



University of St Andrews
Law Journal
Institute of Legal and Constitutional Research



Title: Law as It Is, Law as It Lives: Judicial Reasoning in Penumbral Interpretation of Same-Sex Marriage Rights

Author(s): Rusne Vaskeviciute

Source: *University of St Andrews Law Journal* 6, no. 2 (October 2026): 65-78.

Published by: Institute of Legal and Constitutional Research, University of St Andrews

Stable URL: <https://doi.org/10.15664/stalj.v6i2.3227>

DOI: 10.15664/stalj.v6i2.3227

This work is protected under Creative Commons Attribution 4.0 International (CC BY 4.0) License 2020.

The author(s) retain copyright holding, having permitted the *University of St Andrews Law Journal* to distribute (publish) their work.

The *University of St Andrews Law Journal* is an Open-Access publication of the University of St Andrews, recorded by the ISSN National Centre for the UK. Published in partnership with the Institute of Legal and Constitutional Research, University of St Andrews.

Copyright © 2026 University of St Andrews Law Journal

All use subject to:

<https://creativecommons.org/licenses/by/4.0/>

ISSN 2634-5102

Law as It Is, Law as It Lives: Judicial Reasoning in Penumbra Interpretation of Same-Sex Marriage Rights

By Rusne Vaskeleviciute

Introduction

“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” declared Chief Justice Warren, delivering the opinion of the Supreme Court of the United States in *Trop v. Dulles*.²⁹³ This 1958 holding addresses law not as a static entity, but as an evolving one, responsive to the necessities and standards of a developing society. Justice Warren’s statement reflects a teleological interpretative approach towards jurisprudence, which aims to reason the law in compliance with its intended purpose. Through this interpretative framework, legal reasoning extends beyond the clear-cut wording of legal provisions towards the surrounding *penumbra*. In this domain, the limitation of legal language becomes apparent. Since legal provisions cannot anticipate every circumstance they are meant to regulate, they require judicial interpretation.

The most comprehensive definition of *penumbra* was coined by English legal professional and philosopher H. L. A. Hart in his 1961 work *The Concept of Law*.²⁹⁴ Hart defined it as the area of ambiguity in an application of legal rules where judicial discretion²⁹⁵ is necessary due to the inherently imprecise legal language not accounting for every possible state of affairs that might occur.

However, American legal professional and philosopher Ronald Dworkin criticises Hart’s definition. He argues that Hart fails to include the role of legal principles, which substantially guide judicial decisions in the absence or ambiguity of explicit legal rules. Dworkin extends Hart’s account of the *penumbra*, arguing that even within that so-called *grey zone*, judicial reasoning remains guided by principles of fairness, justice, and equality integral to the legal system.²⁹⁶

French philosophers Michel Foucault and François Ewald propose a different approach to the concept of *penumbra*. Instead of focusing on judicial decision-making, they delve into the social and historical conditions that produce it. Foucault and Ewald examine how non-legal norms, such as evolving societal expectations and shifting rights discourse, widen the gap between socially recognised and legally protected conduct, generating pressure around rights and duties that have yet to gain legal recognition.^{297 298}

These perspectives suggest that when legal rules provide no determinate answer, judges must exercise discretion in interpreting the law. However, such discretion does not operate in isolation. From the Indian Supreme Court’s use of constitutional provisions to establish safeguards against workplace sexual harassment,²⁹⁹

²⁹³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁹⁴ H. L. A. Hart, *The Concept of Law*, 2nd ed., edited by Penelope A. Bulloch and Joseph Raz (Oxford University Press, 1994), p. 123.

²⁹⁵ Judicial discretion – the authority and flexibility of the judges to exercise independent legal reasoning to reach decisions where the law does not prescribe a single, definitive outcome.

²⁹⁶ Ronald Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35, no. 1 (1967), p. 35, <https://doi.org/10.2307/1598947>.

²⁹⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, 2nd ed. (Vintage Books, 1995), pp. 210–11.

²⁹⁸ François Ewald, “Norms, Discipline, and the Law,” *Representations* 30 (1990), p. 138, <https://doi.org/10.2307/2928449>.

²⁹⁹ *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).

to the Italian Constitutional Court's recognition of informed consent as a fundamental principle protecting health and individual self-determination,³⁰⁰ courts adapt legal doctrines to evolving values of equality and dignity where legislation is limited or absent.

Therefore, to analyse the relationship between the transformation of collective values and judicial interpretation of laws established under earlier social conditions, this paper aims to assess *how changing societal attitudes toward sexuality, family, and equality influence judicial interpretation of penumbra across legal systems concerning same-sex marriages*.

As this paper will reflect on the United States of America's common law system and Brazil's civil law system, specifically through the respective cases *Obergefell v. Hodges* (2015)³⁰¹ and *ADI 4277*³⁰² and *ADPF 132* (2011),³⁰³ it will be argued that:

(I) while the interpretation of penumbra in law is largely influenced by the *internal dynamics* of judicial reasoning, such as different legal interpretative methodologies employed by judges within their respective legal systems,

(II) *external factors*, such as changing public attitudes and evolving understandings of individual rights, play a crucial role in shaping the normative environment within which judges reason and decide, as evidenced by the impact of the expanding public recognition of LGBT rights on judicial decisions across civil and common law systems.

