

THE POSITIVE RIGHT TO MARRY

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Obergefell v. Hodges held same-sex couples have a right to legal marriage. As the dissenters emphasized, this right to marry is anomalous, doctrinally and normatively. Most rights in the United States Constitution are negative liberty rights. For example, the states may not interfere with procreative choices, but individuals have no right to public funds for contraception. Moreover, if children have no right to public funds for education, it seems morally dubious to claim a right to public support for adult marriages. What is this positive right to marry and what justifies it? This Article reconstructs a conceptual and normative foundation for the positive right to marry. Previous theories of the right to marry as a negative liberty right or an equality right are unsatisfactory, because they fail to justify the connection between intimate liberty and marriage law. The right to marry is a positive right, but one of a specific kind. Unlike the right to education, it is not a claim to public benefits. It is a “power right,” a right to create legal duties for intimate relationships. This right is not simply a means to promote valuable relationships; it is necessary to ensure equal liberty. Relationships carry open-ended commitments that threaten to subordinate the partners to one another. A right to legal marriage is necessary to reconcile intimate liberty with equality.

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INTRODUCTION

IN *Obergefell v. Hodges*, the U.S. Supreme Court held that laws limiting marriage to opposite-sex couples violate the constitutional right to marry.¹ As Justices Roberts and Thomas argued in dissent, this right to marry is a doctrinal and normative outlier. The plaintiffs sought not freedom from government but “public recognition of their relationships,

¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

along with corresponding government benefits.”² This positive right to benefits is unusual in the United States’ constitutional tradition, where “liberty has long been understood as individual freedom *from* government action, not as a right *to* a particular government entitlement.”³ Most of our constitutional rights are negative liberty rights.⁴ The government may not restrict speech or procreative choices, but no one has a right to public funds for their newspaper or contraception.⁵ The Court has rejected positive rights to education,⁶ police protection,⁷ and housing⁸—all of which protect more important interests than adult companionship. If children have no right to public funds for education, why should adults have a right to public benefits for their personal relationships?

Before *Obergefell*, the Court and legal academics tried to frame the right to marry as a negative right. The Court described it as a right to choose whom to marry without government interference.⁹ In *Obergefell*, Justice Thomas doubled down on this interpretation, claiming the right to marry protects only freedom that would exist outside of government, such as the freedom to choose whether to cohabit, raise children, exchange vows, or have a religious ceremony.¹⁰ This legal right is a nega-

² *Id.* at 2620 (Roberts, J., dissenting). See *id.* at 2635–36 (Thomas, J., dissenting). As I argue below, courts and academics often refer to “marriage benefits” in a loose fashion that obscures crucial distinctions. See *infra* Part I.

³ *Obergefell*, 135 S. Ct. at 2634 (Thomas, J., dissenting).

⁴ This point is controversial. Compare *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) (arguing that the U.S. Constitution is “a charter of negative rather than positive liberties”), and Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. Rev.* 857, 868–74 (2001) (arguing that the Bill of Rights is essentially negative in nature), with Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 43 (1999) (arguing that the existence of remedies means that all legally enforced rights are positive rights), and Susan Bandes, *The Negative Constitution: A Critique*, 88 *Mich. L. Rev.* 2271 (1990) (criticizing the idea that the Constitution is a charter of negative liberties).

⁵ *Harris v. McRae*, 448 U.S. 297, 316–17 (1980); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973); see also Frederick Schauer, *Hohfeld’s First Amendment*, 76 *Geo. Wash. L. Rev.* 914, 917 (2008) (noting that the traditional conception of the right to free speech does not include the right to the resources that make speech possible). Most apparent counterexamples, such as the right to counsel, the right of access to the courts, or the poll tax amendment, can be interpreted as procedural rights justified by the right to be free of unjust punishment or unjust discrimination in legal rights.

⁶ *Rodriguez*, 411 U.S. at 35.

⁷ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989).

⁸ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

⁹ See *infra* Subsections I.A.1 & I.B.1.

¹⁰ *Obergefell*, 135 S. Ct. at 2635 (Thomas, J., dissenting).

tive liberty that protects an individual's right to form social relationships, with no associated rights to legal status or public benefits. The problem with this framework is that it obscures the right's core feature: Law creates civil marriage. The real question is why we have a *right to state intervention* in our relationships.¹¹

Unlike the Court, legal academics emphasize the role of law in marriage. Nonetheless, academics hold a misleading conception of marriage. They think of legal marriage as a set of public benefits: legal rights to facilitate relationships, economic subsidies to support them, and a formal status to dignify them.¹² In their framework, the right to marry is merely a right to access these government benefits without discrimination. This right of equal access is an incomplete theory of the right to *marry*. If states had tied public benefits to friendship, then citizens would have had a right of equal access to friendship status. Indeed, states could abolish civil marriage altogether without infringing this right of equal access. If the right to marry is merely an equal access right, there is no right to marry *per se*.

Assuming there is a fundamental right to marry that warrants constitutional protection, what is this right and what justifies it? *Obergefell* was correct to conclude individuals have a right to civil marriage. This is a positive right, but one of a specific kind. Unlike alleged rights to welfare or education, the right to marry is not a claim to public benefits. The core of the right to marry is a "power right": Citizens are entitled to the power to create marriage's legal rights and duties. The liberty to marry, in turn, is a right to exercise this power without state interference.

Some laws about marriage, like age limits, define the power to marry. These are what Professor H.L.A. Hart called "power-conferring" laws: laws that specify who can create marital rights and what procedures they must follow to do so.¹³ Other laws, like prison rules prohibiting marriage

¹¹ See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 *Geo. Wash. L. Rev.* 949, 955 (1992) (arguing, "rather than a right to be free from state interference, the right to marry can only be conceptualized as a right to place the power of the state behind previously agreed-to, consensual arrangements, and to forge a linkage between a variety of different rights and obligations derived from those arrangements," and rejecting all possible justifications for such a right to marry).

¹² See, e.g., Cass Sunstein, *The Right to Marry*, 26 *Cardozo L. Rev.* 2081, 2083–84 (2005); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 *U. Pa. L. Rev.* 1375 (2010). A few academics have argued that the right to marry is a positive liberty, most extensively Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 *Minn. L. Rev.* 1184 (2004).

¹³ H.L.A. Hart, *The Concept of Law* 27–28, (3d ed. 1961).

ceremonies, restrict the liberty to exercise this power to marry.¹⁴ The hard questions about the right to marry surround limits on the power to marry. Why do individuals have a right to change the legal status of their relationships? What legal rights and duties must individuals be able to create? Who has a right to this power?

While marriage carries important tax, immigration, and employment benefits, I will argue the *fundamental* right to marry is a right to create legal obligations for committed relationships. This right is grounded in a foundational commitment to equal liberty. Everyone should be free to enter committed relationships, as long as doing so can be consistent with equal liberty for both parties. However, relationships carry open-ended moral duties that threaten both parties' liberty. Partners are obligated to support one another's ends. As a result, each partner's choices limit the other's liberty. Suppose your partner abandons his career as a stockbroker to paint native islanders in Tahiti. May you demand he resume selling stocks to support your middle-class lifestyle? If you cannot, his choice defines your right to support and your liberty to pursue your chosen life. If you can, your choices define his rights and liberty. Individuals should be free to form committed relationships, but how can they hold such authority over one's liberty without risking subordination?

Civil marriage resolves this tension. Spouses may hold this authority over one another's liberty because the law regulates marriage entry and exit. Marriage's entry rules give spouses the power to control the creation of these flexible, open-ended duties. During marriage, states will not intervene to enforce marital obligations, which enables spouses to structure their shared lives with indeterminate duties. When marriages end through death or divorce, the law offers equitable remedies to ensure their choices during marriage do not burden either spouse's liberty unfairly. Property division, alimony, and the elective share enable spouses to share lives without risking subordination. We have a fundamental right to marry because only civil marriage can reconcile intimate liberty with equal liberty.

This theory of the positive right to marry has several advantages over existing accounts. First, by connecting intimate liberty with legal rights, it explains why marriage is an individual right even though the law dic-

¹⁴ *Turner v. Safley*, 482 U.S. 78, 95–96 (1987). The statutes challenged in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Zablocki v. Redhail*, 434 U.S. 374, 375–77 (1978), restricted the power to marry by making classes of marriages void *ab initio* and restricted the liberty to marry by punishing anyone attempting to enter them.

tates marriage's basic terms. The right to marry is not merely consistent with state regulation of marriage; it actually requires domestic relations law. Second, this justification clarifies the boundaries of the right to marry, explaining why other relationships lack a right to legal status. Cohabitants do not need a basic right to legal status, because once couples can create legal duties through marriage, they may choose to live together without undermining one another's liberty. Traditional polygamists cannot claim a basic right to a legal status, because entering multiple marriages creates additional layers of unequal moral power that cannot be reconciled with equality. Last, unlike *Obergefell*, this theory justifies treating marriage as a central component of liberty without elevating marriage in a way that denies the value of other relationships.¹⁵

Obergefell constructed its right to marry on shaky foundations. This Article rebuilds a conceptual and normative framework for the positive right to marry. Part I deconstructs the leading theories. Judges and academics struggled to define a right to be free of state interference for a relationship created by state law. On close inspection, these efforts were bound to fail. Part II lays a new conceptual foundation. Using Professor Wesley Hohfeld's analytical system, it isolates aspects of the right to marry that can support a plausible constitutional right. The right to marry is a power right, which the law also protects with liberty and immunity rights. Part III rebuilds a normative framework that justifies treating the power to marry as a fundamental right. Drawing on liberal political philosophy, it argues marriage law is necessary to ensure equal liberty within relationships. The Article concludes by arguing the positive right to marry need not extend to cohabitants or polygamists.

To avoid confusion, the normative theory I develop is not a resuscitation or defense of the constitutional reasoning in *Obergefell*.¹⁶ The theory does not engage institutional design questions, such as whether state or federal constitutions should protect the right to marry or what level of scrutiny judges should apply to marriage restrictions. Institutional design

¹⁵ Academic commentators have criticized *Obergefell* for valorizing marriage and argued that any opinion grounded in the substantive right to marry could not help but glorify marriage at the expense of other relationships. See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 Fordham L. Rev. 23, 23–24 (2015); Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 Geo. L.J. Online 124, 126 (2015). I agree with the former but not the latter claim.

¹⁶ For an admirable defense of the opinion, see Kenji Yoshino, *A New Birth Of Freedom?: Obergefell v. Hodges*, 129 Harv. L. Rev. 147 (2015).

issues are important, but their dominance in constitutional theory often obscures deeper confusions. My goal is to answer the prior question: Why should the positive right to marry be a fundamental right?

I. THE U.S. CONSTITUTIONAL RIGHT TO MARRY

Judges and academics writing about the right to marry have built edifices worthy of Escher. Before we can rebuild, we must clear the ground. The Supreme Court has held repeatedly that citizens have a right to marriage's legal benefits, even as it continued to insist the right to marry is a type of freedom from government.¹⁷ The courts struggled hopelessly to balance this negative liberty with pervasive domestic relations law. Academics make the opposite mistake. Thinking of marriage as a set of state benefits, they reduce the right to marry to a right of "equal access" to government benefits. Marriage then holds no special importance; citizens have a right only to whatever benefits states happen to offer.

Obergefell improved upon these existing approaches without escaping their limits. The Court recognized same-sex couples have a right to legal marriage and defined this positive right by reference to the interests protected by civil marriage. Yet, the Court's justifications reveal that it still fails to appreciate the central problem. The Court's appeal to intimate liberty could justify an individual right but not a right to marriage law, and its appeal to child and social welfare could justify marriage law but not an individual right. All three conceptions of the right to marry are inadequate, because none can explain the connection between the individual right to marry and legal regulation of marriage.

A. *Supreme Court Jurisprudence Before Obergefell*

Since at least 1967, the Supreme Court has recognized that the Due Process Clause protects a fundamental right to marry.¹⁸ Applying this

¹⁷ *Turner*, 482 U.S. at 95–96; *Zablocki*, 434 at 388.

¹⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Dicta prior to *Loving* described the right to marry as a protected liberty or privacy and used this assumed right to justify others. In *Griswold v. Connecticut*, for example, the Court argued that the right to contraception is implicit in the right to marital privacy. 381 U.S. 479, 486 (1965). See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the right to marry is among the rights protected by the Due Process Clause). Later dicta list the right to marry as one species of freedom of association protected by the First Amendment. *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545–50 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620–21 (1984).

right or its equal protection variant, the Court struck laws prohibiting interracial marriage,¹⁹ prohibiting inmates from marrying,²⁰ and prohibiting individuals from marrying until they complied with their child support orders.²¹ Nevertheless, the right remained unclear. Although the Court repeatedly held that states could not deny individuals the legal benefits of marriage, it also continued to describe marriage as one of “the decisions that an individual may make without unjustified government interference.”²² This negative liberty conception prevented the Court from (1) articulating a persuasive justification for the right to legal marriage and (2) building a doctrinal framework for reconciling the right to marry with the states’ pervasive regulation of marriage.

1. *The Constitutional Right to Marry and its Doctrinal Justification*

The Court has explicitly described the right to marry as a negative liberty right, but without specifying what aspects of marital life were protected from government interference. In the seminal right to marry case, *Zablocki v. Redhail*, the Court held that Wisconsin could not withhold marriage licenses from a person because of unpaid child support obligations.²³ The closest the Court came to defining the right to marry was “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.”²⁴ In other cases, the Court has written the right to marry protects “decisions relating to marriage” from “unjustified government interfer-

¹⁹ *Loving*, 388 U.S. at 12.

²⁰ *Turner*, 482 U.S. at 82.

²¹ *Zablocki*, 434 U.S. at 375. I do not discuss *United States v. Windsor*, 133 S. Ct. 2675 (2013). Despite its proliferation of “dignity” language, *Windsor* neither analyzes the right to marry nor explains why marriage requires law. The Court’s primary concern was allocating authority over marriage between the states and the federal government, rather than explaining why states have this power over a fundamental right in the first place. The opinion never explains why “couples who wish to define themselves by their commitment,” *id.* at 2689, need the state to recognize that commitment, which would be the first step toward grounding a right to marry.

²² *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977).

²³ *Zablocki*, 434 U.S. 388. Under Wisconsin law, anyone subject to a child support order could receive a marriage license only if they proved that they had complied with the order and that their children “are not then and are not likely thereafter to become public charges.” *Id.* at 375–77 (quoting Wis. Stat. § 245.10) (internal quotation marks omitted); *id.* at 402 n.3 (Powell, J., concurring in the judgment) (“[T]he plaintiff in the companion case had complied with his support obligations but was denied permission to marry because his four minor children received welfare benefits.”).

²⁴ *Id.* at 386 (majority opinion).

ence.”²⁵ The Court has also asserted that the right to marry restricts “the State’s power to control the selection of one’s spouse.”²⁶

One might hope the justification for the right could offer more clarity, but the Court’s official rationales have been piecemeal and scattershot. The Court argued in *Zablocki* that the rights to procreate and form a family entailed a right to marriage.²⁷ Because sex outside of marriage was unlawful and children born to unmarried parents were illegitimate, individuals had “some right to enter the only relationship” in which sex, procreation, and family formation are lawful.²⁸ This reasoning lost most of its force when the Court undercut legitimacy classifications²⁹ and prohibited criminal penalties for non-marital sex.³⁰ Marriage is no longer required to create legally recognized families or have sexual relationships outside of marriage legally. If the right to marry is simply a corollary for the right to procreate or to form families, and these rights now receive independent protection, then the right to marry is obsolete (as some academics have concluded).³¹

The Court has also justified the right to marry as a way to protect individual interests, of at least three sorts. First, marriages are valuable relationships, and individuals have an interest in benefits that support these relationships.³² In its valorization of marriage, the Court has en-

²⁵ *Carey*, 431 U.S. at 685 (first internal quotation marks omitted and first quoting *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)).

²⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). See also *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (opinion of Stevens, J.) (“[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made.”).

²⁷ *Zablocki*, 434 U.S. at 386. Earlier cases listed the right to marry as part of a bundle with the right to “establish a home and bring up children.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

²⁸ *Zablocki*, 434 U.S. at 386.

²⁹ *Trimble v. Gordon*, 430 U.S. 762, 776 (1977).

³⁰ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

³¹ See, e.g., Maltz, *supra* note 11, at 961 (arguing the sexual liberty argument does not justify a right to marry as fundamental, because the state could simply legalize sex outside marriage); Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 *Yale J.L. & Feminism* 331, 358 (2016) (“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.”).

³² *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (inmates’ interests in marriage include “expressions of emotional support and public commitment”; religious purposes; anticipation of consummating marriage after parole; and “receipt of government benefits (e.g., Social Secu-

dorsed a companionate conception of marriage as a relationship of loyalty and emotional intimacy, often in contrast to instrumental visions of economic, civil, or political associations.³³ The height of this rhetoric appears in *Griswold v. Connecticut*, where the Court held that the right to marital privacy implied a right for spouses to use contraception:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.³⁴

Second, other cases argue that the right to marry (and other “privacy” rights) protect a right to self-authorship.³⁵ Choices about with whom we develop emotional attachments, profess commitments, and share our private lives are essential aspects of “personhood.”³⁶ Such choices would lose their significance if they were subject to state “compulsion” or “intrusion.”³⁷ Third, the Court has observed that citizens have a right to marry because marriage is a religious sacrament for many.³⁸

All three interest-based justifications share a similar unarticulated premise: *Civil marriage* is essential to protect these individual interests. The ground for that assumption is unclear. Legal marriage is not necessary to form a family, as single parents, cohabiting parents, and extended families amply demonstrate. Nor is legal marriage necessary for intimate partners to share their lives, form attachments, or make commitments. Cohabiting couples can rely on moral and social norms to reinforce their

riety benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock”); *Zablocki*, 434 U.S. at 384 (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)).

³³ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984) (“Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”).

³⁴ *Griswold*, 381 U.S. at 486.

³⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

³⁶ *Id.*

³⁷ *Id.*; *U.S. Jaycees*, 468 U.S. at 619 (“Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”).

³⁸ *Turner v. Safley*, 482 U.S. 78, 96 (1987).

commitment to one another, perhaps backed by cohabitation contracts. Lastly, a religion need not require its adherents to obtain a legal license before recognizing their marriages for sacramental religious purposes.

The Court supplements these individualist justifications with social welfare arguments. The Court has argued that the right to marry protects an individual's decision to enter the relationship that is "the foundation of the family and of society."³⁹ Marriage is one of the "personal bonds [that] have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."⁴⁰ The right to marry benefits society, because marriage offers spouses space to foster their cultural ideals with less state interference. Older cases argue that marriage is a civil right because it—bundled with procreation and child-rearing—is essential to maintain the population.⁴¹ These statements suggest a rule-consequentialist argument: An individual right to marry promotes the common good by encouraging cultural development and population growth. (Such reasoning more often justifies state power to regulate marriage.⁴²) This argument is also missing a similar premise: Why is a right to *civil* marriage important to achieve these benefits? Perhaps states should encourage individuals to marry and buttress marriage as a social institution, but these social goals do not require an individual right to the legal benefits of marriage.

The Court has never explained why a right to *legal* marriage is essential to support the individual or social interests in marriage. One reason for this oversight is the Court's limited conception of the right. Seen as merely a negative liberty, the right to marry appears to protect relationships existing outside law. The Constitution need only keep the state away. However, *Zablocki* and the other right to marry cases did not con-

³⁹ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁴⁰ *U.S. Jaycees*, 468 U.S. at 618–19.

