A Union Unlike Any Other: *Obergefell* and the Doctrine of Marital Superiority

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"Marriage is a wonderful institution . . .
but who wants to live in an institution?"[1]

INTRODUCTION

Obergefell v. Hodges[2] is a historic decision that accomplishes the important task of requiring marriage equality across the nation. To many, the opinion's romantic language gives particular poignancy to the historic moment when the long-recognized fundamental right to marry was finally extended to same-sex couples.

However, what people see as the romance of the opinion masks a profoundly conservative decision, one that abandons meaningful equality analysis, and instead engages in a full-throated embrace of the conservative institution of marriage as an essential and necessary cornerstone of American society. In so doing, the decision advances a new and troubling doctrine of marital superiority that explicitly undercuts the dignity and worth of non-marital relationships.[3] Much to the dismay of those who may have wished to allow states to experiment with other, more progressive relationship-recognition forms, *Obergefell*'s marital superiority rhetoric may guarantee that marriage will, for the foreseeable future, remain the only recognized relationship in town.

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1. Attributed to Groucho Marx.

2. 135 S. Ct. 2584 (2015).

3. This paper appeared online almost simultaneously with several other essays and articles that advance similar, though not identical, arguments. *See, e.g.*, Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015); Melissa Murray, *Recovering the Right to Not Marry*, CAL. L. REV. (forthcoming 2016); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277 (2015).

I. OBERGEFELL'S MARITAL SUPERIORITY DOCTRINE

With *Obergefell*, the Supreme Court had an opportunity to write an opinion that would have advanced lesbian and gay rights by focusing on an equality analysis and clarifying whether sexual orientation is a suspect class. Instead, *Obergefell* is largely a lengthy paean to traditional marriage that advances fundamentally conservative notions of family and intimate relationships. In so doing, the Court articulates a doctrine that we call "marital superiority"—an exaggerated exaltation of the importance of marriage accompanied by the disturbing denigration of those who are not married.

Perhaps the most important step in the Court's reasoning was its analysis of the "essential attributes" of marriage.[4] By looking at these "basic reasons why the right to marry has been long protected,"[5] the Court was able to conclude that the marriage precedents—all cases involving marriage in the context of opposite-sex unions—could be broadened to include same-sex unions.

The Court discussed four "principles and traditions" that explain why marriage is a fundamental right,[6] each one fully in line with conservative views of traditional marriage. First, the Court explained that the ability to choose whom to marry is an essential part of personal autonomy that shapes a person's destiny and creates a dignified bond between the two individuals. Marriage, as the Court sees it, is where "two persons together can find other freedoms, such as expression, intimacy, and spirituality."[7] Second, to the Court's majority, marriage is a "union unlike any other in its importance to the committed individuals."[8] In this unique relationship, people can define themselves, find life-long companionship, and enjoy intimate association.

But marriage is not just about the two individuals and how their lives are improved; it is also important for children and society. The Court explained, in its third reason, that marriage provides the stability and predictability that is essential for children to thrive. With married parents, children have an easier family life and escape "the stigma of knowing their

4. *Id.* at 2598.
5. *Id.* at 2599.
6. *Id.*
7. *Id.*
8. *Id.*

families are somehow lesser."[9] Even more broadly, the Court reasoned in its fourth point that "marriage is a keystone of our social order."[10] Citing de Tocqueville, the Court explained that marriage is where people find refuge from the difficulties of public civic life.[11] Marriage also ties people to a community, both local and national. In exchange, governments confer benefits on married couples that make them "a central institution of the Nation's society."[12]

In the process of explaining how vital marriage is to individuals and society, *Obergefell* repeatedly shames those who do not marry. It does so subtly in its first two reasons describing why marriage is a fundamental right, both of which imply that non-married individuals are less able to find intimacy, expression, spirituality, and self-definition than those who are married. It does so openly as well. Peppered throughout the opinion are explicit statements that paint people who are not married as lonely, miserable, and inferior: they have no "nobility and dignity"; they miss out on a "unique fulfillment . . . that could not be found alone"; their children have "a more difficult and uncertain family life"; they lie awake at night with the "universal fear that [as] a lonely person [they] might call out only to find no one there"; their unions are less "profound"; and they are "condemned to live in loneliness."[13] Unmarried people, to this Court, are without legal status and, more disturbingly, their relationships, no matter how intentionally built and structured, *may as well not exist at all.*

