

*IPSE DIXITS, BOOTSTRAPS, AND CONSTITUTIONAL DOCTRINE*

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AUTHOR’S NOTE

*This article was completed in 2021, before the Supreme Court decided Dobbs v. Jackson Women’s Health Organization.<sup>1</sup> Despite its having been overruled, the discussion of Roe v. Wade and the cases on which it was built,<sup>2</sup> remains relevant because the form of reasoning I critique here virtually*

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<sup>1</sup> 142 S. Ct. 2228 (2022).

<sup>2</sup> 410 U.S. 113 (1973). *See infra* text accompanying notes 45–69.

*ensured that Roe's foundations would render it both open to critique and vulnerable to overruling. This section of the paper can serve thus as both post-mortem and warning to future Courts.*

## INTRODUCTION

An *ipse dixit* pronouncement is defined as “[a]n unproved assertion resting on the bare authority of some speaker; a dogmatic statement; a dictum.”<sup>3</sup> There is a particular form of *ipse dixit* statement that appears from time to time in the *U.S. Reports*. A justice will write that “if X means anything, it means Y.” Call these *if-then ipse dixits*. X might be an area of doctrine, textual provision, or constitutional principle. Y is something X is deemed to encompass, permit, or prohibit—indeed it is said to be an indispensable part of X. This article argues that this is an especially noxious form of the *ipse dixit* that should be lumped among “anti-modal” arguments that—however frequently they are deployed outside the courts—have no business appearing in judicial opinions, especially those issued by the Supreme Court.<sup>4</sup>

I make this claim broadly because such if-then *ipse dixit* pronouncements lack legal legitimacy.<sup>5</sup> Specifically, I argue that these particular *ipse dixit* statements are legally illegitimate because they are unreasoned, arbitrary, disingenuous, and often simply false. Perhaps their most pernicious effect is that cases in which they appear provide opportunities for bootstrapping<sup>6</sup> in

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<sup>3</sup>*Ipse dixit*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/99370?redirectedFrom=ipse+dixit#eid> (last visited June 15, 2021).

<sup>4</sup>See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021) (describing “the categories of reasoning that are employed in nonconstitutional debates over public policy and political morality but are considered out of bounds in debates over constitutional meaning” as “anti-modal” in contrast with the usual modalities of constitutional argumentation described in Philip Bobbitt’s *Constitutional Fate*). See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (discussing textual, historical, doctrinal, structural, and ethical arguments as the proper modes available to lawyers and judges to make constitutional arguments).

<sup>5</sup>See generally RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 35 (2018) (explaining that legal legitimacy is concerned with “whether the Justices’ decisions accord with or are permissible under constitutional and legal norms”).

<sup>6</sup>See Stuart Minor Benjamin, *Bootstrapping*, 75 L. & CONTEMP. PROBS., no. 3, 2012, at 115 (offering as a definitional example of bootstrapping an actor who “undertakes action Y that enables that actor’s action Z” with “the later action depend[ing] on the earlier one,” the actor having created “the conditions for its later actions”).

future cases, enabling the Court to “move to higher levels of abstraction, where more general propositions are announced, and . . . that begin to take over some of the work of deciding cases.”<sup>7</sup>

Part I provides examples of decisions in which an if-then *ipse dixit* is the basis for the outcome in the decision, as well as examples in which those initial decisions were later bootstrapped and thus served as the precedential basis for a subsequent expansion of the initial case’s constitutional principle. Part II considers Dan Coenen’s arguments that *ipse dixit* declarations generally, including the if-then *ipse dixits* I describe here, are appropriate vehicles for what he terms “quiet-revolution rulings” in constitutional law.<sup>8</sup> Part III then rejects Coenen’s defense and elaborates my claim that these pronouncements are legally illegitimate. A brief conclusion follows.

### I. IF-THEN *IPSE DIXITS* AND BOOTSTRAPS: SOME EXAMPLES

In this Part, I offer examples of cases whose outcomes turn on if-then *ipse dixits* and demonstrate how those cases can serve as a bootstrap that enables the Court to articulate constitutional principles at ever-higher levels of abstraction in subsequent cases. As I shall demonstrate, this is not inevitable; but once the bootstrapping starts, it tends to operate as a one-way ratchet. My survey is intended to be illustrative, not exhaustive;<sup>9</sup> I believe my examples are numerous enough to suggest that this phenomenon is not uncommon in constitutional doctrine. In addition, this Part offers a theory why the Court resorts to the use of if-then *ipse dixits* in the first place. Because many of these cases occur in particularly contentious areas of constitutional law, I feel obliged to state up front that my critique of the Court’s *means* of achieving the ends it reaches in these cases does not signal my opposition to the ends themselves.

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<sup>7</sup>CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 189 (2004).

<sup>8</sup>Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2104 (2019).

<sup>9</sup>I found other examples, which tended to be in commercial speech cases. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (“If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring) (“If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.”). The points I shall make about the cases discussed in Part I would hold for those cases as well, but I omitted any discussion because it would tend to be repetitious.

### A. *Obscenity Cases*

The earliest examples of the if-then *ipse dixits* I have located occur in the Court's early obscenity decisions. Until the 1973 *Miller* decision,<sup>10</sup> the Court had great difficulty defining what constituted obscene material.<sup>11</sup>

Justice Potter Stewart, for example, dissented from a decision upholding the prosecution of Ralph Ginzburg for sending allegedly obscene material through the mail. Stewart—who famously admitted that while he could not define hard core pornography, he knew it when he saw it<sup>12</sup>—observed that the material at issue was “both vulgar and unedifying.”<sup>13</sup> But, he added, “if the First Amendment means anything, it means that a man cannot be sent to prison merely for distributing publications which offend a judge’s esthetic sensibilities, mine or any other’s.”<sup>14</sup>

Three years later, in *Stanley v. Georgia*, Justice Thurgood Marshall wrote a majority opinion overturning the conviction of a man charged with possession of obscene materials when police executed a search warrant at his house.<sup>15</sup> In it, he wrote that “[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”<sup>16</sup> He continued: “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”<sup>17</sup>

A subsequent majority refused to extend *Stanley* beyond the confines of the home in *United States v. Orito*,<sup>18</sup> thus illustrating my earlier point that cases in which if-then *ipse dixits* appear do not inevitably result in subsequent bootstrap decisions. Even so, attempts to utilize *Stanley* as a bootstrap were not entirely lacking. For example, the Court’s decision in *Orito* produced a dissent from Justice Douglas, who argued that *Stanley* ought to apply to the defendant who was convicted of transporting obscene material in interstate

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<sup>10</sup>413 U.S. 15, 22 (1973).

<sup>11</sup>The Court’s difficulties resulted in “movie days” in which some of the Justices would view the exhibits in obscenity trials and would take a vote. This practice is humorously described in Bob Woodward and Scott Armstrong’s book on the Supreme Court. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 198–200 (1979).

<sup>12</sup>*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>13</sup>*Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

<sup>14</sup>*Id.*

<sup>15</sup>394 U.S. 557, 558–59 (1969).

<sup>16</sup>*Id.* at 565.

<sup>17</sup>*Id.*

<sup>18</sup>413 U.S. 139, 141–42 (1973).

