WHAT'S WRONG WITH *OBERGEFELL*

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Although Obergefell v. Hodges *was a historic victory for progressive constitutional law, the Supreme Court's glorification of marriage created widespread anxiety among progressive family law scholars. Yet, the critics have still not explained why this marriage rhetoric arouses such moral indignation. Some critics predict* Obergefell*'s rhetoric will shape family and constitutional law in ways that harm nonmarital families, but these forecasts rely on weak doctrinal arguments and cynical speculation about judicial behavior. Others argue* Obergefell*'s rhetoric was gratuitously insulting. Is that as deep as the objection goes?*

Obergefell*'s glorification of marriage is wrong, not because it was harmful or hurtful, but because its rhetoric denies the equal dignity of citizens in nonmarital families. For a state to treat all citizens as equals, officials must justify the law with reasons that all can accept as reasonable, even if mistaken. That is why* Obergefell *could justifiably ignore religious objections to same-sex marriage. If marriage law rests on the idea that different-sex relationships are more valuable, then it treats gay and lesbian persons as second-class citizens who enjoy full legal rights only if they adopt someone else's vision of the good life. Unfortunately,* Obergefell *commits a similar sin. The Court glorifies marriage as a secular ideal for family life and authorizes states to encourage marriage as an ideal family form. People in nonmarital families cannot accept this as a reasonable basis for law.* Obergefell*'s glorification of marriage violates the ideal of public reason in a way that denigrates nonmarital families and contradicts the opinion's own legal commitment to equal dignity.*

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INTRODUCTION

Obergefell v. Hodges was a historic victory for progressive constitutional law.[1] The U.S. Supreme Court held that excluding same-sex couples from marriage violated their right to marry under the Constitution.[2] Yet, the opinion created waves of anxiety among progressive family law scholars who cringe at the way the Court glorifies marriage. The Court declares marriage "essential to our most profound hopes and aspirations,"[3] implies nonmarital children view their families as "somehow lesser,"[4] and describes unmarried adults as "condemned to live in loneliness."[5]

Obergefell's critics are right to decry this rhetoric, but their writing carries moral indignation that their objections cannot justify. Progressives have offered three types of objections to the Court's marriage rhetoric. Some raise practical objections. Pragmatic critics worry the Court's marriage rhetoric will shape family law and constitutional law in ways that harm nonmarital families.[6] I agree the law should do more to help nonmarital families, but the dire forecasts rest on weak legal arguments and cynical empirical speculation. A second group accuses the Court of shaming unmarried persons by calling them lonely and miserable.[7] I agree this rhetoric is insulting, but is that as deep as the objection goes? That Justice Kennedy should have avoided extravagant praise of marriage that might offend other families? The final strand of criticism argues that using substantive due process rather than equal protection provokes unnecessary controversy.[8] To justify a positive right to marry, the Court waded into debates about the

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

2 *Id.* at 2604–05.

3 *Id.* at 2594.

4 *Id.* at 2590.

5 *Id.* at 2608.

6 *See infra* Section II.A.

7 *See, e.g.*, Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126–27 (2015), https://georgetownlawjournal.org/articles/155/union-unlike-any-other/pdf [https://perma.cc/Z2NJ-YXKV]. *See infra* Section II.C.

8 *See, e.g.*, Deborah Hellman, *Equality and Unconstitutional Discrimination*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 51, 53–55 (Deborah Hellman & Sophia Moreau eds., 2013). *See infra* Section II.D.

nature of marriage that it could have avoided with equality analysis. On the contrary, even in an equal protection opinion, the Court would still have needed to judge whether the reasons for civil marriage apply differently to same-sex than different-sex couples.

Existing critics have not justified their sense that *Obergefell*'s marriage rhetoric is a moral affront to nonmarital families. They fall short for a similar, illuminating reason. They all rely on a claim that *Obergefell* favors marriage *for illicit reasons*, yet few offer any theory to distinguish permissible from impermissible reasons. Many assume states should never favor marriage, but then the criticism of *Obergefell* is really an indictment of all family law.[9] From divorce to cohabitation to income tax law, states routinely declare their policy is to encourage citizens to marry and remain married.[10] Indeed, Justice Kennedy appropriated his marriage rhetoric from state courts. One of his most effusive passages is a quote from the Massachusetts Supreme Court, which wrote, "[because] it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."[11] We need an explicit theory to identify illegitimate reasons for treating marital families differently.

