

THE FREEDOM TO *CHOOSE* TO MARRY

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Marriage 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.

—*Obergefell v. Hodges*¹

Marriage is the batterer's gateway to establishing power over the family finances and property.

—Dana Harrington Conner²

INTRODUCTION

Over the last several decades, the Lesbian, Gay, Bisexual, and Trans (LGBT)³ community made the political decision to push for “marriage equality” and the “freedom to marry,” rather than “same-sex” marriage or “homosexual” marriage.⁴ Like the decision that

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

2 Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 363 (2014).

3 Although I use the terminology “LGBT,” I recognize that the equality rights of trans or bisexual individuals have received comparatively less attention by the LGBT community than the rights of gay men and lesbians. Elsewhere, I have discussed the problem of bisexual invisibility. See Ruth Colker, *Hybrid Revisited*, 100 GEO. L.J. 1069 (2012). The limited implications of the marriage equality movement to bisexual and trans individuals are beyond the scope of this paper, but I use the phrase “LGBT” because that is the term that the gay rights community typically uses for itself at this time.

4 Although it is difficult to document this transition, the language of one leading writer in the field is instructive in seeing the transition to the use of the term “marriage equality.” In 1993, Professor William Eskridge published an article entitled “A History of Same-Sex Marriage.” See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993). In 2015, he published a blog entry in which he talked about “marriage equality.” See William N. Eskridge, Jr., *Symposium: Original Meaning, Public Deliberation, and Marriage Equality*, SCOTUSBLOG (Jan. 17, 2015, 11:52 AM), <http://www.scotusblog.com/2015/01/symposium-original-meaning-public-deliberation-and-marriage-equality-2/> [<http://perma.cc/VP4S->

Justice Ruth Bader Ginsburg made in the 1970s, to refer to “gender-based” equality rather than “sex-based” equality, this change in terminology tried to focus society on the concept of “equality” rather than “sex”⁵ and the category of “marriage” rather than “homosexual

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One of the only discussions of the appropriate terminology in a judicial decision appeared in a Hawaii decision and was repeated by one of the Justices in a Massachusetts decision. Massachusetts Chief Justice Marshall explained:

We use the terms “same sex” and “opposite sex” when characterizing the couples in question, because these terms are more accurate in this context than the terms “homosexual” or “heterosexual,” although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex.

Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 953 n.11 (Mass. 2003) (citation omitted).

In 1993, the Hawaii Supreme Court already understood the importance of emphasizing the concept of “equality” rather than the concept of “sex.” It said:

“Homosexual” and “same-sex” marriages are not synonymous; by the same token, a “heterosexual” same-sex marriage is, in theory, not oxymoronic. A “homosexual” person is defined as “[o]ne sexually attracted to another of the same sex.” 16 *TABER’S CYCLOPEDIA MED. DICTIONARY* 839 (1989). “Homosexuality” is “sexual desire or behavior directed toward a person or persons of one’s own sex.” *WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE* 680 (1989). Conversely, “heterosexuality” is “[s]exual attraction for one of the opposite sex,” *TABER’S CYCLOPEDIA MED. DICTIONARY* at 827, or “sexual feeling or behavior directed toward a person or persons of the opposite sex.” *WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENG. LANGUAGE* at 667. Parties to “a union between a man and a woman” may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

Baehr v. Lewin, 852 P.2d 44, 51 n.11 (Haw. 1993) (as clarified on reconsideration) (May 27, 1993).

5 See Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender Justice: Supreme Court’s Newest Member Speaks at Her Old Law School and Brings Down the House with Her History Lesson About Fighting Bias*, L.A. TIMES, Nov. 21, 1993, http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court [<http://perma.cc/X8NN-FN96>] (“I owe it all to my secretary at Columbia Law School, who said, ‘I’m typing all these briefs and articles for you and the word sex, sex, sex is on every page,’” Ginsburg said. “Don’t you know that those nine men [on the Supreme Court]—they hear that word, and their first association is not the way you want them to be thinking? Why don’t you use the word gender? It is a grammatical term and it will ward off distracting associations.”).

marriage.”⁶ Although this change in terminology cannot, alone, account for changes in public opinion, it does coincide with increasing public acceptance of individuals having the freedom to marry the person they love without regard to sex or sexual orientation.⁷

Thus, when the Supreme Court announced its decision in *Obergefell v. Hodges*,⁸ the leading LGBT rights organizations applauded a victory for “marriage equality”⁹ or the “freedom to marry.”¹⁰ Partially reflecting this change in terminology, the *Obergefell* Court described the victory as one for “same-sex marriage,”¹¹ the “freedom to marry,”¹² and the “right to marry,”¹³ although it never mentioned the term “marriage equality.”

But what is “marriage equality” and the “freedom to marry”? How does *Obergefell* relate to those two constitutional protections? This Article argues that the *Obergefell*

6 The Gallup Organization changed the wording of its questions about same-sex marriage while public perceptions about the institution were changing. From 1996 to 2005, it asked: “Do you think marriage between homosexuals should or should not be recognized by the law as valid, with the same . . . as traditional marriages?” In 2006, it changed the wording to “same-sex couples” rather than “homosexuals.” See *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<http://perma.cc/49M6-AYHT>].

7 See *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx> [<http://perma.cc/D9RH-EMYQ>] (last visited Nov. 12, 2015) (percentage of public in a Gallup Poll who said same-sex marriage should be valid increased from twenty-seven percent in 1996 to fifty-five percent in 2014; the poll changed the language to refer to “same-sex couples” rather than “homosexuals” in 2006).

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

9 James Esseks, *All Eyes on Justice Kennedy*, ACLU: SPEAK FREELY (May 1, 2015, 12:30 PM), <https://www.aclu.org/blog/speak-freely/all-eyes-justice-kennedy> [<http://perma.cc/SY27-NE92>] (referring to “marriage equality”); *Love Wins*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/stand-for-marriage> [<http://perma.cc/AS52-R7S4>] (last visited Nov. 12, 2015) (referring to “marriage equality”); *Sign Our Thank You Message*, ACLU, https://action.aclu.org/secure/sign-our-thank-you-message?ms=web_150626_scotus_mar [<http://perma.cc/B6XX-JYHA>] (last visited Nov. 12, 2015) (referring to “marriage equality”).

10 *Marriage, Relationships and Family Protection*, LAMBDA LEGAL, <http://www.lambdalegal.org/issues/marriage-relationships-and-family-protections> [<http://perma.cc/2BKC-VT9T>] (last visited Nov. 12, 2015) (referring to “freedom to marry”).

11 See, e.g., *Obergefell*, 135 S. Ct. at 2594. The “lower” courts have also vacillated in their use of the term “marriage equality” in recent cases involving same-sex marriage. Compare *Kitchen v. Herbert*, 755 F.3d 1193, 1198 (10th Cir. 2014) (referring to case as a “marriage equality appeal”), with *Deboer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) (referring to case as about “same-sex marriages”).

12 See, e.g., *Obergefell*, 135 S. Ct. at 2603.

13 See *id.* at 2593, 2597, 2598, 2599, 2603. The *Obergefell* court does not distinguish between the “freedom to marry” and the “right to marry.”

decision reflects an important advance for some aspects of marriage equality and the freedom to marry,¹⁴ while also insufficiently developing the freedom to *choose* to marry. Nonetheless, the roots of the freedom to choose to marry can be found in the precedent underlying *Obergefell* as well as in some aspects of the decision itself.

“Marriage equality” should be understood to have three interrelated aspects.¹⁵ First, the two members of the couple¹⁶ should be entitled to have a relationship of equality rather than one of domination and submission.¹⁷ As Justice Ginsburg mentioned during the oral argument in *Obergefell*, the elimination of laws like Louisiana’s “Head and Master” rule¹⁸ helped to change marriage so that it would no longer be a state-mandated “relationship of a dominant male to a subordinate female.”¹⁹ Second, marital and nonmarital couples

14 This Article uses the terms “freedom” and “right” interchangeably because the Court has used those terms interchangeably in its marriage decisions. See *Obergefell*, 135 S. Ct. at 2593, 2597, 2598, 2599, 2603. As Professor John Garvey has argued, “freedom of choice is at the heart of the right to marry.” John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1761 (1981). While there may be some important differences between a “freedom” and a “right,” those differences are beyond the scope of this Article.

15 For example, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Court extended formal equality on the basis of race by banning the exclusion of people from marriage based on their race while also recognizing that one factor that made the challenged Virginia statute invidious was that it furthered white supremacy by only seeking to maintain the “racial integrity” of the white race. *Id.* at 12 n.11. The *Loving* opinion also rested on the “freedom to marry.” See *id.* at 12.

16 The status of multiple-person relationships is beyond the scope of this Article.

17 For development of dominance/submission theory, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

18 See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

19 Justice Ginsburg referred to this aspect of marriage equality during oral argument in *Obergefell*:

But you wouldn’t be asking for this relief if the law of marriage was what it was a millennium ago. I mean, it wasn’t possible. Same-sex unions would not have opted into the pattern of marriage, which was a relationship, a dominant and a subordinate relationship. Yes, it was marriage between a man and a woman, but the man decided where the couple would be domiciled; it was her obligation to follow him.

There was a change in the institution of marriage to make it egalitarian when it wasn’t egalitarian. And same-sex unions wouldn’t—wouldn’t fit into what marriage was once.

Transcript of Oral Argument at 10–11, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). Later, during the oral argument, Justice Ginsburg repeated that point, observing that the Court struck down Louisiana’s “Head and Master Rule” in 1982, heralding the development of a more egalitarian marriage regime. She said:

should be treated with equal dignity and respect so that access to important societal benefits and privileges, such as adoption or contraception, are not dependent on a couple's marital status.²⁰ Third, individuals should be able to enter into marriage on a nondiscriminatory basis, as reflected in the Supreme Court's historic decision to overturn anti-miscegenation statutes.²¹ The courts have also referred to this third aspect of marriage equality as the "freedom to marry"²² or the "right to marry,"²³ emphasizing that characteristics like the race of one's partner should not serve to exclude one from the institution. While the *Obergefell* decision undoubtedly furthers the third aspect of marriage equality, by allowing couples to enter the institution without regard to their sex or sexual orientation,²⁴ it does not sufficiently recognize and protect the first two aspects of marriage equality. Without all three aspects of marriage equality, this Article argues that individuals will not have the freedom to *choose* to marry.

By tracing the development of the freedom to marry (or what the *Obergefell* Court interchangeably describes as the "right to marry"²⁵), Part I of this Article argues that the freedom to marry should be understood to include the freedom to choose *not* to get

Marriage today is not what it was under the common law tradition, under the civil law tradition. Marriage was a relationship of a dominant male to a subordinate female.

That ended as a result of this Court's decision in 1982 when Louisiana's Head and Master Rule was struck down. And no State was allowed to have such a—such a marriage anymore.

Transcript of Oral Argument at 70–71, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). Justice Ginsburg made a slight factual error when she said the Supreme Court struck down Louisiana's Head and Master Rule in 1982. The year was actually 1981. *See Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

20 *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting unmarried persons to obtain such contraceptives violated the equal protection clause of the Fourteenth Amendment).

21 *See generally Loving v. Virginia*, 388 U.S. 1 (1967) (holding that preventing marriages solely on the basis of one's racial classification violated the equal protection and due process clauses of the Fourteenth Amendment).

22 *Loving*, 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.").

23 *Id.* ("The freedom to marry has long been recognized as one of the vital personal *rights* essential to the orderly pursuit of happiness by free men.") (emphasis added).

