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Marriage (In)equality and the Historical Legacies of Feminism

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In *Obergefell v. Hodges*, marriage equality advocates won a spectacular victory, vanquishing the material and dignitary harms that same-sex marriage bans visited upon individuals and families. The product of a decades-long struggle for recognition, the legalization of same-sex marriage marked a triumph eminently worthy of celebration. But Justice Anthony Kennedy's majority opinion also felt bittersweet to many feminists and LGBT activists. *Obergefell* glorifies marriage as the apotheosis of human fulfillment and freedom, as fundamental to full citizenship and belonging. For those who sought sexual liberation and eschewed monogamy; who scorned marriage as a patriarchal, heterosexist, capitalist travesty; who wished to marry but could not; or who found personal fulfillment outside of intimate conjugal relationships, the opinion's rhetoric rankled. Moreover, critics saw in *Obergefell* not merely an endorsement of inclusion and dignity for same-sex couples, but an implicit ratification of the legal and social privileges accorded to marital families and withheld from the nonmarried.[1] The

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1. *See, e.g.*, Clare Huntington, Obergefell's *Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015); R. A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53 (2015); Melissa Murray, Obergefell v. Hodges *and the New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming 2016); Rebecca Davis, *Faith in Marriage*, PUB. SEMINAR (July 28, 2015), http://www.publicseminar.org/2015/07/faith-in-marriage [http://perma.cc/VM98-M78V]; Timothy Stewart-Winter, *The Price of Gay Marriage*, N.Y. TIMES, June 26, 2015, at SR1.

Obergefell opinion also troubled some who wished to find a more precise and generalizable doctrinal exposition of equal protection and due process principles in the opinion's florid but somewhat nebulous paeans to liberty and equality.[2]

For a legal historian of twentieth-century feminism, *Obergefell*'s valence is especially complex. This Essay measures *Obergefell* against two legacies of second-wave feminist legal advocacy: the largely successful campaign to make civil marriage formally gender-neutral, and the lesser-known, less successful struggle against laws and practices that penalized women who lived their lives outside of marriage. *Obergefell* indirectly acknowledges marriage equality's debt to the former legacy, and utterly disregards the latter. But the history of transformational change invoked in *Obergefell* suggests the potential for marriage equality to become more than an affirmation of marriage's legal supremacy.

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The feminist legacy most apparent in *Obergefell* is the transformation of marriage law. Justice Kennedy's opinion endorses wholeheartedly the historical account articulated by feminist scholars, most prominently Nancy Cott, since the turn of the twenty-first century.[3] Marriage, on this view, is a dynamic institution, transformed since the Founding from an inegalitarian, racially exclusive, socially mandatory, and presumptively permanent status by state-level reforms and federal constitutional intervention. Exhibit A in this story of evolutionary change is the abolition of coverture and the replacement of highly differentiated and unequal rights and duties for husbands and wives with gender-neutral partnerships that spouses may enter and exit voluntarily.

Historically, as a matter of formal law if not always social reality, marriage prescribed gender-differentiated and unequal roles for husbands and wives and the subordination of wives' legal identity through coverture.[4] The reigning marital bargain required men to provide economic support to their wives and children; in exchange, women owed their husbands personal services such as homemaking, caregiving, and consortium. At

2. *See, e.g.*, Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality—But They Did It the Wrong Way*, SALON (June 29, 2015), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94_but_they_did_it_the_wrong_way [http://perma.cc/6JSZ-WT4G].

3. *See, e.g.*, *Summary: Work of the House Judiciary Committee for the Week of January 17–21, 2000*, Vermont House of Representatives, available at http://www.leg.state.vt.us/baker/jan17.htm [http://perma.cc/2FZ3-43E4] (summarizing Cott's testimony); Expert Report of Nancy F. Cott, Ph.D., Perry v. Schwarzenegger, Case No. 09-CV-2292 (N.D. Cal. Nov. 9, 2009); Brief for Historians of Marriage and the American Historical Association as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14-574).

4. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

common law, married women could not make contracts, hold property in their own names, sue or be sued. A husband's prerogatives included the right to determine the family's domicile, to chastise wayward dependents, and to demand sexual access to his wife.

Thanks both to feminist struggle and broader economic and social changes, many of married women's formal legal disabilities receded over the course of the nineteenth and early twentieth centuries. Married Women's Property Acts, the Nineteenth Amendment, and early antidiscrimination laws blunted the sharpest edges of coverture.[5] But as late as 1961 the Supreme Court famously declared that women's role "as the center of home and family life" justified exempting them from jury service,[6] and the sex-differentiated laws of marriage and divorce remained on the books in most jurisdictions.[7] Laws and government policies, including the provision of key social insurance benefits, not only assumed but encouraged and rewarded a male breadwinner/female homemaker division of labor.[8] The reigning liberal consensus followed the 1965 Moynihan Report in recommending that black families adopt this white middle-class patriarchal ideal or risk a dismal descent into poverty, illegitimacy, and violence.[9] By the 1970s, many policy makers worried that the "culture of pathology" that Moynihan saw in the "Negro family" would spread across American society if women achieved the equal employment opportunity feminists sought.[10]

Feminists such as Pauli Murray and Eleanor Holmes Norton countered with their own vision of family life, anchored by the egalitarian marriages African American middle-class families pioneered.[11] They insisted that women's equal opportunity in the workplace and at home was essential, not antithetical, to racial progress, and that black women's strength and self-sufficiency could serve as a model for white women constrained by restrictive sex-role expectations. A litigation campaign led by law professor and ACLU attorney Ruth Bader Ginsburg wrote this

5. Even today, remnants of coverture persist in family law. *See* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED, 97–132 (2014).

6. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

7. On the limitations of nineteenth-century legal reforms, see, e.g., LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES (1998); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073 (1994).

8. *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2001).

9. *See* Serena Mayeri, *Historicizing the 'End of Men': The Politics of Reaction(s)*, 93 B.U. L. REV. 729, 730 n.10 (2013) and sources cited therein.

10. *See id*. at 737–38.

11. *See* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 41–75 (2011).

vision of egalitarian marriage into constitutional law.[12] Though feminists did not win ratification of the federal Equal Rights Amendment (ERA), they achieved many of the ERA's original goals through state-level reforms to marriage and divorce law, and through federal and state constitutional rulings that applied heightened judicial scrutiny to sex-based classifications.[13] In cases such as *Frontiero v. Richardson*,[14] *Weinberger v. Wiesenfeld*,[15] and *Califano v. Goldfarb*,[16] Ginsburg and her allies persuaded the Court that the federal government could not constitutionally distinguish between husbands and wives or between widows and widowers in the allocation of military and Social Security benefits. By the 1980s, as a matter of formal law—though not of social reality—feminist advocacy made marriage a gender-neutral institution, a presumptively equal partnership of spouses with identical, reciprocal legal rights and responsibilities.[17]

Obergefell invokes this feminist legacy in two related ways. First, Justice Kennedy politely but clearly rejects respondents' contention that "[m]arriage . . . is by its nature a gender differentiated union of man and woman."[18] Second, he does so by adopting historical accounts of marriage's evolution that foreground a progressive shift toward gender egalitarianism. Citing the work of Nancy Cott and others, Kennedy affirms that "[t]he history of marriage is one of both continuity and change."[19] His foremost example is male supremacy within marriage: "Under the centuries-old doctrine of coverture," he writes, "a married man and woman were treated by the State as a single, male-dominated legal entity."[20] But, "[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned."[21] Kennedy clarifies that "[t]hese and other developments in the institution of marriage . . . were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[22] Later, the opinion describes how

12. On Ginsburg's litigation campaign, see *id*. especially at 41–185; *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 1 (2010).

13. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

14. 411 U.S. 677 (1973).

15. 420 U.S. 636 (1975).

16. 430 U.S. 99 (1977).

17. *See, e.g.*, cases cited *supra* notes 14–16; Orr v. Orr, 440 U.S. 268 (1979) (invalidating a sex-specific Alabama alimony law). Of course, legal sex neutrality did not necessarily ameliorate, and in some cases may have aggravated, sex inequality. *See, e.g*., Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. (forthcoming 2016).

18. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

19. *Id*. at 2595.

20. *Id*.

21. *Id*.

22. *Id*.

"invidious sex-based classifications in marriage remained common through the mid-20th century," and how "the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage."[23] Citations to Ginsburg's brief in *Reed v. Reed*[24] and to more than half a dozen cases she championed as a litigator support the majority's contention that "the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution."[25]

Kennedy's opinion could have been far more precise in drawing the doctrinal connections between constitutional sex discrimination law and the constitutional imperative of same-sex marriage. Since the 1980s, scholars and advocates have elaborated several compelling sex equality arguments against sexual orientation discrimination generally and same-sex marriage exclusions in particular.[26] Until recently, most courts have given short shrift to these claims.[27] But Judge Marsha Berzon's concurring opinion in the 2014 Ninth Circuit case *Latta v. Otter* provided a sophisticated elaboration of the contention that same-sex marriage bans "not only classify based on sex, but also, implicitly and explicitly, draw on 'archaic and stereotypic notions' about the purportedly distinctive roles and abilities of men and women."[28]

Indeed, the centerpieces of Ginsburg's 1970s litigation campaign—*Frontiero*, *Wiesenfeld*, *Goldfarb*—had established the constitutional infirmity of sex-based discrimination in government benefits available to spouses, as Kennedy's opinion acknowledged.[29] *Obergefell* suggests that the laws challenged in these sex equality cases were broadly analogous to same-sex marriage bans in their violation of equal protection. The opinion does not, however, address directly the argument that same-sex marriage bans are

23. *Id.* at 2603.

24. *Id.* (citing Brief for Appellant at 69–88, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4)).

25. *Id*. at 2604 (citing, *inter alia*, Califano v. Westcott, Califano v. Goldfarb, Weinberger v. Wiesenfeld, and Frontiero v. Richardson).

26. For early examples, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that laws that discriminate based on sexual orientation "reinforce the hierarchy of males over females"); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that homophobia stems from the violation of gender norms, not merely disapproval of same-sex sexual conduct, and that "legal censure of homosexuality violates constitutional norms of gender equality"). For a review and analysis of sex discrimination arguments in marriage equality litigation, see Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

27. Notable exceptions include Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (adopting expert witness Nancy Cott's historical account of coverture's demise wholesale and explaining marriage bans as unconstitutional discrimination based on sex as well as sexual orientation); and Baker v. State, 170 Vt. 194, 257–59 (1999) (Johnson, J., concurring in part and dissenting in part) (explaining how State's justifications for prohibiting same-sex marriage "reflect outdated sex-role stereotyping").

28. *See* Latta v. Otter, 771 F.3d 456, 479–497 (9th Cir. 2014) (Berzon, J., concurring).

29. *See supra* notes 23–25 and accompanying text.

unconstitutional for substantially the same *reason*: because the sex-based classifications they create reinforce the notion that husbands and wives perform distinct, sex-specific roles within marriage.[30] Notwithstanding the many available doctrinal paths to calling same-sex marriage bans sex discrimination, Kennedy's opinion relied instead on the potent but analytically hazy hybrid of due process and equal protection that animated his earlier gay rights decisions.[31]