Obergefell itself has an implicit theory of legitimate reasons. The Court ignores religious arguments against same-sex marriage because enshrining these reasons in law denigrates lesbian and gay citizens.[12] Laws premised on the superiority of heterosexual relationships treat

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9 Some theorists embrace this position, arguing marriage law is a remnant of patriarchy inconsistent with liberal respect for pluralism and intimate liberty. *See, e.g.*, CLARE CHAMBERS, AGAINST MARRIAGE: AN EGALITARIAN DEFENSE OF THE MARRIAGE-FREE STATE, 52–75 (2017). Elsewhere I develop a liberal justification for a right to civil marriage consistent with reasonable pluralism about family values. Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1746–56 (2016).

10 *See, e.g.*, Peden v. State, 930 P.2d 1, 15–16 (Kan. 1996) (holding differential tax rates for single and married persons were supported by valid state interest to "favor" marriage, "[s]ince marriage conveys benefits to children, marriage participants, and society as a whole"); Rogers v. Webb, 558 N.W.2d 155, 157 (Iowa 1997) (invalidating contingent fee arrangement giving lawyer incentive to pressure client to divorce because it was contrary to state interest in promoting marriage); Blumenthal v. Brewer, 69 N.E.3d 834, 858 (Ill. 2016) (rejecting equitable remedies for separating cohabitants).

11 Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)) (internal quotation marks omitted).

12 *Id.* at 2602, 2607.

lesbian and gay persons as second-class citizens. Unfortunately, *Obergefell* commits a similar sin. The opinion proclaims marriage the ideal relationship for realizing "the highest ideals of love, fidelity, devotion, sacrifice, and family."[13] Elevating marriage as an ideal family degrades people who live in and value other types of families. Secular glorification of marriage, no less than religious glorification, is inappropriate. The inconsistency in *Obergefell*'s own reasoning points to a deeper progressive objection to its rhetoric: it denigrates people in nonmarital families by treating them as less than equal citizens.

To treat all citizens as equals, officials must justify the Constitution using reasons that all citizens can accept as reasonable, even if mistaken. This principle is known as the liberal ideal of public reason.[14] John Rawls articulated it as part of "political liberalism," a philosophy designed to enable communities with deep moral and religious disagreements to live together as free and equal citizens.[15] In any free society, citizens will disagree about matters of justice. No constitution can avoid moral controversies. Some citizens will conclude it is not fully just. Nevertheless, if officials respond to their complaints with public reason, even dissenters can recognize that the state protects a reasonable scheme of justice. That is the most anyone can demand. No group, minority or majority, has a right to impose its ideal of justice on others.

When officials limit themselves to public reason, they treat their fellow citizens as political equals. No one need accept political authority unless she can judge, by her own lights, that the law offers a reasonable basis for social cooperation. In contrast, when officials rely on non-public reason, they demand everyone accept their judgment, even others who cannot see why it is reasonable. Dissenters can view these officials only as using force to impose their preferences.[16] The officials proclaim themselves a moral authority, demeaning other citizens as moral inferiors.

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13 *Id.* at 2602, 2608.

14 JOHN RAWLS, POLITICAL LIBERALISM 226 (2005); *see infra* Section III.A.

15 RAWLS *supra* note 14, at xxiv–xxvi.

16 Chief Justice John Roberts calls the majority's decision "an act of will, not legal judgment." *Obergefell*, 135 S. Ct. at 2612. I reach a similar conclusion, but I reject the Chief Justice's legal argument and his theory of legitimacy. His assertion that the Court's right to marry "has no basis in the Constitution or this Court's precedent," *id.*, is overstatement. The Court reasons from precedents in an adequate fashion. More important, the Chief Justice's use of a majoritarian theory of legitimacy conflicts with commitments to equality and liberty. *Id.* at 2625; *see infra* Section III.A.

That is *Obergefell*'s moral failing. *Obergefell*'s glorification of marriage violates the ideal of public reason in ways that treat nonmarital families as less than equal.[17] The Court could have justified marriage equality using only public reason. It offers public reasons, such as its arguments that the right to marry protects intimate autonomy, child welfare, and equal access to a basic institution.[18] Unfortunately, the opinion does not stop there. Instead, it extols matrimony as the pinnacle of family life. It also authorizes states to encourage marriage for its own sake as the ideal relationship. These are non-public reasons. *Obergefell* implies that nonmarital families must conform to the Court's vision of a valuable family to obtain full legal rights. Nonmarital families cannot accept this as a reasonable basis for social cooperation. *Obergefell*'s glorification of marriage is wrong, not because it is harmful or offensive, but because it demeans the equal dignity of citizens in nonmarital families.

