

2015

Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality

Catherine Powell
Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

Digital Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Society Commons](#)
Network

Logo Recommended Citation

Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 Fordham L. Rev. 69 (2015).

Available at: <https://ir.lawnet.fordham.edu/flr/vol84/iss1/7>

This Foreword is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

UP FROM MARRIAGE: FREEDOM, SOLITUDE, AND INDIVIDUAL AUTONOMY IN THE SHADOW OF MARRIAGE EQUALITY

Catherine Powell*

Whatever the theories may be of woman's dependence on man, in the supreme moments of her life, he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. . . . There is a *solitude*, which each and every one of us has always carried. . . . Such is individual life.

-Elizabeth Cady Stanton¹

*Obergefell v. Hodges*² represents a tremendous victory for those of us who believe that each individual has the right to love, form bonds, and create families with whomever one so desires. Through *Obergefell* and the line of cases from *Griswold v. Connecticut*³ and *Loving v. Virginia*⁴ onward, the Court has now repeatedly affirmed the freedoms to plan, to choose, and to create one's own family as fundamental.

The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy's adulation for the dignity of marriage⁵ risks undermining

* Associate Professor of Law, Fordham University School of Law. For input, I am very grateful to Elizabeth Cooper, Clare Huntington, Joseph Landau, Ethan Leib, Robin Lenhardt, Darren Rosenblum, Reva Siegel, and participants in a panel discussion on equality at the International Society of International Law annual conference, New York University School of Law (July 2015). I am also thankful to Christine Calabrese, Amanda Kane, and Devan Grossblatt for excellent research assistance.

1. Elizabeth Cady Stanton, Address to the Congressional Judiciary Committee: The Solitude of Self (January 18, 1892) (emphasis added), http://www.pbs.org/stantonanthony/resources/index.html?body=solitude_self.html [<http://perma.cc/L3H4-G72Q>]. I would like to thank Reva Siegel for drawing my attention to this speech, which Stanton delivered when she retired at seventy-six years old as President of the National American Woman Suffrage Association. See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhardt*, 117 YALE L.J. 1694, 1800 (2008). Stanton repeated this widely reported speech before the U.S. House Committee on the Judiciary and the U.S. Senate Committee on Woman Suffrage in 1892, and 10,000 copies of the *Congressional Record's* publication of it were distributed around the country. *Id.*

2. 135 S. Ct. 2584 (2015).

3. 381 U.S. 479 (1965).

4. 388 U.S. 1 (1967).

5. See also *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (recognizing same-sex marriage as "a far-reaching legal acknowledgment of the intimate relationship between

the dignity of the individual, whether in marriage or not. Often when we celebrate great landmark cases, such as *Obergefell*, it is necessary to examine the dark corners of these opinions to ensure we can continue to “bend the arc toward justice”⁶ to perfect our union.⁷ As Justice Kennedy himself acknowledged, “The nature of injustice is that we may not always see it in our own times.”⁸ While I agree with most of Justice Kennedy’s analysis in *Obergefell*, aspects of his reasoning have limitations which signal that work has yet to be done in ensuring the liberty, equality, and dignity⁹ which the majority extols.

two people, a relationship deemed by the State worthy of *dignity* in the community equal with all other marriages” (emphasis added).

6. See Martin Luther King, Jr., Address at the Southern Christian Leadership Conference: Where Do We Go From Here? (August 16, 1967), http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention/ [<http://perma.cc/9LWP-FZDA>]. In proclaiming that “the arc of the moral universe is long, but it bends towards justice,” *id.*, Martin Luther King, Jr. was quoting the nineteenth century abolitionist and Unitarian minister, Theodore Parker. See Jamie Stiehm, *Oval Office Rug Gets History Wrong*, WASH. POST (Sept. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/03/AR2010090305100.html> [<http://perma.cc/4PUV-TQEN>].

