The Fundamental Right to Marriage Defined Using the Penumbra Theory

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Abstract

The right to marriage is often disregarded and underappreciated within both the American legal system and modern society. Still, its roots are undoubtedly buried within developed case law and intertwined with other popular fields of study, such as civil and equal rights, gaining attention in recent times for issues such as same-sex marriage. The Supreme Court of the United States has defined the fundamental right to marriage through multiple cases that were connected and popularized through their main topics of civil and equal rights; however, it was not until the landmark case of *Obergefell v. Hodges* (2015) that the Court explicitly stated United States citizens held the fundamental right to marriage, as well as describing the judicial principles that justified their decision. This liberty – as are many others developed through case law – is not specifically incorporated within the Constitution of the United States. Many scholars may believe that this is an enumerated right from the Ninth Amendment in the Bill of Rights, which seeks to be an umbrella term for any liberties otherwise not covered in the Constitution. In fact, a famous Supreme Court judge, Oliver Wendell Holmes, would later coin the legal "penumbra theory" in 1873 as a method used for deciding how rights come about from the penumbras (shadows) of the Constitution. While its application may directly be aligned with the ideology behind the Ninth Amendment, this theory's implementation can be utilized towards any written law in order to find the extent that it covers. The penumbras of the Constitution are therefore not solely limited to the Ninth Amendment: the fundamental right to marriage is a primary example of developing from the shadows of the Fourteenth Amendment, as seen in *Obergefell*. This review uses a qualitative analysis of many landmark Supreme Court decisions regarding matters of privacy, equal rights, and constitutional theory to develop a deeper understanding of the fundamental right to marriage and its limits, as well as its current practices in modern society and

the potential future legal outcomes. It is concluded in this review that upon the official definition of the fundamental right to marriage, other rights must now be defined and limited within the penumbras of this newfound freedom.

Chapter 1: Introduction

The Bill of Rights was ratified to the Constitution of the United States on December 15, 1791, acquiring ten additional amendments to the existing document. Amongst them was the Ninth Amendment, which states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (U.S. Const. amend. IX § 1). The reasoning behind this amendment can be fully attributed to Former President James Madison, who had been concerned about the potential consequences of outlining civil liberties within the historical document. Madison knew that the law was a living and breathing culmination of text, theory, and precedent, and its governance would go on to outlast his lifetime and affect the very nation the Founding Fathers were trying to build. The Ninth Amendment was thus used to broaden the lines of freedoms and rights that may be developed later on.

This is the core principle of the penumbra theory, devised in 1873 by Justice Oliver Wendell Holmes. In his law review article, *The Theory on Torts*, Holmes explains that the theory of law is no different than the theory of science and mathematics, as they have the same principles of reasoning and critical analysis. He first uses the penumbra theory to describe how common law should grow and be defined within the darkness of the established written law:

> The growth of law is very apt to take place this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions... The distinction between the groups,

> however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty. (Henly, 1987).

Holmes takes the Ninth Amendment and, similar to Madison, acknowledges that the law lives and breathes. He furthers that though it is philosophical, and decisions are subject to judges of the court, there are outlines of rights deriving from the law that may be defined and redefined so long as the nation is alive.

In the landmark decision of *Obergefell v. Hodges* (2015), the Supreme Court of the United States decided that same-sex marriage shall be federally recognized under Fourteenth Amendment protections, specifically under the Due Process Clause[1]. The syllabus of the opinion stated that the "Court has long held the right to marry is protected by the Constitution" (*Obergefell v. Hodges*, 2015), and the majority opinion authored by Justice Anthony Kennedy further defines the case law and reasoning behind such a statement. The opinion claims that there are multiple tenants acting as underlying principles for why same-sex marriage should be legalized – and why the right to marry is protected by the Constitution. It is the goal of this research to analyze the cases of precedent involved in the Supreme Court's *Obergefell* opinion through the lens of the penumbra theory on the Fourteenth Amendment, to develop a deeper understanding of the legal reasoning applied. Additionally, this review seeks to use the same legal reasoning and lens towards a recent federal case regarding the fundamental right to marriage, and to see how this right that was recently brought out of the shadows casts another penumbra in the field of law.

[1] The Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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," (U.S. Const. amend. XIV § 1). This part of the amendment is often cited as the Due Process Clause, as well as the Equal Prtections Clause.