This logic not only denigrates the couples who were before the Court—couples who *already had* profound, dignified, and fulfilling relationships[14]—but it also envisions marriage in an extraordinarily tradi-

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9. *Id.* at 2600.
10. *Id.* at 2601.
11 *Id.*
12. *Id.* at 2602.
13. *Id.* at 2594, 2600, 2608. Justice Kennedy's reference to calling out and finding no one there is, perhaps inadvertently, reminiscent of an episode of *30 Rock* in which one of the characters, after having a terrible blind date, worries that being single means she will "chok[e] to death alone in [her] apartment" because no one will be there to save her. *30 Rock: Blind Date* (NBC television broadcast Oct. 25, 2006). Many of our unpartnered friends and colleagues have remarked that they find Justice Kennedy's language similarly bleak.
14. *See, e.g.*, Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST, Apr. 6, 2015, https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html.

tional and conservative way. According to the Court, people wishing to become their best selves and to live a life free from loneliness must follow the most traditional of all paths: find a life-long companion to the exclusion of all others and then get hitched.[15] Any other way that an individual might seek fulfillment and happiness is inferior.[16]

Clearly, *Obergefell* is not the first right-to-marriage case, but it stands apart from past cases in its marked emphasis on marital superiority. The earlier cases stressed the ways that laws restricting marriage interfered with sexual and emotional intimacy,[17] equality,[18] or governmental benefits.[19] They did not go to the great lengths that *Obergefell* does to assert the superiority of marriage and to erase the relationships of the unmarried.

For instance, in *Turner v. Safley*, the Court discussed the importance of marriage based, in part, on the fact that the institution is—not that it *should* be—a precondition for access to government benefits.[20] Additionally, the Court noted that marriage allows individuals to express a public commitment[21]—but, at the time, in the days before civil unions and domestic partnerships, marriage was the only vehicle through which such a public commitment could be expressed.

Turner's rationales, then, differ from those in *Obergefell*. *Obergefell* does not merely stress the importance of marriage as the only currently existing gatekeeper for other benefits and rights; rather, it valorizes marriage *qua* marriage, imbuing the status with ephemeral qualities such as dignity and profundity, and shaming those who do not participate.

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15. This language echoes much of the dicta in Justice Kennedy's majority opinion in *Lawrence* that lauded monogamous, long-term relationships. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.").

16. Justice Thomas rightly notes this in his dissent, decrying the majority's "suggestion that Americans who choose not to marry are inferior" as "specious." *Obergefell*, 135 S. Ct. at 2639 n.8 (Thomas, J., dissenting).

17. Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Turner v. Safley, 482 U.S. 78, 95 (1987).

18. Loving v. Virginia, 388 U.S. 1, 11–12 (1967); *Zablocki*, 434 U.S. at 386–87.

19. *Turner*, 482 U.S. at 96.

20. *Id.*

21. *Id.*at 95–96.

II. MARITAL SUPERIORITY'S CONFLICT WITH TRADITIONAL FUNDAMENTAL RIGHTS DOCTRINE

Obergefell's focus on the special and unique qualities of marriage moves beyond the institution's utility as an access point to rights. The result is an opinion conceptually at odds with other fundamental rights that the Court has found in the past. *Obergefell* also calls into question many scholars' post-*Turner* analyses of the right-to-marry cases, the best of which (as we will discuss *infra*) concluded that the fundamental right to marry was really only a right of equal access to whatever the state chose to include in the marital form.