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commerce by a common carrier.<sup>19</sup> After quoting at length from *Stanley*, including the if-then *ipse dixit* mentioned above, Douglas wrote that:

By that reasoning a person who reads an ‘obscene’ book on an airline or bus or train is protected. So is he who carries an ‘obscene’ book in his pocket during a journey for his intended personal enjoyment. So is he who carries the book in his baggage or has a trucking company move his household effects to a new residence.<sup>20</sup>

Because federal law made it illegal to do any of those things, Douglas concluded, the law was overbroad.<sup>21</sup> Any other conclusion, he argued, meant the de facto overruling of *Stanley*.<sup>22</sup>

The *Stanley ipse dixit* also featured prominently in a dissent from Justice Brennan in *Osborne v. Ohio*, in which he argued that *Stanley* compelled the reversal of a defendant’s conviction for possessing child pornography.<sup>23</sup> Quoting Marshall’s *Stanley* opinion, Brennan observed that the “[a]ppellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. . . . There was no evidence that the photographs had been produced commercially or distributed.”<sup>24</sup> Moreover, “[a]ll were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.”<sup>25</sup> Under those circumstances, Justice Brennan thought the right recognized in *Stanley* to possess obscene material in the privacy of one’s own home ought to apply here as well.

### B. *Animus* Cases

What I am calling the Court’s “animus” cases furnish examples of both the if-then *ipse dixit* and subsequent bootstrap decisions that essentially created an entirely new area of equal protection doctrine.<sup>26</sup> The origins of this

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<sup>19</sup> *Id.* at 146 (Douglas, J., dissenting).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

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

<sup>23</sup> 495 U.S. 103, 126 (1990) (Brennan, J., dissenting).

<sup>24</sup> *Id.* at 139.

<sup>25</sup> *Id.*

<sup>26</sup> For other scholarly treatment of these cases as constituting a doctrine all its own, see generally William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155 (2019); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185 (2020).

doctrinal line are found in *United States Department of Agriculture v. Moreno*.<sup>27</sup> In that case the Court invalidated legislation that rendered households containing unrelated persons ineligible to receive federal food stamps.<sup>28</sup> Purporting to apply the rational basis test, the Court brushed aside government arguments that the exclusion was intended to police fraud.<sup>29</sup> Justice Brennan noted that the stated purpose of the program was to alleviate hunger and provide an outlet for agricultural surplus and that the exclusion of unrelated households from the program was “irrelevant” to those ends.<sup>30</sup>

He then seized on statements in the record—though he cited only a single legislator—that the “amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>31</sup> This was an illegitimate governmental end, he wrote, because “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>32</sup>

For the next twenty years, it looked as if *Moreno* had gone the way of *Stanley*.<sup>33</sup> In 1996, however, the Court rediscovered *Moreno*, and relied on it to overturn Colorado’s Amendment 2 in *Romer v. Evans*.<sup>34</sup> The state constitutional amendment overrode some Colorado cities’ inclusion of sexual orientation as one of the protected classes covered by anti-discrimination ordinances.<sup>35</sup> In addition, it reversed an executive order by the state government similarly barring discrimination on that basis.<sup>36</sup> Justice Kennedy’s majority opinion—somewhat tendentiously—argued that the effect of the amendment was to deprive gays and lesbians of legal protections

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<sup>27</sup> 413 U.S. 528 (1973).

<sup>28</sup> *Id.* at 538.

<sup>29</sup> *See id.* at 535–37.

<sup>30</sup> *See id.* at 533–34.

<sup>31</sup> *Id.* at 534.

<sup>32</sup> *Id.*

<sup>33</sup> One of the few pre-1996 decisions that did cite *Moreno* was a case in which the Court rejected an equal protection claim brought by a conscientious objector who performed alternative service but was nevertheless excluded from veterans’ educational benefits. *Johnson v. Robison*, 415 U.S. 361, 383 (1974). The plaintiff alleged that the exclusion was intended to punish those who had claimed objector status. *Id.* at 383 n.18. In a footnote, the majority quoted the bare-congressional-desire language but concluded that there was no evidence in the record that was Congress’s aim. *Id.*

<sup>34</sup> 517 U.S. 620, 634–35 (1996).

<sup>35</sup> *Id.* at 629.

<sup>36</sup> *Id.* at 629–30.

enjoyed by other Coloradans.<sup>37</sup> Purporting to apply the rational basis test, the Court further argued that “[a] second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,”<sup>38</sup> citing *Moreno* and quoting its bare-desire-to-harm language.<sup>39</sup>

That language and accompanying citation reappeared in another opinion written by Justice Kennedy that concluded the federal Defense of Marriage Act—which defined “marriage” as a heterosexual relationship for purposes of federal law—violated the equal protection component of the Fifth Amendment.<sup>40</sup> In fact—solely on the basis of *Moreno* and *Romer*—Justice Kennedy all but held that the constitutional concept of equal protection contained within it an anti-animus principle. “The Constitution’s guarantee of equality,” he wrote, “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.”<sup>41</sup> Moreover, in determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character especially suggest careful consideration.”<sup>42</sup>

Kennedy concluded that the DOMA offended this precept because “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>43</sup> This differentiation was demeaning and humiliating to same-sex couples and their children and, he concluded, the only explanation for the distinction was congressional (and presidential, presumably) animus towards homosexuals.<sup>44</sup>

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<sup>37</sup> See *id.* at 627–29.

<sup>38</sup> *Id.* at 634–35.

<sup>39</sup> *Id.*

<sup>40</sup> See *United States v. Windsor*, 570 U.S. 744, 770 (2013).

<sup>41</sup> *Id.* (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

<sup>42</sup> *Id.* at 768 (quoting *Romer*, 517 U.S. at 633).

<sup>43</sup> *Id.* at 772.

<sup>44</sup> See *id.* at 775 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”). Interestingly, Justice Kennedy’s opinion in *Obergefell v. Hodges* did not cite *Moreno* or invoke its anti-animus language. 576 U.S. 644 (2015). For discussion of why the Court wanted to avoid imputing anti-homosexual bias to the opponents of same-sex marriage, see James E. Fleming, *The Unnecessary and Unfortunate Focus on “Animus,” “Bare Desire to Harm,” and “Bigotry” in Analyzing Opposition to Gay and Lesbian Rights*, 99 B.U. L. REV. 2671, 2681–82 (2019).

### C. *Autonomy Cases*

Probably the most well-known example of the bootstrapping of an if-then *ipse dixit* to create an entirely new area of doctrine is found in the use of the Court's "privacy" cases to announce a right to abortion in *Roe v. Wade*.<sup>45</sup> In *Griswold v. Connecticut*, the Court extrapolated a right of privacy from provisions of the Bill of Rights that protected a married couple's right to use contraceptives.<sup>46</sup> Justice Douglas's opinion tied the right to the nature of the marital relationship, asking rhetorically whether "we [would] allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives" before answering that "[t]he very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>47</sup> He concluded with a paean to the institution itself, describing it as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."<sup>48</sup>

Seven years later, the Court considered a Massachusetts law barring unmarried persons from purchasing contraceptives. In its opinion striking down the law, Justice Brennan wrote that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>49</sup> *Eisenstadt v. Baird* severed the tie between the right of privacy in *Griswold* and marriage without giving reasons. The law treats married couples differently from unmarried couples in numerous ways—in criminal law, testamentary matters, and health care decision making.<sup>50</sup> But Justice Brennan offered no justification—let alone a constitutional one—to support his statement. Second, his insertion of the word "bear" anticipated an expansion of the right to include the right to abortion, again without offering reasons. He simply declared that the decision whether "to bear" a child was an essential part of the individual's right to privacy. Justice Brennan was clearly setting the stage not only for *Roe* but also for an entire line of now-mature doctrine

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<sup>45</sup> See 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>46</sup> See 381 U.S. 479, 484–85 (1965).