1. The Influence of Legal Theory on Judicial Reasoning and the Use of Precedent and Judicial Review in Resolving Penumbral Ambiguity

1.1. The Influence of Legal Theory and Interpretative Methodology on Judicial Reasoning in Penumbral Cases

The issue of the approach towards penumbra in law is twofold. Firstly, legal theories present contrasting visions of the function of law. Secondly, it concerns interpretative methodology, which determines how law is applied in practice by judges.

Natural law theory, legal positivism, legal realism, and critical legal studies constitute prominent legal theories that define the nature and source of law and determine the normative standards by which its validity and scope are assessed. However, given their direct relevance to the treatment of penumbra in law, particularly in the context of same-sex marriage, this paper will focus on legal positivism and legal realism. These theories diverge on whether law constitutes a closed, self-sufficient system, autonomous from morality and social reality

³⁰⁰ *Decisione della Corte Costituzionale*, n. 438/2008 (Italy, 2008).

³⁰¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁰² *Ação Direta de Inconstitucionalidade [ADI] 4277* (Prosecutor General v. President of the Republic), Supremo Tribunal Federal (Brazil 2011).

³⁰³ *Arguição de Descumprimento de Preceito Fundamental [ADPF] 132* (Governor of the State of Rio de Janeiro v. Courts of Justice of the States), Supremo Tribunal Federal (Brazil 2011).

(an approach advocated by legal positivism), or whether it is shaped by social context and judicial discretion (an approach advocated by legal realism). Therefore, their divergence influences how judges address the insufficiency of the legal framework in indefinite legal situations. It is important to note that legal theories operate alongside interpretative methodologies. In this regard, the two interpretative methodologies most pertinent to this discussion are *formalist* and *teleological*.³⁰⁴ This subpart therefore traces two parallel tracks: the theoretical positions of legal positivism and legal realism, which define the nature and boundaries of law, and the interpretative methodologies of formalism and teleological reasoning, which translate those theoretical positions into judicial practice.

(a) Legal Positivism and Formalist Interpretation

The treatment of penumbra in law is most developed within **legal positivism**, primarily through Hart's distinction between clear-cut cases and *hard cases*. The latter are instances where the legal text is inconclusive and judicial discretion becomes necessary, creating a "penumbra of debatable cases".³⁰⁵ However, such discretion operates strictly within the boundaries of *law as it is*, independently of moral considerations, given the strict separation between law and morality that legal positivism maintains. From the perspective of legal theory, the positivist approach to the limits of judicial authority is reflected in the dissenting opinions in *Obergefell v. Hodges*. The minority held that the Constitution's silence on same-sex marriage left no textual basis for judicial intervention (therefore, the issue did not constitute a hard case), and that any broad margin of interpretation would exceed the boundaries of *law as it is*, amounting to judicial legislation rather than adjudication. This positivist position is exemplified in Chief Justice John Roberts's dissenting opinion: "*judges have power to say what the law is, not what it should be*".³⁰⁶

In contrast to hard cases, clear-cut cases present no such ambiguity; therefore, no judicial discretion is required. In these instances, legal positivism tends to operate alongside **formalism**. Whereas legal positivism defines the boundaries of judicial authority, a judge who adopts a formalist interpretation reads and applies the text solely within those boundaries, without looking beyond its literal meaning. The formalist interpretative approach derives from Montesquieu's principle of separation of powers between the government branches, articulated in his 1748 work *The Spirit of the Laws*: "*But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour.*"³⁰⁷ With that being said, formalism does not recognise penumbra as an invitation for any judicial response whatsoever, and leaves the concept of a legal *grey area* out of the discourse. In *Obergefell v. Hodges*, such a formalist approach is reflected in Justice Antonin Scalia's opinion. He strongly dissented from

³⁰⁴ Telos – an ultimate objective or aim.

³⁰⁵ H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958), p. 607, <https://doi.org/10.2307/1338225>.

³⁰⁶ *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting) ("Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be").

³⁰⁷ Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (Batoche Books, 2001), bk. XI, ch. VI, p. 180, originally published 1748, <https://plattypus1917.org/wp-content/uploads/The-Spirit-of-Laws-Montesquieu.pdf>.

the majority's decision to legalise same-sex marriage, arguing that the ruling constituted judicial overreach,³⁰⁸ and claiming that the Court's mission was to read the constitutional text and do what it says.³⁰⁹ Scalia's position thus exemplifies formalist interpretation in practice, confining the Court strictly to the enacted constitutional text.

(b) Legal Realism and Teleological Interpretation

Where legal positivism conceives of law as a closed, autonomous system defined by its textual form, legal realism takes an opposing position, situating law as a social fact – dynamic, indeterminate, and inseparable from the realities of how courts resolve disputes in practice.

This is captured most prominently in the work of Oliver Wendell Holmes Jr., who, across his two foundational texts, articulated the core claims of legal realism. In the 1881 book *The Common Law*, Holmes argues that the life of the law has not been logic, but experience.³¹⁰ He positions law's content as not determined by textual logic or formal deduction, but by the accumulated social and historical realities through which it has been applied. This statement directly challenges the positivist conception of law as a self-sufficient logical order.