7. See U.S. CONST. pmbl. (beginning “[w]e, the People of the United States, in Order to form a more perfect Union”). More recently, President Obama has used variations of the phrase “perfect our union” in numerous speeches dating back to his 2008 presidential campaign. See, e.g., Senator Barack Obama, Address to the National Constitution Center in Philadelphia, Pennsylvania: A More Perfect Union (Mar. 18, 2008), <http://www.politico.com/news/stories/0308/9100.html> [<http://perma.cc/3M5P-5ABC>]; David Nakamura, *Obama on Same-Sex Marriage Ruling: ‘We Have Made Our Union a Little More Perfect’*, WASH. POST (June 26, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/06/26/obama-on-same-sex-marriage-ruling-we-have-made-our-union-a-little-more-perfect/> [<http://perma.cc/7V2M-RXTH>].

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

9. While Justice Kennedy does not provide a definition of dignity, note that the meaning of dignity is “famously contested.” Siegel, *supra* note 1, at 1799. Side stepping the various debates about “dignity” as a concept, this Essay instead takes as its central focus the notion of individual “autonomy” and explores the value of situating individual autonomy within marriage by drawing on the theory of relational autonomy. See *infra* note 26 and accompanying text. For discussion and critique of the dangers and risks of constitutionalizing “dignity,” see, for example, Catharine MacKinnon, *Sex Equality in Global Perspective* 4 (Oct. 29, 2014) (unpublished manuscript) (on file with author) (“[R]educing [the] injury [of sex inequality] to the feeling of indignity in the subordinated person makes it all mental and within the unequally treated person, which tends to cover up, even trivialize, the coercive and injurious external conditions and systemic acts usually involved, the material deprivations and physical harms inflicted by dominant groups, along with the resources and status they benefit from.”); Katherine Franke, “*Dignity*” *Could Be Dangerous at the Supreme Court*, SLATE (June 25, 2015), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html [<http://perma.cc/93GH-3HUL>]. Franke criticizes Justice Kennedy’s reliance on dignity, because of the way it can rebound, as “[d]ignity does its work by shifting stigma from one group to . . . other groups who, by contrast, are not deserving of similar ennoblement. These others include ‘less-deserving’ groups like unmarried mothers, the sexually ‘promiscuous,’ or those whose relationships don’t fit the respectable form of marriage.” Franke, *supra*. But see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (“The introduction of a[n] . . . overarching term like ‘dignity’ that acknowledges the links between liberty and equality is overdue.”).

In exalting “the transcendent importance of marriage” throughout “the annals of human history,” Justice Kennedy opines “[i]ts dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons.”¹⁰ Observing “[t]he centrality of marriage to the human condition,” Justice Kennedy proclaims that “[t]he lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.”¹¹ The shortcoming in Justice Kennedy’s otherwise appropriate celebration of marriage is that it obscures the dignity of the individual, whether married or not.

The flaw in Justice Kennedy’s analysis is most clearly revealed in a particularly shortsighted statement, in which Justice Kennedy writes, “Marriage responds to the universal fear that a lonely person might call out only to find no one there.”¹² This observation ignores the fact that in the end, we are each all alone—for marriage is always contingent.¹³ After all, “singleness includes everyone at some point, even those who are married: love ends; spouses cheat; someone dies first.”¹⁴ In fact, single Americans are now more than half the U.S. population.¹⁵ Indeed, “To be in a marriage, no matter how strong, is always a precarious condition, which means that the [presumed] dignity [of marriage] you’ve been given can be taken away at any moment.”¹⁶

In fact, there is nothing shameful nor undignified in solitude. Indeed, solitude—and comfort within solitude—is a necessary condition for individual fulfillment as, in the process of “tak[ing] counsel with [oneself] in solitude,” one can learn to reach one’s highest potential.¹⁷ It is little wonder, then, that the U.S. approach to constitutional rights is primarily based on individual liberty, for it is the basic building block for securing human dignity (1) in our lives alone with ourselves, (2) within marriage, (3)

10. *Obergefell*, 135 S. Ct. at 2593–94.

11. *Id.* at 2594.

12. *Id.* at 2600.