The omission of a sex or sexual orientation discrimination analysis in *Obergefell* understandably disappointed many observers. The opinion's focus on the exalted status of marriage and its singular importance to human dignity caused some to wonder whether *Obergefell* spoke to the larger goal of eliminating discrimination throughout American law and society. Moreover, without a declaration that heightened scrutiny should apply to all sexual orientation-based classifications, it seemed possible to confine *Obergefell*'s analysis to marriage and leave other injustices untouched. And one could only imagine the restraint it must have required for Justice Kennedy's three female colleagues—widowed, divorced, and never married, feminists all—to refrain from writing a single separate concurrence.[32] Even the *Obergefell* Court's cryptic historical summary obscured the centuries of feminist struggle that led "society" to "abandon" coverture. And yet—the gender egalitarian vision of marriage invoked by *Obergefell* is, unmistakably, a direct legacy of feminist legal advocacy and of the constitutional sex equality revolution that then-lawyer and professor Ginsburg and her allies secured.

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Second-wave feminism has another legacy—one with a much more tenuous constitutional foothold—that is in profound tension with *Obergefell*. Even as feminists won important constitutional victories for gender neutrality in the provision of government benefits and secured state-level reforms to the law of marriage, they also struggled—less visibly—against laws that penalized unmarried women. Feminists attacked policies and practices that excluded women with nonmarital children from employment and housing, denied them government benefits, and forced mothers to reveal the identity of their children's father.[33] Feminists argued

30. *See supra* note 27 and accompanying text.

31. *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 133 S. Ct. 2675 (2013).

32. In an interview with Neil Siegel shortly after the *Obergefell* decision, Justice Ginsburg explained her belief that "[p]erhaps … in this case it was more powerful to have the same, single opinion." Samantha Lachman & Ashley Alman, *Ruth Bader Ginsburg Reflects on a Polarizing Term One Month Out*, HUFF. POST, July 29, 2015, http://www.huffingtonpost.com/entry/ruth-bader-ginsburg-tk_55b97c68e4b0b8499b18536b [http://perma.cc/94PW-JUGN].

33. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

that laws which discriminated against "illegitimate" children in fact burdened the mothers who were primarily responsible for their care and support.[34] In law review articles, legal briefs, and personal testimonies, they explained how and why penalties for nonmarital sex and childbearing subordinated women, especially poor women and women of color.[35] Some of these feminists challenged marital supremacy itself, questioned the privatization of dependence in the nuclear family, and contested the assumption that women and children should rely on men—or "the Man"—for economic sustenance.[36] Others sought to reframe nonmarital motherhood as a noble enterprise replete with hard work and sacrifice worthy of recognition and celebration rather than denigration and devaluation.[37]

Those who challenged illegitimacy penalties and other discrimination against unmarried women enjoyed only limited success, and fell largely under the constitutional radar. But their arguments resonate with even greater urgency today as an ever-widening marriage gap separates the wealthy, educated, married haves from the increasingly impoverished unmarried have-nots.[38] Just as gender egalitarian marriage became a real possibility for highly educated professional couples, marriage itself increasingly seemed out of reach for many low-income women and women of color. This growing marriage gap between rich and poor, white and black, meant that the families most in need of now sex-neutral benefits could not receive them. For example, when Margaret Gonzales, an *un*married mother, tried to obtain the same insurance benefits Ginsburg and her client Stephen Wiesenfeld had won for widowed husbands and fathers, the Supreme Court ruled that marital status was a perfectly constitutional basis on which to deny government benefits.[39]

Meanwhile, the formal gender equality that now applied to *married* couples did not extend to the unmarried. For example, equitable division of marital property at dissolution did not apply to most unmarried cohabitants, leaving unmarried women who had made financial sacrifices to care for home and children with nothing.[40] The partial and incomplete shift

34. *See* Mayeri, *Marital Supremacy*, *supra* note 33.

35. *See, e.g.*, Brief for Equal Rights Advocates Inc. and ACLU as Amici Curiae at 9–11, Andrews v. Drew Mun. Separate Sch. Dist., 425 U.S. 559 (1976) (No. 74-1318), 1974 WL 175944.