In the 1897 essay "The Path of the Law", he advances this idea further by introducing the "Bad Man" theory. The theory proposes that the most accurate understanding of law comes from the perspective of an individual entirely unconcerned with morality, who calculates the law solely by predicting when and how force will be applied to his conduct. Because a "bad man" disregards moral obligation entirely, he strips law down to its practical reality: not what statutes declare, but what courts will actually do³¹¹. This perspective reinforces the legal realist distinction between law in books and law in action, and positions law as fundamentally a prediction of judicial behaviour rather than a fixed textual command. Since legal realism argues that law is defined through how courts resolve disputes, judicial engagement with unclear or undefined legal situations is neither a deviation from the legal system nor an instance of judicial overreach, but a constitutive part of how law materialises in reality and develops. However, the question of how judges ought to reason when confronting penumbral cases belongs to interpretative methodology. Judges drawing on legal realist assumptions tend to employ teleological reasoning as their interpretative methodology, as both share a rejection of law as a closed textual system and an orientation toward law's social purpose and lived reality.

Obergefell v. Hodges demonstrates such a methodological position in the majority's ruling. The Court held that the exclusion of same-sex couples from the institution of marriage violated the Fourteenth Amendment's right to marry protected by the Due Process Clause³¹² and that denying this right violated the Equal

³⁰⁸ *Obergefell*, 576 U.S. at 713 (Scalia, J., dissenting) ("This is a naked judicial claim to legislative - indeed, super-legislative - power; a claim fundamentally at odds with our system of government").

³⁰⁹ Jonathan R. Siegel, "Legal Scholarship Highlight: Justice Scalia's Textualist Legacy," *SCOTUSblog*, November 14, 2017, <https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/>.

³¹⁰ Oliver Wendell Holmes, Jr., *The Common Law*, ed. Paulo J. S. Pereira and Diego M. Beltran (University of Toronto Law School, 2011), p. 5, <https://www.general-intelligence.com/library/commonlaw.pdf>.

³¹¹ Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10, no. 8 (1897), pp. 459–61, <https://moglen.law.columbia.edu/LCS/palaw.pdf>.

³¹² The Due Process Clause prohibits the government from depriving any person of life, liberty, or property without due process of law. It

Protection Clause.³¹³ By using the Fourteenth Amendment's broader objective of guaranteeing equal dignity and protection under the law, the Court reasoned that the meaning of fundamental rights is not fixed at the moment of a provision's drafting, but evolves alongside society's understanding of liberty³¹⁴ (*"The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution"*).³¹⁵ Therefore, the ruling exemplifies teleological interpretation by reading the constitutional provision beyond its original textual meaning in light of the broader purpose it was intended to serve.

Common law systems are more conducive to such teleological interpretation, as judicial reasoning proceeds inductively from specific cases toward broader legal principles, as evident in *Obergefell v. Hodges*. In civil law systems, by contrast, judicial reasoning proceeds deductively, applying pre-existing codified rules to the facts at hand. However, penumbral protection for same-sex couples is not exclusive to common law systems. Cases *ADI 4277* and *ADPF 132* illustrate that civil law judges are equally capable of penumbral reasoning. At the joint trial of *ADI 4277* and *ADPF 132*, the Brazilian Supreme Court read constitutional Article 226 as an open rather than exhaustive enumeration of family entities, positioning same-sex families not as excluded by the provision, but simply unaddressed, leaving penumbral space for judicial extension. Therefore, teleological reasoning facilitated the penumbral extension of legal recognition and protections for same-sex couples in both civil and common law systems, directing judges toward the broader purpose of existing legal provisions rather than their explicit text.

1.2. The Use of Judicial Precedent and Judicial Review to Resolve Penumbral Ambiguity of Same-Sex Marriage

In common law systems, the judiciary uses *stare decisis* – binding precedents – as the primary source of law in an incremental development of legal protections across successive cases. In civil law systems, where precedent carries no binding force, judicial review of constitutional principles serves as the primary tool for resolving ambiguity in constitutional text.

(a) Stare Decisis and Penumbral Extension

In the US, state supreme courts generally have final authority over questions of state law within their jurisdictions, while the US Supreme Court may review final state-court judgments that present federal constitutional questions. Accordingly, a state court's interpretation of federal constitutional protection may be reviewed by the US Supreme Court, whereas questions of state law ordinarily remain for the state courts. The

encompasses both procedural protections (fair notice and a hearing) and substantive limits on government power over fundamental rights.
³¹³ The Equal Protection Clause prohibits states from denying any person within their jurisdiction equal protection under the law. It requires that similarly situated individuals be treated alike by the government, and serves as the constitutional basis to combat discriminatory laws and policies.

³¹⁴ The Court's reasoning reflects the philosophy of living constitutionalism, which holds that the Constitution's meaning evolves alongside contemporary social values rather than remaining fixed to its original textual intent. Living constitutionalism shares the purposive orientation of teleological reasoning, though it operates specifically at the level of constitutional interpretation rather than statutory interpretation.