⁴¹ *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁴² *Maynard*, 125 U.S. at 205 ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."); *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878) ("[A]ccording as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.").

cern state limits on moral, social, or religious marriage. These cases protect access to *civil* marriage, an institution created and regulated by the state. The core of the right to marry is not a right to be free of government interference, as it might be for freedom of speech, association, or procreation. The right to marry depends on government involvement from the outset.

2. *The Framework for Defining the Right and Reviewing Restrictions*

Having conceived of the right to marry as a negative liberty, the Court faced the impossible task of balancing freedom from government with the pervasive regulation of marriage.⁴³ It has articulated three analytical frameworks: (1) a broad right to marry with deferential intermediate review; (2) a historically restricted right with strict scrutiny; and (3) no right, but heightened rational basis review.⁴⁴ The Court adopted the first framework in *Zablocki*. The next two appeared in *Zablocki* concurrences and in subsequent landmark fundamental rights cases. All three frameworks employed a two-step analysis. The goal was to separate the definition of the right from scrutiny of the acts that infringe it. All three frameworks would inevitably fail because conceiving of marriage as a negative liberty obscured the intrinsic connections between the two stages of the analysis.

a. *A Broad Right with Intermediate Review*

In *Zablocki*, the Court wrote that laws that “interfere directly and substantially” with marriage must be subject to “critical examination”⁴⁵ to ensure that they are “supported by sufficiently important state interests and [are] closely tailored to effectuate only those interests.”⁴⁶ Conversely, “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship” receive only rational basis

⁴³ *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (“The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the [p]rotection of offspring, property interests, and the enforcement of marital responsibilities.” (alteration in original)) (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)); *Zablocki*, 434 U.S. at 386.

⁴⁴ For this division of the basic analytical frameworks, I am indebted to my former professor, David Meyer.

⁴⁵ *Zablocki*, 434 U.S. at 383, 387 (first internal quotation marks omitted and first quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)).

⁴⁶ *Id.* at 388.

review.⁴⁷ Justice Marshall, who wrote the majority opinion, wanted courts to adopt a flexible, yet deferential balancing test.⁴⁸

Instead, lower courts turned the “direct and substantial” language into a rigid threshold in hopes of limiting judicial review.⁴⁹ Lower courts defined the right to marry so that regulations will not even implicate the right and so are subject only to rational basis review. For example, the U.S. Court of Appeals for the Sixth Circuit concluded that prohibiting spouses from working in the same municipal department did not substantially burden the choice to marry.⁵⁰ Consequently, antinepotism rules can be upheld without even scrutinizing their justification. Laws substantially interfere with marriage “only where . . . those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses.”⁵¹ The court was trying to define what counts as a substantial interference with marriage without asking why the individuals have a right to marry in the first place. The result is an ad hoc test that fails its desired purpose. Under this test, age limits should receive heightened scrutiny because they prohibit an underage person from marrying anyone. In contrast, hefty filing fees would receive no review because they do not “largely prevent[]”⁵² anyone from marrying.

The Second Circuit adopted a more promising interpretation of the threshold step. The “substantial interference” language became a propor-

⁴⁷ Id. at 386.

⁴⁸ See *Lyng v. Castillo*, 477 U.S. 635, 644 (1986) (Marshall, J., dissenting); *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1053 (1978) (Marshall, J., dissenting from denial of petition for writ of certiorari).

⁴⁹ These courts were following the Supreme Court’s lead in a familial association case, *Lyng*, 477 U.S. 635. The Court held that a federal law decreasing welfare benefits for households who purchased or prepared food together did not “substantially interfere” with familial association, because it did not prohibit shopping or cooking together and was “exceedingly unlikely” to change anyone’s behavior in practice. Id. at 638 (first internal quotation mark omitted). Justice Marshall rejected the Court’s restrictive use of the direct and substantial interference test. Id. at 644 (Marshall, J., dissenting); *Hollenbaugh*, 439 U.S. at 1053 (Marshall, J., dissenting from denial of petition for writ of certiorari).

⁵⁰ *Wright v. MetroHealth Med. Ctr.*, 58 F.3d 1130, 1135–36 (6th Cir. 1995). See also *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir. 1995) (rule prohibiting individuals from holding supervisory positions in same department as spouse did not substantially burden the right to marry); *Austin v. Berryman*, 862 F.2d 1050, 1055 (4th Cir. 1988) (denial of unemployment benefits to one who quits to follow spouse to new residence did not substantially interfere with the right to marry).

⁵¹ *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).

⁵² Id. at 710–11.

tionality test that calibrates the level of scrutiny in the second step of substantive review.⁵³ If the familial interest is less weighty or the law only minimally interferes with it, then the law receives less scrutiny. This test allows courts to consider the relationship between a restriction on marriage and the purposes of marriage law. However, it does so confusingly, at what purports to be a threshold step to determine whether a law even impinges on the right. The court must revisit those same reasons again in the second, scrutiny step. The same arguments govern both, purportedly independent steps of the test.

The Supreme Court tried to balance the right to marry with state authority over marriage, but thinking of the right as a negative liberty right confused the tradeoffs inherent in this project. A two-step test is feasible for a right that protects conduct like speech that can exist largely outside of law. But law creates civil marriage. Consequently, it is impossible to identify laws that substantially interfere with the right to marry without evaluating the interests that justify legal regulation of marriage in the first place.

b. Historically Limited Right

In concurring opinions in *Zablocki*,⁵⁴ Justices Powell and Stewart described two alternative methods for defining the right to marry that the Court would later use for other fundamental rights. Justice Powell proposed a historical test, similar to the test later used to reject a right to assisted suicide in *Washington v. Glucksberg*.⁵⁵ In his *Obergefell* dissent, Justice Roberts argued precedent required the Court to use this historical test for the right to marry.⁵⁶

Justice Powell concluded that the Constitution protects a right to marry, but insisted the scope of marital liberty is defined by tradition.⁵⁷ States infringe the right to marry only if they “intrude[] on choices con-

⁵³ *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 143–44 (2d Cir. 2007) (citing, inter alia, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984)) (explaining that strict scrutiny applies to substantial interferences with important associational interests, but “where the associational interest claimed by the plaintiff is of less importance, and where the regulation challenged interferes only minimally with the associational freedom, the state’s justification for the regulation need not be as weighty”).

⁵⁴ *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment); id. at 396 (Powell, J., concurring in the judgment).

⁵⁵ 521 U.S. 702, 705–06 (1997).

⁵⁶ *Obergefell*, 135 S. Ct. at 2618 (Roberts, J., dissenting).

⁵⁷ *Zablocki*, 434 U.S. at 398–400 (Powell, J., concurring in the judgment).

cerning family living arrangements in a manner which is contrary to deeply rooted traditions.”⁵⁸ Justice Powell’s right to marry excludes—by definition—any challenge to laws banning incest, bigamy, or homosexuality.⁵⁹ He did not ground the definition in the rationale for a right to marry; instead, he argues that a state, “representing the collective expression of [its citizens’] moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”⁶⁰ This historical method took center stage in *Glucksberg*, which rejected a right to assisted suicide,⁶¹ and *Bowers v. Hardwick*, which rejected a right to sexual privacy.⁶²

The problems with this historical test are well rehearsed.⁶³ It protects state authority only by two acts of definitional fiat. First, it equates the class of deeply rooted liberties with historically protected types of conduct. Any conduct that states have restricted is not fundamental by definition. This definition is justified, if at all, only by deference to democratic rule—a justification deeply at odds with the idea of protected liberty. Second, advocates of the historical approach typically frame the plaintiffs’ alleged liberty interests in arbitrarily narrow fashion. In *Glucksberg*, the Court defined the plaintiff’s alleged liberty interest as an interest in committing suicide rather than in controlling what happens to his body,⁶⁴ just as Justice Powell defined the plaintiff’s liberty interest in *Zablocki* as an interest in opposite-sex, monogamous marriage. By framing the historical inquiry narrowly, the author can ignore deeply rooted legal principles that might justify extending liberty.⁶⁵ These acts of definitional fiat ensure that any common legal restriction will receive only rational basis review, so the Court can accept as justification any speculative public policy or even democratic resolution of moral debates.⁶⁶

⁵⁸ Id. at 399 (internal quotation mark omitted).

⁵⁹ Id.

⁶⁰ Id.

⁶¹ *Glucksberg*, 521 U.S. at 710–16.

⁶² *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

⁶³ See, e.g., Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 75 (1991).

⁶⁴ *Glucksberg*, 521 U.S. at 722.

⁶⁵ Id. at 724–25.

⁶⁶ Id. at 732–35 & n.23.

c. No Right with Heightened Rational Basis Review

Justice Stewart preferred a third analytical framework. He proposed a type of heightened rational basis test, similar to the one later used to invalidate sodomy laws in *Lawrence v. Texas*.⁶⁷ Justice Stewart concluded the Constitution cannot protect a right to marry because states can ban certain marriages altogether.⁶⁸ Nevertheless, he argued that Wisconsin lacked a rational basis for denying Zablocki permission to marry. Although the State had a legitimate interest in incentivizing child support payments, it was irrational to prohibit the truly indigent from marrying because doing so could never increase their child support payments.⁶⁹

As Justice Rehnquist implied in his dissent, Justice Stewart was actually applying a heightened rational basis test because a traditional rational basis test would defer to legislative judgments about a statute's overall effectiveness despite its overinclusive application in some cases.⁷⁰ A similar doctrinal framework (and criticism) reappeared in *Lawrence*, which invalidated criminal sodomy laws.⁷¹ There, the Court held that the Texas sodomy laws violated the right to liberty under the Due Process Clause, without identifying a protected right or labeling it "fundamental."⁷² The opinion uses the language of rational basis review,⁷³ yet rejects "moral" reasons that would typically satisfy that test.⁷⁴

Justice Stewart's framework in *Zablocki* does avoid the confusion created by trying to build deference to state law into the definition of a negative liberty. However, similar confusions arise in the scrutiny stage,

⁶⁷ 539 U.S. 558, 578 (2003).

⁶⁸ *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment).

⁶⁹ *Id.* at 393–94.

⁷⁰ *Id.* at 407–08 (Rehnquist, J., dissenting).

⁷¹ 539 U.S. at 578.

⁷² *Id.* ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."). See also Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak its Name*, 117 Harv. L. Rev. 1893, 1904 (2004) (noting that the Court in *Lawrence* failed to identify a fundamental right to homosexual sodomy). Even though the Court never identified a fundamental right in *Lawrence*, the Court analyzed the right to privacy cases at great length. See *Lawrence*, 539 U.S. at 564–67.

⁷³ *Lawrence*, 539 U.S. at 577–78.

⁷⁴ Compare *id.* at 571, 577–78 (concluding that majority cannot use state power to enforce its moral code), with *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (concluding that "ethical and moral concerns" about dilation and extraction abortions were sufficient to justify restrictions), and *Glucksberg*, 521 U.S. at 732–35 (considering moral arguments regarding the right to assisted suicide).

when courts try to apply the heightened rational basis test to an ill-defined right. The rational basis test assumes courts should weigh all restrictions and reasons on a similar scale. However, some restrictions on marriage implicate fundamental concerns at the core of marriage, while others do not. A heightened rational basis cannot distinguish among the kinds of laws that affect marriage and their appropriate justifications. For example, laws against nepotism and polygamy both limit intimate liberty, but a law prohibiting spouses from working in the same police department is fundamentally different from a law invalidating second marriages. Moreover, some reasons that may justify limiting liberty in general should be irrelevant for limiting fundamental rights. For example, administrative convenience may justify formal rules that reduce liberty but cannot justify restrictions on fundamental rights. As a result, the framework of heightened rational basis review muddles the process of evaluating state restrictions on marriage.

Before *Obergefell*, the Court had no adequate framework for evaluating state regulations of marriage. The Court sidestepped the difficult task of explaining why individuals have a right to *legal* marriage and how that relates to the state's power to regulate domestic relations. Rather than confront this difficult task, the Justices tried to build deference to state regulation into the doctrinal framework for a negative right. The law needs a more careful analysis of the right to marry and its relation to state regulation of marriage.

B. Academic Interpretations Before Obergefell

Unlike the Court, legal academics emphasize government regulation of marriage. Nevertheless, they agree that the right to marry is a negative liberty. Scholars regard the right to marry as a right to be free from government discrimination when accessing the benefits of marriage.⁷⁵ This limited interpretation of the right to marry seems inevitable once one accepts the conception of civil marriage as a set of public benefits. It is implausible to claim adults have a basic right to financial or expressive support for relationships. Therefore, the only limit on civil marriage must be an equality constraint. This interpretation of the right is not wrong, just incomplete. Because it fails to identify the connection between law and intimate liberty, it overlooks the distinctive wrong when a

⁷⁵ But see Maltz, *supra* note 11, at 967 (concluding there is no fundamental right to marry per se, and at most a right to certain interests surrounding marriage).

state denies someone access to civil marriage, as opposed to the more general category of discrimination.

1. The Right of Intimate Association and Equal Access to Marriage

Professor Cass Sunstein wrote an influential article arguing that the right to marry is a nondiscrimination right rather than a positive right.⁷⁶ Sunstein's argument against a positive right to marry is appealingly simple. Because states could abolish their marriage benefits without violating the Constitution, no one has a positive right to legal marriage.⁷⁷ Sunstein identifies two categories of benefits: (1) material benefits, such as tax breaks, FMLA leave, social security, inheritance, ownership benefits, surrogate decision making, and evidentiary privileges; and (2) expressive benefits through the signaling function of the title "married."⁷⁸ These marital benefits are significant, but the Court has repeatedly rejected the claim that the Constitution protects a right to public benefits.⁷⁹ Because the Constitution does not require states to provide couples with material or expressive support, the right to marry cannot be an entitlement to marriage's public benefits.

Nevertheless, Sunstein argues the Constitution places two limits on marriage law. First, individuals have a right to liberty of intimate association.⁸⁰ A state would violate this liberty if it prohibited private religious marriages or prohibited individuals from using ordinary contract law "to create the expressive and economic equivalents of marriage."⁸¹ Second, additional limits on state power arise once the state enters the marriage arena. As long as the state offers exclusive benefits for marriage, the Equal Protection Clause requires the state not to restrict access to these marriage benefits on discriminatory terms. Consequently, Sunstein concludes that the constitutional right to marry is limited to (1) a substantive due process right to enter private intimate associations; and (2) an equal protection right "*of access to the symbolic and the material benefits of marriage, so long as the institution of marriage exists.*"⁸²

⁷⁶ See Sunstein, *supra* note 12, at 2112.

⁷⁷ *Id.* at 2084.

⁷⁸ *Id.* at 2090–93.

⁷⁹ See *supra* notes 5–8 and accompanying text.

⁸⁰ Sunstein, *supra* note 12, at 2096.

⁸¹ *Id.* at 2095.

⁸² *Id.* at 2099.

Others extended Sunstein's analysis by arguing that civil marriage is itself an intervention in family life that limits negative liberty. Dean David Meyer has argued "governmental decisions to withhold formal recognition from [other] intimate relationships that society regards as essentially family-like . . . imposes on the interpersonal relations of excluded family members in ways that would not obtain if the state simply stayed out of the business of conferring family status altogether."⁸³ Civil marriage is not a neutral baseline. As Meyer points out, marriage law does not simply aid some couples and leave the rest alone; it expands and reinforces the economic and social differences between spouses and cohabitants.⁸⁴ This selective intervention into family life can actively harm families excluded from marriage's legal benefits. In a later article, Professors Nelson Tebbe and Deborah Widiss argue that "civil marriage is so rarely differentiated from private and religious marriages" that restricting civil marriage interferes with individuals' "ability to construct a personal and familial identity."⁸⁵ Therefore, the state monopoly over civil marriage created a de facto monopoly over the moral, social, or religious benefits of marriage.

Tebbe and Widiss also clarify the doctrinal and normative foundation for the "right of equal access" to marriage. They argue that the right to marry is similar to the right to vote.⁸⁶ Although citizens have no fundamental right to vote for state officers under substantive due process doctrine, laws that restrict voting rights for particular groups have received heightened scrutiny under equal protection doctrine even if the group is not a suspect class.⁸⁷ This doctrinal division makes normative sense. Voting is a valuable exercise of autonomy, but states have legitimate reasons to appoint certain public officials, so citizens have no fundamental right to elected offices. Nevertheless, once states create elected offices, laws restricting the franchise limit some citizens' fundamental interest in political participation and thereby question their status as equal citizens.

⁸³ David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 *Vill. L. Rev.* 891, 913–14 (2006) (footnote omitted).

⁸⁴ See *id.* at 906–10 (citing studies suggesting numerous benefits that accrue to married couples).

⁸⁵ Tebbe & Widiss, *supra* note 12, at 1422.

⁸⁶ *Id.* at 1417–19.

⁸⁷ See *id.* at 1418.

The right to marry implicates liberty and equality in a similar fashion. Although intimate relationships are valuable, they are not so important that states must offer legal benefits for intimate couples. Nevertheless, once a state creates a marriage scheme to support certain relationships, denying these benefits to particular groups limits their liberty and challenges their status as equal citizens.⁸⁸ Thus, although no one has a positive right to marriage law, restrictions on marriage should receive heightened scrutiny under equal protection.

2. Limits of the Right to Equal Access to Marriage

The equal access theory of the right to marry remains incomplete because it relies on a limited conception of civil marriage. Professor Sunstein is misled from the start by his analogy between the right to marry and the right to intimate association. People can become friends, lovers, or long-term partners without law. The state can respect this freedom of association by simply staying out of the way. A state that chose to fund Camp Fire USA would not thereby be restricting the Boy Scouts' freedom to associate. Similarly, if civil marriage really is just a set of benefits, then a state may give those benefits to some couples without restricting other couples' right to intimate association.

Although Professors Tebbe and Widiss' analogy to the right to vote seems more apt, the right to vote raises importantly distinct concerns. A state that restricts the franchise is not simply depriving some citizens of a valuable liberty, as if the state has chosen not to fund their preferred fine arts program. Limiting the franchise denies some citizens the fundamental legal right of a republican democracy. Voting is our way of allocating legal authority, and only the state can provide the right to vote. Tebbe and Widiss identify no similar connection between marriage and law. Why does marriage require law, so that exclusion from legal marriage carries special equality concerns?

The key to filling this gap is to see why intimate liberty is insufficient to protect the rights of a married couple. The more promising analogy is to private rights, like the right to property or contract. For example, assume there is a minimal right to property that deserves constitutional protection. It would include a liberty right, which a state might violate by expropriating property without adequate public justification. A state could also violate the right to property if it allowed citizens full liberty

⁸⁸ *Id.* at 1421–24.

to use land but abolished all causes of action for trespass. Similarly, a state could violate the right to contract (assuming there is one⁸⁹) if they interfered with specific agreements without adequate justification, but also if they allowed citizens full liberty to make agreements but abolished the breach of contract cause of action. In both cases, the right is violated by being rendered meaningless.