This Article proceeds in four parts. Part I distinguishes four strands of existing progressive objections to *Obergefell*'s marriage rhetoric. Part II argues these criticisms are unsatisfying on their own terms and, moreover, they rely on an implicit theory of public reason. Part III describes one ideal of public reason, identifies parts of *Obergefell*'s reasoning that violate it, and explains why these non-public reasons denigrate nonmarital families.[19] Part III concludes by arguing

17 After this Article was accepted and complete, Sonu Bedi published an Article raising similar public reason objections to *Obergefell*. Sonu Bedi, *An Illiberal Union*, 26 WM. & MARY BILL RTS. J. 1081 (2018). We agree on many things, but I want to mark several disagreements. I believe Bedi (1) wrongly rejects a positive right to legal marriage, *compare id.* at 1144–48, *with* Strauss, *The Positive Right to Marry*, *supra* note 9, at 1741–60; (2) is too quick to dismiss arguments for marriage law as non-public or insincere because they are over-inclusive or ultimately unpersuasive, *compare* Bedi, *supra*, at 1132–35 (rejecting equality and child welfare arguments against polygamy and incest), *with* Strauss, *infra* Section III.C, *and* Strauss, *The Positive Right to Marry*, *supra* note 9, at 1760–65; and (3) is cavalier in his call for marriage abolition, *compare* Bedi, *supra*, at 1148–53, *with* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L. REV. 1261 (2015).

18 *See infra* Section II.C.

19 Others have considered the relationship between *Obergefell* and public reason, but I am the first to argue *Obergefell* violates that ideal. Robert Katz argues the majority and Chief Justice Roberts' dissent appeal implicitly to notions of public reason. *See generally* Robert Katz, *The Role of Public Reason in* Obergefell v. Hodges, 11 FIU L. REV. 177 (2015). As Katz emphasizes, the Chief Justice does not analyze whether these theories of public reason are valid or if the reasons are legitimate "on the merits." *Id.* at 188. In addition, Glen Staszewski uses "deliberative democracy" theory (a relative of political liberalism) to defend *Obergefell* from the claim that the opinion is undemocratic. Glen Staszewski, Obergefell *and Democracy*, 97 B.U. L. REV. 31, 32

Obergefell's glorification of marriage violates the opinion's own legal commitment to equal dignity and should be ignored by future courts as inconsistent dicta.

I. EXISTING OBJECTIONS TO *OBERGEFELL*'S MARRIAGE RHETORIC

Given the breadth of *Obergefell* commentary, I should be clear about the scope of this intervention. I do not offer a comprehensive defense of *Obergefell*. Conservatives criticize *Obergefell* for many reasons: they object to judicial review of unenumerated rights; they disagree with the opinion's definition of marriage; and they worry the opinion's reasoning will limit religious liberty. These criticisms should be addressed, but this Article focuses on criticisms by progressives otherwise inclined to support *Obergefell*'s outcome. Some progressives wish the Court had declared sexual orientation a protected class, which would have set a clear path to full LGBT equality.[20] I agree with this goal and its strategic observation, but I am interested in a different objection. I am interested in the progressives who object to *Obergefell*'s rhetoric on behalf of nonmarital families. I begin by recapping *Obergefell*'s problematic marriage rhetoric before turning to the scholarly criticisms.

A. *The Opinion's Rhetoric*

Obergefell holds that prohibiting same-sex couples from marrying violates the fundamental right to marry under substantive due process and equal protection doctrines.[21] This Section does not recap the Court's legal reasoning, but instead gives a taste of the rhetoric that many progressives find troubling. The opinion is full of rhetorical praise for marriage, apparently to amplify the sense that justice requires extending civil marriage to same-sex couples.

(2016). He argues, persuasively, that the Court justifiably cut off democratic debate after it became clear gay marriage opponents could offer only religious or philosophical reasons that "could not reasonably be accepted by citizens with fundamentally competing perspectives." *Id.* at 54–56. However, Staszewski never asks whether the Court's reasoning is consistent with equal respect for pluralism. Instead, he endorses the majority's arguments, including the Court's invocation of "transcendent" values to justify marriage law. *Id.* at 38, 52.

[20] *See, e.g.*, Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463, 506–12.

[21] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

A central theme of the opinion is that all couples, regardless of sex, can "aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[22] Because marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."[23] In a section ostensibly about the history of marriage, the Court writes,

> [T]he annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.[24]

The Court's tribute to marriage reaches its crescendo in the final paragraph: "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[25]

Given this high praise of marriage, it is unsurprising the opinion also suggests it is undesirable to be single or in a nonmarital relationship. The Court implies unmarried persons are lonely or forsaken. For instance, it writes that same-sex couples want to marry so they will not "be condemned to live in loneliness."[26] The Court implies that only marriage offers a reliable source of companionship and long-term care:

> Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers hope of companionship

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22 *Id.* at 2602; *see also id.* at 2590.

