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FREEDOM OF MARRIAGE: AN ANALYSIS OF POSITIVE AND NEGATIVE RIGHTS

RACHEL ALYCE WASHBURN*

ABSTRACT

The institution of marriage is deeply embedded in modern society. Within the United States, legal recognition of marriage conveys both social dignity and material benefits to married individuals. As far back as 1967, the Supreme Court has treated freedom of marriage as a Constitutional right necessary to protect personhood rights such as liberty and autonomy. However, it did not fully extend this right to same-sex couples until its 2015 decision in Obergefell v. Hodges.

Justice Scalia criticizes the majority opinion in Obergefell as lacking logic and precision, yet it reconciles jurisprudential discrepancies in prior case law addressing the right of marriage. These discrepancies are rooted in the contrasting negative and positive rights analytics of Immanuel Kant and Georg Willhelm Friedrich Hegel, respectively. Supreme Court precedent instituted a negative right to marriage in Loving v. Virginia, and a positive right to marriage in United States v. Windsor. These decisions are inconsistent under an exclusive negative or positive rights analysis. However, the Obergefell decision establishes Constitutional protection of same-sex marriage by acknowledging correlating positive and negative rights to marriage. This Note analyzes same-sex marriage under negative, positive, and correlating rights analytics. It concludes that the correlating rights analysis in Obergefell achieves optimal freedom by respecting and protecting the personhood rights of same-sex couples.

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INTRODUCTION

Marriage has been a cornerstone of societal structures around the world for many centuries.¹ It is a timeless institution that remains a centerpiece of twenty-first century society in the United States. While marriage is an age-old practice, the institution has evolved as the needs of society have shifted.² Views regarding the acceptability of couples of different religion, race, and now gender have changed.³ Despite this evolution, the concept of marriage has consistently been valued by society and the legal system. People marry for a variety of reasons: religious, institutional, social, individualist, and sexual.⁴ There cannot be one exclusive definition of marriage because every marriage differs based on the needs of each couple.

Although there are many types of intimate personal relationships, for the purposes of this Note the term “marriage” refers to the creation of a spousal relationship that is recognized within the legal system. The scope of this paper is limited to jurisprudential analysis of which marriages ought to be recognized within the legal system. Until recently, individual states had the ability to determine their own legal definitions of marriage.⁵ Legal recognition of marriage gives couples unique benefits within the law, the economy, and society. Therefore, when a legal system denies marital status to particular groups of people, they are denied these benefits and the ability to fully partake in the society in which they live. In *Obergefell v. Hodges*, the Supreme Court extended the right of marriage to same-sex couples based in part on precedent establishing that, “the right to personal choice regarding marriage is inherent in the concept of individual

1. See Joel Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV. 195, 198 (2011).

2. See *id.* at 197–201 (providing a short history of marriage in Western culture, beginning in the Middle Ages).

3. See, e.g., Don S. Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31, 48–49 (2008) (an overview of the recent effect of Christianity on the marital institution); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

4. See Paul R. Amato, *Institutional, Companionate, and Individualistic Marriages: Change over Time and Implications for Marital Quality*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 107, 111 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (containing a study of different types of marriages and how they change over time).

5. See Nichols, *supra* note 1, at 195.

autonomy.”⁶ While Supreme Court precedent has treated marriage as a personhood right,⁷ it has also historically confirmed the power of each state to determine who could marry.⁸ These discrepancies in Supreme Court precedent are rooted in contradictory jurisprudence, which *Obergefell* resolves without specifically addressing.

The first part of this Note examines contradictory treatment of marriage in Supreme Court precedent prior to its recent decision in *Obergefell*. A combination of that precedent resulted in a legal system that allowed states to determine which relationships grant legally protected rights to personhood, dignity, and liberty.⁹ In the second part I briefly discuss why states have a legitimate interest in the marital institution. I subsequently analyze state regulation of marriage and explain why the government does not have a legitimate interest in denying same-sex couples access to the marital institution. Part III explains the negative and positive rights theories of Kant and Hegel, respectively, and how these theories apply to marriage. Finally, in Part IV, I argue that a comprehensive evaluation of freedom requires acknowledging that positive and negative rights correlate. In order for the government to maximize freedom, it must balance a duty to limit constraints on personal rights against the task of regulating social institutions that affect legitimate government interests. In conclusion, a comprehensive analysis of both negative and positive freedom shows that the government has a duty to limit constraints on the personal right to marry. While there is no legitimate state interest outweighing this duty, there is a state incentive to not limit access to social institutions. This conclusion is consistent with the holding in *Obergefell*, and strengthens the position that the government ought to protect the personhood right of marriage by prohibiting states from denying same-sex couples the freedom to marry.

6. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (“This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.”).

7. *See Loving*, 388 U.S. at 12 (“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.”); *see also id.* (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

8. *See United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

9. *Id.* at 2696.

I. RECOGNITION OF MARRIAGE IN THE LAW

The legal system historically recognized and regulated marriage through individual state laws.¹⁰ In *Windsor*, the Supreme Court acknowledged 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.”¹¹ However, *Windsor* maintained a legal system where states define and regulate marriage, despite precedent in *Loving* that established the personal right to marry as protected by the Constitution.¹² Prior to *Obergefell*, it was unclear to whom and how far the Supreme Court would extend this right. In 1967, the Supreme Court guaranteed that “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”¹³ Forty-eight years later the Supreme Court acknowledged that same-sex couples should have the same freedom to marry, and that the federal government must provide equal protection of that freedom from state infringement.¹⁴ This position is inconsistent with *Windsor*, where the Supreme Court accepted a legal policy allowing states the power to decide who has the freedom to marry—decide whose relationships are “worthy of dignity in the community.”¹⁵

Although *Windsor* held the Defense of Marriage Act (DOMA)¹⁶ to be an unconstitutional deprivation of the due process of law under the Fifth Amendment, it stipulated that only same-sex marriages deemed lawful by the states were protected.¹⁷ The Court declined to answer the primary question of whether the right to marry is an inherently protected right under the Equal Protection Clause of the Fourteenth Amendment because the majority limited their holding to the more narrow issue of DOMA

10. *Windsor*, 133 S. Ct. at 2689–90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”).

11. *Loving*, 388 U.S. at 12.

12. *See id.* (referring to marriage as “one of the basic civil rights of man.”).

13. *Id.*

14. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

15. *Windsor*, 133 S. Ct. at 2692; *see also Obergefell*, 135 U.S. at 2613 (Roberts, C.J., dissenting) (arguing that *Windsor* stands for the proposition that the Framers “entrusted the States with the whole subject of domestic relations of husband and wife.”).

16. *See Windsor*, 133 S. Ct. at 2682 (explaining that DOMA is a federal law “which excludes a same-sex partner from the definition of ‘spouse’ as that term is used in federal statutes.”).