Legal remedies are not benefits attached to prelegal property or contract arrangements. They are a constitutive element of private rights. Property and contract rights exist only in a system with legal remedies (or at least law-like remedies backed by pervasive and successful enforcement). These rights are “private” only in the sense that their core obligations are between individuals, rather than between individuals and the state. They are not independent of public authority. For similar reasons, a right to enter “private marriages” requires more than state abstinence. The right to marry is, in part, a right to legal remedies like property division or alimony. That is, it is a right to government action, a positive right.

Professor Sunstein recognizes this complication in a footnote. Other rights, such as “[t]he right to private property and freedom of contract . . . require affirmative government action.”⁹⁰ Sunstein does not pursue this idea, but instead dismisses the concern because he is “speaking here in the conventional doctrinal terms.”⁹¹ This limitation to conventional doctrine is unsatisfying, at best, because the question at stake is whether the Constitution *should* recognize a fundamental liberty interest in marriage. In any case, even as a doctrinal matter, it misses the point. Between the Due Process Clause, Takings Clause, and Contracts Clause, the Constitution protects a basic remedial scheme for contract and property relations.⁹² No similar provisions protect the right to create

⁸⁹ See *infra* discussion accompanying notes 224–26.

⁹⁰ Sunstein, *supra* note 12, at 2094 n.55.

⁹¹ *Id.* The deliberate omission is surprising because, as Sunstein implies in the same footnote, he is a critic of strong distinctions between positive and negative liberty. See Holmes & Sunstein, *supra* note 4, at 40–43 (criticizing attempts to cleanly divide negative rights and positive rights). Indeed, Sunstein and Holmes argue that the Takings Clause, U.S. Const. amend. V, cl. 4, and the Contracts Clause, *id.* art. I, § 10, cl. 1, protect positive rights to state remedies for property and contracts. Holmes & Sunstein, *supra* note 4, at 52–53.

⁹² U.S. Const. art. I, § 10, cl. 1; *id.* amend. V, cl. 4; *id.* amend. XIV, § 1. See also Holmes & Sunstein, *supra* note 4, at 52–53 (arguing that the Takings Clause and Contracts Clause protect positive rights).

intimate legal relationships⁹³—except the right to marry under substantive due process. To understand the right to marry, we need to understand the positive aspects of this right to marital association.

3. A Positive Right to Marry?

A handful of academics have argued that there should be a positive right to marry. Professor Martha Nussbaum has suggested it would be unconstitutional “if a state forbade everyone to marry.”⁹⁴ However, it is not clear whether she meant abolishing marriage or, like Sunstein noted, merely prohibiting ethical, social, or religious marriages. Elsewhere, she writes, marriage is “like voting: there isn’t a constitutional right to vote, as some jobs can be filled by appointment. But the minute a state offers voting, it is unconstitutional to fence out a group of people from the exercise of the right.”⁹⁵ In that case, her right to marry is a right to equal access. In any case, Nussbaum offers no full defense of the positive aspects of the right to marry.

Professor Carlos Ball has argued that the right to marry “imposes positive obligations on the state to act.”⁹⁶ Relying on *Zablocki* and *Turner v. Safley*, Ball argues that the state has a constitutional duty to offer benefits for spousal relationships.⁹⁷ In *Turner*, the Court found that prison inmates had a right to marry because they could share in the state benefits of marriage: a public expression of commitment, community recognition, and various legal rights and benefits.⁹⁸ Ball addressed the issue of why states must support marriages, but not help citizens exercise other fundamental liberties. He argues that a right against interference offers sufficient protection for speech, association, and abortion, because these acts “can and do[] take place in the absence of state support,” but “civil marriage (at least as we have traditionally understood it in this country) cannot exist in the absence of state recognition. It is State action that

⁹³ Marriage is not protected by the Contracts Clause, U.S. Const. art. I, § 10, cl. 1. See *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁹⁴ Martha C. Nussbaum, *A Right To Marry?*, 98 Calif. L. Rev. 667, 687 (2010).

⁹⁵ *Id.* at 688.

⁹⁶ Ball, *supra* note 12, at 1205.

⁹⁷ *Id.* at 1199, 1202–03 (discussing *Turner v. Safley*, 482 U.S. 78 (1987) and *Zablocki*, 434 U.S. 374).

⁹⁸ 482 U.S. at 95–96.

creates the very institution that makes the exercise of the fundamental right to liberty in the context of marriage possible.”⁹⁹

Unfortunately, Professor Ball’s theory of the right to marry falls short for the same reasons as the Supreme Court doctrine. As I argued above, the benefits of marriage that the Court lists for justifying the right to marry do not derive from state action.¹⁰⁰ Couples can proclaim their commitment publicly, and a community can recognize that commitment even if the relationship has no legal effect. Of course, benefits like tax breaks require state action, but such benefits are not fundamental. Ball asserts that marriage requires law, but never explains why. He needs to demonstrate that intimate liberty, unlike liberty of speech or association, cannot be exercised without a legal institution. Like the Supreme Court before *Obergefell*, Ball misses the link between the intimate liberty and *civil* marriage.

C. The Right to Marry in Obergefell

Obergefell offers the Supreme Court’s most extensive discussion of the right to marry.¹⁰¹ *Obergefell* improves on prior doctrine by not describing the right to marry as a negative liberty and by suggesting a normative analytical framework for the right to marry. Nevertheless, the opinion fails to develop an adequate conception of the positive right to marry. While the Court searched for normative reasons to treat marriage as a basic right, the opinion fails to recognize it needs reasons for an *individual* right to marriage *law*. Consequently, the Court’s justifications largely miss the mark. The central normative question—for which *Obergefell* offers little guidance and to which I return in Part III—is why does liberty in our personal lives require legal intervention?

⁹⁹ Ball, *supra* note 12, at 1206 (footnote omitted).

¹⁰⁰ See *supra* Subsection I.A.1; text accompanying notes 32–38.

¹⁰¹ See *Obergefell*, 135 S. Ct. at 2603–04 (discussing the fundamental right to marriage). The Court’s Equal Protection Clause analysis is secondary to its Due Process Clause analysis, because the Court holds that the “denial to same-sex couples of the right to marry . . . serves to disrespect and subordinate them.” *Id.* at 2604. The Court similarly reinterprets *Zablocki*, 434 U.S. 374, as arguing that “the essential nature of the marriage right, . . . made apparent the law’s incompatibility with requirements of equality.” *Obergefell*, 135 S. Ct. at 2603.

1. A New Doctrinal Framework

Obergefell suggests a new analytical framework for fundamental rights cases. In place of the traditional two-step analysis, the Court asks two new, distinct questions: What reasons justify treating the right to marry as a fundamental right; and do those reasons apply differently to opposite-sex and same-sex marriages? This new framework has two implications.

First, the Court defines the right to marry normatively rather than historically. Judges defining fundamental rights must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”¹⁰² The Court repudiates both troubling aspects of the historical test advocated by Justice Powell in *Zablocki* and adopted in *Glucksberg*.¹⁰³ Instead of asking whether particular marriages were historically protected,¹⁰⁴ the Court evaluates whether a restriction is consistent with “the basic reasons why the right to marry has been long protected.”¹⁰⁵ Moreover, instead of defining marriage rights “in a most circumscribed manner, with central reference to specific historical practices,”¹⁰⁶ the Court asks whether the plaintiffs may participate in “the right to marry in its comprehensive sense.”¹⁰⁷

Second, the new framework compresses the second, justificatory stage. In the old framework, the court first asked whether the law infringed the right to marry and then evaluated the state’s justifications for the infringement. *Obergefell* offers little second-stage analysis. The Court’s analysis is largely complete once it concludes in Section III that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”¹⁰⁸ In a traditional analysis, Section IV would have evaluated the states’ purported justifications for impinging on the right. Instead, the Court barely responds to the defendants’ arguments for banning same-sex marriage and does not even bother to articulate a standard for review.

¹⁰² *Obergefell*, 135 S. Ct. at 2598.

¹⁰³ See supra notes 54–66 and accompanying text.

¹⁰⁴ *Obergefell*, 135 S. Ct. at 2598. (“History and tradition guide and discipline this inquiry but do not set its outer boundaries.”).

¹⁰⁵ *Id.* at 2599.

¹⁰⁶ *Id.* at 2602.

¹⁰⁷ *Id.* Professor Kenji Yoshino has noted that the Court is unclear whether it jettisons the *Glucksberg* methodology altogether, or whether the *Glucksberg* historical approach remains appropriate in some domains. See Yoshino, supra note 16, at 165–66.

¹⁰⁸ *Obergefell*, 135 S. Ct. at 2599.

The lower courts in other cases had engaged at length with the “responsible procreation” and “optimal child-rearing” arguments offered against same-sex marriage.¹⁰⁹ In contrast, *Obergefell* offers a cursory response to several objections to same-sex marriage: Judicial recognition limits democratic authority, would harm the institution of marriage, and impugns religious objectors.¹¹⁰ In each case, the Court’s response is simple: Such reasons cannot justify restrictions on a basic right. The mere fact that a law was enacted democratically does not justify curtailing fundamental rights.¹¹¹ The states had no “foundation” for finding that same-sex marriage would harm the institution of marriage by leading to fewer opposite-sex marriages.¹¹² And finally, religious individuals “may continue to advocate . . . [that] same-sex marriage should not be condoned,” but the Constitution does not allow states to prohibit same-sex marriages in the name of religious orthodoxy.¹¹³

Some will argue that the Court’s analysis shortchanged the states’ arguments because the Court failed to adequately address the arguments against same-sex marriage. However, the new framework is better suited for fundamental rights jurisprudence. Fundamental rights place limits on government conduct. For rights to genuinely restrict state action, they must receive some special weight in decision making.

Most liberal political philosophers accept some version of the idea that only special types of justifications warrant restricting rights. John Rawls’s principle of “priority of liberty” states that “liberty can be restricted only for the sake of liberty,” not for the sake of economic or social goods.¹¹⁴ Professor Robert Nozick claims that rights place “side-constraint[s]” on the methods that others may use to pursue their policy goals, including protecting other rights.¹¹⁵ Professor Ronald Dworkin

¹⁰⁹ See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 660–64 (7th Cir. 2014) (discussing the ability of same-sex couples to raise children); *Bostic v. Schaefer*, 760 F.3d 352, 381–84 (4th Cir. 2014) (discussing “responsible procreation” and “optimal childrearing”).

¹¹⁰ *Obergefell*, 135 S. Ct. at 2605–07.

¹¹¹ *Id.* at 2605 (“[W]hen the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decisionmaking. This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity. . . . An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.” (citation omitted)).

¹¹² *Id.* at 2607.

¹¹³ *Id.*

¹¹⁴ John Rawls, *A Theory of Justice* § 39, at 214 (rev. ed. 1999).

¹¹⁵ Robert Nozick, *Anarchy, State, and Utopia* 29 (1974).

contends that rights are “political trumps held by individuals” against impositions in the name of the common good.¹¹⁶ Despite their differences, these theorists recognize a shared feature of basic rights: A limit on the scope of a right can be justified only by the kind of reasons that justify the right in the first place.¹¹⁷ The states opposing same-sex marriage needed to show, in Professor Jeremy Waldron’s terms, an “internal relation” between the rights and the challenged restriction.¹¹⁸

This basic aspect of rights discourse clashes with both phases of the old doctrinal framework. The “substantial interference” language could never be a neutral threshold test, because the only way to determine if a state action impinges on the right to marry is to consider the reasons underlying the right. Moreover, an open-ended justificatory stage conflicts with the function of rights, because a right should not be balanced against just any ordinary policy reason. The second stage of the traditional right to marry framework tries to respect this limit by demanding “important” or “substantial” state interests, but offers no guidance for deciding what state interests are sufficiently important.

Obergefell’s framework responds to both problems left open by the Court’s prior analysis. The scope of a right and the valid reasons to limit its exercise are defined by the reasons for treating it as fundamental. Once the Court concluded that all four of the reasons for treating marriage as fundamental applied equally to opposite and same-sex marriages,¹¹⁹ there was little point in a second stage analysis. Those four reasons exhaust most permissible state justifications for limiting anyone’s right to marry, including same-sex couples. The state’s only remaining option was to offer a truly compelling justification for overriding the fundamental right of same-sex couples to marry, and defendants offered no plausible arguments in that vein.

¹¹⁶ Ronald Dworkin, *Taking Rights Seriously*, at xi (1977).

¹¹⁷ I do not mean to imply that rights are absolute trumps that cannot be overridden by other rights or by interests of sufficient magnitude, see Frederick Schauer, *A Comment on the Structure of Rights*, 27 *Ga. L. Rev.* 415, 429 (1993) (arguing that rights may be overridden by states provided that state interest is strong enough), only that not every ordinary interest can justify limiting or overriding a right. Moreover, rights must be defined at a sufficient level of generality to give states leeway to select different institutional realizations based on moral disagreement or on considerations like administrative efficiency.

¹¹⁸ Jeremy Waldron, *Rights in Conflict*, 99 *Ethics* 503, 516–18 (1989).

¹¹⁹ *Obergefell*, 135 S. Ct. at 2599.

2. *Obergefell's Conception of the Right to Marry*

The Court articulates its conception of the right to marry by explaining how the reasons for regarding marriage as fundamental determine the scope of the right. Unfortunately, here, at the crucial moment, the Court's analysis of the interests and the rights they justify fall short. *Obergefell* lists four "basic reasons why the right to marry has been long protected": (1) marital choices are essential for individual autonomy; (2) marital relationships are valuable to individuals; (3) marriage "safeguards children and families"; and (4) "marriage is a keystone of our social order."¹²⁰ The list lacks any apparent conceptual unity. I address the arguments in reverse order, in order of their increasing plausibility. Arguments four and three largely miss their mark, although reconstructed versions resonate with a right of equal access. Arguments two and one are the best candidates for justifying a positive right to marry, but they also require substantial reconstruction.

a. Marriage and the Social Order

The Court's fourth justification for the right to marry, that "marriage is a keystone of our social order," falls apart under minimal inspection. The Court holds that despite modern social changes, "[m]arriage remains a building block of our national community," and "[f]or that reason, . . . society pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."¹²¹ After reciting the impressive list of government benefits that spouses receive, the Court concludes 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."¹²² Denying these benefits to same-sex couples makes their relationships unstable and "teach[es] that gays and lesbians are unequal."¹²³ This justification divides into two parts: a consequentialist argument and an equal protection argument.

The first part seems to argue that the right to marry is fundamental because marriage is socially important, so much so that states regulate and incentivize it. This argument is not persuasive. Individual rights can

¹²⁰ Id. at 2599–601.

¹²¹ Id. at 2601.

¹²² Id.

¹²³ Id. at 2602.

be justified as means to collective ends (such as the “marketplace of ideas” justification for free speech), but the Court does not articulate a consequentialist argument for the right to marry or even hint at how to construct such an argument. The opinion does not explain why an individual right to civil marriage would support the social institution of marriage or why marriage supports the American social or political order.

The Court tries to shore up its argument with quotations from Alexis de Tocqueville and *Maynard v. Hill*,¹²⁴ but the Court uses these quotes in a facile way without engaging their reasoning. De Tocqueville argued that marriage supplies American men with a peaceful “bosom” to recover from the “turmoil of public life,”¹²⁵ but surely this is an insufficient reason for the Court to regard marriage as the “keystone” of society.¹²⁶ The Court’s appeal to *Maynard* is ironic, because Justice Field’s assertion that marriage is “the foundation of the family and of society” was a premise in his argument for plenary legislative control of marriage.¹²⁷ The Court’s assertion that marriage is “the keystone of our social order”¹²⁸ remains an *ipse dixit*, and the Court’s move from this premise to an individual right to marry is a non sequitur. The Court reasonably felt the need to acknowledge precedent emphasizing the social importance of marriage, but this section repeats *Zablocki*’s mistaken attempt to bake consequentialist state interests into the definition of the right to marry.

If the argument that marriage is a “keystone” of society is so bad, why did the Court include it? There is a more charitable reading. Although the Court does not mention the “synergy” of due process and equal protection until later in the opinion,¹²⁹ this argument might assume an equal access right to marriage.¹³⁰ The law increased the significance of mar-

¹²⁴ Id. at 2601 (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888); Alexis de Tocqueville, 1 Democracy in America 309 (Henry Reeve trans., rev. ed. 1990)).

¹²⁵ de Tocqueville, supra note 122, at 304.

¹²⁶ See *Obergefell*, 135 S. Ct. at 2601 (citing *Maynard*, 125 U.S. at 211).

¹²⁷ *Maynard*, 125 U.S. at 211. Compare *Obergefell*, 135 S. Ct. at 2601 (arguing that states made marriage the center of our social order and so must extend it to same-sex couples), with *Maynard*, 125 U.S. at 205 (“Marriage, as creating the most important relation in life, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.”).

¹²⁸ *Obergefell*, 135 S. Ct. at 2601.

¹²⁹ Id. at 2603.

¹³⁰ See supra Subsection I.B.1.

riage by attaching benefits and “placing [marriage] at the center of so many facets of the legal and social order.”¹³¹ Once law intervenes to support marriages, the law interfered with other relationships by relegating some couples to cohabitant status. As the Court observed, denying same-sex couples the same “constellation” of benefits “consigned [them] to an instability many opposite-sex couples would deem intolerable in their own lives.”¹³² Once the state builds *legal* marriage itself to a visible and precious status, excluding couples from legal marriage can become a way to deny their equality. No state can bestow or remove our innate dignity, but states can slander a person’s equal status by publicly withholding valuable rights.¹³³

Of course, this interpretation replicates the problems described above—most importantly, a right of equal access is not a right to *civil* marriage. An equal access right assumes the government interferes with liberty interests that are not sufficient to be self-standing fundamental rights. The argument requires some explanation of the value of the underlying liberty interest, so the Court naturally concludes this Section by saying that “[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage.”¹³⁴ Yet, as Justice Thomas reminded us, marriage’s transcendent purposes do not depend on legal recognition.

b. Marriage and Children

The Court’s “third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of child-rearing, procreation, and education.”¹³⁵ This argument has two warring parts. On one hand, the Court uses the idea of family to bring same-sex couples into the fold of marriage. The Court notes that “many same-sex couples provide loving and nurturing homes to their children,” and their children will benefit as much as others will from the material, social, and psychological benefits of civil marriage.¹³⁶ Laws

¹³¹ *Obergefell*, 135 S. Ct. at 2601.

¹³² *Id.*

¹³³ See *id.* at 2639 (Thomas, J., dissenting) (arguing that the American government is incapable of bestowing dignity on persons). Contrary to Justice Thomas’ uncharitable reading, the Court is not assuming law can bestow dignity on persons, but that the law denies them liberty to slander their equal dignity.

¹³⁴ *Id.* at 2602 (majority opinion).

¹³⁵ *Id.* at 2600.

¹³⁶ *Id.*

banning same-sex marriage “harm and humiliate the children of same-sex couples,” which “conflicts with a central premise of the right to marry.”¹³⁷

On the other hand, the Court denies any necessary connection between marriage and reproduction.¹³⁸ The constitutional right to marry cannot be restricted to those able to procreate sexually, because the “ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State,” and because the Constitution protects the right of spouses not to procreate.¹³⁹ This argument fends off the claim—without dignifying it with a full response—that states may limit marriage to opposite-sex couples because only they can produce children with a genetic tie to both parents.

The Court’s vacillating attempt to ground the right to marry in child-welfare is perplexing. Is child-rearing a “central premise of the right to marry,” or merely one “aspect[.]” of marriage?¹⁴⁰ If child-rearing is not an essential function of marriage, then why does it matter for the right to marry that same- and opposite-sex marriages are equally beneficial for children?