13. To be fair, Justice Kennedy, in passing, recognizes the contingent nature of marriage in noting that “[i]t offers the hope of companionship and understanding and assurance that *while both still live* there will be someone to care for the other.” *Id.* at 2600 (emphasis added).

14. Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?ref=opinion&_r=0 [<http://perma.cc/S5GW-K27Q>]; *see id.* (“I started to wonder how Justices Sonia Sotomayor and Elena Kagan—two of the most high-profile single women in the federal government—felt as they reviewed and had to join Justice Kennedy’s opinion . . .”).

15. Rich Miller, *Single Americans Now More than Half the U.S. Population*, CHI. TRIB. (Sept. 10, 2014), <http://www.chicagotribune.com/news/nationworld/chi-single-americans-population-20140910-story.html> [<http://perma.cc/79PW-PV9T>].

16. Cobb, *supra* note 14.

17. William Deresiewicz, Lecture at the United States Military Academy at West Point: *Solitude and Leadership* (Oct. 2009), <https://theamericanscholar.org/solitude-and-leadership/#.Vb-4WPlDsXg> [<http://perma.cc/9WVL-A775>].

within other relations (including with our children), and (4) within society and our relationship with the state.¹⁸

Yet throughout the opinion, Justice Kennedy elides the individual and the married couple.¹⁹ He also obscures the right to marry (or *not*) with the right to marriage.²⁰ This conflates, on the one hand, the negative duty of the state not to interfere in individual rights to exercise the freedom to marry (or not), and, on the other hand, any positive obligation of the state to support affirmatively individual rights to marry and the institution of marriage. The opinion leaves me wondering where sovereignty lies. Was Justice Kennedy's intention to empower the individual in the exercise of "self-sovereignty"²¹ in making choices surrounding one's association and family? Was he seeking to empower the sovereignty of the family?²² Or was Justice Kennedy's objective to define limits on the sovereignty of the state in determining which associations (i.e., marriages) it can recognize or not? Or was he aiming at all three?

Justice Kennedy's celebration of the married couple over the solitary individual is especially problematic because it overlooks—and even implicitly undermines—the importance of individual autonomy and the importance of solitude in defining and refining individual autonomy. In fact, individual autonomy empowers the choices we make, including decisions about with whom we associate. Marriage itself has evolved from being an arrangement of political power (in ancient times where rulers married off their daughters for political power), to economic power (in the

18. Implicitly, Justice Kennedy recognizes this in the way he organizes a key part of his opinion around four "principles and traditions" demonstrating that "the reasons marriage is fundamental under the Constitution" are that the right to personal choice in marriage supports: (1) "individual autonomy," (2) "a two-person union unlike any other," (3) "children and families," and (4) "a building block of our national community." *Obergefell*, 135 S. Ct. at 2599–601.

19. See, e.g., *id.* at 2599 ("[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."); *id.* at 2600 ("The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'" (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013))); *id.* ("[W]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2005))).

20. For a critique of this, see Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 41–42 (2015). As Leib notes, commentators "saw that the slippage between the right to marry and the right to marriage long before *Obergefell* provided reason to revisit the question." *Id.* at 42 n.4 (citing Martha C. Nussbaum, *A Right to Marry*, 98 CALIF. L. REV. 667, 685–89 (2010); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005)).

21. For an elaboration of the concept of "self-sovereignty" (in the context of reproductive rights for women), see Siegel, *supra* note 1, at 1797–800.

22. As John Locke indicated, families can be seen as small governing structures, as "[t]he first society was between man and wife." JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 39 (J. Gough ed., 1947). In dissent in *Obergefell*, Justice Thomas points to this Lockean notion of family, but Justice Thomas does so to argue that, at the founding, the "right to engage in the very same activities that petitioners have been left free to engage in—mak[e] vows, hold[] religious ceremonies celebrating those vows, [and] rais[e] children . . . was understood to predate government, not to flow from it." *Obergefell*, 135 S. Ct. at 2636 (Thomas, J., dissenting).

era of husbands as breadwinners and wives as caregivers), to love and self-expression in the twenty-first century.²³ In a sense, marriage has become an extension of the self, a way to amplify and enhance selfhood and self-sovereignty.