17. *Id.* at 2695–96 (specifying protection for marriages made lawful by the state and limiting its holding to those lawful marriages).

under the Fifth Amendment.¹⁸ The *Windsor* Court did not find DOMA unconstitutional because it violated a constitutionally protected freedom of marriage, but because it undermined the states' ability to define and regulate marriage.¹⁹ Furthermore, the Court emphasized the power of the state to determine which relationships are deserving of recognition and protection of personhood and dignity within a community.²⁰ The *Loving* Court held "that [states] restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."²¹ The negative inference of the *Windsor* Court's holding is that states have the power to restrict who may marry and determine whose relationships deserve protection of personhood and dignity. The Court reasoned that the state historically had this power and should continue having it so that it can protect its interest in domestic relations within the state.²²

Some state and circuit courts took the position that state involvement in marriage originated, and is necessary, to enable the state to regulate the effects of procreation. For example, in *DeBoer v. Snyder*, the Sixth Circuit expressed the belief that "[o]ne starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse."²³ The *DeBoer* court clarified that while marriage is now understood to encompass more than a couple's procreative capacities, the legal definition of who may marry ought to be determined by individual states, and not treated as a Constitutional right.²⁴ It went on to explain that a same-sex

18. *Id.* at 2706 (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

19. *See id.* at 2696 (majority opinion) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

20. *See id.* at 2692 ("When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.").

21. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

22. *See Windsor*, 133 S. Ct. at 2691 ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

23. *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014).

24. *Id.* at 402–03 ("Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.").

couple's ability to raise children is a legitimate reason for some states to broaden their definition of marriage; yet it does not convey a Constitutional right to marriage. This decision was consistent with language in *Windsor*, which emphasized each state's individual ability to define and regulate marriage.

In *Obergefell*, the Supreme Court specifically held that same-sex couples have the same Constitutional protection of the right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁵ This holding embraced a jurisprudential view consistent with the forty-eight year old *Loving* decision, as opposed to the recent decision in *Windsor*. In doing so it overturned *DeBoer v. Snyder*, and clarified that the federal government has an affirmative duty to protect same-sex couples from state action which infringes on rights derived through personhood and ensured by the Constitutional guarantee of liberty.²⁶ In protecting a same-sex couples' right to marriage, *Obergefell* resolved a discrepancy between the decisions in *Loving* and *Windsor*. The jurisprudence underlying this decision is not made evident in the opinion, yet understanding it strengthens the holding against Justice Scalia's critique that it lacks the logic and precision demanded in the law.²⁷

II. THE STATE'S INTEREST IN MARRIAGE

In *Windsor*, the Supreme Court explained that the state has an interest in defining marriage as a way to regulate its interests regarding children, property, and marital responsibilities.²⁸ It was traditionally believed that "marriage is the foundation of the family and of society, without which there would be neither civilization nor progress."²⁹ Although marriage has increasingly been viewed more as an individual right,³⁰ the state still claims an interest in regulating it.³¹ As long as society continues to be structured around the institution of marriage, that institution will continue

25. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

26. *Id.* at 2594.

27. See *id.* at 2630 (Scalia, J., dissenting) ("The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today's opinion has to diminish this Court's reputation for clear thinking and sober analysis.").

28. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

29. Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 225 (2004) (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

30. *Id.* at 227.

31. This Note does not address the argument that all serious relationships affect state interests, and so marriage is not unique and should be outside of state control. However, that argument just as easily leads to the conclusion that the state has an interest in regulating all serious relationship.

to have a significant impact on societal and state interests. Even if the state did not regulate marriage, it is a deeply embedded societal custom in which people want to take part.

Regardless of who or why people marry, the outcome has a substantial effect on state interests. When people combine property it affects ownership and any future ability to divide it.³² Married couples typically divide responsibilities and contribute to the family through different roles; historically through the spousal division where men earned income while women performed domestic work.³³ Although contribution to the family is not as gender divided as it once was, the government still has an interest in ensuring that partners receive proportionate shares of the proceeds of that partnership in divorce. The government also has an interest in accounting for factors such as combined incomes, shared responsibility for supporting children, and inheritance proceeds so that it can best meet societal needs and prevent abuse of the tax system. While the state should be limited in defining marriage and delegating who has the right to marry, the state remains invested in prohibiting marriage between parties incapable of giving consent in order to prevent abusive power disparities.³⁴

Arguably the most important state interest in marriage is the effect that marriage and divorce have on children and parental rights. “In virtually every comparison done to date, children in two-biological parent, marital homes (the ‘nuclear family’) fare better than other children, along almost every index.”³⁵ The state has an interest in protecting the welfare of children. Since children do better within a two-parent family it follows that the state has an interest in encouraging marriage and regulating divorce.³⁶ After a divorce the state must protect parental rights, and it has an interest in maximizing child welfare through a system ensuring

32. See Catherine T. Smith, *Philosophical Models of Marriage and Their Influence on Property Division Methods at Divorce*, 11 J. CONTEMP. LEGAL ISSUES 214, 217–18 (2000) (explaining that in a divorce the state is responsible for dividing property equally and tasked with considering need disparities between couples).

33. Clare Chambers, *The Marriage-Free State*, 113 PROC. OF THE ARISTOTELIAN SOC’Y 123, 125 (2013).

34. See *id.* at 133 (“[P]ersonal relationships still have to be regulated so as to protect vulnerable parties, including, but not only, children; so as to regulate disputes over such matters as joint property; and so as to appropriately direct state benefits and taxes.”).

35. Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry*, 42 SAN DIEGO L. REV. 889 (2005) (citing Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 851–52 (2005) (“[This research was based on studies] in two types of married and unmarried households: those in which the child is a biological child of both adults and those in which the child is the biological child of only one.”)).

36. See *id.* at 891 (“[T]here is something about marriage that confers advantages on children. Marriage itself makes people better parents.”).

visitation and child support. Child welfare is one of the primary interests used to justify state regulation of the marital institution.³⁷ However, it is important to note that a marital relationship affects more state interests than just child welfare. It affects the state's interests in property, taxation, and healthcare, and it accommodates for the differing benefits and sacrifices that people make when they build a life with one another.

Without state involvement in the marital institution, marriage would simply be a contractual relationship and the state would be unable to address the above-mentioned needs. Purely contractual relationships are subject to power discrepancies and abuse between parties that the state has an interest in preventing. As mentioned above, marriage affects legitimate state interests that cannot be avoided by turning it into a purely contractual relationship.³⁸ Additionally, people entering into marriage are not always sophisticated parties and do not typically plan for future disputes or potential divorce. Eliminating state regulation of marriage would prevent the state from effectively addressing these issues.

Marital relationships existed before governments instituted legal recognition of them.³⁹ Legal recognition of marriage simply allows the state to address interests that are affected by these relationships. However, legal recognition of a marital relationship conveys “recognition, dignity, and protection”⁴⁰ within society. In *Windsor*, the Supreme Court acknowledged that legal recognition of marriage protects personhood and dignity.⁴¹ Nevertheless, it also stipulated that states have discretion in issuing this protection, and declined to acknowledge that the Constitution itself protects such personhood and dignity. Two years later, the Supreme Court in *Obergefell* held that same-sex marriage is a fundamental right that cannot be denied by states.⁴² The discrepancy between these decisions can be explained through a jurisprudential analysis.