The Court’s muddled reasoning reflects a blend of litigation strategy and family law history. The opponents of same-sex marriage had tried to connect child welfare, sexual reproduction, and opposite-sex marriage. At the time of *Griswold* and *Zablocki*, this connection was intuitive for courts. Marriage was the only way to have legitimate children, which is why *Pierce v. Society of Sisters*,¹⁴¹ *Meyer v. Nebraska*,¹⁴² and *Zablocki* describe the right to marry as part of a package with the right to “establish a home and bring up children.”¹⁴³ Openly moralistic laws punished adultery, cohabitation, and illegitimacy, in an attempt to force couples to have sex only in marriage. But times have changed. Modern law has severed the most coercive connections between sex, reproduction, child-rearing, and marriage. States no longer coerce parents into marriage by punishing their illegitimate children. *Lawrence* gave constitutional protection to sex outside marriage, and the remaining laws against cohabita-

¹³⁷ Id. at 2600–01.

¹³⁸ Id. at 2601 (“That is not to say the right to marry is less meaningful for those who do not or cannot have children.”).

¹³⁹ Id.

¹⁴⁰ Id. at 2600–01.

¹⁴¹ 268 U.S. 510, 534–35 (1925).

¹⁴² 262 U.S. 390, 399 (1923).

¹⁴³ Id. at 2600 (quoting *Zablocki*, 434 U.S. at 384).

tion are obsolete and likely unconstitutional. The law still gives married spouses parental presumptions, but these laws are often now justified as attempts to benefit children by protecting their established parental relationships.¹⁴⁴

The opponents of same-sex marriage, sensing courts would no longer accept moralistic justifications, tried to weave together family law's old and new strands, arguing that marriage may be limited to opposite-sex couples because children fare best when cared for by parents of two different genders.¹⁴⁵ This proposition is largely contradicted by psychological evidence,¹⁴⁶ which demonstrates that same-sex couples are equally capable of raising children and more likely to foster and adopt needy children.¹⁴⁷

Moreover, once the opponents of same-sex marriage embraced child welfare as the primary reason for marriage, this created a strategic opening for advocates who tried to turn the table by arguing that the ability of same-sex couples to raise children well justified recognizing their right to marry. While the advocate's premise is correct, this flipped argument is invalid. States should promote marriage if doing so benefits children overall, including children in unmarried families. Protecting child welfare might also be a legitimate reason to restrict intimate liberty, such as in child custody cases when one parent wants to live with a convicted child abuser. Yet, the fact that marriage can benefit children does not

¹⁴⁴ Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 Fla. St. U. L. Rev. 645, 663 (2014).

¹⁴⁵ See, e.g., *DeBoer v. Synder*, 772 F.3d 388, 427–28 (6th Cir. 2014) (Daughtrey, J., dissenting) (discussing how the majority rejected an optimal child-rearing argument); *Bostic v. Schaefer*, 760 F.3d 352, 383–84 (4th Cir. 2014) (rejecting the argument that children are best reared by opposite-sex couples).

¹⁴⁶ See *DeBoer*, 772 F.3d at 425; Brief of the American Psychology Ass'n et al. as Amici Curiae in Support of Petitioners at 26 n.48, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713, at *26 (offering evidence of lack of negative psychological effects on children of same-sex partners). Respondents and their *amici* tried to rebut the scientific consensus and rehabilitate contrary studies. See, e.g., Brief of Amici Curiae 100 Scholars of Marriage in Support of Respondents at 13, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519039, at *13 (arguing that allowing same-sex marriages would expose children of same-sex couples to "enormous risks"); Brief of the Institute for Marriage and Public Policy et al. as Amici Curiae in Support of Respondents at 17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1545070, at *17. (arguing that the psychological effects of same-sex marriage are largely unknown).

¹⁴⁷ See Brief of the American Psychology Ass'n et al. as Amici Curiae in Support of Petitioners, *supra* note 146, at 17 n.33, 22–26.

justify a constitutional right to marry, any more than the fact that education benefits children justifies a constitutional right to public education. Policy questions about child welfare are distinct from questions about the scope of the right to marry.

c. The Value of Marital Relationships

The Court's second argument is closer to its target of justifying a fundamental right to marriage, but still wide of the mark. The Court argues that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."¹⁴⁸ The Court invokes *Griswold*'s famous homage to the sanctity of marriage as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."¹⁴⁹ The Court further argues that "the right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other,'" including commitments to "companionship and understanding and assurance" of future care.¹⁵⁰

As I discussed above, this argument cannot justify a fundamental right to marry.¹⁵¹ Even if marriages are valuable enough to warrant a special title and material benefits, this reasoning does not justify a fundamental right. Individuals can seek companionship and reassurance without legal marriage. Their relationships can have dignity without legal benefits. The Court glimpses this problem at the end of its argument, where it admits *Lawrence* already protects same-sex couples' right to "intimate association."¹⁵² This admission should have prompted the Court to ask why couples who want commitments need more than a right to intimate association. Instead, the Court blithely asserts that it "does not follow that freedom stops" with permitting "individuals to engage in intimate association without criminal liability."¹⁵³ The "full promise of liberty" requires more.¹⁵⁴ But why? That is the central difficulty.

¹⁴⁸ *Obergefell*, 135 S. Ct. at 2599.

¹⁴⁹ *Id.* at 2599–2600 (citing *Griswold*, 381 U.S. at 486).

¹⁵⁰ *Id.* at 2600 (first quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013)).

¹⁵¹ See *supra* Subsection I.A.1.

¹⁵² *Obergefell*, 135 S. Ct. at 2600.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

d. Personal Choice Regarding Marriage

The Court's first argument is its most promising. A "first premise" of the marriage precedents "is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."¹⁵⁵ Marital choices are central exercises of autonomy because marriage determines the course of our lives and shapes our identity. The Court suggests two reasons for the centrality of these choices. First, it quotes Justice Margaret Marshall in *Goodridge v. Massachusetts*, who wrote that marriage is "among life's momentous acts of self-definition," because it "fulfils [sic] yearnings for security, safe haven, and connection that express our common humanity."¹⁵⁶ In addition, the Court explained, "through [marriage's] enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."¹⁵⁷ Despite Justice Scalia's mockery,¹⁵⁸ the meaning of this sentence is sufficiently clear. Marriage's commitments enable two individuals to exercise their liberty together. The choice to marry is a central exercise of autonomy for two reasons: The bonds themselves express our shared humanity and the bonds shape our other exercises of liberty.

This discussion of marital autonomy is a substantial advance on previous cases, but it still does not escape the dominant negative conception of rights. The Court still emphasizes personal choices, without explaining why a liberty to make personal choices entails a claim to legal benefits of marriage. The Court still analogizes marriage to "choices concerning contraception, family relationships, procreation, and childrearing" without acknowledging that those are negative liberty rights.¹⁵⁹ Justice Thomas observes—without acknowledging the irony that he dissented in *Lawrence*¹⁶⁰—these states no longer prevent same-

¹⁵⁵ Id. at 2599.

¹⁵⁶ Id. (quoting *Goodridge v. Massachusetts*, 798 N.E.2d 941, 955 (Mass. 2003)).

¹⁵⁷ Id.

¹⁵⁸ Id. at 2630 (Scalia, J., dissenting) ("Of course the opinion's showy profundities are often profoundly incoherent. 'The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.' (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.)" (emphasis in original) (footnote omitted)).

¹⁵⁹ Id. at 2599.

¹⁶⁰ 539 U.S. at 605 (Thomas, J., dissenting).

sex couples from forming “enduring bonds” that will satisfy their need for security and provide a platform for exercising their other liberties.¹⁶¹

Despite its infelicities, *Obergefell* improves the Court’s articulation of the right to marry. Its doctrinal framework reflects a more sophisticated picture of fundamental rights. The scope of the right to marry should be determined by the reasons for regarding civil marriage as a fundamental right. *Obergefell* is less successful in explaining the justifications for the right to civil marriage. The Court still assumes the right to marry protects private decisions and marriage law promotes social welfare. Like previous cases and academic writing, *Obergefell* is still missing the internal connection between intimate liberty and law.

II. RECONCEPTUALIZING THE RIGHT TO MARRY

Judges and academics tied the right to marry in knots because they were using a fuzzy conception of the right. The right to marry has many elements, and distinct elements have been at play at different times. We need to isolate the components of this right and clarify their relationships to one another. We need precision, which requires getting distance from constitutional theory. This Part analyzes the right to marry using Wesley Hohfeld’s widely accepted framework for describing legal relations.¹⁶² This analysis will identify those aspects of civil marriage—many ignored in constitutional theory—that could plausibly form the basis of a positive right to marry.

The most important legal rights do not consist of one simple right. Rather, they are “molecular rights” composed of many legal relations.¹⁶³ The right to marry is no exception. It has at least five nested components:

1. Spouses’ claims, duties, privileges, powers, and liabilities with respect to one another;

¹⁶¹ *Obergefell*, 135 S. Ct. at 2635–36 (Thomas, J., dissenting).

¹⁶² Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913). See generally George W. Rainbolt, *The Concept of Rights* 31–34 (2006) (defining a refined contemporary Hohfeldian scheme); Leif Wenar, *Rights*, § 2.1, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta et al. eds., Fall 2011 ed.), <http://plato.stanford.edu/archives/fall2011/entries/rights/> (summarizing the classic Hohfeldian framework); Pierre Schlag, *How to Do Things with Hohfeld*, 78 *L. & Contemp. Probs.* 185 (2015) (same).

¹⁶³ Wenar, *supra* note 162, at § 2.1; Schlag, *supra* note 162, at 217–20.

2. Spouses' claims, duties, privileges, powers, and liabilities with respect to third parties;
3. Fiancés' powers to create the first-order legal relations in (1) and (2);
4. Fiancés' privileges to exercise or not the power in (3);
5. Higher-order legal protections for (1)-(4), which may include
 - a. Claims against government interference with exercise of the legal relations in (1)-(4),
 - b. Immunity for the legal relations in (1)-(4), and
 - c. Claims on the government to create the legal relations in (1)-(4).

The first and second components constitute marriage as a legal status. The third and fourth enable citizens to control their marital status. The fifth protects citizens' marital status and their power to control it. This fifth category includes the plausible candidates for a fundamental right, including a right to create marriage's legal relations, a right to exercise that power without state interference, and a right to prevent the state from altering the relationships we create. After analyzing these five aspects of the right to marry in Part II, I will present a full-blown normative defense of the positive right to marry in Part III.

A. The Status of Civil Marriage: "Internal" and "External" Marital Norms

The legal status of marriage consists in legal relations between the spouses and between spouses and third parties. A full catalogue of marital rights would fill a domestic relations treatise and spills over into tax, welfare, employment, and immigration law. Nevertheless, a brief survey will help illustrate the breadth of civil marriage and help identify its core elements. Moreover, marriage law includes all six of Hohfeld's legal relations: claims, duties, privileges, powers, immunities, and liabilities. This brief survey of marriage law also offers a quick refresher course on Hohfeld's classificatory scheme before I enter more controversial territory.

Marriage law can be divided usefully into “internal” and “external” legal relations.¹⁶⁴ The two categories are not fully distinct, but they offer a helpful heuristic. First, marriage alters the legal relations between spouses. Spouses obtain a set of reciprocal claims and duties. For instance, spouses have a legal duty to support one another financially. This duty correlates with several legal claims. If the couple separates, a dependent spouse has a claim for alimony *pende lite*. If they divorce, spouses have a claim to the marital property and maybe ongoing maintenance. If the marriage ends in death, the surviving spouse has a claim to an elective share. In Hohfeld’s scheme, claims and duties are correlative: I have a “claim” on someone if and only if they have a “duty” to me to do some act (or refrain from doing some act).¹⁶⁵ To say that a dependent spouse has a claim to support means his husband has a duty to pay alimony, share marital assets, etc.

Marriage also alters spouses’ privileges with respect to one another. I have a “privilege” to do some act if and only if I have no duty to a specific person to refrain from doing it.¹⁶⁶ For instance, in states where adultery remains a ground for divorce, spouses have a duty to their partners not to engage in extramarital sexual affairs. In other words, spouses no longer have a privilege to engage in sexual relations outside the marriage.¹⁶⁷

¹⁶⁴ For a similar division of marriage into “intrinsic economic relationships,” or the private economic obligations of the spouses, and “extrinsic economic incidents,” or government benefits, see Maltz, *supra* note 11, at 957–58.

¹⁶⁵ Hohfeld, *supra* note 162, at 32; Wenar, *supra* note 162, at § 2.1.2. For example, suppose Anne hires Betty to build her house. Betty has a claim on Anne to build the house, and Anne has a duty to Betty to build the house. Under Hohfeld’s definition, any legal duty correlates with a claim held by another person or persons. Anne has a claim against Betty if and only if Betty has a duty to Anne. In contrast, many moral duties lack correlative claim rights. I may have a moral duty without any correlative claim holder (to donate to charity) or a duty to myself with no correlative claim at all (not to sell myself into slavery). Contrary to Hohfeld’s stipulation, some legal duties seem to lack correlative claims. For instance, although the United States has a duty to “guarantee to every State in this Union a Republican Form of Government,” U.S. Const. art. IV, § 4, cl. 1, the Court has held that no individual has an enforceable claim. *Luther v. Borden*, 48 U.S. (7 How.) 1, 2 (1849).

¹⁶⁶ Hohfeld, *supra* note 162, at 32–33; Wenar, *supra* note 162, at § 2.1.1. For example, Anne has a privilege to use the beach by Betty’s house if and only if Anne has no duty to Betty not to use the beach. Importantly, Anne’s privilege does not imply that Betty must not build a fence that prevents Anne from using the beach. If Betty has a duty to not build the fence, then Anne has a claim that Betty not interfere. Nor does it imply that Anne is generally at liberty against everyone. She may have a duty to someone else to not use the beach.

¹⁶⁷ Just as the duty is owed to one’s spouse, the privilege is also relative to your spouse; consequently, if a spouse condones the adultery, it is no longer grounds for divorce. In the

Marriage also gives spouses the legal powers to alter one another's rights, privileges, and duties. A legal "power" is the ability to alter some other legal relation.¹⁶⁸ For example, in a community property state, each spouse can create debts payable from the other's marital income.¹⁶⁹ Spouses are also surrogate medical decisionmakers, which means one spouse has the power to consent to medical treatment on the others' behalf if she is incapacitated.¹⁷⁰ Anytime one spouse has this kind of legal power, the other spouse's rights are subject to a "liability." An incapacitated spouse's claim not to receive treatment is liable to be changed by her wife's consent. In contrast, a spouse cannot sell her partner's separate property. If your spouse tries to pledge your separate property as credit, the act is a legal nullity. The absence of a power is an "immunity."¹⁷¹ A spouse's right to exclude others from her separate property is immune from change by her partner.

The second category of marriage laws structures the couple's "external" legal relations with others. For instance, physicians have a duty to follow surrogate decisions by a patient's spouse. An incapacitated patient has a claim against the physicians; she can demand her physicians follow her spouse's directions, and the physicians lack the privilege to follow conflicting requests from parents or friends. Some marital claims are held against everyone. Under the old "heart balm" torts, such as alienation of affection, a jilted spouse could sue her partner's lover.¹⁷² In other words, everyone had a legal duty not to engage in sexual relations

twenty-one states where adultery remains a crime, each spouse also has a criminal duty owed to their spouse or the state, depending on one's theory of criminal law. Jolie Lee & Bob Laird, *New Hampshire Senate Votes to Repeal Anti-Adultery Law*, Map of State Adultery Laws USA Today (April 17, 2014), <http://www.usatoday.com/story/news/nation-now/2014/04/17/anti-adultery-laws-new-hampshire/7780563/> [<https://perma.cc/KF4E-P7GP>].

¹⁶⁸ Hohfeld, *supra* note 162, at 44–45 (1913); Wenar, *supra* note 162, at § 2.1.3. Consent is the prototypical power to change one's moral relations to others. If Anne invites Betty into her home, for example, Anne changes Betty's duty to Anne not to enter Anne's home into a privilege to enter.

¹⁶⁹ E.g., *Lezine v. Sec. Pac. Fin. Servs., Inc.*, 925 P.2d 1002, 1005–6 (Cal. 1996).

¹⁷⁰ E.g., *Tex. Health & Safety Code Ann.* § 313.004 (West 2010).

¹⁷¹ Wenar, *supra* note 162, at § 2.1.4. Like all Hohfeldian relations, powers and immunities are held by one person with reference to another person(s). Schlag, *supra* note 162, at 200. Your rights may be immune from change by a specific person or by everyone.

¹⁷² A handful of states still recognize claims against interlopers for alienation of affection or criminal conversation (despite its name, a tort). William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Torts Looking for A New Career*, 33 *Ariz. St. L.J.* 985, 989 & n.7, 992 n. 27 (2001).

with a married person.¹⁷³ Marriage also alters the couple's relationship to states and other institutions. In particular, marriage creates a variety of claims to welfare benefits from the state. A long list of marital benefits featured prominently in same-sex marriage cases and included favorable tax rules, health insurance benefits, social security benefits, immigration preferences, testimonial privileges, and parentage presumptions.¹⁷⁴

Some family law scholars argue a primary function of civil marriage is to mark relationships that receive special treatment.¹⁷⁵ Marriage licenses offer an efficient heuristic. Like property, marriage bundles a set of rights to help reduce transaction and information costs when couples encounter other individuals and the government. For example, at dinner parties, you are able to avoid awkward conversations about the nature of your relationship, and marital status offers a rough proxy for states trying to decide who will likely be a successful immigrant.¹⁷⁶

While signaling is an important function of marriage law, I doubt arguments about the priority of internal and external relations are productive, because the two sets of norms influence one another. The external marriage rules often presuppose the internal marital duties and privileges. For example, federal tax law permits spouses to file jointly because it assumes spouses share income and expenditures. State law makes spouses our default surrogate decisionmakers because it assumes spouses are most likely to know one another's preferences. Without marriage's internal moral and legal relations, these external signals would lose their conceptual footing. Of course, the dialogue goes both ways. Social and legal norms shape and influence couples' relationships. No one negotiates their relationship from scratch—most marriages reflect internalized social and legal norms. For example, the drafters of modern no-fault divorce adopted an equitable property scheme because they viewed marriage as an economic partnership. Their vision is now a predominant social conception of marriage. In addition, spouses often rely on social incentives to encourage compliance with their internal norms, which tends to press couples toward the “typical marriage.” Even if the

¹⁷³ *Id.* at 990–91.

¹⁷⁴ *Obergefell*, 135 S. Ct. at 2601; *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–56 (2003).

¹⁷⁵ E.g., *Mary Ann Case, Marriage Licenses*, 89 Minn. L. Rev. 1758, 1783–84 (2005).

¹⁷⁶ Kerry Abrams, *What Makes the Family Special?*, 80 U. Chi. L. Rev. 7, 16–19 (2013).

spouses prefer an unconventional marriage, their friends and family are less likely to reinforce their unconventional expectations.¹⁷⁷

B. Power to Create Legal Norms and the Privilege to Exercise It

In addition to defining spouses' relationship to one another and the world, the law gives spouses some control over those legal relationships. Marriage law includes various second-order legal rights, rights to change or protect the internal and external rights of marriage.