Chapter 2: Literature Review

The evolution of the right to marriage stems from a few different cases, however, one of its earliest roots is seen in the matter of *Skinner v. Oklahoma* (1942). While this case specifically addresses the use of sterilization as punishment for repeat offenders in the state of Oklahoma, the majority opinion's words still ring true throughout modern American jurisprudence: "marriage and procreation are fundamental to the very existence and survival of the race," (*Skinner v. Oklahoma,* 1942). This is one of the first instances in which the Court emphasized the importance of marriage as an inherent human right, and such logic would be next implemented in the famous matter of *Loving v. Virginia* (1967), when the Court revisited the Fourteenth Amendment principles conducted in the *Skinner* reasoning to make their decision.

In 1958, two Virginia residents – Mildred Jeter, a black woman, and Richard Loving, a white man – married in the District of Columbia and returned to their home state afterward. Upon their return, the couple was charged with violating Virginia's statute banning interracial marriages. The Lovings were then found guilty and sentenced to a year in jail, with the only relief being a suspended sentence if the couple left Virginia and did not return for 25 years (*Loving v. Virginia,* 1967). The couple then appealed the constitutionality of Virginia's anti-miscegenation law. They claimed that it violated the Fourteenth Amendment, as it deprived the couple of liberty based on race without due process of the law. The Supreme Court of the United States ruled in favor of Loving, referencing *Skinner* and stating that marriage is a "basic civil right of man that is fundamental to our existence", and to deny this freedom based on race violates the Due Process Clause of the Fourteenth Amendment (*Loving v. Virginia,* 1965). Additionally, the court reasons that "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" (*Loving*

v. Virginia, 1967), which is the first time the Constitution is mentioned in reference to the right to marriage. The Court then reversed the previous judgment of the Supreme Court of Appeals of Virginia, ruling that the anti-miscegenation law was unconstitutional and establishing that the right to interracial marriages cannot be infringed upon by the government. This decision expanded the liberty of marriage to apply to all races and serves as a primary example of how precedent may change the boundary of rights.

A few more matters involving the right to marriage followed the *Loving* decision after 1967, pushing the penumbral lines of the Fourteenth Amendment further. However, it is important to note that the right to privacy for married couples was brought before the Court in 1965 during the landmark case of *Griswold v. Connecticut* (1965), in which the penumbra theory was explicitly used as rationale by Justice William O. Douglas in his authored majority opinion (*Griswold v. Connecticut,* 1965). Like the *Skinner* matter, *Griswold* was not directly related to the intrusion of the right to marriage, but it instead defined the rights a married couple held under the law -- specifically to the privacy of using contraception. Furthermore, *Griswold* aimed to further emphasize the importance of the marital relationship, as seen when Justice Douglas writes, "The marriage relationship lies within the zone of privacy created by several fundamental constitutional guarantees. Conn. Gen. Stat. § 53-32 (rev. 1958), which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship," (*Griswold v. Connecticut,* 1965). The Court once again places heavy value on the marital bond and denies the notion of government intervention, similar to *Loving* and *Skinner*.

In later years, *Zablocki v. Redhail* (1973) was brought to the Court. A Wisconsin resident was refused an application for a marriage license due to outstanding child support payments from his previous relationship. The Court not only refers to the legal reasoning used in *Loving* and

Skinner, but to other cases such as *Maynard v. Hill* (1888) and *Meyer v. Nebraska* (1923) to define the marital relationship. The Court deduced that "'marriage is the most important relation in life,' id. at 125 U. S. 205, and as 'the foundation of the family and of society, without which there would be neither civilization nor progress,'" (*Zablocki v. Redhail,* 1978). In an 8-1 decision, the Supreme Court reiterates that the right to marriage is of fundamental importance and that the government could not interfere unless it furthers important state interests and is narrowly tailored to pursue only those important goals[2]. Once more, the Court pushed the boundaries of the fundamental right to marriage and further discerned it from the penumbra of the Fourteenth Amendment, acknowledging the importance of marriage and claiming that there is a right to marry that has been protected by precedent.

