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Which Rights are Right: Understanding Constitutional Rights through Analysis of *Obergefell's* Right to Marry

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Abstract

In *Obergefell v. Hodges*, the Supreme Court recognized the "right to marry" as "fundamental," extending it to same-sex couples. While the outcome—the recognition of same-sex marriages by every state—may be just, the means the Court uses to achieve it are suspect. As this article will demonstrate, when the Court recognizes a "right," it limits the power of the legislative branch, just as the rights enumerated in the Constitution do. For example, the freedom of speech comes from the First Amendment's prohibition on government regulation of speech. Yet unlike "freedom of speech," the "right to marry" is unenumerated, appearing nowhere in the founding document or its amendments. Though the dissenters in *Obergefell* may be right that the recognition of a "right to marry" is dangerous, they are wrong to establish such a high bar for recognizing unenumerated constitutional rights. This article will examine primary sources from the First Federal Congress, the Ninth Amendment in relation to the Constitution, and secondary literature on interpreting these primary sources in order to determine the Founders' understanding of constitutional rights. By determining the meaning of 'right' as used in the Constitution and by the Supreme Court, jurists, students of law, and legal professionals can begin to understand which unenumerated rights are held by the people—which ones are valid and which are not. This article will demonstrate that rights which require government action do not appear to fit with the Founders' conception of rights retained by the people while those rights which merely prohibit government interference do.

Keywords: Constitutional Rights, Supreme Court, *Obergefell v. Hodges*

1. Introduction

Nowhere does "the right to choose" or "the right of privacy" appear in the U.S. Constitution. With this fact in mind, we could perhaps dismiss the existence of these rights and move on, but the Ninth Amendment stands in the way: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[1] In plain language, it states that there are rights beyond the text of the Constitution, rights that are *unenumerated*. Nonetheless, the Ninth Amendment does not provide a tool for testing the legal status of proposed unenumerated rights. For instance, how do we know there is a right to marry? It is not written in the Constitution, but it does not sound like an outrageous candidate for a constitutionally protected right—at least, the Supreme Court does not think so.[2]

The meaning of 'right' provides one way to discern whether a right to marry or other claimed rights are constitutionally protected. By determining the meaning of 'right' as used in court opinions and the Constitution and comparing it with the Founders' understanding of constitutional rights, we can begin to understand which unenumerated rights we hold. I will argue that rights that require government action do not appear to fit with the

Founders' conception of rights retained by the people, while those rights that merely prohibit government interference do. Accordingly, the Supreme Court should not recognize unenumerated rights that fall outside this conception.

Instead of considering the entire corpus of Supreme Court opinions on rights reserved by the people, this article will consider the "right to marry" as discussed in the Supreme Court case *Obergefell v. Hodges*, which recognizes that the right is "fundamental" and extends it to same-sex couples.[3] Section 2 will examine the majority opinion and demonstrate the problem that a "right to marry" poses by making an action obligatory for state governments. Section 3 will advance a test for determining the validity of a claimed unenumerated right. Lastly, Section 4 will present a solution to the problem in *Obergefell*—one that preserves marriage equality but rejects a constitutional "right to marry," absolving states from *any* duty to recognize marriages.

2. The Majority Opinion

When the Supreme Court recognizes a right to marry for same-sex couples in *Obergefell*, the Court is not clear what it means by the term 'right.' In everyday life, people use 'right' with varying meaning.[4] Consider an open parking space. In one case, an individual has that space reserved for her. In another, the individual has a permit allowing her to park in the space. In both cases, we would say, "She has a right to park in that space." Yet, the meaning of 'right' is different in both cases. In the former, she has a *claim* to park there; she is guaranteed that parking space.[5] In the latter, she has a *liberty* to park there; she may park there if the space is empty.[6] Before understanding how the court uses 'right' in the "right to marry," we can consider another constitutional right: the right to free speech. The First Amendment states that "Congress shall make no law … abridging the freedom of speech."[7] The First Amendment creates a *disability* for Congress. That is, it prevents Congress from creating or modifying rules concerning certain conduct, namely speech.[8] Since Congress cannot prohibit speech, the people have an *immunity*; the people are immune from laws which prohibit their speech.[9] From this immunity, one can deduce the *liberty* to say most things. Thus, liberty denotes one specific meaning of the word "right."

However, when the Court mentions the "right to marry," they do not mean a liberty to marry someone of the same sex. When the Court mentions precedent prior to *Obergefell*, it notes that "*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.' Rather, each case inquired about the right to marry in its comprehensive sense."[10] In each instance, the Court characterizes the right to marry as a *claim*, not a liberty. Unlike a liberty, a claim correlates with a duty.[11] Each instance of "the right to marry" above presupposes a duty on the part of the state to recognize the marriage. If two partners meet all the legal conditions, the state has a duty to recognize the marriage. The Supreme Court views marriage not as an optional government service but as a constitutionally guaranteed duty, as the Court "has made clear, time and again, that marriage is one of the most significant and fundamental rights provided protection under the Constitution."[12] If marriage is a fundamental right protected under the Constitution, then marriage is not a private institution but a public one, and the *Obergefell* decision along with legal precedent solidifies the idea that states have no legal choice but to recognize marriages. In *Obergefell*, the majority writes that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."[13] The majority does not think about the case before them as a case purely of discrimination against gay and lesbian couples. They think about the case as one in which gay and lesbian couples should no longer be excluded from a constitutionally mandated government service, even though this service (i.e. marriage) is never mentioned in the Constitution.

