Obergefell’s Legacy

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INTRODUCTION

In Obergefell v. Hodges, the United States Supreme Court struck down same-sex marriage bans as a violation of federal constitutional guarantees. This decision was very important for same-sex couples and their families, and may well be the springboard for the recognition of additional rights for sexual minorities and other marginalized groups. Yet, Obergefell is surprising in both form and focus, which complicates not only predicting the decision’s effects but even inferring what the opinion is trying to do beyond striking down the bans.

Part I of this article examines Obergefell’s discussion of due process guarantees, noting some of the ways in which the opinion is less persuasive than it might have been and offering some possible explanations of why the opinion was crafted this way. Part II discusses the equal protection analysis, explaining some of the ways in which the opinion complicates the jurisprudence. The article concludes by discussing some of the respects in which Obergefell is so open-ended that it could provide the basis for restricting or expanding equal protection and due process guarantees.

I. THE RIGHT TO MARRY

Many commentators expected the Obergefell Court to strike down same-sex marriage bans, at least in part because several circuit courts had struck down such bans and the Supreme Court had denied certiorari when those cases were

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1. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”).

2. See Autumn L. Bernhardt, The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class, 25 TUL. J.L. & SEXUALITY 1, 5 (2016) (“The language of the opinion sheds new light on constitutional interpretation and can be used to advance the civil rights of gays beyond the context of marriage.”).

3. Anthony O’Rourke, Substantive Due Process for Noncitizens: Lessons from Obergefell, 114 MICH. L. REV. FIRST IMPRESSIONS 9, 9 (2015) (“The outcome of the case was a foregone conclusion after the Court, in United States v. Windsor, signaled its views regarding the constitutional importance of same-sex marriage rights.”); Maureen Johnson, You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions, 49 IND. L. REV. 397, 428 (2016) (“By the time Obergefell made its way to the Supreme Court, many courts and legal commentators believed that Windsor mandated a finding that there was a constitutional right for gays and lesbians to marry.”).
appealed. Yet, the circuit courts were far from unanimous when explaining why those bans violated constitutional guarantees, and the Court finally granting certiorari provided reason to hope that the Court would add some clarity to the implicated issues. While the Obergefell opinion did resolve some issues, it raised many more questions than it answered and is more likely to undermine rather than promote consensus among the circuits about the proper way to approach due process issues.

A. Which Relationships Have Constitutional Significance?

The Obergefell opinion focused on the importance of marriage, describing it as having “transcendent importance” and as an institution that “always has promised nobility and dignity to all persons, without regard to their station in life.” Marriage is not only “sacred to those who live by their religions . . . [but] offers unique fulfillment to those who find meaning in the secular realm.” Marriage “is essential to our most profound hopes and aspirations,” is “central[] . . . to the human condition,” and provides a variety of benefits, because “through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality . . . [which] is true for all persons, whatever their sexual orientation.” Further, “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”

Some of the Obergefell Court’s discussion of marriage is reminiscent of the Court’s discussion of the same topic in Griswold v. Connecticut: 

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


5.  Compare Baskin, 766 F.3d at 665 (striking down same-sex marriage ban on rational basis grounds as a violation of equal protection guarantees), with Bostic, 760 F.3d at 367 (striking down same-sex marriage ban as a violation of the fundamental right to marry).


The Tenth Circuit Court of Appeals led the way by upholding a lower district court decision finding Utah’s constitutional ban on same-sex marriage unconstitutional on substantive due process grounds. Four other circuits followed striking same-sex marriage bans for a variety of reasons . . . By next year’s article, the same-sex marriage issue will be resolved.

7.  Obergefell, 135 S. Ct. at 2594.

8.  Id.

9.  Id.

10.  Id.

11.  Id.

12.  Obergefell, 135 S. Ct. at 2599 (citing United States v. Windsor, 133 S. Ct. 2675, 2693–95 (2013)).

13.  Id. (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.\textsuperscript{14}

Yet, Griswold’s discussion of marriage occurred prior to the Court’s recognition in \textit{Loving v. Virginia} that marriage was protected by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{15} Post-Loving, one might have expected the Court to simply explain that the right to marry is protected by substantive due process guarantees and, possibly, that the right to marry includes the right to marry someone of the same sex.

It is not as if the Obergefell Court failed to make these points. On the contrary, in addition to waxing eloquent about the importance of marriage, the Court also noted that the right to marry is a fundamental right\textsuperscript{16} and that same-sex couples may exercise that right.\textsuperscript{17} Thus, the Court both said what was necessary to avoid having to talk about the importance of marriage and nonetheless made clear that marriage occupies a special position in the Constitution’s hierarchy of values. The Court’s extended discussion of marriage made some commentators wonder whether the Court was implicitly if not explicitly suggesting that those in non-marital relationships were not deserving of respect.\textsuperscript{18}

Before reaching the conclusion that the Obergefell Court was signaling that marriage is the only relationship protected by the Constitution, one should consider a different post-Loving marriage decision.\textsuperscript{19} In \textit{Zablocki v. Redhail}, which was issued after \textit{Loving}, the Court described “marriage as ‘the most important relation in life’”\textsuperscript{21} and “as ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’”\textsuperscript{22} Yet, some commentators read \textit{Zablocki} as providing the basis for protecting non-marital

\begin{footnotes}
\item[15.] Loving v. Virginia, 388 U.S. 1, 12 (1967) (“These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).
\item[16.] Obergefell, 135 S. Ct. at 2589 (“[T]he right to marry is fundamental.”).
\item[17.] Id. at 2599 (“[S]ame-sex couples may exercise the right to marry.”).
\item[19.] Cf. Mark Strasser, Loving Revisionism: On Restricting Marriage and Subverting the Constitution, 51 HOW. L.J. 75, 87 (2007) (noting that “[t]he Zablocki Court was unstinting in its praise of marriage”).
\item[20.] Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (“The leading decision of this Court on the right to marry is \textit{Loving.”}
\item[21.] Id. at 384 (citing \textit{Maynard v. Hill}, 125 U.S. 190, 205 (1888)).
\item[22.] Id. (citing Maynard, 125 U.S. at 211).
\end{footnotes}
associations rather than as privileging marriage over other kinds of relationships. Zablocki at least suggests the possibility that the Obergefell Court’s extolling the virtues of marriage need not undermine the values of other types of relationships.

Zablocki is useful to consider for yet another reason, because it may offer a clue as to why the Obergefell Court praised marriage so effusively. At issue in Zablocki was a Wisconsin statute that precluded noncustodial parents from marrying if they had an existing child support obligation that they were unable to pay. The Loving Court had suggested that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and that “deny[ing] this fundamental freedom on so unsupportable a basis as [a] racial classification . . . is surely to deprive all the State’s citizens of liberty without due process of law.” But Zablocki did not involve a racial classification, and there was some question whether Loving would provide the basis for protecting the right to marry when issues of race were not implicated. Most of the Loving opinion involved why Virginia’s interracial marriage ban violated federal equal protection guarantees, and the Virginia law could have been struck down on equal protection grounds alone. In contrast, the equal protection classification at issue in Zablocki involved economic status rather than race, and the Court had already held that indigency was not a suspect classification. Because poverty did not trigger closer scrutiny, the Court’s


24. Regrettably, some commentators characterizing Obergefell as “shaming those who do not participate” in marriage fail to consider the implications of Zablocki when offering this interpretation of Obergefell. See, e.g., Carpenter & Cohen, supra note 18, at 127.


27. Id.


29. Aaron J. Shuler, From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the “Equality” of the Substantive Due Process Clause, 12 J. L. & SOC. CHALLENGES 220, 264 (2010) (describing “Loving [as] primarily being an equal protection opinion”); Mark Strasser, Windsor and Its Progeny, 13 AVE MARIA L. REV. 181, 190 (2015) (“While Loving establishes the fundamental right to marry, most of that opinion was focused on the equal protection aspect of the interracial marriage ban.”).

30. Joseph A. Pull, Questioning the Fundamental Right to Marry, 90 MARQ. L. REV. 21, 84 (2006) (“The language about legal-marriage being a fundamental right in Loving was completely unnecessary to the holding of the case; equal protection doctrine alone required the Loving outcome.”).