<sup>47</sup> *Id.* at 485–86.

<sup>48</sup> *Id.* at 486.

<sup>49</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>50</sup> See, e.g., JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 67–97 (4th ed. 2013) (describing various property and support rights attending marriage).



recognizing constitutionally-protected aspects of personal autonomy. Bootstrapping was essential to this project.<sup>51</sup>

Justice Blackmun subsequently effected that bootstrap in *Roe v. Wade* by relying on *Eisenstadt*'s "bear or beget" language to justify the holding that the right to obtain an abortion was an indispensable element of the right to privacy. In an effort to make the recognition of the abortion right seem unexceptional, Justice Blackmun's majority opinion cited a number of what he characterized as privacy cases, then concluded that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>52</sup> In his opinion concurring in *Roe* and a companion case, *Doe v. Bolton*,<sup>53</sup> Justice Douglas stressed the connection between *Eisenstadt* and the Court's other "contraceptive" cases.<sup>54</sup>

Just a few years after *Roe*, the Court struck down, among other provisions, the portion of a Missouri law requiring spousal consent to an abortion. Justice Blackmun's opinion, noting that *Roe* and *Doe* had reserved the question of spousal consent, cited *Eisenstadt*'s bear-or-beget language in a footnote to a sentence that read, "we cannot hold that the State has the constitutional

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<sup>51</sup>The Court itself has acknowledged this connection. See *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) ("The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade* . . ."). See also *Rust v. Sullivan*, 500 U.S. 173, 216 (1991) (Blackmun, J., dissenting) (noting the connection among *Griswold*, *Eisenstadt*, and *Roe*; arguing that *Roe* is about "a woman's fundamental right to self-determination" and characterizing those cases as "vindicat[ing] the idea that 'liberty,' if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions").

<sup>52</sup>*Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>53</sup>See 410 U.S. 179, 194, 202 (1973) (holding Georgia's abortion statute unconstitutional).

<sup>54</sup>Douglas wrote:

The liberty to marry a person of one's own choosing, the right of procreation, the liberty to direct the education of one's children, and the privacy of the marital relation, are in this category [of fundamental rights whose infringement must satisfy strict scrutiny]. Only last Term in *Eisenstadt v. Baird*, another contraceptive case, we expanded the concept of *Griswold* by saying:

"It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

*Id.* at 212–13 (1973) (Douglas, J., concurring) (footnote omitted) (citations omitted).

authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.”<sup>55</sup>

The linchpin between the procreation and abortion cases, which were originally presented as privacy cases, and the Court’s later substantive due process cases like *Lawrence v. Texas*<sup>56</sup> or *Obergefell v. Hodges*<sup>57</sup> is the plurality opinion in *Planned Parenthood v. Casey*.<sup>58</sup> In it, the plurality places abortion among “the most intimate and personal choices a person may make in a lifetime,” including decisions “relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>59</sup> Our law recognizes constitutional protections for decisions in these areas because they involve “choices central to personal dignity and autonomy” and “are central to the liberty protected by the Fourteenth Amendment.”<sup>60</sup> In other words, if the liberty guaranteed by the Fourteenth Amendment means anything, it means that the right of a woman to terminate her pregnancy as an exercise of personal autonomy must be part of that liberty.

The shift from privacy to autonomy<sup>61</sup> enabled subsequent Courts to recognize new manifestations of autonomy that must be protected. In *Lawrence v. Texas*,<sup>62</sup> and then again in *Obergefell v. Hodges*,<sup>63</sup> the Court acknowledged its debt to earlier cases to support bootstrap claims about what individual autonomy had to include. Justice Kennedy’s opinion in *Lawrence*,

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<sup>55</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976). The Court’s plurality opinion in *Casey* affirmed *Danforth* using almost identical language. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992) (plurality opinion), *overruled by Dobbs*, 142 S. Ct. 2228.

<sup>56</sup> 539 U.S. 558 (2003).

<sup>57</sup> 576 U.S. 644 (2015).

<sup>58</sup> See 505 U.S. 833.

<sup>59</sup> *Id.* at 851.

<sup>60</sup> *Id.*

<sup>61</sup> Plaintiffs’ early efforts to invoke privacy against sodomy laws failed, see *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by Lawrence*, 539 U.S. 558, but Justice Blackmun’s dissent did offer up an if-then *ipse dixit*:

I believe we must analyze *Hardwick*’s claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an “abominable crime not fit to be named among Christians.”

*Id.* at 199–200 (Blackmun, J., dissenting) (quoting *Herring v. State*, 46 S.E. 876, 882 (Ga. 1904)).

<sup>62</sup> 539 U.S. 558.

<sup>63</sup> 576 U.S. 644 (2015).

for example, opened with the observation that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>64</sup> Later in the opinion, he stated that “[w]hen 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. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>65</sup>

Likewise in *Obergefell*, Justice Kennedy wrote that the Constitution guarantees “a liberty that includes certain specific rights that allow persons . . . to define and express their identity,” including the ability to make “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>66</sup> Among these is “the right to personal choice regarding marriage,” including same-sex marriage, which he regarded as “inherent in the concept of individual autonomy.”<sup>67</sup> Invoking the Equal Protection Clause, he also argued that same-sex marriage bans likewise “abridge central precepts of equality” because they deny same-sex couples the opportunity to exercise a fundamental right and “all the benefits afforded to opposite-sex couples.”<sup>68</sup> He concluded:

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection

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<sup>64</sup> *Lawrence*, 539 U.S. at 562. Later, Justice Kennedy wrote:

The opinions in *Griswold* and *Eisenstadt* were part of the background for the decision in *Roe v. Wade*. As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman’s rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. *Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.

*Id.* at 565 (citation omitted).

<sup>65</sup> *Id.* at 567.

<sup>66</sup> 576 U.S. at 651–52, 663.

<sup>67</sup> *Id.* at 665.

<sup>68</sup> *Id.* at 675.

Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.<sup>69</sup>

Despite not being expressed explicitly in the “if X means anything” terms used in other cases, the structure of the opinions and the claims that Kennedy makes are very much in the spirit of that phrase. If the liberty guaranteed by the Due Process Clause means anything, it means that individuals must be allowed to exercise some autonomy free from state control, including the rights to private, consensual sexual relations without criminal penalty and to marry a same-sex partner. Similarly, if the concept of equality means anything, it means that same-sex couples cannot be denied the fundamental right to marry—and the accompanying benefits of marriage—accorded opposite-sex couples.

