Fundamental Rights in a Post-Obergefell World

Peter Nicolas†

ABSTRACT: In this Article, I identify and critically examine three substantive criticisms raised by the dissents in the Supreme Court's 2015 decision in Obergefell v. Hodges, which struck down state laws and constitutional provisions barring same-sex couples from marrying within the state or having their out-of-state marriages recognized by the state. First, that the majority improperly framed the right at issue broadly as the right to marriage instead of narrowly as the right to same-sex marriage, conflicting with the Court's holding in Washington v. Glucksberg that in fundamental rights cases the right at issue must be framed narrowly, and in turn opening the door to the Court finding an analogous right to polygamous marriage. Second, that the right to marriage sought in the case was a positive right, and that the Court thus erred in recognizing the right as fundamental under the Due Process Clause, which only protects negative rights. And finally, that the majority's invocation of the Equal Protection Clause in tandem with the Due Process Clause in support of its conclusion was both doctrinally without support and violated the canon against unnecessarily deciding constitutional questions.

First, I contend that the majority's framing of the right at issue broadly as the right to marriage was consistent with Glucksberg, demonstrating that the precedents upon which it was built, while requiring specific framing, do not call for the narrowest framing possible. I further demonstrate that because Glucksberg's framing requirement is only the first step in a multi-step process for determining a law's constitutionality, the majority's approach does not portend the striking down of laws prohibiting plural marriage. Next, while agreeing with the dissents that the Due Process Clause protects only negative rights, I demonstrate that the Equal Protection Clause has historically protected positive rights. Because marriage has historically consisted of a bundle of rights, both positive and negative, I argue that the majority's invocation of both clauses was not only supported by precedent but was also necessary to the decision.

† William L. Dwyer Chair in Law and Adjunct Professor of Gender, Women & Sexuality Studies, University of Washington.

Copyright © 2016 by the Yale Journal of Law and Feminism
Finally, I consider the implications of Obergefell's invocation of both the Equal Protection and Due Process Clauses on a specific hypothetical: a future law enacted by a state legislature to withdraw from the marriage business by eliminating state-sanctioned marriage on an even-handed basis for same-sex and opposite-sex couples alike. I demonstrate that as a result of other doctrinal developments in the Court's substantive due process jurisprudence, there likely are no longer any negative rights that a state can constitutionally tie to marriage, and thus that if the Court were confronted directly with the question, it would conclude that the right to marry as it exists today consists solely of positive rights protected by the Equal Protection Clause. Because fundamental rights protected by the Equal Protection Clause can be extinguished by states so long as they do so in an even-handed manner, this arguably means that a state could withdraw from the marriage business. However, I contend that because the Due Process Clause also protects a separate negative right related to marriage—the right of existing married couples to retain their status as such—a state could never truly eliminate marriage on an even-handed basis because it could not retroactively strip existing married couples of their status as married. Accordingly, despite the conditional nature of the positive fundamental right to marry, I conclude that the right, once created by a state and exercised by some, cannot be subsequently withdrawn.

INTRODUCTION........................................................................................................... 333

I. OBERGEFELL AND THE GLUCKSBERG "TWO STEP"........................................... 336
   A. A Closer Look at the "Careful Description" Requirement......................... 337
      B. Obergefell's Framing and Its Implications for Laws Prohibiting
         Polygamous Marriage ................................................................................... 341

II. NEGATIVE AND POSITIVE LIBERTY AND THE FUNDAMENTAL RIGHTS TO
    MARRY ................................................................................................................. 343
    A. The Penumbral Negative Right to Marry ....................................................... 345
    B. The Positive Right to Marry ......................................................................... 348

III. THE IMPLICATIONS OF THE OBERGEFELL LINE OF CASES ON THE
     FUTURE OF MARRIAGE ..................................................................................... 353
    A. The Death of the Penumbral Negative Right to Marry ................................. 353
    B. The Conditional Nature of the Positive Right to Marry ............................... 358
    C. The Negative Right to Retain One's Marriage ............................................. 359

CONCLUSION............................................................................................................. 361
INTRODUCTION

In *Obergefell v. Hodges*, the United States Supreme Court declared unconstitutional state laws and constitutional provisions barring same-sex couples from lawfully marrying within the state or having their lawful out-of-state marriages recognized by the state. The decision followed exactly two years to the day from the Court’s decision in *United States v. Windsor*, in which the Court struck down as unconstitutional a provision in the federal Defense of Marriage Act (“DOMA”) that defined marriage for purposes of federal law as between a man and a woman and that refused to recognize marriages validly entered into in states where same-sex marriage is lawful.

The *Windsor* Court declared DOMA unconstitutional without deciding the question whether sexual orientation discrimination was a suspect or quasi-suspect classification subject to heightened equal protection scrutiny and without invoking the Court’s fundamental right to marry cases. Instead, in a somewhat opaque opinion, the Court cited several of its equal protection and substantive due process decisions involving gay rights—none of which purported to apply anything other than rational basis scrutiny—along with federalism principles.

Post-*Windsor*, several lower federal courts declared the state law analogues to DOMA to be unconstitutional on class-based equal protection grounds—invoking *Windsor* as a basis for declaring classifications based on sexual orientation to be suspect or quasi-suspect and thus subject to some form of heightened scrutiny. However, Justice Kennedy’s majority opinion in *Obergefell* eschewed deciding the case on that basis. Instead, the Court concluded that such laws interfered with the fundamental right to marry protected primarily by the Fourteenth Amendment’s Due Process Clause but also buttressed by its Equal Protection Clause.

Setting to one side the rhetorical flourishes found in portions of the separately written dissents in the case that garnered a fair amount of attention

2. 133 S. Ct. 2675 (2013).
3. See id. at 2689-96; id. at 2696-97 (Roberts, C.J., dissenting); id. at 2705-07 (Scalia, J., dissenting).
4. See, e.g., Latta v. Otter, 771 F.3d 456, 467-68 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 659 (7th Cir. 2014). The *Obergefell* Court also declined to decide the case on the alternative ground that the bans on same-sex marriage were in fact sex discrimination subject to intermediate scrutiny. See, e.g., Latta, 771 F.3d at 479 (Berzon, J., concurring) (so holding).
6. Id. at 2597-2602.
7. Id. at 2602-04. After *Windsor* but prior to *Obergefell*, some lower federal courts had also invoked the fundamental right to marry as a basis for striking down such laws. See Bostic v. Schaefer, 760 F.3d 352, 375 (4th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1208 (10th Cir. 2014).
8. See *Obergefell*, 135 S. Ct. at 2616-22 (Roberts, C.J., dissenting) (analagizing the decision to the Court’s decisions in *Lochner* and *Dred Scott*); id. at 2629, 2630 n.22 (Scalia, J., dissenting) (describing the decision as a “judicial Putsch” and declaring that “[t]he Supreme Court of the United States has
in popular media coverage of the decision,\(^9\) two of the dissents nonetheless raised several serious substantive doctrinal criticisms of the majority’s decision that are worthy of attention and consideration. First, Chief Justice Roberts argued that the decision—by framing the right at issue as “marriage” rather than “same-sex marriage”—was inconsistent with the Court’s two-part test for framing and recognizing fundamental rights most clearly articulated in *Washington v. Glucksberg*,\(^10\) which requires a “careful” description of the right at issue and a showing that the right, so framed, is deeply rooted in the country’s history and tradition.\(^11\) In turn, the Chief Justice contended that the majority’s methodology would likewise result in a finding that there is a fundamental right to polygamous marriage.\(^12\) Second, Justice Thomas and the Chief Justice contended that the right being sought in the case—the right to marry—is a positive right, and that the Court’s fundamental rights jurisprudence has clearly and uniformly protected only negative rights.\(^13\) And finally, the Chief Justice contended that the majority’s bimodal invocation of both the Due Process and Equal Protection Clauses in support of its conclusion that there is a fundamental right to marry a person of the same sex was not only doctrinally without support but also violated the canon against unnecessarily deciding constitutional questions.\(^14\)

If taken together at face value, these criticisms suggest that the *Obergefell* decision was groundbreaking not only for its specific holding regarding the right of same-sex couples to marry, but also more broadly for altering the way in which the Court will recognize fundamental rights in the future. For reasons I have detailed elsewhere,\(^15\) I am critical of the *Obergefell* decision for its failure to decide the case at least in part on class-based equal protection grounds. Nonetheless, in this Article I seek to defend the Court’s fundamental rights reasoning against the charges leveled by Chief Justice Roberts and Justice Thomas. In this Article, I demonstrate that *Obergefell* is consistent with, rather than a break from, the Court’s pre-existing general fundamental rights jurisprudence, and I assess the decision’s implications for future cases involving marriage rights.