31. See Zablocki, 434 U.S. at 387 (“Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges.”).

employing a tougher standard of review would be dependent upon the nature of the interest affected rather than the class targeted.33

The constitutionality of the statute at issue was a closer call in Zablocki than Loving for an additional reason. While the Loving Court rejected that the state had a legitimate interest in prohibiting racial intermarriage,34 the Zablocki Court recognized that the state had legitimate if not important interests in preventing a noncustodial parent with support obligations from marrying someone other than the custodial parent if that noncustodial parent was unable to pay the court-ordered child support already owed.35 Had the Court employed rational basis review, the Wisconsin statute would likely have been upheld.36 By emphasizing the importance of the individual interest at stake,37 the Zablocki Court emphasized how much was lost by precluding the marriage at issue. So, too, the Obergefell Court’s paean to marriage38 may not simply have been a “rhetorical flourish”39 but, instead, an attempt to suggest how much is lost by individuals who have arbitrarily been denied the right to marry.40 The Court noted that marriage has the same import for same-sex couples as it does for different sex couples,41 so the denial would impose a variety of opportunity costs in addition to the stigma of being prohibited from marrying.42

While the Obergefell Court may have been extolling marriage to illustrate the severity of the burden imposed on same-sex couples who are precluded from marrying, the Court may have had other purposes in mind. Demographic trends reflect that more and more couples are choosing to live together without benefit of

(“[I]f the case [Zablocki] truly were only an equal protection case, rational basis review would have applied because wealth is not a suspect classification.”).

33. Cf. Chris Bower, Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of United States v. Windsor, 102 CAL. L. REV. 971, 974 (2014) (“Under the traditional tiers-of-scrutiny framework, a government action that treats a suspect class unequally or infringes on a fundamental right can be justified whenever the violation is narrowly tailored to achieve a compelling government interest.”).

34. Loving, 388 U.S. at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).

35. Zablocki, 434 U.S. at 388 (“We may accept for present purposes that these are legitimate and substantial interests.”).

36. See Rush, supra note 32, at 726 (“[U]nder rational basis review, the law [at issue in Zablocki] might have been upheld.”).

37. Zablocki, 434 U.S. at 383.

38. Carpenter & Cohen, supra note 18, at 125 (“Obergefell is largely a lengthy paean to traditional marriage.”).


40. But see Carpenter & Cohen, supra note 18, at 129 (“By framing the opinion as a love letter to marriage itself, the Court has moved beyond an equal access rationale and toward an implicit determination that marriage is so critical that states are constitutionally required to offer that institution as the enduring and unique way to recognize relationships.”).

41. See Obergefell 135 S. Ct. at 2601.

42. Id. at 2602 (“[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”).
marriage. Perhaps the Court was trying to urge more couples to marry or was even endorsing the view that unmarried individuals should not enjoy the same status as those who are married. Some commentators worry that Obergefell bodes poorly for the treatment of non-marital couples. Obergefell need not be read to privilege marital over non-marital relationships and, instead, might be read to offer implicit support for the dignity of non-marital relationships. To see why, one should read both the Lawrence opinion and what the Obergefell Court said about that opinion.


44. But see Laurence H. Tribe, Equal Dignity: Speaking Its Name, 129 Harv. L. Rev. F. 16, 31 (2015) (“To penalize individuals for living either alone or in intimate nonmarital arrangements in the name of honoring and encouraging marriage is akin to denying same-sex couples the right to marry in the name of honoring and encouraging marriage by opposite-sex couples—a justification that Justice Kennedy’s Obergefell opinion rightly repudiated.”).

45. See Carpenter & Cohen, supra note 18, at 127 (“Obergefell does not merely stress the importance of marriage as the only currently existing gatekeeper for other benefits and rights; rather, it valorizes marriage qua marriage, imbuing the status with ephemeral qualities such as dignity and profundity, and shaming those who do not participate.”).

46. Cf. Douglas NeJaime, Marriage Equality and the New Parenthood, 129 Harv. L. Rev. 1185, 1249–50 (2016) (“The Court envisions nonmarital life, including nonmarital childrearing, as inferior.”). See Carpenter & Cohen, supra note 18, at 127 (“According to the Court, people wishing to become their best selves and to live a life free from loneliness must follow the most traditional of all paths: find a life-long companion to the exclusion of all others and then get hitched. Any other way that an individual might seek fulfillment and happiness is inferior.”); Ruth Colker, The Freedom to Choose to Marry, 30 Colum. J. Gender & L. 383, 389 (2016) (“The Obergefell Court’s emphasis on the importance of children being raised by married parents reflects the historical stigma against nonmarital parents and their children.”).

47. See Courtney G. Joslin, Marriage Equality and Its Relationship to Family Law, 129 Harv. L. Rev. F. 197, 198 (2016) (“I posit an even more radical proposition: I argue that marriage equality might open up progressive possibilities not just for nonmarital children, but also for nonmarital adult relationships.”).

48. See infra notes 50–91 and accompanying text.

49. See infra notes 50–75 and accompanying text.
In *Lawrence v. Texas*, the Court struck down on due process grounds a Texas law criminalizing same-sex relations. While the Court held that the “right to liberty under the Due Process Clause gives . . . [same-sex couples] the full right to engage in their conduct without intervention of the government,” the Court never described the implicated interest as a fundamental right but instead simply suggested that the interest was constitutionally protected. That said, however, the Court also did not describe the right to engage in non-marital relations as a mere liberty interest, instead leaving the proper characterization of the interest an open question.

That open question was answered when the *Obergefell* Court explained that “*Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation” and that “*Bowers* was eventually repudiated in *Lawrence*. The Court’s describing *Bowers* as denying a fundamental right and

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50. *539 U.S. 558 (2003).*

51. *Id. at 564 (“[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”); id. at 567 (“[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).*

52. *Id. at 562 (“The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”).*

53. *Id. at 578.*

54. *See id. at 586 (Scalia, J., dissenting) (“[N]owhere does the Court’s opinion declare that homosexual sodomy is a ‘fundamental right’ under the Due Process Clause.”); Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1079 (2013) (“The opinion’s refusal to designate the infringed liberty interest as ‘fundamental’ also significantly distances its holding from the privacy cases, all of which depend upon such a classification.”).*

55. *See Donald H. J. Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, 49 IND. L. REV. 367, 369 (2016) (“[I]n *Lawrence v. Texas*, the second sodomy case, the Court reasoned that the case involved a liberty interest (the Court did not use the term fundamental right) to engage in sexual intimacy and whether homosexuals can be denied that right.”). See also *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (“[T]he Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”); Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 47 (2012) (“In *Lawrence v. Texas*, the Court did not explicitly establish that a fundamental right to privacy existed in all intimate relationships, but it did invoke a standard beyond mere minimal scrutiny.”).*

56. *See Mark Strasser, *Marriage, the Constitution, and the Future of Family Law*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 303, 304 (2015) (“While the Court in both cases [Windsor and Lawrence] struck down laws disadvantaging same-sex couples, the analyses offered neither specified the level of scrutiny employed nor whether the rights at issue were fundamental rather than mere liberty interests.”); Daniel J. Crooks III, *Toward “Liberty”: How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 256 (2014) (“There is no discussion of privacy in the majority’s opinion, no mention of a particular fundamental right, and not so much as a whisper of whether the Texas law in question was entitled to deference of any sort.”).*

57. *Obergefell*, 135 S. Ct. at 2606 (emphasis added).

58. *Id.*
then noting that the decision had been overruled suggests that the right at issue—the right to engage in adult, consensual, non-marital relations—was not a mere liberty interest but was instead itself fundamental.

Even if the right to engage in voluntary, adult, intimate relations is fundamental, a separate issue involves how broadly that right should be construed. The Obergefell Court explained that Lawrence stood for more than the proposition that those engaging in adult, consensual relations were immunized from criminal prosecution. “But while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”

What would the full promise of liberty include? That question is difficult to answer, at least in part, because Lawrence involved issues of equality of treatment as well as intimate association. The Court might have been suggesting that individuals should not be treated differently because they engage in same-sex rather than different-sex relations. But then a separate question would be whether non-marital relations as a general matter were protected.

The Obergefell Court explained that under Lawrence both same-sex and different-sex couples have the right to engage in intimate relations, assuming that those relations are voluntary, non-commercial, and between adults. Even after announcing that the right to intimate association was a fundamental right, the Obergefell Court suggested that it is error to believe that the “freedom stops there,” which leaves open what else that freedom might include.

The Lawrence Court may have shed some light on what in addition that freedom includes when noting that “adults may choose to enter upon . . . [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” As an initial matter, the Court’s comment should not be interpreted as merely indicating that individuals do not lose their dignity simply because they have non-marital relationships.

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59. See Lawrence, 539 U.S. at 578.

60. Peter Nicolas, Fundamental Rights in A Post-Obergefell World, 27 YALE J.L. & FEMINISM 331, 340 (2016) (“Obergefell rather clearly describes Lawrence as falling within the Court’s line of cases recognizing a fundamental right to ‘intimate association.’”).