Now, recognizing marriages as a constitutionally mandated public service may not appear like much of a problem, but there is a problem with the principle of the case: a government service, once the judiciary declares it a "keystone of our social order," becomes constitutionally mandated. As previously mentioned, the Ninth Amendment does allow for constitutional rights not explicitly written in the Constitution. However, rights like the right to marry are claims and therefore correspond with a duty on the government. The Constitution recognizes some rights that do function as claims, yet in the case of the right to marry, it is not the Constitution but the Supreme Court who recognizes the right—the claim—and accordingly the Supreme Court creates the duty. If we allow the judiciary to recognize claims, then we allow the judiciary to mandate or forbid conduct for states of which the Constitution makes no mention. If we understand constitutional rights in this way and recognize them based on the "keystone" principle, then the judiciary will be the one to determine whether something is a "keystone of our social order," and thus constitutionally protected. The judiciary will decide what the states must do instead of the Constitution.

3. Criteria for Constitutional Rights

Nonetheless, the outcome of *Obergefell* seems correct. Law professor Jack Harrison notes that the question before the Court is "whether there existed a substantial or compelling, let alone rational, basis for the exclusion of same-sex couples from the fundamental right of marriage."[14] The Court answers 'no.'[15] The Court dismisses, as do I later in this article,[16] the most compelling basis for such an exclusion, which is that extending marriage to same-sex couples will destroy the link that marriage symbolizes between children and their biological parents. With this claim out of the way, the Court's decision appears correct.

Yet, the reasoning that the Court used to reach the outcome is not constitutionally sound since the Court creates a new duty for states. The unconstitutionality of the decision is more apparent when we examine the nature of constitutional rights. There are two general characteristics of constitutional rights reserved by the people: (1) they tend to be immunities—a specific definition of right mentioned earlier that means an exemption from regulation; and (2) they exist wherever the government lacks a power. Whereas claims concern what someone must or must not do, immunities concern what constitutes a legal act. After these criteria are shown to hold true generally, they can be used to resolve the problem in *Obergefell* by demonstrating that gender restrictions for marriage violate the people's immunity from laws that include gender discrimination without a legitimate state interest. However, these criteria do not support the people's claim to marriage—the very right to marry as the Court understands it. These criteria do not allow the Court to create a duty for states.

Examples from the Bill of Rights establish the general truth of the first criterion. The Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed."[17] Here, the people's right is considered an immunity from laws that prevent the ownership of firearms. We find this again with an immunity from the imposition of "excessive bail[,] … excessive fines[,] … [and] cruel and unusual punishment."[18] Even the main body of the Constitution frames rights of the people as immunities. For example, the people have an immunity from the suspension of habeas corpus, "unless when … the public safety may require it."[19] Most rights held by the people are exemptions from government interference. People enjoy these freedoms because the government lacks the power to mandate or forbid certain conduct.

As a corollary to the first criterion, we must also recognize the second criterion that rights exist in spheres where the government lacks the power to act. These rights also function as immunities. Theoretically, were the Bill of Rights not to exist, the rights contained in it still would. For example, the First Federal Congress considered the following amendment to the Constitution: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[20] During debate of the proposed amendment, Rep. Roger Sherman said, "It appears to me best that this article should be omitted intirely [*sic*]: Congress has no power to make any religious establishments, it is therefore unnecessary."[21] If Congress does not have a power to do something, then by default the people have an immunity.

The spirit of this proposed amendment lives on in the First Amendment, but Sherman's point remains. For instance, Congress lacks the power to require citizens to read the Constitution, so citizens are immune from laws requiring them to read the Constitution. It does not matter whether the Constitution states "Congress shall make no law mandating citizens to read the Constitution"; we know that Congress lacks this power. Congress' powers are limited to those enumerated in the Constitution. Since the powers of the federal government are finite, immunities held by the people are infinite.

The fact that states do not have an enumeration of powers would seem to call into question the infinite nature of immunities. That is, if we assume the powers of the state are infinite because they are not enumerated, then we cannot assume that the rights held by the people are also infinite; at some point, the powers and rights would conflict. Yet, we can limit the scope of a state's powers, as law professor Randy Barnett does, to "exercise of its 'police power,' that is, the state's power to protect the rights of its citizens."[22] Case law supports Barnett as it affirms the existence and the extent of the police power. The Supreme Court has declared that "[t]he good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests."[23] The police power is thus limited to protecting the safety, health, and rights of the citizenry.

