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OBERGEFELL'S CONSERVATISM: REIFYING FAMILIAL FRONTS

*Clare Huntington**

I am delighted with the result in *Obergefell v. Hodges*,¹ but I am unhappy with the Court's reasoning.² In lieu of a straightforward, and far more defensible, decision based purely on the Equal Protection Clause,³ Justice Kennedy's reliance on the Due Process Clause is deeply problematic.

A substantive due process analysis required the Court to define marriage and explain its social importance. This meant the Court had to choose between competing images—social fronts—of marriage. If it had used an equal protection analysis, the Court would not have had to decide whether marriage *is* traditional or marriage *is* more plural. Instead, the Court would have espoused a thinner notion of marriage—that, whatever its essential nature, marriage must be available on equal grounds unless the state can convincingly argue otherwise. An equal protection analysis also would have obviated the need for Justice Kennedy's paean to marriage.

There are two lamentable consequences of the Court's framing. It unnecessarily disrespects people who in good faith have a different view of the social front of marriage. And it reifies marriage as a key element in the social front of family, further marginalizing nonmarital families.⁴

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

2. I laid out my concern about basing marriage equality on the Due Process Clause rather than the Equal Protection Clause before *Obergefell* was decided. See Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 646–49 (2013). As I explain in this Essay, *Obergefell* confirmed that I was right to worry. See *infra* Parts I, II.

3. Justice Kennedy, in his majority opinion for the Court, did invoke the Equal Protection Clause as an additional basis for its holding, see *Obergefell*, 135 S. Ct. at 2602–05, but the equal protection analysis is very thin, see *id.* at 2623 (Roberts, C.J., dissenting) (“The majority does not seriously engage with [the equal protection] claim. Its discussion is, quite frankly, difficult to follow.”).

4. There are other problems with the opinion as well, some of which also flow from the decision to rest the opinion primarily on the Due Process Clause. For example, marriage equality is an important substantive and symbolic victory for promoting equal treatment of LGBT individuals, but the majority opinion is unnecessarily anchored to marriage. If the Court had seen discrimination in marriage as part of a larger question about equal citizenship, all LGBT individuals would have benefitted. A more robust LGBT rights agenda would include protection from discrimination in employment, housing, and much more. *Support the Equality Act*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/support-the-equality-act> (last visited Sept. 27, 2015) (“Even after a marriage victory at the Supreme Court, in most states in this country, a couple who gets married at 10 a.m. remains at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply

I. THE IMPORTANCE OF SOCIAL FRONTS

Justice Kennedy framed the majority's analysis as a struggle between competing social fronts of marriage, with the Court as the arbiter. To understand what this means and why it is problematic, let me back up.

As I have written elsewhere,⁵ family law is performative. That is, iterated, everyday performances of family roles—from wearing a wedding ring to sending holiday cards—create and then maintain collective understandings of categories such as mother, father, child, and family itself. Think about presidential candidates crossing the stage with their smiling, opposite-sex spouses and biological or adopted children. These performances send a message about the centrality of the traditional, nuclear family in our culture. Or think about school pick-up time, when the playground is filled with mothers and female babysitters. These performances send a message about the role of women as primary caregivers.

Over time, these performances shape what the sociologist Erving Goffman called a social front—a shorthand for conveying information about a category of people.⁶ A woman pushing a stroller is a mother. A man throwing a ball to a young child is a father. Almost by definition, social fronts tend to be narrow, reflecting the typical and sometimes idealized performance.

Social fronts change over time, but the way they typically change is through other, iterated performances. When politicians reflect other family structures,⁷ it sends a message about the potential faces for “family.” And when fathers begin to pick up children from school, their performances may initiate, even if only fitfully, the slow process of changing the social front of fatherhood.⁸

The law plays a role in this process, drawing on and often reinforcing social fronts. When deciding whether the Constitution should protect the relationship between an unmarried father and his child, for example, the

for posting their wedding photos on Facebook.”) [<http://perma.cc/5CFD-5E68>]. An opinion based solely on the Equal Protection Clause, and not “the transcendent importance of marriage,” would have sent the message that equal citizenship is about more than marriage. *Obergefell*, 135 S. Ct. at 2594. Additionally, there would have been greater clarity with respect to the level of scrutiny applicable to laws and actions that treat LGBT individuals differently from heterosexual individuals.

