

11-2015

Interpreting Liberty and Equality Through the Lens of Marriage

Nan D. Hunter

Follow this and additional works at: <http://scholarship.law.berkeley.edu/clrcircuit>

Recommended Citation

Hunter, Nan D., "Interpreting Liberty and Equality Through the Lens of Marriage" (2015). *The Circuit*. 78.
<http://scholarship.law.berkeley.edu/clrcircuit/78>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in The Circuit by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Interpreting Liberty and Equality Through the Lens of Marriage

Nan D. Hunter*

Would a master painting be worth as much if it were mounted inside a cheap and ugly frame? Of course—one would simply replace the frame with one that matched the artistic sensibility and value of the painting. What if it was not the frame that demeaned the visual aesthetic but a lens that distorted the artist’s work? Imagine that this lens was affixed to the painting, so that one could view the painting only through the lens. This possibility is more troubling. If the lens is permanent, the painting would no longer be worth as much because the distortion caused by the lens would have altered the meaning and experience of the painting.

Reading Justice Kennedy’s opinion for the Court in *Obergefell v. Hodges*¹ left me with a similar queasy feeling about the right of same sex couples to marry.² The opinion repeatedly emphasizes those aspects of marriage that are both the most idealized and the most constraining. The opinion’s discussion of marriage moves far beyond a right to gain access to an important government structure for recognition and benefits, to the point of invoking the fear that without marriage, one will be “condemned to live in loneliness.”³ Is marriage equality the frame for an important step forward at least for formal equality under the law or has the Supreme Court’s decision bowdlerized the message of equality with its distorting lens? If, as is most likely, the answer is both, how

DOI: <http://dx.doi.org/10.15779/Z38N55J>

* Professor of Law, Georgetown University Law Center; Distinguished Scholar, The Williams Institute, UCLA.

1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2605.
3. *Id.* at 2608.

difficult will this lens be to dislodge and for how long? I argue in this Essay that *Obergefell* elevates traditionalist concepts of marriage over principles of liberty or equality. It reproduces a jurisprudence that frames access to a state-created status, which should be open to all, as a reward for adherence to a narrow social meaning of marriage. Using the power of law and invoking liberty and equality, the Court forces open an exclusionary institution, but as a cultural message of support for greater human freedom, the opinion seems conflicted. Moreover, at the level of doctrine, it generates greater uncertainty for other courts in applying equal protection analysis and dealing with intimate relationships outside marriage.

The freedom to marry for same-sex couples has always drawn criticism from opposite political poles as either too conservative in its ambitions or too destabilizing in its consequences. There is nothing new here. A right to equal treatment often grows from an outsider's claim to participate in a fundamentally assimilationist institution, as is demonstrated by the history of challenges to exclusion from practices associated with citizenship, whether public education or military service. Voting is so prosaic that half of Americans who could vote regularly do not,⁴ yet the rights of African-Americans and women to vote were once radical claims; suffrage for women is still less than 100 years old. And although voting is insufficient to secure full social citizenship and economic participation, it is nonetheless necessary. One hopes that we will one day say the same about sexual citizenship, that achieving equal access to marriage was a necessary step to a deeper understanding of sexuality as a human right and a central component of human flourishing. If, as the Court says, marriage is “the keystone of our social order,”⁵ then further disconnecting it from mechanisms of subordination would be something to celebrate.

Yet seldom has the theme of joining rather than challenging an institution been as central as it was in the same-sex marriage campaign.⁶ This theme provided Justice Kennedy with the linchpin of his opinion: “[I]t is the enduring importance of marriage that is their whole point. [Plaintiffs are motivated by] their respect—and need—for its privileges and responsibilities.”⁷ The tone sounds vaguely apologetic, and one imagines Justice Kennedy in conversation with fellow conservatives, seeking to downplay and justify the result. He surely

4. Thom File, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, U.S. Census (July 2015) at 3 (Table 1) (available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> [<http://perma.cc/VP2M-63N9>]).

5. *Obergefell*, 135 S. Ct. at 2601.

6. See generally FREEDOM TO MARRY, MOVING MARRIAGE FORWARD: BUILDING MAJORITY SUPPORT FOR MARRIAGE 6 (2011) (“[G]ay couples want to join marriage not ‘change’ it . . . because they respect the institution and what it means in our society, and because they believe in the values of marriage and what it can bring: commitment, happiness, responsibility, companionship, family connectedness, and support and help in caring for those we love.”), <http://www.freedomtomarry.org/page/-/files/pdfs/Moving%20Marriage%20Forward.pdf> [<http://www.perma.cc/53ZR-B5EG>].