The Ninth Amendment also supports the infinite nature of immunities held by the people since we cannot have both an infinite list of powers reserved by the states and an infinite list of rights reserved by the people. As previously stated, immunities are held by the people regardless of whether the Constitution explicitly denies a power to the government. If either the federal or state government lacks a power, then the people have an immunity. The Ninth Amendment "simply extends [this] … protective presumption" to cases in which the Constitution does not explicitly prohibit a power.[24] The words "Congress shall make no law" become unnecessary when Congress lacks the power to make such a law anyway.

4. Reconciling *Obergefell*

When considering whether marriage equality can still exist without using the Court's reasoning in *Obergefell*, we should not ask whether the people have an immunity from state laws excluding same-sex couples from marriage. Instead, we should ask whether a state has the power to exclude same-sex couples from marriage. If the state lacks such a power, then we automatically know that the people have an immunity. If we limit the power of the state only to "its power to protect the rights of citizens," then no power to exclude same-sex couples from marriage exists. Only the state's interest for the well-being of its citizens would justify the exclusion. Representing the states in *Obergefell*, John Bursch attempted to offer a legitimate state interest by arguing that marriage is about "that linkage between kids and their biological mom and dad."[25] The Supreme Court rejected this argument: "[I]t cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate."[26] That marriage is about the linkage between children and their biological parents cannot be true if there are opposite-sex couples without the ability or intention of having children. In short, no legitimate state interest exists to justify the exclusion of same-sex couples from marriage.

Concluding that the states lack the power to exclude same-sex couples from marriage appears to lead us to the Supreme Court's decision. However, a fundamental difference remains. There is no claim and therefore no duty. In my analysis, the people, specifically gays and lesbians, have an immunity from laws that exclude same-sex couples from marriage. This right agrees with the established criteria: (1) it is an immunity, and (2) no existing government power conflicts with this immunity. Revisiting earlier analysis of *Obergefell*, this is not what the Court does. The Court recognizes it as a *duty* for states to provide marriage licenses. If the Court simply recognized an immunity held by the people, then states could stop issuing marriage licenses altogether—marriage equality would still exist, albeit not as people imagined.

Likely, the states will continue to recognize marriages. Nonetheless, this difference in reasoning is important. In *Obergefell*, as it stands, the Court imposes a duty on the state, a duty which requires action. While the Constitution may impose duties on the government, we should be wary when the judiciary does so—when it begins labeling government services as mandatory, constitutionally required. The reasoning argued for here still preserves marriage equality, but rather than require states to do something, it prohibits them from making certain rules.

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6. References

1 U.S. Const. Amend. IX

2 The Supreme Court has repeatedly recognized a right to marry. See note 7 below.

3 *Obergefell v. Hodges*, No. 14-556, slip op. at 22 (U.S. June 26, 2015)

4 O'Rourke, Allen Thomas. "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law." *South Carolina Law Review* 61, no. 1: 142 (Autumn 2009). Here, O'Rourke states that even "the Supreme Court has used *right* with many different meanings."

5 *Supra* note 4, at 145, for further explanation and examples of a *claim*

6 *Id.* for further explanation and examples of a *liberty*

7 U.S. Const. Amend. I

8 *Supra* note 4, at 147, for explanation and further examples of a *disability*

9 *Id.* for explanation and further examples of an *immunity*

10 *Obergefell*, *supra* note 3, at 18. For the cases that this excerpt references, see also *Loving v. Virginia*, 388 U.S. 1 (1967); *Turner v. Rogers*, 564 U.S. 431 (2011); and *Zablocki v. Redhail*, 434 U.S. 374 (1978)

11 Since rights represent legal relationships, all the fundamental concepts that represent the different meanings of 'right' have an opposite. If some person A has a claim, some person B has a duty. In the parking example, if you have a claim to a parking space, everyone else has a duty not to park there. For illustration of the relationships between the fundamental concepts, see *O'Rourke*, note 4, at 146 and 148.

12 Harrison, Jack B. "At Long Last Marriage." *The American University Journal of Gender, Social Policy & the Law* 24, no. 1 (2015): 47.

13 *Obergefell, supra* note 3, at 16

14 *Supra* note 12, at 54

15 *Id.*

16 See note 25

17 U.S. Const. Amend. II

18 U.S. Const. Amend. VIII

19 U.S. Const. Art. I, sec. 9, clause 2

20 *Creating the Bill of Rights: the Documentary Record from the First Federal Congress*. Edited by Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs. Bickford. Baltimore, MD: Johns Hopkins University Press, 1991: 153.

21 *Id*.

22 Barnett, Randy E. "A Ninth Amendment for Today's Constitution." In *The Bill of Rights in Modern America: After 200 Years*, edited by David J. Bodenhamer and James W. Ely, 183. Bloomington, IN: Indiana University Press, 1993.

23 *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)

24 Barnett, *supra* note 22, at 184

25 Transcript of Oral Argument at 70, *Obergefell v. Hodges*, No. 14-556, slip op. (U.S. June 26, 2015)

26 *Obergefell, supra* note 3, at 15-16