In Part I of this Article, I respond to the Chief Justice’s criticisms of the manner in which the *Obergefell* Court framed the right at issue and its


\(^{10}\) 521 U.S. 702 (1997).


\(^{12}\) See id. at 2621-22.

\(^{13}\) See id. at 2635-37 (Thomas, J., dissenting); id. at 2620 (Roberts, C.J., dissenting).

\(^{14}\) See id. at 2623 (Roberts, C.J., dissenting).

implications for future legal challenges to laws prohibiting plural marriage. In Part I.A, I demonstrate that whatever the *Glucksberg* majority—which included Justice Kennedy—intended by the phrase “careful description,” the precedents upon which *Glucksberg* was built make clear that it was not intended to require that a right be framed in the narrowest way possible, and thus that the *Obergefell* Court’s framing of the right at issue as “marriage” rather than “same-sex marriage” was fully consistent with the *Glucksberg* line of cases. In Part I.B, I demonstrate that although framing the right at this level of generality means that laws prohibiting plural marriage likewise infringe upon the fundamental right to marry, because the *Glucksberg* two-step process is itself only the first step in a larger two-step process for determining a law’s constitutionality, the *Obergefell* Court’s decision striking down laws banning same-sex marriage does not portend the striking down of laws prohibiting plural marriage.

In Part II of this Article, I respond to the claim by the Chief Justice and Justice Thomas that the Court in *Obergefell* was wrong to vindicate the right to marry at issue therein because the right sought therein was a positive right. I contend that although Justice Thomas and the Chief Justice are correct that the Due Process Clause has only protected negative rights deemed fundamental, they are incorrect both in their characterization of the right to marry as solely a positive right, as well as in their contention that positive fundamental rights are devoid of any constitutional protection. In Part II.A, I demonstrate that the right to marry has historically served as a gateway to engaging in a number of negative liberties deemed fundamental under the Due Process Clause, including the rights to procreate and to engage in non-procreative sexual activity. Because at the time of the *Obergefell* decision, numerous states continued to criminalize sexual activity between unmarried persons via their fornication statutes, because such statutes have as yet not explicitly been declared unconstitutional by the U.S. Supreme Court, and because the plaintiffs in *Obergefell* did not raise challenges to the constitutionality of fornication statutes, the right to marry at issue in *Obergefell* was properly treated by the Court as a gateway to the exercise of constitutionally protected negative liberties. In Part II.B, I demonstrate that the Court has also historically protected or at least entertained protecting positive fundamental rights—including the positive aspects of the right to marry—via the Equal Protection Clause. Because I conclude that what has loosely been described as “the fundamental right to marry” in fact has historically encompassed a bundle of rights—both positive and negative—the components of the right to marry are separately protected by the Equal Protection and Due Process Clauses. Accordingly, although the Court’s reasoning is admittedly somewhat muddled
and thus “difficult to follow.” I conclude that the Court’s invocation of both the Equal Protection and Due Process Clauses was not only consistent with precedent but was also necessary to the Court’s decision.

In Part III of this Article, I consider the implications of Obergefell’s invocation of both the Equal Protection and Due Process Clauses on a specific hypothetical: a future law enacted by a state legislature to withdraw from the marriage business by eliminating state-sanctioned marriage on an even-handed basis for same-sex and opposite-sex couples alike. In Part III.A, I note that fundamental rights protected by the Due Process Clause cannot be extinguished even if the right is denied even-handedly to everyone, suggesting that such a proposed state law would be deemed unconstitutional. Yet I further demonstrate that because the Court’s contemporary substantive due process jurisprudence has decoupled marriage from the negative rights traditionally associated with it, upon close analysis in a case in which the issue is squarely before the Court, it likely would find the negative fundamental right to marry to be moribund and thus not a barrier to a state’s decision to withdraw from the marriage business. In Part III.B, I note that my conclusion in Part III.A means that the Equal Protection Clause would be deemed the sole protector of the fundamental right to marry. Because the Court’s precedents allow fundamental rights protected solely by the Equal Protection Clause to be extinguished by legislative bodies so long as they do so on an even-handed basis, I contend that this would suggest that states opposed to same-sex marriage possess the power to eliminate state-sanctioned marriage as it exists today, provided that they do so for same-sex and opposite-sex couples alike. In Part III.C, I contend that although in theory states possess this power, because the Due Process Clause also protects a separate negative right related to marriage—the right of existing married couples to retain their status as such—a state could never truly eliminate marriage on an even-handed basis because it could not retroactively strip existing married couples of their status as married. Accordingly, despite the conditional nature of the positive fundamental right to marry, I conclude that the right, once created by a state and exercised by some, cannot be subsequently withdrawn.

I. OBERGEFELL AND THE GLUCKSBERG “TWO STEP”

Conservative Supreme Court Justices have long been concerned with the Court’s potentially boundless power to identify and enforce unenumerated fundamental rights, typically referred to as the doctrine of “substantive due

process." One of the more prominent—and controversial—examples of the doctrine is the right to an abortion recognized by the Court in *Roe v. Wade* and its progeny.

Although some conservative Justices contend the power to recognize and enforce such rights simply does not exist, in recent decades they have grudgingly acknowledged the power and have instead sought to establish tests for recognizing and enforcing such rights that are designed to cabin the Court's future discretion in this realm. The elements of these tests have contained two key features: framing the alleged right at issue in narrower rather than broader terms, and then inquiring whether the right, so framed, is deeply rooted in the nation's history and traditions.

Ultimately, in 1997, five Justices—Chief Justice Rehnquist along with Justices O'Connor, Scalia, Kennedy, and Thomas—coalesced around a common test. At issue in *Washington v. Glucksberg* was whether a law making it a crime to assist someone in committing suicide ran afoul of a fundamental right guaranteed by the substantive component of the Due Process Clause. Under the test set forth therein, the Court held that identifying fundamental rights requires a two-part inquiry: First, the court must articulate a "careful description" of the alleged right at stake and second, it must ask whether the right, so described, is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"

### A. A Closer Look at the "Careful Description" Requirement

Although set forth as a two-step process, in truth, the first step—how narrowly or broadly the right is framed—will nearly always be outcome determinative. If the right at issue is phrased in extremely narrow and specific
terms—such as the right to physician-assisted suicide—one is almost certain not to find support for the right in canvassing the nation’s history and traditions. On the other hand, if it is phrased in broader terms—such as the right to exercise autonomy over one’s body—one is far more likely to find historical support since one need not find support for the specifically articulated right but instead the more generalized one.

As indicated above, in Glucksberg, the Court described the framing step as calling for a “careful description” of the right at issue. Although the Court did not define the term “careful” with precision, in applying the “careful description” requirement it appeared to equate “careful” with precise or narrow, holding that the right at issue was not properly framed more generally as the “right to die” or the right to “control of one’s final days,” but more specifically as “a right to commit suicide which itself includes a right to assistance in doing so.”27 Having so framed the right, the Court canvassed the historical record and, having found that assisting suicide was criminalized at common law, in the colonies, and in most of the states at the time the Fourteenth Amendment was ratified, concluded that the right was thus not deeply rooted in history and tradition, and, accordingly, that it was not a fundamental right protected by the Due Process Clause.28

In litigation challenging state laws and constitutional provisions prohibiting same-sex marriage, debate amongst jurists has centered around the question whether—under Glucksberg—the right at issue should be framed narrowly as “same-sex marriage” or more broadly as “marriage.”29 The relative novelty of same-sex marriage means that, if framed in the former terms it will fail the Glucksberg test since such a specific right cannot be said to be deeply rooted in the nation’s history and tradition but if framed in the latter terms there is clear historical support for the right. Jurists favoring the former method of framing contended that Glucksberg’s requirement of a “careful description” meant that the alleged right must be framed in its “narrowest terms.”30

While Glucksberg makes clear that some degree of specificity is required in framing the alleged right, it also seems clear that all five Justices in the majority never would have signed on to an opinion that required the narrowest or most specific framing possible, either for fundamental rights analysis generally or the right to marry in particular. Specifically, two of the five Justices who signed on to Glucksberg’s majority opinion—Justices O’Connor and Kennedy—clearly rejected this approach in two cases immediately predating Glucksberg.