37. See Gallagher, *supra* note 29, at 232–33.

38. See Chambers, *supra* note 33, at 133–34 (“Even if contracts are allowed, the state must set limits on contracts that would be unjust for the contracting parties . . . or for third parties such as children, and must provide guidance for disputes that arise between people in personal relationship who have not made a contract.”).

39. See Nichols, *supra* note 1, at 198 (“[T]he initial evolution of any external jurisdiction (whether civil or ecclesiastical) over marriage was itself an innovation, for matters of marriage ‘had been largely outside the sphere of law’ for many centuries.”).

40. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601–02 (2015) (“As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects.”).

41. *Windsor*, 133 S. Ct. at 2696.

42. *Obergefell*, 135 S. Ct. at 2604–05.

III. THE RELATIONSHIP BETWEEN PERSONHOOD AND RIGHTS

Although states have a responsibility to regulate certain interests that are affected by marriage, it does not necessarily follow that states ought to have the ability to distinguish which relationships deserve protection of personhood and dignity. In *Loving*, the court treated the freedom to marry as a vital personal right belonging equally to all people.⁴³ In *Windsor*, the court declined to acknowledge an overall personal right to marriage, and instead emphasized the authority of the state to determine whose personhood and dignity are protected by marriage.⁴⁴ The difference in how each court construed the government's role varies by how each court analyzed the connection between positive and negative rights. The *Loving* court acknowledged that personhood corresponds with certain rights that government must affirmatively protect from state infringement. The rationale in *Windsor* was more in line with the position that the government's function is to acknowledge and protect certain societal institutions, which in turn protect personhood. This political and philosophical debate is centered on the contrasting philosophies articulated by Immanuel Kant and Georg Wilhelm Friedrich Hegel.

A. Immanuel Kant

"Modern philosophy can hardly ignore Kant; it either derives from him or must deal with him."⁴⁵ His political theory, although fundamentally unique, falls within the category of natural law theories similar to Locke's.⁴⁶ It is my opinion that Kant's philosophy aligns with the classical liberalism of the founding fathers and explains the belief that government is necessary to protect individual autonomy and personhood.⁴⁷ Kant believed in a strong central government limited to laws and actions that could pass the test of the Categorical Imperative,⁴⁸ which is essentially a duty to "[a]ct only according to that maxim whereby you can, at the same

43. See *supra* note 12 and accompanying text.

44. *Windsor*, 133 S. Ct. at 2706.

45. Nathaniel Lawrence, *Kant and Modern Philosophy*, 10 REV. METAPHYSICS 441, 441 (1957).

46. See Daniel Weinstock, *Natural Law and Public Reason in Kant's Political Philosophy*, 26 CAN. J. PHIL. 389, 392 (1996) (explaining that Kant's natural law argument is limited to the rational necessity for consent for a state that limits institutions and realizes individual autonomy).

47. See Steven Smith, *What is "Right" in Hegel's Philosophy of Right?*, 83 AM. POL. SCI. REV. 3, 15 (1989) (arguing the types of "unbridled individualism" embraced by Locke and Kant have virtually been accepted as a self-evident truth in the United States).

48. See Weinstock, *supra* note 46, at 395.

time, will that it should become a universal law.”⁴⁹ “Kant’s requirement is that legislators ask themselves whether the policies they are proposing could be accepted by people, without their acceptance having the effect of subverting their autonomy.”⁵⁰ Ultimately, the necessity of government and its ensuing limits are focused around ensuring inherent freedom.

Today, “the prevailing idea of personhood draws much of its sense from the Kantian dichotomy of person and object.”⁵¹ According to Kant, people have “an ‘innate right to freedom,’ defined as ‘independence from being constrained by another’s choice.’”⁵² Within the state of nature, people acting with absolute free will inevitably intrude on the absolute free will of others. Therefore, a form of government is necessary to maximize individual rights of the subject by “apportioning and enforcing legal rights.”⁵³ People consent to a form of government, therefore legitimizing it as a means of protecting autonomy and personhood. While the government can enact laws that are unpopular, it cannot make laws that contradict autonomy and free will. To a certain extent all laws limit free will, yet a law that contradicts autonomy and free will is one that fails the Categorical Imperative. “The examples Kant provides of laws incompatible with the contractualist criterion are ones in which law-makers seize on conventional but morally arbitrary facts about certain classes of persons as sufficient grounds for differential treatment.”⁵⁴ Under Kantian liberalism, the government cannot have the power or discretion “to give [one] class of persons the right to marry [and therefore confer] upon them a dignity and status of immense import”⁵⁵ without conferring the same dignity, status, and rights universally.

Within American society, the rights of personhood are tied to a concept of universal “inalienable rights of life, liberty and the pursuit of happiness” because “all men are created equal.”⁵⁶ I believe it is safe to say that the Fourteenth Amendment embraces Kantian Liberalism and the

49. IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington trans., 3d ed. 1993); see also *id.* at 402 (“As long as it is not self-contradictory to say that an entire people could agree to such a law, however painful it might seem, then the law is in harmony with right.”) (citing Immanuel Kant, *Theory and Practice* (1793), reprinted in *KANT’S POLITICAL WRITINGS* 79 (Hans Reiss ed., H.B. Nisbet trans., 1970)).

50. Weinstock, *supra* note 46, at 403.

51. Daniel Hoffman, *Personhood and Rights*, 19 *POLITY* 74, 85 (1986).

52. Weinstock, *supra* note 46, at 393 (citing Immanuel Kant, *The Doctrine of Right* (1797), reprinted in *THE METAPHYSICS OF MORALS* 63 (Mary Gregor ed. and trans., 1991)).

53. *Id.* at 393.

54. *Id.* at 403.

55. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

56. Hoffman, *supra* note 51, at 77–78.

concept of personhood in stating, “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵⁷ Kantian liberalism is also consistent with language in *Obergefell* protecting the personhood and fundamental rights of same-sex couples under the Fourteenth Amendment.⁵⁸ Kant believed that the function of government is to protect personhood rights; and while he believed that the Categorical Imperative only allows for sexual relationships within marriage, he did not address whether he believed in an inherent legal right to marriage protected by the Categorical Imperative.⁵⁹

Kant viewed marriage as a civil contract and defined it as “a union of two persons of different sexes for lifelong possession of each other’s sexual properties.”⁶⁰ Hegel critiqued this definition of marriage and pointed out that Kant’s view of marriage treats people as objects.⁶¹ If marriage is simply a contractual obligation involving objects then it cannot be protected by the Categorical Imperative, which protects the rights of the subject to experience the object. Furthermore, the Categorical Imperative leads to an unconditional requirement that must be obeyed in all circumstances. Marriage is a choice, not an unconditional requirement and so it does not fall within the Categorical Imperative.⁶² It is my contention that Hegel’s arguments do not adequately construe Kant’s philosophy.