³¹⁵ *Obergefell*, 576 U.S. at 663 (opinion of the Court).

legal recognition of same-sex marriage in the US ultimately required Supreme Court intervention to resolve the federal constitutional question and extend constitutional protections into previously unaddressed penumbral territory.

In 1972, the appeal of *Baker v. Nelson* to the US Supreme Court, in which petitioners argued that Minnesota's refusal to issue a same-sex marriage licence violated the Ninth Amendment's protection of fundamental rights and the Fourteenth Amendment's Due Process and Equal Protection Clauses, was dismissed "for want of a substantial federal question" at that time.³¹⁶ However, in the 43 years between *Baker v. Nelson* and *Obergefell v. Hodges*, successive Supreme Court decisions progressively developed the penumbral scope of the Fourteenth Amendment, gradually reading the fundamental right to marry into its protections of liberty, dignity and equal protection.

In reaching its 2015 decision in *Obergefell v. Hodges*, the Supreme Court anchored its majority ruling in a line of prior precedents. Those precedents established that the right to marry cannot be based on arbitrary distinctions (*Loving v. Virginia*, 1967), cannot breach personal autonomy and respect for privacy (*Lawrence v. Texas*, 2003), and cannot violate dignity and equality for same-sex couples under the law³¹⁷ (*United States v. Windsor*, 2013). Grounded in this case law, the Court in *Obergefell v. Hodges* extended the right to marry to same-sex couples, overruling *Baker v. Nelson* as incompatible with the evolved constitutional understanding of liberty, dignity, and equal protection.

(b) Judicial Review and Constitutional Scrutiny

In Brazil, the penumbral extension of legal recognition to same-sex couples was determined through the Federal Supreme Court's constitutional judicial review, examining whether the statutory treatment of same-sex unions established in the Civil Code conformed to the constitutional principles of human dignity and non-discrimination.

The Supreme Federal Court of Brazil (STF) granted such recognition, addressing the penumbra of same-sex stable unions by evaluating whether existing laws violated the established constitutional principles. In *ADI 4277* and *ADPF 132*, judicial review centred on Article 226, § 3 of the Brazilian Constitution, which recognises the stable union between a man and a woman as a family entity but contains no explicit prohibition of same-sex unions.³¹⁸ Brazilian law never explicitly prohibited same-sex marriage, as Article 1.521 of the Civil Code, which enumerates matrimonial impediments, contains no provision excluding same-sex couples. Under Article 5 of the Brazilian Constitution, no one is obliged to refrain from doing something except by virtue of explicit law. This means that individual conduct is permitted by default unless expressly restricted; neither the Constitution nor the Civil Code prohibits same-sex marriage. The gendered language of Articles 1.514, 1.517, 1.565 and 1.723 of the

³¹⁶ *Obergefell*, 576 U.S. at 656 (syllabus).

³¹⁷ In *United States v. Windsor*, 570 U.S. 744 (2013), the US Supreme Court ruled that Section 3 of the "Defence of Marriage Act", which defined marriage explicitly as between a man and a woman, was unconstitutional because it violated the equal dignity of same-sex marriages already recognised by states.

³¹⁸ Constituição Federal [C.F.] art. 226, § 3 (Brazil), <https://www.globalhealthrights.org/wp-content/uploads/2013/09/Brazil-constitution-English.pdf>.

Civil Code (“between/for the man and a woman”) did not amount to an implicit prohibition, given that Brazilian law requires explicit legal provision to restrict individual conduct.³¹⁹ Therefore, same-sex stable unions occupied a penumbral space in Brazilian law: not prohibited, but equally without any statutory mechanism through which couples could formally implement their civil union.

Therefore, through judicial review, the STF jointly held that gendered provisions (“between/for the man and a woman”) in the Civil Code and Article 226 of the Constitution **must be interpreted in conformity** with Article 3, IV, of the Constitution, which prohibits “*prejudice as to <...> sex, <...> and any other forms of discrimination*”,³²⁰ thereby extending recognition to same-sex stable unions as family entities. Moreover, it was established that the absence of recognition of same-sex stable unions violates the principles of human dignity and protection of equality established in the Constitution.

The ruling resolved the issue of penumbra surrounding same-sex stable unions, granting same-sex couples nationwide the same legal rights as heterosexual couples in stable unions, setting a foundation for further legal changes, as the conversion of stable unions into marriage remained contested in subsequent proceedings. Two years later, in 2013, the STF’s rulings in *ADI 4277* and *ADPF 132* provided the constitutional foundation for Resolution 175, issued by the National Council of Justice in 2013. The Resolution ordered all civil registries to license same-sex marriages and convert existing stable unions into marriages upon request, effectively legalising same-sex marriage across Brazil through an administrative order.³²¹

2. The Influence of the LGBT Rights Movement and International Human Rights Norms on Judicial Recognition of Same-Sex Marriage