61. Obergefell, 135 S. Ct. at 2600.

62. Cf. Lawrence, 539 U.S. at 574 (“As an alternative argument in this case, counsel for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument . . . .

63. Cf. id. at 575 (“Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

64. Obergefell, 135 S. Ct. at 2600 (“As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”).

65. Lawrence, 539 U.S. at 578 (“The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”).

66. Obergefell, 135 S. Ct. at 2600.

67. Lawrence, 539 U.S. at 567.

68. See Unfixing Lawrence, 118 HARV. L. REV. 2858, 2868 (2005) (“The opinion thus limited the
said much more: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” In making such a point, the Court strongly implied that the enduring, personal, non-marital bond itself has value.

The recognition that intimate non-marital relationships have value does not establish that states must accord formal recognition to those relationships, and the Court expressly refused to address that question. “The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” The Court reiterated its point later in the opinion — “[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”

When expressly refusing to address whether federal constitutional guarantees protect same-sex marriage, the Court may simply have been noting that the issue of same-sex marriage was not before the Court. Or, the Court may have been undecided about whether same-sex marriage is protected by federal constitutional guarantees. The focus here, though, is a little different. If one reads Lawrence through an Obergefell lens, one sees Lawrence as holding that same-sex and different-sex non-marital relationships are equivalent for constitutional purposes and that such relationships have value of which the Constitution takes account.

The Court said that the personal bond is more enduring than the sexual relations.

69. Lawrence, 539 U.S. at 567.

70. Mark Strasser, Same-Sex Marriage and the Right to Privacy, 13 J.L. & FAM. STUD. 117, 128 (2011) (“[T]he [Lawrence] Court went out of its way to explain that when ‘sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring[,] . . . suggest[ing] that the relationship itself has value independent of the sexual relations.’”).

71. Lawrence, 539 U.S. at 567 (emphasis added)

72. Id. at 578.

73. Sylvia A. Law, Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality, 3 STAN. J. CIVIL RIGHTS. & CIVIL L. 1, 3 n.1 (2007) (“Lawrence did not raise the question of marriage equality.”) In McLaughlin v. Florida, 379 U.S. 184 (1964), the Court struck down Florida’s punishing interracial fornication and adultery more severely than intra-racial fornication and adultery, expressly refraining from addressing the constitutionality of the state’s interracial marriage ban. See id. at 196 (“We accordingly invalidate s 798.05 without expressing any views about the State’s prohibition of interracial marriage . . . .”)

74. Kenneth P. Miller, The California Supreme Court and the Popular Will, 19 CHAP. L. REV. 151, 188 (2016) (“[S]trategists for the gay rights movement believed that the Court [at the time Lawrence was issued] was not yet prepared to issue a broad decision granting same-sex couples федерal constitutional marriage rights. . . . “). But see Lawrence, 539 U.S. at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

75. Obergefell, 135 S. Ct. at 2600 (“As this Court held in Lawrence, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.”).

76. See Lawrence, 539 U.S. at 567.
Does this constitutionally recognized value translate into a requirement that states accord to cohabiting couples some or all of the rights enjoyed by married couples?77 Certainly, states are permitted to accord non-marital couples and their families certain benefits and obligations.78 But states being permitted to do so is not equivalent to their being required to do so, and whether states are required by the Federal Constitution to do so might depend at least in part upon whether those in intimate non-marital relationships enjoy any rights beyond immunity from criminal prosecution.

There is room for disagreement about whether the Obergefell Court viewed non-marital relationships as having positive value. Admittedly, the Court made some negative comments about non-marital relationships, for example, describing one of the couples seeking marriage as "seek[ing] relief from the continuing uncertainty their unmarried status creates in their lives."79 Much of that couple’s insecurity was due to Michigan’s refusal to permit second-parent adoption, which meant that each of the children raised by the couple was only recognized as having one legal parent.80 If the legal parent died, the relationship of the partner (i.e., the non-legal parent) with the child would be at risk.81 Yet, that instability and insecurity would not have been present if Michigan had recognized second-parent adoptions,82 which suggests that marriage is not the only route to establishing secure parent-child relations between children and the adults who are raising them.

The Obergefell Court implied that children raised in non-marital households “suffer the stigma of knowing their families are somehow lesser”83 and, further, “suffer the significant material costs of being raised by unmarried parents,

77. Cf. Serena Mayeri, Marriage (In)equality and the Historical Legacies of Feminism, 6 CAL. L. REV. CIR. 126, 135 (2015) ("Obergefell might come to stand for the core principle that due process and equal protection forbid exclusionary laws that demean and reinforce the subordinate status of historically marginalized groups. Theoretically, at least, this principle would apply not only to other discrimination based on sexual orientation, but also to laws that exclude nonmarried individuals and families from obtaining the benefits available to the married.").

78. See Erez Aloni, Registering Relationships, 87 TUL. L. REV. 573, 590 (2013) ("[Washington courts] have advanced the doctrine of ‘committed intimate relationships’ . . . in which the court looks at the couple’s conduct during their relationship to see if the relationship demonstrates a marriage-like pattern. If the court finds that it does, the couple is treated similarly to married couples with regard to property distribution.

79. Obergefell, 135 S. Ct. at 2595.

80. See id. ("Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent."); see also Ginger Grimes, Masking the Reemergence of Immutability with “Outcomes for Children,” 5 UC IRVINE L. REV. 683, 693 (2015) ("Michigan law prohibited all unmarried couples from jointly adopting children and thus prevented April and Jayne from both being legal parents to their three children on the basis of their marital status. Michigan law also prevented same-sex couples from getting married. Together, these laws operated to ban all same-sex couples from jointly adopting children.").

81. See Obergefell, 135 S. Ct. at 2595 ("[W]ere tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt.").

82. Danaya C. Wright, Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families, 25 CORNELL J.L. & PUB. POL’Y 1, 22 (2015) ("The second-parent adoption allows a nonspouse to adopt a child without terminating the parental rights of the biological co-parent.").

83. Obergefell, 135 S. Ct. at 2600.
relegated through no fault of their own to a more difficult and uncertain family life.” 84 But the Court was not entirely clear about why those families are allegedly lesser. The stigma might be due to the state’s prohibiting the couple from marrying rather than to the parents choosing not to marry. 85 If that is the correct interpretation, then children would not be stigmatized merely because their parents had rejected the option of marrying. Further, when discussing the material costs associated with being raised by unmarried parents, the Court may have had in mind some of those discussed in United States v. Windsor, 86 for example, the extra healthcare costs associated with providing coverage for non-marital partners. 87 While some families might well have to pay those costs, others would not if both of the adults were covered by insurance provided by their respective employers. 88

It is simply unclear whether Obergefell should be understood as reifying the difference between marital and non-marital relationships. 89 Obergefell did cite with approval the Lawrence language praising “a personal [non-marital] bond that is more enduring,” 90 so the resolution of how to value non-marital relationships will have to await future opinions. 91 A separate issue will be whether lower courts read Obergefell as promoting or at least condoning adverse treatment of those in non-marital relationships, Lawrence’s celebration of the value of intimate non-marital relationships notwithstanding. 92 Thus, even if the Court did not intend to communicate that the Constitution stigmatizes those in non-marital relationships, lower courts might nonetheless infer that the Constitution either devalues or

84.  Id.; see also Colker, supra note 46, at 417 (“The Obergefell Court recognizes the harms that flow to the children of unmarried parents—both material and attitudinal.”); NeJaime, supra note 46, at 1249–50 (“The Court envisions nonmarital life, including nonmarital childrearing, as inferior.”).

85.  Cf. United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (suggesting that the federal government’s refusal to recognize same-sex marriages valid in the states would humiliate the married, same-sex couples’ children because “[t]he law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

86.  Id. at 2695.

87.  See id. (“DOMA . . . raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses.”) (citing 26 U.S.C. § 106; Treas. Reg. § 1.106–1, 26 CFR § 1.106–1 (2012); IRS Private Letter Ruling 9580001 (Sept. 10, 1998)).

88.  Cf. Kerry Hannon, Employers Penalizing Spouses for Health Insurance, NEXTAVENUE (Apr. 23, 2013), http://www.nextavenue.org/employers-penalizing-spouses-health-insurance/ (“If you’re currently on your husband’s policy but work full-time for an employer that offers health benefits, check with your human resources department for details on enrolling. You might find that your employer provides a larger subsidy.”).

89.  See Clare Huntington, Obergefell’s Conservatism: Reifying Familial Fronts, 84 FORDHAM L. REV. 23, 23 (2015) (suggesting that Obergefell “reifies marriage as a key element in the social front of family, further marginalizing nonmarital families”).