Realizing self-sovereignty has been particularly important for women's empowerment, as the Elizabeth Cady Stanton quote at the start of this Essay reflects.²⁴ Given the long history of inequality women have experienced and continue to experience in marriage, families, and society more broadly, recognizing the self-sovereignty and independence of women is essential for gender equality, specifically, and human dignity, more generally.

It is thus essential to interrogate further the fact that, in elevating the dignity of marriage over the autonomy of individuals, Justice Kennedy muddles the connections between both (1) the individual and collective interests at stake, and (2) the government's negative and affirmative obligations toward marriage, the individuals within marriage, and individuals within other family structures. While Justice Thomas picks up on the dichotomy between the negative and positive duties of the state,²⁵ my approach to the validity of the dichotomy is quite different from his in that my view is that, in addition to having a duty not to interfere in the individual's exercise of rights, the state should also play an affirmative role to support both relationships and individuals (and my bottom line on the same-sex marriage question is the same as the majority's, even on the more narrow understanding that the government is strictly limited to the negative obligations of the night watchman state).

As a vehicle for mediating our relationships with each other and the state, marriage is akin to a form of governance that needs to be disaggregated to better understand (1) how individual rights, autonomy, and choices can be enhanced (inside and outside marriage) even as we value the associational dimensions of rights, and (2) how we might think more expansively about the scope of the government's duties in supporting individual choices, conduct, and experiences within and beyond the governing units of the family and the state.

I. INDIVIDUAL AUTONOMY IN RELATION TO OTHERS

While Justice Kennedy collapses the individual and collective interests at stake in ways that diminish the value of solitude, his analysis can be better understood (and strengthened) if we flip the analysis and evaluate marriage from the standpoint of relational autonomy.²⁶ In other words, as

23. STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* 11 (2005).

24. See *supra* note 1 and accompanying text.

25. See, e.g., *Obergefell*, 135 S. Ct. at 2632–637 (Thomas, J., dissenting).

26. For further discussion, see JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND THE LAW* (2011). In discussing relational autonomy, Nedelsky explains that rather than view autonomy in an "asocial atomistic image of the self-made man[,] many contemporary philosophers of autonomy . . . gravitate toward relational or intersubjective accounts of autonomy." *Id.* at 9 (quoting MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* (2003)).

individuals, we obviously do not make choices in isolation with regard to intimate companions, other associates, and the state; rather, these relationships also shape and inform who we are and how we experience our autonomy.

Justice Kennedy might have distinguished the individual and collective interests at stake in marriage²⁷ because there are not only historic but also *ongoing* inequalities *within* marriages—particularly between breadwinners and caregivers.²⁸ Relationships between breadwinners and caregivers within marriage are often based on relative power, dominance, and subordination. Federal law not only fails to address, but, if anything, possibly facilitates unequal division of household responsibilities.²⁹ For example, for married couples with a “wage-earning spouse” (typically a man) and a “stay-at-home spouse” (typically a woman), federal tax law provides a marriage “bonus,” in that the couple pays less in total taxes than they would if they were single; for a married couple whose salaries are more equal, however, federal tax law provides a marriage “penalty.”³⁰

Once we understand that we fundamentally exist in relation to others, we recognize that we become autonomous *with* others—with parents, teachers, spouses, employers, and the state—even as we are embedded within relationships of power.³¹ Autonomy can therefore be understood as a capacity that can be nurtured or undercut in life through the relationships and the societal structures we inhabit.³²

Even though the U.S. Bill of Rights is founded on individual rights, we often exercise these rights in association with others, such as with the right to assemble. But in recognizing the freedom to exercise these associational rights—to speak, to assemble, to organize politically with others, to share intimate relationships and procreate with one another—the U.S. constitutional text and jurisprudence place *individual* choice and autonomy at the center. The right to be oneself—on one’s own terms and with

27. See, e.g., *Obergefell*, 135 S. Ct. at 2605–06.

28. For an excellent early discussion that captures the theory of how same-sex marriage could be sought as a means to disrupt traditional structures of gender and power within marriage and family law, see generally Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 9 (1991).