2.1. Societal Mobilisation and the LGBT Movement as Catalysts for the Judicial Establishment of Same-Sex Marriage Rights

Judicial interpretation does not occur in a social vacuum. The attitudinal change model holds that the same social forces that reshape public opinion shape judges as members of society. However, judicial outlook is influenced not by public opinion directly (e.g., opinion polls or political debates), but by the mutually experienced cultural and ideological shifts that simultaneously reorient judicial thinking. Chief Justice Rehnquist acknowledged that major constitutional cases, as they engage broad jurisprudential themes rather than narrow legal technicalities, are particularly susceptible to the tides of public opinion already running in the country.³²²

In the context of same-sex marriage, this dynamic is visible in the journey from the holding in *Baker v. Nelson* to *Obergefell v. Hodges*. Between 1972 and 2015, no amendment was made to the constitutional

³¹⁹ Marianna Chaves, “Same-Sex Families in Brazil: An Overview after the Trial of ADI 4277 and ADPF 132 by the Supreme Court,” in *The International Survey of Family Law 2014*, ed. Bill Atkin (Jordan Publishing, 2014), p. 30, <https://isfl.world/wp-content/uploads/2022/07/Brazil-2014.pdf>.

³²⁰ Constituição Federal [C.F.] art. 3, IV (Brazil).

³²¹ Conselho Nacional de Justiça, “Resolução nº 175, de 14 de maio de 2013,” <https://atos.cnj.jus.br/atos/detalhar/1754>.

³²² Riley Fredrick, “Marriage Equality: The Paralleled Progress Between Public Approval and Supreme Court Decisionmaking,” *Florida State University Law Review* 44, no. 2 (2016), p. 825, <https://ssrn.com/abstract=2837575>.

provisions at stake. However, arguments grounded in the Fourteenth Amendment that were dismissed in *Baker v. Nelson* were accepted in *Obergefell v. Hodges*, demonstrating that the shift in judicial reasoning reflected a transformation in the broader social environment rather than a change in the constitutional text itself. Before *Obergefell v. Hodges*, the question of same-sex marriage recognition remained within individual states' legislative and judicial competence due to the dismissal in *Baker v. Nelson*. This reflected the broader political context of 1972, in which same-sex marriage had not emerged as a subject of public political debate. Illinois had taken the most progressive state-level step in 1961 by decriminalising consensual sodomy, removing provisions disproportionately used to criminalise same-sex relationships and stigmatise LGBT individuals.³²³ However, even this represented only the removal of criminal punishment rather than any positive recognition of same-sex unions.

The emerging *Gay Liberation Movement* in the late 1960s focused on fighting discrimination against homosexual individuals in industry, the mass media, government, schools, and churches.³²⁴ The movement's sustained advocacy gradually shifted the legal and political landscape, manifesting in the Massachusetts Supreme Judicial Court's 2003 decision *Goodridge v. Dep't of Pub. Health*. It was the first decision by a state court in the US to hold that prohibiting same-sex marriage violated its state constitution.³²⁵ This decision catalysed public and political discourse on same-sex marriage at the national level, prompting demands for the extension of equal protection to same-sex couples across other states. By the time the Supreme Court ruled in *Obergefell v. Hodges* in 2015, 36 out of 50 states had already legalised same-sex marriage, demonstrating that federal constitutional recognition followed the broader shift in same-sex marriage law across the country, rather than led it.³²⁶ As Justice Anthony Kennedy stated in the opinion of the Court in *Obergefell v. Hodges*, "*the generations <...> did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.*"³²⁷

Similarly, in Brazil, shifting attitudes toward LGBT rights guided the recognition of same-sex unions, reflecting broader changes in views on marriage and equality. However, such changes began as early as 1830, when Brazil, then a unitary state governed by a single national penal code, eliminated sodomy from its criminal legislation nationwide. The broader legal and social recognition of LGBT rights, however, developed much later, gaining momentum through the political changes of the 1980s. Brazilian gay liberation activists leveraged the AIDS crisis as a starting point for advancing equality, forming alliances with political leaders during the country's transition from authoritarianism to democracy and gaining influence over public health policy through the progressive healthcare reform movement.³²⁸ The influence gained within political institutions during this period

³²³ Gerber/Hart Library and Archives, "Sodomy Laws and the LGBTQ Community," *Chicago LGBTQ History 1924–1970*, accessed March 30, 2026, <https://exhibits.gerberhart.org/exhibits/show/chicago-lgbtq-history-1924-197/sodomy>.

³²⁴ Gay Liberation Front, "Platform Statement," Digital Public Library of America, December 2, 1970, <https://dp.la/primary-source-sets/stonewall-and-its-impact-on-the-gay-liberation-movement/sources/1411>.

³²⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

³²⁶ Lyle Denniston, "Opinion Analysis: Marriage Now Open to Same-Sex Couples," *SCOTUSblog*, June 26, 2015, <https://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/>.

³²⁷ *Obergefell*, 576 U.S. at 664 (Kennedy, J.).