23 *Id.* at 2599 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)) (internal quotation marks omitted).

24 *Id.* at 2593–94.

25 *Id.* at 2608.

26 *Id.*

> and understanding and assurance that while both still live there will be someone to care for the other.[27]

Moreover, the following passage arguably suggests children of same-sex couples are humiliated by the fact that their parents are unmarried:

> Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[28]

The opinion also elevates marriage as a central social institution. The Court writes that its own prior "cases and the Nation's traditions make clear that marriage is a keystone of the Nation's social order."[29]

B. *Strands of Criticism*

The existing objections to *Obergefell*'s marriage rhetoric fall into four broad categories. Some oppose marriage in general. Others worry the Court's praise of marriage will shape the law in ways that harm nonmarital families. Still others object to the rhetoric itself, either because it insults nonmarital families or because using a right to marry created unnecessary controversy that could have been avoided with equal protection analysis.

1. Radical Reform Critics

Many left-leaning scholars object to *Obergefell*'s marriage rhetoric because they object to civil marriage generally.[30] These reformers want to abolish legal marriage because it perpetuates gender inequality and

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27 *Id.* at 2600.

28 *Id.* at 2600–01. Under a more charitable interpretation, this paragraph blames states for stigmatizing same-sex couples by excluding them from marriage.

29 *Id.* at 2601.

30 *See* Robin Fretwell Wilson, "*Getting the Government out of Marriage*" *Post-*Obergefell*: The Ill-Considered Consequences of Transforming the State's Relationship to Marriage*, 2016 U. ILL. L. REV. 1445, 1461–64 (recounting various arguments for abolishing marriage).

heterosexual norms and privatizes the burden of care-work in ways that distort distributive justice. Reform proponents warned decades ago that the same-sex marriage movement would undermine attempts to liberate intimacy, sexuality, and family from the heterosexual norm that family must be built around exclusive sexual relationships.[31] *Obergefell*'s praise of marriage perpetuates the legal and cultural predominance of marriage, which in turn facilitates the injustices in the basic institution of the American family. I will say little about this objection in this Article because it is primarily an indictment of the basic structure of family law, of which *Obergefell*'s holding or rhetoric is only the latest and hardly most significant manifestation.

2. Pragmatic Legal Critics

Other critics are more pragmatic. Professor Clare Huntington worries that *Obergefell*'s glorification of marriage will hinder legal reforms needed to help a broader range of families.[32] Although marriage is no longer the most common family form in the United States,[33] much law is still oriented around marriage. Spouses receive special treatment across public and private law, including in estate, tax, healthcare, labor, contract, property, and tort law.[34] Expanding these rights and duties beyond marriage would help nonmarital families and help these laws achieve their policy goals.[35] These critics argue *Obergefell*'s marriage rhetoric will delay legal changes that would improve the welfare of nonmarital families.

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[31] *See, e.g.*, Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES 20 (Suzanne Sherman ed., 1992).

[32] Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 30–31 (2015).

[33] CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 28–31 (2014) (summarizing social science research detailing the increase in nonmarital families).

[34] United States v. Windsor, 570 U.S. 744, 765 (2013) (citing study finding over 1,000 federal statutes referencing marriage).

[35] *See* Deborah A. Widiss, *Non-marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 571–72 (2015) (recommending states "reconsider the extent to which a large number of government policies and programs rely on marriage as the exclusive mechanism of recognizing family structures").

Some pragmatic criticism worries about *Obergefell*'s effects on state law. The boldest argue *Obergefell* will lead federal courts to prohibit changes to marriage or the adoption of new family forms.[36] More subtle critics worry the rhetoric reduces the likelihood of pluralistic family law. Professor Melissa Murray, for example, argues the Court's praise of marriage will encourage lower courts to interpret statutory terms like "family" or "kinship" narrowly to require marriage rather than broadly to include nonmarital families.[37]

Another strand of pragmatic criticism argues that the marriage rhetoric will limit constitutional rights for nonmarital families.[38] Murray worries *Obergefell* will reverse the trend to expand sexual and familial liberty outside marriage.[39] The Supreme Court has invalidated illegitimacy laws,[40] recognized a right to contraception for unmarried persons,[41] protected some nonmarital families from housing and welfare discrimination,[42] and invalidated criminal sodomy laws.[43] *Obergefell* could have interpreted these precedents to embrace "a vision of alternative [family] statuses as a manifestation of privacy, individual autonomy, and familial self-definition."[44] Such reasoning could have supported nonmarital rights and maybe even the conclusion that states have an "obligation to furnish alternatives to marriage or to otherwise recognize and respect nonmarital life."[45] Instead, *Obergefell* exalts marriage. This rhetoric weakens any future claims for positive rights for nonmarital families and undercuts equal protection claims against marital status discrimination.[46]

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[36] *See* Carpenter & Cohen, *supra* note 7, at 130.