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

25 *See Obergefell*, 135 S. Ct. at 2593, 2597, 2598, 2599, 2603.

married,²⁶ just as the freedom to choose to use contraceptives²⁷ or have an abortion²⁸ also includes the freedom to choose not to get sterilized,²⁹ not to have a compulsory caesarean section,³⁰ as well as to go to term with one's pregnancy.³¹

Part II relates the first aspect of marriage equality—the elimination of the subordinate treatment of women within marriage—to the *Obergefell* decision. Despite the elimination of coverture, this Article argues that marriages between a man and a woman³² often continue to retain the traditional elements of a relationship between “a dominant male” and “subordinate female.”³³ The *Obergefell* Court's idealistic assertion that marriage offers the “hope of companionship and understanding”³⁴ ignores the evidence that women, within marriage, are disproportionately the individuals who provide care to others while also disproportionately facing the threat of violence in their intimate lives.³⁵ This Article argues that the *Obergefell* decision is neither the result of, nor likely to lead to, improvement in the first aspect of marriage equality unless the Court recognizes the importance of women having a more genuine choice whether to enter (or leave) this institution.³⁶

26 See *Loving*, 388 U.S. at 12 (referring to the “freedom to marry, or not marry”).

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

28 See, e.g., *Roe v. Wade*, 410 U.S. 113, 129 (1973) (describing “a right . . . to *choose* to terminate [a woman's] pregnancy”) (emphasis added).

29 See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (overturning Oklahoma's Habitual Criminal Sterilization Act of 1935); *In re Estate of K.E.J.*, 887 N.E.2d 704 (Ill. App. Ct. 2008) (providing that a guardian must establish by clear and convincing evidence that sterilization is in the ward's best interest when ward is not competent to make the decision herself).

30 See *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (right of patient to make decision about caesarean section).

31 See Farah Diaz-Tello & Lynn Paltrow, *Birth Justice as Reproductive Justice* (Nat'l Advocates for Pregnant Women, Working Paper, May 2012), <http://advocatesforpregnantwomen.org/Birth%20justice%202012.pdf> [<http://perma.cc/R87S-C2WJ>] (arguing for women to have control over the conditions of their childbirth).

32 Throughout this Article, I have not referred to individuals by virtue of their sexual orientation because I recognize that some individuals identify as bisexuals. We therefore do not know someone's sexual orientation merely by knowing the sex of the person with whom the individual is intimate.

33 Transcript of Oral Argument at 70–71, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (Justice Ginsburg referring to historical changes within marriage). For further discussion, see *infra* Part II.B.

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

35 See *infra* Part II.B.

36 The *Obergefell* Court recognized the lack of transformative effect of its opinion on traditional marriage

Part III relates the second aspect of marriage equality—the equal treatment of marital and nonmarital relationships—to the *Obergefell* decision. The *Obergefell* Court’s emphasis on the importance of children being raised by married parents reflects the historical stigma against nonmarital parents and their children. The Court’s decision might contribute to that stigma by facilitating states’ refusals to allow unmarried couples to adopt children.³⁷ Further, the Court’s emphasis on the financial benefits that are accorded marital couples, in contrast to those offered nonmarital couples, reflects the historical discrimination against nonmarital couples. The Court’s opinion might facilitate the deepening of that disparity by emboldening entities to eliminate the few benefits they currently offer nonmarital couples.³⁸ In order to further the second aspect of marriage equality, the Court needs to question why certain rights and privileges, such as adoption and financial benefits, are limited to nonmarital couples, and avoid a simplistically idealistic portrayal of marriage under which government is allowed to reflexively limit those benefits to marital couples.

Part IV concludes by suggesting that we could better attain genuine marriage equality by insisting that the freedom to *choose* to marry requires the state to develop a more neutral legal stance towards the institution of marriage. Such a stance might improve the institution of marriage itself, by encouraging people to enter it for love and companionship rather than instrumental benefits, while also respecting the freedom of individuals to share love and companionship without entering the institution of marriage. By exploring sociological evidence from one country that has developed a more neutral stance towards marriage, this Article suggests that such an approach is both attainable and beneficial. The freedom to choose to marry is a possibility under conditions of genuine marriage equality.

I. From the Freedom to Marry to the Freedom to Choose to Marry

How do we can truly achieve genuine marriage equality and the freedom to choose to marry? One step forward is to build on the *Obergefell* Court’s observation that the freedom to marry is both an equality interest and a liberty interest—one that we can genuinely *choose* whether to accept. Close examination of some of the liberty and equality case law underlying the *Obergefell* opinion can provide us with the foundation to build a genuine freedom to choose to marry.

when it noted that same-sex couples planned to “honor” their relationships rather than “denigrate” (or transform) the institution of marriage. *Obergefell*, 135 S. Ct. at 2595.

37 See *infra* Part III.A.

38 See *infra* Part III.B.

A. *Pierce v. Society of the Sisters*: The Freedom to Choose Education

The foundational, liberty case law is based on a freedom to *choose* to engage in various protected activities, as reflected in the 1925 decision in *Pierce v. Society of the Sisters*,³⁹ which was discussed in the *Obergefell* opinion.⁴⁰ Oregon's 1922 state initiative to amend the state's Compulsory Education Act required parents to send their children to a public school, thereby precluding them from attending plaintiff's parochial school.⁴¹ The plaintiffs argued that the statute "conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training."⁴² The Supreme Court accepted this argument, finding that the "fundamental theory of liberty" prevents the "general power of the state to standardize its children by forcing them to accept instruction from public teachers only."⁴³ The Supreme Court affirmed the injunction against enforcement of the statute that had been entered by the lower courts.⁴⁴ As a result of this injunction, no one would be forced to send his or her child to a nonpublic school but the *option* of such education was retained by the Court's liberty-based decision. Thus, properly understood, *Pierce* protected the freedom of parents to choose a private or public school for their children's education.

B. *Griswold v. Connecticut*: The Freedom to Choose Contraceptives

In overturning a state statute that precluded married couples from using contraceptives, the Supreme Court built on the *Pierce* decision in 1965 in *Griswold v. Connecticut*.⁴⁵ The *Griswold* Court described *Pierce* as standing for the proposition that "the right to educate one's children as one *chooses* is made applicable to the State by the force of the First and Fourteenth Amendments."⁴⁶ It found that Connecticut law interfered with the "zone

39 *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).

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

41 *Pierce*, 268 U.S. at 530.

42 *Id.* at 532.

43 *Id.* at 535.

44 *Id.* at 536.

45 *Griswold v. Connecticut*, 381 U.S. 481, 481 (1965).

46 *Id.* at 482 (emphasis added).

of privacy” and had “a maximum destructive impact upon [the marital] relationship.”⁴⁷ Unfortunately, the Court did not explain how the law achieved this “maximum destructive impact” but one might surmise that the Court believed the law impinged on a married couple’s decisions whether or not to seek to have children and whether or not to engage in nonprocreative sexual intercourse. The Court’s decision protected the right to choose not to procreate as well as the right to retain the ability to procreate.⁴⁸ The *Obergefell* Court cited *Griswold* for the proposition that the Constitution protects “certain personal choices central to individual dignity and autonomy,”⁴⁹ recognizing the foundational element of “choice” in that decision.

C. *Loving v. Virginia*: The Freedom to Choose to Marry

Then, in 1967, the landmark decision in *Loving v. Virginia*⁵⁰ invalidated anti-miscegenation laws and recognized the “freedom of *choice* to marry.” This case received considerable attention from the *Obergefell* Court as the basis of the freedom to marry.⁵¹

The story underlying this case reflects the limited choices available to a mixed-race couple. Mildred and Richard Loving were married in Washington, D.C. on June 2, 1958, but their families were from Central Point, Virginia.⁵² After getting married in D.C., they returned to Virginia to live with Mildred’s parents where, five weeks later, they were arrested by the county sheriff and two deputies for violating Virginia’s Racial Purity Law.⁵³ They got married in D.C. because Richard, who was white, realized that Virginia law would

47 *Id.* at 485.

48 The right to be free from involuntary sterilization has been protected since the Court’s 1942 decision in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Cf.* *Bowen v. Gilliard*, 483 U.S. 587, 629 (1987) (“Surely no one could contend, for instance that a concern for limiting welfare outlays could justify mandatory sterilization of AFDC beneficiaries.”). *See also supra* notes 29–31.

49 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). *See also id.* at 2598, 2599 (citing *Griswold*, 381 U.S. 481).

50 *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (emphasis added).

51 *See, e.g., Obergefell*, 135 S. Ct. at 2598, 2599, 2602, 2603, 2604, 2614, 2619.

52 *See* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 *How. L.J.* 229, 234 (1998); Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, *N.Y. TIMES*, May 6, 2008, <http://www.nytimes.com/2008/05/06/us/06loving.html> [<http://perma.cc/X7VP-W8HF>].

53 *See* Pratt, *supra* note 52, at 236.

not allow the couple to marry in Virginia due to the fact that Mildred was part-Cherokee and part-black.⁵⁴ Virginia law also precluded them from residing in Virginia after they married. The state law “stipulated that all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process, and it prohibited interracial couples from circumventing the law by having their marriages validated elsewhere and later return to Virginia.”⁵⁵ The penalty, as they soon learned, when they were arrested by three law enforcement officers early one morning in Virginia,⁵⁶ was a year in jail if they ever returned to Virginia. They only avoided that penalty by agreeing to move to Washington, D.C., pay a court fine, and not “return together or at the same time for a period of twenty-five years.”⁵⁷

In convicting them of violating the state Racial Purity statute, the state court judge made clear his animosity to their relationship and marriage: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”⁵⁸ When the Lovings sought to have the judge vacate their conviction in 1963 so they could return to Virginia, he refused.⁵⁹ That refusal was the legal basis of their Supreme Court case.

Their case parallels *Obergefell*⁶⁰ in that Virginia’s marriage law precluded recognition of mixed-race marriages irrespective of whether the couple married out of state and returned to Virginia, or sought to get married in Virginia. While the modern bans against same-sex marriages did not create criminal penalties for same-sex couples who sought to marry, they achieved the parallel result of failing to recognize the validity of marriages even if they had been performed out of state.

54 *See id.* at 230, 236.

55 *Id.* at 236.

56 *Id.*

57 *Id.*

58 *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

59 *Id.*

60 “The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

Loving also has parallels to the decision overturning state sodomy statutes in *Lawrence v. Texas*.⁶¹ The plaintiffs in *Lawrence* faced criminal penalties for engaging in sexual activity. The plaintiffs in *Loving* faced criminal penalties for getting married.

But the parallel between *Loving* and *Lawrence* also breaks down when one considers the tapestry of laws criminalizing sexual activity between mixed-race couples. Whereas sodomy laws typically targeted all sexual activities between two people of the same sex,⁶² laws criminalizing mixed-race sexual activity were often more selective. Referring to the lawfulness of white men having sex with black female slaves, one commentator noted: “After all, it was cheaper to breed slaves than to import them.”⁶³ The criminal law statutes prohibiting fornication and adultery were typically only enforced to prevent mixed-race sexual activity when the woman was white.⁶⁴ “[S]exual exploitation of black women was maintained and promoted by the system of segregation, including prohibitions against interracial marriage.”⁶⁵ A white man could have free rein over a black woman’s sexuality but not be expected to marry her. In fact, the anti-miscegenation laws precluded him from marrying her.

Thus, in context, what did the *Loving* Court mean when it referred to the “freedom to choose to marry”? The *Loving* Court says: “The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”⁶⁶ The Court is referring to the choice of the race of one’s *partner* rather than the choice of whether to get married. The state of Virginia had not sought to prevent a white man from having sexual relations with a black woman, but it did not want him to *marry* her.

Hence, *Loving* contains the “freedom to choose” formulation proposed by this Article but does not do so in a context that emphasizes that two people might choose *not* to marry

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

62 *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1519 (1989) (surveying sodomy statutes).

63 Pratt, *supra* note 52, at 232.

64 Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. REV. 255, 257–58 (2002).

65 *Id.* at 260.