³²⁸ James N. Green, "In Brazil, AIDS Activism Led to Political Connections," *New York Times*, January 29, 2014, <https://www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights/in-brazil-aids-activism-led-to-political-connections>.

materialised in a series of Executive Branch public policy initiatives. The Branch adopted a series of human rights programmes targeting the LGBT population, beginning with “Brazil Without Homophobia” in 2004 and expanding through the National GLBT Conference (2008), the National Plan for the Citizenship and Human Rights of LGBT Persons (2009), and the National Council Against Discrimination and for LGBT Rights Promotion (2010).³²⁹

However, the LGBT movement has found the federal legislature largely unresponsive to advancing LGBT rights. Conservative religious factions, organised predominantly around the Evangelical Bench, created a persistent legislative deadlock preventing any federal law on LGBT rights from passing. This prompted LGBT organisations to redirect their efforts toward the Federal Supreme Court from the mid-2000s, which had demonstrated a willingness to decide on LGBT rights where the legislature had not.³³⁰ In 2011, Alagoas was the first state to legalise same-sex marriages, stimulating other states to do so, resulting in approximately half of Brazil’s 27 jurisdictions permitting same-sex marriage before the National Council of Justice legalised it nationwide in 2013.³³¹

2.2. The Aspirational Role of International Human Rights Standards in Domestic Judicial Recognition of Same-Sex Marriage

Growing international consensus on key issues influences domestic judicial interpretation by guiding courts in expanding constitutional protections within their own legal frameworks. The legalisation of same-sex marriage began in Europe, with the Netherlands becoming the first country to do so in 2001, followed by Belgium in 2003, establishing the first legal precedents for resolving the discrimination inherent in restricting civil marriage to heterosexual couples.³³² Both countries’ legislative choices aligned with the broader normative framework of the European Convention on Human Rights, which guarantees the right to marry and prohibits discrimination on grounds including sex. The legalisation of same-sex marriage extended beyond Europe before 2010, with Canada in 2005 becoming the first country in the Americas to do so, followed by Argentina in 2010 as the first in South America.

Although *Obergefell v. Hodges*, *ADI 4277*, and *ADPF 132* do not explicitly reference foreign decisions or international legal frameworks, the growing international consensus on same-sex marriage rights formed part of the broader legal and political environment within which these cases were decided. Constitutional scholars describe this phenomenon as the “migration of constitutional ideas”, through which constitutional courts draw on foreign legal developments to refine their understanding of fundamental concepts such as human dignity,

³²⁹ Ana de Mello Côrtes and Lívia Gonçalves Buzolin, “Paths Towards LGBT Rights Recognition in Brazil,” *Sexuality Research and Social Policy* 21 (2024), p. 1207, <https://doi.org/10.1007/s13178-023-00931-y>.

³³⁰ Côrtes and Buzolin, “Paths Towards LGBT Rights Recognition in Brazil,” p. 1215.

³³¹ Michael K. Lavers, “Brazil’s Most Populous State to Allow Same-Sex Marriage,” *Washington Blade*, December 21, 2012, <https://www.washingtonblade.com/2012/12/21/brazils-most-populous-state-to-allow-same-sex-marriage/>.

³³² Pew Research Center, “Gay Marriage Around the World,” accessed March 30, 2026, <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.

equality, and freedom, without being formally bound by them.³³³ As founding members of the United Nations, Brazil and the US adopted the Universal Declaration of Human Rights (hereafter UDHR) on 10 December 1948, whose Article 16 guarantees the right to marry without any limitation due to race, nationality or religion, and without explicitly confining that right to heterosexual unions.³³⁴

Moreover, having ratified the *American Convention on Human Rights* in 1992, Brazil is legally bound by its Article 1, which prohibits discrimination based on sex, and Article 24, which affirms equal protection of the law without discrimination.³³⁵ The United States, by contrast, signed but never ratified the Convention, and therefore assumes no legally binding obligations under it.

The global normative consensus on same-sex marriage rights finds its most institutionally advanced expression in the European human rights framework. Unlike the UDHR and the *American Convention on Human Rights*, the *European Convention on Human Rights* operates through a designated court with binding enforcement authority. In *Oliari and Others v. Italy* (2015),³³⁶ the European Court of Human Rights held that Italy's failure to provide any legal recognition for same-sex couples violated Article 8³³⁷, which protects the right to respect for private and family life. The Court considered it unnecessary to examine separately the complaint under Article 14³³⁸, which prohibits discrimination in the enjoyment of the rights guaranteed by the Convention. The Court's Article 8 holding required Italy to provide a legal framework for the recognition and protection of same-sex couples. The Italian Senate's subsequent recognition of civil partnerships illustrates the trajectory of the global normative consensus: from aspirational international standards toward binding regional enforcement and concrete domestic legal change.³³⁹

The international human rights commitments of Brazil, the US, and Italy embed standards of equality and human dignity into the normative environment within which domestic courts and legislatures address the constitutional treatment of same-sex couples. In practice, these obligations shaped domestic legal developments differently across the three jurisdictions: providing an aspirational normative foundation in the US and Brazil, and producing a binding obligation in Italy to provide legal recognition and protection for same-sex couples through the enforcement authority of the European Court of Human Rights.

Conclusion

This paper set out to assess how changing societal attitudes toward sexuality, family, and equality shape judicial

³³³ Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge University Press, 2006), p. 1, <https://doi.org/10.1017/CBO9780511493683.001>.

³³⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16 (December 10, 1948), https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.

