those terms in the draft, unlike the published version in which Douglas referenced privacy a dozen times and the penumbra metaphor four times.

We now know that Justice William Brennan persuaded Justice Douglas to edit his draft opinion in *Griswold* to abandon the First Amendment right of association approach in favor of a right of privacy after Douglas circulated his draft to the justices. In a letter Brennan sent to Douglas regarding the draft opinion, Brennan noted that in the First Amendment context, in cases such as *NAACP [National Association for the Advancement of Colored People] v. Alabama* (1958)—a case Douglas cited in *Griswold* in which the Court held that a state’s requirement that the NAACP disclose its membership list to conduct business in the state violated the Due Process Clause of the Fourteenth Amendment—privacy was necessary to “protect the capacity of an association for fruitful advocacy.” Brennan encouraged Douglas to consider what the Bill of Rights guaranteed as “but expressions of examples of those rights,” without precluding “applications or extensions of those rights to situations unanticipated by the Framers.” In other words, Brennan explained, the First, Third, Fourth, and Fifth Amendments, taken together, “indicate a fundamental concern with the sanctity of the home and the right of the individual to be alone,” an allusion to Justice Brandeis’s assertion of a “right to be let alone” in *Olmstead*.

Despite Justice Brennan’s influence on the published version of Justice Douglas’s opinion in *Griswold*, Brennan ultimately joined Justice Arthur Goldberg’s concurring opinion in which Goldberg wrote separately to emphasize the importance of the Ninth Amendment but agreed that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.” Although Goldberg’s opinion was different in emphasis, it specifically endorsed Douglas’s conclusion that “the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights.”

David O’Brien writes that Justice Douglas’s penumbra approach to privacy may have been “too imaginative to persuade many court watchers.” Although Justice John Harlan joined the decision in *Griswold*, he wrote a separate concurring opinion to express disagreement with the penumbra theory because he thought the case could be decided solely under the liberty protected by the Due Process Clause of the Fourteenth Amendment.
In Justice Hugo Black’s dissenting opinion, which Justice Potter Stewart joined, Black more broadly criticized living constitutionalism as an arrogation of authority to amend the Constitution, although he recognized the “rhapsodical” quality of epideictic registers often used to support the theory in relatively flattering terms: “I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times.”

The penumbra metaphor did not originate in response to the privacy right recognized in *Griswold*. Instead, Justice Douglas had previously used the metaphor eight times and other federal judges and legal scholars had frequently used it. The metaphor had a long history in legal reasoning beginning at least as early as the nineteenth century, including its use by Justice Oliver Wendell Holmes in his dissenting opinion in *Olmstead*, in which Holmes wrote that he was “not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant” but that courts often erred by adhering too closely to the text of laws which “import a policy that goes beyond them.” In Douglas’s dissenting opinion in *Poe v. Ullman* (1961), the predecessor to *Griswold* in which the Court held that the plaintiffs did not have standing to challenge the same contraceptive law at issue in *Griswold*, he also used the emanation metaphor closely linked with the penumbra metaphor. In *Poe*, Douglas wrote that “this notion of privacy is not drawn from the blue,” but “emanates from the totality of the constitutional scheme under which we live.” Christopher Rideout writes that part of the criticism of Douglas’s penumbra metaphor in *Griswold* derives from a general distrust of metaphor, although he recognizes that the penumbra metaphor provoked unique disdain among legal metaphors. It faced the harshest critique from those like Justice Hugo Black, who simply objected to the recognition of any rights not explicitly enumerated in the Constitution.

In *Obergefell*, Justice Kennedy also relied on Justice John Harlan’s dissenting opinion in *Poe*, which has been particularly influential in the Court’s Due Process jurisprudence. Both Justices Douglas and Harlan wrote dissenting opinions in *Poe* arguing that the plaintiffs had standing to sue and that the contraceptive law deprived the plaintiffs of liberty without due process of law under the Due Process Clause of the Fourteenth Amendment. Although Douglas cited his own dissenting opinion in *Poe* in his majority opinion in *Griswold*, and both Douglas’s and Harlan’s
opinions in Poe contain epideictic registers extolling the breadth and significance of liberty. Harlan’s opinion in Poe has been the more influential of the two.