29. See Deborah Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 749–51, 753–55 (2012).

30. See Deborah Widiss, *Marriage Policy Encourages One Spouse to Stay Home and the Other to Work: How Will This Affect Same-Sex Couples As They Gain More and More Legal Rights?*, ATLANTIC (June 5, 2013), <http://www.theatlantic.com/sexes/archive/2013/06/marriage-policy-encourages-one-spouse-to-stay-home-and-the-other-to-work/276566/> (“Even federal welfare programs encourage a breadwinner-caretaker divide for married couples, by imposing work requirements on families collectively, so that it makes sense for one parent to work and the other to provide childcare. (In fact, if both parents work, they likely would exceed income eligibility).”) [<http://perma.cc/594F-ABUU>]. It is not clear to what extent the gender asymmetry in caregiving-breadwinning roles is shaped by legal frameworks and “how much it stems from societal norms regarding feminine and masculine roles,” but “[s]ame-sex marriage can serve as a natural experiment to help tease these factors apart.” *Id.*

31. NEDELSKY, *supra* note 26, at 3–5.

32. *Id.*

whomever one chooses—is itself a fundamental form of individual liberty. As the U.S. Supreme Court noted in *Lawrence v. Texas*,³³ at the core of liberty “is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³⁴ But implicit in *Lawrence* is the idea that autonomy as individuals is developed by, exercised in, and shaped by our associations, particularly our intimate associations.

A few simple examples serve to illustrate this point. First, consider that each of us often becomes our truest selves in the course of talking with a close friend, lover, or partner. “This is what we call thinking out loud, discovering what you believe in the course of articulating it.”³⁵ Second, consider studies that suggest marriage helps individuals—particularly men—live longer.³⁶ Our associations with others can help us be the best versions of ourselves. Finally, consider one survey suggesting that while parents are more sleep deprived, exercise less, and have less time for entertainment than nonparents, parents are “happier” based on the rewards and fulfillment of parenting.³⁷ These considerations demonstrate that humans are social creatures and that our relationships shape our sense of self and our “autonomy.”

While U.S. constitutional rights are framed in terms of rights that belong to individuals, the right to marriage obviously has associational dimensions. Justice Kennedy essentially merges individual and shared rights of married couples when he speaks of “the liberty of same-sex couples” and the “denial to same-sex couples of the right to marry” before concluding that “[t]he Court now holds that same-sex couples may exercise the fundamental right to marry.”³⁸ Who is the rights-holder here? At points, he treats the rights of the individual more distinctly from the rights of the married couple as a unit, in, for example, stating that “the right to marry is a fundamental right inherent in the liberty of the *person*, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex

33. 539 U.S. 558 (2003).

34. *Id.* at 562 (striking down Texas’s anti-sodomy law and noting “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”).

35. Deresiewicz, *supra* note 17.

36. Melaina Juntti, *Does Marriage Help You Live Longer?*, MEN’S J. (June 10, 2014), <http://www.mensjournal.com/health-fitness/exercise/does-marriage-helps-you-live-longer-20140610> (“Marriage is both a cause and a consequence of good health Research shows that healthier people are more likely to get married in [the] first place and less likely to divorce. However, while this is definitely part of the equation, most of these studies suggest that marriage also causes good health and improves overall well-being—especially for men.” (quoting RAND Corporation sociologist Michael Pollard)) [<http://perma.cc/E5VM-6846>].

37. See John Dick, *Hands Down, People Without Kids Have Better Lives—Except for This One Major Thing*, QUARTZ (Sept. 11, 2014), <http://qz.com/262645/people-without-kids-live-better-than-parents-on-all-fronts-except-one/> (“[M]aybe joy indeed doesn’t just have to come from extrinsic things and fabulous social lives—it can come from the adventure of raising a family, from teaching and nurturing others, from sacrifice, and from unconditional love.”) [<http://perma.cc/N3X8-KM6R>].

38. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05.

may not be deprived of that right and that liberty.”³⁹ A relational autonomy standpoint may create a useful bridge to understand the ways in which these distinct sets of interests are interrelated.

II. THE INDIVIDUAL IN RELATION TO THE STATE

Justice Kennedy also collapses the notion of negative and positive duties of the state. Justice Thomas criticizes this, noting that since U.S. rights are based on the Lockean negative rights paradigm,⁴⁰ there is no obligation of the state to affirmatively recognize same-sex marriage.⁴¹ The state merely needs to abide by its negative obligation not to interfere with liberty, for example, by criminally prosecuting couples.⁴² However, from a relational autonomy standpoint, the project of securing rights should not only be to protect the individual from the state and keep the state out, but also to use law to construct relations with the state that enhance autonomy.⁴³

Even so, the Supreme Court has repeatedly rejected the notion that the state owes affirmative duties to individuals.⁴⁴ In fact, supporting a “positive” duty, for example, to provide welfare benefits to married couples, is actually not materially or conceptually different (nor does it necessarily require greater affirmative government outlays) from the “negative” duty of the state not to interfere in the classic right to liberty.⁴⁵ The classic right to liberty requires *actively* and *affirmatively* supporting the cost of a police force, of a judicial system, and of the right to counsel for indigent defendants. To use Justice Thomas’s example of *Loving v. Virginia*—in his claim that liberty is merely a negative duty⁴⁶—protecting the Lovings from criminal prosecution for marrying actually required an expansive system comprising police, judges, lawyers, courthouses, and the entire apparatus of the rule of law to defend their right to marry.

Contrary to Justice Thomas’s stingy view of the role of the state, Justice Kennedy acknowledges a positive role for the federal government, given the “constellation of benefits that the States have linked to marriage”⁴⁷—

39. *Id.* at 2604 (emphasis added).

40. See LOUIS HENKIN, *THE AGE OF RIGHTS* 2–3 (1990).

41. *Obergefell*, 135 S. Ct. at 2632–37 (Thomas, J., dissenting).

42. *Id.*

43. NEDELSKY, *supra* note 26, at 71.

44. See, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005) (noting no affirmative obligation of law enforcement to respond to request for assistance in domestic violence dispute that resulted in the deaths of the couple’s children); *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989) (noting the State’s failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause because the Clause imposes no duty on the State to provide members of the general public with adequate protective services). *But see* HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 35–40 (2d ed. 1996). I am grateful to Jeremy Waldron for bringing this point to my attention.

45. Catherine Powell, *Introduction: Locating Culture, Identity, and Human Rights*, 30 COLUM. HUM. RTS. L. REV. 201, 203 n.5 (1999) (citing Henry Shue, *supra* note 44).

46. *Obergefell*, 135 S. Ct. at 2636–37 (Thomas, J., dissenting).

47. *Id.* at 2601. Justice Kennedy notes that these benefits include “taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of

which is a basis upon which the Court finds it is unfair to deny same-sex couples the right to marry. Justice Kennedy, of course, does not reach the question as to whether it is fair to limit these benefits to married couples, as opposed to other, nonmarried couples or even to individuals.

As other scholars have noted,⁴⁸ the *Obergefell* (and related) litigation comes up short because rather than seek state-sanctioned marriage, marriage equality activists could have sought to have the state extend the constellation of benefits that belong to marriage to other types of relationships. But rather than advocating for new forms of governance, they asked to be governed by the rules that already exist. Thus, as Michael Cobb notes:

And so old questions remain: Why can't I put a good friend on my health care plan? Why can't my neighbor and I file our taxes together so we could save some money, as my parents do? If I failed to make a will, why is it unlikely a dear friend would inherit my estate? . . . It's because I'm not having sex with those people.⁴⁹