90.  Obergefell, 135 S. Ct. at 2600 (citing Lawrence, 539 U.S. at 567).

91.  Cf. Tribe, supra note 44, at 28 (“But in Obergefell, the lesson went further, teaching that the deeper purposes of neither equal protection nor due process could be satisfied if only negative liberty—the liberty ‘to engage in intimate association without criminal liability’—was entitled to constitutional protection.”).

92.  Colker, supra note 46, at 406 (“One must wonder if the stigma against nonmarital parents and their children will increase as a new group is allowed to enter the institution of marriage, because couples can no longer offer as an excuse that the state would not permit them to marry.”).
permits states to devalue such relationships. Such an interpretation might have important implications in states with constitutional amendments that preclude according the benefits of marriage to those in non-marital relationships, especially if those prohibitions are construed broadly.

B. Glucksberg and the Right to Marry

While Obergefell is important because it struck down same-sex marriage bans, it also may turn out to be very important because of how it treats Washington v. Glucksberg. Glucksberg involved a challenge to a Washington assisted-suicide prohibition. The plaintiffs were doctors who, but for the law, would have provided assistance to terminally ill patients who wished to end their lives.

The Glucksberg Court began its due process analysis “by examining our Nation’s history, legal traditions, and practices,” noting a long history of criminalizing suicide and the assistance of suicide. The Court announced that its “established method of substantive-due-process analysis has two primary features.” The first was that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’” and the second was that “in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest is necessary. The Court then noted some of the rights that had already been recognized: the right to marry, the right to procreation, the right to direct the education of upbringing of one’s children, the right to use contraception whether within marriage or outside of it, and the right to abortion.

93. Cf. Carpenter & Cohen, supra note 18, at 125 (discussing Obergefell’s “disturbing denigration of those who are not married”).
96. Id. at 705–06 (“The question presented in this case is whether Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution.”).
97. Id. at 707 (“These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington’s assisted-suicide ban.”).
98. Id. at 710 (citing Planned Parenthood of Sc. Pa. v. Casey, 505 U.S. 833, 849–50 (1992)).
99. Id. at 711–18.
100. Id. at 720.
102. Id. at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).
103. Id. at 720 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).
104. Id. (citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 545 (1942)).
105. Id. (citing Meyer v. Nebraska, 262 U.S. 390, 403 (1923) and Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925)).
106. Id. (citing Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965)).
108. Id. (citing Planned Parenthood of Sc. Pa., 505 U.S. at 839–40 (1992)).
The Glucksberg Court neglected to mention that its recommended due process approach would not have protected all of the interests that it described as fundamental.\(^{109}\) For example, in *Griswold v. Connecticut* in which the Court struck down a Connecticut law denying marital couples access to contraception,\(^{110}\) Justice Stewart noted in dissent that the Connecticut law had been on the books for over eighty years.\(^{111}\) So, too, consider *Loving v. Virginia* in which the Court struck down Virginia's interracial marriage ban.\(^{112}\) Virginia had laws banning interracial marriage while it was still a colony.\(^{113}\) In *Eisenstadt v. Baird*, the Court struck down a Massachusetts law that had been on the books in some form for over 90 years.\(^{114}\) In *Roe v. Wade*, the Court struck down an abortion law that had been in existence for almost 120 years,\(^{115}\) a fact emphasized by then-Justice Rehnquist in his dissent.\(^{116}\) If these laws had been on the books for decades, then it could hardly be said that protection of the rights at issue was deeply rooted in the Nation's history and traditions. But this means that the substantive due process approach described by Chief Justice Rehnquist in the majority opinion in *Glucksberg*\(^{117}\) was the approach *not* used in the very cases in which many of the fundamental rights were recognized. Had the Court employed the *Glucksberg* approach in those earlier cases, it would likely have reached much different conclusions, as then-Justice Rehnquist’s *Roe* dissent illustrates.\(^{118}\) Further, the *Glucksberg* approach is

\(^{109}\) Strasser, *supra* note 19, at 112-13 (“[T]he history and tradition test is inappropriate to determine fundamental rights because its use would mean, for example, that the right to have access to contraception or abortions are also not fundamental rights. . . .”).

\(^{110}\) See *Griswold*, 381 U.S. at 480

The statutes whose constitutionality is involved in this appeal are ss 53—32 and 54—196 of the General Statutes of Connecticut (1958 rev.). The former provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Section 54—196 provides:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

\(^{111}\) See id. at 527 (Stewart, J., dissenting) (“Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone.”).

\(^{112}\) *Loving*, 388 U.S. at 12 (“There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”).

\(^{113}\) See Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (“Virginia was . . . one of the first colonies to formulate a legal definition of race and to enact prohibitions against interracial marriage and interracial sex.”).

\(^{114}\) See *Eisenstadt*, 405 U.S. at 447 (“Section 21 stems from Mass. Stat.1879, c. 159, s 1, which prohibited without exception, distribution of articles intended to be used as contraceptives.”).


\(^{116}\) See id. at 176–77 (Rehnquist, J., dissenting) (“[T]he Texas statute struck down today was, as the majority notes, first enacted in 1857 and ‘has remained substantially unchanged to the present time.’”).

\(^{117}\) See *Glucksberg*, 521 U.S. at 705 (“Chief Justice Rehnquist delivered the opinion of the Court.”).

\(^{118}\) See *supra* note 116 and accompanying text.
incompatible with a later decision—*Lawrence*—where that decision recognizes a fundamental right to engage in non-marital relations.\(^{119}\)

While *Glucksberg* does not provide a principle that plausibly accounts for those interests that have been recognized as fundamental rights, a separate question is whether *Obergefell* required overruling *Glucksberg* or, at least, severely limiting its reach.\(^{120}\) The *Obergefell* Court noted “*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices.”\(^{121}\) But, the *Obergefell* Court explained, “*Loving* did not ask about a ‘right to interracial marriage’ . . . and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’”\(^{122}\) Instead, in each case the Court considered whether “there was a sufficient justification for excluding the relevant class from the right.”\(^{123}\)

One way to accommodate *Glucksberg* while still striking down same-sex marriage bans would be to suggest that the *Glucksberg* analysis is only triggered if the recognition of new rather than existing rights is involved.\(^{124}\) Because the right to marry had already been recognized prior to *Glucksberg*, *Glucksberg*’s analysis would be inapplicable when deciding whether the already-recognized right to marry included the right to marry a same-sex partner.\(^{125}\)

The *Obergefell* Court did not simply reject the applicability of *Glucksberg* because the right to marry had already been recognized as a fundamental right. Rather, although recognizing that “[t]he right to marry is fundamental as a matter of history and tradition,”\(^{126}\) the Court also suggested that “rights come not from ancient sources alone.”\(^{127}\) Such an approach, while not overruling *Glucksberg*, nonetheless severely limited its reach—”while that approach [in *Glucksberg*] may have been appropriate for the asserted right there involved (physician-assisted

\(^{119}\) *See Lawrence*, 539 U.S. at 593–94 (Scalia, J., dissenting) (noting that *Glucksberg* was incompatible with a holding that the right to engage in non-marital relations is fundamental). But the *Obergefell* Court suggested that the right to engage in such relations was indeed fundamental. *See Obergefell*, 135 S. Ct. at 2606.

\(^{120}\) Chief Justice Roberts wrongly suggests that the two decisions were incompatible. *See Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (“It is revealing that the majority’s position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.”).

\(^{121}\) *Obergefell*, 135 S. Ct. at 2602.

\(^{122}\) *Id.*

\(^{123}\) *Id.*


\(^{125}\) *Id.* (“Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg*’s analysis is inapplicable here.”); *see also Kenji Yoshino, A New Birth of Freedom?*, *Obergefell* v. Hodges, 129 HARV. L. REV. 147, 163–64 (2015) (“*Obergefell* presented the Court with an escape hatch that would have allowed it to leave the *Glucksberg* view of tradition intact.”).

\(^{126}\) *Obergefell*, 135 S. Ct. at 2602.