Kant believed that sex requires people to allow themselves to be objectified and possessed by another. On the surface, this use of another as a means to an end is immoral. However, Kant believed the arbitrary power and dehumanization in sex could be constrained “by applying the principle of legal equality to certain rights in marital life.”⁶³ He argued that within a just society marriage ought to entail legal equality conditioned on reciprocity of rights, and an impartiality that brackets out inequality and treats partners as contractually equal human agents.⁶⁴ Therefore, marriage

57. U.S. CONST. amend. XIV § 1.

58. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”).

59. Anthony J. La Vopa, *Thinking about Marriage: Kant’s Liberalism and the Peculiar Morality of Conjugal Union*, 77 J. Mod. Hist. 1, 12 (2005).

60. Steven Miller & Sara Guyer, *Literature and the Right to Marriage*, DIACRITICS, Winter 2005, at 3, 12.

61. *Id.*

62. See *id.* at 4 (“There is no categorical imperative to marry. Marriage has the paradoxical status of an elective obligation: an obligation that one chooses to assume (and, in principle, has the right to choose).”).

63. See La Vopa, *supra* note 59, at 25.

64. *Id.* at 25–26.

could be understood as “‘rights to persons akin to rights to things,’ with ‘right’ here meaning ‘possession of an external object as a thing’ but ‘use of it as a person.’”⁶⁵ While Kant believed that legal marriage resulted in contractual and metaphysical equality which made sex moral, he still believed that men were superior to women.⁶⁶ “Like the wage earner in a free-market contract, the married woman had purely formal contractual rights—rights that might be meaningless in view of the structure of inequality in which the contract operated and that might in fact serve to obscure structural injustice.”⁶⁷

It is important to note that while Kant’s political philosophy protects against moral and arbitrary legislation, he himself condemned same-sex relationships as immoral. Kant perceived sexual relationships as repugnant, animalistic, and prone to abuse of power during vulnerability.⁶⁸ He made an exception for heterosexual marriage because it was an opportunity for unequal parties to become mutually dependent on one another in a way that complimented and completed them.⁶⁹ “Hence it is not only admissible for the sexes to surrender and to accept each other for enjoyment under the condition of marriage, but it is possible for them to do so *only* under this condition.”⁷⁰ Kant viewed sex as a mutual property exchange of one’s body, where partners acted as “contractually equal human agents” and therefore neither was subject to an abuse of power or loss of dignity.⁷¹ He argued that only sex within marriage was moral because partners did not sacrifice their dignity, and they could therefore be granted legal protection against one another.⁷² Kant believed that “[h]omosexuality dehumanized not simply by reducing the other to a thing but also by ‘degrading the self below the level of animals’ (which at least used sex to preserve the species).”⁷³

In spite of his personal views, Kant’s political philosophy guarding against arbitrary distinctions in the law presents a strong argument requiring legal recognition of same-sex marriage. His political philosophy must first be separated from his moral judgments regarding same-sex

65. *Id.* at 24 (citing Kant, *supra* note 49).

66. *Id.* at 27.

67. *Id.*

68. *See* La Vopa, *supra* note 59, at 25.

69. *See id.* at 20 (“Marriage, I contrast, was a relationship of mutual dependence in which each needed the other to approach ‘completion’ and in which inequality was the rule.”).

70. *Id.* at 24 (citing Immanuel Kant, *Praktische Philosophie Herder*, 27 PREUSSISCHE AKADEMIE DER WISSENSCHAFTEN 1, 62 (1974)).

71. *Id.* at 26.

72. *Id.* at 20.

73. *Id.* at 28.

relationships and marriage in general. One approach would be to point out Kant's own belief that legislatures should not make laws based on morally arbitrary facts that set apart certain classes of people.⁷⁴ However, advocates of same-sex marriage ought to also address Kant's argument that only sexual relationships within heterosexual marriages contain dignity, and are therefore the only ones deserving of legal recognition. This entire premise is based on the assertion that humans sacrifice their dignity during sex, unless it falls within a heterosexual marriage. This assertion may have been accepted during Kant's time, but it is not a generally accepted belief today.

Kant believed that dignity is sacrificed during sex because people allow themselves to be dehumanized, objectified, and because they make themselves vulnerable and therefore subject to power discrepancies. He argued that marriage protects dignity and guards against power discrepancies through "a mutually voluntary (and exclusive) contractual relationship."⁷⁵ According to Kant, when both parties are given the right to objectify the other by acquiring property rights to the other then they retain their dignity and power. Since they retain their dignity, the law must recognize that they have rights, and it must protect those rights. Kant maintained that heterosexual sex was moral within the context of marriage, where the civil contract is guaranteed in law. Since same-sex couples are just as capable of forming civil contracts consisting of equality and reciprocity of rights, Kant's rationale can be used to argue that a just legal system ought to recognize and protect that contract.

There are those who argue that marriage is nothing more than an optional contract that should not be regulated by the state. If this were the case, then marriage would be equally available to everyone and would fit nicely within the Kantian political and ethical philosophy of liberalism. However, people marry for a variety of reasons, and limiting marriage to a contract over-simplifies that relationship.⁷⁶ Regardless of who, why, or how people marry; their union has an affect on substantial state interests.⁷⁷ As a result, the state will continue to be involved in marriage, and the institution will continue to convey social status and economic benefits. As long as marriage continues to convey important benefits and recognition within the community, it confers upon people "a dignity and status of

74. See Weinstock, *supra* note 46.

75. La Vopa, *supra* note 59, at 31.

76. See Amato, *supra* note 4 (explaining that people marry for status within the institution, companionship and mutual support, or passion and individual growth).

77. See Chambers, *supra* note 33, at 133.

immense import.”⁷⁸ Today, legal recognition of marriage actually conveys dignity upon relationships, which is the opposite of Kant’s premise that the law recognizes sexual relationships that are already comprised of dignity.

Obergefell supports the position that the recognition of personhood and social dignity, conveyed by state acknowledgment of marriage, falls within the “inalienable rights of life, liberty and the pursuit of happiness” that must be equally recognized under the Fourteenth Amendment. As long as state action conveys dignity and rights within certain relationships, doing so arbitrarily among classes of people violates Kant’s Categorical Imperative. While marriage affects social interests, so long as it is between consenting individuals it is one of the few freedoms that does not intrude on the rights of others. Under Kantian liberalism there is no state interest in denying same-sex couples the right to marry, though there is a vital duty to prevent acknowledging arbitrary and differential treatment between classes.⁷⁹ Failure to protect against such arbitrary differential treatment does not “take seriously the fact that there exist within such societies a plurality of reasonable conceptions of the good, and that the enterprise of justification must therefore prescind from basing itself on any one of them to the exclusion of the other.”⁸⁰ The authors of the Constitution embraced Kantian liberalism when they formed a legal system emphasizing equally inherent freedom and rights. This liberalism rejects illegitimate paternalism, even if it means rejecting the overall moral will of the people in that time.⁸¹ Whatever Kant’s moral beliefs regarding marriage, as long as state action conveys dignity and rights it cannot discriminate based on arbitrary moral determinations.