The next time a large marriage-involved matter came before the Supreme Court, it was in the case of *United States v. Windsor* (2013). A woman named Edith Windsor had a legally recognized same-sex marriage in the state of New York when her wife passed away. However, under a specific portion of the federal Defense of Marriage Act (DOMA), Windsor was denied a federal tax exemption that was given to heterosexual couples, despite her being a widow and qualifying for the exemption under all other factors. She then filed a suit in the district court seeking a declaration that the Defense of Marriage Act was unconstitutional. The district court and the appellate court both ruled that the section in DOMA was unconstitutional, and the Supreme Court eventually affirmed the decision. The high court stated that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages," (*United States v. Windsor,* 2013). The Supreme Court specifically admonished DOMA's overstep into the states' powers to recognize marriage, but

[2] This is also known as the "strict scrutiny" form of judicial review, used by the Supreme Court when the government's actions burden a fundamental right of citizens.

solely since it sought to take away a recognition of rights that had been already granted to same-sex couples. In their majority opinion, the Court understands that states have been given the right to form their own domestic relations laws and that DOMA violated this concept of federalism, but it furthermore violated the Fifth Amendment by depriving legally marries same-sex couples their federal benefits.

All previously stated federal cases shifted the views and outlines of the right to marry on a theoretical basis, as seen when it extended constitutional protections to same-sex couples, but it was not until 2015 that they acknowledged this liberty was protected under the Constitution and provided the legal backing. The Supreme Court of the United States, as well as federal and state governments, grappled with the topic of legalizing same-sex marriage for years prior to *Obergefell*. Many states had already begun to legalize the practice, as seen in cases such as *Goodridge v. Department of Public Health* (Massachusetts), *Kerrigan v. Commissioner of Public Health* (Connecticut), and *Garden State Equality v. Dow* (New Jersey). Yet, the federal government lagged in its jurisprudence. In *Obergefell v. Hodges* (2015), multiple same-sex couples sued their home states to challenge the constitutionality of bans on same-sex marriage, or the refusal to recognize same-sex marriages that occurred legally in jurisdictions. Most plaintiffs argued that the bans violated the Fourteenth Amendment's Due Process Clause and Equal Protection Clause (*Obergefell v. Hodges*, 2015). In all the cases, the trial courts ruled in favor of the plaintiffs, which the U.S. Court of Appeals for the Sixth Circuit reversed (*Obergefell v. Hodges*, 2015). The Supreme Court then reversed the previous judgment and ruled that the Fourteenth Amendment requires states to license marriages between same-sex couples, as well as recognize the union if it were legally licensed and performed in another state. However, the language in the court's opinion strongly suggests a turning point in the ideology behind the right to marriage. The syllabus references *Skinner, Loving, Zablocki,* and more, stating once more that

Court has "long held the right to marry is protected by the Constitution," (*Obergefell v. Hodges*, 2015).

These cases show the progression of the courts defining the fundamental right to marry. Before the *Obergefell* decision, the Supreme Court outlined who could benefit from marriage and what role marriage played in a person's liberty, from different races to a married couple's right to privacy. These opinions all related to the *Skinner* case and the language that marriage is a fundamental civil liberty, but it was not until *Obergefell* that they explicitly stated how marriage is a right for all citizens. In all these matters, the courts build off the idea and prior precedent that marriage is a sacred institution that should be protected – or, at least, not taken away without due process of the law, cementing the direct correlation between the right to marriage and the Fourteenth Amendment's Due Process Clause. This reasoning led to the *Obergefell* decision defining marriage as a fundamental right, which bestows an important liberty amongst the American people that had been avoided before the case. However, as this right is now defined, the Court has seen contemporary matters that have challenged the penumbras extending from this newfound freedom in other areas of law, such as in the field of immigration.

In the *Department of State v. Muñoz* (2024), an American citizen named Sandra Muñoz married an El Salvadorian resident and desired to live in the United States with her spouse. However, her husband, Luis Asencio-Cordero, was denied an immigration visa for vague reasons. The consulate in San Salvador alluded to Asencio-Cordero having gang affiliations and claimed that he had potential to engage in unlawful activity (*Department of State v. Muñoz*, 2024). After disavowing all gang activity and appealing the decision, the couple was still denied the immigration visa and the matter was eventually brought to the Supreme Court with an interesting argument: since Asencio-Cordero was not under constitutional protections because he was a non-citizen, Muñoz claimed that the barring of her spouse's visa intruded on her constitutional right