#### D. *Why Resort to the If-Then Ipse Dixit?*

Assuming that the Court does not simply engage in the occasional naked power grab just to see if it can get away with it, the question arises: why does the Court employ if-then *ipse dixits* to announce new constitutional principles? My claim in this section is that if-then *ipse dixits* and their subsequent bootstrapping permit the Court to achieve desired results in the face of substantial doctrinal obstacles that would otherwise make that outcome difficult to achieve in a principled fashion. In *Stanley*, for example, there was apparently no question that the material seized was legally obscene.<sup>70</sup> Because obscenity is not protected by the First Amendment,<sup>71</sup> that should have been the end of it. Justice Marshall had to rely on an if-then *ipse dixit* to apply the First Amendment at all. Justices Douglas and Brennan would have used *Stanley* subsequently, expanding it to cover transportation of obscene materials and even private possession of noncommercial child pornography.

The if-then *ipse dixit* in *Moreno* was necessary because of the edentulous nature of rational basis review. Ordinarily, the Court instructs that if any possible factual basis exists for differentiating between non-suspect classes of people, then it will assume that served as the legislature’s basis for distinguishing between them.<sup>72</sup> A routine application of the rational basis test

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<sup>69</sup> *Id.*

<sup>70</sup> *See* 394 U.S. 557, 559 (1969).

<sup>71</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>72</sup> *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). The Court noted:

would have almost certainly resulted in the government's exclusion of non-related households from the food stamp program being upheld. *Romer* presented the same dilemma, which was compounded by the fact that *Bowers v. Hardwick* was then still good law; the Court would have been hard-pressed to hold that homosexuality was a suspect classification while maintaining that states could still criminalize homosexual conduct. *Windsor*, too, was made possible not by *Lawrence*—which denied that the decision had any effect on marriage bans or that any elevated standard of review applied to state regulations of consensual sexual conduct<sup>73</sup>—but by *Moreno*.

*Griswold's* focus on marital privacy created difficulties in *Eisenstadt*; only by removing the linkage between the privacy right and marriage could the right expand. The inclusion of “to bear” in the opinion also made *Roe* possible and was almost certainly done deliberately.<sup>74</sup> Not only did it furnish a modicum of doctrinal support for the subsequent decision in *Roe*, it also allowed the *Roe* Court to elide important differences between procreation and abortion, namely that the latter involves an additional life or at least potential life whose independent interests had to be accounted for. *Casey's* subsequent pivot to autonomy and recharacterization of cases going back to *Griswold* and *Eisenstadt* then enabled the Court to hold unconstitutional the criminalization of consensual same-sex sexual relations in *Lawrence* without finding that conduct was a fundamental right; and later, in *Obergefell*, to

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In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

*Id.* (citations omitted).

<sup>73</sup> 539 U.S. 558, 578 (2003) (“The present case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); *id.* at 594 (Scalia, J., dissenting) (“Not once does [the majority opinion] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest,’ nor does it subject the Texas statute to strict scrutiny.”).

<sup>74</sup> *Eisenstadt* and *Roe* were initially argued in November and December 1971, respectively. *Eisenstadt* came down in March 1972. *Roe* was then scheduled for an October 1972 reargument; the opinion was announced in January 1973. See EDWARD LAZARUS, CLOSED CHAMBERS 365 (1998) (“*Eisenstadt* provided the ideal opportunity to build a rhetorical bridge between the right to use contraception and the abortion issue pending in *Roe*.”); see also Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILLIAMS U. L. REV. 9, 43 (2003).

extend the fundamental right of marriage to same-sex couples while presenting the result as almost self-evident.<sup>75</sup>

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Given that if-then *ipse dixit* statements appear with some regularity in important cases that sometimes become the taproot of entirely new constitutional doctrine, perhaps they should not be dismissed without considering the case for their use. Their utility to the Court is beyond doubt; is there a normative case to be made for their use? I consider that case in the next Part.

## II. *IPSE DIXITS* AND QUIET REVOLUTIONS

A recent article by Dan Coenen suggests that *ipse dixit* declarations are useful vehicles for what he terms “quiet revolutions” in constitutional law. Here, I summarize Coenen’s defense of *ipse dixit* arguments.<sup>76</sup> Whatever benefits attend those quiet revolutions kicked off by if-then *ipse dixits*, I argue in Part III, comes at the cost of those decisions’ legal legitimacy.

Coenen observes that landmark decisions producing tectonic shifts in constitutional doctrine can do so in a quite self-conscious manner. Think *Brown v. Board of Education*<sup>77</sup> or *Miranda v. Arizona*.<sup>78</sup> Others, he argues, come in on cat feet. These cases “capture ground—often sprawling ground—without the support of any analysis at all.”<sup>79</sup> He terms these “quiet-revolution rulings.”<sup>80</sup> Corporate personhood,<sup>81</sup> the expansion of *Brown* beyond the

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<sup>75</sup> *Windsor*, of course, was the key. Unlike *Lawrence* with its numerous signals that the Court was not willing to rule on the status of same-sex marriage bans, *Windsor* was rife with signals indicating the contrary. See 570 U.S. 744, 770–75 (2013) (discussing the ways in which the DOMA interfered “with the equal dignity of same-sex marriages.”). The lower courts obliged, and then the *Obergefell* decision affirmed the lower courts as if the outcome were all but foreordained. For an analysis of this dialectic between the Supreme Court and the lower courts, see Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017).

<sup>76</sup> Coenen, *supra* note 8.

<sup>77</sup> 347 U.S. 483, 493–95 (1954) (rejecting “separate but equal” in public education).

<sup>78</sup> 384 U.S. 436, 460 (1966) (prescribing warnings to be given to those taken into custody to protect the right against self-incrimination).

<sup>79</sup> Coenen, *supra* note 8, at 2064.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* at 2075–77 (discussing *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886)).

public education context to effectively overrule *Plessy v. Ferguson*,<sup>82</sup> and the extension of the First Amendment to nonlegislative actors<sup>83</sup> are just a few of the areas in which Coenen argues that quiet revolutions have occurred.<sup>84</sup> After offering illustrative examples, Coenen then offers a taxonomy of quiet revolution rulings, distinguishing between those driven by *ipse dixit* declarations (of which if-then *ipse dixits* would be a subset) and those opinions containing invitational pronouncements. I will focus here on his case for the former.<sup>85</sup>

Examples of *ipse dixit* declarations include *NLRB v. Friedman-Harry Marks Clothing Co.*'s<sup>86</sup> application of the landmark *NLRB v. Jones & Laughlin Steel Corp.*<sup>87</sup> In *Jones & Laughlin Steel Corp.*, the Court upheld the application of the National Labor Relations Act to labor disputes at Jones & Laughlin in part because it was a vertically-integrated steel company with an enormous national reach.<sup>88</sup> Coenen writes that “the striking emphasis in *Jones & Laughlin Steel Corp.* on the ‘integrated,’ ‘far-flung,’ and ‘national’ character of the employer’s operations gave reason to believe that the Court might well deal with small, local employers in a very different manner.”<sup>89</sup> And yet, “[i]n *Friedman-Harry Marks Clothing, Co.*, . . . the Court simply declared in one sentence that the principle of *Jones & Laughlin Steel Corp.* would apply across the board to localized production.”<sup>90</sup> Likewise, in

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<sup>82</sup> 163 U.S. 537, 550–51 (1896); Coenen, *supra* note 8, at 2084 (“The Court first outlawed segregated beaches, then golf courses, then buses, then parks, all by way of one-sentence pronouncements that did not even pause to cite *Brown*.”).