28. See id. at 710-16, 723, 728.
29. Compare Bostic, 760 F.3d at 375-77 (framing the right more generally as the right to marriage), and Kitchen v. Hebert, 755 F.3d 1193, 1209 (10th Cir. 2014) (same), with Inniss v. Alderhold, 80 F. Supp. 3d 1335, 1353 (N.D. Ga. 2015) (framing it as the right to same-sex marriage).
First, in *Michael H. v. Gerald D.*, the Court rejected a substantive due process challenge to a state law that conclusively presumed a woman's husband to be the father of any children born to her during the marriage, with only a limited time period for either the husband or wife—but not third persons—to use blood tests to challenge the presumption. The challenge to the statute was brought by a man who had an affair with a married woman and claimed to be the genetic father to a child she bore. The plurality opinion penned by Justice Scalia rejected a broad framing of the inquiry as "whether parenthood is an interest that historically has received our attention and protection," instead framing the right at issue more narrowly as "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man," or alternatively, "the rights of the natural father of a child adulterously conceived."

Writing more generally on the issue of framing substantive due process claims, Justice Scalia wrote in *Michael H.* that "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." However, Justice Scalia's description of the appropriate method of framing substantive due process claims was only joined by Chief Justice Rehnquist. The two other Justices in the plurality—Justices O'Connor and Kennedy—not only refused to join this portion of the opinion, but wrote separately to express their concern that this approach was "somewhat inconsistent" with the Court's prior substantive due process decisions. With specific citations to the Court's prior decisions in *Loving v. Virginia*—striking down Virginia's criminal prohibition on interracial marriage—and *Turner v. Safley*—striking down a Missouri law prohibiting prisoners from marrying—the two Justices wrote that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available."

Three years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*—in a decision reaffirming the right of a woman to decide whether or not to terminate her pregnancy—these same two Justices—in their "joint opinion" with Justice Souter—once again rejected the idea that fundamental rights should always be framed "at the most specific level" possible. Citing

32. Id. at 117-18 (plurality opinion).
33. Id. at 113-16.
34. Id. at 125-27, 127 n.6 (citation omitted).
35. Id. at 127 n.6 (emphasis added).
36. Id. at 132 (O'Connor, J., concurring in part).
37. 388 U.S. 1 (1967).
41. Id. at 847 (opinion of O'Connor, Kennedy, Souter, JJ.).
the Court’s prior decision in Loving, they described this view as “inconsistent with our law,” noting that the most specific framing of the right at issue in that case—the right to interracial marriage—was illegal in most States for much of U.S. history but the Court nonetheless concluded that laws prohibiting it violated the substantive component of the Due Process Clause.42

Given Justice Kennedy’s caveats regarding framing in both Michael H. and Casey, it was thus rather unsurprising that Justice Kennedy rejected an argument that the right at issue in Obergefell should be framed narrowly as the right to “same-sex marriage” instead of more broadly as the right to “marriage.” Citing the Court’s preexisting marriage cases—Loving, Turner, and Zablocki v. Redhai43—Justice Kennedy wrote that “Loving did not ask about a ‘right to interracial marriage’; Turner did not ask about a ‘right of inmates to marry’; and Zablocki did not ask about a ‘right of fathers with unpaid child support duties to marry.’”44 Rather, in all three cases, the Court framed the right at issue as the right to marry and then proceeded to consider the question whether the law satisfied the heightened scrutiny associated with infringements on fundamental rights.45

Justice Kennedy previewed this interpretation of Glucksberg in his 2003 opinion for the Court in Lawrence v. Texas.46 In Lawrence, the Court overruled its earlier decision in Bowers v. Hardwick47 and declared that laws criminalizing sodomy violate the substantive component of the Due Process Clause. In overruling Bowers, the Lawrence Court criticized the way in which Bowers framed the right at issue in that case. According to Lawrence, the Bowers Court framed the right at issue too narrowly—as the right to engage in homosexual sodomy—and suggested instead that it should be more broadly framed as the right to engage in sexual activity in private within the confines of a personal relationship.48 Although Lawrence never explicitly stated that a fundamental right was at issue in the case,49 Obergefell rather clearly describes Lawrence as falling within the Court’s line of cases recognizing a fundamental right to “intimate association.”50

Thus, whatever the merits of Justice Scalia’s approach to framing, it is safe to say that his view on framing never became the law,51 and that the phrase “careful description” was intended to be a compromise requiring relative

42. Id.
45. Id.
47. 478 U.S. 186 (1986).
49. Id. at 586, 594 (Scalia, J., dissenting).
50. Obergefell, 135 S. Ct. at 2589.
specificity but not laser-sharp precision. Indeed, even in *Glucksberg* itself, the Court—in cataloguing the various decisions in its substantive due process line of cases—cited *Loving* as standing for the proposition that there is a fundamental right to marriage, not a fundamental right to *interracial* marriage.\(^52\) Thus, both before and after *Obergefell*, under *Glucksberg*, the framing cannot be so general that it is wholly unmoored from the right at issue, such as a right to "liberty" or to "control what one does with one's body," but must be more specific, such as a right to procure an abortion, or to "intimate association," or to seek assisted suicide. Yet the framing also need not be unduly "cramped,"\(^53\) such as a right to engage in homosexual sodomy,\(^54\) or to seek assisted suicide by means of poison.\(^55\) As one jurist has described the balance struck by *Glucksberg*, courts must employ "sufficient specificity to ground the right in a concrete application and sufficient generality to connect the right to its animating principles."\(^56\) Accordingly, the Chief Justice's contention that *Obergefell* "effectively overrule[s] *Glucksberg*"\(^57\) is based on an interpretation of the phrase "careful description" that is inconsistent with the historical precedents upon which *Glucksberg* was founded.

**B. Obergefell's Framing and Its Implications for Laws Prohibiting Polygamous Marriage**

For somewhat analogous reasons, the Chief Justice is also incorrect in contending that the logic of the *Obergefell* decision necessarily extends to polygamy, thus requiring laws banning polygamous marriage to be struck down on the ground that they likewise interfere with the fundamental right to marry.\(^58\) In particular, the Chief Justice contends that one finds greater support for polygamous than for same-sex marriage in "history and tradition" under *Glucksberg*'s second step,\(^59\) and that many of the rationales raised by the majority for recognizing same-sex marriage apply with equal force to polygamous marriages.\(^60\) While the Chief Justice is perhaps correct that a claimed right to polygamous marriage would presumptively fall within the fundamental right to marry recognized by the majority, he is wrong to suggest that this would necessarily or even possibly lead to the invalidation of such laws. First, the *comparative* support in history and tradition between same-sex and

---

53. Latta v. Otter, 771 F.3d 456, 477 (9th Cir. 2014) (Reinhardt, J., concurring).
56. *Hutchins*, 188 F.3d at 554 (Rogers, J., concurring in part and dissenting in part).
58. *Id.* at 2621-22.
59. *Id.* at 2621.
60. *Id.* at 2621-22.
polygamous marriage is irrelevant to the analysis. Because the proper level of abstraction in framing the right at issue under *Glucksberg* is the general right to marry, one need only find support in history and tradition for such a right, a proposition that had been established by the Court long before *Obergefell* in cases such as *Loving*, *Zablocki*, and *Turner*. Second, to demonstrate under *Glucksberg*’s two-step process that a prohibited practice touches upon a fundamental right does not mean that the law is therefore to be struck down as unconstitutional; it only means that the law must now be subjected to the heightened\(^{61}\) level of scrutiny associated with infringements upon fundamental rights.\(^{62}\) Thus, the *Glucksberg* two-step process is itself the first step in a two-step process for determining the constitutionality of such a law:

The point of fundamental-rights analysis is to protect an individual’s liberty against unwarranted governmental encroachment. So it is a two-step analysis: is the right fundamental, and, if so, is the government encroachment unwarranted (that is, does the encroachment survive strict scrutiny)? At the first step, the right to marry—to choose one’s own spouse—is just as important to an individual regardless of whom the individual chooses to marry . . .

It is only at the second step—on the question of whether the government encroachment is unwarranted—that the nature of the restriction becomes critical. The governmental interest in overriding a person’s fundamental right to marry may be different in these different situations . . . but that is a different issue from whether the right itself is fundamental.\(^{63}\)

Consider, in this regard, the many decisions by the U.S. Supreme Court *upholding* laws that in some way restrict a woman’s right to procure an abortion. In those cases, the Court did not reject the contention that the laws at issue involved the right to an abortion protected by the substantive component of the Due Process Clause. Rather, in those cases, the Court concluded that the laws at issue—or portions of those laws—survived the heightened scrutiny

\(^{61}\) I use the term “heightened” rather than strict because in recent decades the Court’s decisions have been somewhat inconsistent on the level of scrutiny that applies to such laws, sometimes using language suggesting a lower standard than strict scrutiny. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-88 (1992) (applying “undue burden” standard to laws infringing upon the right to procure an abortion); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (applying what appears to be intermediate scrutiny to a law infringing upon the right to marry).