to reside with him (*Department of State v. Muñoz,* 2024). The reasoning was based on the fundamental right to marriage described in *Obergefell* and the supposed derived right to reside with her spouse in order to raise a family and enjoy the benefits that other married couples have. However, the Court decided that the issue at hand did not trigger strict scrutiny and therefore could not be legitimized as a fundamental right. The majority rationalized that the right to reside with a foreign spouse in the States was not "objectively, deeply rooted in this Nation's history and tradition" (*Department of State v. Muñoz,* 2024). The decision set a precedent limiting the rights of married partners and outlined what enumerated liberties can come forth from the penumbras of *Obergefell.* While the legal system has now defined such freedom, it marks the beginning of a new era filled with undiscovered boundaries of the intersection between law and marriage.

Chapter 3: Methods

For this analysis of the development of the fundamental right to marriage, this study uses qualitative legal research of existing Supreme Court of the United States opinions, as well as the legal encyclopedia of American Jurisprudence acting as a search engine. Additionally, peer-reviewed articles of Judge Oliver Wendell Holmes' *A Theory on Torts* was used, as well as the primary source itself.

Selection criteria

To obtain the correct information needed for this research, primary sources were used to develop an objective thesis and analysis of the legal reasoning. I specifically chose the federal court of last resort when deciding which cases to use, as the Supreme Court's decisions affect the nation entirely and oversees the law of the land. Secondary sources, such as the peer-reviewed article of Judge Holmes' work, were used to understand the manner of which the penumbra theory has been implicated in practice.

Search terms

The search terms used for this piece were conducted within the online American Jurisprudence encyclopedias ("Am. Jur. 2d"), where I chose to lookup "marriage", "fundamental right to marriage", and other related topics in order to find the proper court opinions. The cases in the Am. Jur. 2d are constantly subject to peer-review and updated to ensure the validity of the case. If the case has been overturned, or there is a current pending issue, the website will make it known.

Data collection and analysis methods

I chose to use qualitative analysis in order to develop my thesis, compiling the different court opinions and legal analyses to piece together my own ideas.

Study quality and risk of bias

The methodology used can be seen as subject to bias, as are many papers and research projects – especially those without the use of hard numbers or mathematical principles. However, the focus of the research was to maintain an objective viewpoint and analyze the developed case law throughout its judicial history using the lens of a defined legal theory. All dissenting opinions and majority opinions were considered to do this and understand the mindset behind all parties involved in making court decisions.

Conclusion

The methods used in this research strived to be both objective and accurate, utilizing primary sources as well as peer-reviewed secondary sources from legal scholars. Many cases used in this study relevant to the *Obergefell* matter had been referenced throughout the *Obergefell* opinion and had been properly cited by the Supreme Court. These matters were then examined separately to identify the outcome and validity of the rationale, as well as their relationship to the fundamental right to marriage and its development through the penumbra theory lens. Overall, I do believe that the methods have been fair and unprejudiced.

Chapter 4: Findings

The findings of this research can be tracked and defined by each referenced case in chronological order, as their individual majority/dissenting opinions developed the fundamental right to marriage in their own way by building off prior precedent. Each section describes the case's effect on the development, as well as its advancement of the right to marriage through the lens of the penumbra theory.

Skinner v. Oklahoma (1942)

The *Skinner* matter dealt with the use of sterilization as punishment for repeat criminal offenders. However, this was the first case that related marriage to being a right and civil liberty of men, stating that "marriage and procreation are fundamental to the very existence and survival of the race," (S*kinner v. Oklahoma,* 1942). Here, the Court outlines and emphasizes that marriage holds the same importance as procreation, though not outlining the right itself, and this is one of the first times they do so.

Griswold v. Connecticut (1965)

The Griswold matter dealt with the liberties of married couples and their right to privacy regarding contraceptives. In the majority opinion delivered by Justice Douglas, the penumbra theory is explicitly used to describe the rights implied by the First, Third, Fourth, and Ninth Amendments. The penumbra theory is thus recognized to apply to all the amendments, and not solely the Ninth Amendment.

Griswold defines not the right to marry itself but instead draws the line of what rights come out of marriage – specifically, the right to privacy and usage of contraceptives.