The most important second-order right in marriage law is the legal power to marry. The act of marriage is the exercise of a power to create marriage's first-order legal relationships.¹⁷⁸ By exchanging vows with a license and in front of an officiant, fiancés alter their moral, social, and legal relations to one another and third parties. Marriage law bundles a variety of legal relations together, empowering fiancés to change all of them in a single act. The default rule is that assent to marriage creates the full bundle of default marital relations. At one point, spouses were required to adopt the bundle wholesale, but now most jurisdictions empower fiancés to alter aspects of the relationship using premarital contracts. Common law marriage offers a second way to create this bundle of legal relations without the formal license or ceremonial requirements.¹⁷⁹

Contract law offers an alternative power to create some—but not all—of marriage's first-order relations. In most states, couples can enter cohabitation contracts that recreate marriage's property sharing arrangements. Anyone can execute a power of attorney giving someone else the power to make surrogate medical decisions. But not all marital benefits can be created by contract. Two states prohibit individuals from recreating remedies like equitable division or alimony through con-

¹⁷⁷ Mary Ann Case, *Enforcing Bargains in an Ongoing Marriage*, 35 Wash. U. J.L. & Pol'y 225, 254–55 (2011).

¹⁷⁸ This observation is not new, but we seem to forget its importance. See e.g., J.L. Austin, *How to Do Things with Words* 12–19 (1962) (describing marriage as a performative speech utterance); H.L.A. Hart, *supra* note 13, at 27–28, 43 (describing power-conferring rules).

¹⁷⁹ Washington imposes obligations on individuals who cohabit with the intention to share resources. *Connell v. Francisco*, 898 P.2d 831, 834–35 (Wash. 1995). The American Law Institute prosed extending similar duties to anyone who shares “a primary residence and a life together as a couple.” *Principles of the Law of Family Dissolution: Analysis & Recommendations* § 6.03(1) (2002) [hereinafter ALI Principles]. These are not power-conferring rules but first-order claims and duties conditioned on the occurrence of certain events. Hohfeld, *supra* note 162, at 44.

tract.¹⁸⁰ The “elective share” offers special protections only for spouses,¹⁸¹ and only married couples can file joint tax returns.¹⁸² Hospitals are not required to extend visiting privileges to non-family members, although Medicare or Medicaid rules now require recipient hospitals to extend visitation to domestic partners, family members, or friends.¹⁸³ Marriage is a state-conferred power to create these first-order legal relations in one fell swoop.

By default, everyone also has a *privilege to exercise the power to marry or not*. An unmarried person has no legal duty to marry or to refrain from marrying.¹⁸⁴ The privilege *not to marry* is protected by an absolute legal immunity. In other words, no one can create a legal obligation to marry. This immunity is a recent addition to American law. In the past, an engagement could be a binding promise, creating a legal duty for a person to marry his or her fiancé. A large minority of states still recognize the common law cause of action for breach of promise to marry.¹⁸⁵

The privilege *to marry* is trickier. The law is suspicious of attempts to create a duty not to marry.¹⁸⁶ Contracts that unreasonably restrain mar-

¹⁸⁰ *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

¹⁸¹ See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 Case W. Res. L. Rev. 83, 154 (1994) (discussing whether to extend forced share to cohabitants).

¹⁸² 26 U.S.C. § 6013 (2012).

¹⁸³ 42 C.F.R. § 482.13(h) (eff. Jan. 18, 2011).

¹⁸⁴ One might assume that a power implies the privilege to exercise it or not, but the three are separable. Suppose Anne enters a contract with Betty to build a house, but the contract violates Anne’s noncompetition agreement with Carol. Anne has the power to enter this contract, yet she has a duty not to, so she has no privilege to exercise her power. Suppose further then Anne promised Dan that she would build Betty’s house. Anne now has a duty to enter the contract with Betty, and so no privilege to refrain from exercising her power.

¹⁸⁵ Kelsey M. May, Comment, *Bachelors Beware: The Current Validity and Future Feasibility of a Cause of Action for Breach of Promise to Marry*, 45 Tulsa L. Rev. 331, 332 (2009) (listing twenty-two states with this cause of action). See, e.g., *Thorpe v. Collins*, 263 S.E.2d 115, 117 (Ga. 1980); *Bradley v. Somers*, 322 S.E.2d 665, 666 (S.C. 1984); *Stanard v. Bolin*, 565 P.2d 94, 97–98 (Wash. 1977). May also argues that state recognition of a private cause of action for breach of promise to marry is an unconstitutional infringement on the negative liberty to (not) marry, particularly insofar as these claims authorize punitive damages. May, *supra*, at 353–55.

¹⁸⁶ See 7 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 16:17 (4th ed. 1997); Romualdo P. Eclavea, 52 Am. Jur. 2d *Marriage* § 116 (2016). Professor Adam Hirsch offers a helpful comparison and analysis of the restrictions on contracts, donations, bequests, and trusts. Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 Minn. L. Rev. 2180, 2193–2206 (2011).

riage are not enforceable.¹⁸⁷ Similarly, gifts and bequests cannot be conditioned on a promise never to marry.¹⁸⁸ However, similar legal acts may be valid if, rather than preventing a person from marrying, they only narrow the range of permissible marriages for reasonable ends, like ensuring support or creating an incentive for one's child not to marry a specific person.¹⁸⁹ This line, of course, is difficult to draw consistently. Yet, it does appear the law protects some privilege to marry.

There is one universal way to alter your power and privilege to marry: by marrying. Consider the legal effect of bigamy statutes. These statutes do two things. They render any purported second marriage void *ab initio*.¹⁹⁰ They also make it a crime to marry or purport to marry a second person.¹⁹¹ Like fraud statutes, bigamy statutes create a criminal duty not to purport to exercise a legal power that you do not possess.¹⁹² By marrying one person, you extinguish your power to marry anyone else and obtain a new legal duty not to purport to marry anyone else.

One might use the phrase “the right to marry” to refer to this constellation of second-order marriage relations, including the power to marry and the privilege to exercise it. For example, a court might conclude, “Jack had no right to marry Ken, because he never finalized his divorce from Jill.” In this situation, “the right to marry” refers to both the power to marry and the privilege to use it. Jack cannot marry Ken because he lacks the legal power to marry again and because his duty to Jill negates his privilege to marry. Sometimes one might use the phrase “the right to marry” to refer to the immunity as well. A court might conclude, “Even though Lenny promised his father never to marry, Lenny still has the right to marry Mark.” Lenny still has the right to marry despite his promise, because an immunity prevents him from changing his privilege to marry into a duty not to marry. This constellation of “rights,” however, is not where the action lies when people are arguing about the constitutional right to marry.

¹⁸⁷ Restatement (Second) of Contracts § 189 (Am. Law Inst. 1981).

¹⁸⁸ Restatement (Second) of Property, Donative Transfers § 6.1 (Am. Law Inst. 1983) (condition on gift is valid if “dominant motive of the transferor is to provide support until marriage”).

¹⁸⁹ Romualdo P. Eclavea, 52 Am. Jur. 2d Marriage § 117 (citations omitted).

¹⁹⁰ E.g., Tex. Fam. Code Ann. § 6.202 (West 2006).

¹⁹¹ E.g., Tex. Penal Code Ann. § 25.02 (West Supp. 2016).

¹⁹² This resolves one superficial puzzle about bigamy. Since no one has the power to enter two marriages, bigamy seems to be a crime that no one can complete. Such purported exercises of a nonexistent power underlie many common frauds.

C. Four Versions or Aspects of the Right to Marry

As a right of constitutional magnitude, the right to marry encompasses a web of higher-order relations protecting the first four categories of relations in ordinary domestic relations law. The right to marry could include one or all of four distinct legal relations: (1) a claim to the legal benefits of marriage, (2) a claim against interference with exercise of the power to marry, (3) a legal immunity for the power to marry, or (4) a claim to the power to marry.

1. The Right to Marry as a Bundle of Simple Claim Rights

The simplest interpretation of the right to marry is as a claim right to public benefits. To say that a person has the right to marry would be equivalent to saying that the government has a duty to provide her with certain benefits. On this conception, the right to marry is a welfare entitlement restricted to married couples. This conception has been the universal target of academic criticism, and correctly so. Claim rights of this sort sound in distributive justice. It is difficult, if not impossible, to imagine why married couples would deserve additional state support—either as a matter of normative or positive constitutional theory. Justices Roberts and Thomas tried to discredit the plaintiff's case in *Obergefell* by characterizing it as a claim to public benefits.¹⁹³ If there is a fundamental right to marry, we need to look elsewhere.

2. The Right to Marry as a Liberty to Exercise the Power to Marry

The second interpretation of the right to marry and the focus of most Supreme Court doctrine is the liberty right. I have a “liberty right” if I have a bilateral privilege to perform some action or not and a claim against interference with that action. For example, freedom of speech includes a liberty right. I have no duty to speak or refrain from speaking, and the government has a duty not to interfere with my speech. This kind of liberty right is one essential component of the right to marry. However, previous theorists have often misunderstood which privileges the right protects from state interference.

Two avenues for interpreting the liberty to marry are dead ends. First, one might think that the liberty to marry is a claim against interference with marriage's first-order legal relations. The state might be obligated

¹⁹³ 135 S. Ct. at 2620 (Roberts, J., dissenting); *id.* at 2635–36 (Thomas, J., dissenting).

not to interfere with the couples' choice about how to arrange their property and support obligations. However, this liberty cannot plausibly be the central component of a right to marry. Marriage is a creature of law, and most of civil marriage's first-order rights are not privileges that could be protected by a simple claim against interference. The government inevitably intervenes to define and enforce marriage's default rules—rules about marital property rights and surrogate decision making, etc. Questions about interference arise only after the law sets these background rules.

Another option is to argue that the liberty right to marry is a claim against government interference with spouses' moral, social, or religious relationships. This is the negative liberty that Sunstein describes.¹⁹⁴ Individuals have a legal privilege to form relationships (which they may call "marriages" or something else) and the state has a duty not to interfere with those relationships. This is a more promising interpretation. Marriages can exist as moral, social, or religious relationships without law. For eons, individuals married without law. Moreover, nonlegal, intimate relationships are sufficiently valuable to justify rights on interest-based theories of rights.

Nevertheless, this interpretation is a blind alley. The first problem is that these interests do not justify a right *to marry*. Because moral, social, or religious *marriages* deserve no greater protection than other similar relationships, this interpretation subsumes the right to marry within a right to intimate or familial association. Yet, prison wardens or public employers can interfere with inmates' or employees' relationships in many ways without affecting their right to intimate association. The prison can limit inmates dating opportunities and restrict their contact with significant others. An employer can require his employee to work long hours or go on frequent business trips. If the right to marry is nothing but a protection against interference with relationships, then it should easily extend to these other circumstances. Of course, some authors writing about the right to marry want to unseat marriage as the privileged familial relation in exactly this way.¹⁹⁵ Because my goal is to understand the right to marry, I find this conception of the right unsatisfying.

¹⁹⁴ See *supra* Section I.B.

¹⁹⁵ See e.g., Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons from (and to) the Western World*, 25 *Duke J. Comp. & Int'l L.* 125, 135–38, 193–95 (2014).

In any case, this interpretation has a bigger problem. The *liberty* to form relationships offers only modest protection for intimate relationships. When states facilitate relationships, they do so through domestic relations law. Very few domestic relations laws are liberty rights. Intimate relationships are risky investments based on general commitments, which divorce law protects through division and alimony rules. If the right to marry is justified as a way to protect individuals' interests in relationships, then liberty rights are but a small component of the bundle. It is one thing to define the right to marry in a way that it appears to extend by definition to cohabitants or friendships; it is quite another to define the right in a way that suggests cohabitants or friendships have equal right to a system of status-based law.

We need a new interpretation of the liberty component of the right to marry. I propose we connect the liberty with the power to create marital rights and duties. Individuals have a privilege to exercise their power to marry or not, and the government has a duty not to interfere with their exercise of that privilege. In other words, states should not interfere with citizens' attempts to enter a civil marriage or their choice not to marry. The government violates this duty by imposing burdensome costs for choosing to marry or remain unmarried.

In most right to marry cases, the plaintiffs have alleged the government interfered with their attempt to marry. A simple way to violate this liberty would be to impose excessive licensing fees. The prison regulations at issue in *Turner v. Safley*¹⁹⁶ also violated this liberty. Inmates were required to obtain the warden's permission before the prison would allow them to perform a wedding ceremony.¹⁹⁷ They could call themselves married for personal or social purposes. They even still had the legal power to marry. If a prisoner had performed a secret ceremony without detection, his marriage would have been valid. The regulations interfered only with inmates' privilege to exercise their power to marry. Employers might interfere with marital liberty in a similar way, by requiring employees to remain single as a condition of employment. These

¹⁹⁶ 482 U.S. 78 (1987).

¹⁹⁷ *Id.* at 82. The warden's permission was not a condition for a valid marriage, unlike the judicial order required by Wisconsin in *Zablocki v. Redhail*, 434 U.S. 374, 375 (1978).

rules impose costs on the exercise of the power to marry, interfering with a prisoner's or employee's privileges to exercise that power.¹⁹⁸

As Professor Kaiponanea Matsumura has argued, individuals also have a "right *not* to marry."¹⁹⁹ More precisely, individuals have a privilege not to exercise their power to marry and a claim against state interference with that privilege. A state can violate this duty by punishing the choice not to marry or by coercing individuals to marry. Matsumura argues several states have violated domestic partners' right not to marry. In the wake of same-sex marriage rulings, some states chose to abolish their domestic partnership or civil union statutes and to convert all such partnerships into marriages unless the couple affirmatively opts out.²⁰⁰ Effectively, these states have threatened to withdraw valuable benefits from partners unless they marry. And even if the couples are willing to give up those benefits, the only way they can avoid becoming married is by dissolving their partnership, a burdensome procedure with steep financial and social costs.²⁰¹

Of course, this analysis does not suggest that any interference with the choice to marry violates the right to marry. As with any liberty right, it is difficult to determine precisely what level of adverse consequences qualify as interfering with the privilege and what reasons can justify that interference. Perhaps limiting prisoner marriages is necessary to prevent conflict. Employers may need to restrict spouses' work assignments to prevent nepotism. Evaluating restrictions on marriage may require answering difficult questions about the baseline we use to distinguish permissible offers from coercive threats. States may offer incentives for couples to marry, but there is something more coercive about withdrawing benefits from domestic partners unless they marry (by choice or by

¹⁹⁸ The Court left open the possibility that withdrawing the power to marry could be a legitimate punishment. *Turner*, 482 U.S. at 96 (distinguishing *Butler v. Wilson*, 415 U.S. 953 (1974)).

¹⁹⁹ Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *Fordham L. Rev.* 1509, 1541–44 (2016) (emphasis added).

²⁰⁰ *Id.* at 1511, 1521–23 (discussing Washington, Connecticut, Delaware, and New Hampshire). In addition, the Arizona state public benefits department informed same-sex state employees that their "domestic partners" would no longer receive employee benefits, but this decision involves the complicated interplay of employee policy, statutory law, and a judicial antidiscrimination order. *Id.* at 1520–21.

²⁰¹ *Id.* at 1550. Matsumura also argues the states violated domestic partners' rights when they received no notice of the change in law and so became married by default with no choice in the matter. *Id.* at 1548. This legal act is more precisely a violation of their immunity right, which I describe in Subsection II.C.3.

default).²⁰² These are some of the difficult questions encompassed in the Supreme Court's direct and substantial interference test.²⁰³

In addition, clarifying the nature of the liberty to marry illuminates another distinction often overlooked in marriage theory. Interference with the privilege to marry differs in kind from conditions on the power to marry itself. Some legal rules place conditions on the power to marry, such as capacity rules that define the minimum age for marriage. A few Supreme Court cases have involved rules that limit both the power to marry and the privilege to exercise it. In *Zablocki v. Redhail*, the challenged statute provided that child support obligors who tried to marry without court approval were subject to civil penalties and their putative marriages were void.²⁰⁴ The penalties interfered with the plaintiff's liberty right to marry. The nullity provision limited his power to marry, making it contingent on prior court approval. Similarly, the bigamy laws challenged in *Reynolds v. United States* punished anyone who tried to enter a second marriage and declared any purported second marriage void.²⁰⁵ The criminal punishment interfered with the privilege to marry, while the civil provisions extinguished their power to marry a second person.

The right to marry includes a claim against interference with exercise of the privilege or not, but these cases demonstrate that the liberty right does not exhaust the right to marry. The right must also include protection for the power to marry itself. It must include either an immunity for the power or a claim to the power.

3. *The Right to Marry as an Immunity*

The right to marry might also include various immunities. Hohfeldian "immunities" protect other legal relations from change. For example, I have no duty to mow your lawn (I have a privilege not to mow it), and you lack the power to create a duty for me to mow your lawn, which means my privilege is immune from your change. Of course, my privilege is not immune from all change. If I offer to mow your lawn, then I give you the power to change my privilege into a duty by accepting the offer. Immunities of this sort are essential to protect our ability to con-

²⁰² Id. at 1549–52.

²⁰³ See *supra* Subsection I.A.2. and text accompanying notes 45–53.

²⁰⁴ 434 U.S. 374, 375.

²⁰⁵ 98 U.S. 145, 165–67 (1878).

trol our duties through more precise channels like contracts. If the fundamental right to marry includes an immunity right, then the government lacks the authority to alter some part of marriage law—either to alter individuals’ marital status, their existing first-order marital relations, or their power to marry. In addition, the government would have a duty to citizens not to purport to exercise this power that it lacks.

The first possibility is that a person’s marital status is immune from government change. The state cannot marry or divorce a couple without their consent (or at least one spouse’s consent²⁰⁶). It is possible to imagine a system in which both individuals and the government could create or terminate marriages unilaterally. However, giving states this power would drastically diminish the value of marital commitments and our power to control them. Some immunity for marital status must be part of any fundamental right to marry, although I know of no cases that have recognized it.

A state might violate this immunity right by declaring an existing set of marriages void. Once couples exercise their power to marry, the government lacks the power to extinguish their marital status, at least without one party’s consent. Suppose, for example, a state declared tomorrow that any marriage entered into when the parties were under twenty-one years of age is now invalid. The law is an *ultra vires* act without legal effect, and the state has violated its citizens’ immunity right by purporting to exercise a power that it does not possess.²⁰⁷ A similar immunity claim might underlay the lawsuits filed by same-sex couples who married in one state and later moved into a nonrecognition state (this claim is complicated by the fact that the couple changed jurisdictions).²⁰⁸

²⁰⁶ *Maynard v. Hill*, 125 U.S. 190, 205–06 (1888) (holding state and territorial legislatures have power to grant divorce to one spouse without dissenting spouse’s presence or consent).

²⁰⁷ This immunity right is structurally similar to the Contracts Clause, which declares that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10. It prohibits states from releasing or extinguishing contractual obligations or impairing “substantial” contractual rights. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 431 (1934). Doctrinally, however, the Contracts Clause does not apply to marriage. *Maynard*, 125 U.S. at 210.

