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

Obergefell opinion also troubled some who wished to find a more precise and
generalizable doctrinal exposure of equal protection and due process
principles in the opinion’s florid but somewhat nebulous paens to liberty and
equality.  

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. Marriage, on this view, is
a dynamic institution, transformed since the Founding from an inequitable,
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,
mariage prescribed gender-differentiated and unequal roles for husbands
and wives and the subordination of wives’ legal identity through coverture.
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_t
he_wrong_way [http://perma.cc/6JSZ-WT4G].

3. See, e.g., Summary: Work of the House Judiciary Committee for the Week of
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
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. 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, and the sex-differentiated laws of marriage and divorce remained on the books in most jurisdictions. 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. 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. 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.

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. 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 REMAGINED, 97–132 (2014).
10. See id. at 737–38.
vision of egalitarian marriage into constitutional law.\textsuperscript{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.\textsuperscript{13} In cases such as \textit{Frontiero v. Richardson},\textsuperscript{14} \textit{Weinberger v. Wiesenfeld},\textsuperscript{15} and \textit{Califano v. Goldfarb},\textsuperscript{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.\textsuperscript{17}

\textit{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{22} Later, the opinion describes how

\begin{itemize}
  \item \textsuperscript{12} On Ginsburg’s litigation campaign, see \textit{id.} especially at 41–185; \textit{see also} Cary Franklin, \textit{The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law}, 85 N.Y.U. L. REV. 1 (2010).
  \item \textsuperscript{14} 411 U.S. 677 (1973).
  \item \textsuperscript{15} 420 U.S. 636 (1975).
  \item \textsuperscript{16} 430 U.S. 99 (1977).
  \item \textsuperscript{17} \textit{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. \textit{See, e.g.}, Deborah Dinner, \textit{The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities}, 102 VA. L. REV. (forthcoming 2016).
  \item \textsuperscript{18} \textit{Obergefell v. Hodges}, 135 S. Ct. 2584, 2594 (2015).
  \item \textit{Id.} at 2595.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{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. Reed24 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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{33} Feminists argued

\begin{itemize}
\item \textsuperscript{30} See supra note 27 and accompanying text.
\item \textsuperscript{32} In an interview with Neil Siegel shortly after the Obergefell decision, Justice Ginsburg explained her belief that “[i]t is 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_55b97e68e4b0b8499b18536b [http://perma.cc/94PW-JUGN].
\item \textsuperscript{33} See Serena Mayeri, Marital Supremacy and the Constitution of the Nonmarital Family, 103 CALIF. L. REV. 1277 (2015).
\end{itemize}
that laws which discriminated against “illegitimate” children in fact burdened the mothers who were primarily responsible for their care and support.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 unmarried 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.\textsuperscript{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.\textsuperscript{40} The partial and incomplete shift

\textsuperscript{34} See Mayeri, Marital Supremacy, supra note 33.
\textsuperscript{37} See id.
\textsuperscript{38} See, e.g., JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); Mayeri, Marital Supremacy, supra note 33.
\textsuperscript{39} See Califano v. Boles, 443 U.S. 282 (1979); Mayeri, Marital Supremacy, supra note 33.
\textsuperscript{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 nonmarriage 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 nonmarital, 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

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.
44. Mayeri, Marital Supremacy, supra note 33.
45. See id.
46. See id.
48. Cf. Maxine Eicher, 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. 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. 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. 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. Creative legal alternatives to marriage, such as domestic partnership benefits, disappear. 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,

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).


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 FRANK, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015); Lenhardt, supra note 1.


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. 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.

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.” 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.” 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

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. 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.