66 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

but still want the full respect and recognition offered to marital relationships. In the race context, that would have been an odd formulation because one might argue that black women could *only* hope for societal respect if their white partner was willing to marry them. An unmarried relationship between a black woman and white man was nothing new or remarkable; it was the expected relationship. It would have been no victory for the racial civil rights movement for the *Loving* Court to emphasize the freedom of a white man *not* to marry a black, female, sexual partner. The choice that was absent was only in one direction—the desire of a white man and black woman to marry each other.

Loving, therefore, plants the seeds of “choice” in thinking about marriage but does not contemplate that choice as including the freedom not to marry. Further development of the concept of liberty is needed for the Court to also develop the freedom to refrain from a decision to marry.⁶⁷

D. *Roe v. Wade*: The Freedom to Choose to Terminate a Pregnancy

The grounding of the Court’s liberty decisions in the freedom to choose is clearer in *Roe v. Wade*.⁶⁸ By making abortion illegal, the plaintiff argued that the state of Texas had “improperly invade[d] a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.”⁶⁹ The Supreme Court largely accepted that argument, finding that the right of privacy, as based on the concept of liberty found in the Fourteenth Amendment, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁷⁰ While the Court would certainly recognize the desire of many women to choose to give birth, it also recognized “the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.”⁷¹ Thus, the Court’s decision is understood to protect the freedom to *choose* to terminate one’s pregnancy.

A discussion of *Roe v. Wade* is absent from the Court’s decision in *Obergefell*, probably

67 See generally Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 638 (1980) (developing the freedom of “nonassociation”).

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

69 *Id.* at 129.

70 *Id.* at 153.

71 *Id.*

because of the controversial nature of that opinion.⁷² Nonetheless, that case is clearly an important component of the development of the Court's liberty doctrine, particularly with respect to the concept of "choice."

E. *Planned Parenthood v. Casey*: The Freedom to Choose to Terminate a Pregnancy

About a decade before the Court extended some liberty rights to gay men and lesbians, the Court reaffirmed that the liberty interest protected by the Fourteenth Amendment included the freedom of a woman to *choose* to terminate her pregnancy in *Planned Parenthood v. Casey*.⁷³ In reaffirming this liberty interest, the plurality opinion, which was joined by Justice Kennedy (the author of *Obergefell*) was careful to recognize the reasonable bases upon which people might make different choices regarding the abortion decision:

One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.⁷⁴

In recognizing a woman's freedom to choose to terminate her pregnancy, the Court, however, did not insist that the state take a position of complete neutrality with respect to the woman's decision. "Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."⁷⁵ The Court selected the amorphous "undue burden"⁷⁶ standard to determine if a state regulation interfered with the woman's constitutional freedom to choose to terminate or continue her pregnancy

72 While not discussing *Roe* as a basis for its interpretation of the Constitution, the dissent cites Justice Ginsburg's article on *Roe* to support its argument that "heavy-handed judicial intervention" is inappropriate. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

73 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (recognizing the "right of the woman to choose to have an abortion before viability").

74 *Id.* at 853.

75 *Id.* at 872.

76 *Id.* at 876.

before viability. Thus, *Casey* protected a woman's freedom to choose whether or not to terminate her pregnancy while also allowing a state, if it desired, to enact regulations that would impose some restrictions on a woman's ability to procure an abortion. Whether those restrictions were "undue" was determined by assessing whether the "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁷⁷ In *Casey*, the Court upheld certain restrictions and overturned others, based on the application of the undue burden standard, making it clear that the state did not have to take a perfectly neutral stance with respect to the woman's abortion decision. Because the Court recognized the right of the state to impose some restrictions on the abortion decision, it would be wrong to describe the Court's opinion as "pro-abortion." Instead, it was "pro-choice."

As the Court turned to the application of this line of cases to the rights of gay men and lesbians to engage in sexual intimacy, and, ultimately, to choose to get married, the Court never repeated this "undue burden" legal standard (or even cited *Casey*). It therefore leaves open the question whether the undue burden standard is unique to the abortion arena. In other areas in which the Court has found a "liberty" interest, is the state allowed to try to interfere with the individual's exercise of that liberty interest by expressing a policy preference for the individual choosing, or not choosing, to exercise that liberty interest? Is abortion different because of the state's recognized interest in protecting potential life? As discussed below, in Parts I (F)–(H), the answer to that question should be "yes," because the freedom to choose to express sexual intimacy and the freedom to choose to marry pose few strong countervailing state interests that justify the state tipping its hand in a particular direction.

F. *Lawrence v. Texas*: The Freedom to Choose Sexual Intimacy

After hinting in 1996 in *Romer v. Evans* that the Court was prepared to broadly protect gay men and lesbians from state regulations that seem "inexplicable by anything but animus toward the class it affects,"⁷⁸ the Court in *Lawrence v. Texas*,⁷⁹ in an opinion authored by Justice Kennedy, overturned a Texas sodomy statute that was only enforced against same-sex participants. As it has in many of its gay rights decisions, the Court connected equal protection and liberty principles: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked

77 *Id.* at 877.

78 *Romer v. Evans*, 517 U.S. 620, 632 (1996).

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

in important respects, and a decision on the latter point advances both interests.”⁸⁰ The *Lawrence* decision was an important basis of the Court’s decision in *Obergefell*.⁸¹

Unlike the *Casey* decision, *Lawrence* fails to identify the legal rule that governs its decision. May the state limit individuals’ liberty interests in private sexual intimacy in any way? What kinds of arguments, if any, can be used to limit the freedom of couples to engage in sexual intimacy?

There are two passages in *Lawrence* that hint at the answer to that question but do not resolve it. First, the Court tells us what the case does *not* involve, suggesting that a state might regulate an individual’s liberty interest in sexual intimacy if one of these factors were involved:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.⁸²

One could interpret that passage to mean that a state might restrict (or even ban) sexual relations with minors, nonconsensual sexual relations, public sexual expression, prostitution, or legal recognition of same-sex relationships. Yet, the *Lawrence* decision does not make clear how significantly that restriction might be imposed. Can a state, for example, criminalize all sexual conduct involving individuals under the age of eighteen? Without a legal framework, it is impossible to resolve that question. But the post-*Lawrence* case law also makes it clear that the Court did *not* mean that states might restrict or ban everything on that list. We now know that a state must recognize marriage between two individuals of the same sex. With hindsight, therefore, that passage tells us very little about the Court’s framework. It may simply tell us what the case is *not* about—leaving to another day the resolution of cases fitting those fact patterns.

Second, the Court tells us what rights the plaintiffs are entitled to invoke. “Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct

80 *Id.* at 575.

81 *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596, 2598, 2599, 2600, 2602, 2604, 2606 (2015).

82 *Lawrence*, 539 U.S. at 578.

without intervention of the government.”⁸³ Citing *Casey*, the Court then says: “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”⁸⁴ Presumably, so long as they have consent and have not engaged in coercion or injury, adults get to decide on the parameters of their sexual intimacy. Building on the abortion case law, individuals have the freedom to *choose* with whom and how to engage in sexual intimacy. It is unthinkable that the state would insist that two people engage in intimate sexual behavior, just as it is impermissible for a state to criminalize “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”⁸⁵ One might say that *Lawrence* protects the freedom to choose to be celibate as fully as it protects the freedom to choose to be sexually intimate.

G. *United States v. Windsor*: The Right to the Exclusive Benefits of Marriage

Justice Kennedy’s opinion for the Court in *United States v. Windsor*,⁸⁶ which invalidated Section 3 of the Defense of Marriage Act (DOMA), was a huge victory for the third aspect of marriage equality. It made it possible for married, same-sex couples to access the full set of benefits accorded to marital couples by the federal government. *Windsor* is cited extensively in *Obergefell*.⁸⁷ Nonetheless, the *Windsor* Court’s reflexive assumption that the state should be able to limit valuable tax benefits to marital couples fails to sufficiently further the freedom to *choose* to get married. Although Edith Windsor and Thea Spyer held a commitment ceremony decades ago, during which they exchanged a circular diamond brooch and made a long-term commitment to each other, Windsor’s constitutional entitlement to the tax benefits of a long-term relationship was contingent on their legally-recognized marital status.⁸⁸ The Court held that she was entitled to obtain a tax refund for the \$363,053 she had paid in federal estate taxes, because she and Spyer were legally married in Canada in 2007, not because they had a commitment ceremony many decades earlier.⁸⁹

83 *Id.*

84 *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

85 *Lawrence*, 539 U.S. at 578.

86 *United States v. Windsor*, 133 S. Ct. 2675 (2013).

87 *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2599–2601 (2015).

88 *Windsor*, 133 S. Ct. at 2683. *See* Roberta Kaplan, “*It’s All About Edie, Stupid*”: *Lessons from Litigating United States v. Windsor*, 29 COLUM. J. GENDER & L. 85, 88 (2015).

89 *Windsor*, 133 S. Ct. at 2683.

While furthering the third aspect of marriage equality, the *Windsor* decision undermined the second aspect of marriage equality—the equal treatment of marital and nonmarital couples. Spyer and Windsor were fortunate to have the resources to travel to Canada to get married, at a time when New York was not granting same-sex marriages. After New York recognized their marriage, Windsor was also able to attain the services of a lawyer to ask for a refund of the estate taxes she had paid to the federal government. But for the trip to Canada, she would not have been allowed to ask that her relationship be treated with the “dignity”⁹⁰ of heterosexual marriages. In other words, no one asked why a relationship is only entitled to a \$363,053 tax benefit if the two members of that relationship are *married*. States and the federal government are unquestionably allowed to “give this class of persons . . . a dignity and status of immense import.”⁹¹ But should these benefits be limited to those who are legally married? Because Spyer and Windsor were legally married, this issue did not directly arise in *Windsor*.

Under the third aspect of marriage equality, the Court’s decision in *Windsor* is correct. If opposite-sex couples are allowed to get married and receive a massive tax benefit, then same-sex couples should have the same opportunity. But if the freedom to marry is truly a *liberty* interest, grounded in the freedom to *choose*, then similarly situated, unmarried partners should also be able to request such a tax benefit—or adopt and raise a child with the same ease as married partners—under the second aspect of marriage equality. By limiting that benefit to those who are married, the state is placing a heavy hand on the scale in favor of marriage. It is being far from neutral. Recognition of the second aspect of marriage equality would, at least, give litigants who represent unmarried couples the opportunity to ask the state to justify this stark difference in treatment between marital and nonmarital couples.

A response to this observation is that the abortion case law allows the state to take a non-neutral stance towards abortion. The state is allowed to regulate abortion to further interests such as the protection of fetal life so long as its regulation does not pose an *undue burden* on the woman seeking an abortion. The Court’s case law on what constitutes an undue burden is murky but, at least, we have a legal standard. And, in the abortion area, we have a clearly articulated state interest—the protection of potential life.

In the marriage context, however, there has been no clear articulation of why the state needs to take a pro-marriage stance. One might argue that married people have higher

90 *Id.* at 2692.

91 *Id.*

rates of happiness, but that happiness could be, in part, due to the benefits that society accords to those who are married. One might argue that it is better for children to be “legitimated” by having married parents but that argument merely allows one form of prejudice (illegitimacy) to support another form of prejudice (unmarried status). One might argue that married couples tend to have longer and more stable relationships than unmarried couples. Even if that is true (and those married relationships are healthy ones that should be maintained), that does not answer the question of why the government needs to financially support those relationships. People could still have religious marriages or private nonreligious commitment ceremonies, even if the state did not recognize marriage. Those ceremonies might “cement” relationships in a way that would be supportive of their long-term nature.