²⁰⁸ See e.g., Brief for Petitioners at 21–23, *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (No. 14-562), 2015 WL 860739, at *21–23. Matsumura notes that same-sex couples raised similar lawsuits after states refused to recognize marriages contracted during the brief window between a district court opinion striking a same-sex marriage ban and an appellate court’s stays of those orders. Matsumura, *supra* note 199, at 1536–38 (discussing *Caspar v. Snyder*, 77 F. Supp. 3d 616 (E.D. Mich. 2015); *Evans v. Utah*, 21 F. Supp. 3d 1192 (D. Utah 2014); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009)). These cases, however, raise complicated proce-

This immunity right also protects an aspect of what Matsumura calls the right *not* to marry: the right to remain unmarried. A state would violate its citizens' immunity right by marrying them without their permission.²⁰⁹ Matsumura contends that several states infringed this right by converting domestic partnerships into marriages without ensuring couples received notice of the change.²¹⁰ Trying to specify the limits of this immunity raises interesting challenges. States have long used common law marriage to impose marital duties on an unwilling partner. However, common law marriages arise only if both parties intend to marry and hold themselves out as such, in which case this doctrine is simply a way for couples to exercise their power to marry without *ex ante* state intervention. This immunity right raises more interesting challenges for laws that impose marriage-like obligations on cohabitants: Why would cohabitants have a right not to be married against their will but lack the right to avoid the marriage-like rights of Washington State's "meretricious relationship" doctrine?²¹¹ In any case, individuals have some immunity right from being married or divorced without their consent.

In theory, marriages could enjoy even broader immunity. Some have argued that existing marriage relations should be immune from government change. For example, some argued the switch to no-fault divorce violated the constitutional rights of married couples, who had married under the old system assuming only fault would justify divorce.²¹² The power to marry itself could also be generally immune from certain governmental changes. A nineteen-year-old might argue that a law raising the marriageable age to twenty-one deprives him of his right to marry. (The Contracts Clause, in comparison, does not limit states' authority to alter contract rules prospectively.²¹³)

These broader immunity claims, however, are hard to square with Supreme Court doctrine or the history of marriage. In *Maynard v. Hill*, the Court wrote that

dural questions about the status of the law and the responsibility of the parties and the courts in that brief interim period.

²⁰⁹ Matsumura, *supra* note 199, at 1545. See *infra* notes 233–34 and accompanying text.

²¹⁰ Matsumura, *supra* note 199, at 1548.

²¹¹ See Erez Aloni, *Deprivative Recognition*, 61 *UCLA L. Rev.* 1276, 1313 (2014) (describing ways states recognize cohabitants against their wishes to deny them state benefits).

²¹² *In re Marriage of Walton*, 104 *Cal. Rptr.* 472, 476 (Ct. App. 1972).

²¹³ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 234 (1827).

Marriage . . . has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.²¹⁴

Consistent with that power, states have drastically changed the power to marry and marriage's first-order relations. States have raised the marriageable age, expanded fault grounds for divorce, eliminated gendered marital rights, created no-fault divorce, and imposed equitable distribution schemes. These changes applied to existing marriages. Many couples married in a legal regime that permitted divorce only for fault and that left all property with its titled owner, but then divorced under a no-fault regime that split any property earned during marriage equitably.

While the right to marry plausibly includes an immunity for a couple's marital status, it is implausible to think that the right to marry includes immunity for marriage's individual legal incidents or rules defining the power to marry prospectively. On the other hand, there might be a few essential incidents of marriage that no state could eliminate without violating the right to marry, such as some protection at divorce. I develop some such arguments in the normative Section below.

4. The Right to Marry as a Claim Right to the Power to Marry

The final component of the right to marry is a claim to the power to marry. The government has a duty to enable individuals to marry. That is, individuals have a right to laws that empower them to create marriage's first-order legal relations, and the government has a duty to provide some regime of legal marriage. One way a state could violate this power right would be to stop licensing marriages. Another would be to refuse to recognize marriages for a group of people—such as barring interracial marriage. In the latter case, the government commits two wrongs: It deprives these citizens of the power to marry and it subjects them to this legal disadvantage because of their race. It is the former violation that distinguishes the right to marry.

Determining the precise scope of this power right involves more difficult questions—questions about the class of rights holders and the rela-

²¹⁴ 125 U.S. 190, 205 (1888).

tions that the power creates. First, what conditions may a state put on entering marriage without violating the power right to marry? The most salient issue is whether a state may limit the power to marry to individuals in opposite-sex, monogamous relationships. Second, what marriage rights must a state enable spouses to control?

Legal powers are derivative of the relations that they enable us to alter. A legal power exists only to modify some other right. Its importance lies in the ability to control those relations. If individuals have a power right to marry, then the state has a duty to provide a scheme of marital rights and duties and to provide some means for individuals to create and alter these obligations. Does the power to marry require a specific set of first-order relations? Importantly, although the significance of the power right depends on marriage's underlying rights, the two remain conceptually and normatively distinct. For example, whether the tax code confers a benefit on me is distinct from whether it gives me the power to control whether I receive the benefit. In addition, whether I should receive a tax break and should be able to control the tax break are distinct normative questions.

I have described above the difficulty with grounding the right to marry directly on marriage's first-order benefits. If tax benefits for relationships are not sufficiently important to justify a claim to public resources, it is even harder to argue that we have a fundamental interest in controlling whether our relationships come with tax benefits. Other "marital interests," such as the ability to form a family, might seem important enough to justify power rights. However, these interests do not require state intervention. *To justify a claim to the power to marry, one must identify incidents of legal marriage that individuals have a fundamental interest in controlling and that require state intervention.* In Part III, I will argue that we should not lump all of marriage's first-order relations in the same basket as public benefits. Some of marriage's first-order relations are private rights rather than public benefits, and the power to control the creation of these private legal rights is of fundamental importance.

In summary, using Hohfeldian categories, this Part has distinguished three aspects of the fundamental right to marry. The right to marry includes (1) a power right to marry, which is a claim that the government provide a scheme that individuals may use to create marriage's legal relations; (2) a liberty right to exercise the power, which is a claim that the government not interfere with an individual's choice to use their power

to marry; and (3) an immunity right for the marital status, which is an inability of the government to alter a couples' marital status without their consent. The liberty and immunity rights are derivative from the power right, but even the power right is not freestanding. Its importance depends on our interest in controlling some of marriage's underlying rights and duties. Part III identifies the interest that justifies the positive power right to marry.

III. NORMATIVE FOUNDATIONS OF THE POSITIVE RIGHT TO MARRY

This Part rebuilds a justification for the right to marry. A positive right to marry can be grounded in a commitment to equal liberty. Each person may pursue her ends as she chooses, insofar as doing so is consistent with equal liberty for others. This idea applies to intimate liberty as well: Everyone should be free to share their life with another person, if doing so can be consistent with equal liberty for both parties. The problem is that committed relationships carry open-ended duties of support that threaten both parties' liberty. When one person has a duty to support another's ends, the other person's choices define her duties. Her partner has a power over her liberty that threatens to render her subordinate. The flexible, open-ended commitments that define relationships conflict with the right to equal liberty. The role of fundamental private law rights is to specify this system of equal liberty.

As no-fault divorce law struggled to respond to traditional breadwinner-homemaker marriages, an intuitive sense of fairness shaped modern civil marriage into a scheme capable of serving this function. While a marriage is intact, the law creates space for spouses to shape their shared lives with flexible, open-ended duties. They have reciprocal duties of support, but the state will not enforce these duties absent blatant abuses of authority. Spouses can choose how to define their duties and how to fulfill them. Yet, these choices during marriage do not fix rights in case the marriage ends. Instead, the law uses equitable distribution, alimony, and the elective share to ensure those choices do not unfairly burden either spouses' ongoing liberty. Only within a system of law with marriage-like duties can two individuals hold the type of shared authority characteristic of intimate obligations without compromising both parties' equal liberty.

With this rationale for the right to marry in place, we can begin to discern the right's core protections and its limits. States must offer some scheme of indeterminate duties for relationships, which must include

rules to empower couples to create these duties. States have a duty not to interfere with their citizens' exercise of the power to enter this status. However, states are not obligated to extend this power to couples who do not want to take on indeterminate duties, such as cohabitants, or to relationships that are inconsistent with the equal liberty that marriage protects, such as underage or polygamous marriages.

A. Some Assumptions

Like any normative project, this Section of the paper must begin with some controversial assumptions. First, no theory of the right to marry can get off the ground without some assumptions about the nature of marriage-like relationships. For a rough prototype, I assume a conception of marriage as a "shared life."²¹⁵ Spouses unite their lives by making open-ended commitments to facilitate one another's ends.²¹⁶ Spouses typically live together, commingle funds, and invest jointly. They exchange domestic, financial, or sexual services. The many aspects of this relationship are united by a reciprocal, indefinite, and flexible commitment of mutual support. Spouses commit to support one another, without limiting where life takes them. They may enter their joint life with specific hopes and expectations, but their commitments are rarely so limited.

While this notion of shared lives is not neutral, its controversial aspects are limited in several ways. Most importantly, as will become clearer below, I will not rely on any claim about the value of sharing lives. My argument will not elevate marriage as a uniquely valuable relationship. Instead, I argue only that people in fact share lives and that they should be at liberty to do so.

In addition, I do not—as the law does not—limit the purposes for which spouses share their lives. Marriage is not limited to romantic, sexual, or parenting relationships. Of course, couples often commit to

²¹⁵ To forestall confusion, this concept does not track the idea of "shar[ing] a life together as a couple" adopted by the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations, § 6.03(7) (Am. Law Inst. 2002) [hereinafter "A.L.I. Principles"], although the ideas draw on similar intuitions.

²¹⁶ I resist calling marital commitments "promises," because promising has heavy moral freight and sufficient differences within the class of promises quickly make the concept unhelpful. In any case, I want to remain agnostic about the moral ground for marital obligations. My concern is whether two parties can hold such duties consistent with equal liberty. Even if marital obligations are promissory in nature, they remain imperfect and so raise the same problems.

sharing lives as part of romantic and parental commitments. Long-term sexual partners spend time together in the same residence, which is easier if they cohabit. It is difficult to coparent a child unless the parents coordinate their lives around the child, which is easier if parents share a home, domestic tasks, and finances. Sharing lives can facilitate sexual or parenting relationships, but spouses need not adopt these particular ends. The idea of “sharing lives” is consistent with relationships not yet recognized as entitled to legal protection. Deeply codependent friends without romantic feelings may share lives in ways that call for similar rights.

Some may argue that I should not use the title “marriage,” if I am open to extending legal protections to couples that social norms would not regard as married. However, most relationships with this level of shared living are marriages in the more specific social sense. Marriage law developed as a way to cope with such committed relationships. Once we understand why spouses have a right to legal protections, then we can ask whether other relationships warrant similar rights for similar reasons.

The second major assumption is moral. All normative scholarship is situated in some moral and political perspective, particularly work on fundamental rights. I believe our fundamental rights are deontological rights that form a system of equal liberty. This belief is the core of a particular form of liberalism. To be more precise, I draw on a version of social contract theory indebted to Immanuel Kant’s political philosophy, particularly as interpreted recently by Professor Arthur Ripstein.²¹⁷ From this perspective, the basic moral justification for law is to protect each person’s fundamental right to equal liberty. Each person may pursue her

²¹⁷ See generally Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (2009) (developing a comprehensive interpretation of Kant’s political philosophy); Helga Varden, *Kant’s Non-Absolutist Conception of Political Legitimacy – How Public Right ‘Concludes’ Private Right in the “Doctrine of Right,”* 101.3 *Kant-Studien* 331 (2010) (arguing that Kant outlines a republican theory of political legitimacy, according to which a state must meet certain institutional requirements before political obligations arise); Helga Varden, *Kant’s Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature*, 13.2 *Kantian Rev.* 1 (2008) (defending the Kantian position that individuals can only interact with one another rightfully under a legal authority, and therefore, everyone has a political obligation to accept civil society); Kyla Ebels-Duggan, *Kant’s Political Philosophy*, 7.12 *Phil. Compass* 896 (2012) (discussing recent interpretations of Kant’s political philosophy).

ends as she chooses insofar as doing so is consistent with equal liberty for others to pursue their ends.²¹⁸

Unfortunately, liberty and equal liberty are in tension. We cannot avoid exercising our liberty in ways that assume others lack the same liberty. For instance, I can only claim land as *my* home if I have the power to create a duty for everyone else not to trespass on that land.²¹⁹ If I have the power to acquire property, then I have the power to limit everyone else's liberty. Whenever we use objects, exchange labor, or share lives, we assume relationships of asymmetric moral authority. If I claim a home, I create neighbors. If I open a business, I take on customers and employees. If I share my home, I become a landlord, roommate, or partner. When we exercise our liberty, we create relationships that presume kinds of unequal authority.

The law can resolve these tensions between liberty and equal liberty. Private law offers a system of rules that define how each person can pursue her ends consistent with everyone having equal liberty to pursue their ends. Each branch of private law offers a system of rules to deal with a specific type of conflicting liberties. Property, contract, and status law reconcile the liberty, respectively, to use objects, to exchange, and to share lives. The law allows individuals to exercise their liberty without "subordination" to other individuals. (Because systems of private law—and law in general—generate systemic threats to liberty, private law also must be supplemented with public law commitments to procedural and distributive justice.²²⁰)

For example, contract law can reconcile liberty to exchange with equal liberty. Exchange relationships threaten equal liberty. Suppose I promise to fence my neighbor's garden in exchange for half of his strawberries next month. When I start building, I place my liberty in his hands. When I finish the fence, he might choose not to give me the

²¹⁸ This is a version of Kant's "Universal Principle of Right." Immanuel Kant, *The Metaphysics of Morals* Ak. 6:230–31 (1797), reprinted in *Immanuel Kant: Practical Philosophy* 353, 387–88 (Mary J. Gregor ed. & trans. 1996).

²¹⁹ Ebels-Duggan, *supra* note 217, at 897–98 (citing Kant, *supra* note 218, at Ak. 6:255).

²²⁰ Both public and private rights can be fundamental. Property and contract rights are aptly called "private" because they regulate relations between individuals, but the fundamental right to property and contract are held against the public authority. They are rights to a set of laws and remedies created and enforced by legal institutions. In contrast, public fundamental rights, such as due process, freedom of speech or the right to vote, arise as problems primarily in the relationship between individuals and the state (or state-conferred monopolies). "Public" and "private" rights are distinct in their conceptual structure and their justification.

strawberries.²²¹ Even if he acts only in good faith, he may refuse to pay because he honestly believes the fence was inadequate.²²² Our relationship has created an inequality of liberty. My liberty is subject to his choice and to his judgment.²²³ It may be rational for me to choose to subject myself to his authority, because I believe he is likely to reciprocate and his judgment is trustworthy, but our relationship remains unequal nonetheless.²²⁴ Exchange relations create an apparent dilemma: We should have the liberty to exchange our labor and property but we cannot exercise it without undermining equal liberty.

A system of contract law can reconcile this tension. If my neighbor chooses not to reciprocate, my rights remain intact because I have a legal right to force him to transfer the strawberries or pay their equivalent.²²⁵ If we disagree about the terms of our contract or about the quality of my performance, a neutral third party settles our dispute.²²⁶ My liberty is no longer subject to his choice or judgment. Contract law enables us to exercise our liberty to exchange without either person becoming subordinate to the other. Citizens have a basic right to contract, because we have a right to equal liberty and a right to liberty of exchange, but exchange can be consistent with equal liberty only within a system of contract law.

This fundamental right to contract is not a liberty right. It is not a claim against state interference in consensual relationships. Nor is it a species of freedom of association. The core of the right to contract is a power right. The state is obligated to create a system of laws that enables citizens to create enforceable duties for exchange relationships. Any system of contract law must protect the liberty to enter contracts, but it cannot avoid innumerable limits on that liberty. Contract law must define rules for creating, interpreting, and enforcing contractual duties, and it must restrict private enforcement. Contract law must limit contractual

²²¹ See Ripstein, *supra* note 217, at 162.

²²² See *id.* at 170–72.

²²³ The first is a rough approximation of what Kantians describe as a problem of assurance and the second a problem of indeterminacy. Ebels-Duggan, *supra* note 217, at 898.

²²⁴ This inequality has two separable aspects: He claims the moral power to define my rights by his judgment and his choice about whether to perform will limit my ability to use my ends. Some Kant scholars focus on the latter, for example, Helga Varden, *Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents*, 45 *Dialogue* 257, 261 (2006), but I believe both are equally problematic.

²²⁵ Ripstein, *supra* note 217, at 166–67.

²²⁶ *Id.* at 172–73.

liberty to avoid inequalities created by specific contract powers, such as by imposing fiduciary duties on trustees. Finally, the state must limit contractual liberty to address systemic inequalities created by the system of enforceable contract law. Public law serves this function through labor protections and public welfare rights.²²⁷

Some system of contract law is necessary for everyone to enjoy equal liberty of exchange. To be clear, I am arguing that contract law is necessary to ensure equal liberty, not that the rules or remedies of contract law must directly consider the parties' equality. Below I will argue similarly that some system of marriage law is necessary for everyone to enjoy equal liberty to share lives. Unlike contract law, marriage law should concern itself directly with protecting the parties' equal liberty. When spouses share their lives through open-ended and flexible duties, these duties create new and distinct problems of unequal authority, which I describe in the next Section. In Section III.D, I argue that the authority created by these flexible duties can be consistent with equal liberty only if the law offers a system of rights and remedies similar to civil marriage.

B. Sharing Lives Creates an Unequal Relationship

Another way we exercise our liberty is by sharing lives in marriage-like relationships. Individuals should have the liberty to share lives through long-term commitments, as long as doing so can be consistent with both parties' continued equality. The problem is that marriage-like relationships pose unique risks of subordinating one party to the other.²²⁸

The problem arises from marriage's indefinite, open-ended commitment of mutual support. Spouses commit to support one another without limitation. Relying on this commitment, they make investments toward

²²⁷ Any legal system of property and contract—any market—creates systemic limits on liberty, like institutional poverty, which restricts the liberty of many citizens, generating public rights to distributive justice against the state. See *id.* at 277–84; Varden, *supra* note 224, at 270–71. The argument I sketch here concerns the private relations between the parties, and I say little about background social and economic conditions necessary for contract to fulfill this function.

²²⁸ What is the consequence if sharing lives inevitably undermines the partners' liberty? The result would seem to be that social marriage is unjust: If individuals cannot share lives without using one another, no one may morally enter such relationships. This is equivalent to the basic question for Kant and Locke: How is it possible to have a just system of private property? Whether the failure of the project entails that the state should prohibit the social marriage would be a different question.

their chosen ends. Their ability to continue pursuing those ends depends on their partner's choice to maintain the relationship. Yet, spouses can also choose to end their relationship. Each spouse places his or her ability to pursue his or her life plans—that is, his or her autonomy—in the hands of another person. In that situation, sharing lives can easily undermine one partner's equal liberty.

The homemaker-breadwinner marriage presents a stark example of this inequality. Homemaker spouses often postpone or abandon their careers to raise the family's children. Expecting to share her partner's future life and earnings, she invests in skills for raising children and sustaining the family, rather than skills that increase her earning power. If the relationship ends, the homemaker will be unable to maintain her chosen life. Family caretaking is unpaid, and similar work outside the family pays relatively low wages. Her ability to sustain her chosen life depends on her partner's choice to sustain the relationship.