In Justice Felix Frankfurter’s plurality opinion in Poe, he argued that because the Connecticut contraceptive law had apparently only been enforced in a single case in 1940 since its original passage in 1879 despite contraceptives being “commonly and notoriously sold in Connecticut drug stores,” Connecticut evinced a policy of nullification with no “real threat of enforcement.” The Court, he wrote, “cannot be umpire to debates concerning harmless, empty shadows.” By contrast, Harlan opened his discussion of the constitutional question in Poe by describing the law as “an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual’s personal life.” Although he acknowledged that his conclusions were not based on any “explicit language of the Constitution, and have yet to find expression in any decision of this Court,” he wrote that the Court must approach the text of the Constitution “not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.”

According to Justice Harlan, the scope of protection afforded to life, liberty, and property by the Due Process Clause of the Fourteenth Amendment was not determined by “the particular enumeration of rights in the first eight amendments” but embraced all of those rights considered fundamental. In a gnomic saying that began a substantial paean to due process, he wrote that “due process has not been reduced to any formula; its content cannot be determined by reference to any code.” Instead, he wrote, “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.” This balance, Harlan concluded, is formed by tradition and determined with judgment and judicial restraint:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not
long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.\textsuperscript{100}

After addressing the Connecticut law before the Court, Justice Harlan returned to an epideictic register in the final section of his opinion, first quoting at length from Justice Brandeis’s dissenting opinion in \textit{Olmstead} regarding the broad scope of the Bill of Rights to protect spiritual and intellectual needs through the “right to be let alone” and then expounding on the importance of the “privacy of the home” to liberty and security. The “sweep of the Court’s decisions, under both the Fourth and Fourteenth Amendments,” Harlan wrote, “amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.”\textsuperscript{101} Quoting \textit{Wolf v. Colorado} (1949), he added that “the security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”\textsuperscript{102}

\textit{Loving and Brown}

In \textit{Obergefell}, Justice Kennedy also relied extensively on citations to \textit{Loving v. Virginia} (1967), decided two years after \textit{Griswold}, in which the Court held that Virginia’s miscegenation law adopted to prevent marriages between persons based solely on their racial classification was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\textsuperscript{103} Writing for a unanimous Court in \textit{Loving}, Justice Warren wrote that “the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination,” and that there was “no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race” in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{104}

In an otherwise brief and pragmatic opinion, Warren adopted an epideictic register in the final two paragraphs to announce the Court’s conclusion that Virginia’s miscegenation law also deprived the couple of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit
of happiness by free men,” Warren wrote, and in his final paragraph he elevated the freedom to marry to an existential necessity:

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.105

In Obergefell, Justice Kennedy quoted extensively from this final paragraph of Loving to support his conclusion that a prohibition on same-sex marriage violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.106

Although in Obergefell Justice Kennedy does not cite Brown v. Board of Education (1954) and it is only cited in Loving for the purpose of rejecting the usefulness of consulting the legislative history surrounding the Fourteenth Amendment,107 it is also useful to consider Brown part of a genealogy of Obergefell. As discussed briefly in the introduction to this book, Eugene Garver has argued that Brown constitutes an “epideictic declaration that equality and antidiscrimination are fundamental American constitutional values” which committed the Court and the nation to those values, a quality that created a new constitutional ethos connecting Brown to President Lincoln’s Gettysburg Address and later to further desegregation orders which ultimately culminated in Loving.108 An ethos such as that found in Brown, Garver writes, allowed practical reason to reach a conclusion “stronger than the premises that lead to it,” creating an “ethical surplus” that made it “legitimately ampliative,” an accomplishment unattainable by a strictly atemporal deductive logic but comparable to the ampliative possibilities of poetic work. According to Garver, Brown’s ethos “survives in the ethical surplus of the argument,” the antidiscrimination principle that committed the Court to desegregation beyond the context of education.109 Today the ethical surplus of Brown may also be observed in Obergefell through Loving.
Describing *Brown* as “an act of commitment,” Garver argues that “had the *Brown* decision been more ‘reasoned,’ with more explicit ties of judgment to text and precedent, it would have been less persuasive.”\(^{110}\) He notes that Chief Justice Earl Warren stated that the opinions in *Brown* and its companion case *Bolling v. Sharpe* (1954) “should be short, readable to the lay public, nonrhetorical, unemotional and, above all, nonaccusatory,”\(^ {111}\) and according to Garver, “the brevity of the *Brown* opinion, which critics quickly characterized as ‘containing almost no law,’ is part of its persuasiveness because it is part of its legitimacy.”\(^ {112}\) With regard to the need for the opinion’s brevity, Garver’s conclusion is premised on the observation that it needed to be readable by the lay public, “because it is they who decide whether the opinion is legitimate, and this particular opinion had to be legitimate in order to be successful.”\(^ {113}\)