Equally importantly, we should remember that not all relationships that may be recognized through state-sanctioned marriage *should* endure. Marriage does not shield women from abuse and violence.⁹² Marriage may also make it harder for women to leave abusive relationships. As will be discussed in Part II, women tend to sacrifice some of their wage-earning power during marriage, especially if they have children.⁹³ Their financial precariousness can make it difficult for them to leave abusive relationships, let alone ones that are merely unpleasant. It was not until fairly recent times that a woman could allege that she was raped while married.⁹⁴ “Marital rape” was considered an oxymoron. Although we have removed the legal barrier from claiming marital rape or seeking divorce, we have not removed all the social barriers. By allowing the state to financially privilege marriage, we may make it harder for women and men to “choose” to leave their marriage or not enter it in the first place.

The determination that Section 3 of DOMA was unconstitutional was grounded in “the liberty protected by the Fifth Amendment’s Due Process Clause [which] contains within it the prohibition against denying to any person the equal protection of the laws.”⁹⁵ DOMA was found to be unconstitutional because it has the “purpose and effect to disparage and

92 See RAQUEL KENNEDY BERGEN WITH ELIZABETH BARNHILL, NAT’L RES. CTR. ON VIOLENCE AGAINST WOMEN, MARITAL RAPE: NEW RESEARCH AND DIRECTIONS (2011), http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=248 (marital rape) [<http://perma.cc/5A9E-VZ8V>].

93 See Conner, *supra* note 2, at 341.

94 As recently as 1962, the Model Penal Code precluded the possibility of marital rape. See Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 213–14 (2003).

95 Windsor, 133 S. Ct. at 2695.

to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”⁹⁶ The federal government could offer “no legitimate purpose” to justify that injury.⁹⁷ The Court, however, did not consider whether Edith Windsor would have had a comparable injury had she and Spyer not traveled to Canada to have their relationship legally recognized. Their private ceremony in front of their friends, with an exchange of jewelry, would have still rendered their relationship invisible in the eyes of the state. The Court does not ask what “legitimate purpose” is served by treating couples so differently depending on whether they register their ceremony with the state as a marriage. To develop the freedom of *choice* to marry, that question should be raised in future cases.

H. *Obergefell v. Hodges*: Towards the Freedom to Choose to Marry

While most legal observers predicted that the *Windsor* decision would lead to the invalidation of all state bans on same-sex marriage, the *Obergefell* Court still had the responsibility to explain its rationale for that conclusion. A close examination of the justification offered by the *Obergefell* Court for that extension shows how a freedom to *choose* to marry can be found in that justification even if the freedom to choose is not emphasized by the Court’s decision.

The *Obergefell* Court mentions four principles that support extending state-recognized marriage to same-sex couples. This Part suggests how the Court’s four principles could be refined and developed to support the freedom to *choose* to marry.

1. “The right to personal choice regarding marriage is inherent in the concept of individual autonomy.”⁹⁸

The Court’s articulation of this principle explicitly emphasizes the concept of “choice” yet the Court does not seem to understand what “choice” would truly mean in the marital context. It does not distinguish between a person deciding to get married in a private or religious setting and the state deciding to accord benefits to those who choose to marry.⁹⁹

96 *Id.* at 2696.

97 *Id.*

98 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

99 For discussions of the history of marriage and its transformation into a legally-recognized institution, see STEPHANIE COONTZ, MARRIAGE: A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005) (recognizing that the state had no role in the recognition of marriage for at least sixteen centuries).

This sloppiness or confusion does not exist in other areas where the Court recognizes liberty interests. For example, the Court readily distinguishes between a woman having the freedom to choose to have an abortion and the state being required to pay for that abortion under Medicaid.¹⁰⁰

When the Court refers to the “personal choice regarding marriage,” it seems to be referring to the personal choice to enter a state-sanctioned institution of marriage. In the second half of the sentence articulating this first principle, the Court connects this “right to personal choice” to “individual autonomy.” Because the “personal choice regarding marriage” is the personal choice to enter state-sanctioned marriage, the Court is directly connecting state recognition of marriage to individual autonomy. An emphasis on individual autonomy, in fact, could lead to a very different conclusion. “Autonomy” evokes a libertarian perspective—that one should make a decision alone without state interference. The concept of individual autonomy, as applied to marriage, could mean that the state should take an entirely neutral stance with respect to marriage—neither forbidding people from privately entering this institution nor according any legal benefits to those who do. It seems incongruous to say that the concept of individual autonomy requires the *state* to recognize the marital relationship.

The Court’s discussion of this principle emphasizes the concept of “choice”¹⁰¹ without investigating what it means to have a genuine “choice.” The Court says:

“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”¹⁰²

“Choices about marriage shape an individual’s destiny.”¹⁰³

100 See *Harris v. McRae*, 448 U.S. 297 (1980) (states that participate in Medicaid are not required to provide state-funded abortions).

101 The Court also uses the terminology of “choice” elsewhere in its opinion. “In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Obergefell*, 135 S. Ct. at 2597.

102 *Id.* at 2599.

103 *Id.*

“There is a dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”¹⁰⁴

In this last passage, in particular, the Court thinks of “choice” as only moving in one direction—to make the decision to marry. Its view is colored by the expectation that marriage constitutes the highest form of personal expression. “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”¹⁰⁵ In that passage, the Court says “can” rather than “shall” but, nonetheless, seems to favor marriage over other kinds of personal relationships.

Even though the Court may favor marriage over other forms of relationships, it ties the benefits of marriage to “expression, intimacy, and spirituality” rather than to state-rendered benefits such as tax exemptions and the like. Thus, one could read the Court as saying that couples must be allowed to enter this state-recognized institution if they feel it will further their expression, intimacy, or spirituality. But, of course, entering the institution for those highly personal reasons does not require the state to recognize the institution legally. Those observations could lead one to conclude that the state should not be allowed to ban private expressions of commitment through marriage but does not necessarily mean the state needs to privilege marital relationships over other kinds of relationships.

2. “The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”¹⁰⁶

As with the first principle, the Court talks about the “right to marry” without considering why the state is allowed to privilege those who choose to marry. Drawing on its decision in *Lawrence*, the Court talks about the importance of individuals being able to enter into intimate conduct with another person as “one element in a personal bond that is more enduring.”¹⁰⁷ The Court then takes the step to say that couples do not gain freedom by merely having the state no longer criminalize their intimate conduct. The Court posits that

104 *Id.*

105 *Id.*

106 *Id.*

107 135 S. Ct. at 2600.

such couples, if not allowed to marry, would still be “outcast(s).”¹⁰⁸ “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”¹⁰⁹

The problem with this line of argument is that it is circular. The “support” is “unlike any other,” in part, because the state chooses to offer substantial support to those who enter state-sanctioned marriage. The circularity of this argument is not apparent from the Court’s opinion, because the Court does not reference state-sanctioned support in this part of its opinion. Instead, the Court speaks about the personal benefits that an individual might attain by being in a long-term, committed relationship. Without citation, the Court says: “Marriage 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.”¹¹⁰ In those two sentences, one could substitute “long-term relationship” for “marriage” and draw the same conclusion.

The larger difficulty implicit in the Court’s discussion is that many people in society consider same-sex partners to be “outcasts” irrespective of whether those relationships are recognized by the state as marriages. Harkening back to *Plessy v. Ferguson*,¹¹¹ one could observe that the state’s failure to recognize those relationships as marriages had a reinforcing effect on the thoughts or minds of the public. Before *Obergefell*, one could argue that we had state-sanctioned segregation—same-sex couples had to sit in the segregated railroad car of domestic partnership reinforcing prejudices against their relationships. Thus, *Obergefell* is the *Brown v. Board of Education*¹¹² of the LGBT community because it refused to allow the state to maintain this mandated segregation.

But, on close examination, the analogy falters. The concept of “marriage equality” is premised on the notion that one should be able to *choose* whether to get married. Similarly, in the education context, we say that parents may choose the education that their child receives, so long as parents make choices that are consistent with the child’s constitutional right to receive an education.¹¹³ Those who choose private or parochial education for their

108 *Id.*

109 *Id.*

110 *Id.*

111 *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state-sanctioned segregation).

112 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

113 The right to choose an education is different than the right to marry because a parent cannot choose not to have their child receive an education since all states have compulsory education laws. *See* Michael

children are no longer considered “outcasts.”¹¹⁴ Parents who make such choices are thought to be exercising their freedom to choose their children’s education. In fact, the freedom of parents to choose their children’s education is part of the liberty case law that supports *Obergefell*.¹¹⁵

Nonetheless, the Court is probably correct that those who choose to live in nonmarital relationships—be they opposite-sex or same-sex relationships—are likely stigmatized by society and treated adversely. In the Court’s words, they have not received the “dignity”¹¹⁶ accorded to others who enter marriage. The Court’s solution to this lack of dignity problem is to allow same-sex couples to enter marriage rather than to ask what is the source of the “outcast” nature of nonmarital couples. The Court only refers to same-sex couples facing that outcast status but, surely, unmarried opposite-sex couples can also face such outcast status. That is why we have expressions like “living in sin.” Based on the Supreme Court’s decision in *Lawrence*, Virginia’s statute banning fornication was found unconstitutional in 2005¹¹⁷ in a case involving sexual relations between a man and woman. The persistence of the Virginia fornication statute (until it was struck down as unconstitutional) suggests that the outcast status of nonmarital couples continues. The fact that opposite-sex couples have long had the freedom to marry does not seem to have ended the outcast status of those who choose not to marry. In fact, one might argue that their outcast status is heightened by the increased availability of marriage.

One might therefore ask: how does one truly go from outcast to the achievement of full liberty? If opposite-sex couples are allowed to enter the state-sanctioned regime of marriage then it seems logical to allow same-sex couples to have the same opportunity. But to accord all partners the opportunity to choose how to create an enduring bond that is

S. Katz, *A History of Compulsory Education Laws*, FASTBACK SERIES, No. 75. BICENTENNIAL SERIES (1976), <http://eric.ed.gov/?q=ED119389&id=ED119389> [<http://perma.cc/W3C4-9Q73>]. Further, one can argue that the United States Constitution guarantees the right to a public education. *But see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (refusing to invalidate Texas public elementary and secondary schools’ reliance on local property taxes to finance schools).

114 Admittedly, they have been viewed as outcasts during the early twentieth century when the legal challenges, discussed below, were brought.

115 *Pierce v. Soc’y of the Sisters*, 268 U.S. 510 (1925) (overturning compulsory education law that required parents to send children to public school) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (overturning law that required instruction only in English) are cited through the opinion. *See Obergefell*, 135 S. Ct. at 2598, 2600.

116 *Id.* at 2599, 2603, 2606.

117 *See* *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005).

most appropriate for them, without facing an outcast status, then one must think about the meaning that is attached to the state-sanctioned relationship. In tipping the scales heavily in the favor of state-sanctioned marriage by according huge financial benefits to middle-class couples, the state may be contributing to this outcast status.

3. “[T]he right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”¹¹⁸

The Court’s articulation of this third principle reflects how the Court’s holding in *Obergefell* may harm some of the people it claims to want to assist, because, again, it cannot contemplate that some couples may want to choose to stay unmarried. This third principle purports to assist the children born to or adopted by nonmarital couples. The Court says: “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”¹¹⁹ They suffer this stigma even though the Court recognized that there is powerful evidence that “gays and lesbians can create loving, supportive families.”¹²⁰ The Court tries to solve the stigma against “illegitimacy” by allowing the unmarried parents to get married. While all couples should certainly have the choice to get married, it seems troubling that one factor a couple must consider in making this choice is whether their children will be stigmatized because of the parents’ nonmarital status. One must wonder if the stigma against nonmarital parents and their children¹²¹ will increase as a new group is allowed to enter the institution of marriage, because couples can no longer offer as an excuse that the state would not permit them to marry.