\(^{127}\) *Id.*
suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”128

The Obergefell Court made explicit what should have been clear upon a brief examination of those interests recognized as fundamental129—the Glucksberg history and tradition test does not plausibly account for those rights recognized as fundamental. Yet, the history and tradition test has been cited as a reason not to recognize particular interests as fundamental,130 and after Obergefell the Court may have to provide a different rationale when rejecting that a particular interest qualifies as a fundamental right.131 Before that standard is discussed, however, a different point might be made. It would be unsurprising for members of the Court sometime in the future to claim that the right to marry has long been recognized as a fundamental right as a matter of history and tradition,132 and that the Court’s severe limitation of Glucksberg134 was mere dictum and not entitled to precedential weight.135 As to how many justices will assert that position, this may depend upon who is nominated and confirmed to occupy any open seats on the Court.136

C. The Judicial Role

Courts following Obergefell and employing the Glucksberg approach only when physician-assisted suicide is at issue will need to know what approach to employ when other kinds of interests are alleged to be protected by substantive due process guarantees.137 The Court engaged in a brief discussion of the role of

128. Id.
129. See supra notes 109–18 and accompanying text.
130. See, e.g., Kerry v. Din, 135 S. Ct. 2128, 2134 (2015) (“[B]efore conferring constitutional status upon a previously unrecognized ‘liberty,’ we have required ‘a careful description of the asserted fundamental liberty interest,’ as well as a demonstration that the interest is ‘objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed.’”) (citing Glucksberg, 521 U.S. at 720–21).
131. But see infra text following this note.
132. See infra notes 137–45 and accompanying text.
133. See supra note 126 and accompanying text.
134. See supra note 128 and accompanying text.
136. David Garrow, Op-Ed, Four Supreme Court Justices are older than 75. Is that a problem? L.A. TIMES (Feb. 2, 2016), http://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html (“Today we have four Supreme Court justices who are superannuated: Stephen G. Breyer is 77, Anthony M. Kennedy will turn 80 this summer, Antonin Scalia will celebrate his 80th birthday on March 11, and Ruth Bader Ginsburg will celebrate her 83rd four days later. Both Clarence Thomas, 67, and Samuel A. Alito Jr., 65, also qualify for Social Security.”). Justice Scalia died within two weeks of the publication of that op ed. See also Jamie Gangel, Ariane de Vogue, Evan Perez & Kevin Bohm, Antonin Scalia, Supreme Court justice, dies at 79, CNN POLITICS (Feb. 15, 2016), http://www.cnn.com/2016/02/13/politics/supreme-court-justice-antonin-scalia-dies-at-79/index.html (“U.S. Supreme Court Justice Antonin Scalia, the leading conservative voice on the high court, has died at the age of 79, a government source and a family friend told CNN on Saturday.”).
137. Some commentators seem not to appreciate how Obergefell attempted to cabin Glucksberg’s reach. See O’Rourke, supra note 3, at 16 (“Obergefell thus opens a doctrinal space for extending well-
the judiciary, noting that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.” Because the way to exercise “[t]hat responsibility, however, ‘has not been reduced to any formula,’” judges must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”

Reasoned judgment cannot perform its function unless informed by something, and the Court suggested that the judging process “is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.” Judges should consider “[h]istory and tradition [a] guide” rather than as setting “outer boundaries.” The Court warned that according history and tradition a more privileged status might “allow . . . the past alone to rule the present.” That said, however, courts using history and tradition as a guide might reach the same conclusions in particular cases as courts using history and tradition as the criterion, which means that post-Obergefell courts may not be recognizing rights that pre-Obergefell courts would not also have recognized. At the very least, it is too early to declare that Obergefell marks a major change.

After laying out this vision of judging, the Obergefell Court implied that this was the method of judging that had been in use by members of the Court for a long time. “Applying these established tenets, the Court has long held the right to marry is protected by the Constitution.” The Court then noted that the right to marry had been recognized in Loving v. Virginia, a decision issued in 1967, and reaffirmed that position in Zablocki v. Redhail and Turner v. Safley. But the Court implied that the recognition of marriage as a fundamental right predated 1967. “Over time and in other contexts, the Court has reiterated that the right to marry

recognized due process rights to new groups, and applying those rights in new contexts. If a litigant cannot persuasively frame her due process claim in terms of a well-recognized right, then Glucksberg may be fatal to the claim.”

139. Id. (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).
140. Id.
141. Id.
142. Id. (citing Lawrence, 539 U.S. at 572).
143. Obergefell, 135 S. Ct. at 2598.
144. See Yoshino, supra note 125, at 148 (“Obergefell became something even more than a landmark civil rights decision. It became a game changer for substantive due process jurisprudence.”); cf. Michael W. McConnell, Time, Institutions and Interpretation, 95 B. U. L. REV. 1745, 1782 (2015) (suggesting that Obergefell seems “to open the door to whatever new rights might appeal to the sensibilities of five Justicos”).
145. Obergefell, 135 S. Ct. at 2598.
148. Id. (“The Court again applied this principle in Turner v. Safley, 482 U.S. 78, 95 (1987)”).
is fundamental under the Due Process Clause.” Among the cases cited for that proposition was one issued in 1923 and another issued in 1888.

After suggesting that the right to marry had been recognized for more than three quarters of a century before Loving, the Court made what appeared to be a damning admission: “It cannot be denied that this Court’s cases describing the right to marry presumed a relationship involving opposite-sex partners.” Such a comment is surprising. Whether such a claim can be denied depends upon the kind of presumption at issue. If this is a logical presumption and marriage for same-sex couples serves the same purposes as it does for different-sex couples, then the presumption not only can but should be denied. Further, the Obergefell Court stated that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,” so there is an important sense in which that presumption must be denied. But that makes the Obergefell Court’s statement all the more mysterious.

As support for its claim that marriage was presumed to be for different-sex couples, the Court explained that “[t]his was evident in Baker v. Nelson, 409 U.S. 810 (1972), a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.” The explanation for the Baker holding was that “[t]he Court, like many institutions, had made assumptions defined by the world and time of which it was a part.”

Yet, the Court failed to note that a mere eleven years before the Court struck down interracial marriage bans in Loving v. Virginia, the Court in Naim v. Naim refused to hear a challenge to Virginia’s interracial marriage ban because “the case was devoid of a properly presented federal question.” Mentioning Naim would have put the Court’s analysis in a whole different light.

Consider the Court’s suggestion that the right to marry presumed different-sex partners, as was indicated by the Court’s having denied in an earlier opinion that a challenge to a same-sex union ban implicated federal guarantees. That same reasoning would suggest that the marriage jurisprudence prior to Loving presumed relationships between individuals of the same race, as was indicated by

150. Id. (citing M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–40 (1974)).
151. Id. (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
152. See id. at 2601 (discussing Maynard v. Hill, 125 U.S. 190 (1888)).
154. Perhaps not appreciating what the Court was actually admitting, see infra notes 189–90 and accompanying text, Chief Justice Roberts expressly noted this statement in his dissent. See Obergefell, 135 S. Ct. at 2619 (Roberts, C.J., dissenting) (“As the majority admits, the institution of ‘marriage’ discussed in every one of these cases ‘presumed a relationship involving opposite-sex partners.’”).
155. Obergefell, 135 S. Ct. at 2598.
156. Cf. id. at 2601 (“There is no difference between same- and opposite-sex couples with respect to this principle.”).
157. Id. at 2599.
158. Id. at 2598.
159. Id.
the Court’s having denied in an earlier opinion that a challenge to an interracial union ban implicated federal guarantees.

Such a claim about presumptions would not have implied that interracial marriages were prohibited everywhere, because interracial marriages were permitted in about half the states when Naim was decided162 and in even more states when Loving was issued.163 Instead, the presumption would have meant something else—for example, that the Court did not believe that the Federal Constitution required the recognition of interracial marriages.164

One explanation for why the Naim Court might have denied that a federal question was implicated was that the Court might have believed that the regulation of marriage was a matter left for the states.165 That explanation would seem subject to the following criticism. In an earlier case involving the same parties, the United States Supreme Court remanded the case for further consideration.166 But, it might be thought, if marriage were simply a matter left to the states, the United States should not have remanded the case the first time but, instead, have said that there was no federal issue implicated.