5. See Huntington, *supra* note 2.

6. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 26–27 (1959). Wearing a white laboratory coat, for example, conveys a general message of cleanliness and modernity to the audience without fleshing out the details of precisely how this particular professional is clean and modern. *See id.* at 26.

7. Former New York City Mayor Michael Bloomberg, for example, has a long-time companion who accompanied him to many official events. *See* Michael Cooper, *City's 'First Lady' to Leave State Position for Private Firm*, N.Y. TIMES (Feb. 15, 2007), <http://www.nytimes.com/2007/02/15/nyregion/15diana.html> [<http://perma.cc/3CNW-J65H>].

8. *See* Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 58–78 (2012) (describing the multiple “ways in which legal and social norms configure parenting as a sexed endeavor,” with mothers understood as the primary parent and fathers as peripheral caregivers, but also offering solutions for changing these norms).

Supreme Court looked to the dominant social front of fatherhood—breadwinning—to judge whether the would-be fathers deserved legal recognition.⁹ By making this marker of fatherhood legally salient, the Court reinforced the social front of fatherhood: fathers are men who provide for their children.

The law can also play a role in altering a social front. When Sweden changed its parental leave policy to encourage more fathers with young children to take time off, for example, this helped shift the social front of fatherhood, with men more likely to combine careers with caregiving.¹⁰

It is more fraught, however, when a court, as opposed to a legislature, chooses between competing social fronts. Marriage equality is a good example.

The debate over marriage equality was fundamentally about controlling the meaning—the social front—of marriage. Advocates of marriage equality wanted access to the tangible and intangible benefits of marriage, but they knew the way to get there was by hewing closely to the existing social front of marriage. Thus, advocates carefully selected plaintiffs and crafted media campaigns that preserved the core of the social front. Lesbians and gay men were portrayed as long-term, committed partners and parents who sought nothing more than normalcy—to be a soccer mom or to say grace before a family dinner.¹¹ Framed this way, the claim for legal recognition was not so great a demand. The advocates did not want to change marriage, they simply wanted access to it.¹²

Social conservatives, in turn, believed that allowing same-sex couples to marry would drastically change the social front of marriage. From their

9. See Huntington, *supra* note 2, at 620–21 (discussing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983)). The Court thus took a narrow, idealized social front, cemented it into the legal category of “father,” and then invoked this construction to judge all aspirant fathers. Breadwinning is still the dominant social front of fatherhood. See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 210–11 (2015) (discussing the continuing norm of fathers as breadwinners).

10. See Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 38–39 (2012) (discussing the changes in Sweden’s law and noting both its relative success as well as limitations in equalizing caregiving responsibilities between men and women); Katrin Bennhold, *In Sweden, Men Can Have It All*, N.Y. TIMES (June 9, 2010), http://www.nytimes.com/2010/06/10/world/europe/10iht-sweden.html?_r=0 (describing the changes in social norms after the change in the law) [<http://perma.cc/2GJP-76K5>].

11. Natalie Wilson, *From Gestation to Delivery: The Embodied Activist Mothering of Cindy Sheehan and Jennifer Schumaker*, in *MOTHERS WHO DELIVER: FEMINIST INTERVENTIONS IN PUBLIC AND INTERPERSONAL DISCOURSE* 231, 243 (Jocelyn Fenton Stitt & Pegeen Reichert Powell eds., 2010) (describing the “500 Mile Walk for Togetherness” by Jennifer Schumaker, a lesbian who called herself a “lesbian soccer mom,” in an effort “to create a sustainable link between forces that wish to ‘other’ her”); GetToKnowUsFirst.org, *Xavier & Michael*, YOUTUBE (Jan. 21, 2009), http://www.youtube.com/watch?v=SeK_wGyHD8 (depicting a happy, functional two-father family playing basketball and saying grace before dinner) [<http://perma.cc/X3B5-4N7L>].

12. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves.”).

perspective, if the social front of marriage was no longer one man and one woman, it would be that much harder for conservatives to teach their children that men and women have distinct roles to play in family life.¹³ Families could teach this lesson at home, but it would be more difficult to do so if the social front of marriage did not reflect a traditional gender division.¹⁴

When courts and legislatures decided whether, as a matter of policy or constitutional necessity, same-sex couples should be allowed to marry, these legal institutions weighed in on the dispute over the social front of marriage.

But courts and legislatures are not similarly situated when it comes to making these decisions. It is one thing for a legislative proposal or a ballot initiative to determine the social front of marriage, because those processes allow multiple voices and sustained debate about this sensitive social issue. By contrast, it is more problematic for the judiciary to choose the appropriate social front.

And yet Justice Kennedy did exactly this. By basing its opinion primarily on the Due Process Clause, the Court had to define marriage and then ask whether LGBT individuals could be excluded from it. Justice Kennedy argued that allowing same-sex couples to marry would not drastically alter the social front of marriage. As he stated:

Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. . . . Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities.¹⁵

In other words, same-sex couples are no different from opposite-sex couples, and because there are good reasons to allow same-sex couples to marry (such as conferring dignity and providing benefits), the state cannot prevent them from doing so.¹⁶

All this may be true, but who is Justice Kennedy to choose between competing social fronts? It is hardly surprising that Chief Justice Roberts raised charges of judicial activism.¹⁷ The objections in his dissent can be

13. *See id.* at 2594 (“To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman.”).

14. Ken Blackwell, *Civil Unions and True Marriage*, WORLD (Aug. 24, 2012, 5:31 PM), http://www.worldmag.com/2012/08/civil_unions_and_true_marriage (describing the dangers of allowing same-sex couples to marry, including the concern that “schoolchildren [will be] proselytized in the early grades [with] the new definition of marriage”) [<http://perma.cc/HP7U-5Y85>].

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

16. *Id.* at 2599 (“The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”).

17. *Id.* at 2611–12 (Roberts, C.J., dissenting).

understood as a criticism of the Court choosing one social front over another.¹⁸

A more persuasive, and arguably less provocative, way to uphold the right of same-sex couples to marry would have been to base the decision purely on the Equal Protection Clause. In an equality analysis, the Court would not have overtly chosen between social fronts. The Court would have concluded that regardless of the social meaning of marriage, states cannot deny access to it based on sexual orientation absent a rational, important, or compelling state interest. In this way, the Court would not have defined the proper social front of marriage, but instead determined the permissible grounds for state classifications.¹⁹

As a matter of institutional competence, courts are much better suited to the task of evaluating claims of equality and discrimination than choosing between contested social fronts. Moreover, there are significant disadvantages to the framing the Court chose, as the next two parts explore.

II. AN UNNECESSARY FIGHT

In reality, marriage equality *was* a fight over the social front of marriage, but Justice Kennedy framed the legal question in these terms as well. By doing so, he unnecessarily provoked social conservatives. I am not arguing that the Court should have avoided the constitutional issue. I disagree with Chief Justice Roberts that this issue should have been left to the political process. Rather, my point is that there was an alternative path for reaching the same conclusion and that taking the other route would have been more respectful of both sides.

An equal protection analysis would have acknowledged the stakes at play for both advocates and opponents of marriage equality. The Court would have found a constitutional basis for marriage equality without explicitly choosing one social front over another and thus disparaging social conservatives who felt that their own public conception of marriage was threatened. It would have been more respectful to say to social

18. *See id.* at 2611 (“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”); *id.* (“Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage.”); *id.* at 2612 (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial ‘caution’ and omits even a pretense of humility, openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’”).

19. The dissent by Chief Justice Roberts intimated that targeted claims under the Equal Protection Clause might have been more persuasive to him, too. *See id.* at 2623 (rejecting a basic equal protection claim because state law “distinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage,’” but noting that “[t]he equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits”).

conservatives, “We understand your views on marriage, but equality principles require opening marriage to same-sex couples.”²⁰

To be sure, the effect of an equal protection analysis would still have been a change in the social front of marriage, and social conservatives would likely still have felt a strong sense of loss. But the rationale for the loss—that equality demands equal access, not that marriage is *X*—would have acknowledged multiple social conceptions of marriage while still upholding the Constitution.