7. *Obergefell*, 135 S. Ct. at 2594.

has the discretion to write in this register, and doing so may be strategically adept. But as political philosophy, the opinion is scattershot at best. It swerves between the classically liberal concept of self-determination, a gesture toward Rawlsian justice,⁸ and a neoliberal commitment to privatizing the risk of material insecurity through the mechanism of expanding private, family-based responsibility.

I.

THE ROLE OF DIGNITY

Obergefell's center of gravity is the concept of dignity. The Court catalogs the ways in which same-sex couples measure up to the ideals of “nobility and dignity”⁹ embodied in the institution of marriage. Not only are LGBT Americans as devoted to partners and children as heterosexuals, but we also “aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”¹⁰ Exactly what these lofty phrases mean is anyone’s guess. It certainly sounds, though, that, like the deserving poor, the deserving queer have earned this recognition by pledging allegiance to a particular cultural flag and the norms for which it stands.

Where does that leave the presumptively un-deserving (poor or queer or both)? The Court in *Obergefell* reasons that marriage serves the same functions for lesbian and gay couples as for different-sex couples, and inequality in access to marriage is wrong. Does the case also stand for the proposition that inequality is wrong because we are equally *worthy* of access? The opinion creates a disturbing sense of contingency, the implication that the dignity rights at issue flow less from the bedrock of human rights than from the respectability of both the particular institution and the particular plaintiffs whose moral worth render them eligible to participate in it. Dignity is a slippery concept, and it is too soon to know whether it will figure significantly in U.S. constitutional law.¹¹ It is instructive, however, to compare the use of “dignity” in *Obergefell* and *Windsor*, an earlier Justice Kennedy decision concerning federal recognition of same-sex marriage,¹² to the role dignity plays in the law of other nations where the right is explicitly found in constitutional text. In the same-

8. John Rawls conceived of justice as the maximization of both liberty and equality, exemplified by principles flowing from “the veil of ignorance,” in which the test of justice would be whether an individual would agree to be governed by a given policy without knowing her position in society. JOHN RAWLS, A THEORY OF JUSTICE 118–19 (rev. ed. 1999). See also, Leif Wenar, “John Rawls”, Para. 4, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Winter 2013 Edition), Edward N. Zalta (ed.), (available at <http://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc>) [<http://perma.cc/NSM5-HUUG>].

9. *Obergefell*, 135 S. Ct at 2594.

10. *Id.* at 2602.

11. For a comparative analysis, see Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331 (2012).

12. *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692, 2694, 2696 (2013).

sex marriage decision from the Constitutional Court of South Africa,¹³ for example, dignity is intrinsic to the person and all family forms. In the view of that court, the state does not confer dignity by granting marriage rights; rather it is compelled to recognize the strong link between dignity and equality.¹⁴

In *Obergefell*, marriage and dignity are fused, and marital dignity functions as a mediating institution. The bonds of marriage enable “two persons together [to] find other freedoms, such as expression, intimacy, and spirituality.”¹⁵ There is an “abiding connection between marriage and liberty,”¹⁶ and marriage appears to ennoble this liberty. It is a “two-person union unlike any other in its importance to the committed individuals.”¹⁷ The opinion leaves no doubt that this is a quid pro quo: “[J]ust as a couple vows to support each other, so does society pledge to support the couple.”¹⁸

In fairness to the Justices, they were struggling with how to analyze an institution of densely packed social meaning. Perhaps one reason for the overblown language of the opinion is an impulse to deflect attention from the historical association of marriage not only with commitment and children, but also with sexuality. The words “dignity” and “sexuality” do not usually appear in the same sentence. Consciously or not, the Court uses the language of dignity in ways that occlude the physical intimacy dimensions of what is at stake, even though, until relatively recently, marriage was the only social location in which sexual activity was lawful. An alternative concept of dignity more infused with democratic and pluralist values could encompass respect for variation in kinship, sexuality, and affiliation. The moralistic version of dignity in *Obergefell* does not.

Yet, norms of sexual practice will remain dynamic despite the extent to which they are hidden or legitimized by marriage. When sex was legal only between spouses and marriage was coterminous with heterosexuality, any and all of the sexual practices of same-sex partners were intrinsically transgressive. Acquiring the option to marry will not eliminate extra-marital liaisons by same-sex partners any more than it has for different-sex couples. Indeed, there is evidence that the custom of multiple partners is especially common among male couples.¹⁹ In sexual liberty terms, what same-sex couples have acquired is

13. Minister of Home Affairs v. Fourie, [2005] ZACC 19.

14. *Id.* at para. 78, 79.