The homemaker's financial dependence gives her partner significant power, but the breadwinner role is not without its own risks.²²⁹ The breadwinner's career investment increases her earning potential, so the economic value of her chosen ends are less dependent on her partner's decision to remain married (even recognizing caretaking work frees her time for paid labor). Nevertheless, the subjective value of her career often derives from its financial benefit to her family. Many people accept jobs primarily to support their families. If the family separates, the breadwinner spouse loses a substantial piece of her liberty as well. As in other exchange relationships, the breadwinner's and homemaker's liberties become subject to one another's choices.

The role division in a homemaker-breadwinner marriage accentuates the relationship inequality because the homemaker takes on a larger share of relationship-specific investments.²³⁰ Nonetheless, similar problems arise whenever two people share lives, even in dual-earner relationships. One person may relocate to facilitate the other's career. One person may choose a riskier or less lucrative career, relying on the oth-

²²⁹ I depart from the traditional gendered division of labor because it is useful to shake up assumptions and because, like others, I believe similar problems arise even in same-sex marriages or in opposite-sex marriages where the male takes on homemaking roles. Allison Anna Tait, *Divorce Equality*, 90 Wash. L. Rev. 1245, 1267–72 (2015).

²³⁰ Paula England & George Farkas, *Households, Employment, and Gender: A Social, Economic, and Demographic View* 44–45, 53–56 (1986) (explaining how the tendency of women to invest in relationship skills at the expense of market skills diminishes their bargaining power in the relationship).

er's income. In a sharing relationship, each person's ability to continue pursuing her projects depends on the other's choice to remain in the relationship.

Since these inequalities arise in an exchange relationship, one might think that contract law can resolve the problem. Many have argued that denying the right to marry does not deny couples any meaningful private rights, because they can simply rely on contract law to create "functionally equivalent" obligations.²³¹ However, the inequality in committed relationships is distinct. Contract law relies on enforcement of relatively determinate duties. My contract rights do not depend on my partner's choices because I am entitled to an equivalent remedy if she elects not to perform.²³² I have a legal power to force her to fulfill her promise or pay damages equal to the value of her promise. The possibility of enforcement ensures neither party's rights depend solely on the other's choice.²³³ Spouses who share lives engage in economic exchanges but rarely bargain to exchange precise obligations. Contract law cannot alleviate the inequality created by sharing lives, because the duties in committed relationships cannot be enforced by damages or specific performance.²³⁴

The problem with marital duties lies not in their content but their structure. The issue is not that spouses share a sexual relationship, as Kant argued, or that spouses unify the private sphere of the home or share particularly personal ends, as Professor Helga Varden has argued.²³⁵ The problem is that spouses structure their shared lives around an open-ended duty of mutual support. The duty of support is not limited

²³¹ See, e.g., Maltz, *supra* note 11, at 957.

²³² Ripstein, *supra* note 217 at 166–67.

²³³ This argument applies to transactional contracts rather than relational contracts, by which I mean exchanges in which parties commit to negotiate essential terms and contingencies in the ongoing relationship. Such relational contracts create duties on the imperfect end of the spectrum, raising similar problems to marital duties. The remedies for these problems, such as fiduciary duties, require enforcement through reasonableness standards that authorize judges to specify duties, and perhaps even supervised dissolution on fair terms. Relational "contracts" are not a counterexample, but one step on a spectrum from contract-law remedies for perfect duties to status-law remedies for imperfect duties.

²³⁴ Gregg Strauss, *Why the State Cannot Simply "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 *Ind. L.J.* 1261, 1292–95 (2015).

²³⁵ Helga Varden, *A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage, and Prostitution*, 22 *Soc. Phil. Today* 199, 203–04 (2010); Helga Varden, *A Kantian Critique of the Care Tradition: Family Law and Systemic Justice*, 17.2 *Kantian Rev.* 327, 344 (2012).

to specific conduct. It is a duty to facilitate your partner's ends. It is what ethicists call an "imperfect" as opposed to a "perfect" duty.²³⁶

Perfect duties obligate us to perform particular actions, while imperfect duties obligate us to promote ends. Since an end can often be promoted in many ways, imperfect duties leave those who are obligated leeway to choose how, when, and to what extent to act. A spouse commits to support her partner's ends for some time and to some extent. Does this duty require helping her spouse purchase a car? This month or next year? New or used? Within a broad zone of discretion, spouses have authority to choose how to support one another. The imperfect duty of support requires more than minimal effort, but what level of support is necessary to honor marital commitments depends on the couple's discretionary choices about their finances, joint commitments, and independent ends.

A relationship structured by imperfect duties creates two unique kinds of authority that threaten the parties' equality. First, each spouse has the power to alter her partner's duties. Suppose that Anne and Betty are married. Anne is obligated to support Betty's ends. If Betty chooses to quit her job and return to school, Anne is now obligated to assist her academic pursuits. Betty has the power to determine which ends Anne is obligated to pursue. A spouse can alter her partner's duties merely by choosing new ends for herself.²³⁷

Second, each spouse has power over her partner's rights. Because an end can be promoted in many ways, spouses may choose how, when, and how often to fulfill their imperfect support duty. Consequently, their partners have no claim to a particular manner, time, or extent of support. For example, Anne may choose whether to help Betty with her new academic career by helping pay for her loans or by working more around the house. The discretion in imperfect duties has limits, but as long as a spouse's choices fall in this realm of discretion, whether she has fulfilled her duty depends on whether she made good faith decisions. Anne's

²³⁶ Strauss, *supra* note 234, at 1301–04.

²³⁷ Some Kantians argue no person can rightfully hold the power to determine what ends another person must pursue, e.g., Varden, *supra* note 224, at 262–63, but I believe this is precisely the dilemma created by relationships and resolved by marriage. In addition, Professor Arthur Laby has argued the legal obligation to pursue another person's ends is the core of fiduciary duties. Arthur B. Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 *Buff. L. Rev.* 100, 103 (2008).

choice about how to fulfill her duty defines the precise content of Betty's rights.

These two kinds of unequal authority are inherent in the notion of imperfect duties, and they generate the indeterminacy that prevents contracts from resolving the inequality in committed relationships. The problem is not that imperfect duties are too abstract or too contextual for judges to make accurate judgments about what a specific couple owes one another. Rather, the problem is that within a wide zone of discretion, one person has authority to choose ends and the other has authority to choose the means. Until they make those choices, there is no answer about what they owe one another.²³⁸

Consequently, *ex ante* legal rules for imperfect duties can be little more than minimal thresholds or airy generalities. The minimal thresholds are only modestly useful. For instance, one spouse can violate the marital duty of support by refusing to buy groceries for their partner in need. But beyond such meager requirements, imperfect legal duties become hortatory generalities. Law is limited to principles like "spouses have an obligation of support" or a right to "equitable division of property" at divorce.

This indeterminacy cannot be resolved at the point of enforcement either. The judge or jury is not simply applying an abstract rule to a concrete case. Upholding marriage's imperfect duties requires more than a judgment about what the duty of support reasonably requires for this particular relationship at this particular moment. Suppose Caleb wants to buy a new house, but his husband Dan files suit claiming that they need the money to support their retirement travel plans. If the judge sides with Dan, she is enforcing Dan's choices about what ends the couple should adopt. To split the difference, she would have to decide how luxuriously the couple should live now and in retirement. A judge cannot simply interpret the couple's obligations. She is choosing what ends the couples should pursue, recreating the imposition on liberty that the law was supposed to solve.

²³⁸ Contract law's difficulty with imperfect duties is reflected in the indefiniteness doctrine. If parties leave some contingency unclear in a contract, judges may fill the gaps if there is a method of determining the obligation "independent of [either] party's mere . . . will," such as by industry standards. Arthur Linton Corbin, 1 *Corbin on Contracts* § 95, at 396, 400–02 (1963). No such basis could exist for imperfect duties, the content of which are left indefinite precisely so the parties can fill them in later by their "mere will."

I am not arguing that intimate couples cannot arrange their lives through determinate duties or that such a contract-like intimate relationships are less valuable. A couple can assign one another discrete tasks: He does the dishes; she mows the lawn. They can agree to an “exploding” relationship that lasts five years or lasts until the kids leave for college.²³⁹ Couples should be free to choose whether to structure their relationship through duties to perform discrete acts or through duties to support flexible ends. The distinction is really a continuum.

Each end of the continuum raises different moral concerns. Contract law can reconcile equal liberty with discrete obligations, but what about the open-ended, indefinite obligations typical of marriage-like relationships? A system of status-based law, like marriage, can reconcile the liberty to create imperfect marital duties with the parties’ continued equality.

C. How the Power to Marry Resolves the Inequality Problem

Civil marriage offers legal rights and duties to reconcile spouses’ authority in marriage with their equal liberty. The basic elements of contemporary marriage law—rules for entry, midgame, and divorce—enable spouses to adopt imperfect marital obligations without abandoning their status as equals. Because we should be free to share our lives with another person if doing so can be consistent with equal liberty, and only marriage law offers legal duties capable of reconciling intimate liberty with equality, we have a fundamental right to marry.

1. Entry Rules Mark the Creation of Obligations Through Voluntary Assent

The law polices entry, requiring a marriage license and a ceremony with a registered officiate. Legal scholars often regard these formalities as merely a way to create a record of the couples’ intent or to emphasize the significance of their undertaking. In fact, the ceremony is a central moment of marriage’s basic structure. It gives couples the power to control their transition from a consensual relationship to a relationship carrying imperfect legal obligations. Marriage is a performative speech act.

²³⁹ Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 *Calif. L. Rev.* 235, 241–42 (2011) (describing Johann Wolfgang von Goethe’s idea of an “exploding marriage” with a renewable five-year term).

By following a (roughly) prescribed ritual, spouses exercise their power to create the relationship and its accompanying duties.

The importance of this power becomes clear when one compares marriage to cohabitation. Marriage and cohabitation are similar in many ways. Relying on their intuitive similarity, Washington State chose to extend marriage-like duties to cohabitants.²⁴⁰ Former cohabitants may bring a claim for an equitable division of assets acquired during their relationship, if the couple maintained a long-term relationship involving “pooling of resources and services for joint projects.”²⁴¹ Essentially, Washington imposes legal sharing obligations on any couple who are sharing a life as a factual matter.

One problem with this cohabitation regime is that no qualitative difference in the relationship determines when the new obligations arise. Couples often “fall” into cohabitation, staying together frequently until they are effectively, and then officially, living together. When does the choice to share change from an exercise of liberty to use one’s property and labor into a duty to use one’s means for the other’s benefit?²⁴² It is unclear why these acts, individually or jointly, alter their respective duties. In contrast, marriage’s entry requirements empower individuals to control the creation of their duties. A similar function could be performed by any act with a publicly understood meaning, such as signing domestic partnership papers or jumping over a broomstick.

While the ceremony is essential to create shared intent, the exchange of marital vows should not be conflated with a contract. Contract law uses offer and acceptance to enable two people to act together. I offer to perform a specific act for you in exchange for your promise to do something for me. I use my authority over my own choices to give you the

²⁴⁰ *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984). The A.L.I. also endorsed such a conscriptive approach to “domestic partnership[s]” in the A.L.I. Principles, *supra* note 215, § 6.04 at 937–38. The majority rule is that when a cohabiting relationship ends, cohabitants may raise only claims which would be cognizable between legal strangers in tort, contract, or equity.

²⁴¹ *In re Marriage of Lindsey*, 678 P.2d at 331.

²⁴² Consensual relationships can give rise to claims ranging from promissory estoppel to unjust enrichment, but the interaction between the relationship and these legal claims is qualitatively different. The relationship is not itself a ground for the claim, although it may illuminate the nature of the legally relevant transaction. Consider, for example, a promissory estoppel claim in which a cohabitant quit her job to move to a new city with her girlfriend. This claim rests on the promise and the reliance. The seriousness of their relationship and the fact that they shared household expenses and labor is relevant only to the reasonableness of the cohabitant’s reliance.

power to determine how I will act in this particular matter. These contractual transfers must be limited to particular deeds or outcomes, because no one has the moral power to give someone else a blank check over his ongoing ability to set ends.²⁴³ A contract that purports to give someone else indefinite control over your liberty would be a slavery contract, which of course undermines the parties' equal liberty.

Spouses, in contrast, appear to give one another this kind of power to control what ends they set. Spouses do not exchange obligations to perform specific future acts; they accept an imperfect duty to foster their partner's ends.²⁴⁴ They have discretion to revise their choices about both the means and ends. And no set of acts or particular outcomes would qualify as fulfilling these duties. Enforcement of discrete, contract-like duties cannot reconcile this kind of marital duties with the agent's freedom; hence, we need the other two aspects of marital status.

2. The Intact Marriage Rule Ensures Discretion in Ongoing Marriage

The law empowering entry and regulating exit allows spouses to maintain negative liberty during marriage. Spouses cannot sue one another to enforce their marital rights during marriage,²⁴⁵ although some courts allow such suits if one spouse neglects the other's basic needs.²⁴⁶ This "intact marriage rule" protects the authority necessary for spouses to have imperfect legal duties.²⁴⁷

To have imperfect duties, spouses must have the authority to choose their ends and the means to support them. The content of marital obligations are not set at any given time. To maintain legal relationships defined by imperfect duties, the law must refuse during marriage to en-

²⁴³ Kant, *supra* note 218, at Ak. 6:330.

²⁴⁴ *Balfour v. Balfour* [1919] 2 KB 571 (C.A.) at 579 (Atkins L.J.) (Eng.) ("[Spouses' everyday agreements for support] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the agreement, never intended that they should be sued upon. . . . The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law [of contracts] as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code.").

²⁴⁵ *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953); Strauss, *supra* note 234, at 1269.

²⁴⁶ *Com. ex rel. Goldstein v. Goldstein*, 413 A.2d 721, 724 (Pa. Super. Ct. 1979) (concluding the rule applies unless spouse is "not receiving adequate food and housing").

²⁴⁷ Strauss, *supra* note 234, at 1305–10.

force *marital rights* within the zone of discretion. (This does not affect laws to protect innate rights, such as domestic violence laws.)

On the other hand, the law can police the thresholds of imperfect duties during the relationship. Some acts or omissions violate imperfect duties regardless of the parties' authority or motivations, such as acts inconsistent with supporting one another's ends. For instance, no one can remain committed to supporting their spouse financially while refusing to pay for basic needs (absent excusing conditions like poverty). Second, over the course of a relationship, repeated failures to act reveal lack of commitment. For example, a spouse reveals his lack of commitment to his husband's career if he refuses to help him return to school for a needed degree. Whether the law should permit spouses to enforce these thresholds during a marriage depends on our confidence about identifying these lower bounds, as an absolute matter and over the course of a relationship.

The threshold of neglect is a ripe source of disagreement, just as thresholds are for any vague concept.²⁴⁸ The most famous, or infamous, American case about the intact marriage rule is the 1953 case of *McGuire v. McGuire*.²⁴⁹ Mr. McGuire was well-off but of "more than ordinary frugality."²⁵⁰ He paid for groceries and his wife's medical bills, but he refused to pay for her clothes or indoor plumbing. After 30 years, she filed suit. The court chided Mr. McGuire for his miserliness but refused to award support payments unless Mrs. McGuire first separated from her husband. He was obligated to help keep a decent home, but the Court was unwilling to decide whether decency required indoor plumbing.

More recent opinions set the threshold at "neglect," which seems to mean payment of basic groceries, clothing, and shelter.²⁵¹ Even critics of *McGuire* who support more intervention will likely lose confidence at some level—perhaps disputes about the quality of furnishings or domestic care. Wherever the lower threshold lies, there is a range of discretion

²⁴⁸ Technically, *McGuire* may be a problem of higher-order vagueness. Vague concepts often have not only uncertain threshold cases but also uncertainty about the set of borderline cases. See generally Roy Sorensen, *Borderline Hermaphrodites: Higher-order Vagueness by Example*, 119 *Mind* 393 (2010) (developing a theory of second-order vagueness). Some may regard *McGuire* as a clear case of neglect (or not), while others may regard it as a borderline case.

²⁴⁹ 59 N.W.2d 336 (Neb. 1953).

²⁵⁰ *Id.* at 337.

²⁵¹ *Com. ex rel. DiPadova v. DiPadova*, 302 A.2d 510, 511 (Pa. Super. Ct. 1973).

in core marital duties that the law justifiably refuses to enforce. A component of the dispute between *McGuire* and many of its critics is where to place that line. (*McGuire* is justly criticized for failing to recognize that the law's marital title scheme gave Mr. McGuire control over any property titled in his name, so even though Mrs. McGuire had worked the farm for years, she had no access to resources generated by their shared investment.)

The entry formalities and the intact-marriage rule enable the couple to adopt a relationship of shared ends through imperfect duties. The state's refusal to enforce marital rights during marriage leaves spouses free to define the ends they will pursue and the means to facilitate them. When the relationship ends, whether in divorce or death, the law may step back in without undermining the imperfect duties. Separated spouses return to pursuing separate ends. Having abandoned their commitment to support one another's ends, they lose their authority to choose how to do so in light of future performance. The law can return to its ordinary role of specifying determinate content for otherwise underspecified private duties.²⁵²

Consider another stereotypical case. Evelyn postpones her career to help pay for her husband Frank's law degree. Frank can accept Evelyn's assistance without using her because they are deferring his reciprocal support. Once he has a stable job as an attorney, they will decide how he will support Evelyn's ambitions. Maybe she will enter graduate school, or maybe Frank will take a leave of absence to raise their children. Such choices fall within their discretion to choose their ends and the means of their support.

Suppose, instead, Frank and Evelyn file for no-fault divorce soon after Frank's graduation. Frank's use of Evelyn's labor during the marriage can no longer be interpreted in light of their future intentions. He no longer has authority to choose how he will fulfill his obligation of support. If a court orders Frank to pay for Evelyn's graduate school, its order no longer imposes on the couple's authority to define their obligations. The court order will limit his choices for employment, but this restriction on his liberty simply reflects his lost authority over the content of his imperfect duties.

²⁵² Of course, some couples structure their relationship in light of divorce law and divorce law influences the social norms that set couples' expectations. In neither case, however, has the law forced the couple to adopt a particular view of their relationship. The proper role of law in altering social norms is a huge topic beyond the scope of this Article.

While this negative liberty during marriage is essential for imperfect duties, it exacerbates the conflict between intimate liberty and equal liberty. If the state refuses to enforce Evelyn's right to reciprocal support as a contract, her choice to enter the relationship seems like submission to ongoing inequality. Frank becomes the sole judge of his own support obligation. At the extreme, Frank may even choose to end the relationship. Evelyn's ability to pursue her ends depends on Frank's judgment and continued good will. Civil marriage offers an alternative to contract for protecting spouses' equal liberty: the remedies of property division and alimony at divorce.

3. Equitable Remedies at Divorce Permit Determinacy and Assurance

The cliché that divorce tries to provide a “clean break” overemphasizes half of divorce law.²⁵³ Separation marks the end of spouses' mutual obligations, and divorce law untangles the couples' shared life so they can resume pursuing separate ends. Yet, this is just the beginning of divorce. During marriage, most spouses make choices relying on their partner's commitment. They choose whether to invest in one another's education, what careers to adopt, and whether to stay home with children. When a couple has shared their life through imperfect duties, they cannot simply part ways and resume separate lives on equal terms.

Only divorce law can render these arrangements consistent with equal liberty. With divorce protections, Evelyn can dedicate herself to Frank's education without simply placing her resources and her liberty at his mercy. To ensure spouses' liberty does not become dependent solely on their partner's good will, divorce law must ensure neither spouse can take advantage of the indeterminate commitments that enable their shared life.