\(^{62}\) See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1217 (10th Cir. 2014) (“Whether a state has good reason to exclude individuals from the marital relationship based on a specific characterisitc certainly comes into play in determining if the classification survives the appropriate level of scrutiny. Even when a fundamental right is impinged, ‘[s]trict scrutiny is not ‘strict in theory, but fatal in fact.’”’ (internal citations omitted)).

applicable to infringements upon that right.\textsuperscript{64} Stated somewhat differently, the Court did not—when considering the constitutionality of a law prohibiting partial-birth abortion—frame the right at issue narrowly as the right to \emph{partial-birth} abortion and hold that there is no history and tradition in support of such a specific right.\textsuperscript{65} Rather, it considered the infringement at issue to fall within the general right to an abortion and proceeded to consider whether the law survived the heightened scrutiny associated with laws infringing upon that right.\textsuperscript{66}

In sum, the Chief Justice may be right to suggest that \textit{Obergefell} will change things somewhat for states defending other sorts of restrictions on marriage, such as restrictions based on age, consanguinity, and the number of partners to the marriage.\textsuperscript{67} States will not simply be able to have such suits dismissed on the ground that they do not infringe upon a fundamental right. Rather, they will have to demonstrate that the restrictions are justifiable infringements upon that right. Yet just as the Court has been able to distinguish parental consent laws from spousal consent laws in assessing the constitutionality of restrictions on abortion,\textsuperscript{68} and just as the lower courts have been able to distinguish the sodomy laws struck down in \textit{Lawrence} from other sorts of laws regulating other sexual matters, such as incest\textsuperscript{69} and prostitution,\textsuperscript{70} so too can the courts distinguish the state interests associated with prohibiting same-sex marriage from those associated with prohibiting plural marriage, underage marriage, and marriage between close relatives. And although one cannot predict with certainty how future courts will decide the constitutionality of laws prohibiting plural marriage or other types of marriage relationships that are currently subject to widespread prohibition, such prohibitions will not fall as a direct result of the \textit{Glucksberg} analysis endorsed in \textit{Obergefell} but rather on the strength or weakness of the articulated state interests justifying those prohibitions.

\section*{II. \textsc{Negative and Positive Liberty and the Fundamental Rights to Marry}}

In considering substantive due process fundamental rights claims, the Court has distinguished between positive and negative claims, holding that the

\begin{itemize}
\item \textsuperscript{64} See, e.g., Gonzales v. Carhart, 550 U.S. 124, 146-68 (2007) (upholding federal law prohibiting partial-birth abortion); \textit{Casey}, 505 U.S. at 879-901 (upholding state law informed consent and parental consent provisions, recordkeeping and reporting requirements, and waiting period).
\item \textsuperscript{65} See \textit{Gonzales}, 550 U.S. at 146-68.
\item \textsuperscript{66} See \textit{id}.
\item \textsuperscript{67} In its 2013 decision striking down DOMA, the Court acknowledged the existence of differing age and consanguinity restrictions nationwide. See \textit{United States v. Windsor}, 133 S. Ct. 2675, 2691-92 (2013).
\item \textsuperscript{68} See \textit{Casey}, 505 U.S. at 887-900.
\item \textsuperscript{69} See, e.g., \textit{Lowe v. Swanson}, 663 F.3d 258, 261-65 (6th Cir. 2011).
\end{itemize}
Due Process Clause only protects negative liberty, or the right to have the
government leave you alone; it does not require the government to affirmatively
act.\textsuperscript{71} Thus, for example, although women have a substantive due process right
to procure an abortion within the guideposts set forth by \textit{Roe} and its progeny,
the Due Process Clause does not entitle a woman who cannot afford an
abortion to a government subsidy to pay for the procedure.\textsuperscript{72}

Relying on this canon, both the Chief Justice and Justice Thomas
contended that in seeking the right to marry, same-sex couples were trying not
to protect negative liberty, but instead were seeking to require the government
to affirmatively act by both publicly recognizing their relationships and
providing affirmative governmental benefits.\textsuperscript{73} The Chief Justice thus
distinguished the positive right to marriage being sought in \textit{Obergefell} from the
negative rights vindicated by the Court in its earlier line of substantive due
process cases involving laws criminalizing the sale or use of contraceptives and
laws criminalizing private, consensual sexual activity:

Neither \textit{Lawrence} nor any other precedent in the privacy line of
cases supports the right that petitioners assert here. Unlike criminal
laws banning contraceptives and sodomy, the marriage laws at issue
here involve no government intrusion. They create no crime and
impose no punishment. Same-sex couples remain free to live together,
to engage in intimate conduct, and to raise their families as they see fit.

\ldots

In sum, the privacy cases provide no support for the majority’s
position, because petitioners do not seek privacy. Quite the opposite,
they seek public recognition of their relationships, along with
corresponding government benefits.\textsuperscript{74}

While the conclusion of the Chief Justice and Justice Thomas seemed to
logically follow from the principle that the substantive gloss on the Due
Process Clause protects only negative, not positive liberties, it would also seem
to be in clear tension with the Court’s prior decisions in \textit{Loving}, \textit{Zablocki}, and
\textit{Turner}, all of which recognized and vindicated a fundamental right to marry for
individuals denied that right—interracial couples in \textit{Loving}, fathers who had
outstanding child support obligations in \textit{Zablocki}, and prisoners in \textit{Turner}. Yet
Justice Thomas distinguished those cases on the ground that at least \textit{some}
negative liberties were involved in those cases:

\begin{itemize}
\item \textsuperscript{71} See Collins v. City of Harker Heights, 503 U.S. 115, 126-27 (1992); Deshaney v. Winnebago
\item \textsuperscript{72} See McRae, 448 U.S. at 317-18.
\item \textsuperscript{73} See \textit{Obergefell} v. Hodges, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting); \textit{id.} at 2634-37 (Thomas, J., dissenting).
\item \textsuperscript{74} \textit{id.} at 2620 (Roberts, C.J., dissenting).
\end{itemize}
Those precedents all involved absolute prohibitions on private actions associated with marriage. *Loving v. Virginia*, for example, involved a couple who was criminally prosecuted for marrying in the District of Columbia and cohabiting in Virginia. . . . In a similar vein, *Zablocki v. Redhail* involved a man who was prohibited, on pain of criminal penalty, from “marry[ing] in Wisconsin or elsewhere” because of his outstanding child-support obligations. And *Turner v. Safley* involved state inmates who were prohibited from entering marriages without the permission of the superintendent of the prison, permission that could not be granted absent compelling reasons. In none of those cases were individuals denied solely governmental recognition and benefits associated with marriage.\(^{75}\)

In contrast, according to Justice Thomas, the same-sex couples suing in the cases before the Court remained free to cohabit, raise children, engage in intimate behavior, hold private religious marriage ceremonies, enter into civil marriages in states that permit them, and hold themselves out as married.\(^{76}\)

Justice Thomas’s critique of the majority opinion is insightful but incomplete. My interpretation of the Court’s marriage cases culminating in *Obergefell* leads me to the conclusion that what has been loosely described as the fundamental right to marry in fact encompasses two distinct baskets of rights protected by two different constitutional provisions. First, a set of negative rights—and in particular the rights to engage in procreative as well as non-procreative sexual intercourse free of governmental sanction or interference—that are protected by the substantive component of the Due Process Clause. And second, a set of positive rights—including official governmental recognition of the relationship and the attendant public benefits—that are protected by the Equal Protection Clause. Because both negative and positive rights for same-sex couples were denied as a result of state laws prohibiting them from marrying, the *Obergefell* Court’s invocation of both Clauses in tandem as a basis for striking down such laws was not only consistent with precedent but necessary to the Court’s decision.

**A. The Penumbral Negative Right to Marry**

Beginning with what might best be referred to as the negative right to marry, a lawful marriage has for much of our nation’s history served as the exclusive legal gateway for engaging in both procreative and non-procreative

\(^{75}\) *Id.* at 2636-37 (Thomas, J., dissenting) (citations omitted). He also noted that the Virginia law prohibited even religious ceremonies, raising First Amendment questions. *Id.* at 2637 n.6.