78. Smith, *supra* note 47; see also Miller & Guyer, *supra* note 60, at 1 (quoting MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 81–148 (1999). “[I]n the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people’s most intimate lives; it is a zone of privacy outside of which sex is unprotected. In this context, to speak of marriage is merely one choice among others is at best naïve.”).

79. See *supra* note 54 and accompanying text.

80. Weinstock, *supra* note 46, at 401.

81. *Id.* at 407 (explaining that Kant’s hypothetical contractarian procedures avoids one generation unjustly binding others by entrenching their understandings into steadfast laws).

B. Wilhelm Friedrich Hegel

Although the U.S. legal system embraces basic Kantian liberalism and natural law principles as outlined above, the Supreme Court in *Windsor* incorporated some of Hegel's positive rights theory. Hegel criticized natural law theorists for embracing a static concept of human rights fixed at human origin.⁸² Instead, he argued that human rights are "bound up with the dynamic structure of human history."⁸³ Instead of believing in natural arbitrary freedoms, Hegel believed that freedom is tied to mutual recognition within societal institutions. To Hegel, rational liberty is moral freedom, which contains "the capacity not just to desire but also to reflect evaluatively upon the kinds of things we ought to desire."⁸⁴ The law "purges the state of caprice and makes possible such modern freedoms as contract, property, career choice, religion, and speech."⁸⁵ It is within the social institutions enabled by law that a person truly has free will because it causes people to recognize and respect the ways of others. Hegel believed that it is only possible for a person to know himself and his own will through interaction with others, and that the ultimate human desire is to be recognized by others.⁸⁶ He embraced the human capacity to desire more than natural objects and the ability "to stand back from our desires and ask whether they are the kinds of desires we wish to have."⁸⁷ One of these desires is to be recognized and respected by others.

While Kant embraced the rights of the natural individual will, Hegel argued that "[t]he practices and institutions of ethical life—family life, economic activity, and politics—are not just limitations on the will's activity but the social context within which freedom is possible."⁸⁸ Although Hegel believed that individuals ought to be treated as equally free under the law, he believed that this legal recognition is earned by "overcoming the natural state of his self-consciousness and obeying a universal," which is the law.⁸⁹ Essentially, Hegel argued that laws make societal institutions possible, which in turn allow people to be self-conscious of others and their will to be recognized. Hegel believed that it is by "conforming" ones desires to fit within moral, ethical, and political

82. See Smith, *supra* note 47, at 4.

83. *Id.*

84. *Id.* at 7.

85. *Id.* at 8.

86. *Id.* at 9.

87. *Id.* at 10.

88. See Smith, *supra* note 47, at 11–12.

89. *Id.* at 13.

institutions that one earns recognition and therefore free will under the law. Kant believed government should function as a safeguard against moral paternalism, while Hegel believed that government should promote morality.⁹⁰

The *Windsor* Court declined to acknowledge an inherent right to marriage, and instead emphasized the power of the state to define the marital institution and determine who has a right to the dignity and privileges of marriage. The decision to protect the state's power to define the marital institution, above any inherent human right to marriage, fits within Hegel's political and ethical philosophy. However, a closer look at Hegel's concept of marriage can also be used to support recognizing same-sex marriage. "Hegel describes the marital vow as a 'festive declaration of consent to the ethical bond of marriage.'"⁹¹ In describing marriage, Hegel explained that "[t]he sensuous moment which pertain[s] to natural life is thereby put in its ethical context as an accidental consequence belonging to the external existence of the ethical bond, which may even consist exclusively in mutual love and support."⁹² Therefore, the ethical bond of the marital institution is the vow or consent (mutual recognition) that embraces mutual love and support. It is neither a contract nor the attraction and desire experienced in the state of nature, because those fall beyond the higher ethical bond. Hegel emphasized the importance of the "festive" declaration because it extends recognition beyond just the couple but to the family, community, and state.⁹³

Hegel's basic definition of marriage states: "Marriage should therefore be defined more precisely as *rightfully ethical* love, so that the transient, capricious, and purely subjective aspects of love are excluded from it."⁹⁴ His concept of an ethical life and "the right" is the process of rising above the state of nature and beyond our biological urges to a place of shared ideas, norms, values, and the recognition and respect for others that is embraced by institutions such as marriage. Like any philosopher, Hegel was a product of his time, and he believed that marriage is the union of

90. *See id.* at 14 ("What [Smith] called Hegel's positive defense of right is indicated in his decision to treat politics as a branch of ethics.").

91. Miller & Guyer, *supra* note 60, at 6.

92. *Id.* at 5 (citing G.W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 204 (Allen W. Wood ed., H. B. Nisbit trans. 1991)).

93. *Id.* at 7.

94. *Id.* at 10 (citing G.W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 201 (Allen W. Wood ed., H. B. Nisbit trans., 1991)); *see also id.* at 12 (explaining that marriage celebrates and upholds a relationship where partners have impersonal desires and do not become objects or engage in a Kantian contractual property exchange).

one man and one woman. However, it is my belief that his philosophy may be used as a proponent for same-sex marriage.

Hegel was not concerned with the physical aspect of marriage. Instead he explained the institution of marriage as the recognition of rightfully ethical love and support, where the couple mutually recognizes each other and is recognized by society. Furthermore, Hegel believed that rights are tied to human history and “a worldwide struggle aimed at the realization of a certain desirable goal, namely, freedom.”⁹⁵ If rights are not fixed but change with the historical struggle for freedom, the argument must be made that the state ought to recognize that same-sex couples are equally capable of mutual love and support. After all, it is only by allowing same-sex couples to take part in societal institutions such as marriage that they will be able to experience recognition and free will under a Hegelian philosophy. While the state may restrict access to the marital institution to maintain morality within the institution, Hegel’s conception of marriage actually supports an argument that it ought to be made available to all of those capable of mutual love and support.

IV. FREEDOM OF MARRIAGE INVOLVES CORRELATING NEGATIVE AND POSITIVE RIGHTS

Kantian liberalism emphasizes natural freedom and places a duty on government not to legislate morality. Although Kant supported an authoritative government, his duties and limitations on government convey significant personal rights. In contrast, Hegel emphasized the importance of institutions and the “right” for people to be able to act and be recognized through participating in those institutions. However, he did not follow this up by placing duties on the community, government, or institution that prevent them from limiting access to the very societal institutions that he believed enable freedom. Kant emphasized the importance of negative rights, while Hegel emphasized the importance of positive rights. Both theories have had an impact on American jurisprudence and interpreting Constitutional rights.⁹⁶ It is my belief that the influence of these contrasting theories helps to explain the contrasting outcomes in *Loving* and *Windsor*. Below I argue that negative and positive

95. Smith, *supra* note 47, at 4.

96. See ROBERT M. MAURO, *HEGEL’S INFLUENCE ON AMERICAN POLITICAL THOUGHT: AN ANALYSIS OF THE AMERICAN PROGRESSIVE MOVEMENT* 3–4 (2000) (providing an overview of the belief that contemporary American liberalism draws upon Kant and that modern American liberalism is a result of the progressive movement influenced by Hegel).

rights are not distinct, but instead correlate. I explain how they correlate in the context of government regulation of the marital institution, and how that analysis is relevant in the *Obergefell* decision.