<sup>83</sup> See *Bridges v. California*, 314 U.S. 252 (1941); Coenen, *supra* note 8, at 2090.

<sup>84</sup> The other areas he discusses include incorporation, Coenen, *supra* note 8, at 2067–75; reverse incorporation, *id.* at 2077–84; the creation of tiered standards of review and the development of strict scrutiny specifically, *id.* at 2084–90; the development of the clear and present danger test, *id.* at 2092–95; and tests governing the scope of congressional powers, *id.* at 2095.

<sup>85</sup> “Invitational pronouncements,” in contrast with *ipse dixit* declarations, “put forward a phrase laden with the potential for later creative use as it worked its way to resolving the issue at hand,” but “without offering any citation to authority or other supportive justification.” *Id.* at 2102. The example Coenen offers is *Schenck*’s “clear and present danger” test, which allowed future courts to draw “on the libertarian ring of the phrase over time to help justify libertarian results founded on a libertarian theory.” *Id.* Invitational pronouncements “never close the door on future constitutional growth” like *ipse dixit* declarations sometimes do, but neither is that future growth assured because “some invitational pronouncements end up having no consequences at all.” *Id.* at 2103.

<sup>86</sup> See 301 U.S. 58 (1937).

<sup>87</sup> 301 U.S. 1 (1937).

<sup>88</sup> See *id.* at 26–27.

<sup>89</sup> Coenen, *supra* note 8, at 2096–97 (footnotes omitted).

<sup>90</sup> *Id.* at 2098.

*Cantwell v. Connecticut*,<sup>91</sup> the Court, “without openly reflecting on the issue . . . simply announced the full-bore incorporation of both the Free Exercise and Establishment Clauses.”<sup>92</sup>

Coenen observes that *ipse dixit* declarations can take different forms. “Some,” he writes, “depart sharply from preexisting law, or at least from the direction in which the law then seems to be headed.”<sup>93</sup> In 1907, for example, the Court held that a criminal contempt finding involving a political cartoon did not violate the First Amendment because it involved no prior restraint.<sup>94</sup> Coenen notes that:

The Court’s ruling in *Patterson* . . . invited the conclusion that the free-expression clauses concern nothing more than licensing denials and other prior restraints. By the time of *Schenck*,<sup>95</sup> however, Justice Holmes was so ready to cut loose this constraining proposition that he needed only thirty-nine words to make the point. As he wrote for a unanimous Court: “It well may be that prohibition of laws abridging freedom of speech is not confined to previous restraints,” so that “in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.”<sup>96</sup>

Later, in *Stromberg v. California*,<sup>97</sup> the Court completed its *volte-face* from *Patterson*, holding that “some applications of ordinary criminal statutes, even though they involved no prior restraints, were invalid because they targeted ‘conduct which the State could not constitutionally prohibit.’”<sup>98</sup> As Coenen notes, “the Court did not pause to discredit the historical argument for a prior-restraint-focused First Amendment protection. It simply dispatched in a single sentence the position that the Court had seemed to endorse in *Patterson*.”<sup>99</sup>

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<sup>91</sup> See 310 U.S. 296, 303 (1940).

<sup>92</sup> Coenen, *supra* note 8, at 2098.

<sup>93</sup> *Id.*

<sup>94</sup> See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

<sup>95</sup> See 249 U.S. 47 (1919) (rejecting First Amendment challenge to conviction under the Espionage Act).

<sup>96</sup> Coenen, *supra* note 8, at 2098 (footnotes omitted) (quoting *Schneck*, 249 U.S. at 51–52).

<sup>97</sup> 283 U.S. 359, 369 (1931).

<sup>98</sup> Coenen, *supra* note 8, at 2099 (quoting *Stromberg*, 283 U.S. at 369).

<sup>99</sup> *Id.*



Others “open legal doors” or, conversely, “slam doors shut.”<sup>100</sup> Coenen writes that “[t]he Court’s one-liner in *Stromberg*, for example, led to the Court’s development of almost all now-recognized constitutional free-expression protections because the vast majority of communicative-liberty disputes involve not prior restraints but subsequent punishments.”<sup>101</sup> *Valentine v. Chrestensen*,<sup>102</sup> on the other hand, slammed a door for a time when “the Court rebuffed without analysis the idea that First Amendment protections accorded to political handbill distributors should extend to commercial handbill distributors as well.”<sup>103</sup>

Still other *ipse dixit* declarations “find support in the distortion of precedent, particularly as the Court ascribes to an earlier ruling a far-reaching principle that the ruling does not embody on any fair view.”<sup>104</sup> In *Gitlow v. New York*,<sup>105</sup> the Court simply assumed that the First Amendment was incorporated through the Fourteenth; in subsequent cases, however, “the Court cited *Gitlow*, without batting an eye, as having resolved the very question it reserved.”<sup>106</sup>

Quiet revolutions, Coenen reminds us, often “take[] the form of a quiet *evolution*—that is, a process in which *ipse dixit* declarations, invitational pronouncements, and more ordinary forms of judicial action interact over time to rearrange a field of doctrine in a far-reaching way.”<sup>107</sup> The combination may even “spur the development of underlying legal theory,”<sup>108</sup> as in *United States v. Carolene Products Co.*,<sup>109</sup> in which the Court’s famous footnote four gave rise to tiered scrutiny and John Hart Ely’s representation-reinforcing theory of the Fourteenth Amendment.<sup>110</sup>

What are the normative claims that Coenen puts forth for quiet revolution rulings—in particular, *ipse dixit* declarations? First, he concedes that to the deeply committed originalist, quiet revolution rulings—*ipse dixit*

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 316 U.S. 52, 54 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

<sup>103</sup> Coenen, *supra* note 8, at 2099.

<sup>104</sup> *Id.* at 2100.

<sup>105</sup> *See* 268 U.S. 652, 664 (1925).

<sup>106</sup> Coenen, *supra* note 8, at 2100.

<sup>107</sup> *Id.* at 2105.

<sup>108</sup> *Id.* at 2109.