15. *Obergefell*, 135 S. Ct. at 2599.

16. *Id.*

17. *Id.*

18. *Id.* at 2601.

19. Colleen C. Hoff et al., *Relationship Characteristics Associated with Sexual Risk Behavior Among MSM in Committed Relationships*, 26 AIDS PATIENT CARE & STDS 738, 741 (2012) (reporting that 55 percent of the 566 gay male couples studied had agreed to an open relationship); Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L. J. 1855, 1867 (2012).

the option that heterosexual couples have long had: to act *as if* sexuality is contained within marriage.

Most people would consider the implicit agreement to participate in the performance of monogamy as discursive theater—a representation which could be accurate or not, at any given time, for any given couple—as a small price to pay for equality under law. Some LGBT rights advocates prioritized equal marriage rights in part because the extraordinary degree of resistance to their arguments seemed to signal that if gays and lesbians were found equal for purposes of this institution, then eliminating other barriers to equality would seem like a mop-up operation. Admittedly, it might take a few years to iron out all the wrinkles in the fabric of equality, but there would be no doubt as to the outcome. The degree of judgmentalism in the opinion, however, illuminates serious flaws in the proposition that equal marriage will raise all boats.

II.

A RIGHT NOT TO MARRY?

The *Obergefell* Court concludes that same-sex partners who wish to marry are entitled to “equal dignity in the eyes of the law.”²⁰ But the logic of the opinion raises the obvious question of how much dignity should attach to individuals who choose not to marry. The Court describes an individual’s choices regarding marriage as central to autonomy because they “shape an individual’s destiny.”²¹ A right to marry that is so central to personhood must entail a commensurate right not to marry. Every important liberty is a Janus-like construct: absent extraordinary and urgent conditions, there are always two equal sides. One has the liberty to speak or not to speak. One has the right to bear or beget a child, or not. Americans can travel at will, but cannot be forcibly relocated. So too, not-marriage as a negative liberty right must be fundamental.

Less clear is the fate of policies that affirmatively advantage or favor married persons over the unmarried. In demographic terms, not-marriage is growing in significance as both a status, whether temporary or permanent, and a choice. Of Americans aged 25 to 44, almost a third are either single or divorced.²² There are two dimensions to the right not to marry. Not-marriage (like marriage) may coincide with sexual practices that implicate questions of constitutional protection for conduct.²³ In addition and independently of the question of conduct, constitutional questions arise concerning protection for

20. *Obergefell*, 135 S. Ct. at 2608.

21. *Id.* at 2599.

22. See Hunter, *supra* note 19, at 1860 (“Of American women in the prime marrying ages of twenty-five to forty-four, more than 40% were either divorced (13%), cohabiting (11%), or single (18%).”).

23. See *infra* notes 40–42; see also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (discussing the history of marriage and how the institution serves as “a vehicle of state-imposed sexual discipline”).

unmarried status. Individuals who could have married but chose not to may challenge the validity of government policies that favor similarly situated persons who chose to marry. Ironically, their grounds for doing so may be stronger after *Obergefell*.

III.

UNRESOLVED CHALLENGES POST-*OBERGEFELL*

Having won the right to marry, the LGBT rights movement will face the same question as other social justice movements: Is formal equality or liberty enough? The question today for the LGBT rights movement is how it will deploy the resources that it mobilized for marriage equality. One option is that organizations will continue to prioritize other formal equality goals, such as enactment of federal and state laws that explicitly prohibit sexual orientation discrimination. Protection from discrimination in the ordinary transactions of daily life—on the job, in housing or in public accommodations—is surely important. Equally important, however, are issues that arise from the bottom up and have a disproportionate impact on less advantaged portions of the LGBT population.

For economically marginal groups within the LGBT community, the daily operations of law enforcement agencies continue to re-inscribe subordination. A study by the Center for Gender and Sexuality Studies at Columbia Law School reported that 73 percent of a sample of LGBT people and people living with HIV had face-to-face contact with police during a five-year period.²⁴ Of that group, five percent had been incarcerated, compared to three percent of the U.S. adult population.²⁵ One reason, the report argued, is that “transgender women of color and LGBT youth of color are endemically profiled as being engaged in sex work, public lewdness, or other sexual offenses.”²⁶ Other studies also document a disproportionate association between race, gender identity, or sexual orientation, and police harassment, especially in the context of sex work.²⁷

24. CATHERINE HANSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 4 (2014), http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [<http://perma.cc/NGL8-53J9>].