[37] Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1249, 1252 (2016).

[38] *Id.* at 1211–12.

[39] *Id.* at 1240–52.

[40] *Id.* at 1218–20 (discussing Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Stanley v. Illinois, 405 U.S. 645 (1972)).

[41] *Id.* at 1220–21 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 440–42 (1972)).

[42] *Id.* at 1221–23 (discussing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); Moore v. City of E. Cleveland, 431 U.S. 494 (1977)).

[43] *Id.* at 1226 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)).

[44] *Id.* at 1248.

[45] *Id.* at 1210, 1249.

[46] *Id.* at 1249, 1244. Chief Justice Roberts similarly argued the majority cuts off "more selective claims" against withholding "ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents." Obergefell v.

3. Offensiveness Critics

Other critics find the language offensive in itself. Almost immediately, critics panned *Obergefell*'s rhetoric for demeaning nonmarital families. Professors Leonore Carpenter and David S. Cohen, for example, argue that the opinion "repeatedly shames" unmarried persons.[47] It shames them openly in "statements that paint people who are not married as lonely, miserable, and inferior."[48] It also shames them "subtly" by justifying its right to marry with the argument that marriage is a valuable exercise of autonomy and a valuable relationship.[49] Both of these arguments "imply that non-married individuals are less able to find intimacy, expression, spirituality, and self-definition that those who are married."[50]

4. Moral Controversy Critics

In a final strand of criticism, scholars have argued *Obergefell* created unnecessary moral controversy by using due process rather than equal protection law.[51] The Court chose to emphasize the right to marry under substantive due process. To justify this right to marry, the Court had to explain marriage's personal and cultural significance in a way that would inevitably extol marriage, belittle nonmarital families, and "disrespect[] people who in good faith have a different view of the social

Hodges, 135 S. Ct. 2584, 2623–24 (2015) (Roberts, C.J., dissenting). It stretches credulity to believe that the dissenters would look favorably on piecemeal claims for sexual orientation or marital status discrimination.

47 Carpenter & Cohen, *supra* note 7, at 126; *see also* Murray, *supra* note 37, at 1210.

48 Carpenter & Cohen, *supra* note 7, at 126.

49 *Id.* Deborah Widiss argues similarly that the valorization of marriage in *United States v. Windsor* "reinforces claims that nonmarital childrearing—and sexual relationships outside of marriage, more generally—are inherently less worthy of respect than marital relationships." Widiss, *supra* note 35, at 549–51. She also notes that progressive academics "have long warned that the marriage equality movement's valorization of marriage could be detrimental to respect for alternative family structures." *Id.* at 550, 550 n.12 (citing, inter alia, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 98–109 (2008)).

50 Carpenter & Cohen, *supra* note 7, at 126.

51 *See* Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 53–55; Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 646–49 (2013); Huntington, Obergefell*'s Conservatism*, *supra* note 32, at 27–28; Megan M. Walls, Obergefell v. Hodges*: Right Idea, Wrong Analysis*, 52 GONZ. L. REV. 133, 140–41 (2017).

[meaning] of marriage."[52] Moreover, a liberty-based opinion "necessarily requires a court to develop a thick theory of . . . marriage . . . to decide if a person has a right" to marry without regard to gender, and resting a judicial decision "on a particular view of the nature of marriage . . . is less respectful of the diversity of modern liberal democracies."[53] In contrast, an equal protection analysis could have held that "whatever marriage means culturally, a state cannot deny access to it without distinctions that have a *state* (as opposed to private, cultural) interest as a basis."[54] Such an equality analysis would have avoided controversies about the nature of marriage that were bound to offend nonmarital families and violate principles of state neutrality.

II. EXISTING OBJECTIONS FALL SHORT

I share the sense that *Obergefell* wrongs nonmarital families, but the existing objections fail to pinpoint the problem. Many of them are unpersuasive on their own terms. More interestingly, they are incomplete in similar ways. They implicitly appeal to a theory of the legitimate and illegitimate reasons for treating marital and nonmarital families differently.

A. *Will* Obergefell *Hinder Family Law Reform?*

Many pragmatic critics predict legal harms from weak doctrinal arguments and cynical views of judicial behavior. For example, Carpenter and Cohen argue,

> [The] affirmative right to marriage . . . strongly suggests states would be prohibited from experimenting with alternative relationship recognition structures through wholesale abolition of the marital form, significant changes in that form, or the development of parallel relationship statuses with similar government benefits.[55]

[52] Huntington, Obergefell*'s Conservatism*, *supra* note 32, at 23.
[53] Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 65.
[54] Huntington, Obergefell*'s Conservatism*, *supra* note 32, at 28 (emphasis in original).
[55] Carpenter & Cohen, *supra* note 7, at 130.