That said, there is another way to understand what the Court was doing the first time it heard the case. In 1955, the Naim Court wrote:

The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered ‘in clean cut and concrete form, unclouded’ by such problems.167

In what respect was the record incomplete? One possibility was that the Court was not sure where the parties were domiciled at the time of the marriage.168 If, for example, the couple had moved to North Carolina and married there where such marriages were permitted, then the marriage would have been valid in the domicile at the time of the marriage.169 In that event, a subsequent move to Virginia

163. See Loving, 388 U.S. at 6 (“Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.”).
164. But see infra notes 189–90 and accompanying text (suggesting that the Court might not have interpreted federal constitutional guarantees that way).
165. Cf. Windsor, 133 S. Ct. at 2689–90 (“By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”). The Windsor Court also noted that state regulation of marriage was subject to federal constitutional guarantees. See id. at 2691 (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”) (citing Loving v. Virginia, 388 U.S. 1 (1967)).
166. See Naim, 350 U.S. at 891 (“The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion.”).
167. Id. (citing Rescue Army v. Mun. Court, 331 U.S. 549, 584 (1947)).
168. Strasser, supra note 19, at 79 (“The Court might instead have believed that the important issue was whether either of the parties was domiciled in Virginia when the marriage was contracted in North Carolina.”).
would have raised issues that could be addressed without speaking to the validity of Virginia’s interracial marriage ban.170

Commentators disagree about why the Naim Court denied that interracial marriage bans implicated federal guarantees.171 In any event, just as Naim did not settle how Loving would be decided, Baker v. Nelson172 did not settle how Obergefell would be decided. Baker did not settle the matter because there “are other, more instructive precedents,”173 and “in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected.”174 Precisely because “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples,”175 the Court suggested that a position that once had seemed sensible, namely, that same-sex couples could be precluded from marrying, was simply no longer tenable.176

If the Court had discussed Naim and had pointed out that an interracial marriage ban that (allegedly) did not implicate federal guarantees during the fifties nonetheless implicated those guarantees in the sixties, then it might have been easier to understand how a same-sex marriage ban that (allegedly) did not implicate federal guarantees in the 1970s nonetheless implicated such guarantees more than forty years later. But making this history clear would have made Obergefell seem less revolutionary.177

It also would have served other purposes as well, because it would have undercut one of the dissent’s criticisms, namely, that interracial marriage bans were not even analogous to same-sex marriage bans. Ironically, Chief Justice Roberts helped illustrate in his dissent why the two kinds of bans were more analogous than many seemed to admit. For example, he noted in his dissent that

(1991) (“Yielding to Frankfurter’s importuning, the Court remanded Naim to the Virginia Supreme Court on the pretext that the parties’ domicile stood in need of clarification.”); see also Mark Strasser, Naiming the States Where Loving Will Be Recognized: On Tea Leaves, Horizontal Federalism, and Same-Sex Marriage, 22 WM. & MARY J. WOMEN & L. 1, 17 (2015) (“Suppose, for example, that Ruby and Han had planned to move to North Carolina where their marriage was legal. In that event, they would have been marrying in accord with the law of the domicile at the time of the marriage.”).

170. See State v. Ross, 76 N.C. 242, 247 (1877) (upholding the validity of an interracial marriage contracted in another domicile even though such marriages could not be celebrated within the state).


173. Obergefell, 135 S. Ct. at 2598.

174. Id. at 2599.

175. Id.

176. Id. at 2602 (“The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.”).

177. See Yoshino, supra note 125, at 148 (describing Obergefell as “a game changer”).
“the interracial marriage ban at issue in Loving [did not] define marriage as ‘the union of a man and a woman of the same race.’” 178 What did the statute at issue in Loving state? “All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” 179 But Chief Justice Roberts failed to include the wording of some of the statutes banning same-sex marriage. For example, Ohio law specified: “Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.” 180 While there were differences between the marriage prohibitions especially because Virginia had criminalized attempting to enter into an interracial marriage, 181 it was nonetheless true that both kinds of marriage were treated as void ab initio and neither defined marriage as excluding a particular kind of union.

In his dissent, Chief Justice Roberts suggested that the Court was somehow seeking “to change the core definition of marriage as the union of a man and a woman.” 182 But such a criticism seemed anachronistic, because various states were already recognizing same-sex marriage. 183 Indeed, the number of states recognizing same-sex marriage at the time Obergefell was issued was comparable to the number of states recognizing interracial marriage at the time Loving was issued. 184

Members of the Court clearly disagree about whether the state furthers legitimate interests by reserving marriage for different-sex couples, but that disagreement at least can be discussed, for example, by analyzing whether the interests served by recognizing different-sex marriages are also served by recognizing same-sex marriages. 185 But appeals to core definitions are unhelpful as a mode of analysis, especially when the alleged core definition did not reflect the law of almost three quarters of the states. 186

When discussing the presumption that marriage was for individuals of different sexes, the Court was not implying that the purposes of marriage can only be served by individuals of different sexes—on the contrary, the Obergefell Court

180. OHIO REV. CODE ANN. § 3101.01 (C)(1) (West).
181. Loving, 388 U.S. at 5 n.4 (“It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian.”) (citing Section 20—54 of the Virginia Code).
184. When Loving was issued, sixteen states prohibited interracial marriage. See supra note 163. When Obergefell was issued, thirteen states prohibited same-sex marriage. See supra note 183.
185. See Obergefell, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (“[D]istinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’”) (citing Lawrence, 539 U.S. at 585 (O’Connor, J., concurring in judgment)), But see id. at 2599–601 (discussing why recognizing same-sex marriage promotes both state and individual interests).
186. See supra note 183 (noting that only thirteen states did not recognize same-sex marriage when Obergefell was issued).
explicitly denied such an assertion. Instead, the Court was discussing what individual justices presumed, which is why it said that “[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.” Here, the Court was echoing an observation made in Lawrence that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”

Ironically, there may be a reason that the Court decided not to refer to Naim. If one accepts that members of the Naim Court knew that interracial marriage bans were unconstitutional but did not want to issue that holding for fear of a backlash, then that Court would not have been blinded by the times but instead making a calculation about the timing effects of the decision. In contrast, the Obergefell Court implied that the Baker Court (and, perhaps, the dissenting members of the Obergefell Court) were simply blinded by the times.

II. EQUAL PROTECTION

Almost all of the Loving Court opinion addressed why Virginia’s interracial marriage ban violated federal equal protection guarantees, and only a short part of the opinion addressed why that ban violated due process guarantees. Some

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187. See Obergefell, 135 S. Ct. at 2599–601 (noting the various interests served by recognizing same-sex marriage).
188. Id. at 2602.
189. Lawrence, 539 U.S. at 579. See also Yoshino, supra note 125, at 163 (noting that in Obergefell “[i]t was all [discussed] there again—the problem of the blindness of each generation”).
190. See Rebecca Schoff, Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis, 95 VA. L. REV. 627, 637 (2009) (“Internal correspondence between Court members at the time indicates that the prospects of further backlash influenced the Court when it chose to avoid confronting anti-miscegenation statutes in these cases.”); Mae Kuykendall, Equality Federalism: A Solution to the Marriage Wars, 15 U. PA. J. CONST. L. 377, 409 n.122 (2012) (“The Court did not want to decide the case immediately after Brown v. Board of Education, 347 U.S. 483 (1954), for fear of a massive backlash and greater resistance to the Court’s holding that schools must desegregate.”).
191. Cf. Nancy Scherer, Viewing the Supreme Court’s Marriage Cases Through the Lens of Political Science, 64 CASE W. RES. L. REV. 1131, 1152 (2014) (“In a speech at Columbia University Law School in early 2012, Ginsburg explained that judicial restraint can sometimes be a more effective policy choice for the justices than making an expansive, aggressive decision like Roe: ‘It’s not that the judgment was wrong, but it moved too far too fast.’”).
192. Jessica Knouse, Civil Marriage: Threat to Democracy, 18 MICH. J. GENDER & L. 361, 391 (2012) (“[M]ost of the Court’s opinion in Loving focused on equal protection rather than substantive due process . . . .”); Strasser, supra note 29, at 190 (“While Loving establishes the fundamental right to marry, most of that opinion was focused on the equal protection aspect of the interracial marriage ban.”); 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, 1197 (2004) (“Loving is primarily thought of as an equal protection case . . . .”).
193. Shuler, supra note 29, at 263 (“The bulk of the Loving opinion relied on equal protection to strike down the anti-miscegenation law, however Chief Justice Warren’s opinion also briefly but explicitly relied upon the Fourteenth Amendment’s substantive due process clause.”); Jeremiah Egger, Glucksberg, Lawrence, and the Decline of Loving’s Marriage Precedent, 98 VA. L. REV. 1825, 1828 (2012) (“While Loving is primarily an equal protection case, Chief Justice Warren’s opinion closes with a succinct and forceful due process analysis . . . .”).
commentators have suggested that the Obergefell Court missed a golden opportunity by not holding that same-sex marriage bans violate equal protection guarantees. Just as the Loving Court struck down interracial marriage bans as a violation of both substantive due process and equal protection guarantees, the Obergefell Court might have adopted a similar approach. Yet, the confusing aspect of the opinion is not that the Obergefell Court failed to mention equal protection but, instead, what to make of what the Court actually said.

A. Obergefell’s Equal Protection Approach

In holding that same-sex couples can exercise the fundamental right to marry, the Court provided the basis for striking down same-sex marriage bans without even addressing equal protection concerns. But the Court did discuss equal protection, albeit in a way that is likely to yield more confusion rather than less.