25. *Id.* at 5.

26. *Id.*

27. See, e.g., Elijah Adiv Edelman, “*This Area Has Been Declared a Prostitution Free Zone*”: *Discursive Formations of Space, the State, and Trans “Sex Worker” Bodies*, 58 J. HOMOSEXUALITY 848 (2011); Lydia A. Sausa et al., *Perceived Risks and Benefits of Sex Work Among Transgender Women of Color in San Francisco*, 36 ARCHIVES SEXUAL BEHAVIOR 768 (2007).

IV. HOW STRONG THE EQUALITY?

In addition to the strategic questions related to movement priorities, two major questions of law remain unsettled. For all its rhetorical fireworks, *Obergefell* does little to clarify the scope of either the liberty or equality principles on which it is based. The right to marry is a classic equal liberty claim, a hybrid of the fundamental right to marry and the exclusion of a class of couples in violation of the Equal Protection Clause. In the closest analogous case, *Loving v. Virginia*,²⁸ the Court struck down a state ban on interracial marriage in an opinion much more heavily grounded in an Equal Protection analysis than *Obergefell*. *Loving* contains two short paragraphs on liberty, treating it as almost an afterthought, a brief recognition that the parties, whose primary claim rested in the Equal Protection Clause, also had a liberty-based right to marry.²⁹ Plaintiffs' lawyers in *Obergefell* had hoped to win a similar Equal Protection victory, ideally organized along the principles of heightened scrutiny.

The Court chose a different path in *Obergefell*, however. It recognized both liberty and equality grounds for its holding, but the equality portion of the analysis reads as the weaker of the two. Equality is not so obviously the tagalong in *Obergefell* that liberty was in *Loving*, but its scope is unclear. Throughout its discussion of equal protection, *Obergefell* references the equality issue nested within a right to liberty, stating for example that “[i]t was the essential nature of the marriage right [in *Zablocki v. Redhail*³⁰] that made apparent the law’s incompatibility with requirements of equality.”³¹ But how strong will the Court’s commitment to equality be when there is no fundamental liberty involved to make apparent the inequality of a sexual orientation classification? The Court does not answer that question. Remarkably, the section of the opinion addressing equality contains no citation to *Romer v. Evans*, the only Supreme Court case involving LGBT persons that was squarely decided on Equal Protection grounds.³² Nor is there any discussion of the tiers of review that have traditionally been necessary to an analysis under the Equal Protection Clause.

The absence of tiers may simply signal the declining use of an overly mechanistic structure in a calculus that would more appropriately turn on questions related to proportionality. Identifying whether a law imposes a burden that is disproportionate to its likely benefit would offer a more sensible

28. 388 U.S. 1 (1967).

29. *Id.* at 12.

30. 434 U.S. 374 (1978).

31. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

32. 517 U.S. 620, 623 (1996). *But cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (“DOMA is unconstitutional as a deprivation of the liberty . . . protected by the Fifth Amendment’s Due Process Clause.”); *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003) (declining to declare the Texas statute invalid under the Equal Protection Clause).

approach than remaining stuck in the criteria for heightened scrutiny. The underlying principle that greater burdens require more persuasive justifications provides one of the anchors of constitutional jurisprudence.³³ Review of classifications that are odious but have not been found suspect provides an obvious opportunity for the Court to expand on its use of this principle.

Instead, the opinion lacks a meaningful equal protection analysis despite its holding that the Equal Protection Clause had been violated. This omission will produce uncertainty. We know from the context of reproductive rights that while the state cannot block the exercise of a fundamental right, it can engage in negative action, such as condemnation, to discourage it. Since *Maher v. Roe*,³⁴ the Supreme Court has imposed “no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”³⁵ The same principle could apply to sexual orientation issues. For example, Alabama requires that public school sex education curricula “emphasize . . . that homosexuality is not a lifestyle acceptable to the general public.”³⁶ There is no liberty right to non-pejorative or even accurate schoolbooks, and one can imagine that some state legislatures or school boards might cling to the message that homosexuality is immoral, even if same-sex couples can marry. The gaps in the equal protection analysis in *Obergefell* may allow states to continue adopting policies that attempt to shame lesbians and gay men who exercise their right to marry.

V.

HOW CAPACIOUS THE LIBERTY?