The Constitution is often understood as conveying predominately negative rights and not positive rights.⁹⁷ Negative rights theorists believe that constitutional rights protect citizens from overreaching government action, yet place no duty on the government to protect against non-government action. Therefore, the Constitution protects from the government but does not necessarily entail protection by the government.⁹⁸ Under a strict negative rights interpretation, the Constitution constrains the government and does not necessarily give it the power to act in order to protect citizens from third-party constraints on freedom. While some theorists argue that the Constitution also contains positive rights, positive rights have generally been recognized under the power of the states not the federal government.⁹⁹ This division of positive and negative rights is consistent with prior court opinions granting states the discretion to determine whether or not to protect a same-sex right to marriage. Prior to recognition of a fundamental constitutional right to marriage in *Obergefell*, individual states had the decision of whether to affirmatively protect such a right.¹⁰⁰ This structure essentially treated marriage as a positive right.

In *Loving*, the Supreme Court had already recognized that there was a fundamental right to marriage. However, *Loving* was a case involving a heterosexual couple during a time when same-sex marriage was not at issue. The question in *Obergefell*, was whether the Constitution also protects a same-sex couple's right to marriage. As explained above, there is a strong argument under a Kantian negative rights theory that the government must not arbitrarily legislate or place constraints on a same-sex couple's "right" to marry.¹⁰¹ However, it does not necessarily follow that the federal government has a duty to actively protect same-sex marriage as a fundamental right against constraints by individual states. Under a strict negative rights theory, the federal government does not have a duty to affirmatively protect a right to same-sex marriage unless it is

97. See Lawrence Friedman, *Rights in Front of Our Eyes: Positive Rights and The American Constitutional Tradition*, 44 RUTGERS L.J. 609, 610 (2014) ("The Bill of Rights, after all, reflects an effort aimed at constraining government, primarily by prohibiting its interference with basic individual liberties like the freedom to speak and express oneself.").

98. See *id.* at 614.

99. See *id.* at 611.

100. See *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014).

101. See *supra* note 54 and accompanying text.

acknowledged as a fundamental constitutional right. Therefore, *Obergefell*'s acknowledgement of same-sex marriage as a fundamental constitutional right ensures active protection by the federal government.

The Supreme Court had already acknowledged a fundamental positive right to marriage in *Loving*, and withholding that right from same-sex couples based on arbitrary moral distinctions would have been inconsistent with Kantian liberalism. Since the act of same-sex marriage does not infringe upon the rights or freedoms of other parties, the federal government should ensure that couples are free to marry.¹⁰² After *Windsor*, it was not clear whether same-sex marriage was a negative or positive right. The federal government was prohibited from placing constraints on any acknowledged same-sex right to marriage—effectively treating it as a negative right. However, this right only legally existed if an individual state chose to acknowledge the dignity and personhood of a same-sex couple's relationship. *Obergefell*'s acknowledgement of a fundamental right to same-sex marriage resolved this confusion, making it both a positive and negative right.

Kant believed that individuals have a right to internal and external freedom, and that this freedom involved correlating negative and positive rights. Theoretically, people accept rule of law because it maximizes overall freedom by uniformly placing a duty on everyone not to violate the rights of others.¹⁰³ This duty results in a negative freedom, which is “independence from another's necessitating choice.”¹⁰⁴ Kant believed that the correlating positive right was dependence on the juridical state, and the ability to be a part of it.¹⁰⁵ According to Kant, the positive right that correlates with external freedom is the right to choose the juridical state over the state of nature.¹⁰⁶ This correlative analysis fails to address the fact that in a juridical state where there is “independence from another's necessitating choice,” there is a resulting opportunity to make one's own choices. Therefore, the correlating positive right under Kantian Liberalism

102. See Michael A. Payne, *Philosophical Perspectives on the Constitution*, 12 U. DAYTON L. REV. 341–45 (1987) (“The individual is free to do whatever he wants, but only if the basic moral rights of others are not violated.”).

103. See SHARON BYRD AND JOACHIM HRUSHCKA, KANT'S DOCTRINE OF RIGHT: A COMMENTARY 88–89 (2010); see also Weinstock, *supra* note 46, at 394 (“[M]y claim to freedom, since it is grounded on a capacity I share with all other persons, must be bounded in a way that recognizes the like claim to freedom of all others.”).

104. See *id.* at 92.

105. See *id.* at 92–93.

106. See *id.* at 93 (“Kant's formulation of the postulate of public law reflects the positive aspect of external freedom ‘In a situation of unavoidable contact with all others, you should leave this state [the state of nature] and move to a juridical state!’”).

is not just the right to choose to be a part of the juridical state, it is the freedom of independent choice and action. However, this correlating freedom only means something if the government protects it in addition to refraining from infringing upon it. Although Kant did not address correlating state protection, there are subsequent liberalists who believe in certain innate natural rights and argue that the state has a duty to protect those freedoms. These liberalists have built on this concept of the freedom to be left alone and emphasize a correlating freedom of action and expression.¹⁰⁷

A right that requires legislative acknowledgement and action is commonly viewed as a positive right. The rights to education or healthcare are common positive rights that require legislative acknowledgement and, subsequently, legislative action. For people to effectively have these rights, states create institutions and act in ways ensuring access to each right. Although marriage is an institution that requires state regulation and authorization, it is different than typical positive rights such as education or healthcare. Unlike education or healthcare, the institution of marriage does not require state involvement to make relationships accessible or maintainable. Instead, state regulation of marriage is necessary to address the effects of marital relationships on state interests. Marital relationships are attainable whether or not states provide access, and the permissive function of state regulation of marriage actually limits access to the institution. This is very different from the state's objective of expanding access to educational and healthcare institutions.

Under a positive rights theory, states have the authority to regulate institutions because such regulation is necessary to preserve and provide access to those institutions. Adherents of Hegelian thought believe that with positive freedom "the agent in whose freedom they are interested is identified as the 'real' or the 'rational' or the 'moral' person who is somehow sometimes hidden within."¹⁰⁸ As explained above, Hegel believed that true freedom could only occur when the "rational person" within the human body could partake in societal institutions and thus realize his rational or moral self. This allows the person "to see the surge of impulse or passion as an obstacle to the attainment of what [he] 'really wants.'"¹⁰⁹ Therefore, only by having access to societal associations does a person have the ability to truly identify himself, embrace autonomy, and become truly free. Simply put, state action is necessary to create and

107. See Gerald MacCallum, *Negative and Positive Freedom*, 76.3 PHIL. REV. 312, 323 (1967).

108. *Id.* at 324.

109. *Id.*

maintain social institutions so that citizens may utilize them and become free.