As discussed in Chapter 1, the brevity Garver describes may also refer to the gnomic aspect and affirmative modality characteristic of epideictic, or to the absence of “explicit ties of judgment to text and precedent” which Garver describes, rather than to the opinion’s length alone. As Garver explains the necessity of a brief opinion:

> The Court could have written an opinion of nothing but footnotes, that is, constructed an opinion that deduced the violation of equal protection from constitutional text, history, and precedent, but for a case as monumental as *Brown* such a deduction would have been perceived as the Court hiding behind legal precedent and not taking responsibility for the decision.… The Court presents the opinion as ethically necessary precisely because it is not necessary and inevitable by narrow logical and legal criteria.\(^ {114}\)

This description refers to characteristic epideictic features, a discourse that is self-enclosed and unconstrained by evidence or attribution, expressing beliefs, desires, and ethical commitments knowable only through the practical imagination as common knowledge.\(^ {115}\)

Beyond the circumstances of its performance or its references to commitment, Justice Warren’s opinion in *Brown* also contained discursive registers exemplifying all of the characteristic features of epideictic. At the heart of the opinion, for example, Warren extolled education as the foundation of good citizenship in a democratic society using an epideictic register that included praise, anaphora, eloquence, the gnomic aspect, and a relatively affirmative modality:
Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\textsuperscript{116}

It is through such discursive practices that Warren constructed the ethos of the relationship between education and citizenship in a democratic society in \textit{Brown}—an opinion not coincidentally issued during the Cold War when American ideology framed world affairs as a struggle between democracy and tyranny—discursive practices which allowed Warren to avoid, as Garver writes, “tackling the questions of whether the Fourteenth Amendment...changed meanings.”\textsuperscript{117}

\textbf{An Epideictic Chorus}

Following Justice Kennedy’s discussion of due process in \textit{Obergefell}, at the end of his opinion he turned to addressing the respondents, who had advanced among other things an equal protection argument. “The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too,” he wrote, “from that Amendment’s guarantee of the equal protection of the laws.” The Due Process and Equal Protection Clauses are connected “in a profound way,” he wrote, possessing a “synergy” or “interlocking nature” in which “each concept—liberty and equal protection—leads to a stronger understanding of the other.”\textsuperscript{118} In his peroration in the final paragraph of the opinion, Kennedy returned to an epideictic register to again extol the transcendent bond of marriage:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital
union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death.\textsuperscript{119}

In these and similar passages throughout the opinion, Kennedy not only used praise, eloquence, and a variety of repetition devices to magnify the value of his subject, but he used the unbounded present tense to complement his often explicit depictions of marriage as a timeless institution.

The Court’s decision in \textit{Obergefell} was a particularly controversial one that followed decades of activism promoting the right to same-sex marriage and substantial resistance, including numerous actions by federal and state government authorities to stop such marriages. Such controversies regarding the inauguration of change with broad social consequences invite or even demand epideictic registers, making it unsurprising that Justice Kennedy’s opinion in \textit{Obergefell} represents one of the most elaborate examples of an epideictic register in the Court’s history. Its impact is also exacerbated by the fact that the right of privacy on which it was based is not explicitly enumerated in the Constitution, which combined with the breadth of social consequences that privacy implicates may explain why epideictic registers appear prominently in so many of the Court’s privacy cases.

Justice Kennedy’s paean to marriage in \textit{Obergefell} can of course be read to have addressed those expected to applaud the decision and benefit directly from it, but it appears to have also been specifically directed to the social conservatives who disapproved of the decision. In the concluding lines of the opinion, Kennedy addressed the conservative audience:

\textit{It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.}\textsuperscript{120}