\(^{76}\) *Id.* at 2635.
sexual activity. Thus, for example, at the time Loving was decided, the State of Virginia had a statute that remains on the books to this day criminalizing sex between unmarried persons (fornication), as well as a statute criminalizing cohabitation between unmarried persons that was only recently repealed. Similarly, at the time Zablocki was decided, the State of Wisconsin had a statute on the books criminalizing fornication. Accordingly, the negative right to marry is not so much a stand-alone fundamental due process right but is instead a derivative or penumbral right of the underlying substantive due process rights to procreate and to engage in non-procreative sexual activity. In other words, it is only because states have historically criminalized sexual relations outside of marriage that marriage itself has been treated as a substantive due process right. Under this theory, once the link between marriage and procreative and non-procreative sexual activity is broken, the negative right to marriage evaporates.

The right to marry was described by the Court as either “fundamental” or protected by the Due Process Clause in dicta in two pre-Loving cases, Meyer v. Nebraska and Skinner v. Oklahoma. Yet in both of these early cases, marriage seemed to be described not as an independent right but one intertwined with procreation. Thus in Meyer, the right was described as the right “to marry, establish a home and bring up children.” And in Skinner—a case involving the power of a state to sterilize a prisoner and thus to take away his ability to procreate—the Court wrote that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”

A closer look at the Court’s decisions in Loving and Zablocki suggests that in declaring the laws therein to violate the fundamental right to marry, the Court was concerned at least in part if not primarily with the connection between marriage and the underlying right to procreate. The Loving decision—which was primarily decided on class-based equal protection grounds and that devoted only two short paragraphs to the substantive due process claim—cited Skinner in support of the statement that marriage is “fundamental to our very

81. 262 U.S. 390 (1923).
82. 316 U.S. 535 (1942).
83. Meyer, 262 U.S. at 399.
existence and survival.\(^8^5\) Both the citation to *Skinner*—a case about sterilization and its impact on the right to procreate—as well as the language regarding our “existence and survival” at least implicitly connect the right to marry to the underlying right to procreate.\(^8^6\) In *Zablocki*, the Court was far more explicit in tying the right to marry to the right to procreate, writing that “if appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place,”\(^8^7\) and noting that “Wisconsin punishes fornication as a criminal offense.”\(^8^8\)

In addition to the fundamental due process right to procreate that *Loving* and *Zablocki* linked directly to the fundamental right to marry, just two years prior to the decision in *Loving*, the Court’s substantive due process jurisprudence had also recognized an inverse fundamental right of married couples not to procreate. In *Griswold v. Connecticut*,\(^8^9\) the Court recognized that married couples have a fundamental right to obtain contraception,\(^9^0\) thus recognizing a fundamental right of married couples to engage in non-procreative sexual activity. Thus, under the legal landscape in place at the time of *Loving*, marriage was rightly treated for substantive due process purposes as a penumbral fundamental right because it served as the gateway to exercising the rights to engage in procreative and non-procreative sexual activity.

Whether the negative fundamental right to marry retained any vitality by the time the Court issued its decision in *Obergefell*—and thus whether Justice Thomas was right to contend that no negative rights were at issue—turns on the connection, if any, that state laws continued to make between marriage and the rights to engage in procreative and non-procreative sexual activity at the time the decision was rendered. Specifically, it requires resolution of the question whether, at the time *Obergefell* was decided, any of the states—and perhaps more importantly, any of the states refusing to recognize same-sex marriages—continued to make marriage the sole lawful gateway to engaging in procreative and non-procreative sexual activity?

At the time the Court issued its decision in *Obergefell*, ten states still had statutes on the books criminalizing fornication\(^9^1\)—three of which had been

88. *Id.* at 386 n.11.
89. 381 U.S. 479 (1965).
90. *Id.* at 481-86.
declared unconstitutional by state courts— and two additional states criminalized cohabitation between unmarried opposite-sex couples. Thus, state laws in nearly twenty percent of states continued to link marriage to the negative liberties of couples to cohabit and engage in intimate conduct with one another. Because the fornication laws (unlike the cohabitation laws) were gender neutral, and because at least some of the states with such laws extant also prohibited same-sex marriage (or would have but for pre-Obergefell federal court decisions holding such laws unconstitutional), the Chief Justice and Justice Thomas were thus wrong to suggest that no negative liberties were at stake.

B. The Positive Right to Marry

As detailed by the Chief Justice and Justice Thomas in their Obergefell dissents, in addition to the negative rights to procreate and to engage in non-procreative sexual activity historically associated with marriage, what we have come to know as marriage also contains an ever-growing basket of positive rights. Yet the positive nature of many of the rights associated with marriage does not mean, as the Chief Justice and Justice Thomas contend, that they are without constitutional protection. Because the positive aspects of the right to marry have separately been established as a fundamental right under the Equal Protection Clause, the Court was on solid ground when it opted to invoke the latter in tandem with the Due Process Clause in declaring that the laws at issue in Obergefell interfere with the fundamental right to marry.

The Court itself has not always been careful about distinguishing those substantive rights protected by the Due Process Clause and those protected by the Equal Protection Clause. The Court’s mid-twentieth century fundamental rights cases—such as Skinner and Griswold—consciously avoided reference to the Due Process Clause to distance themselves from the so-called Lochner-era, in which the Due Process Clause had been invoked in a series of controversial

93. See FLA. STAT. ANN. § 798.02 (West 2015); MICH. COMP. LAWS ANN. § 750.335 (West 2015).
94. Same-sex marriages did not commence in Mississippi until after Obergefell was decided and implemented by the lower federal courts. See Campaign for S. Equal. v. Bryant, 791 F.3d 625 (5th Cir. 2015). Same-sex marriages in Idaho, South Carolina, and Utah were permitted only as a result of pre-Obergefell federal court orders, see Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014); Condon v. Haley, 21 F. Supp. 3d 572 (D.S.C. 2014), and those three states would almost certainly have sought to reinstate the bans had Obergefell come out the other way.
95. Such negative liberties were at stake even in states that prohibited same-sex marriage but that lacked fornication laws. To the extent that citizens of those states travelled to states that both recognized out-of-state same-sex marriages and that had fornication laws on the books—such as Illinois, Massachusetts, and Minnesota—their home states’ refusal to let them marry impacted their ability to exercise those rights in the states in which they travelled, and thus their challenge to their home state’s ban on same-sex marriage might appropriately be considered to implicate the Due Process Clause since it interfered with their ability to exercise those negative rights.
economic substantive due process cases that had only recently been repudiated by the Court. 96 Thus, for example, the majority opinion in *Skinner* found a fundamental right to procreate in the Equal Protection Clause, 97 while the majority opinion in *Griswold* found a right to marital privacy in the “penumbras” of the Bill of Rights. 98 By the time the Court issued its 1973 decision in *Roe*, however, these early decisions were re-characterized as being grounded in the Due Process Clause. 99 Yet, despite this general re-characterization, three lines of fundamental rights cases have continued to rely in whole or part upon the Equal Protection Clause post-*Roe*: those addressing the claimed fundamental rights to vote, to a base level of education, and to marry. 100 In these three lines of cases, the Court has applied or considered applying heightened scrutiny under the Equal Protection Clause not because of the nature of the classification drawn—in none of these cases could it be said that a suspect or quasi-suspect classification was involved—but rather because of the fundamental nature of the right impacted.

First, the Court recognized and aggressively enforced a fundamental right to vote—or more specifically, a “right to participate in elections on an equal basis with other citizens in the jurisdiction” 101—protected by the Equal Protection Clause in the mid-1960s to early 1970s, 102 during the same period of time in which it was recognizing the fundamental rights to marital privacy, marriage, and abortion under the Due Process Clause. As recently as 2000 in *Bush v. Gore*, 103 long after the Court had re-characterized virtually all other fundamental rights as grounded in the Due Process Clause, the Court nonetheless reconfirmed that the fundamental right to participate equally in the electoral process is guaranteed by the Equal Protection Clause. 104

Second, although the Court has never recognized a fundamental right to education, to the extent that it has entertained the possibility that such a

---


100. The Court at one point recognized a fundamental right to travel protected by the Equal Protection Clause, see *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), but subsequently identified the right to travel as instead being grounded in the Privileges and Immunities Clause of Article IV as well as the Privileges or Immunities Clause of the Fourteenth Amendment, see *Saenz v. Roe*, 526 U.S. 489, 500-03 (1999).


103. 531 U.S. 98 (2000).

104. Id. at 104-05.
fundamental right exists, it has relied on the Equal Protection Clause to do so. In *San Antonio Independent School District v. Rodriguez* the Court considered the constitutionality of a state system in which public schools are funded differentially based on local property tax levies, resulting in unequal levels of spending on public education by district. In considering whether this resulted in a deprivation of a fundamental right to an education in those districts with lower levels of funding, the Court invoked not the Due Process Clause but instead the Equal Protection Clause. Although the Court rejected the claim under the circumstances of the case, it left open the possibility that the Equal Protection Clause does protect a fundamental right to a base level of education.