Kennedy describes marriage as “a keystone of our social order . . . without which there would be neither civilization nor progress.”⁵⁰ He claims marriage is “a great public institution, giving character to our whole civil polity”⁵¹ and that marriage equality is essential because of the desire “not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.”⁵² Yet in “[f]ounding your dignity on something as flimsy and volatile as a sexual connection insures [sic] dignity’s precariousness as it enshrines your inherent unworthiness as a single individual.”⁵³

Beyond undercutting the individual autonomy of those who are single or who chose other forms of coupling beyond marriage, locating the constellation of benefits in marriage is also problematic because marriage is “a bourgeois institution that is . . . out of reach for many poor people,”⁵⁴ particularly for individuals who lack the resources, education, and social capital necessary to attract a mate and start a family.⁵⁵ Of course, recognizing that same-sex couples should have equal access to the package of benefits linked to marriage is based on formal equality and simple

survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.” *Id.* Justice Kennedy goes on to point out that marriage recognized under state law “is also a significant status for over a thousand provisions of federal law.” *Id.* (citing *United States v. Windsor*, 133 S. Ct. 2675, 2690–91 (2013), which struck down the Defense of Marriage Act for restricting federal recognition of marriage as between a man and a woman and thus had the effect of denying federal benefits to same-sex couples).

48. *See, e.g.*, NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 142–43 (2008).

49. *See* Cobb, *supra* note 14.

50. *Obergefell*, 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

51. *Id.* (quoting *Maynard*, 125 U.S. at 213).

52. *Id.* at 2608.

53. Cobb, *supra* note 14.

54. Ethan J. Leib, *Hail Marriage and Farewell*, 84 *FORDHAM L. REV.* 41, 44 (2015).

55. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS* 13–20 (2014).

justice. But marriage equality should also pave the way to reimagine how we can support the plural forms of family life⁵⁶ that constitute and enrich society—as well as the individuals who comprise it.

CONCLUSION

In affirming liberty and equality for same-sex marriage, *Obergefell* is undoubtedly a victory deserving of celebration for the ways it moves freedom, autonomy, and equality forward. However, as other commentators note, the decision and litigation strategy that secured this landmark decision fail to address both (1) the inequality within marriage, and (2) the inequality between marital and nonmarital relationships.

This Essay has sought to address these shortcomings in ways that other commentators have missed by using the concept of relational autonomy to suggest ways *Obergefell* might lay the groundwork for future battles. First, I suggest that it is precisely because Justice Kennedy obscures the distinction between the individual and collective interests at stake in marriage that the opinion under-theorizes and fails to adequately engage the ongoing problem of equality *within* marriage.⁵⁷ Nonetheless, while convoluted, in merging the individual and collective interests at stake, Justice Kennedy's opinion may actually help us understand that enhancing the autonomy and power of individuals is itself in part based on supporting the relationships individuals have with each other and the state. Because marriage is built on gendered relationships of power, *Obergefell* should prompt us to reimagine how the legalization of same-sex marriage can disrupt the way power tracks gender and gendered expectations—not only in same-sex marriage, but for the institution of marriage overall.⁵⁸

Second, in glossing over the extent to which the government's obligation toward marriage is based on a negative or positive rights paradigm, Justice Kennedy fails to acknowledge the degree to which the liberty, equality, and dignity values upon which the opinion is based may also call for similar government obligations toward nonmarital relationships as well as single individuals. At the same time, by blurring the negative/positive dichotomy line, Justice Kennedy's opinion points the way for us to challenge the dichotomy between the negative and affirmative obligations the state owes to individuals.

Even if our Supreme Court constitutional jurisprudence does not progress to use the notion of relational autonomy to secure greater equality *within* families and *between* different types of family structures, our politics and policies should.

56. See generally POLIKOFF, *supra* note 48.

57. Justice Kennedy only addresses the problem of inequality within marriage in a couple passing references to the *historical* subordination of women within marriage. See *Obergefell*, 135 S. Ct. at 2595.

58. Cf. Hunter, *supra* note 28, at 12 (“New discursive terms could communicate that legalization of lesbian and gay marriage is not only a rights claim by a particular minority, but part of a much broader effort to subvert a social system of gender-based power differentials.”).