Kant and Hegel have different conceptions of freedom and human rights. Their approach to analytical jurisprudence is responsible for much of the divide in political theory, and is reflected in the contrasting Supreme Court rulings in *Loving* and *Windsor*. However, not all jurisprudential theorists believe there has to be a distinction between the negative and positive interpretations of freedom. Gerald MacCullum Jr. argued that the distinction between the two types of thought is not in their concept of freedom, but instead in their concept of the “person.”¹¹⁰ Both Kant and Hegel emphasized the importance of protecting the freedom and rights of autonomy. The distinction is that Kant believed an individual has inherent autonomy as a natural person, while Hegel believed that autonomy is only realized through participation in societal institutions that reveal the “real” person within the human body.¹¹¹

In both *Loving* and *Windsor*, the Supreme Court referenced a personhood right in marriage.¹¹² The difference between the two is that *Loving* treated a personhood right as deserving inherent freedom from government restraint while in *Windsor*, the Court acknowledged a connection between personhood and marriage yet emphasized the state’s discretion in granting access to this personhood right. In each case the freedom the Court considered was the same: the freedom to marry. The difference is in where they determined personhood rights originate; the former treated personhood rights as inherent while the latter decided that the state determines to whom to grant personhood rights.¹¹³ This contradictory treatment of personal rights and freedom is rooted in a futile distinction between different kinds of freedom or rights.

MacCullum believed that instead of distinguishing between negative and positive conceptions of freedom, freedom ought to be understood as a

110. *See id.* at 325 (“Only by insisting at least provisionally that all the writers have the same concept of freedom can one see clearly and keep sharply focused the obvious and extremely important differences among them concerning the concept of ‘person.’”).

111. *See supra* note 86 and accompanying text.

112. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“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.”); *see also United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

113. *See Windsor*, 133 S. Ct. at 2710 (Scalia J., dissenting) (suggesting that the Court will next be “appalled by state legislatures; irrational and hateful failure to acknowledge that ‘personhood and dignity’ in the first place.”).

triadic relation between different variables.¹¹⁴ The triadic relation acknowledges that “freedom is thus always *of* something (an agent or agents), *from* something, *to* do, not do, become, or not become something.”¹¹⁵ This analysis enables consideration of the fact that the state has other legitimate interests aside from protecting freedom, and that some barriers may potentially outweigh certain freedoms. A triadic relation for the freedom of same-sex marriage considers: The freedom of an individual weighed against conflicting state interests to marry a person of the same gender. Ultimately the analysis is prone to discrepancies because it depends on how heavily each variable is weighed. However, it at least provides a means of simultaneously weighing the importance of the freedom, the severity of an intrusion, and any competing government interests. The triadic relation is a means of acknowledging that there are government interests in protecting both negative or positive rights, and that these interests correlate.

Consider the example of state involvement in the institution of marriage. Under a negative rights theory, the government must acknowledge personhood rights and protect a person’s innate right to be free from government constraints on that right.¹¹⁶ A strict negative rights theorist would limit the government’s duty to refrain from imposing on a right, yet would not require the government to protect the same right from constraint by third parties. When marriage is acknowledged as a negative right, individuals are effectively given the freedom to act on their personal right of marriage without government constraint. Of course, freedom from constraint only lasts as long as an individual’s free acts are not also constrained by third parties.¹¹⁷ Therefore, negative rights provide freedom, yet those freedoms do not mean much without correlating “rights to protection *by*, and not merely *from*, government.”¹¹⁸ Although people disagree with whether marriage should be available to same-sex couples, it is not generally argued that allowing them the freedom to marry would somehow constrain the rights of others.¹¹⁹ Under a negative rights theory, acknowledging a personal right to marriage places a duty on government

114. See MacCallum, *supra* note 107, at 312.

115. *Id.* at 314.

116. See *supra* note 52 and accompanying text.

117. See Byrd & Hrushcka, *supra* note 103.

118. Friedman, *supra* note 97, at 614.

119. There are arguments that children have a right to well-being and that this requires the preservation of the institution of marriage. However, it is my opinion that this argument does not directly show how the freedom of same-sex marriage would constrain the rights of children.

to protect this right from unnecessary constraints by government as in *Loving*.

Government protection from unnecessary constraints on personal rights is not the end of the story. Once this happens people have the freedom to marry and marriage soon becomes a societal custom. The institution of marriage is now part of the bedrock of society, and as explained above, has an impact on other government interests.¹²⁰ This requires a positive rights consideration of the importance of state involvement in societal institutions. Some social institutions are created by the state as part of its community caretaking function. The education and healthcare systems are both examples of this. In contrast, sometimes the community forms other social institutions, such as marriage, and the state must address how those institutions affect legitimate state interests. According to the positive rights analysis, the government has an interest in maintaining these societal institutions because participation provides a person with the freedom of self-recognition and an opportunity to discover their own will.¹²¹

The Supreme Court's decision in *Windsor* to recognize a state's authority to regulate the marital institution reflects its acceptance of a positive rights theory. However, that position focused solely on the state's interest in maintaining the institution of marriage and neglected to consider the state's duty to protect personal freedom from unnecessary constraint. As Gerald MacCullum explained:

In recognizing that freedom is always both freedom from something and freedom to do or become something, one is provided with a means of making sense out of interminable and poorly defined controversies concerning, for example, when a person really is free, why freedom is important, and on what its importance depends.¹²²

The freedom to marry affects state interests, and the *Windsor* Court was correct to acknowledge that the state has an interest in governing aspects of the marital institution. The Court acknowledged that when the state permits same-sex marriage it protects personhood and dignity,¹²³ yet it failed to address whether the federal government had a duty to protect against constraints on that personhood and dignity. It was not until

120. See *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

121. See *supra* note 85 and accompanying text.

122. See MacCallum, *supra* note 107, at 319.

123. See *supra* note 113 and accompanying text.

Obergefell, that the Court acknowledged that the freedom to marry also entails a freedom from unnecessary government constraint.

Although an analysis of the triadic relation depends on the weight placed on each variable, such an analysis at least requires that each variable be considered. The freedom to marry may conflict with governmental interests, and it entails a correlating freedom from certain barriers. This requires one to consider and weigh any conflicting government interests, and the barriers preventing the freedom of marriage. There are many scholarly articles addressing whether the government has legitimate conflicting interests with the freedom to marry. The necessary follow-up question that many of them fail to address is whether any of those conflicting interests are enough to justify a state's decision to enact barriers that obstruct the freedom to marry. This analysis is similar to the rational basis review that courts use in determining whether there is a rational basis for state laws that conflict with personal rights.¹²⁴

Since marriage is a social institution originating in the community and not the state, the state's interests and involvement ought to be more limited than its interests in an institution such as education or healthcare. Furthermore, the state primarily has an interest in marriage because of the effect that it has on property, taxes, child welfare, inheritance, etc. Therefore, any barriers the state places on marriage ought to be tied to those legitimate government interests. When the state enacts barriers that obstruct the freedom to marry, it must have a legitimate interest that outweighs the duty of government to protect against such constraints. The primary motivation for barriers to same-sex marriage are not directly tied to state interests such as property or child welfare. Instead, objections to same-sex marriage are rooted in beliefs within society that same-sex marriage is immoral or that marriage only applies to relationships that have the potential for procreation.¹²⁵ Proponents of this argument ignore the fact that infertile couples are allowed to marry and that society needs adoption just as much as procreation.