Finally, in the Court's post-*Loving* cases regarding the fundamental right to marry, it has either explicitly or implicitly invoked the Equal Protection Clause in tandem with the Due Process Clause as a basis for the right. First, in *Zablocki v. Redhail*, the Court—after noting and citing with approval the *Loving* Court's invocation of the Due Process Clause as well as numerous substantive due process precedents—proceeded to invoke the Equal Protection Clause as a basis for striking down the statute at issue therein, which denied the right to marry to those in arrears of making child support payments. Next, in *Turner v. Safley*, the Court—in striking down a Missouri law barring inmates from marrying—did not specify whether it was relying on the Due Process or Equal Protection Clause or both, instead simply citing *Loving* and *Zablocki* in support of the conclusion that there is a fundamental right to marry. And finally, as detailed above, the Court in *Obergefell* invoked both Clauses as a basis for striking down state laws prohibiting same-sex marriage.

What ties these three lines of cases together that would justify invocation of the Equal Protection Clause in lieu of the Due Process Clause as a basis for vindicating the fundamental rights invoked therein? One way to distinguish these lines of cases—as some commentators have—is that these lines of cases all involved a targeted rather than a widespread denial of a fundamental right. In other words, while *Griswold* and *Roe* involved a blanket denial of the rights to contraception and abortion for everyone, the voting, education, and...

106. Id. at 4-17.
107. Id. at 29-44.
110. Id. at 377-78.
111. 482 U.S. 78, 94-95 (1987).
marriage cases involved a targeted denial of the right at issue to only selected categories of persons.\textsuperscript{114}

But another characteristic that ties these three lines of cases together is that they all involve positive rights. The voting cases seek an affirmative right to vote in elections, the education cases seek the right to government-funded education, and the marriage cases seek affirmative government acknowledgment of the relationship coupled with certain governmental benefits. Because the Court’s substantive due process line of precedent protects only negative rights, location of these lines of cases in a different constitutional provision was and is necessary if the Court was to have a principled way of enforcing positive unenumerated rights in some instances but not others.

Because there are so few examples of Supreme Court cases considering fundamental rights claims derived from the Equal Protection Clause, the criteria for a right being so denominated is somewhat opaque. In contrast to the structured \textit{Glucksberg} two-step analysis for recognizing and enforcing fundamental rights under the Due Process Clause that has developed over time, the process under the Equal Protection Clause appears to be far more \textit{ipse dixit}, although the Court has made clear that mere relative “importance” of a right does not suffice to denominate it fundamental for equal protection purposes.\textsuperscript{115}

Nonetheless, one can discern a unifying principle from the handful of cases recognizing fundamental rights under the Equal Protection Clause. Collectively, those cases appear to stand for the proposition that when a government-created right serves as a precursor to a sufficiently large array of rights, then denial of the government-created “gateway” right is tantamount to denying a class of persons what is in effect a cornerstone of modern citizenship, effectively relegating them to a second-class status. Under those circumstances, the “gateway” right will be denominated a fundamental one under the Equal Protection Clause. Thus, for example, the Court has treated voting as a fundamental right on the theory that it is necessary to preserve all other civil and political rights, reasoning that those denied the franchise for a given office likewise lack the ability to influence the political process that in turn affects the entire panoply of civil and political rights within a polity.\textsuperscript{116} In this sense, the government-created right to vote serves as a gateway to the exercise of a broad range of other rights.

The positive right to marry, like the right to vote, also serves as a gateway to the exercise of a large number of other important rights. Indeed, in both \textit{Windsor} and \textit{Obergefell}, the Court took note of the sheer breadth of positive

\begin{itemize}
\item \textsuperscript{114} Cain, \textit{supra} note 113, at 32-37.
\end{itemize}
rights that marriage serves as a legal gateway for accessing. Moreover, the Court explained that it was the decision of the states themselves to associate so many rights with marriage that helped define its nature as a fundamental right, declaring that “[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.” And in both cases, the Court noted that the effect of the law was to place same-sex couples in a second-class status relative to other couples in society. Thus, like voting, the Court in Obergefell described marriage as a cornerstone of citizenship, referring to it as “a keystone of our social order” and “a building block of our national community.”

This helps to explain the Court’s mixed invocation of both the Due Process and Equal Protection Clauses in its marriage line of cases. As indicated above, marriage as it has come to be known contains a mix of both negative and positive rights, making invocation of both clauses necessary to fully protect the basket of rights marriage has come to encompass. Indeed, by the time the Court decided Turner, the Court’s emphasis had shifted to the positive rights associated with marriage, such as government benefits and property rights. This was perhaps necessary due to the specific facts of the case before it. First, unlike Virginia and Wisconsin in Loving and Zablocki, respectively, Missouri had no fornication laws on the books and thus did not make marriage the sole gateway to engaging in procreative and non-procreative sexual activity. Second, because the case involved the rights of incarcerated prisoners, it was not clear that they would ever be able to exercise the negative rights associated with marriage due to their incarceration.

In sum, what has been described loosely in both case law and the literature as the “fundamental right to marry” consists of a bundle of rights, both positive and negative, that are separately protected by the Equal Protection and Due Process clauses. Thus, the Obergefell Court’s invocation of both Clauses in tandem as a basis for striking down laws prohibiting same-sex marriage was not only consistent with precedent but necessary to the Court’s decision.

118. Obergefell, 135 S. Ct. at 2601.
119. Id. at 2602 (noting that “exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects”); Windsor, 133 S. Ct. at 2694 (describing DOMA as “placing same-sex couples in an unstable position of being in a second-tier marriage”).
120. Obergefell, 135 S. Ct. at 2601.
III. THE IMPLICATIONS OF THE OBERGEFELL LINE OF CASES ON THE FUTURE OF MARRIAGE

In the wake of the Obergefell decision, some legislators hostile to same-sex marriage have proposed having their states withdraw altogether from the marriage business by eliminating state-sanctioned marriage on an even-handed basis for same-sex and opposite-sex couples alike. In this Part, I consider the consequences of the Obergefell Court's invocation of both the Equal Protection and Due Process Clauses on the vitality of such a proposed withdrawal from the marriage business.

In Part III.A, I note that fundamental rights protected by the Due Process Clause cannot be extinguished even if the right is denied even-handedly to everyone, suggesting that such a proposed law would be deemed unconstitutional. Yet I further demonstrate that because the Court's contemporary substantive due process jurisprudence has decoupled marriage from the negative rights traditionally associated with it, upon close analysis in a case in which the issue is squarely before the Court, it likely would find the negative fundamental right to marry moribund and thus not a barrier to a state's decision to withdraw from the marriage business. In Part III.B, I note that my conclusion in Part III.A means that the Equal Protection Clause would be deemed the sole protector of the fundamental right to marry. I contend that because the Court's precedents allow fundamental rights protected solely by the Equal Protection Clause to be extinguished by legislative bodies so long as they do so on an even-handed basis, this would suggest that states opposed to same-sex marriage possess the power to eliminate state-sanctioned marriage as it exists today, provided that they do so for same-sex and opposite-sex couples alike. In Part III.C, I contend that although in theory states possess this power, because the Due Process Clause protects a separate negative right related to marriage—the right of existing married couples to retain their status as such—a state could never truly eliminate marriage on an even-handed basis because it could not retroactively strip existing married couples of their status as married. Accordingly, despite the conditional nature of the positive fundamental right to marry, I conclude that the right, once created by a state and exercised by some, cannot be subsequently withdrawn.

A. The Death of the Penumbral Negative Right to Marry

In Part II.A of this Article, I demonstrated that the Chief Justice and Justice Thomas were wrong to assert that no negative liberties were at stake in

Obergefell, noting the many states that continued to make marriage the sole lawful gateway to engaging in procreative and non-procreative sexual activity by way of statutes criminalizing fornication and cohabitation between unmarried persons. I thus defended the Court’s invocation of the negative right to marry protected by the Due Process Clause, noting the Court’s focus on the negative right to marry—and in particular the fact that state laws criminalizing fornication made marriage the only lawful gateway to engaging in sexual activity—in its pre-Obergefell marriage cases, including Loving and Zablocki.