In all other contexts in which the Court has found a fundamental right, the Court has held that state prohibitions of certain types of behavior were unconstitutional.[22] For instance, the Court has found that states cannot prohibit parents from educating their children in certain ways,[23] prohibit a married couple from using contraception,[24] prohibit a woman from obtaining an abortion,[25] prohibit a family from living together,[26] infringe upon parental custody,[27] or prohibit adults from consensual sexual behavior.[28]

Outside the context of marriage, the Supreme Court had refused to use the doctrine of fundamental rights under the Due Process Clause to require states to act.[29] Two examples illustrate this point. In the context of education, although parents have the right to determine how their children are educated, the Supreme Court has refused to require states to affirmatively provide an effective schooling system.[30] Separately, in the context of

22. *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1205 (2004) ("The right to marry, then, is different from the rights applicable in the other [substantive due process cases] because it sometimes imposes positive obligations on the state to act.").

23. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

24. Griswold v. Connecticut, 381 U.S. 479 (1965).

25. Roe v. Wade, 410 U.S. 113 (1973).

26. Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

27. Troxel v. Granville, 530 U.S. 57 (2000).

28. Lawrence v. Texas, 539 U.S. 558 (2003).

29. *See* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2094–96 (2005) (stating that fundamental rights "do not require affirmative provision by the state" and concluding that "the Court has erred" in treating the right to marry as a part of substantive due process).

30. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

abortion, although states cannot prohibit abortion, the Supreme Court has rejected finding a fundamental right to government funding for abortion.[31] Thus, even though the Constitution recognizes a fundamental right that protects individuals from the state prohibiting their private conduct, the Due Process Clause does not require states to affirmatively provide benefits. In other words, the rights it creates are negative, not positive.

Before *Obergefell*, many scholars therefore had grappled with how the fundamental right to marry fit within the substantive due process negative-rights framework. The best solution came from those who argued that the right meant that states could not deny people the intimate association that marriage enables and that it also could not create unequal access to whatever legal status the state created.[32]

After *Obergefell*, however, this analysis seems wrong. Equality takes a backseat in the opinion, and instead, the Court focuses almost entirely on the unique importance of the traditional marital form, for reasons that go far beyond its utility as an access point to concrete benefits. By framing the opinion as a love letter to marriage itself, the Court has moved beyond an equal access rationale and toward an implicit determination that marriage is so critical that states are constitutionally required to offer that institution as the enduring and unique way to recognize relationships.

In his dissent, Justice Thomas attacked the majority on this point. He framed one of the differences between the majority's opinion and his own as a battle between negative and positive rights.[33] While that approach has problems as a broad constitutional matter,[34] his point is valid in the context of substantive due process—the right to marry as *Obergefell* describes it is of a different nature than other rights found under this doctrine. Thomas's critique of the fundamental right to marry would seem to call into question the reasoning of the past right-to-marry cases, but each of those cases had alternative rationales—the much lengthier section on equality in *Loving*, the equal protection fundamental interest analysis in *Zablocki*, and the intimate association concerns in *Turner*.[35]

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31. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

32. *See, e.g.*, Sunstein, *supra* note 29, at 2096–98; Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 685–89 (2010).

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631–37 (2015) (Thomas, J., dissenting).

34. *See generally, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

35. Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 34–35 (1996).

III. PREVENTING OTHER RELATIONSHIP STRUCTURES

While we both endorse affirmative rights in other contexts, *Obergefell*'s affirmative right to marriage is troubling because it strongly suggests that states would be prohibited from experimenting with alternative relationship recognition structures through wholesale abolition of the marital form, significant changes in that form, or the development of parallel relationships statuses with similar government benefits.[36]

Although most citizens take the ubiquity of marriage for granted, a longstanding body of social and legal scholarship has launched significant and well-considered criticism of the marital form. Scholars have criticized marriage for many reasons, including its rigidity as a bright-line test for determining relationship-based rights and its position as a historically gendered and essentially retrogressive institution.[37] Scholars have also noted that civil marriage in the United States has become unhealthily entangled with religion, leading to civic confusion about its actual role in society.[38]

That criticism could have led to the establishment of permanent marriage alternatives in two different ways: the marital form could have been abolished in favor of an alternative structure or structures; or marriage could have existed alongside more flexible alternatives that served different purposes.