The second unanswered doctrinal question is how far the liberty right will extend to protect intimate relationships other than marriage. Put another way, what is the scope of liberty for couples gay or straight who could marry but choose not to and for those in intimate relationships that involve more than two persons? The Constitutional Court of South Africa joined the right of same-sex couples to marry with a “right to be different,” noting “South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.”³⁷

In the United States, there is well-established doctrine, though relatively little case law, on a right to intimate association that is exemplified by familial,

33. In the realm of equal protection, for example, the Court has developed a concept of “proportionality or congruence between the means adopted and the legitimate end to be achieved” in assessing whether Congress has exceeded its authority in enacting remedial legislation. The State must demonstrate a compelling government interest and show that the law is the least restrictive means of furthering its interest. *City of Boerne v. Flores*, 521 U.S. 507, 533–34 (1997).

34. 432 U.S. 464 (1977).

35. *Id.* at 474.

36. ALA. CODE 1975 § 16-40A-2(c)(8).

37. *Minister of Home Affairs v. Fourie*, [2005] ZACC 19, at para. 59.

but not necessarily marriage-based, relationships.³⁸ The Supreme Court has described the prototype of intimate association as relationships that involve “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”³⁹ Cases brought on this ground have often involved plaintiffs who were fired from public sector jobs, frequently in law enforcement, for beginning romantic relationships with co-workers or offenders in violation of agency policies.⁴⁰ It is unclear how the liberty right recognized in *Obergefell* will interact with government policies that ban or impose penalties for intimate associations in workplace or other settings.

Additional challenges to laws that restrict liberty within the zone of intimate association seem inevitable. Recently, fundamentalist Mormons in Utah brought a case, now pending in the Tenth Circuit, to assert that they engage in “religious cohabitation” in violation of a statute that prohibits cohabitation as well as polygamy.⁴¹ Plaintiffs in this case are not challenging the validity of the prohibition on bigamy, but claim a right to live as they wish so long as they do not seek the recognition of marriage. The district court found no fundamental right to religious cohabitation, but struck down the statute under rational basis review as a restriction on liberty in light of *Lawrence*, in part because the State did not prosecute persons for adultery or “religiously motivated polygamy.”⁴²

38. See *Roberts v. Jaycees*, 468 U.S. 609, 619–20 (1984) (“[T]he relationships that might be entitled to . . . constitutional protection are those that . . . attend the creation and sustenance of a family.”).

39. *Id.* at 620.

40. See, e.g., *Bautista v. Cnty. of Los Angeles*, 190 Cal. App. 4th 869 (2010) (alleging that termination for engaging in a personal relationship with a prostitute violated plaintiff’s right to freedom of association under the First and Fourteenth Amendments); *Isenbart v. Bd. of Cnty. Comm’rs*, No. 11-cv-03240-LTB-BNB, 2012 WL 4378269 (D. Col. Sept. 25, 2012) (alleging termination as a result of entering into an “intimate dating, marital, and familial relationship” with another county employee); *Via v. Taylor*, 224 F. Supp. 2d 753 (D. Del. 2002) (alleging wrongful termination resulting from correctional officer’s off-duty relationship with paroled former inmate); *Cross v. Baltimore City Police Dep’t.*, 213 Md. App. 294 (2013) (arguing that plaintiff was terminated in violation of her constitutional right to marry and to engage in intimate association); *Briggs v. N. Muskegon Police Dep’t*, 563 F. Supp. 585 (W.D. Mich. 1983), *aff’d without opinion*, 746 F.2d 1475 (6th Cir. 1984) (alleging that plaintiff was dismissed from his job as a part-time city police officer for cohabiting with a married woman who was not his wife); *Corso v. Fisher*, 983 F. Supp. 2d 320 (S.D.N.Y. 2013) (alleging that New York City’s Department of Corrections policy prohibiting personal association of agency employees with current and former inmates and their associates violated the First Amendment). Other cases involve firing a public employee based on a spouse’s actions. *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999) (alleging his discharge in retaliation for lawsuit filed by wife violated his First Amendment rights); *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985 (2d Cir. 1997) (challenging local law on grounds that it unconstitutionally infringed on right of association).

41. *Brown v. Buchman*, 947 F. Supp. 2d 1170, 1178, 1181 (D. Utah 2013) (appeal pending).

42. *Id.* at 1224.

CONCLUSION

One lesson from *Obergefell* is clear: those who thought that a ruling on same-sex marriage would be the final word from the Supreme Court on the limits of state regulation of sexuality must reconsider. There is surely more to come and more that needs to be done, especially on behalf of those whose sexual practices or intimate relationships fall outside the penumbra of respectability that *Obergefell* celebrates. “The nature of injustice is such that we may not always see it in our own times.”⁴³

43. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).