Moreover, if indeed the right to marry is a negative right protected by the Due Process Clause, legislators cannot extinguish the right even if they do so on an even-handed basis that denies the right to everyone equally across the board. If a right is deemed fundamental under the Due Process Clause, infringements upon that right are subject to heightened scrutiny even if the government is evenhanded and infringes upon everyone’s ability to exercise that right, as was the case in Roe where the right to an abortion was denied to everyone across the board. Accordingly, under the Due Process Clause, the government cannot escape constitutional scrutiny by evenhandedly denying the right to everyone.123

Yet in another sense, the Chief Justice and Justice Thomas were absolutely correct to state that no negative liberties were at stake in Obergefell. In this regard, they are grudgingly accepting an eventual constitutional reality: that the Court’s substantive due process cases culminating in the Court’s 2003 decision in Lawrence have effectively recognized a fundamental right of couples—married or unmarried, same-sex or opposite-sex—to engage in both procreative and non-procreative sexual conduct free of governmental intrusion.124 This line of decisions would thus result in the invalidation of fornication and cohabitation laws criminalizing such intimate conduct. Because invalidation of such laws would fully break the link between the penumbral negative right to marriage and the core fundamental rights to engage in procreative and non-procreative sexual activity, the former would cease to exist.

To be sure, Lawrence itself involved the constitutionality of sodomy laws, but the Court’s language was broad enough to encompass fornication laws as well. The language perhaps most on point was the Court’s approving citation to Justice Stevens’s dissent in Bowers, in which he wrote, “[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this

123. See Nicolas, supra note 26, at 1268 n.166; Cain, supra note 113, at 32-33.
protection extends to intimate choices by unmarried as well as married persons. In Lawrence, Justice Thomas joined Justice Scalia’s dissent, which directly stated that Lawrence undermined the constitutional rationale for fornication laws as well. And while the Court itself has not directly addressed a constitutional challenge to fornication laws, lower courts have invalidated such laws both pre- and post-Lawrence. To the extent that cohabitation laws are designed to prevent intimate conduct between unmarried persons, those would likewise fall within the zone of liberty protected by Lawrence.

I thus agree with the Chief Justice and Justice Thomas that the petitioners in the case were free in the absence of a legal marriage to live together and to engage in intimate conduct. In so contending, they were accurately portraying the way in which Lawrence confirmed a fundamental right of unmarried persons to engage in procreative and non-procreative sexual activity. The penumbral negative right to marry thus died a quiet death in 2003 when Lawrence eliminated the power of states to make marriage the gateway for engaging in sexual activity.

Yet to contend as I do that the penumbral negative right to marry was effectively extinguished in 2003 when Lawrence was decided is not to say that the Obergefell Court erred in invoking the Due Process Clause as a partial basis for striking down state laws prohibiting same-sex marriage. Given the procedural posture of the cases before the Court, coupled with the fact that the Court has not expressly held that fornication laws, like sodomy laws, violate the Due Process Clause, the Court really had little choice but to invoke the Clause.

The plaintiffs in Obergefell and in the other cases winding their way through the courts at the same time sued for the ability to exercise the basket of negative and positive rights associated with marriage. In suing, the couples had three different ways in which they could frame that challenge. The first

125. See id. at 578 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
126. See id. at 590 (Scalia, J., dissenting).
129. Obergefell v. Hodges, 135 S. Ct. 2584, 2620 (Roberts, C.J., dissenting); id. at 2635 (Thomas, J., dissenting).
130. See, e.g., Mary Ann Case, Of "This" and "That" in Lawrence v. Texas, 2003 SUP. CT. REV. 75, 139 ("After Lawrence, every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control. To the extent that the so-called fundamental right to marry is, as is customary for fundamental rights under the U.S. Constitution, a negative liberty which establishes only a limit on state interference, Lawrence, at least as an analytical matter, may spell less the beginning than the end for same-sex couples of any claimed right of access to state-sponsored marriage rooted in substantive due process . . . .").
approach—which the couples in all of these cases opted for—and as reflected in the grant of certiorari—was to accept the power of states to make marriage a precondition for the exercise of this basket of rights, and to challenge the exclusion of same-sex couples from the institution of marriage. The second approach would have been to contend that the states lacked the power to make marriage a precondition for the exercise of some or all of the rights associated with marriage—and in particular the rights to engage in procreative and non-procreative sexual activity outside of marriage—and to challenge the constitutionality of the underlying fornication laws that made marriage the sole lawful means of engaging in such sexual activity. The third approach would have been to invoke the first two approaches as alternative theories for why they should be granted the relief sought in the cases.

Had the plaintiffs in Obergefell or in any of the other same-sex marriage cases winding their way toward the U.S. Supreme Court elected the second or third approaches, the Court would have had squarely before it the question whether making marriage a precondition to engaging in procreative and non-procreative sexual activity via fornication laws interfered with the right recognized in the line of Due Process cases culminating in Lawrence. The Court could at that point have confirmed what the Chief Justice and Justice Thomas effectively conceded in Obergefell, namely that fornication laws are sufficiently analogous to the sodomy laws at issue in Lawrence to be declared unconstitutional. From that point forward—and in the absence of states linking marriage to the exercise of any other negative rights—the Court could properly declare the penumbral negative right to marry moribund and no longer invoke it in cases challenging restrictions on the right to marry. But because the constitutionality of making marriage the sole lawful gateway for exercising the right to engage in sexual activity was not directly before the Court in

---

133. Perhaps in part because the four states whose laws were directly at issue in Obergefell itself—Michigan, Kentucky, Ohio, and Tennessee—did not have fornication laws on the books, it made sense for the plaintiffs to frame the case in the way that they did. This is not to say, however, that the negative rights to engage in procreative and non-procreative sexual activity were not at issue for these plaintiffs. To the extent that they travelled to states that both recognized out-of-state same-sex marriages and that had fornication laws on the books—such as Illinois, Massachusetts, and Minnesota—their home states’ refusal to let them marry impacted their ability to exercise those rights in the states in which they travelled, and thus their challenge to their home state’s ban on same-sex marriage might appropriately be considered to implicate the Due Process Clause since it interfered with their ability to exercise those negative rights. Alternatively, of course, they could have followed the second approach and brought suit against the states to which they travelled or sought to travel, challenging those states’ fornication laws directly, but they did not pursue that option. In any event, the parties did not bring the presence or absence of fornication laws to the attention of the courts in Obergefell, and so neither the lower courts nor the Supreme Court focused on this detail in their opinions.
Obergefell, the Court lacked an opportunity to break the link between the two and in turn to declare the negative right to marry extinct. If a state were to decide to eliminate marriage for same-sex and opposite-sex couples alike, the manner in which the state opted to do so and the way in which the parties litigated the case could bring the continued vitality of the negative right to marry squarely before the Court. If, for example, a state repealed both its marriage laws and its fornication statutes (or had previously repealed its fornication statutes), and the state were sued by couples aggrieved by the law, the state could defend the case on the ground that the negative rights to engage in sexual activity were no longer linked to marriage and thus that the Due Process Clause had no role to play. The parties might further litigate the question whether the presence of fornication laws in other states meant that the marriage laws still effectively served as a gateway to the nationwide exercise of the negative rights to engage in procreative and non-procreative sexual activity and thus whether the negative right to marry protected by the Due Process Clause retained vitality. The state might continue to defend its actions on the ground that such sister state fornication laws were of no consequence because those laws could not constitutionally be enforced post-Lawrence. At that point, the Court could address the constitutionality of the sister state fornication laws, and if it found them to be unconstitutional—and in the absence of the state linking marriage to the exercise of any other negative rights—the Court could properly declare the penumbral negative right to marry moribund. Alternatively—although it would be quite unusual—a state might repeal its marriage laws yet at the same time retain its fornication laws. Aggrieved couples could sue alternatively on the grounds that repealing

134. Parties have autonomy in how they frame the constitutional claims they choose to bring, and the Court respects that framing. Thus, for example, in the pre-Loving era, interracial couples who could not legally marry were also subject to prosecution under state laws criminalizing interracial cohabitation between married persons. The Court made clear that the parties could challenge the marriage laws themselves—on the ground that but for the ban on interracial marriage they would not be subject to the cohabitation prosecution—or they could instead challenge the cohabitation statute directly without raising questions about the marriage ban’s constitutionality. See McLaughlin v. Florida, 379 U.S. 184, 195-96 (1964); Peter Nicolas, Gay Rights, Equal Protection, and the Classification-Framing Quandary, 21 GEO. MASON L. REV. 329, 370-71 (2014).

135. To be sure, the defendant-states in Obergefell might have opted to defend their bans on same-sex marriage on the ground that they had no fornication laws on the books, but none of them opted to do so.