36. *See, e.g.*, Aleta Wallach & Patricia Tenoso, *A Vindication of the Rights of Unmarried Women and their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23 (1974); Johnnie Tillmon, *Welfare is a Women's Issue (1972)*, MS. MAGAZINE, Spring 2002.

37. *See id*.

38. *See, e.g.*, JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); Mayeri, *Marital Supremacy*, *supra* note 33.

39. *See* Califano v. Boles, 443 U.S. 282 (1979); Mayeri, *Marital Supremacy*, *supra* note 33.

40. *See, e.g.*, Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

toward gender egalitarian parenting within marriage did not extend to nonmarital families, where both law and social practice vest primary rights *and responsibilities* in mothers.[41] A coalition of feminists and fiscal conservatives won better child support enforcement,[42] but the limited sums low-income fathers could contribute went largely to the government, offsetting welfare expenditures rather than benefiting poor women and their children.[43] The Supreme Court struck down much discrimination against so-called "illegitimate" children, but never questioned the legitimacy of discriminating against their *parents*, or of privileging marriage over non-marriage more generally.[44]

The persistent legal privileging of marriage reinforced existing inequalities of race, class, and gender. Tying social supports to conjugal partnership—marital or not—meant that many poor women and women of color suffered a double disadvantage, because they lacked partners likely to be eligible for employment- related benefits in the first place.[45] Since the 1970s, income inequality, mass incarceration, and chronic unemployment have intersected with divergent marriage rates to widen the chasm between highly educated women who could aspire to gender egalitarian partnerships with affluent male peers, and their impoverished counterparts, who no longer could count on sharing the burdens of raising children in poverty with a partner, much less rely on a second income.[46]

The triumph of marriage equality has radical, transformative potential. But it may or may not be a step toward marriage equality writ large. Ideally, the legalization of same-sex marriage heralds a new era of family pluralism, in which individuals and families of all kinds flourish regardless of their formal structure. Conjugal relationships—marital and non-marital, gay, straight, and queer—become more egalitarian, and the state supports not only conjugal unions but other relationships of care and mutual support.[47] Rather than privileging marriage, laws and policies attempt to sever the link between family structure and socioeconomic status.[48]

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41. *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 126 YALE L.J. (forthcoming 2016); Mayeri, *Marital Supremacy*, *supra* note 33.

42. *See* JOCELYN ELISE CROWLEY, THE POLITICS OF CHILD SUPPORT IN AMERICA (2003).

43. *See, e.g.*, Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007); Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127 (2011).

44. Mayeri, *Marital Supremacy*, *supra* note 33.

45. *See id*.

46. *See id*.

47. *Cf.* MARTHA FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE ADULT PERSONAL RELATIONSHIPS (2001); Nancy D. Polikoff, *Law That Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW 85 (2009).

48. *Cf.* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010) (arguing that families in all their diverse forms will be unable to flourish without government support). Such a transformation may require that individuals receive

Many marriage skeptics fear another, bleaker scenario.[49] The extension of marriage rights to same-sex couples reinforces and entrenches the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry.[50] Instead of propelling heterosexual couples toward more gender egalitarian partnerships, marriage pushes same-sex couples to replicate gender specialization, alleviating pressure on the state and on employers to help families integrate breadwinning and caregiving.[51] Now that marriage is an option for same-sex couples, progressive legal doctrines extending parental rights to non-biological parents are unavailable to *unmarried* gay parents.[52] Creative legal alternatives to marriage, such as domestic partnership benefits, disappear.[53] Individuals who remain uncoupled, and couples who choose not to marry, are subjected to social and economic pressure and penalty. With marriage theoretically available to all, the legal privileging of marriage appears unproblematic, and policy makers continue to promote marriage as a solution to poverty. The marriage gap widens, reinforcing the intersecting inequalities of race, gender, class, and sexual identity.

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Obergefell does not bear the marks of feminism's second legacy—the campaigns against discrimination based on nonmarital status. Instead,

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support by virtue of their citizenship, rather than accessing benefits through their status as family members. *Cf.* Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSP. ON POL. 269 (2005).