The fundamental point of Kant's Categorical Imperative was that the government must only make and enforce laws that apply to everyone universally and that those laws ought to maximize freedom of action.¹²⁶ Kant saw a propensity of the majority to legislate morality in a way that

124. See *Zablocki v. Redhail*, 434 U.S. 374, 395–96 (1978) (Justice Stewart, concurring) (arguing that majority should have used rational basis scrutiny in finding Wisconsin law an unconstitutional violation of the right to marry).

125. See *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014).

126. See *Payne*, *supra* note 102.

creates laws that treat classes of people differently.¹²⁷ Under a negative rights theory, the government has a duty to protect from these very constraints on personal rights. Under a positive rights theory, it is possible for the government to legislate morality in a way that requires conformity in order to participate in social institutions. However, a fundamental aspect of a positive rights theory is that the state is necessary because it provides people with access to social institutions. Furthermore, a Hegelian conception of marriage would not base a moral conception on the physical aspect of a couple's relationship. It follows that states ought to have a strong, legitimate reason to deny a person's ability to participate in the institution of marriage.

Under a comprehensive analysis of freedom weighing both negative and positive rights, the government's duty to protect against constraints on individual rights is not outweighed by any legitimate government interest in denying marriage to same-sex couples. Regardless of whether same-sex marriage is a fundamental constitutional right, both federal and state governments have a responsibility to refrain from unnecessarily imposing on freedom of action. Same-sex marriage is a commitment between two people that does not affect the freedom or rights of third parties. Therefore, the proffered government interest in constraining the freedom to marry does not outweigh the government's duty to prohibit constraints on freedom.

Prior to *Obergefell*, the federal government did not place constraints on the marital institution, nor did it affirmatively protect a right to same-sex marriage. Instead, the legal system simply allowed states to either maintain or broaden their pre-existing definition of marriage. This is reflected in the *Windsor* decision, which upheld the power of individual states to define marriage, and declined to provide federal protection for same-sex couples in states where marriage was limited to heterosexual couples. That system was consistent with a strict negative rights position, which contends that the government does not have a duty to protect against constraints on freedom not brought about by specific affirmative government action.

In *Windsor*, unlike *Loving*, the Supreme Court declined to first acknowledge a negative right to marriage, and instead treated it as a positive right to be administered and restricted by the state.¹²⁸ The first

127. See *supra* note 54 and accompanying text.

128. See *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.”).

problem with this approach is that the state's duty under a positive rights theory has always been to provide access to institutions in order to maximize freedom. However, the most severe issue is a failure to acknowledge that freedom requires correlating positive and negative rights that must be considered together. A positive right requiring affirmative state action quickly turns useless if that right is not guarded from excessive state action. Similarly, a negative right against constraints by government is useless if the government does not also protect that same right. Freedom is an empty promise once the government adopts a jurisprudence that enables it to actively delegate personhood and dignity to some while simultaneously refusing to protect that same personhood and dignity in others.

In *Obergefell*, the Supreme Court finally analyzed the correlating positive and negative rights associated with the freedom of marriage. Justice Kennedy began the opinion by stating: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."¹²⁹ From the beginning, the opinion acknowledged that the Constitution protects rights tied to personhood, and that protection of these rights ensures the liberty to act and express oneself.¹³⁰ It explained that state definitions of marriage which exclude same-sex couples are "demeaning," "diminish their personhood," and infringe on a correlating liberty to act.¹³¹

The Court upheld a fundamental right to same-sex marriage under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. While the Due Process Clause protects against government oppression, the Equal Protection Clause simultaneously requires the government to protect against third-party oppression. "This interrelation of the two principles furthers our understanding of what freedom is and must become."¹³² "Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other."¹³³ *Obergefell* instituted a triadic concept of freedom:

129. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

130. *See id.* at 2597 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.").

131. *See id.* at 2590, 2602 ("But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

132. *Id.*

133. *Id.*

freedom of both heterosexual and homosexual couples, from state and federal government restraint, to become legally recognized members of the marital institution.¹³⁴

CONCLUSION

Forty-eight years ago the United States Supreme Court recognized marriage as a fundamental right, and explained that legal recognition of marriage acknowledges personhood and conveys dignity and social status within society. Nevertheless, the Court in *Windsor* refused to acknowledge a fundamental Constitutional right to same-sex marriage, and emphasized that each state had the power to determine whose relationships deserve protection of personhood and dignity. The holding in *Windsor* was based on an understanding that states are the proper branch to define and regulate marriage, and was likely based on the belief that this Country's "inalienable rights of life, liberty and the pursuit of happiness" provide protection from government infringement but are not necessarily a guarantee of protection by government.¹³⁵ The *Windsor* decision was a product of the historical tug-of-war between positive and negative rights theories, and a failure to conduct a comprehensive analysis of the correlation between so called positive and negative rights. It was not until the recent Supreme Court decision in *Obergefell* that same-sex couples were guaranteed this fundamental right through protection by the federal government. The contrast in Supreme Court precedent can be distinguished through an understanding of the jurisprudential rights analysis underlying each decision. An understanding of the correlative rights analysis underlying the *Obergefell* decision supports the position that it ensures optimal freedom by balancing both positive and negative rights.

While the state has a legitimate interest in the marital institution, this interest ought to be limited to regulation specifically addressing how marriage affects government interests. The state should be limited in governing who may have access to the institution of marriage, and it should not obstruct the right to marry when doing so does not affect those legitimate government interests. The legal system within the United States is highly influenced by classic liberalism, which embraces a negative rights concept that places a duty on government to protect against constraints on individual freedom. A positive rights theorist could justify

134. See *supra* note 115 and accompanying text.

135. See Hoffman, *supra* note 51, at 77.

legislation that constrains an individual's ability to act, if used to maintain morality within social institutions. However, constraining a same-sex couple's access to the marital institution is inconsistent with the underlying philosophy of Hegel's positive rights theory.

A comprehensive analysis of freedom and personhood rights should not be limited solely to negative or positive rights theories and should instead weigh considerations of both. Under a correlative analysis, the federal government has a duty to protect against constraints on same-sex couples' personhood rights to marriage. That duty is both a duty to refrain from placing constraints on this freedom, and a correlating duty to protect that same freedom from state constraints. Equal protection of the freedom of marriage is not outweighed by legitimate government interests, and is in fact strengthened by the state's responsibility in promoting access to social institutions. A comprehensive analysis balancing both negative and positive rights acknowledges that the personhood rights that constrain government action must also be protected. Within today's social and legal system, marriage is a personhood right that conveys dignity and the opportunity to recognize a spouse and be recognized by the community. The right to marriage is a freedom tied to one's personhood, a right that enables one to partake in society and find fulfillment, and an act that does not infringe on the freedom of others but that others all too often seek to infringe upon. This is the very type of freedom that both positive and negative rights theorists sought to protect with their analytical jurisprudence, and it was achieved through a correlating rights analysis in *Obergefell*.