After holding that the right to marry a same-sex partner was included within the right to marry, the Court noted that equal protection was also implicated. “The right of same-sex couples to marry . . . is derived, too, from [the Fourteenth] Amendment’s guarantee of the equal protection of the laws.” The Court explained that “[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.” Thus, the Court suggested that equal protection and due process guarantees may but need not inform their respective reaches.

By way of explanation, the Court discussed two of the marriage cases, Loving and Zablocki. The Obergefell Court noted that the Loving “Court first declared the [marriage] prohibition invalid because of its unequal treatment of interracial couples,” and then “[w]ith this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty.” While the Obergefell Court is correct that in Loving the equal protection analysis was offered first and then only later was the due process analysis included, the Court nonetheless risks confusion by framing the opinion this way—the Court leaves open whether

194.  Mayeri, supra note 77, at 131 (“The omission of a sex or sexual orientation discrimination analysis in Obergefell understandably disappointed many observers.”).

195.  Peter Nicolas, Obergefell’s Squandered Potential, 6 CAL. L. REV. CIR. 137, 140 (2015) (“Even if Justice Kennedy felt it necessary to reach the fundamental rights claim in Obergefell and overrule the Court’s summary dismissal of such a claim in Baker v. Nelson, he could again have followed the Loving example and rendered a decision declaring the statute unconstitutional on both substantive due process and class-based equal protection grounds.”).

196.  See infra notes 197–248 and accompanying text.

197.  Obergefell, 135 S. Ct. at 2604–05 (“The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

198.  Id. at 2602.

199.  Id. at 2603.

200.  See id.

201.  Id.

202.  Id.

203.  Loving, 388 U.S. at 7–12.

204.  Id. at 12.
the due process analysis (holding that the interest in marriage is fundamental) is in some way dependent upon the finding that equal protection guarantees had been violated.\(^{205}\)

Allegedly, \textit{Zablocki} also illustrated “[t]he synergy between the two protections,”\(^{206}\) where “the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law.”\(^{207}\) In \textit{Zablocki}, “[t]he equal protection analysis depended in central part on the Court’s holding that the law burdened a right ‘of fundamental importance.’”\(^{208}\) That is correct, precisely because the classification at issue in \textit{Zablocki}—indigency—did not trigger heightened review.\(^{209}\) But this only makes the \textit{Obergefell} Court’s position more opaque, given the lack of work equal protection seems to be doing in \textit{Zablocki}.\(^{210}\) As Justice Stewart pointed out in his \textit{Zablocki} concurrence in the judgment: “The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.”\(^{211}\) The constitutional difficulty posed by the Wisconsin statute was that “it exceed[ed] the bounds of permissible state regulation of marriage, and invade[d] the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.”\(^{212}\)

The \textit{Obergefell} opinion did include the language one might expect in an analysis striking down a statute on equal protection grounds—“[t]he imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”\(^{213}\) The Court had used similar language in previous opinions. For example, when striking down a state constitutional amendment precluding affording anti-discrimination protection on the basis of orientation, the Court noted in \textit{Romer v. Evans}\(^{214}\) that the amendment at issue “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”\(^{215}\) So, too, in \textit{United States v. Windsor}, the Court struck down the Defense of Marriage Act at least in part because of its attempted “interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”\(^{216}\) But at least one of the questions at issue in \textit{Obergefell} was whether the State’s classifying on the basis of the sexes or orientations of the parties was itself a sufficient ground for striking the bans.\(^{217}\) While the Court wrote that same-sex

\begin{footnotes}
\footnote{205. Cf. supra notes 29–33 and accompanying text.}
\footnote{206. \textit{Obergefell}, 135 S. Ct. at 2603.}
\footnote{207. Id.}
\footnote{208. Id. (citing \textit{Zablocki}, 434 U.S. at 383).}
\footnote{209. See supra note 32 and accompanying text.}
\footnote{210. But see infra notes 226–39 and accompanying text.}
\footnote{211. \textit{Zablocki}, 434 U.S. at 391 (Stewart, J., concurring in the judgment) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring opinion)).}
\footnote{212. Id. at 391–92 (Stewart, J., concurring in the judgment).}
\footnote{213. \textit{Obergefell}, 135 S. Ct. at 2604.}
\footnote{214. 517 U.S. 620 (1996).}
\footnote{215. Id. at 635.}
\footnote{216. \textit{United States v. Windsor}, 133 S. Ct. 2675, 2693 (2013).}
\footnote{217. Commentators disagree whether \textit{Obergefell} foreshadows recognizing orientation as a quasi-suspect class. Compare Dena H. Sokolow, Governmental Agencies Can Be Our Guides to Future Trends in}
\end{footnotes}
marriage bans “abridge central precepts of equality.”218 The Court left open whether it would strike down “unjustified inequality [even when not] within our most fundamental institutions.”219 It is thus difficult to tell whether after Obergefell the Court will strike down statutes discriminating on the basis of sexual orientation when mere liberty interests are at issue.220

B. Obergefell’s Equal Protections Implications

Some commentators have already noted that the Court has sometimes combined liberty and equality in its analyses of which statutes pass muster.221 The Court reinforced the accuracy of that observation when suggesting that “[r]ights implicit in liberty and rights secured by equal protection . . . in some instances . . . may be instructive as to the meaning and reach of the other.”222 Nonetheless, that suggestion was worrisome because the examples offered by the Court were at best ambiguous. Zablocki is often discussed as a case involving due process rather than equal protection.223 The point is not to deny that Zablocki stated that it was doing equal protection analysis,224 but merely to suggest that the level of scrutiny was likely not increased because of the equal protection aspects of the case and that the statute’s constitutionality would have been upheld had a mere liberty interest been at stake.225

Employment Law, ASPATORE, 2015 WL 9875511 *1, at *2 (“Obergefell is not a broad guarantee of protection against sexual orientation discrimination in the workplace, but it is likely a preview of future developments in employment law and a shift toward eventual recognition of sexual orientation and gender identity as a protected class.”) with Ann L. Schiavone, Unleashing the Fourteenth Amendment, 2016 Wis. L. Rev. FORWARD 27, 28 (2016) (“Obergefell potentially signal[s] a shift away from declaration of new rights and suspect classes, while applying a stronger rational basis test.”).

218. Obergefell, 135 S. Ct. at 2604.
219. Id. at 2603.
220. See Kyle C. Velte, Obergefell’s Expressive Promise, 6 HOUS. L. REV. 157, 161 (2015) (suggesting that Obergefell “will not prohibit discrimination against LGBT individuals in other contexts”); but see Jane R. Bambauer & Toni M. Massaro, Outrageous and Irrational, 100 MINN. L. REV. 281, 329 (2015) (“But it now will be difficult indeed—even in a non-fundamental rights case—for government to justify using sexual orientation as a basis for denying liberty interests.”). See also Elizabeth B. Cooper, The Power of Dignity, 84 FORDHAM L. REV. 3, 21 (2015) (“Whether Obergefell will bode well for civil rights litigation, as I believe it has the power do, or will further undermine attempts to achieve at least formal equality, we will know only with the passage of time.”).
221. See Pamela S. Karlan, Foreword: Loving Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) (“[L]iberty and equality are more intertwined.”).
222. Obergefell, 135 S. Ct. at 2603.
224. Zablocki, 434 U.S. at 382 (“[T]he statute violates the Equal Protection Clause.”).
225. See supra note 35 and accompanying text.
Nonetheless, the Court could be suggesting that the class at issue in Zablocki did some work in the opinion sub silentio. A different case cited by the Court, M.L.B. v. S.L.J., also extended protection to an impoverished individual, holding that “Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.” Parenting rights also implicate a fundamental interest, so perhaps Obergefell, Zablocki, and M.L.B. all involve these hybrids.

The Obergefell Court also discussed Loving, which is traditionally viewed as providing two independent justifications for striking down the Virginia antimiscegenation law. However, describing the guarantees as working together might be taken to imply that the equal protection or due process guarantees, standing alone, would not suffice to justify striking down the statute.

