One Is the Loneliest Number: The Complicated Legacy of *Obergefell v. Hodges*

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This Essay considers a Kennedy opinion that has been mentioned multiple times in the course of this symposium, *Obergefell v. Hodges*.[1] Let me state at the outset that I have perhaps unorthodox views of *Obergefell*.[2] Although it has been rightly heralded as one of the most important decisions of the last twenty years,[3] in my view, it is also one of the most challenging.[4] To be very clear, I fully support same-sex marriage and I appreciate that *Obergefell* extended the right to marry to include same-sex couples. But if winning cases is important, it is surely as important to win them in the right way. And on this point, *Obergefell* fails. To put it plainly, although *Obergefell* reaches the right outcome, it does so for the wrong reasons. We are only beginning to appreciate the full extent of *Obergefell*'s collateral consequences for those who live their intimate lives outside of marriage.

Although the Court's decision in *Obergefell v. Hodges* was momentous, it was hardly surprising. By the time *United States v. Windsor*[5] was decided two years earlier—not to mention the raft of federal appellate cases that followed in

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1. 135 S. Ct. 2584 (2015).

2. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016).

3. *See* Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 124 (2015) (noting that *Obergefell* was an "historic decision"); Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (with an Emphasis on* Obergefell v. Hodges*)*, 24 WM. & MARY BILL RTS. J. 341, 342 (2015) (referring to *Obergefell* as "[t]he Supreme Court's most important substantive due process decision in years"); Joseph Landau, *Roberts, Kennedy, and the Subtle Differences that Matter in* Obergefell, 84 FORDHAM L. REV. 33, 33 (2015) (noting that *Obergefell* was an "enormously significant decision [that] resolve[d] a major civil rights question").

4. For further elaboration of this point, see generally Murray, *supra* note 2.

5. 570 U.S. 744 (2013).

Windsor's wake[6]—the writing was clearly on the wall. When it decided *Obergefell* in 2015, the Court was essentially ratifying a consensus in favor of the legalization of same sex marriage.

What *was* surprising, however, was *Obergefell*'s rhetoric and its rationale. As Orin Kerr mentioned in his keynote address,[7] in his writing for the Court, Justice Kennedy has been prone to florid, flowery language. Nowhere is this more evident than in the *Obergefell* opinion. *Obergefell* is peak Justice Kennedy, right down to the extravagant prose, broad superlatives, and rhetorical flourishes. On this account, not only does *Obergefell* expand the right to marry to include and recognize same-sex marriages, it builds the case for equal access to marriage on the premise that marriage is the most profound, most dignified, and most important institution into which individuals may enter.[8]

As Justice Kennedy explains, marriage is not simply a religious or civic institution; it is an institution whose importance is deeply personal and meaningful to individuals.[9] Marriage's "dynamic," he explains, "allows two people to find a life that could not be found alone."[10] Indeed, the life that marriage offers is one in which the couple "becomes greater than just the two persons."[11] In short, marriage "is essential to our most profound hopes and aspirations."[12]

But he does not stop there. Marriage, he continues, is "a two-person union unlike any other in its importance to the committed individuals."[13] It offers individuals the chance to forge an "enduring bond" with another person and in so doing cultivates the conditions under which "two persons together can find other freedoms, such as expression, intimacy and spirituality."[14] More intriguingly, marriage, he offers "responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[15]

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6. *See, e.g.*, Latta v. Otter, 771 F.3d 456, 465, 477 (9th Cir. 2014) (enjoining enforcement of state law "preventing . . . same-sex [marriage], or denying recognition to [same-sex] marriages celebrated in other jurisdictions"); Bostic v. Schaefer, 760 F.3d 352, 373–84 (4th Cir. 2014) (overturning state law prohibiting same-sex marriage and refusing recognition of foreign same-sex marriages); Baskin v. Bogan, 766 F.3d 648, 659 (7th Cir. 2014) (overturning same-sex marriage ban which purported among other things to "enhance child welfare"); DeBoer v. Snyder, 772 F.3d 388, 400–19 (6th Cir. 2014) (upholding state constitutional amendment prohibiting same-sex marriage).

7. Orin S. Kerr, *Justice Kennedy and the Counter-Majoritarian Difficulty*, 70 HASTINGS L.J. 1213, 1217 (2019).

8. *Obergefell*, 135 S. Ct. at 2593–94 (noting the "transcendent importance of marriage," and its "centrality . . . to the human condition").