By magnifying the value of marriage to a sublime level, Kennedy hoped to transfer the audience’s commitment to marriage to the Court’s decision so that if they could not agree with the decision, they might at least accept it. Because marriage is so timeless, transcendent, central, and profound, Kennedy argued, it cannot be denied to anyone.
As discussed in this chapter, Justice Kennedy’s paean to marriage in *Obergefell* was not only elaborate in itself but it was preceded and fueled by over a century of other epideictic registers in judicial opinions addressing the constitutional right of privacy. Prominent examples include Justice Marshall’s statement in *McCulloch* that the Constitution was “intended to endure for ages to come,” not to provide rigid rules for exigencies which could only have been “seen dimly,” if at all [121] and in *Cohens* that the Constitution is “designed to approach immortality” as nearly as possible despite facing “storms and tempests”; Justice McKenna’s statement in *Weems* that “a principle to be vital must be capable of wider application than the mischief which gave it birth;” Justice Brandeis’s statement in *Olmstead* that the “right to be let alone” was “the most comprehensive of rights and the right most valued by civilized men;” Justice Douglas’s statement in *Griswold* that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance;” Justice Brennan’s statement in *Roberts* that the “ability independently to define one’s identity…is central to any concept of liberty;” and the plurality’s statement in *Casey* that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”

As Jeffrey Walker describes the “paradigms of eloquence” in ancient Greek epideictic from which pragmatic discourse derived its precedents, language, and power [128]—perhaps what Robert Tsai describes as “the precepts of eloquence” governing an era [129]—countless judicial opinions across more than a century contributed to a privacy jurisprudence “punctuated and pervaded by sententious flights of wisdom-invoking eloquence” [130] which shaped beliefs, desires, and ethical commitments. This intertextual power of the Court’s epideictic registers may be at its height in its privacy jurisprudence because the right is not explicitly enumerated in the Constitution but can only be inferred. As the Court’s commitment to a constitutional right of privacy has accumulated and taken on new meaning across a range of issues from searches and seizures to wiretapping, contraceptive use, sexual relations, and marriage, its privacy jurisprudence has specifically magnified the value of figurative reasoning as a premise of the Court’s interpretive authority. As Don Le Duc argues, “the more vigorous or eloquent the judicial passage being quoted, the less likely it is to be an expression of existing law,” [131] and Jean-François Lyotard has claimed that
“the retreat of regulation and rules is the cause of the feeling of the sublime” in response to Immanuel Kant’s comment that the sublime emerges as a feeling of something formless. Others have echoed this conception of the sublime as that which remains in some sense beyond representation, leading among other things to a call for a “sublime jurisprudence” that recognizes uncertainty, error, and incompleteness as inherent features of law.

The figurative reasoning magnified by the Court’s privacy jurisprudence is particularly apparent in Justice Marshall’s immortal constitution metaphor and Justice Douglas’s metaphor of “penumbras” of the Bill of Rights which include a constitutional right of privacy—a metaphor with a long legal history—which formed central gestures in the epideictic registers of the Court’s privacy jurisprudence, magnifying the Court’s authority to recognize rights such as privacy which are not explicitly enumerated in the Constitution. While metaphors are ubiquitous in judicial discourse, both Marshall’s immortal constitution metaphor in McCulloch and Cohens and Douglas’s penumbra metaphor in Griswold compare constitutional interpretation to situations involving a reduced visibility of light. Such imagery is suggested both by the storms through which constitutions must pass in Cohens while facing exigencies “seen dimly,” if at all, in McCulloch and by the penumbras of the Bill of Rights in Griswold, referring to the partially shaded area “around the shadow of an opaque body, when the light source is larger than a point source and only part of its light is cut off.” The metaphors magnify the value of judicial authority at the outer limits of constitutional interpretation where meaning is difficult to discern.

According to David Zarefsky, the unit of analysis for argumentation can move beyond arguments advanced by individuals to social controversies that develop over time and involve many participants. No less than the rhetorical acts of individuals or institutions, such collective discourse can create what Eugene Garver calls “ethical surplus,” which is “legitimately ampliative,” cumulating in a manner comparable to Kenneth Burke’s description of a poetic process of development which arises from repeating something in various forms until it “increases in persuasiveness by the sheer accumulation” or, in Longinus’s words, when “the points of an argument allow of many pauses and many fresh starts from section to section, and the grand phrases come rolling out one after another with increasing effect.” The cumulative effect of epideictic is particularly
apparent in the Court’s privacy jurisprudence, which has produced numerous paeans to the constitutional right of privacy across more than a century. If, as Chaïm Perelman and Lucie Olbrechts-Tyteca write, epi-deictic is the only form of oratory that might be compared to the libretto of a cantata, in the Court’s privacy jurisprudence it can be compared to a chorus.