Intentionally or not, American divorce law has developed a structure that can achieve just this purpose. The twin rules of divorce—equitable division and alimony—specify ongoing obligations necessary to reconcile spouses' autonomy with the inequality created in their relationship. In most states, a judge divides the couple's marital assets equitably to reflect each spouses' contribution and need, and some states have a specific presumption in favor of a formally equal split.²⁵⁴ The court may al-

²⁵³ Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 *Calif. L. Rev.* 291, 313 (1987).

²⁵⁴ A.L.I. Principles, *supra* note 215, at § 4.09 cmt. a.

so award short-term maintenance payments for a dependent spouse until he or she can independently maintain his or her marital standard of living.²⁵⁵ (In practice, alimony falls far short of even this limited principle.)

The division of marital assets begins with an egalitarian default. While only a few states have adopted a presumption of equal division, judges tend towards an equal split in all but high-earner cases.²⁵⁶ This default reflects an assumption that spouses should share equally in any benefits or sacrifices of their joint enterprise. Consequently, both spouses benefit equally from choices they make about their duties during marriage. A spouse does not give his husband a right to determine what ends he will pursue without ensuring that he will benefit equally from his husband's choices.

Judges also retain discretion to divide marital property "equitably" in light of the spouses' "contribution and need." Need and contribution might seem to be irreconcilable principles, but in fact they are aspects of the same normative concern. Spouses may use their authority over their imperfect marital duties to develop specific expectations. When the relationship ends, these choices may have a differential impact on one spouses' autonomy. A court can use its equitable discretion to divide property in ways that reflect the needs left when those determinate expectations go unfulfilled. Contrary to the name, "equitable distribution" is not a free-ranging authority to rectify unfairness—it is a remedy for the spouses' bilateral obligations.

Consider again Frank and Evelyn. Frank could rightfully accept Evelyn's labor during his law school career only on the assumption that Evelyn had a right to reciprocal benefits. If she had no such claim, then her choice to support him subjected her liberty to his good will. In a case like this, the divorce court may award Evelyn a larger distribution of the couples' assets. The point is not to ensure that Evelyn receives a fair "return on her investment." A fair rate of return would be measured by alternative investments for her money and labor, but courts never engage in these calculations.²⁵⁷ On the other hand, simply reimbursing Evelyn

²⁵⁵ Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?*, 38 *Fam. L.Q.* 3, 10–12 (2004).

²⁵⁶ Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 *N.C. L. Rev.* 401, 407–08, 431, 452–53, 507 (1996) (study of judicial decisions and settlement outcomes in New York from 1980–90).

²⁵⁷ *A.L.I. Principles*, *supra* note 215, at § 5.12 cmt. b (rejecting investment theory because neither spouse thinks of the marriage or the support as one among alternative financial investments).

for Frank's educational and living expenses²⁵⁸ ignores the sacrifice of time she made to invest in his ends and her legitimate expectation to receive similar support in return. The point is to ensure Evelyn's ability to pursue her ends is not dependent on Frank's continued good will, which should require more than merely reimbursing her past expenses. Equitable discretion to consider each spouse's "contribution and need" helps ensure that neither spouse's discretion during the marriage becomes a legal entitlement to subordinate their partner.

Alimony can serve the same function when—as in most marriages—the marital assets are insufficient for each spouse to resume pursuing separate ends on equal terms. For instance, if spouses adopted marital roles that rendered one financially dependent, the wealthier spouse should continue to support his or her partner after divorce. Alimony may be necessary to ensure the spouses' marital choices do not render one spouse's liberty dependent on the other's goodwill.

While alimony responds to need, alimony should not be regarded as privatized welfare.²⁵⁹ Unlike welfare, alimony is not a claim to basic needs or to primary goods, but to the marital standard of living. Nor should alimony be considered simply a restitutionary remedy. While this restitution analogy might justify alimony for spouses who performed unpaid domestic labor (assuming they did not receive adequate compensation during the marriage), the analogy undermines legitimate claims. Wives are compelled to argue they enhanced their spouses' career by hosting dinner parties. A dependent spouse should not have to prove she contributed economically to her partner's career. Dependency in marriage is not freeloading, even if one spouse lives a life of leisure while the other works. Marriage's imperfect duties enable couples to adopt mutually supportive ends, including leisure.²⁶⁰

²⁵⁸ See, e.g., *id.* § 5.12(1) (limiting restitution to "direct costs of the other spouse's education" and "principal financial support" incurred from marital funds or the supporting spouse).

²⁵⁹ See contra Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 *Colum. L. Rev.* 75, 105–06 (2004) (treating division as a right and alimony like welfare).

²⁶⁰ This argument is similar to, yet distinct from, arguments based on reliance. See, e.g., Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 *Tul. L. Rev.* 855, 894 (1988). Reliance alone does not generate obligations. Reliance theories piggy-back either on a corrective justice theory that one spouse caused the loss by encouraging reliance or on a promissory theory that the spouses exchanged obligations that failed technical contract rules.

These prototypical alimony cases need not rest on competing theories of need, promise, and unjust enrichment.²⁶¹ Rather, each form of alimony is necessary to enable spouses to make open-ended commitments without merely becoming subject to the other's good will. A system of alimony is necessary to reconcile individuals' liberty to form such relationships with the unilateral authority the relationship creates.

The pieces are in place to explain why the right to marry requires law and why negative liberty is insufficient to protect intimate association. Individuals have a right to pursue their ends as they wish, so long as doing so is consistent with equal liberty for others. Marriage-like relationships are crucial exercises of this liberty. A spouse commits to supporting his partner's ends without reservation and to relying on his partner's support for his own ends. Yet, sharing lives through such indefinite, flexible commitments fundamentally threatens both parties' liberty. Without legal protection, entering an intimate relationship places your liberty in the hands of another person.

While people will willingly risk this inequality if there is no alternative, it is nevertheless a decision to subordinate your liberty to another's choice. The freedom of association envisioned in Justice Thomas's state of nature cannot be a liberty of equals.²⁶² The liberty to make intimate commitments can be consistent with equal liberty only if the law enables citizens to create relationship rights backed by legal remedies. Civil marriage is our answer to this tension between liberty and equality. Marriage's entry rules give couples the power to create flexible imperfect duties, while divorce remedies reconcile the couple's equality with the authority created by imperfect duties during the relationship. Because we should be free to share our lives if doing so can be consistent with

²⁶¹ The A.L.I. Principles separated these types of alimony, but tried to unify them as forms of compensation for financial losses caused by divorce. A.L.I. Principles, *supra* note 215, at § 5.02. The problem with analogizing alimony to compensation is that tort law and unjust enrichment measure loss from some external baseline of entitlements. In contrast, the A.L.I. Principles must first define marital claim rights as a substantive matter to set the baseline for measuring loss, which then renders compensation an empty conceptual framework. See, e.g., *id.* at § 5.04 cmt. c (arguing that dependent spouses in long-term marriages have a claim to the marital standard of living because relational obligations accrue as their lives become intertwined and denying a remedy would facilitate exploitation). Moreover, the reporters recognize that despite their terminology, the A.L.I. Principles are not compensating for loss but engaging in an "equitable reallocation" of loss, though they never engage with that discrepancy. *Id.* at § 5.02 cmt. a.

²⁶² See *supra* discussion accompanying note 10.

equal liberty, and marriage law can resolve this tension, we have a fundamental right to civil marriage.

D. The Limits of the Positive Right to Marry

The fundamental right to marry is a claim to the power to create legal rights which reconcile equal liberty with committed relationships. This positive right is not merely consistent with regulation of marriage; it requires domestic relations law. The state must empower appropriate individuals to create marital obligations, offer default rules to govern the spouses' authority during marriage, and provide default remedies for divorce and death that can reconcile this authority with ex-spouses' ongoing liberty. States may restrict marital liberty to achieve these purposes, but further restrictions should be considered suspect intrusions on intimate liberty. As I argued in Part I, the justification for the right to marry should determine its boundaries. This Section explores some boundaries of the positive right to marry.

First, states may deny public entitlements to married or cohabiting couples without violating the right to marry. The right to civil marriage is not a right to public benefits that enhance individuals' autonomy or facilitate their relationships. The government is not obligated to give spouses or cohabitants additional tax, health care, or immigration benefits. Coupling does not give individuals new welfare rights. Of course, a state's choice to give public benefits to some couples and not others, or to couples and not individuals, may still be arbitrary discrimination that violates the right to equal treatment.²⁶³ More interestingly, at least in theory, is the argument by Matsumura that states may use public benefits schemes to coerce cohabitants into marrying, thereby interfering with their liberty to marry (or not).²⁶⁴ However, the threshold that risks turning a generally public welfare scheme into coercion will likely be quite high.

Second, a state can choose not to give cohabitants a status with dissolution remedies without violating the positive right to marry. Couples have a fundamental right to relationship duties because they are necessary to reconcile equality with the liberty to share lives. Couples can create open-ended legal duties through marriage and determinate legal duties through contract law. Once these options are on the table, the

²⁶³ See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2142 (2015) (Breyer, J., dissenting).

²⁶⁴ Matsumura, *supra* note 199, at 1511.

couple may also choose to forgo legal duties in their relationship without imposing on one another's liberty. In a similar way, the possibility to contract enables truly voluntary exchanges. The state is not required to offer remedies for cohabitants who had the power to create binding commitments but deliberately chose not to exercise it. (That states are not obligated to create a cohabitant status does not imply they should not experiment with new licensed statuses carrying different constellations of public and private rights.)

Third, if the right to marry is necessary to reconcile intimate liberty with equality, is the right limited to egalitarian marriages? In one technical sense, yes. Citizens have no basic positive right to hierarchical *legal* marriage. The state is not obligated to empower citizens to create enforceable unequal relationships, because no one can have a right or duty to participate in subordination. States may define their marriage law to protect the parties' equal liberty. Entry rules can perform this function, such as by prohibiting marriages between a person and one of his or her former dependents. This seems like the most natural justification for prohibiting incestuous marriages between adults: The law is worried that guardians might use their authority to manipulate the dependents before the age of adulthood. The state may also disregard the actual terms of contracts that promote vastly unequal relationships, such as a contract in which one spouse promises to carry out every request of her partner.²⁶⁵

In a more intuitive sense, the right to marry is not limited to egalitarian marriages. Civil marriage is not and should not be limited to a specific vision of valuable relationships. Couples may adopt unequal roles during marriage, as long as each spouse may choose to leave the relationship and their ability to resume a separate life is not conditioned on marital choices. That, of course, is the role of divorce remedies. When spouses maintain hierarchical roles, protecting exit will require more active use of property division and alimony. Divorce will feel like a greater imposition on these unequal relationships. This imposition is acceptable, however, because divorce is not about enforcing couples' marital roles; it is about reconciling their liberty to adopt such roles with their equality.

²⁶⁵ For an example of the type of agreement a state could justifiably disregard, see, e.g., *Spires v. Spires*, 743 A.2d 186, app. at 193–95 (D.C. App. 1999).

For similar reasons, restrictions on premarital, marital, or separation contracts do not violate the right to marry.²⁶⁶ There is no liberty right to marry on whatever terms one chooses. Some limits on exit, for example, are irreconcilable with equal liberty. A promise to marry for life or a unilateral veto on divorce would submit each spouse's liberty to the other's choice. Whether states should enforce more limited contractual burdens on exit, such as requiring fault for divorce or imposing lengthy waiting periods, depends on judgments about how substantial the burdens are and how likely those burdens will be asymmetrical. Some property arrangements should be suspect for similar reasons. For example, a dependent spouse who waives alimony may be unable to leave the marriage without giving up his or her chosen ends. The current rules for judicial review of marital agreements reflect these concerns.²⁶⁷ The positive right to marry does not challenge, but in fact justifies, the states' authority to regulate the terms of marriage.

Last, this positive right to marry cannot be simply extended to polygamy. The question is whether individuals have a right to demand states create a system of law for multiple simultaneous marriages. While polygamy may seem to promote and limit liberty in ways similar to monogamy, the structure of the plural relationship raises unique challenges. There is no right to polygamy in its traditional sense, because the law cannot reconcile the inequalities of liberty created by traditional polygamy. Whether there is a right to polyfidelitous marriage where each spouse marries each other is a more difficult question.

First, a disclaimer. I doubt criminal punishment of plural relationships is consistent with liberty of intimate association. I also support new legal mechanisms for alleviating the injustices created by polygamy. Legal recognition would benefit polygamous and monogamous families in similar ways, offering protection and stability for the polygamous spouses and their children. However, at risk of repetition, none of these issues bears on the right to marry. The positive right to marry is not a

²⁶⁶ Most states subject agreements about marriage to additional procedural and substantive review. See, e.g., Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 *Ariz. L. Rev.* 11 (2012) (exploring the divergent enforcement standards for marital contracts and suggesting reforms for future policymakers); Brian H. Bix, *Private Ordering and Family Law*, 23 *J. Am. Acad. Matrim. Law.* 249 (2010) (describing family law's treatment of various private ordering agreements relating to marriage).

²⁶⁷ Bix, *supra* note 266, at 266–67.

right to legal benefits that will foster relationships, whether one believes law should foster marriage or foster relationship pluralism.

The problem with traditional polygamy is that it is inherently unequal, as I have argued at length elsewhere.²⁶⁸ In traditional polygamy, only one person may marry multiple spouses. Two inequalities pervade this family structure. First, the central spouse will always have stronger rights and weaker duties within each of his multiple marriages. Peripheral spouses share their lives fully with the central spouse, but the central spouse can share only a fraction of his life with each peripheral spouse. Second, the central spouse always has stronger rights within the overall family. Although peripheral spouses share their lives, they have no direct marital claims on one another. Spouses make choices within each dyadic marriage, such as whether to take a new job and to have children. Those choices deeply affect the other spouses' liberty, yet they have no direct claim to participate in those decisions.

Consider the following scenario. Anne and Betty are married to Carrie but not one another. Anne and Carrie maintain paid employment while Betty works in the home. Betty benefits indirectly from Anne's employment, which improves Carrie's financial well-being. Anne benefits indirectly from Betty's choice, which improves their home and frees Carrie's time and attention from domestic labor.

Suppose now Carrie wants to divorce Betty. Should Betty receive a portion of Anne's assets or alimony from Anne? Betty relied on Anne's earnings during the marriage. That choice will now limit her ability to resume pursuing a separate life. Anne did benefit from Betty's choice to stay home. Yet, Anne never accepted a duty to support Betty. Anne married Carrie. Did Anne really have a say when Betty and Carrie decided that Betty would stay home?

Betty and Carrie's choices impose on Anne's liberty, and Anne and Carrie's choices impose on Betty's liberty. It is unclear what remedy can alleviate the restrictions that Anne's choices pose for Betty's liberty without also imposing on Anne's liberty, and vice versa. Note that the structure of their family creates this conflict. It arises because Anne and Betty are sharing lives in fact without reciprocal duties. Because periph-

²⁶⁸ Gregg Strauss, *Is Polygamy Inherently Unequal?*, 122 *Ethics* 516, 517 (2012). I also argue at length that polygamy could be transformed in ways that remove the formal inequality, but I doubt proponents of a right to polygamy would welcome a right dependent on adopting such legal relationships at odds with their conception of marriage.

eral spouses lack direct legal claims on one another, their choices impose on one another's liberty.

Consent cannot alleviate this inequality, just as consent alone cannot alleviate the inequality created for economic exchanges or for monogamous couples. The polygamous relationship undermines equal liberty even if each peripheral spouse enters the marriage voluntarily and with full information. The inequality persists even if all the spouses are perfectly virtuous and want to treat one another as equals. While marriage law's scheme of imperfect legal duties can reconcile the conflict of liberty within a dyadic relationship, this solution does not simply carry over for the conflict created by traditional polygamy.

Some may argue this position betrays a lack of imagination about novel legal relationships. Professor Adrienne Davis, for example, argues that polygamous divorce could be modeled on partnership dissolution.²⁶⁹ Each spouse could exit unilaterally and force a buy out of an equal portion of the family's assets.²⁷⁰

While this proposal might reduce post-divorce poverty, it does not address the conflict of liberty within traditional polygamy. Instead, it subjects Anne's liberty to Betty's choices. In their polygamist dissolution, Anne receives nothing from Betty because Betty and Carrie decided Betty would stay home. Their choice controls Anne's rights. The regime would impose on Anne a duty to share her assets with Betty, even though Anne never accepted this sharing obligation and has no right to a say in Betty's choices that determine the nature of that sharing obligation.

In effect, Davis's proposal transforms this traditional polygamous marriage into a polyfidelitous one. In a polyfidelity, each spouse marries every other.²⁷¹ As I have argued, these plural marriages can be equal, at least in principle.²⁷² Once Anne and Betty marry, they have direct claims upon one another. Betty now has an obligation to consider how her

²⁶⁹ Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 *Colum. L. Rev.* 1955, 2004–13 (2010).

²⁷⁰ *Id.* at 2013.

²⁷¹ That Davis assumes a polyfidelity model becomes clear when she suggests peripheral spouses might choose to remain married even if their central spouse wants a divorce. *Id.* at 2012. In most forms of polygamy, only the central figure (man or woman) marries multiple spouses; “[g]roup marriage appears to have been rare in traditional societies” and “is probably a very limited practice” in modern societies. Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* 13 (2008).

²⁷² Strauss, *supra* note 268, at 517.

choices with Carrie affect Anne, and vice versa. This raises difficult problems for establishing decision procedures and managing conflicts of interest, especially if spouses develop unequal attachments. Perhaps it is possible to develop a system of legal polyfidelity to manage these conflicts in such a way that can reconcile polyfidelity with equal liberty for multiple spouses. No such legal regime has been developed. It is too early to foreclose the possibility, but there is no fundamental right to polyfidelity without it. In the meantime, what I can conclude with confidence is that my justification for a positive right to civil marriage does not entail a positive right to traditional polygamous marriage.

CONCLUSION

We should embrace *Obergefell's* conclusion that there is a fundamental positive right to marry. This right is not a claim to public benefits to support our relationships. Nor is this right captured by a claim to be free of state interference in our relationships. The core of the right to marry is a claim to the legal power to create obligations for our relationships.

The positive right to marry is fundamental, because only law can create a system of equal intimate liberty. Everyone should be free to choose whether to share his or her life with another person, if doing so can be consistent with equal liberty. Yet, committed relationships carry imperfect moral duties that give partners broad authority over one another's liberty. Civil marriage creates imperfect legal duties that can enable spouses to hold this authority without rendering one another subordinate.

The positive right to marry requires legal regulation. The state has a duty to enact a domestic relations law capable of rendering intimate authority consistent with equal liberty. To serve that function, the state may restrict marital liberty, such as by limiting marital contracts to protect equality-enabling default rules and by denying marital status to inherently unequal relationships like traditional polygamy. Restrictions on marriage that do not serve similar functions should be suspect intrusions on intimate liberty.

Individuals have a fundamental right to marry. In the United States' legal system, this fundamental right, like most, is a complex blend of state and federal law. I have not addressed whether the right to marry is best protected through statutory or constitutional law, state or federal constitutions, or equal protection or substantive due process. Nevertheless, it is worth noting that if federal courts had not recognized a national

right to marry, thirty-three states would likely still be denying same-sex couples their positive right to marry.