One aspect of this argument is sound. Abolishing marriage would violate citizens' positive right to marry.[56] That is a real limit on state power, even if marriage abolition is mostly of theoretical interest.[57] The rest of the argument is invalid. *Obergefell* does not suggest states cannot reform marriage law. Citizens have a right to legal marriage in some form, but states must specify its legal details.[58] *Obergefell* expressly acknowledges states are "in general free to vary the benefits they confer on all married couples."[59] The opinion emphasizes the revolution in marriage over the past century, including the abolition of gendered legal duties.[60] Of course, this power to define marriage cannot be unlimited, or else states could effectively abolish marriage. States must offer civil marriage in some recognizable form, but the required content can be minimal, under-specified, and flexible.

Furthermore, the positive right to marry has no rational bearing on whether states may offer additional relationship statuses. Why would it? Carpenter and Cohen argue,

> A court considering the impact of *Obergefell* might accept an argument that the opinion's focus on marital superiority dictates that any available alternative—particularly domestic partnership, which could actually encourage couples *not* to marry—destroys the constitutionally required uniqueness of marriage and undermines its cultural significance.[61]

This passage combines an invalid doctrinal argument with cynical speculation. *Obergefell* held that individuals have a right to legal marriage because marriage is vital for personal and community well-being.[62] This does not entail that states must reinforce the cultural significance of marriage. Individuals have a right to marry, not a right to enhance their social status by restricting others' intimate lives. Carpenter and Cohen seem worried that the marriage rhetoric will make it politically or psychologically palatable for judges to rely on this

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56 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1760.

57 Strauss, *A Partial Defense of Legal Marriage*, *supra* note 17, at 1263. *But see* Wilson, *supra* note 30, at 1459–61 (describing politicians and scholars calling to abolish marriage after *Obergefell*).

58 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1759.

59 Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

60 *Id.* at 2595–96.

61 Carpenter & Cohen, *supra* note 7, at 131–32 (emphasis in original).

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

patently invalid argument. Judges can adopt any argument they please, but this prediction adopts an excessively cynical view of the judicial branch.

What about the subtler pragmatic objection that *Obergefell*'s marriage rhetoric will lead courts to interpret state and federal law in ways that hurt nonmarital families? These critics worry the Court's praise of marriage will lead lower courts and legislators to examine less carefully the categories they use to distribute statutory rights among families. Before the gay marriage movement, a few courts used purposive reasoning to expand statutory rights for nonmarital families. Murray argues that *Obergefell*'s glorification of marriage makes these opinions less likely.[63]

Critics often cite *Braschi v. Stahl Associates* as an example.[64] Mr. Braschi lived for eleven years in a rent-controlled apartment leased to his long-term same-sex partner.[65] When his partner passed away, the landlord sought to evict Braschi despite a regulation prohibiting eviction of the "surviving spouse of the deceased tenant or some other member of the deceased tenant's family."[66] The landlord argued "family" should be interpreted consistent with intestacy law to include only relatives by blood, marriage, or adoption.[67] The plurality opinion rejected this interpretation because it ignores the hardship that eviction imposes on "genuine family members."[68] To judge whether a defendant and the deceased tenant were a family, judges must engage in a multi-factored, "objective examination of the relationship."[69] The court held that Mr. Braschi could be a family member because "family" encompassed "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."[70]

I agree with Murray that opinions like *Braschi* are less likely after marriage equality. However, I doubt *Obergefell*'s rhetoric is the primary

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63 Murray, *supra* note 37, at 1249–52.

64 *Id.* at 1249 (discussing, among other cases, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989)).

65 *Braschi*, 543 N.E.2d at 50–51.

66 *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1989)).

67 *Id.* at 53.

68 *Id.* at 54.

69 *Id.*

70 *Id.* at 54–55.

reason, and I am less confident about the normative implications. How much the Court's rhetoric will affect nonmarital family law depends, in part, on what policies justify treating marital and nonmarital families differently. To assess pragmatic criticisms empirically and normatively, we need a more complex understanding of the relevant policies behind marriage rules.[71]

Are there good reasons to limit eviction protection to spouses and lineal relatives? The statute had a "dual purpose": to protect genuine families from dislocation while preventing tenants from passing rent control to "mere roommates."[72] Legal marriage is a decent proxy for unrelated adult family members because marriage's legal rights and duties are premised on commitment and interdependence. Many cohabitants choose not to marry to forestall those commitments. Roommates are unlikely to marry simply for rent control, given the other legal consequences of marriage. On the other hand, a marriage rule, like any rule, is over- and under-inclusive.[73] Some spouses do not share a home, while some cohabitants are committed families that do share a home. Moreover, the more rights, like eviction protection, that attach to marriage, the more the law encourages couples to conform with traditional norms.