<sup>109</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>110</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

declarations in particular—will be hard to stomach.<sup>111</sup> Both are much less in tension with a common law constitutionalism, but that tension is not completely resolved. *Ipsse dixit* declarations are a particular problem because “the common law centers on judicial work with reasons.”<sup>112</sup> Coenen writes, “[s]imply put, the declaration of rules without reasons seems at loggerheads with a decision-making methodology . . . that is deeply committed to the giving and use of reasons.”<sup>113</sup>

Nevertheless, he argues, *ipse dixit* declarations can be extremely useful to “common-law-oriented judges, unconstrained by the dictates of historical understandings” who “encounter ‘the power of the idea whose time has come.’”<sup>114</sup> Coenen defends *ipse dixit* declarations on several other grounds as well. He argues that while they “seem to run counter to the premises of the common law and . . . of common-law constitutionalism” by eschewing reason-giving, that “portrayal of the common law is too simplistic, if not wildly romantic.”<sup>115</sup> *Ipsse dixit* declarations, he observes, are also in line with the judicial “minimalism” championed by Cass Sunstein.<sup>116</sup> They furnish the Court with an opportunity to issue a “shallow” opinion that can paper over difficulties in forging a consensus regarding the reasons for the Court’s conclusion.<sup>117</sup>

Finally, Coenen argues that there is a pragmatic aspect to *ipse dixit* declarations insofar as they can function as focal points for the Justices and facilitate unified decisions among those who might have diverse reasons for supporting a given outcome.<sup>118</sup> *Ipsse dixit* declarations are tools available to counter the factors that operate centrifugally, pulling justices apart: the

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<sup>111</sup> See Coenen, *supra* note 8, at 2123–25.

<sup>112</sup> *Id.* at 2126.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2127 (attributing this quotation to civil rights pioneer Diane Nash and noting that it is engraved on the wall of the Birmingham Civil Rights Institute in Birmingham, Alabama).

<sup>115</sup> *Id.* at 2128.

<sup>116</sup> *Id.*; see also *id.* at 2129 (claiming that “*ipse dixit* constitutional declarations have a special claim to legitimacy because, at least in terms of ‘shallowness,’ they fit hand-in-glove with the minimalist philosophy”). See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

<sup>117</sup> In his theory, Sunstein contrasts “narrow” and “shallow” opinions with those that are “broad” and “deep.” See Sunstein, *supra* note 116, at 10–17.

<sup>118</sup> See Coenen, *supra* note 8, at 2132 (“[S]ometimes the construction of a meaningfully reasoned treatment of a constitutional issue will stir up a hornet’s nest of controversy within the Court, pushing it in the direction of issuing the sort of fractionated ruling that members of the legal profession routinely decry.”).

inherent difficulty of issues the Court must decide,<sup>119</sup> the possibility of arriving at a conclusion from different directions,<sup>120</sup> the difficulty of forging consensus within a multi-member body,<sup>121</sup> the different ideological orientations of the Justices themselves,<sup>122</sup> judicial norms that constrain decision-making,<sup>123</sup> and “the pressure of time,”<sup>124</sup> especially as the Term draws to a close.

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To sum up, then, Coenen argues that *ipse dixit* declarations could be attractive to justices who take a common law approach to constitutional cases and are justifiable on several consequentialist and pragmatic grounds. First, they enable a Court to embrace an idea “whose time has come,” and expand upon it in the future to create new constitutional doctrine. It can do so, moreover, in a “minimalist” way, writing shallow opinions that build in flexibility for the future.<sup>125</sup> They also allow a Court to overcome the institutional difficulties that attend the assembly of a majority opinion that will command at least a relatively unified, majority decision. To the extent that *ipse dixit* opinions are at odds with the ideal common law method of reason giving and gradual, as opposed to revolutionary change, Coenen is untroubled.<sup>126</sup> The ideal common law method is often romanticized and does not necessarily resemble the common law method as it is practiced.

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<sup>119</sup> *See id.* at 2132 (“Most grants of certiorari arise because of conflicts in the lower courts, and typically these ‘conflicts arise because the legal issue is hard.’”) (footnote omitted).

<sup>120</sup> *See id.* at 2133 (“[I]t is common for cases that reach the Court to invite more than two analytical approaches for resolving the issue at hand.”).

<sup>121</sup> *See id.* (“[T]he generation of majority opinions is especially tricky for a nine-member decision-making body.”).

<sup>122</sup> *See id.* (“[A] likelihood of disagreement is baked into the case-deciding process by the appointment and selection process for Supreme Court Justices.”).

<sup>123</sup> *Id.* at 2134 (noting that “the principled nature of judicial decision-making . . . takes away from the Court . . . tools for forging five-Justice positions” such as “logrolling and vote-trading”; describing “the accepted idea that Justices are duty-bound to show ‘candor’ in their reason-giving” as likewise constraining).

<sup>124</sup> *Id.*

<sup>125</sup> The Court could, for example, narrow or abandon a decision that encounters significant resistance or build upon those that seem to gain wide acceptance. *Cf.* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009) (arguing that the Court anticipates public reaction to its decisions and will abandon or review positions it adopts if faced with substantial public opposition).

<sup>126</sup> *See supra* note 115 and accompanying text.

### III. THE LEGAL ILLEGITIMACY OF THE IF-THEN *IPSE DIXIT*

My claim in this Part is that if-then *ipse dixit* statements should not be employed by the Court because they are legally illegitimate. Their illegitimacy, and that of the opinions whose results they subsequently drive, is manifest in a number of ways. The statements are unreasoning, are arbitrary, are often used in a disingenuous fashion, offer the prospect for future bootstrapping, and are often simply false.

#### A. *Legal Legitimacy*

Richard Fallon's recent description of legal legitimacy is a suitable yardstick for the purposes of this essay. Legal legitimacy, he writes, concerns "whether the Justices' decisions accord with or are permissible under constitutional and legal norms."<sup>127</sup> He distinguishes the legitimacy of a decision from its correctness. "Our centuries-long experience with constitutional law teaches that we must expect reasonable disagreement about many of the constitutional issues that reach the Supreme Court."<sup>128</sup> But "[i]f the concepts of legal legitimacy and illegitimacy are to do any useful work, they must signify something other than the correctness or incorrectness (in the speaker's judgment) of a judicial opinion."<sup>129</sup> Charges of illegitimacy are serious; they "attempt to mark normative breaches or judicial misconduct that"—as opposed to disagreement as to outcomes that are endemic to the cases the Supreme Court decides—"we should not have to expect and that, if the pattern were extended, we as a nation perhaps ought not tolerate."<sup>130</sup>

Having drawn those distinctions, Fallon then writes:

[A] claim of judicial legitimacy characteristically suggests that a court (1) had lawful power to decide the case or issue before it; (2) in doing so, rested its decision only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment.<sup>131</sup>

An illegitimate decision, not surprisingly, is the mirror image:

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<sup>127</sup> FALLON, *supra* note 5, at 35.

<sup>128</sup> *Id.* at 38.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 39.

<sup>131</sup> *Id.* at 39–40.

[A] court (1) decided a case or issue that it had no lawful power to decide; (2) rested its decision on considerations that it had no lawful authority to take into account or could not reasonably believe that it had lawful authority to consider; or (3) displayed such egregiously bad judgment that its ruling amounted to an abuse of authority, not a mere error in its exercise.<sup>132</sup>

As examples, he cites *Bush v. Gore*,<sup>133</sup> which many think was decided on impermissible partisan political grounds.<sup>134</sup> He also cites *Roe v. Wade*,<sup>135</sup> whose critics often argue that “the Court lacked lawful authority to recognize substantive due process rights not firmly rooted in the nation’s history or abused its discretion by extending precedents recognizing personal rights of bodily integrity to encompass” the right to abortion.<sup>136</sup>

## B. Why If-Then Ipse Dixits Lack Legitimacy

### 1. They Are Unreasoned

I start with an important, if obvious, point: courts—the Supreme Court in particular—are expected to give reasoned opinions, not issue *diktats*.<sup>137</sup> If-then *ipse dixits* are objectionable precisely because they give no explanation or reason—to say nothing of citation to binding legal authority—to back up the claim that “if X means anything, it means Y.” The lack of reasons contravenes the Court’s own decisions that have suggested reason-giving in judicial opinions is required by due process principles.<sup>138</sup> It is certainly not self-evident why equal protection—to have any substantive meaning

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<sup>132</sup> *Id.* at 40.