9. *Id.*

10. *Id.* at 2594.

11. *Id.*

12. *Id.*

13. *Id.* at 2599.

14. *Id.*

15. *Id.* at 2600.

This is perhaps the most startling rhetorical moment in an opinion replete with startling rhetoric. Indeed, for some, the image that Justice Kennedy conjures recalls the musings of Helen Fielding's spinster Bridget Jones,[16] who worried (endlessly) that she would never find a husband and would be left to die alone, only to be discovered weeks later, her body half-eaten by wild dogs.[17] Under *Obergefell*'s logic, one truly is the loneliest number.[18]

But beyond the soaring rhetoric, what is most troubling about *Obergefell*, to my mind, is Justice Kennedy's insistence that marriage, and marriage alone, serves the best interests of children.[19] Marriage, he writes, "safeguards children and families."[20] "Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser."[21] On this account, life outside of the marital fold poses "harm and humiliat[ion]" to children, who may "suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[22]

In this regard, not only is the *Obergefell* opinion unabashed in its veneration and prioritization of marriage, it is equally unabashed in its dismissiveness of life outside of marriage, which, on Kennedy's telling, is less dignified, less profound, and less valuable.[23] This is all to say that Kennedy's rationale for marriage equality rests, perhaps ironically, on the fundamental *inequality* of non-marital relationships and kinship forms. While there is much to celebrate about the *Obergefell* decision and its expansion of civil marriage to same sex couples, the decision's prioritization of marriage and its denigration of life outside of it is cause for serious concern, even alarm.

Obergefell's pro-marriage rhetoric is not simply a matter of florid discourse or flowery rhetoric. The decision portends unappreciated constitutional consequences that go beyond the expansion of civil marriage.[24] As I have elsewhere explained, *Obergefell* is likely to have negative repercussions for those, whether gay or straight, who, whether by choice or by circumstance, live their lives outside of marriage.[25]

Over the last fifty years, the Supreme Court has decided a series of cases that have offered tentative constitutional protections for non-marriage and non-

16. HELEN FIELDING, BRIDGET JONES'S DIARY 18 (1998).

17. *Id.*

18. THREE DOG NIGHT, ONE (Dunhill Records 1969).

19. *Obergefell*, 135 S. Ct. at 2600.

20. *Id.* at 2600.

21. *Id.*

22. *Id*. at 2600–01.

23. *See id.* at 2600 ("Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser."); *see also* Murray, *supra* note 2, at 1256 ("*Obergefell* makes clear that [unmarried persons and their family relationships] pale in comparison to the marital family . . . .").

24. *See* Murray, *supra* note 2, at 1239–57.

25. *Id.*

marital families.[26] To be sure, these cases have focused on a wide range of issues—the rights of non-marital children,[27] the rights of unmarried fathers,[28] access to contraception,[29] and more recently, the criminalization and decriminalization of same-sex sodomy.[30] Despite these differences, these cases nonetheless suggest the promise of some constitutional protection for non-marriage, the unmarried, and non-marital families.[31] *Obergefell*'s pro-marriage impulse demeans and challenges the status of non-marriage and more troublingly, calls into question the promise of the constitutional protections that these cases offer.[32]

This is perhaps surprising when one considers Justice Kennedy's own attachments to these protections for nonmarital relationships and families. Throughout the *Obergefell* opinion, Justice Kennedy invokes the standard canon of right to marry cases—*Loving v. Virginia*,[33] *Turner v. Safley*,[34] *Zablocki v. Redhail*.[35] However, the *Obergefell* decision also relies on non-marriage cases, particularly *Eisenstadt v. Baird*[36] and *Lawrence v. Texas*.[37] With that in mind, I want to shift the discussion to these two cases. Specifically, I want to highlight the effects that *Obergefell* may have for the protections that *Eisenstadt* and *Lawrence* offered non-marital relationships and families.

Eisenstadt, of course, was a challenge to a Massachusetts law prohibiting the use of contraception by unmarried persons.[38] Though the decision struck down the challenged law on equal protection grounds, the *Eisenstadt* Court also considered the decision's implications for the due process right to privacy. When the right to privacy was announced in *Griswold v. Connecticut*,[39] its protections

26. *Id.* at 1233–39.

27. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968) (noting that the right of non-marital children to recover damages from the wrongful death of their mother "involve[s] [an] intimate, familial relationship"); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (applying *Levy*'s logic to recovery for wrongful death by the mother of non-martial child); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (applying *Levy* to "unacknowledged illegitimate children" of fathers).

28. *See* Caban v. Mohammed, 441 U.S. 380, 390 (1979) (invalidating statutory scheme that allowed unmarried mothers, but not unmarried fathers, "to prevent adoption [of their child] by the mere withholding of consent"); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating a state law that presumed unmarried fathers unfit for custody of their children).

29. *See* Eisenstadt v. Baird, 405 U.S. 438, 446–55 (1972) (divorcing the right of privacy from marital union on the rationale that marriage is "an association of two individuals" each entitled to "freedom from unwarranted governmental intrusion" in deciding whether "to bear or beget a child").

30. *See* Lawrence v. Texas, 539 U.S. 558, 564–79 (2003) (recognizing a right of same-sex couples to be free from government intrusion into "their [sexual] conduct without intervention of the government").

31. *See* Murray, *supra* note 2, at 1223.

32. *Id.* at 1240.

33. 388 U.S. 1 (1967).

34. 482 U.S. 78 (1987).

35. 434 U.S. 374 (1978).

36. 405 U.S. 438 (1972).

37. 539 U.S. 558 (2003).

38. 405 U.S. at 440–42.

39. 381 U.S. 479 (1965).

were limited to marriage and the marital couple.[40] But where did this leave those outside of marriage? The *Eisenstadt* Court answered the question without equivocation. The marital couple, the Court mused, was "not an independent entity with a mind and heart of its own, but an association of two individuals."[41]

In this way, *Eisenstadt* recharacterized the right to privacy first announced in *Griswold*, by untethering it from marriage and the marital couple and recasting it as a "right of the *individual*, married or single, to be free from unwarranted governmental intrusion" into his or her intimate life.[42]

The Court went even further with *Lawrence v. Texas*.[43] There, the Court expanded upon *Eisenstadt*'s logic to strike down a Texas statute criminalizing same-sex sodomy.[44] In so doing, Justice Kennedy, who wrote for the majority, spoke approvingly, even reverently, of non-marital gay sex and relationships.[45] Non-marital sexual conduct of the sort in which the petitioners were engaged could be "but one element in a personal bond that is more enduring."[46] And in crediting the importance of the petitioners' non-marital sexual conduct, Kennedy took care to distinguish it from marriage—and any constitutional right to legal recognition of same-sex marriage. As he explained, the Texas anti-sodomy law issue the sought "to control a personal relationship that, *whether or not entitled to formal recognition in the law*,"[47]—that is, legal recognition as a marriage—"is within the liberty of persons to choose without being punished as criminals."[48] Indeed, according to Kennedy, "[t]he liberty protected by the Constitution" allowed LGB persons the right to enter into such non-marital relationships.[49]

This aspect of *Lawrence* is entirely obscured in *Obergefell* (and the decision invokes *Eisenstadt* only to "confirm" the relationship between liberty and equality).[50] Although Kennedy adverts to *Lawrence* and its possibilities for intimate life outside of marriage, he makes clear that such a life is merely a half-life. As he explains in the *Obergefell* opinion, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to

40. *Id.* at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

41. 405 U.S. at 453.

42. *Id.* at 453.

43. 539 U.S. 558 (2003).

44. *See id.* at 578.

45. Murray, *supra* note 2, at 1224 (citing Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1182 (2006)).

46. *Lawrence*, 539 U.S. at 567.

47. *Id.* (emphasis added).

48. *Id.*

49. *Id.*

50. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

outcast may be a step forward, but it does not achieve the full promise of liberty."[51] Instead, outlaw to in-law is the full measure of freedom.