First, abolition. In "Imagine There's No Marriage," Patricia Cain describes a world without marriage, in which relationships could instead be shaped by customized private contracts.[39] Those contracts would determine how property would be owned, how assets would be divided in the event of dissolution, and how parentage and custody would be allocated.[40] In Cain's alternative universe, marriage is replaced with a radically differ-

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36. States could do so, but given the need to satisfy strict scrutiny in this context, they would have great difficulty justifying the experiment in the face of litigation.

37. *See generally, e.g.*, Nancy D. Polikoff, *Law That Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW 85 (2009); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989.

38. *See* Mary Ann Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1792–97 (2005).

39. Cain, *supra* note 35.

40. *Id.* at 44–49.

ent, far more individualized form that lacks both the rigidity and the historical baggage of traditional marriage.

Marriage could also potentially have been abolished in favor of universal[41] civil unions. Civil unions take on all of the characteristics of marriage, but clearly demarcate a currently blurred line between the secular and religious aspects of marriage. Such a scheme might, over time, have created a beneficial cultural shift in which religious people would have come to accept that their own theological objections to same-sex or polygamous marriage were probably irrelevant to the institution's civil aspects.

Short of abolition, states might have established parallel schemes that allowed access to some or all of the benefits currently reserved for marriage. Domestic partnerships, for example, are a form of relationship recognition that, while established in the context of same-sex marriage prohibition, might have proved useful outside of that context. Domestic partnerships allow limited sets of rights (for example, hospital visitation and tax breaks) to an unmarried couple. Domestic partnerships usually require the same-sex couple to demonstrate financial interdependence and co-habitation—facts not prerequisite to obtaining a marriage license.[42] Thus, domestic partnership schemes do something well that marriage does poorly—they address the *actual*, not *presumed*, financial and emotional interdependence of couples. Such arrangements might work quite well for two groups of people: couples not seeking the full commitments of marriage, and co-habitants who are financially, but not romantically, linked.[43]

Now, however, all of these opportunities to reconsider our current system seem foreclosed. It is certainly difficult to imagine squaring *Obergefell*'s marital superiority language with a decision to abolish marriage entirely, even in favor of a comparable institution like civil unions.[44] Parallel institutions might be foreclosed as well. A court considering the

41. Schemes like domestic partnership and civil unions were established in the context of inequality of access to marriage; it is for this reason, not any of their inherent qualities, that they were considered constitutionally infirm in the absence of marriage equality.

42. *See* Case, Marriage Licenses, *supra* note 38, at 1774.

43. Consider, for example, two widows who were childhood friends and have decided to cohabitate following the deaths of their spouses.

44. The history and prestige of an institution is a factor the Court considers in evaluating whether alternatives are constitutional. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 551 (1996).

impact of *Obergefell* might accept an argument that the opinion's focus on marital superiority dictates that any available alternative—particularly domestic partnership, which could actually encourage couples *not* to marry—destroys the constitutionally required uniqueness of marriage and undermines its cultural significance.

CONCLUSION

The conundrum we describe would have been avoided had the Court decided *Obergefell* on the much more sound and appealing rationale of equality for LGBT individuals. Reasoning on a firm equal protection footing and using a precisely described level of scrutiny would have kept open the possibility that states could experiment with alternative family arrangements and would not have reinforced the supremacy of the conservative institution of marriage the *Obergefell* majority praised. In that world, as long as the states provided whatever system of arrangements equally without regard to sexual orientation or gender identity, they would satisfy the Constitution. Such an approach not only could have opened the door to more egalitarian and liberating relationship structures, but it also could have had broad impact in other areas where LGBT equality suffers, such as education, housing, employment, and adoption. As written, though, *Obergefell* does none of this.

Nancy Polikoff wrote in 1993, "Everything in our political history suggests that a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage."[45] *Obergefell*'s marital superiority focus demonstrates the prescience of her statement. We thus celebrate the outcome, but lament the opinion's conservative implications as well as its lost opportunity.

45. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1541 (1993).