³³⁵ American Convention on Human Rights ("Pact of San José, Costa Rica"), arts. 1 and 24, November 22, 1969, 1144 U.N.T.S. 123, https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf.

³³⁶ *Oliari and Others v. Italy*, App. Nos. 18766/11 & 36030/11, 2015-II Eur. Ct. H.R. 45.

³³⁷ European Convention on Human Rights, art. 8, November 4, 1950, 213 U.N.T.S. 221, https://www.echr.coe.int/documents/d/echr/convention_ENG (protecting the right to respect for private and family life).

³³⁸ European Convention on Human Rights, art. 14 (prohibiting discrimination in the enjoyment of the rights and freedoms set forth in the Convention).

³³⁹ Italian Ministry of Foreign Affairs and International Cooperation, "Civil Partnerships," accessed March 30, 2026, <https://www.esteri.it/en/servizi-opportunita/italiani-all-estero/stato-civile/unioni-civili/>.

interpretation of penumbra in same-sex marriage cases. The analysis of *Obergefell v. Hodges* and *ADI 4277* and *ADPF 132* has confirmed that neither internal judicial reasoning nor external societal forces operate independently in determining how courts resolve penumbral ambiguity. The legal theories and interpretative methodologies available to judges determine the internal dimension of penumbral interpretation. Formalism confines judicial interpretation to the explicit textual boundaries of law, leaving penumbral cases without a judicial response, while legal positivism acknowledges judicial discretion in hard cases but strictly within the boundaries of law as it is, independently of moral considerations. Legal realism and teleological reasoning accommodate penumbral cases as a constitutive feature of how law develops, enabling courts in both the US and Brazil to extend constitutional protections to same-sex couples through structurally distinct but analytically analogous processes.

The second part of this paper demonstrated that societal transformation was a constitutive condition for penumbral extension of same-sex marriage rights in both jurisdictions. The attitudinal change model explains how the same constitutional arguments dismissed in *Baker v. Nelson* were accepted in *Obergefell v. Hodges* without any amendment to the constitutional text. In Brazil, civil society mobilisation through the courts overcame legislative deadlock. In both cases, the growing international human rights consensus provided an aspirational normative backdrop that shaped the environment within which domestic judicial reasoning developed.

Penumbral interpretation through teleological reasoning carries an inherent limitation: the risk of judicial activism. When courts extend constitutional protections into a *grey area*, the line between purposive interpretation and judicial legislation becomes contested. On the one hand, it allows the law to develop forward. On the other hand, it exposes such judges to criticism for creating “*constitutional rules out of whole cloth*”.³⁴⁰ Both the US and Brazilian cases attracted this critique. *Obergefell v. Hodges* dissents characterised the majority’s reasoning as judicial overreach, and the Supreme Federal Court of Brazil acknowledged the limits of its authority in the absence of legislative action. This paper recognises this tension as unresolved and inherent to penumbral interpretation.

However, penumbra itself is inevitable, as legal language cannot anticipate every circumstance it is meant to regulate. The cases examined in this paper demonstrate that their resolution is shaped by both the internal frameworks through which judges reason and the social conditions within which they operate.

³⁴⁰ Geoffrey R. Stone, “Selective Judicial Activism,” *Texas Law Review* 89, no. 6 (2011), p. 1423, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6048&context=journal_articles.