Loving v. Virginia (1967)

The *Loving* case is where the first true roots of the fundamental right to marriage are planted; the Court ruled in a unanimous decision that the Fourteenth Amendment protects interracial couples' rights to marry, as anti-miscegenation laws take this away without due process of the law. The fundamental right to marriage has now shifted to incorporate mixed-race couples.

Zablocki v. Redhail (1978)

In an 8-1 decision, the Court held that Wisconsin's statute preventing the Plaintiff from marrying violated the Equal Protection Clause of the Fourteenth Amendment, reaffirming that marriage was a fundamental right despite the state's interest in arrears for child support. In the majority opinion by Justice Marshall, the Court emphasized marriage as part of the right to privacy found in the penumbra of the Fourteenth Amendment as identified in *Griswold*. While the state had an interest in ensuring that child support obligations were fulfilled, this statute only regulated those who wished to be married and did not justify the restriction on the right to marriage as found in *Loving*.

The *Zablocki* matter weighs the importance of an individual's right to marriage and the state's interest in child support obligations, ultimately deciding that the right to marriage outweighs the state's interest if the law is not narrowly tailored.

United States v. Windsor (2013)

The *Windsor* matter held that, in a 5–4 decision, the Court ruled that Section 3 of the Defense of Marriage Act (DOMA), which only granted federal tax benefits to heterosexual couples, was unconstitutional. In the majority opinion, Justice Kennedy held that DOMA's exclusion of legally married same-sex couples from federal recognition demeaned those couples

and imposed a stigma in violation of equal protection and due process principles, referring back to the penumbra laid out by the Fourteenth Amendment.

This decision legally expanded the benefits of marriage to same-sex couples on a federal level, essentially setting the stage for the *Obergefell* matter a few years later.

Obergefell v. Hodges (2015)

In a 5–4 decision, the Supreme Court ruled that the Constitution guarantees the right to marry same-sex couples under the Fourteenth Amendment, as the right to marry itself was constitutionally protected by said amendment. Additionally, the court provides four legal principles backing the constitutional right to marriage: the concept of individual autonomy, supports a two-person union unlike any other in its importance to the committed individuals, safeguarding children and families and drawing meaning from related rights of childrearing, procreation, and education, and the idea that marriage is a keystone of national order *(Obergefell v. Hodges*, 2015).

The fundamental right to marriage has fully been stated and outlined within the penumbras of the Fourteenth Amendment with the *Obergefell* case, now extending to same-sex couples and leaving the Court and federal legislature with this clear, newly stated liberty.

Department of State v. Munoz (2024)

The Supreme Court's recent decision reflects on both the limits of judicial review and the judicial branch's relationship with immigration, as well as the fundamental right to marriage's scope. The plaintiff in the matter sued the Department of State, as her non-citizen spouse was denied a visa to the United States. She raised the claim that the immigration system interfered with her constitutional right to reside in the United States with her spouse, which she claimed stemmed from her right to marry as defined in *Obergefell*. In the majority opinion authored by Justice Amy Coney Barrett, the Court clarified that American citizens did have the fundamental

right to marry, but the right to reside with the family was not covered underneath such liberty. (*Department of State v. Muñoz,* 2024).

Chapter 5: Conclusions

Defining the Right to Marriage: Modern Implications

As seen in the findings of this research, the fundamental right to marriage has been outlined within the penumbras of the Bill of Rights for many years in American jurisprudence. The deliberation of how this right came to be, who it applies to, and what further rights it entails is completely subject to the judges deciding case law, which is the very premise of Justice Oliver Wendell Holmes' penumbra theory. Civil rights and freedoms stem from case law as it progresses, and it builds off of precedent. That is how the law lives – that is how it breathes. If there are people to bring forth injustices, and there are people qualified to weigh each side with the philosophical nuance that the matter needs, there will always be shadows and light balancing to give new precedent.

It was only in 2015 when the *Obergefell* opinion was published when the fundamental right to marry was established to be protected under the Fourteenth Amendment's penumbras. Since then, the Court has seen cases that intersect this right with other areas of the law, such as immigration and civil actions against the immigration system. As newer legal arguments are made using the fundamental right to marriage as a defense, the Court must now decide with new cases how far the penumbra of the right extends, where the darkness is outlined, and where the light shines through.

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