<sup>133</sup> 531 U.S. 98 (2000).

<sup>134</sup> *See, e.g.*, FALLON, *supra* note 5, at 40.

<sup>135</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>136</sup> FALLON, *supra* note 5, at 40.

<sup>137</sup> *See* Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 971 (2011) (listing “legal analysis” and “judicial craftsmanship” as two of four “pillars” of sound constitutional doctrine).

<sup>138</sup> It is true that courts are not under a uniform constitutional obligation to give reasons accompanying their judgment in a case. It is also true that “[r]eason-giving is so instinctive and commonplace in the U.S. judicial culture that the practice has hardly needed formalization.” Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 531 (2015).

whatever—means that the unequal treatment of a politically unpopular group because a legislative majority wishes to penalize them can *never* be a legitimate governmental interest. Or why a *sine qua non* of “privacy” is the equal treatment of married and unmarried persons when it comes to commercial access to contraceptives. That is not to say that such reasons do not exist, but the Court’s refusal even to gesture toward some suggests that it had no binding *constitutional* reasons readily at hand to shore up its pronouncements.

Much of Coenen’s defense of the broader *ipse dixit* declarations is aimed at meeting the objection that they are contrary to the common law method because no reasons are given to justify the declarations in the first place. First, he says that critiques of the unreasoning nature of *ipse dixits* are perhaps based on a naïve conception of the common law method.<sup>139</sup> If he is correct, then it seems that the solution is not to *further* degrade the method by the introduction of unreasoned statements backed only by the authority of the Court that utters them, but rather to work assiduously to recover more of the idealized common law approach. As I have argued elsewhere,<sup>140</sup> one problem with common-law constitutional interpretation is that as a practical matter, and unlike actual common law courts, the decisions of the Supreme Court can only be countermanded by a future Court, given the practical difficulty of constitutional amendment. Thus, it seems incumbent on the Supreme Court to approximate as closely as possible the common law ideal when deciding constitutional cases and not to resort to shortcuts in pursuit of “the idea whose time has come,” which notion itself begs the question about the Court’s proper role.<sup>141</sup>

Second, Coenen suggests that decisions containing *ipse dixit* declarations are “shallow” and thus potentially minimalist in a Sunsteinian sense.<sup>142</sup> Although this *might* be the case, it often does not comport with the reality of how the Court employs if-then *ipse dixits*. Such declarations are often “broad” as opposed to “narrow,” and “deep” as opposed to “shallow,”

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<sup>139</sup> See Coenen, *supra* note 8, at 2127.

<sup>140</sup> Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMMENT. 621, 637 (2011) (book review) (arguing that “the common law model is inappropriate in a system where judicial decisions are not amenable to reversal by ordinary legislative majorities”).

<sup>141</sup> Coenen, *supra* note 8, at 2127 (attributing this quotation to civil rights pioneer Diane Nash and noting that it is engraved on the wall of the Birmingham Civil Rights Institute in Birmingham, Alabama).

<sup>142</sup> See Coenen, *supra* note 8, at 2129.

especially when the bootstrapping starts. Think *Roe*, which relied on *Eisenstadt*'s bootstrapping of *Griswold* to overturn abortion regulations nationwide.<sup>143</sup>

Moreover, to the extent that if-then *ipse dixits* promote minimalism, they might not always be a virtue because minimalism itself may not be benign. In his review of Sunstein's theory, Jeffrey Rosen questioned whether Sunstein's vision of a Court that handed down "bold rulings without bothering to agree on very deep reasons to explain its decisions" was not at bottom "a form of judicial self-aggrandizement masquerading as modesty?"<sup>144</sup> He continued:

Sunstein models his theory on Bickel's "passive virtues," which Bickel defined as the use of techniques of judicial avoidance to delay decisions in important cases that might be further clarified by democratic debate. But for the justices to extend Bickel's notion of "passive virtues" to a judicial opinion itself, refusing to say what they think about a constitutional issue after they have promised to do so, is a peculiarly coy vision of the judicial role. It seems not so much passive as passive-aggressive.<sup>145</sup>

Third, as for *ipse dixits*'—and by extension the decisions which host them—pragmatic value in overcoming obstacles to forging unfractured opinions, that rather proves too much. The challenges Coenen lists are omnipresent in constitutional cases. If producing unfractured opinions was the Court's prime directive, it would abandon reason-giving altogether, not just sometimes. But part of the Court's *raison d'être* as well as the source of its legal (and sociological<sup>146</sup>) legitimacy is its obligation to provide reasons for the judgments it renders. Lacking force or will, as Hamilton wrote, the Court must rely on the strength of its reasoning to persuade.<sup>147</sup> Judgment

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<sup>143</sup> See 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

<sup>144</sup> Jeffrey Rosen, *The Age of Mixed Results*, THE NEW REPUBLIC (June 27, 1999), <https://newrepublic.com/article/74083/the-age-mixed-results>.

<sup>145</sup> *Id.*

<sup>146</sup> FALLON, *supra* note 5, at 22 (defining sociological legitimacy as the "[belief] that the law or the constitution deserves to be respected or obeyed for reasons that go beyond the fear of adverse consequences") (footnote omitted).

<sup>147</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

without reasons is, as Robert Frost famously described free verse, tennis with the net down.<sup>148</sup>

A final thought about Coenen's suggestion that sometimes it is worth sacrificing a little integrity in an opinion to allow a court to embrace an idea whose time has come: in our constitutional system, only Congress is permitted the freedom to act without giving reasons. Most executive agencies are bound by the Administrative Procedures Act and may not issue or suspend regulations in an "arbitrary and capricious" manner.<sup>149</sup> And both legislative and executive officials are accountable to voters in ways the judiciary is not. Lacking the power to coerce, courts—the Supreme Court in particular—have to rely on the persuasive power of their judgments as expressed in their opinions. If the Supreme Court feels free to constitutionalize an idea whose time has come, in the opinion of at least five members, by fiat and without explanation, then it begins to resemble just another political body in our system and the arguments for life tenure,<sup>150</sup> insulation from retaliation through salary reduction,<sup>151</sup> even judicial review itself, lose a good deal of force.

## 2. They Are Arbitrary

Because if-then *ipse dixits* are not supported by reason, they are often arbitrary and admit of no limiting principle. For example, without knowing *why*, exactly, privacy or autonomy—if they are to have any meaning whatever—must include the right to abortion or the right not to be prosecuted for consensual homosexual conduct, we have no basis on which to distinguish the latter from things that the Court does *not* consider indispensable to privacy or autonomy, like the right to engage in sex work or to use controlled substances in one's own home. If autonomy and equality require the extension of the fundamental marriage right to same-sex couples, why not to those who practice polygamy or who wish to enter into incestuous unions as adults? The use of if-then *ipse dixits* strongly implies the Court itself has no rational way to make these distinctions, which tends increasingly to erode the persuasive force of both those decisions and the Court's own credibility.