Ideally, *Braschi*'s familial standard would allow courts to extend eviction protection to only families that warrant it according to these eviction policies and to no other people. But a standard is not a panacea. Decision-makers must exercise judgment to apply vague standards to complex facts.[74] Courts must classify the relationship between the tenant and the defendant. Were they sufficiently committed and interdependent to constitute a genuine family? The complexity of this task increases the likelihood that the decision-makers will err. The degree of judgment invites decision-makers to rely on their own vision of genuine families.[75] Moreover, emotional commitment and

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71 The argument in the next few paragraphs is an iteration of the dynamic around marriage benefits described in Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012).

72 *Braschi*, 543 N.E.2d at 54.

73 FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE, 31–34 (1991).

74 *Id.* at 143.

75 *Id.* at 150–52. *Cf.* Abrams, *supra* note 71, at 32–33 (describing how laws that criminalize marriage to avoid immigration limits require officials to distinguish "genuine" from "fraudulent" marriages, which enables regulators and line officers to rely on stereotypical notions of marriage).

interdependence are easy to allege and difficult to disprove, which encourages fraudulent claims by roommates. It also creates incentives for landlords to preempt claims with intrusive questions.

Ideally, policy-makers would compare likely error rates, biases, and privacy intrusions from a marriage rule and a family standard. The *Braschi* plurality did not, despite its openly purposive methodology. Why? Likely because the scales were tipped decisively by the same-sex marriage ban. Braschi could not marry his partner. A marriage rule would have unjustly excluded all such same-sex couples from eviction protection, irrespective of their commitment and interdependence. The court's broad interpretation of "family" removed one small part of the injustice caused by same-sex marriage bans.

Obergefell removes those clear injustices. Courts and legislators have less reason to expand statutory or common law rights to nonmarital families. Will this make cohabitation reform slower? Probably. But this is not a criticism of *Obergefell* or its rhetoric. Any marriage equality ruling—even one that avoided glorifying marriage—would slow cohabitation reform. Much of the political impetus for cohabitation reform derived from marriage inequality. Radical family law reformers have long opposed the same-sex marriage movement for this tactical reason.[76] Once same-sex couples can marry, it becomes less obvious that it is categorically unjust to treat spouses and nonmarital couples differently. Those seeking to reform family law can no longer leverage the injustice of same-sex marriage inequality.

Will this harm nonmarital families? That question has no uniform answer. Marriage is implicated in a vast array of rights across private and public law. Each should be addressed on its own merits. Should cohabitants receive an interest in one another's property?[77] Receive a portion of one another's estates?[78] Be taxed jointly?[79] Receive employment leave during one another's illnesses?[80] Be one another's

[76] *See, e.g.*, Ettelbrick, *supra* note 31.

[77] Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) (en banc). *See generally* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 10–52 (2017) (describing social norms underlying property rights of spouses and nonmarital couples).

[78] *See generally* E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002).

[79] 26 U.S.C. § 6013 (2018). *See generally* Catherine Kenney, *Cohabiting Couple, Filing Jointly? Resource Pooling and U.S. Poverty Policies*, 53 FAM. REL. 237 (2004).

[80] 29 U.S.C. § 2612(a)(1)(C) (2018) (protecting spouses but not cohabitants).

default surrogates for medical decisions?[81] Be fiduciaries in contract law?[82] Receive loss of consortium damages in a wrongful death tort?[83] Some of the special rules for marriage are historical holdovers, others are designed to favor marriage, and still others use marriage as a means to advance domain-specific policies. With the array of laws, policies, and family forms, it seems impossible to predict whether *Obergefell*'s rhetoric will interfere with careful reform of nonmarital family law.

Obergefell might even help lawmakers think more clearly about nonmarital families. Lumping all same-sex couples together with nonmarital families distorted family law debates. Perhaps now courts and legislators will face the real question: are there legitimate reasons to assign relational rights or public entitlements only to spouses, or do the policies behind such laws extend to cohabitants, extended families, or all caregivers? The answers have profound consequences for the welfare of nonmarital families, but these debates are not really about welfare. They are debates about the legitimate bases for legal rights and resources. Progressives have made strong arguments that there is no legitimate reason to treat nonmarital and marital families differently in particular areas of law, particularly with regard to social welfare law.[84] *Obergefell* does not diminish these arguments. Only political will stands in the way of more pluralistic family law.