The Court does not even mention the heightened status of “illegitimate” children under the Fourteenth Amendment’s equal protection clause when it discusses this stigma.¹²² The only counter-argument it contemplates is the concern that we should not insist that all married couples procreate. “In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry

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

119 *Id.*

120 *Id.*

121 The stigma faced by children born in single-parent households is beyond the scope of this Article.

122 See *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that denying illegitimate children the right to recover for the wrongful death of their mother constituted discrimination against them).

on the capacity or commitment to procreate.”¹²³ In other words, the Court was careful to note that the right to procreate also includes the right *not* to procreate. But it is not careful to consider that the freedom to marry should include the freedom *not* to marry, especially if we want to protect the well-being of children born or raised by nonmarital couples.

4. “[M]arriage is a keystone of our social order.”¹²⁴

The articulation of this principle reflects the revered status that the Court applies to marriage. Under this principle, same-sex couples should have the opportunity to receive a long list of state-conferred benefits because we have always permitted the state to give marriage a privileged status in society. The court then compiles the long list of benefits at the state and federal level¹²⁵ with the glowing conclusion: “The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”¹²⁶ Because states and the federal government have created a privileged status for marital couples, then same-sex couples must be allowed to enter that privileged arena.

The Court lists the material benefits of marriage alongside the more personal or spiritual aspects of marriage. It does not distinguish between the two, although the state has more impact on the material benefits than the personal or spiritual benefits. After the long list of material benefits, the Court says: “Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”¹²⁷ One could argue, however, that the state-sanctioned material benefits of marriage actually demean the institution itself by causing people to enter marriage for material benefits rather than to express their love for each other. The government, itself, is actually aware of this problem. Thus, we have statutes against “marriage fraud” when a United States citizen marries a foreign national for the sole purpose of assisting a foreign national gain

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

124 *Id.*

125 “These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules Valid marriage under state law is also a significant status for over a thousand provisions of federal law.” *Id.*

126 *Id.* at 2601.

127 *Id.* at 2602.

United States immigration status.¹²⁸ Because of the significant material benefits connected to marriage, the government can sometimes find itself having to determine if a marriage is genuine or purely instrumental. One might say that the government, itself, has demeaned the institution of marriage by connecting it to so many material benefits.

Long-term, stable relationships may be the keystone of our social order when the couples maintain those relationships out of personal satisfaction and happiness, and when they, sometimes, also choose to raise children together as part of that long-term commitment. The “social order” created by marriage, however, is not entirely beneficial, especially to some women who find themselves confined in traditional roles with few financial resources to leave those marriages. A more balanced examination of the meaning of state-sanctioned marriage in our society might help the Court to better understand its role in safeguarding the freedom to choose to marry.

Thus, the *Obergefell* decision and its underlying precedents have fodder to develop a right to *choose* to marry. Emphasis on the right to choose marriage could, in turn, help develop the first and second aspects of marriage equality: (1) the equal treatment of women and men within marriage and (2) the equal treatment of marital and nonmarital couples. The next two Parts of this Article will discuss the continued existence of these two kinds of inequalities and suggest how a broader reading of *Obergefell* could help attain these aspects of equality.

II. First Aspect of Marriage Equality: The Equal Treatment of Women and Men Within Marriage

A. Coverture: Historical Roots

The first aspect of marriage equality is the equal treatment of women and men within marriage through the elimination of the subordination of women to men within marriage. As reflected in Justice Ginsburg’s statement from the bench during oral argument, the conventional story is that we have largely ended the subordination of women to men within marriage by eliminating coverture.¹²⁹ Coverture is a property-law concept that allowed a man to take control of a woman’s property upon marriage. It symbolized the independence

128 See *Identity and Benefit Fraud*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/identity-benefit-fraud> [http://perma.cc/9Y4Z-KMHF] (last visited Nov. 15, 2015).

129 See Transcript of Oral Argument at 10–11, 70–71, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 145-56).

that women lost upon entering the institution of marriage, if they had access to property.¹³⁰ Under coverture, children were considered to be their fathers' assets; women could not seek custody of their children upon divorce.¹³¹

Coverture was based on a gendered notion of women's subservient role to men in the household. "Under coverture, when a woman married, she surrendered her legal identity which was subsumed into her husband."¹³² Coverture was symbolic of a man's control over a woman's body or "liberty" as well as her property. Nonetheless, the elimination of coverture did not cause male domination over women to end. Two historical examples can be helpful in understanding the consequences of the elimination of coverture for married women. The first story describes a woman who was married under coverture; the second story describes a woman who was married shortly after coverture ended.

In 1858, the fifty-three year old Sarah Banks Sherwood married financially-challenged Jessup Sherwood.¹³³ When her husband started siphoning off her personal assets, she sought to require her husband to post a bond of the value of her estate, so that he could not drain all her assets.¹³⁴ Rather than accede to this demand, he allegedly "knocked her

130 The qualification "if they had access to property" is important because marriage rates have always been lower for poor women than middle-class women. *See generally* Krissy Clark, *Happily Ever After in a Cross-Class Marriage*, MARKETPLACE (June 22, 2012), <http://www.marketplace.org/topics/wealth-poverty/happily-ever-after-cross-class-marriage> [<http://perma.cc/67GT-RABS>] (connecting marriage to wealth). Under slavery, a black woman "was excluded from property ownership because under the law she was herself a form of property." Cheryl I. Harris, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography*, 18 CARDOZO L. REV. 309, 316 (1996).

131 *See* Amber Bailey, *Redefining Marriage: How the Institution of Marriage has Changed to Make Room for Same-Sex Couples*, 27 WIS. J.L. GENDER & SOC'Y 305, 317 (2012).

132 Christopher Collier, *The Campaign for Women's Property Rights: Sarah Banks's Story*, 54 AM. J. LEGAL HIST. 378, 384 (2014). As described by Connecticut jurist Zephaniah Swift, in 1850, coverture meant:

The husband has power and dominion of the wife, as he is responsible for her actions; he may control, restrain, and regulate her conduct, and keep her by force within the bounds of duty, and under due subordination and subjection. When the wife makes an undue use of her liberty, by squandering the estate of her husband, or going into lewd company, the husband may lay her under a restraint to preserve his honor and estate--but if he restrain her of her liberty unreasonably, or imprison her, she may have relief by habeas corpus.

Id. at 384–85.

133 *Id.* at 381.

134 *Id.* at 393.

down on her bed,” “appeared very angry,” and perpetuated various abuses about which she “[did not] wish to say any more.”¹³⁵ Her legal action was unsuccessful, and she was jailed for contempt and ordered to turn over her personal property to her husband.¹³⁶ Mrs. Sherwood’s only legal recourse to avoid this depletion of her financial resources was the divorce court. Through the happenstance of intervention from P.T. Barnum, she was able to persuade the General Assembly to approve her petition for dissolution of her marriage.¹³⁷

The publicity from Mrs. Sherwood’s situation may have led to elimination of coverture in Connecticut in 1877.¹³⁸ Thus, when Mrs. Mathewson, in 1906, found herself subject to coercive financial practices by her husband in Connecticut, which left her too destitute to take care of basic household needs, she was able to sue her husband “to pay her upon her demand a certain sum of money”¹³⁹ for her basic household needs. In a sympathetic decision, the Connecticut court explained that women no longer had to lose their legal identity or ability to own property upon marriage.¹⁴⁰ Thus, in contrast to Mrs. Sherwood, Mrs. Mathewson was able to secure funds from Mr. Mathewson during the course of her marriage due, in part, to the elimination of coverture.

But these stories also reflect that the elimination of coverture did not bring equality to marriage. A woman, like Mrs. Mathewson, who has to go to court to get basic funds for subsistence from her husband is unlikely to be living in a household in which she is being treated with dignity and respect on a daily basis. The need for the lawsuit is a reflection of the male domination within her marriage and the limited options she had available to

135 *Id.* at 396.

136 Collier, *The Campaign for Women’s Property Rights*, *supra* note 132, at 413.

137 *Id.* at 423.

138 *Id.* at 427.

139 *Mathewson v. Mathewson*, 63 A. 286, 286 (Conn. 1906).

140 The court said:

[B]y the law as now generally established, she does not by force of the marriage lose her legal identity, nor the capacity of owning property, and does not lose the civil rights incident to this capacity. This change in status . . . has been accomplished by a single radical act of legislation, directly reversing the former primary and controlling change in legal status, affected by force of the marriage, and such radical change more clearly involves a consequent change in the civil rights purely incidental to the status.

Id.

attain the most basic economic security. As we will see in Part II.B, Mrs. Mathewson's situation is, unfortunately, not one that we can assign to the history books as anachronistic because married women sometimes continue to find themselves in desperate situations that replicate the conditions of domination and subordination within coverture.

B. Coverture: Modern Vestiges

When the *Obergefell* Court mentions the abandonment of coverture, it asserts that this abandonment “worked deep transformations in [marriage’s] structure, affecting aspects of marriage long viewed by many as essential These new insights have strengthened, not weakened, the institution of marriage.”¹⁴¹ While it is true that the elimination of coverture was an important step towards women’s gender-based equality, the *Obergefell* Court is stuck in a highly romanticized view of marriage in which both partners to the marriage are able to cure their fears of loneliness¹⁴² and “hope [for] companionship and understanding”¹⁴³ through this historic institution. This image is in stark contrast to the evidence that married women disproportionately bear the burden of caring for others, such as children, ill spouses, and elderly parents.¹⁴⁴ It is also in stark contrast to the fear of rape, battery, and even death, which women must disproportionately fear in any intimate relationship, including a marital relationship.¹⁴⁵ While the *Obergefell* decision may spur a marriage boom, as same-sex couples enter the institution, it is unlikely to be transformative to the women who are still living in a traditional marriage.¹⁴⁶

141 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

142 *Id.* at 2600.

143 *Id.*

144 Congress heard this evidence in stark detail when it passed the Family and Medical Leave Act. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). *See also* Thomas E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN’S L.J. 275, 279 (2015) (arguing that the ongoing custodial care costs of their spouse is a significant threat to financial security for elderly women); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 353 (2004) (“[E]lder care, similar to child care, is heavily gendered, with women disproportionately represented among elder care providers.”).

145 *See* Conner, *supra* note 2 (arguing that women’s financial insecurity makes them more susceptible to domestic violence and less able to leave abusive relationships). *See also* Patricia A. Broussard, *Black Women’s Post-Slavery Silence Syndrome: A Twenty-First Century Remnant of Slavery, Jim Crow, and Systemic Racism—Who Will Tell Her Stories?*, 16 J. GENDER RACE & JUST. 373 (2013) (discussing black women’s physical abuse by both black and white men and the code of enforced silence).

146 Professor Karst has noted: “As rape and unwanted pregnancy dramatically illustrate, however, coerced intimate associations are the most repugnant of all forms of compulsory association.” Karst, *supra* note 67,

It is not clear what the Court means when it says that the elimination of coverture “strengthened” the institution of marriage. A smaller percentage of American adults are married today than when the United States Census Bureau first started collecting data on marriage rates in 1920.¹⁴⁷ What is “stronger” about the institution of marriage that has caused fewer people to select it? Although it is impossible to prove causation, one might argue that women are less likely to pursue marriage than in the past because they, on average, have greater economic security as the wage gap between women and men has shrunk somewhat.¹⁴⁸ Interestingly, the marriage rate peaked in 1960 at 72.2%, shortly before the passage of the Equal Pay Act in 1963 and has shrunk to 50.3% in 2013 as the wage gap between men and women has begun to shrink.¹⁴⁹ One might therefore argue that greater equality for women in society has, in fact, diminished the attractiveness of the institution of marriage, in that women now feel less compelled to enter marriage to attain greater economic security than in the past. Marriage, itself, however, may not necessarily be a more equitable institution for women even if women have gained more equality in society at large. Some women may have realized that they can better attain economic security, despite the elimination of coverture, without pursuing marriage.¹⁵⁰

While coverture has ended as a legal matter, modern vestiges of coverture can be seen in the social traditions that endure despite its elimination.¹⁵¹ Women still typically relinquish

at 638. The freedom to choose to marry must therefore strongly protect the right of an individual to leave a marriage, especially when it is abusive.