This abrupt about-face belies the radical possibilities of *Lawrence*. As I have written elsewhere, in decriminalizing same-sex sodomy, but not making same-sex relationships eligible for marriage,[52] the decision introduced a novel prospect—sex unregulated by either criminal law or marriage, historically the two principal domains for the legal regulation of sex and sexuality.[53] Almost immediately, however, *Lawrence*'s radical possibilities were forsaken as the decision came to be seen as a waystation on the road to same-sex marriage.[54]

Lawrence's conscription into the service of marriage equality, and the surrender of its more radical potential, is not entirely surprising. Indeed, it is entirely expected if one considers Justice Kennedy's rhetorical treatment of the petitioners in the case.[55] Although he took great care to underscore that same-sex sex and relationships would not be eligible for marriage, Kennedy nonetheless painted the petitioners in *Lawrence* with the brush of domesticity. That is, he depicted them as a couple, though there was scant evidence for it.[56] On this account, the decision's protections for sex outside of marriage were reserved for those gay couples whose relationships were *marriage-like*—intimate, transcendent, private, in the home, monogamous, and in service of a relationship—even though they were ineligible for marriage.[57] Constitutional protection for sex outside of marriage was contingent on couples presenting their sexual lives in marriage-like terms. In so doing, *Lawrence* surfaced the tension between protecting and respecting life outside of marriage and promoting marriage as the normative ideal of adult intimate life.

If *Lawrence* represents the conflict between protecting non-marriage and promoting marriage, *Obergefell* might be understood as effectively resolving this tension in favor of marriage and marriage promotion.[58] In *Obergefell*, the contingent crediting of non-marital, marriage-like relationships is jettisoned as the Court—and Kennedy—promotes marriage (and only marriage) as the normative ideal for intimate life. Meaningfully, *Obergefell* and its rhetoric

51. *Id.* at 2600.

52. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 54 (2012) [hereinafter Murray, *Marriage as Punishment*]; Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1299 (2009) [hereinafter Murray, *Strange Bedfellows*].

53. Murray, *Marriage as Punishment*, *supra* note 52, at 54; Murray, *Strange Bedfellows*, *supra* note 52, at 1299–1301.

54. Murray, *supra* note 2, at 1226–29; Murray, *Strange Bedfellows*, *supra* note 52, at 1304–06.

55. Murray, *supra* note 2, at 1227–28.

56. Murray, *Marriage as Punishment*, *supra* note 52, at 56–57; *see also* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1407–09 (2004) (describing the ways in which Justice Kennedy conjures a sense of domesticity from the limited facts presented in *Lawrence*).

57. *See* Murray, *supra* note 2, at 1228–29 (describing Justice Kennedy's choice to rely on marital markers instead of grappling with the difficulty of dealing with "nonmarriage *as* nonmarriage"); Franke, *supra* note 56, at 1409 ("The price of victory in *Lawrence* has been to trade sexuality for domesticity . . . .").

58. Murray, *supra* note 2, at 1239–40.

suggest that the decision to prioritize marriage over non-marriage goes beyond simply choosing marriage over potential alternatives.[59] It gestures towards the repudiation of the jurisprudence of non-marriage and its ethic of non-marital equality. In this way, *Obergefell* is not simply about venerating marriage. It cultivates the conditions under which future courts and legal actors may renege on the promise of non-marital protection that *Lawrence*, *Eisenstadt*, and their ilk offered, leaving those who live their lives outside of marriage in a constitutionally precarious position.[60]

Domestic partnerships and civil unions are illustrative of these developments. In the years before marriage equality, these statuses provided alternatives means of recognizing same-sex relationships.[61] The bulk of these alternative statuses were reserved for same-sex couples—a brutal separate-but-equal regime that underscored the second-class status of same-sex couples. However, in some cases, these statuses were available to opposite-sex and same-sex couples alike.[62] In such circumstances, they presented a true alternative to marriage's hegemony—an option for those who wished to have some relationship recognition, without signing on for the full panoply of benefits—and regulation—that accompany marriage.[63]

However, as marriage equality has flourished, these alternative statuses have withered. In some states, they were phased out entirely as marriage equality made civil marriage available to most couples.[64] In other jurisdictions, civil unions and domestic partnerships were automatically translated into marriages.[65]

The post-*Obergefell* landscape provides no safe harbor for those who wish to maintain domestic partnerships and civil unions as relationship recognition alternatives to civil marriage. The decision's veneration of marriage could be interpreted as a signal that robust constitutional protections for, and recognition of, non-marital statuses will be unavailable if marriage is widely available. Put differently, if marriage is available to all, there is no need for the state to furnish alternatives for relationship recognition.

On this account, *Lawrence* and *Obergefell* constitute the full range of the state's obligations to individual rights holders. Per *Obergefell*, the state must provide equal access to marriage; and per *Lawrence*, it may not criminalize consensual, private sexual conduct.[66] It does not have an obligation to furnish an alternative to marriage or otherwise recognize and respect non-marital life

59. *Id.* at 1240.