49. Marriage skepticism, of course, does not imply opposition to the legalization of same-sex marriage. *See* Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011). On the salutary collateral consequences of the marriage equality movement, see, for example, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014).

50. Some marriage skeptics also fear that marriage will subject same-sex couples to oppressive state regulation, as it has other historically subordinated groups. *See, e.g.*, KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015); Lenhardt, *supra* note 1.

51. For an early debate on the potential of same-sex marriage to disrupt gender role specialization within marriage, compare Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991), *with* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Lesbian and Gay Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993). For a sampling of more recent treatments, see Katherine Franke, *Lesbian Husbands and Gay Wives: The Gendering of Gay Divorce*, THE NATION, July 3, 2013; Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721 (2012); Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1 (2015).

52. *Cf.* Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437 (2012); Nancy D. Polikoff, *The New Illegitimacy: Winning Backward in the Protection of Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721 (2012).

53. For various perspectives on the history of domestic partnerships and their relationship to marriage, see, for example, ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION (2012); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013).

Kennedy's opinion elevates and ennobles marriage in terms that implicitly disparage nonmarriage. He laments the fate of children with unmarried parents as inherently difficult and demeaning.[54] He provides no generalizable theory of equality based on sex or sexual orientation that might obviously apply to discrimination in employment, housing, or nonmarital sexual relationships. A pessimistic reader might conclude that *Obergefell* invites same-sex couples to enjoy the privileges of marital supremacy, but does little to enhance liberty and equality outside the institution of marriage.

And yet—history also suggests that marriage skeptics should not despair. After all, a half-century before *Obergefell*, the Court paid homage to marriage as

> a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[55]

The case, of course, was *Griswold v. Connecticut*, where Justice William O. Douglas planted the seeds of a dramatic and wide-ranging constitutional transformation in, of all places, "the sacred precincts of marital bedrooms."[56] Arguably, the right to privacy was *Griswold*'s core principle, its language about marriage little more than a rhetorical flourish soon jettisoned in *Eisenstadt v. Baird*, where Justice William J. Brennan, Jr. embraced the "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[57] Similarly, *Obergefell* might come to stand for the core principle that due process and equal protection forbid exclusionary laws that demean and reinforce the subordinate status of historically marginalized groups. Theoretically, at least, this principle would apply not only to other discrimination based on sexual orientation, but also to laws that exclude nonmarried individuals and families from obtaining the benefits available to the married.

In the wake of a resounding victory that seemed unimaginable even a decade ago, to assume that the constitutional die is cast, that advocates of social change are powerless to affect *Obergefell*'s legacy, risks becoming a

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54. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

55. 381 U.S. 479, 486 (1965).

56. *Id.* at 485. For doctrinal progeny of *Griswold* that reach far beyond marital privacy, see, for example, Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003).

57. *Eisenstadt*, 405 U.S. at 453. *See also id.* ("It is true that, in *Griswold*, the right of privacy inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup.").

self-fulfilling, and self-defeating, prophecy.[58] After all, "society" did not magically "abandon" coverture. Generations of feminists, often laboring in obscurity, vanquished it, and one of them now sits on the Supreme Court. Indeed, the very constitutional indeterminacy that scholars and advocates understandably bemoan as a jurisprudential liability could create opportunities for innovative constitutional and extraconstitutional arguments that call into question marriage's legal primacy. And if the internal architecture of marriage can evolve not only to accommodate same-sex relationships but to require their recognition as a matter of constitutional law, perhaps the status of marriage as legally superior to all other family forms need not remain frozen in time.

58. On the multivalent potential of *Obergefell*, see, for example, Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges,'* THE NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges [http://perma.cc/YRF2-CSVK]; Tobias Barrington Wolff, *The Three Voices of Obergefell*, 18 U. PA. J. CONST. L. ONLINE (forthcoming 2016).