147 In 1920, 65.0% of American adults were married as compared with 50.3% in 2013. See D’Vera Cohn, *For First Time, Census Data on Married Couples Includes Same-Sex Couples*, PEW RES. CTR. (Sept. 18, 2014), <http://www.pewresearch.org/fact-tank/2014/09/18/for-first-time-census-data-on-married-couples-includes-same-sex-spouses/> [<http://perma.cc/7EU8-H8N6>]. The 2013 figure, for the first time, includes some married same-sex couples.

148 In 1960, women were reported to earn 60.7% of men’s wages; in 2013, women were reported to earn 78.3% of men’s wages. See *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT’L COMM. ON PAY EQUITY, <http://www.pay-equity.org/info-time.html> [<http://perma.cc/6RQ2-JA3U>] (last visited June 30, 2015).

149 See D’Vera Cohn, *supra* note 147 (marriage data over time); NAT’L COMMITTEE ON PAY EQUITY, *supra* note 148 (wage data over time).

150 See Kenneth Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165, 178 (2006) (“[T]he decline in marriage and birth rates, in part, reflects a general decline in the desirability of marriage and having children relative to other options, and a greater economic and physical ability, especially on the part of women, to order their personal lives as they see fit.”).

151 See *infra* Part II.B.

basic aspects of their human identity like their last name¹⁵² and the last names of their children¹⁵³ upon entering the institution of marriage.¹⁵⁴ These modern social conventions are the vestiges of the historical legal rules under coverture that mandated inequality. Although the law of child custody has changed to reflect the “best interest of the child” standard,¹⁵⁵ the social convention of giving the child the name of the father is a reflection of the historical principle that the child is the father’s property. Further, women who are married and engaged in paid work outside the home continue to perform an extra three weeks of work at home per year as compared to their married male partners after the birth of a child.¹⁵⁶ “Parenthood remains an important barrier to a complete gender revolution.”¹⁵⁷ The division of labor within the home continues to be gender-based and unequal.

Writing in 2014, Professor Dana Harrington Conner has argued that “economic instability is a link that binds a woman to her abuser.”¹⁵⁸ Women, who are disproportionately killed

152 The assumptions about women changing their names upon marriage reflect the way the issue is even reported. The New York Times recently ran a heading titled *Maiden Names, on the Rise Again*. See Clair Cane Miller & Derek Willis, *Maiden Names on the Rise Again*, N.Y. TIMES, June 27, 2015, <http://www.nytimes.com/2015/06/28/upshot/maiden-names-on-the-rise-again.html> [<http://perma.cc/FV5W-HX5B>]. The article noted that “roughly 20 percent of women married in recent years have kept their names.” Of course, it saw no need to mention what percent of *men* married in recent years kept their names, most likely because the statistic would be nearly 100 percent. And the article, of course, would never describe the man’s birth name as his “maiden” name. We do not even have a word to describe the name a man is given at birth in comparison to the name he has after marriage.

153 See Evonne Lack, *Whose Last Name Should You Give Your Baby?*, BABY CTR., http://www.babycenter.com/0_whose-last-name-should-you-give-your-baby_10327041.bc [<http://perma.cc/ZM7F-M6N9>] (last visited Jan. 8, 2016) (reporting that an informal survey revealed that four percent of mothers give their own last name to their child, when the mother did not take the father’s last name); Molly Caro May, *What Happened When We Gave Our Daughter My Last Name*, HAIRPIN (July 15, 2014), <http://thehairpin.com/2014/07/what-happened-when-we-gave-our-daughter-my-last-name> [<http://perma.cc/33QM-MZW7>] (commenting on people’s shocked reactions when a couple gave their child the mother’s last name). See also Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 388 (2012) (recounting the pressure she got to take her husband’s last name when bearing a child but never questioning that she and the child would have different surnames).

154 See generally Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 910–12 (2010) (discussing trends in women’s names upon marriage).

155 *Id.* at 896.

156 Jill E. Yavorsky, Claire M. Kamp Dush & Sarah J. Schoppe-Sullivan, *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAM. 662 (2015).

157 *Id.* at 677.

158 Conner, *supra* note 2, at 340.

or battered by their husbands,¹⁵⁹ have been deprived of the “profound hopes and aspirations” within marriage.¹⁶⁰ Because marriage depresses women’s labor force participation, it makes women more vulnerable to abusive situations that they cannot afford to leave.¹⁶¹ “Marriage is the batterer’s gateway to establishing power over the family finances and property.”¹⁶² Although coverture has formally ended, women’s lack of economic resources to live independently from their husband is still a powerful force of inequality in women’s lives. Women’s economic precariousness may cause them to be willing to marry men to gain access to more financial resources and, once married, make it harder for them to leave those marriages, even if they are experiencing conditions of profound inequality. Further, as Professor Connor has observed,¹⁶³ these women’s decisions, which are often socially pressured, to leave the paid workforce or accept reduced hours within the paid workforce after marriage, often leave them in precarious financial situations. If women had a more genuine choice to decide whether to marry, they might be able to avoid some of these financial detriments.

When the *Obergefell* Court said that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,”¹⁶⁴ it lost sight of the fact that women do not always have equal access to that individual autonomy within marriage. In *Planned Parenthood v. Casey*,¹⁶⁵ in an opinion joined by Justice Kennedy (who also authored *Obergefell*), the Supreme Court recognized that married women sometimes face both physical violence and psychological abuse. “Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common.”¹⁶⁶ Rather than place marriage on a pedestal, the *Casey* Court safeguarded women’s freedom to choose to terminate a pregnancy by overturning the

159 See Lucinda Marshall, *Three Women are Murdered by Their Husbands, Boyfriends Every Day in America*, ALTERNET (Dec. 21, 2007), http://www.alternet.org/story/71309/three_women_are_murdered_by_their_husbands,_boyfriends_every_day_in_america [<http://perma.cc/YJK4-8BE5>].

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

161 Conner, *supra* note 2, at 357, 363.

162 *Id.* at 363.

163 *Id.* at 357, 363.

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

165 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

166 *Id.* at 891.

provision that required them to notify their husbands.¹⁶⁷ While courts cannot be expected to be responsible for the elimination of gender-based inequality within marriage, they can seek to ensure that marriage is not placed on a legal and societal pedestal in a way that makes it difficult for women to not enter or choose to leave that institution. The *Obergefell* Court's romantic description of marriage is unnecessarily insensitive to the persistence of those gender-based norms and ignores foundational legal precedent that can unmask that romanticism.¹⁶⁸

III. Second Aspect of Marriage Equality: Equal Treatment of Marital and Nonmarital Couples

The second aspect of marriage equality is the equal treatment of marital and nonmarital couples. This claim to equality may be especially controversial because existing statutes that proscribe "marital discrimination" have often not been interpreted to "forbid[] any preference for marital status."¹⁶⁹ As Professor Courtney Joslin has argued, protection against marital status discrimination is of the utmost importance because marital status discrimination disproportionately affects nonwhite and lower-income households, which have a lower rate of marriage than other groups.¹⁷⁰

Two pieces of evidence demonstrate the dramatic persistence of this aspect of marriage inequality: (1) the adverse treatment of the children of nonmarital couples as compared to the children of marital couples, and (2) the adverse financial treatment of nonmarital couples as compared to marital couples. The *Obergefell* Court was made aware of the continuing persistence of these forms of inequality but failed to take concrete steps to redress them.

167 *Id.* at 898.

168 This insensitivity to gender-based norms within traditional marriage may be reflective of a larger problem, which is beyond the scope of this Article—that Justice Kennedy often writes or joins opinions that reify gender-based norms. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (allowing state to ban some late-term abortions on the basis that some women may come to regret their decision despite "no reliable data to measure the phenomenon"); *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding a statute making it more difficult for child born abroad and out of wedlock to claim United States citizenship if the father rather than the mother is the United States citizen because of the inherent and natural mother-child bond that is created at birth).

169 *See Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 611 (7th Cir. 2001). *But see Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010) (overturning limitation of family health benefits to opposite-sex married partners).

170 Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 806 (2015).

A. Nonmarital Couples and Their Children

In 1968, the U.S. Supreme Court declared in *Levy v. Louisiana*¹⁷¹ that it was unconstitutional for the state of Louisiana to treat the children of an unmarried woman less favorably than the children of a married woman in a wrongful death suit brought by her children. “Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.”¹⁷² The remedy for this discriminatory state statute was to allow the “illegitimate” children to recover damages. Since *Levy*, the courts have rendered a number of decisions to protect the rights of children born to unmarried parents, and many states have amended their laws to strengthen the inheritance rights of the children of unmarried parents.¹⁷³

Despite *Levy* and its progeny, children raised by unmarried, same-sex couples have often faced a lack of legal protection due to the unmarried status of their parents.¹⁷⁴ In many states, unmarried couples cannot *both* be the legally recognized parents of their children, when neither is the biological parent,¹⁷⁵ thereby depriving those children of valuable legal protection. The effect of these rules has been to preclude same-sex couples from jointly adopting children when the state forbade same-sex couples from marrying. Two different law reform strategies were available to solve this problem: (1) one could seek to change the state laws that require two adults to be married to each other in order to become the adoptive parents of the children they raise together, or (2) one could seek to change the state laws that forbid same-sex couples from marrying each other, so that same-sex partners could marry each other and then seek to adopt the children they raise together through existing adoption law. The marriage equality movement¹⁷⁶ has attempted to solve

171 *Levy v. Louisiana*, 391 U.S. 68 (1968).

172 *Id.* at 72.

173 See Johan Meeusen, *Judicial Disapproval of Discrimination Against Illegitimate Children*, 43 AM. J. COMP. L. 119, 135 (1995).

174 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (“[S]ome of marriage’s protections for children and families are material.”).

175 See CHILD WELFARE INFORMATION GATEWAY, CHILDREN’S BUREAU, WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION? 2 (2012), <https://www.childwelfare.gov/pubPDFs/parties.pdf> [http://perma.cc/CM4R-8Q9W].

176 See Murray, *supra* note 153, at 388–89.

this problem of discrimination against the children of same-sex couples by embracing the second strategy.¹⁷⁷

The problem with the second strategy is that it conflates good parenting with the parents being married, thereby contributing to the stigma against nonmarital parents. This conflation can be seen in the way the *Obergefell* Court discusses the issue. The *Obergefell* Court recognizes the harms that flow to the children of unmarried parents—both material and attitudinal. The material harm flows, for example, from the inability of the nonparent to consent to medical treatment or attend parent-teacher conferences.¹⁷⁸ Other harms, however, flow from the stigma of illegitimacy. “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”¹⁷⁹ By not allowing same-sex couples to marry, the “marriage laws at issue here thus harm and humiliate the children of same-sex couples.”¹⁸⁰

Worried that those sentences have insulted married adults who choose not to have children (or are not able to do so), the *Obergefell* Court then says: “That is not to say the

Marriage traditionalists argue that marriage was intended to deal with the problem of illegitimacy and irresponsible procreation, and, thus, should be restricted to heterosexual couples. Those who favor marriage equality argue that illegitimacy is an injury foisted upon same-sex couples and their families simply because they are ineligible for civil marriage.

Id.

177 Not all members of the LGBT community embrace this strategy:

Scholars and same-sex couples critical of the patriarchal and heteronormative foundations of the institutions of marriage and family have expressed concerns that LGBT claims for access to marriage reify existing structures of inequality rather than challenge them . . . [and] suggest [that] attaching parental rights to marriage could be a “significant hindrance” to people who choose not to marry or whose relationship configurations do not conform to the dyadic norm.

Jason J. Hopkins, Anna Sorenson & Verta Taylor, *Same-Sex Couples, Families, and Marriage: Embracing and Resisting Heteronormativity*, 7 SOC. COMPASS 97, 102 (2013).