By defining marriage as more plural, the Court said to social conservatives that *this* is what the institution means, not just legally, but also culturally. In an equality analysis, the Court would have said that whatever marriage means culturally, a state cannot deny access to it without distinctions that have a *state* (as opposed to a private, cultural) interest as a basis. In other words, the problem is that Justice Kennedy gave the Court the power to change not only the law but also the culture.

III. AN UNNECESSARY DENIGRATION

Justice Kennedy’s opinion is not only an affront to (some) people within the institution of marriage, but also to individuals outside the institution.²¹

Far from the marble halls of the Supreme Court, marriage is not a central feature of family life in many communities. Marriage rates remain strong for college-educated individuals, but they are steadily declining for those with less education and income.²² As a result, many children—40 percent

20. Moreover, equality principles are at the heart of the American legal system and therefore would have been more persuasive than claims based on the transcendence of marriage. Indeed, one of the most resonant arguments in the marriage equality movement has been the comparison of domestic partnership regimes to racial “separate but equal” laws. *See, e.g.*, Governor Christine Gregoire, Marriage Equality Speech (Jan. 4, 2012), <http://www.digitalarchives.wa.gov/GovernorGregoire/speeches/speech-view.asp?SpeechSeq=222> (“While I understand the experiences of racial minorities and lesbian, gay, bisexual, and transgender Americans are not identical, laws that keep some Americans in a separate status are inherently unjust.”) [<http://perma.cc/AT6A-YUK5>]. These arguments immediately and intuitively—if also problematically—illustrate how restricting marriage to opposite-sex couples is discriminatory. *See e.g.*, R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 879–99 (2008) (arguing that the analogy obscures more than it illuminates and that scholars and advocates should focus on the many ways “identity-based restrictions . . . have served primarily to police and restrain expressions of identity and, ultimately, the range of possibilities for human intimacy”).

21. This discussion focuses on the effect of *Obergefell* on a particular demographic group—low-income, unmarried adults with shared children. For a critical discussion of the implications of marriage equality within LGBT communities, see Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688–89 (2008) (arguing that marriage equality advocacy risks “denigrating or shrinking an affective sexual liberty outside of marriage” and that the legal recognition of same-sex marriage risks bringing same-sex relationships within the constraints of heterosexual relationships, further marginalizing a conception of intimacy and desire not based on marriage).

22. For a book length treatment of this subject, see NAOMI CAHN & JUNE CARBONE, MARRIAGE MARKETS (2014).

nationally²³—are born to unmarried parents, most of whom will never marry each other.²⁴

In addition to choosing the social front of marriage, the opinion in *Obergefell* reified the social front of family as the marital family. By basing the opinion on the Due Process Clause, Justice Kennedy had to glorify marriage.²⁵ And he did, choosing very traditional language. According to Justice Kennedy, marriage is “a keystone of our social order,”²⁶ it “embodies the highest ideals of . . . family,”²⁷ and it “is essential to our most profound hopes and aspirations.”²⁸ Also according to Justice Kennedy, the importance of marriage is likewise felt by children: “[M]arriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”²⁹ Without “the recognition, stability, and predictability marriage offers, . . . children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”³⁰ These sweeping statements about the place of marriage in legitimizing a family are harmful both rhetorically and substantively.

The legal system already does far too little to support nonmarital families,³¹ and Justice Kennedy’s opinion reinforces the notion that these families are deviant. Every statement that Justice Kennedy makes for the Court can be read as an implicit criticism: a nonmarital family is *not* the keystone of the social order; it does *not* embody the ideal of family; and it is *not* essential to profound hopes and aspirations. And, by extension, nonmarital children are necessarily humiliated by their parents’ lack of formal marital status.

Nonmarital families face many challenges, and there is considerable evidence that children of unmarried parents have worse outcomes than children of married parents.³² But much of this is due to the factors that

23. See Brady E. HAMILTON ET AL., CTRS. FOR DISEASE CONTROL, BIRTHS: PRELIMINARY DATA FOR 2014 4 (2014), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_06.pdf [<http://perma.cc/2537-B8A9>].

24. Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 145–47 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (discussing a landmark study that found that more than 80 percent of unmarried parents are romantically involved at the time of birth but that these relationships typically do not endure).

25. This is because the Due Process Clause requires the identification of a fundamental right. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015). In other words, Justice Kennedy had to emphasize the importance of marriage to explain why excluding LGBT individuals was so injurious.

26. *Id.* at 2601.

27. *Id.* at 2608.

28. *Id.* at 2594.

29. *Id.* at 2600 (quoting *Windsor v. United States*, 133 S. Ct. 2675, 2694 (2013)).

30. 135 S. Ct. at 2600–01.

31. I have explored this issue at length elsewhere. See generally Huntington, *supra* note 9.

32. See *id.* at 196.

tend to accompany nonmarital childbearing, notably lower incomes and lower parental education.³³ Justice Kennedy's opinion makes too much of marital status as a marker of integrity and belonging.³⁴

As a substantive matter, Justice Kennedy's framing reinforces family law's neglect of nonmarital families. The problem with family law is that it places marriage at the foundation of legal regulation. Family law is really marital family law, and it is deeply problematic for nonmarital families, undermining relationships in nonmarital families in several distinct ways.

First, marital family law's doctrine pushes fathers out of families, allowing mothers to control fathers' access to shared children.³⁵ It also exacerbates conflict in families through child support laws that are designed for divorcing families.³⁶

Second, marital family law has developed legal institutions that work relatively well for married families but not at all for unmarried families. Marital family law presumes that couples will go to court at the end of relationships, but unmarried couples do not need the state to end their relationships, and most cannot afford to go to court to formalize issues such as custody.³⁷ This means that unmarried parents are left without an effective institution to help them transition from a family based on a romantic relationship to a family based on co-parenting. Thus, unmarried parents do not have the benefit of clearly established expectations for their rights and responsibilities following a breakup.³⁸

Finally, marital family law—especially through child support and custody rules—reinforces traditional gender norms that are starkly at odds with the reality of nonmarital family life. Most unmarried fathers struggle to support their children economically, and most unmarried mothers are both full-time caregivers and breadwinners.³⁹ The dominant social front of fathers as breadwinners renders unmarried fathers failures, undermining their place in the family by telling mothers and children that fathers are not acting as they should. In all these ways, marital family law weakens the already tenuous bonds that tie nonmarital families together.

33. *See id.* at 197–98.

34. *See generally* R.A. Lenhardt, *Marriage As Black Citizenship?*, 66 HASTINGS L.J. 1317 (2015) (describing a more robust notion of citizenship that does not derive wholly from marriage); *see also* R.A. Lenhardt, *Integrating Legal Marriage*, 81 FORDHAM L. REV. 761 (2012) (warning that the dominant marriage equality strategy of distinguishing deserving families from undeserving families risked further marginalizing nondominant families).

35. Huntington, *supra* note 9, at 202–09.

36. *Id.*

37. *Id.* at 209–10.

38. *Id.* at 210.

39. *Id.* at 210–11.

CONCLUSION

There is much more the law can and should do to support and strengthen nonmarital families,⁴⁰ but we need to take this work seriously, beginning with where families are and not assuming marriage is the prescription for all that ails American families.

Justice Kennedy's denigration of nonmarital families, even if unintentional, is deeply troubling. By reifying the social front of family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser. An opinion based on the Equal Protection Clause would not have had to elevate marriage and, in the process, devalue nonmarital families.

In an era when marriage has become a marker of socioeconomic status, *Obergefell* has the effect of further entrenching the divide between marital and nonmarital families. Rather than marginalize nonmarital families, the law needs to strengthen and support these families. *Obergefell* makes it that much harder to do so.

My intention is not to rain on the marriage equality parade. I am thrilled with the outcome, and I am proud to live in a country that embraces marriage equality. But I look forward to the day when we can celebrate opinions that embrace equality and belonging for all families.

40. *Id.* at 225–36 (proposing changes to family law). *See generally* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS (2014) (proposing more broad-based changes).