136. See supra note 133.

137. Alternatively, the state could make the argument that its law should be assessed solely based on the rights it links to marriage, and that to the extent other states link other rights to out-of-state marriages, the other states’ laws should be the focus of the legal challenge.

138. See, e.g., Case, supra note 130, at 139 ("After Lawrence, every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control. To the extent that the so-called fundamental right to marry is, as is customary for fundamental rights under the U.S. Constitution, a negative liberty which establishes only a limit on state interference, Lawrence, at least as an analytical matter, may spell less the beginning than the end for same-sex couples of any claimed right of access to state-sponsored marriage rooted in substantive due process ... ").
the ability to marry violated the negative Due Process right to marry, as well as on the ground that the fornication laws to which they would thus be subject directly violate the fundamental right to engage in procreative and non-procreative sexual activity. The Court could resolve the second issue in favor of the couples, and having so concluded, might in turn reject their first claim on the ground that in light of the ruling on the second issue, the negative Due Process right to marry is thus obsolete.

B. The Conditional Nature of the Positive Right to Marry

As demonstrated above, in a post-Lawrence world, states no longer have the authority to make lawful marriage a prerequisite for exercising the negative rights to engage in procreative and non-procreative sexual activity. To the extent that the states' linkage of marriage with the exercise of these rights was the basis for recognizing marriage as a fundamental right under the Due Process Clause, the negative right to marry is now—in mathematics lingo—a null or empty set. Thus, the right to marry as it may constitutionally be defined today includes only positive rights protected by the Equal Protection Clause.

Yet there is an important distinction between the positive fundamental rights recognized pursuant to the Equal Protection Clause and the negative fundamental rights recognized pursuant to the Due Process Clause: the conditional nature of the former. In contrast to the enduring protection afforded fundamental rights protected by the Due Process Clause, fundamental rights protected by the Equal Protection Clause can be infringed upon or even eliminated by the government without raising any constitutional concerns, so long as the government does so evenhandedly and denies the right to everyone. Only if it infringes upon or denies the right to some individuals but not others is government's conduct subject to heightened scrutiny.139

The conditional nature of positive fundamental rights protected by the Equal Protection Clause is most clearly seen in the Court's right to vote line of cases. In that line of cases, the Court made clear that there is no freestanding fundamental right to vote for any particular governmental position, such as a presidential elector, school board member, or state judges. Thus, a state does not run afoul of the fundamental right to vote guaranteed by the Equal Protection Clause if it simply does away with everyone's right to vote for a particular official, say, by eliminating popular elections for state court judges and instead having the governor appoint them, or by eliminating popular elections for Presidential electors and having the legislature directly appoint

such persons. However, once the state chooses to extend the right to vote for a given office, it must do so in an even-handed manner. If it fails to extend the right to vote equally to everyone, the denial of that right to certain classes of persons is subject to heightened scrutiny.

Given this distinction between rights protected by the Due Process Clause and those protected by the Equal Protection Clause, if my conclusion in Part III.A is correct that the negative rights associated with marriage evaporated when *Lawrence* was decided, this would suggest that states could opt to eliminate civil marriage, provided that they did so in an even-handed manner and did not solely target same-sex couples. Indeed, several commentators have read the Court’s decisions as protecting the fundamental right to marry solely via the Equal Protection Clause and have thus concluded that—as with the right to equal participation in the electoral process—states can eliminate the right to marry without running afoul of the Constitution by simply eliminating it on an even-handed basis for everyone and getting out of the marriage business. If true, this would seem to lend support to the constitutionality of post-*Obergefell* proposals by some state legislators to avoid having to permit same-sex couples to marry by withdrawing altogether from the business of marriage.

C. The Negative Right to Retain One’s Marriage

Although the evaporation of the negative right to marry post-*Lawrence*, coupled with the conditional nature of positive rights protected solely by the Equal Protection Clause as demonstrated by the fundamental right to vote cases, would seem to lend support to the conclusion that state legislatures can withdraw from the marriage business, I believe that the answer is somewhat more complicated. While I agree that, in theory, my conclusions regarding the evaporation of the negative right to marry gives states this power, there are important differences between the fleeting nature of the right to vote on the one hand and the enduring nature of the right to marry on the other that in practice would make it constitutionally impossible for a state to withdraw from the marriage business once having entered into it.

Consider, for example, a state that has historically provided for direct election of its state supreme court justices but wishes, starting in 2016, to have justices appointed by the governor and confirmed by the state legislature. Because the nature of exercising the right to vote is such that it is exercised briefly and repeatedly over time, it is very easy for a state to withdraw the right

to vote from everyone on an even-handed basis. Prior to the conversion date, all
qualified voters were able to exercise the right to vote for justices in any given
election, and after the conversion date, no qualified voters are able to exercise
that right. There are no individuals in the state who retain any vestigial power
to directly elect justices.

Marriage, however, is a much more enduring relationship. Unlike voting, it
is a relationship that is entered into and—absent judicial dissolution—defines a
couple’s status throughout their joint lives. Were a state to suddenly cease the
issuance of marriage licenses to new couples seeking to get married, there still
would be countless couples who married prior to the date the state withdrew
from the marriage business. Only if the state sought by legislative action to
retroactively dissolve the marriages of those who had previously married could
the legislature’s actions be described as even handed in the sense that the
fundamental rights prong of the Equal Protection Clause would seem to
contemplate.

Yet any effort by a state to dissolve the marriages of those who had
previously married under valid state marriage laws would run into
constitutional problems of its own. While there are no historical examples of
states withdrawing from the marriage business altogether, states have in the
past enacted legislation prohibiting types of marriages that had previously been
permitted, including same-sex marriage, interracial marriage, common law
marriage, and marriage between persons of close consanguinity. In litigation
regarding the scope of such laws, courts have unanimously treated the changes
in the laws as prospective only, typically concluding that pre-existing marriages
were a sort of vested property right the abrogation of which would violate the
substantive due process rights of the effected couples. 143 In other words, even if
there is no substantive due process right to get married in the first instance,
there is a separate substantive due process right to retain the status and
attendant property interests once lawfully attained. 144

In this sense, the positive fundamental right to marry recognized under the
Equal Protection Clause acts as a sort of dormant one-way right. States have the
power never to extend the right to its citizens in the first instance, but once they
extend the right, they cannot subsequently withdraw it. Thus, if an imaginary
fifty-first state sprung into existence that never had an established scheme of
civil marriage, they would be under no constitutional compulsion to extend
such a right to their citizens upon entering the union. However, the other fifty

Cook, 104 P.3d 857, 864-67 & n.7 (Ariz. Ct. App. 2005); Mark Strasser, Constitutional Limitations and
Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice, 29
144. See Caspar, 77 F. Supp. 3d at 625.
states, having already created such schemes, are constitutionally powerless to eliminate them. In this sense, despite my conclusion that the negative fundamental right to marry disappeared when the Court decided Lawrence, it is accurate to say that the right to marry remains protected today by the Due Process and Equal Protection Clauses working in tandem, but for a somewhat different reason than the theory implicitly and properly endorsed by Justice Kennedy in Obergefell. Under the theory that I have set forth above, the Due Process Clause protects the right of existing married couples to retain their marriages, while the Equal Protection Clause guarantees existing unmarried couples the right to enter such marriages on an equal basis with those who have previously had the opportunity to exercise that right.

CONCLUSION

In Obergefell v. Hodges, the Court broke important ground for same-sex couples for its specific holding regarding the right of same-sex couples to marry. Yet despite the important criticisms raised by the dissents, the Obergefell Court did not substantially alter its fundamental rights jurisprudence. After Obergefell just as before, fundamental rights recognized under the Due Process Clause are framed in specific but not unduly narrow terms. After Obergefell just as before, a finding that a law infringes upon a fundamental right does not result in invalidation of the law, but only requires that the law be closely scrutinized. And after Obergefell just as before, the fundamental right to marry is dually protected by the Due Process and Equal Protection Clauses working in tandem. Moreover, by clearly placing the Court’s gay rights cases squarely within the Court’s fundamental rights lines of cases, Obergefell brought much needed clarity that will aid lower courts considering future fundamental rights claims.

145. For the purposes of this hypothetical, I am assuming that the state seeks to get out of the business of legally recognizing relationships altogether, as opposed to instead redenominating such relationships something else for everyone, such as civil unions or domestic partnerships, while maintaining all of the rights associated with it. It is doubtful that the Due Process Clause protects a right to retain the name marriage as opposed to the underlying rights associated with it. See In re Marriage Cases, 183 P.3d 384, 434-35 (Cal. 2008).