178 *Obergefell*, 135 S. Ct. at 2600 (“[S]ome of marriage’s protections for children and families are material.”).

179 *Id.* at 2600.

180 *Id.* at 2590.

right to marry is less meaningful for those who do not or cannot have children.”¹⁸¹ But notice what the Court does *not* say. It does *not* say: “That is not to say that the ability to be a good parent is less possible or less likely for those who do not marry.” One might conclude that parents who have chosen not to marry will find it all the more difficult to justify their decision now that the Court has recognized the “harm” and “humiliation” to the children of unmarried parents and suggested that the only way to cure that harm is for the parents to marry.

The story of one of the plaintiffs reflects the *Obergefell* Court’s conflation of marriage with good parenting. April DeBoer and Jayne Rowse were an unmarried same-sex couple residing in Hazel Park, Michigan.¹⁸² As single people, DeBoer had adopted one child and Rowse had adopted two.¹⁸³ Under Michigan law, they could not jointly adopt those children unless they were married.¹⁸⁴ Similarly situated, unmarried opposite-sex adults would have faced the same problem—they would not have been allowed to jointly adopt the three children.

In their original complaint, DeBoer and Rowse alleged that the state adoption law impermissibly discriminated against unmarried couples. The trial court, however, appeared to conclude that their injury really stemmed from their inability to *marry* rather than the inability of all unmarried individuals to jointly adopt.¹⁸⁵ The trial court invited the plaintiffs to amend their complaint to allege that the state marriage law was unconstitutional, thereby precluding them from adopting.¹⁸⁶ Their case then proceeded through the courts as a freedom-to-marry case rather than as a right-to-adopt case. After the United States Supreme Court ruled in their favor, they reportedly said: “Now apparently we have to plan a marriage.”¹⁸⁷ They did *not* say: “Now apparently we have to file for an adoption” because their right to adopt is still contingent on their willingness to marry. Hopefully,

181 *Id.* at 2590.

182 *See Deboer v. Snyder*, 973 F. Supp. 2d 757, 759 (E.D. Mich. 2014).

183 *Id.* at 760.

184 *Id.*

185 *Id.* at 759.

186 *Id.* at 760.

187 *See Ben Freed, April DeBoer and Jayne Rowse Celebrate Supreme Court Gay Marriage Decision in Ann Arbor*, MLIVE (June 26, 2015, 10:30 AM), http://www.mlive.com/news/ann-arbor/index.ssf/2015/06/april_deboer_and_jayne_rowse_c.html [<http://perma.cc/4NW4-K2K7>].

they genuinely *wanted* to get married because their right-to-adopt case was transformed into a freedom-to-marry case. Michigan law still only allows a second-parent adoption if a couple is married. Because the plaintiffs began their lawsuit seeking the right to adopt, as an unmarried couple, rather than the freedom to marry, the *Obergefell* Court could have offered some dicta that their right to be legally recognized as parents should not have been conditioned on their marital status. That language could have advanced marriage equality.

An argument in favor of conditioning adoption on marriage is that parents are more likely to stay together if they are married. In other countries, however, adults manage to stay in long-term relationships to raise children together without formally joining the institution of marriage.¹⁸⁸ In Sweden, for example, couples typically stay in long-term stable relationships and raise children together without being married. “Thus, a child born to unmarried Swedish parents who cohabit—as the overwhelming majority of unmarried parents in Sweden do—may face less risk of family disruption than a child born to the average married couple here in the United States.”¹⁸⁹ In other words, couples can choose to stay together to raise children on a long-term basis without state-sponsored inducements to marry. Despite state-sponsored financial inducements to marry, which will be discussed in Part III.B, the United States has the highest divorce rate in the world.¹⁹⁰ An exclusive emphasis on marriage as a way to get couples to stay together does not seem to have worked in the United States; expanding the kinds of couples who receive support when they choose to raise children together may be a better state policy to promote our interest in the well-being of children irrespective of the marital status of their parents.

188 Another argument in favor of marriage is that marital couples are more likely to bear children. In societies with low fertility rates, policy makers often express concern that low rates of marriage correlate with low rates of childbearing. See, e.g., Magali Mazuy et al., *Recent Demographic Trends in France: The Number of Marriages Continues to Decrease*, 68 POPULATION-E 273, 285 (2013); Kwon Tai-Hwan, *Trends and Implications of Delayed and Non-Marriage in Korea*, 3 ASIAN POPULATION STUD. 223 (2007). Because of the inequities of global population distribution, this argument is beyond the scope of this Article. On a global level, we continue to have a dramatic increase in population. See *World Population Trends*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/world-population-trends> (last visited Nov. 13, 2015).

189 See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?* 24 (2011). If we want to improve the well-being of children, it might make sense to consider what state policies facilitate child-birth and the well-being of children, such as paid parental leave, good health care benefits, and well-paid work with flexible hours, rather than conflate marriage with the well-being of children. See Dau-Schmidt & Brun, *supra* note 150. The scope of policies that would benefit children raised by families is beyond the scope of this Article but it is simplistic to only emphasize higher rates of marriage as a way to benefit children.

190 See *The Divorce Rate per 1,000 People*, NATIONMASTER, <http://www.nationmaster.com/country-info/stats/People/Divorce-rate> [<http://perma.cc/N78W-36LJ>] (last visited Jan. 8, 2016).

B. Financial Benefits from Marriage

Another important aspect of marriage equality is the equal financial treatment of marital couples compared with nonmarital couples. The *Obergefell* decision does not further this aspect of marriage equality,¹⁹¹ even though the Court expressed the view that people marry for “expression, intimacy and spirituality”¹⁹² rather than financial benefits. If the Court really wanted to encourage people to marry out of love, rather than for the financial benefits, then it could have suggested that we make the state justify the myriad of financial benefits that are accorded exclusively to married couples.

The tax benefits of marriage are especially strong for those couples that reflect a traditional marriage by having one high-income and one low-income partner. For example, if one partner earns \$90,000 and one partner earns \$25,000 per year, the married couple would have a tax savings of \$1,256.50 as compared to what they would have paid individually in taxes if not married.¹⁹³ By contrast, there may be an income-tax marriage penalty if they each earn about the same amount of money, and jointly earn more than \$169,150.¹⁹⁴ This aspect of the so-called “marriage penalty” is actually a marriage equality penalty for high-income taxpayers.

The benefits of marriage are important when it is time to retire, especially if the couple has experienced a traditional marriage. When claiming Social Security benefits, the spouse with lower lifetime earnings can claim benefits based on the other spouse’s earnings record. If the higher-earning spouse is the first to die, the lower-earning spouse can receive the higher-earning spouse’s benefit as a survivor benefit.¹⁹⁵ Further, when a surviving spouse inherits an IRA, she or he can delay drawing down the account until she or reaches the

191 Professor Katherine Franke expressed this concern in 2011. See Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, http://www.nytimes.com/2011/06/24/opinion/24franke.html?_r=0 [<http://perma.cc/NGL2-W8FP>].

192 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

193 See Tobie Stanger, *Getting Engaged? Enjoy the Tax Benefits of Marriage: And You Thought It Was All About Love*, CONSUMER REP. (Feb. 12, 2015 12:00 PM), <http://www.consumerreports.org/cro/news/2015/02/tax-benefits-of-marriage/index.htm> [<http://perma.cc/YV7C-SH42>].

194 See Jonathan Clements, *Getting Married Has Its Financial Benefits*, WALL ST. J., May 25, 2014, <http://www.wsj.com/articles/SB10001424052702304652804579571931962914924> (paywall access).

195 *Id.*

age of seventy and a half.¹⁹⁶ If anyone else would inherit the IRA, they would have to draw it down based on when the deceased individual reached the age of seventy and a half.¹⁹⁷ These retirement benefits “can make the difference between running out of money in retirement and being financially secure.”¹⁹⁸

Some researchers have tried to price the “cost” of being unmarried in the United States. In 2009, Tara Siegel Bernard and Rob Lieber calculated the cost of being an unmarried gay couple with respect to various benefits. The health insurance cost ranged from \$28,595 to \$211,993; the estate tax expense was estimated to be \$43,378; the pension cost was estimated to be \$32,253; and the spousal IRA cost was estimated to be \$112,192.¹⁹⁹

The marriage rate among poor couples is closer to that of the marriage rates around the world, arguably because poorer couples do not benefit from most of these rules.²⁰⁰ In fact, although not frequently discussed, there is a marriage penalty for some poor couples in our society. “Getting married might, say, reduce eligibility for Medicaid benefits, the earned-income tax credit or the tax credit that can help pay for health insurance under the Affordable Care Act.”²⁰¹ Because middle-class people disproportionately benefit from getting married, it is often said that marriage leads to stronger financial circumstances. But that is only true if one or both members of the partnership have significant financial resources to bring to the marriage.

196 *Id.*

197 *Id.*

198 *Id.*

199 Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, <http://www.nytimes.com/2009/10/03/your-money/03money.html?pagewanted=all> [<http://perma.cc/GUE4-WCHX>]. Lisa Arnold and Christina Campbell take this research a step further and calculate the “high price of being single in America.” Lisa Arnold & Christina Campbell, *The High Price of Being Single in America*, ATLANTIC, Jan. 14, 2013, <http://www.theatlantic.com/sexes/archive/2013/01/the-high-price-of-being-single-in-america/267043/> [<http://perma.cc/RH5P-UAEW>]. They calculated the life-time cost as ranging from \$484,368 for a lower-earning woman to \$1,022,096 for a higher-earning woman. *Id.* Their research does not distinguish between women who are in a coupled relationship, but considered single as a matter of law, and those women who live by themselves. This Article only focuses on individuals who are in nonmarried couples and does not ask the larger question of why legal and social policy should favor couples over individuals when according benefits.

200 See Michael Greenstone & Adam Looney, *The Marriage Gap: The Impact of Economic and Technological Change on Marriage Rates*, BROOKINGS (Feb. 3, 2012), <http://www.brookings.edu/blogs/jobs/posts/2012/02/03-jobs-greenstone-looney> [<http://perma.cc/928V-8XNW>].

201 Clements, *supra* note 194.

Marriage equality proponents have often supported, rather than sought to undermine, this aspect of marriage inequality by encouraging more couples to be able to enter the institution of marriage without first asking why those benefits are limited to married couples in the first place.²⁰² With the availability of marriage to a larger segment of society, entities that currently allow unmarried couples to seek benefits may decide to end those programs,²⁰³ thereby exacerbating marital discrimination. Same-sex couples, who previously could not choose to marry but were nonetheless able to obtain domestic partnership benefits, will have to decide if they can afford not to marry.²⁰⁴ Opposite-sex couples, who had made a conscious choice not to marry, will now have to confront whether they can continue to afford that decision. These financial inducements may increase the marriage rate—but for what benefit? Although the marriage rate in the United States has been declining, it is still among the highest in the western world.²⁰⁵

202 As Lisa Arnold and Christina Campbell observe: “[L]egalizing gay marriage only solves the problem for a few. Many more single people (gay and straight)—more than half of the population—continue to suffer from institutionalized singlism, the discrimination of individuals based on marital status.” Arnold & Campbell, *supra* note 199. *But see* *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 601 (7th Cir. 2001) (Lambda Legal Defense Fund unsuccessfully arguing that Chicago Board of Education should treat unmarried heterosexual couples as well as it treats married heterosexual couples).