In some sense, equal protection and due process work together as a general matter. When the state precludes some from enjoying a benefit that others enjoy, the state is distinguishing between classes of individuals and those denied the benefit might at least claim that they were not being treated equally. Further, individuals claiming to be harmed are presumably claiming that some interest is at stake, so due process would be implicated at least to the extent that the contested statute would be to be rationally related to a legitimate state interest. Thus, there

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226. See Jane Rutherford, The Myth of Due Process, 72 B.U. L. REV. 1, 73 (1992) (“The combination of treating the poor differently from the rich with the right to marry . . . persuaded the Court.”); C. Quince Hopkins, The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States, 13 CORNELL J.L. & PUB’Y 431, 466 (2004) (“Zablocki, like Loving, stands for the proposition that the right to marry is a protected liberty interest, but only state interference that employs a method that allocates that right differently with respect to some groups than to others is unconstitutional.”).
227. See Obergefell, 135 S. Ct. at 2603.
229. Id. at 107.
230. See id. at 109 (discussing the importance of the right at issue); see also Santosky v. Kramer, 455 U.S. 745, 759 (1982) (“When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.”).
might seem to be no harm in talking about both kinds of guarantees being implicated in that it should not be difficult to talk about some sense in which both equal protection (perhaps involving the lowest level of scrutiny)\textsuperscript{235} and the due process guarantees (perhaps involving the lowest level of scrutiny)\textsuperscript{236} are implicated.

Yet, that approach carries risks if only because of how it might be construed. If due process and equal protection are (almost) always implicated, then requiring both to be triggered will not help determine which interests should be protected and which not. The Court will still have to find some way to distinguish among interests. But this means that characterizing the jurisprudence as involving both liberty and equality may well not result in the recognition of many new rights if only because of the Court’s ever-present desire to avoid opening floodgates.\textsuperscript{237} For

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\textsuperscript{235} See Jacquelyn M. Meirick, \textit{Through the Tiers: Are Iowa’s New Sex-Offender Laws Unconstitutional?}, 96 Iowa L. Rev. 1013, 1023 n.65 (2011) (“Rational-basis review is the lowest level of constitutional scrutiny in deciding due-process and equal-protection claims under the U.S. Constitution.”); Susan E. Hauser, \textit{More Than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(a) of the Bankruptcy Code}, 85 Am. Bankr. L.J. 195, 219 (2011) (“Rational basis review is the lowest level of scrutiny that can be applied to a law challenged as violating the plaintiff’s right to equal protection.”).

\textsuperscript{236} Lynne Marie Kohm, \textit{Liberty and Marriage-Baehr and Beyond: Due Process in 1998}, 12 BYU J. Pub. L. 253, 258 (1998) (“The rational relationship test is the lowest level of due process scrutiny and is applied in the absence of a fundamental right.”); Matthew R. Madara, \textit{Constitutional Law—Sacrificing the Good of the Few for the Good of the Many: Denying the Terminally Ill Access to Experimental Medication}, 31 W. New Eng. L. Rev. 535, 554 n.112 (2009) (“Rational basis review is the lowest level of judicial review that courts will apply in due process cases. This test is applied when the plaintiff is asserting a right that is not fundamental under the Constitution. Government regulation of such a right is permissible so long as there is a legitimate interest for the government’s regulation.”).

\textsuperscript{237} See Lawson v. FMR LLC, 134 S. Ct. 1158, 1172 (2014) (“There is scant evidence, however, that these floodgate-opening concerns are more than hypothetical.”); Henderson v. United States, 133 S. Ct. 1121, 1130 (2013) (“And there are other reasons for concluding that our holding will not open any ‘plain error’ floodgates.”); Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 753 (2012) (“Arrow’s floodgates argument assumes ‘a shocking degree of noncompliance’ with the Act . . . and seems to us more imaginary than real.”); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (“We confronted a similar ‘floodgates’ concern . . . but nevertheless applied \textit{Strickland} to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty . . . . A flood did not follow in that decision’s wake.”); Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 481–82 (1978) (“As we stated in \textit{Switzerland Cheese Ass’n. v. E. Horne’s Mkt., Inc.}, 385 U.S. 23, 24 [1966], ‘we approach this statute [§ 1292(a)(1)] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders.’”); \textit{Switzerland Cheese Ass’n. v. E. Horne’s Mkt., Inc.}, 385 U.S. 23, 24 (1966) (“[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders.”); see also \textit{Willkie v. Robbins}, 551 U.S. 537, 569 (2007) (Ginsburg, J., concurring in part and dissenting in part) (“Allowing Robbins to pursue this suit, the Court maintains, would open the floodgates to a host of unworthy suits ‘in every sphere of legitimate governmental action affecting property interests.’”); \textit{Schriro v. Landrigan}, 550 U.S. 465, 499 (2007) (Stevens, J., dissenting) (“In the end, the Court’s decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation.”); \textit{Lassiter v. Dep’t of Soc. Servs.}, 452 U.S. 18, 58–59 (1981) (Blackmun, J.,
example, in *M.L.B.*, the Court rejected that its holding posed a floodgates difficulty because “parental status termination decrees [are set] apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody.” This suggests that analyzing issues in terms of a combination of due process and equal protection guarantees could result in fewer rather than additional interests being protected. At the very least, those celebrating the approach in *Obergefell* as beginning a new dawn with respect to the recognition of rights may well be doing so prematurely.

The *Obergefell* Court made clear that it was only “in some instances” that “[r]ights implicit in liberty and rights secured by equal protection . . . each may be instructive as to the meaning and reach of the other.” The Court was not offering a more restrictive Fourteenth Amendment jurisprudence such that only cases involving interests triggering closer scrutiny and classes triggering closer scrutiny would yield protected rights, and there was no suggestion of a hybrid analysis requirement analogous to that used in free exercise jurisprudence. Nonetheless, it would not be surprising if some courts were to read the opinion this way, if only because the (sometimes required?) “synergy between the two protections” could be read in a way that is more expansive but also in a way that is more restrictive.

*Obergefell* would have been more promising as a source of increased protections had it cited *Plyer v. Doe* as an example of the discussed synergy,

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239. See Kenji Yoshino, *Supreme Court Breakfast Table: Obergefell Recognizes the Connection between Liberty and Equality*, SLATE (June 25, 2016), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_obergefell_v_hodges_links_liberty_and_equality.html (“For those who have despaired about the recognition of ‘new’ constitutional rights, such as the right to education or health care, that may be the lasting impact of this opinion.”); Nicolas, supra note 60, at 334 (discussing the view that “the *Obergefell* decision was groundbreaking not only for its specific holding regarding the right of same-sex couples to marry, but also more broadly for altering the way in which the Court will recognize fundamental rights in the future”).


241. Id.

242. See id. (“Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive . . . .”).

243. See Emp’t Div., Dep’t of Human Res. of Oregon v. Smith, 494 U.S. 872, 881 (1990) (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.”); see also id. at 882 (rejecting the use of strict scrutiny because “[t]he present case does not present such a hybrid situation”).


because the Court there seemed to use heightened scrutiny\textsuperscript{247} notwithstanding the absence of a protected class or fundamental interest.\textsuperscript{248} But the Obergefell Court did not even cite Plyler, so the best way to interpret the decision will have to await further developments in the jurisprudence.

CONCLUSION

Obergefell is an important decision with much promise. Like most if not all Supreme Court opinions, the decision is open to interpretation, although the Obergefell Court seemed to go out of its way to make matters open-ended. While the Court did wax eloquent about the benefits of marriage, that made sense from the perspective of those challenging the bans—they were in non-marital relationships and were arguing that they were being harmed by their state’s refusal to permit them to marry.

The Court’s due process and equal protection analyses are open-ended in a few respects. The Court’s restriction of Glucksberg represents an admission that the decision did not reflect the method used by the Court to determine which rights are fundamental. But using history and tradition as a guide rather than as a strictly enforced limiting principle (except when it is not enforced) may not result in different holdings as a practical matter. One might expect, though, that the lower courts will vary more markedly in their analyses—some will be more willing to recognize new rights, whereas others will be no more willing to recognize that interests are protected than they would have been were Glucksberg vigorously enforced.

Equal protection is similarly more open-ended. The Obergefell Court suggested that equal protection informed its decision, while at the same time not recognizing sexual orientation as a protected class. Perhaps in light of Romer, Lawrence, Windsor and Obergefell the Court will soon announce that orientation is suspect or quasi-suspect. Perhaps not. In any event, some lower courts will be more willing to strike down laws adversely affecting important (but not fundamental) interests of non-protected classes, whereas others may require some combination of heightened scrutiny for the interests and the class at issue before striking down a challenged law.

Obergefell is open-ended is another way. The Supreme Court of the future considering Obergefell will find much in the decision to support its preferred view, whether that view involves expanding or restricting the protection of classes or interests. Obergefell is written in such a way that it can readily be used to support opposing constitutional perspectives, which means that the next few appointments to the Court will likely do much to determine Obergefell’s legacy.

\textsuperscript{247} See id. at 244 (Burger, C. J., dissenting) (“[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.”).

\textsuperscript{248} Id. (Burger, C. J., dissenting) (“[T]he Court expressly—and correctly—rejects any suggestion that illegal aliens are a suspect class . . . or that education is a fundamental right.”).