60. *Id.*

61. *Id.* at 1241–42; Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294–96 (2013) [hereinafter Murray, *Paradigms Lost*].

62. Murray, *supra* note 2, at 1241–42; Murray, *Paradigms Lost*, *supra* note 61, at 294.

63. Murray, *supra* note 2, at 1241–42; Murray, *Paradigms Lost*, *supra* note 61, at 302–03.

64. Murray, *supra* note 2, at 1243; Murray, *Paradigms Lost*, *supra* note 61, at 304.

65. Murray, *supra* note 2, at 1243 & n.225.

66. *Id*. at 1249.

beyond ensuring that non-marital sex is not criminalized and innocent children are not punished for their non-marital status.[67]

Obergefell's pointed rhetoric about the importance of marriage for supporting parenthood also raises important questions for unmarried persons seeking to raise children. This point was raised—and quickly obscured—in one of the cases that was consolidated into *Obergefell*. In *DeBoer v. Snyder*, Jane Rowse and April DeBoer were a Michigan couple fostering children.[68] Their initial claim against the state had nothing to do with Michigan's prohibition on same-sex marriage.[69] Rather, they sued to challenge Michigan's law that prevented unmarried couples from adopting each other's children.[70] A district court judge advised them to reframe their claim.[71] If the issue was about being unmarried and being unable to adopt as a couple, wouldn't it be easier to simply challenge the prohibition on same-sex marriage, get married, and then proceed easily to adoption? It would, so they did. They reframed their claims, and after *Obergefell*, happily adopted their children.[72]

Although DeBoer and Rowse's marriage made it possible for them to adopt, in Michigan, unmarried couples are still prohibited from adopting children.[73] As the Michigan adoption statute makes clear, marriage continues to be prioritized as the optimal site for raising children. And *Obergefell* does little to disrupt this notion. If anything, it further embeds this intuition. On this account, we might imagine, in a post-*Obergefell* world, a public hospital restricting assisted reproductive technologies to married persons on the ground that ART should be reserved for those who are prepared to raise children in marriage. *Obergefell*'s pro-marriage rhetoric would make such a decision easily defensible. The hospital would need only advert to Justice Kennedy's pronouncements that marriage is the optimal site for raising children. After all, if marriage "affords the permanency and stability important to children's best interests,"[74] why would the law sanction and facilitate other family forms, especially those rooted in non-marriage?

All of this prompts a question, if *Obergefell* stands for the proposition that love wins, who loses? Unfortunately, *Obergefell*'s victory for marriage equality comes at the expense of the unmarried and non-marriage. Even as *Obergefell* insists on equal access to marriage for same sex couples, it implicitly underwrites the inequality of non-marriage and non-marital families. More

67. *Id.*

68. 772 F.3d 388, 397, 423 (6th Cir. 2014), *rev'd*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

69. *Id.* at 396–97.

70. *Id.*

71. *Id.* at 397.

72. Kat Stafford, *DeBoer, Rowse Formally Adopt Their 5 Children*, DETROIT FREE PRESS (Nov. 5, 2015, 9:12 PM), https://www.freep.com/story/news/local/michigan/oakland/2015/11/05/jayne-rowse-april-deboer-adoption-wedding/75208698/.

73. MICH. COMP. LAWS ANN. § 710.24 (West 2016).

74. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

troublingly, the decision, with its florid pro-marriage rhetoric, has strong potential to further embed this inequality into the structure of constitutional law, reneging on the possibility of constitutional protection for non-marital life that underlaid *Lawrence v. Texas* and *Eisenstadt v. Baird*.[75]

As we take the time to reflect on his remarkable career in the law and on the Supreme Court, it is undeniable that Justice Kennedy has left a mark on the Court and its jurisprudence. But it is not enough to focus on what he has created with his jurisprudence. We must take the full measure of his legacy. In many ways, *Obergefell* is a fitting vehicle for viewing the Kennedy legacy holistically. As the case shows, Justice Kennedy has done much to advance our understanding of equality and equal citizenship, but as this Essay explains, equality for some may come at the expense of others. And in *Obergefell*, Justice Kennedy's efforts to advance the cause of equal marriage may actually stymie equality in other domains, creating an uneven landscape for the future advancement of equal rights.

75. Murray, *supra* note 2, at 1240.

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