BIBLIOGRAPHY

- Ação Direta de Inconstitucionalidade [ADI] 4277 (Prosecutor General v. President of the Republic)*, Supremo Tribunal Federal (Brazil 2011).
- American Convention on Human Rights (“Pact of San José, Costa Rica”), November 22, 1969, 1144 U.N.T.S. 123. https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf.
- Arguição de Descumprimento de Preceito Fundamental [ADPF] 132 (Governor of the State of Rio de Janeiro v. Courts of Justice of the States)*, Supremo Tribunal Federal (Brazil 2011).
- Baker v. Nelson*, 409 U.S. 810 (1972).
- Chaves, Marianna. “Same-Sex Families in Brazil: An Overview after the Trial of ADI 4277 and ADPF 132 by the Supreme Court.” In *The International Survey of Family Law 2014*, edited by Bill Atkin, 23–32. Jordan Publishing, 2014. <https://isfl.world/wp-content/uploads/2022/07/Brazil-2014.pdf>.
- Choudhry, Sujit. “Migration as a New Metaphor in Comparative Constitutional Law.” In *The Migration of Constitutional Ideas*, edited by Sujit Choudhry, 1–36. Cambridge University Press, 2006. <https://doi.org/10.1017/CBO9780511493683.001>.
- Código Civil [C.C.] [Civil Code], Lei No. 10.406, de 10 de Janeiro de 2002 (Brazil). https://www.planalto.gov.br/ccivil_03/leis/2002/l10406compilada.htm.
- Conselho Nacional de Justiça. “Resolução nº 175, de 14 de maio de 2013.” <https://atos.cnj.jus.br/atos/detalhar/1754>.
- Constituição Federal [C.F.] [Federal Constitution] (Brazil). <https://www.globalhealthrights.org/wp-content/uploads/2013/09/Brazil-constitution-English.pdf>.
- Côrtes, Ana de Mello, and Lívia Gonçalves Buzolin. “Paths Towards LGBT Rights Recognition in Brazil.” *Sexuality Research and Social Policy* 21 (2024): 1206–19. <https://doi.org/10.1007/s13178-023-00931-y>.
- Decisione della Corte Costituzionale, n. 438/2008* (Italy, 2008).
- Denniston, Lyle. “Opinion Analysis: Marriage Now Open to Same-Sex Couples.” *SCOTUSblog*, June 26, 2015. <https://www.scotusblog.com/2015/06/opinion-analysis-marriage-now-open-to-same-sex-couples/>.
- Dworkin, Ronald. “The Model of Rules.” *University of Chicago Law Review* 35, no. 1 (1967): 14–46. <https://doi.org/10.2307/1598947>.
- European Convention on Human Rights, November 4, 1950, 213 U.N.T.S. 221. https://www.echr.coe.int/documents/d/echr/convention_ENG.
- Ewald, François. “Norms, Discipline, and the Law.” *Representations* 30 (1990): 138–61. <https://doi.org/10.2307/2928449>.
- Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. 2nd ed. Vintage Books, 1995.
- Fredrick, Riley. “Marriage Equality: The Paralleled Progress Between Public Approval and Supreme Court Decisionmaking.” *Florida State University Law Review* 44, no. 2 (2016): 819–50. <https://ssrn.com/abstract=2837575>.
- Gay Liberation Front. “Platform Statement.” Digital Public Library of America, December 2, 1970. <https://dp.la/primary-source-sets/stonewall-and-its-impact-on-the-gay-liberation-movement/sources/1411>.
- Gerber/Hart Library and Archives. “Sodomy Laws and the LGBTQ Community.” *Chicago LGBTQ History 1924–1970*. Accessed March 30, 2026. <https://exhibits.gerberhart.org/exhibits/show/chicago-lgbtq-history-1924-1970/sodomy>.
- Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

- Green, James N. "In Brazil, AIDS Activism Led to Political Connections." *New York Times*, January 29, 2014. <https://www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights/in-brazil-aids-activism-led-to-political-connections>.
- Hart, H. L. A. *The Concept of Law*. 2nd ed. Edited by Penelope A. Bulloch and Joseph Raz. Oxford University Press, 1994.
- Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958): 593–629. <https://doi.org/10.2307/1338225>.
- Holmes, Oliver Wendell, Jr. *The Common Law*. Edited by Paulo J. S. Pereira and Diego M. Beltran. University of Toronto Law School, 2011. <https://www.general-intelligence.com/library/commonlaw.pdf>.
- Holmes, Oliver Wendell, Jr. "The Path of the Law." *Harvard Law Review* 10, no. 8 (1897): 457–78. <https://moglen.law.columbia.edu/LCS/palaw.pdf>.
- Italian Ministry of Foreign Affairs and International Cooperation. "Civil Partnerships." Accessed March 30, 2026. <https://www.esteri.it/en/servizi-opportunita/italiani-all-estero/stato-civile/unioni-civili/>.
- Lavers, Michael K. "Brazil's Most Populous State to Allow Same-Sex Marriage." *Washington Blade*, December 21, 2012. <https://www.washingtonblade.com/2012/12/21/brazils-most-populous-state-to-allow-same-sex-marriage/>.
- Lawrence v. Texas*, 539 U.S. 558 (2003).
- Loving v. Virginia*, 388 U.S. 1 (1967).
- Montesquieu. *The Spirit of the Laws*. Translated by Thomas Nugent. Batoche Books, 2001. Originally published 1748. <https://platypus1917.org/wp-content/uploads/The-Spirit-of-Laws-Montesquieu.pdf>.
- Obergefell v. Hodges*, 576 U.S. 644 (2015).
- Oliari and Others v. Italy*, App. Nos. 18766/11 & 36030/11, 2015-II Eur. Ct. H.R. 45.
- Pew Research Center. "Gay Marriage Around the World." Accessed March 30, 2026. <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world/>.
- Rosenn, Keith S. "Recent Important Decisions by the Brazilian Supreme Court." *University of Miami Inter-American Law Review* 45, no. 2 (2014): 297–334. <https://www.jstor.org/stable/24375768>.
- Siegel, Jonathan R. "Legal Scholarship Highlight: Justice Scalia's Textualist Legacy." *SCOTUSblog*, November 14, 2017. <https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/>.
- Siegel, Jonathan R. "The Legacy of Justice Scalia and His Textualist Ideal." *George Washington Law Review* 85 (2017): 857–921. <https://doi.org/10.2139/ssrn.3068880>.
- Stone, Geoffrey R. "Selective Judicial Activism." *Texas Law Review* 89, no. 6 (2011): 1423–31. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6048&context=journal_articles.
- Supremo Tribunal Federal. *Fundamental Rights and the Constitutional Law of Brazil*. Vol. 3. 2022. https://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_es_es/anexo/CLC3FundamentalRights.pdf.
- Trop v. Dulles*, 356 U.S. 86 (1958).
- United States v. Windsor*, 570 U.S. 744 (2013).
- Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), December 10, 1948. https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf.
- Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).