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<sup>148</sup> See Reginald L. Cook, *Robert Frost: A Time to Listen*, 7 COLL. ENG. 66, 69 (1945).

<sup>149</sup> ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 13.10.2, at 438 (3d ed. 2014).

<sup>150</sup> U.S. CONST. art. III, § 1.

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



### 3. They Are Disingenuous

Though its scope is often contested, there exists a general consensus that judges owe a duty of candor when rendering decisions.<sup>152</sup> If-then *ipse dixits* and the decisions whose outcomes they drive lack that expected candor. Take the animus decisions such as *Moreno*, *Romer*, and *Windsor*. It is clear to all who care to see that—despite the Court’s claims to the contrary—the standard of review applied in those cases is not the deferential rational basis test that it applies in other cases. If it were, we would expect to see the plaintiffs in those cases lose. What makes the outcomes possible, as suggested above, is that the Court relies on an if-then *ipse dixit* to conclude that the government’s aim in each case was an illegitimate one.

Similarly, the Court’s reliance on an if-then *ipse dixit* in *Eisenstadt* allowed the Court to disingenuously sever the link between marriage and the right to use contraceptives in *Griswold*, expand the right recognized in the latter, and smuggle in the right to abortion in the bargain all while acting as if the latter principles flowed ineluctably from *Griswold* itself. The if-then *ipse dixit* served as cover for a Court that nowhere acknowledged that it was breaking new constitutional ground.

Kermit Roosevelt has written about “subterfuge” in Supreme Court opinions.<sup>153</sup> This occurs when the Court “succumb[s] to the temptation to get a particular case right” by claiming to faithfully apply its decision rules but not doing so.<sup>154</sup> Examples would certainly include *Moreno*, *Romer*, and *Lawrence*, which as noted above, clearly applied a more searching version of the rational basis test than the Court applies in other cases. If-then *ipse dixits* can be useful drivers of subterfuge, which itself is one way in which the Court hands down less-than-candid opinions and, in the process, further diminishes its standing in the eyes of the other branches, the legal community, and the public at large.

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<sup>152</sup>There is a vast literature on the subject of judicial candor. See, e.g., Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265 (2017); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1309 (1995); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

<sup>153</sup>Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

<sup>154</sup>*Id.* at 1690.

#### 4. They Offer Opportunities for Bootstrapping

Perhaps the most pernicious effect of the if-then *ipse dixit* is when the first case in which it appears serves as justification for future cases, which then invite reliance in the case after that, until it becomes firmly entrenched in constitutional doctrine. In their catalog and discussion of “anti-modalities”—forms of legal reasoning that are considered beyond the pale if used by judges—David Pozen and Adam Samaha observe that anti-modal reasoning can get smuggled into Court opinions, especially if “[y]oked to a modality.”<sup>155</sup> What they term “modalization” or mainstreaming of an anti-modal argument can occur in a number of ways, but one they highlight is particularly relevant to my argument here. “Doctrinal argument is a particularly powerful engine of modalization,” they note.<sup>156</sup> “Once an authoritative ruling establishes a principle of law, that principle can be invoked and elaborated indefinitely without leaving modal territory, notwithstanding that the initial ruling’s logic might seem anti-modal by contemporary standards.”<sup>157</sup>

Their observation is what makes if-then *ipse dixits* especially noxious. For example, once it is established that the right to equal protection, to have any meaning at all, must mean that unpopular groups cannot legitimately be targeted by political majorities, then that anti-animus principle can be applied in just about any way the Court sees fit. Thus was the *Romer* Court able to cite *Moreno* as a justification for invalidating Colorado’s Amendment 2 despite *Bowers* still being good law and there having been no decision declaring gays and lesbians to be protected classes that would garner heightened review. *Moreno* and *Romer* could then be cited to invalidate the Defense of Marriage Act in *Windsor* and so on.

Likewise, this is clearly seen in the Court’s privacy/autonomy line of cases that began with a dispute about a married couple’s use of contraception and ended (for now) with a decision holding that same-sex marriage was a fundamental constitutional right. It would have been much more difficult—if not impossible—without *Eisenstadt*’s if-then *ipse dixit* for the Court to build upon as it decided future cases that in turn served as authority for decisions in other future cases. But I argue that all such doctrinal edifices are built on sand. This is by no means inevitable. *Stanley* produced no subsequent decisions able to command a majority, but individual justices would have

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<sup>155</sup> Pozen & Samaha, *supra* note 4, at 774.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

happily seen it bear fruit. But *Stanley* might be the exception proving the rule that subsequent cases that bootstrap an if-then *ipse dixit* tend to operate as a one-way ratchet, moving constitutional principles to increasing levels of abstraction and permitting them to sweep across a broader number of laws. On the other hand, *Stanley*—like *Moreno* prior to 1996—could simply be dormant, a sleeper case awaiting activation by a future norm entrepreneur like Justice Kennedy.

### 5. They Are Often False

Finally, if-then *ipse dixits* are often simply not true, or at least they are not true as a strong essentialist claim that X literally has no meaning if it does not include Y. *Stanley*'s claim that the First Amendment is literally meaningless unless it embodies the principle that the government has no business telling a person what they can read or watch in their home was almost surely false at the time, and in any event, by the time the Court decided *Osborne*, the Court itself had abandoned that position. Why a bare desire to harm an unpopular group is a constitutional infirmity is likewise not explained in *Moreno*. Congress and the executive branch frequently single out groups—drug lords, terrorists, bank and insurance executives, other countries—and seek to harm them. And, as noted above,<sup>158</sup> *Eisenstadt*'s statement that married couples and individuals must be accorded equal treatment ignores the many ways in which the law affords privileges to married couples. Autonomy, in order to be meaningful, need not necessarily include either the right to abortion or the ability to marry someone of the same sex. In none of the cases discussed in Part I did the Court bolster its essentialist assertions about the constitutional provisions at issue with appeals to the usual modalities of constitutional interpretation beyond the Court's *ipse dixit*. The bootstrap cases that follow dutifully cited prior cases, but that fact does not, for me, legitimize those earlier cases.

### CONCLUSION

If-then *ipse dixits* and the decisions in which they appear and then often subsequently spawn put—forgive me—the “con” in constitutional law. As John Hart Ely once wrote of *Roe*, not only are many of these decisions “bad constitutional law,” they are “not constitutional law and give[] almost no

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<sup>158</sup>GREGORY ET AL., *supra* note 50 and accompanying text.

sense of an obligation to try to be.”<sup>159</sup> These if-then *ipse dixits* are easily bootstrapped and the principle the earlier decision first announced can be applied to new situations over and over creating entirely new areas of constitutional doctrine. They and the decisions that cite them for support are legally illegitimate and should be consigned to the realm of anti-modal forms of argumentation that the justices should be roundly criticized for employing.

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<sup>159</sup>John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).