203 The State Department is reportedly considering ending domestic partnership benefits. *See* Josh Hicks, *Report: State Department Considering Endings its Domestic-Partner Benefits*, WASH. POST, Jan. 15, 2015, <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/01/15/report-state-department-considering-end-to-its-domestic-partner-benefits> [<http://perma.cc/8UVL-7LKH>]. Maryland has ended benefits for employees’ domestic partners. *See* Carol V. Calhoun, *Maryland to End Benefits for Employees’ Domestic Partners*, EMP. BENEFITS LEGAL RES. SITE (June 10, 2013), <http://benefitsattorney.com/articles/maryland-to-end-benefits-for-employees-domestic-partners> [<https://perma.cc/2SWX-XWXG>]. For a survey of domestic partnership changes, see Joanne Sammer & Stephen Miller, *The Future of Domestic Partner Benefits*, SOC’Y FOR HUM. RES. MGMT. (Oct. 8, 2013), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/domestic-partner-benefits.aspx> [<http://perma.cc/MRC3-MECK>]. These sources, discussing the reduction of domestic partner benefits, were written before the Supreme Court’s decision in *Obergefell*. One would expect this trend to be strengthened following the Supreme Court’s decision.

204 For some same-sex couples, this “choice” may also be constrained by the lack of statutory protection from sexual orientation discrimination under federal or state law. They may “out” themselves by sending out a wedding announcement and find themselves subject to overt sexual orientation discrimination by losing their job or rental housing. That problem is another way in which the *Obergefell* decision failed to extend principles of equality by being primarily couched in liberty language. That problem is beyond the scope of this Article. For discussion of that problem, see Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 27, 2015, <http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news> [<http://perma.cc/V99W-VJM6>].

205 *See* Monthly Bulletin of Statistics, “Countries Compared by People > Marriage Rate. International Statistics at NationMaster.com”, UNITED NATIONS (Apr. 2001), <http://www.nationmaster.com/country-info/>

An argument in favor of the state's favorable treatment of marital couples is that people who marry report higher levels of happiness or satisfaction than people who are unmarried.²⁰⁶ This argument has many flaws. First, it fails to take into account how marriage rates correlate with socio-economic status. Although it is not clear that what we call "happiness" increases with socio-economic status, studies indicate that "global evaluations of life" do tend to rise as people have access to more economic resources.²⁰⁷ Poor people, who are disproportionately less likely to marry,²⁰⁸ report higher levels of "sadness" but it is hard to say that that is because they are unmarried or simply because they are poor.²⁰⁹

Second, this argument fails to consider whether that correlation would continue to be true if, due to societal or legal changes, even more people got married and possibly rushed into marriage before knowing each other well. Factors associated with a higher risk of divorce include marrying at a young age, possessing less education, and having less income.²¹⁰ These factors are interconnected—people who marry at a younger age are less likely to have finished their education and less likely to have started to earn a decent income than those who get married later in life. To the extent that government incentivizes people to marry for economic reasons, it is incentivizing them to marry at a younger age before they have the kind of economic stability that is likely to help sustain their marriage.

stats/People/Marriage-rate [<http://perma.cc/EA3U-PZFV>]. In 2001, the United States marriage rate was 9.8 per 1,000 population, as compared to 6.8 (United Kingdom), 5.1 (France), 6.5 (Germany), 5.4 (Italy), 6.4 (Netherlands), 5.8 (Austria), and 4.7 (Sweden).

206 The Court's repeated invocation of the wonders of marriage in *Obergefell* support this view. The Court, for example, says that marriage allows couples to "find other freedoms, such as expression, intimacy, and spirituality." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

207 See Kostadin Kushlev et al., *Higher Income is Associated with Less Daily Sadness But Not More Daily Happiness*, 6 SOC. PSYCHOL. & PERSONALITY SCI. 483 (2015) (reviewing literature on global evaluations of life, and concluding that sadness declines with greater economic resources); Ulf-G Gerdtham & Magnus Johannesson, *The Relationship Between Happiness, Health and Socio-Economic Factors: Results Based on Swedish Micro Data 1* (Stockholm Sch. of Econ., Working Paper No. 207, Nov. 1997), <http://swopec.hhs.se/hastef/papers/hastef0207.pdf> [<http://perma.cc/2JG3-25NK>] (finding evidence of greater happiness with more economic resources).

208 See Greenstone & Looney, *supra* note 200.

209 See Kushlev et al., *supra* note 207.

210 See UTAH ST. UNIV., HOW COMMON IS DIVORCE AND WHAT ARE THE REASONS? (undated), <http://www.divorce.usu.edu/files/uploads/lesson3.pdf> [<http://perma.cc/GK48-6SNZ>].

Third, this argument fails to take into account the financial hardship that is disproportionately visited upon women who are married and then divorce. To the extent that the tax code incentivizes couples to mimic a traditional male/female relationship by having the lower-earning individual (typically the woman) stay home from paid work to raise the children, it also makes it harder for a woman to be able to afford to leave an unhappy marriage since she has foregone some of her earning power during marriage. A divorced woman is likely to suffer financially, in part, because of the decline in her income resulting from divorce. This is especially true if she reduced her earnings to facilitate raising children during the marriage.²¹¹ Whereas marriage tends to depress women's earning capacity, it has the opposite effect on men. On average, married men (who often have children) earn ten to fifteen percent more than unmarried men.²¹² Thus, a woman may not be able to afford to leave an unhappy marriage,²¹³ and a man often has strong incentives to stay married to maintain his higher earning capacity.

Fourth, reference to the benefits of marriage ignores the data on spousal abuse (usually directed at the wife) within marriage.²¹⁴ “[R]esearch shows that wife assault is more common in families where power is concentrated in the hands of the husband or male partner and the husband makes most of the decisions regarding family finances and strictly controls when and where his wife or female partner goes.”²¹⁵ Thus, women's well-being directly correlates with equality within the relationship itself. When considering whether women benefit from being married, one might want to know if the intimate relationship is based on principles of equality. That factor seems to be pre-eminent in determining if a relationship leads to greater well-being in a woman's life, not whether the relationship is consummated in “marriage.”

211 See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

212 See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 22 (2005).

213 Women who work fewer hours outside the home are less likely to divorce, possibly because they cannot afford to divorce. See Dau-Schmidt & Brun, *supra* note 150, at 178.

214 See PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT. OF JUST., NAT'L INST. OF JUST., *EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY* (July 2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf> [<http://perma.cc/52LH-ZAML>] (“[N]early 25 percent of women and 7.6 percent of men report being raped and/or physically assaulted by a current or former spouse, cohabiting partner, or dating partner/acquaintance at some time in their lifetime.”).

215 *Id.* at 33.

The *Obergefell* opinion extends the financial benefits of marriage to same-sex couples without asking whether those myriad of benefits to marital couples really benefit this institution which the Court holds on a pedestal. The *Obergefell* Court was sensitive to the outcast status of gay men and lesbians in our society.²¹⁶ In tipping the scales heavily in the favor of state-sanctioned marriage by according huge financial benefits to middle-class couples, the state may be contributing to the outcast status of another group in our society—those who do not choose to marry.

CONCLUSION

In *Loving*, the Supreme Court recognized that the state may not infringe the freedom to choose to marry.²¹⁷ In that case, Mildred Jeter Loving and Richard Perry Loving were able to marry in D.C., but they could not return to Virginia to consummate that marriage without facing a prison sentence.²¹⁸ By exposing them to criminal sanctions, the state clearly “infringed” their freedom to marry. The question raised by that case is: “How much action is required by the state to constitute an infringement?” Now that same-sex couples can marry, what penalties will be imposed upon them (and other couples) if they seek to choose *not* to get married? James Obergefell would not be able to be named as the surviving spouse on his partner John Arthur’s death certificate.²¹⁹ Edie Windsor would face a hefty estate tax bill when her partner Thea Spyer died.²²⁰ April DeBoer and Jayne Rowse would face the possibility of each of their children becoming orphans upon the death of one of them, rather than being raised by the other partner.²²¹ Army Reserve Sergeant First Class Ijpe DeKoe would face the risk that, if he died in combat, his partner Thomas Kostura would not receive state government financial support.²²² The *Obergefell* Court said that criminal sanctions are not necessary in order to infringe liberty. “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”²²³ The *Loving* decision protected the marital

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

217 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

218 *See supra* Part I.C.

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

220 *See supra* Part I.G.

221 *See supra* Part III.A.

222 *Obergefell*, 135 S. Ct. at 2595.

223 *Id.* at 2600.

couple from facing criminal sanctions for expressing their love through marriage, but the liberty to marry clearly means more than being free from criminal sanctions.

The *Obergefell* decision furthers marriage equality and the freedom to marry by allowing same-sex couples greater access to the state-sponsored dignity of marriage. State and federal governments, however, undermine the freedom to choose to marry by attaching so many material benefits to the decision to marry. One hopes that Edith Windsor and Thea Spyer went to Canada to be married out of a desire to express their love and commitment to each other—“the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”²²⁴ There is no reason to believe that they married in order to help Windsor later escape a hefty estate tax bill.²²⁵ We will truly have the freedom to marry when people choose marriage out of love rather than as a way to attain state-sanctioned material gain.

Although it is difficult to prove that less state pressure to marry will cause people to marry more frequently for reasons such as love and commitment, rather than instrumental reasons, a recent sociological survey of couples in New Zealand offers some modest hope.²²⁶ Professors Maureen Baker and Vivienne Elizabeth report that, in New Zealand, where marriage has lost most of its legal value, couples have found that they can use a wedding ceremony to “reflect personal values and lifestyles”²²⁷ although, in some instances, they choose to maintain some traditionally gendered aspects of the wedding ceremony. State neutrality towards marriage has not entirely caused the traditional vestiges of gender norms

224 *Id.*

225 See Adam Gabbatt, *Edith Windsor and Thea Spyer: ‘A Love Affair that Just Kept On and On and On,’* GUARDIAN, June 26, 2013, <http://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma> [<http://perma.cc/JJ6J-QC5U>].

226 See Maureen Baker & Vivienne Elizabeth, *A ‘Brave Thing to Do’ or a Normative Practice? Marriage After Long-Term Cohabitation*, 50 J. Soc. 393 (2014). Other scholars will, hopefully, do further work on marriage policies around the world to see what policies are likely to lead to both marriage equality and the freedom to marry. In trying to review this literature, I often found the authors started from the premise that government should try to foster as many marriages as possible. That premise often made the sociological analysis of limited benefit to my thesis. For example, after providing data on marriage and various social conditions, the authors say: “Some financial or non financial benefits should be provided for stimulating marriages, reducing the number of divorces and also the female participation on the labor market.” Christina Boboc et al., *Quantitative Analysis of the Socio-Demographic Impact of Family Benefits*, 5TH INT’L CONFERENCE ON APPLIED STATISTICS, BUCHAREST (2010) at 6. Yet, the authors make that claim without any critical examination of the benefits of marriage to women. Their only concern seems to be an increase in the birthrate.

227 Boboc et al., *supra* note 226, at 12.

within marriage to vanish. It has, however, facilitated couples in finding more space to express their individual values within marriage. Baker and Elizabeth also report that many opposite-sex couples choose to enter civil unions, and not marriages, out of concern for the “religious connotations or gendered traditions” of marriage.²²⁸ Because marriage has no legal value, couples are able to make long-term commitments as part of a civil union without legal penalty. The absence of marriage having legal value facilitates the choice to marry and fosters individual expression within the institution of marriage.

Now that the Supreme Court has opened up the state-sanctioned institution of marriage to same-sex couples, we should ask ourselves how we can best ensure that couples enter that institution to attain “the hope of companionship and understanding.”²²⁹ Everyone benefits when individuals enter the institution of marriage solely as an expression of mutual love and long-term commitment rather than out of a desire to attain instrumental gain from the government. Individuals will only experience true marriage equality when the freedom to marry includes the freedom *not* to marry. “I don’t” should become as well respected as “I do.”

228 *Id.* at 7. Studies of other countries also suggest that awareness of the likely “gender specialization within marriage” causes women in some countries, such as Japan, to choose not to marry at all. See James M. Raymo & Hiromi Ono, *Coresidence With Parents, Women’s Economic Resources, and the Transition to Marriage in Japan*, 28 J. FAM. ISSUES 653, 654 (2007).

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