B. *Will* Obergefell *Limit Constitutional Rights?*

Of course, some theorists believe the rights of nonmarital families should not be subject to democratic decision-making. Another strand of criticism argues that *Obergefell*'s marriage rhetoric will undermine the progress of constitutional rights for family liberty outside marriage.

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[81] William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-marital Cohabitation*, 82 OR. L. REV. 1001, 1023 (2003) (describing states that permit cohabitants to serve as surrogate medical decision-makers).

[82] Maglica v. Maglica, 78 Cal. Rptr. 2d 101, 103–04 (Cal. Ct. App. 1998).

[83] Elden v. Sheldon, 758 P.2d 582, 588–90 (Cal. 1988).

[84] *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 161–66, 226–36 (1995); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 67, 121 (2004); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368–70 (2004).

1. Positive Rights for Other Relationships

Some pragmatic critics contend *Obergefell* will prevent courts from recognizing new constitutional rights for nonmarital families, particularly a right to alternative status-based protections.[85] These arguments adopt a surprising posture. According to conventional wisdom, the Constitution primarily protects negative liberty.[86] Why do states need a special reason not to create a legal status for nonmarital relationships? The Constitution does not require states to exercise their police powers, even when it clearly promotes public welfare. That is part of what makes the right to marry unique. Murray and other critics start with a controversial normative premise, namely, that the Constitution *should* impose an affirmative duty on states to support nonmarital families. Their complaint is that *Obergefell* reduces the likelihood that courts will recognize these new positive rights for nonmarital relationships, because the Court implied these relationships are less valuable.

While I am skeptical about a positive constitutional right to alternative statuses, *Obergefell* does not foreclose such claims. Indeed, it removed a substantial doctrinal obstacle to expanding unenumerated rights. Professor Kenji Yoshino argues that *Obergefell* may reinvigorate substantive due process because the opinion replaces a historical test for defining fundamental rights with openly normative reasoning.[87] Under *Washington v. Glucksberg*, plaintiffs seeking nonmarital rights would have had to prove that the liberty to form nonmarital relationships is "deeply rooted in this Nations' history and tradition,"[88] a test they were doomed to fail given the long history of criminalizing nonmarital sex and cohabitation. *Obergefell* suggests a new doctrinal framework in which courts identify rights using normative reasoning with an eye to changes in modern society.[89] The question should be whether justice

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85 *See, e.g.*, Murray, *supra* note 37, at 1210.

86 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1693 n.4.

87 *Id.* at 1714; Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 163–64, 179 (2015).

88 Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

89 Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015); Courtney G. Joslin, *The Gay Rights Cannon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 473 (2017). *See also* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1542–44 (2016).

requires novel constitutional rights for nonmarital cohabitants and parents.

Advocates could use *Obergefell*'s normative premises to argue for constitutional rights for nonmarital families. Professor Courtney Joslin, for example, argues that the four "basic reasons" that *Obergefell* uses to justify the right to marry also justify nonmarital rights. First, if the choice to marry is a profound exercise of intimate autonomy, then the choice not to marry is equally profound for cohabitants who want to avoid marriage's traditional norms.[90] Second, nonmarital relationships, as much as marriages, are places where we exercise other protected liberties, such as freedom of "expression, intimacy, and spirituality."[91] Third, if marriage is fundamental in part because of children, then nonmarital relationships can also be fundamental given that forty percent of America's children are born outside marriage.[92] Fourth, marriage may be a "keystone of our social order,"[93] but public opinion continues to evolve and future courts may recognize that nonmarital families are also essential support for this edifice, so it is unjust to deny them legal protections.[94]

The debate is not primarily about whether cohabitants should have a constitutional right to some alternative status. Perhaps cohabitants should have limited positive rights, such as a constitutional right to enforceable common law remedies. Illinois arguably infringes this right.[95] Maybe families need only negative liberties, such as the right to live with one's chosen family without being fined, fired, or evicted.[96] Or, perhaps nonmarital families are adequately protected by derivative liberty rights, such as the right against laws that target groups on the basis of social mores about intimacy.

After *Obergefell*, the constitutional question should be whether there are legitimate reasons why the constitutional protections for marriage should not extend to nonmarital families. *Obergefell* invites

90 *Obergefell*, 135 S. Ct. at 2597; Joslin, *supra* note 89, at 467–68. *See also* Matsumura, *supra* note 89, at 1542.

91 *Obergefell*, 135 S. Ct. at 2599; Joslin, *supra* note 89, at 467–68.

92 *Obergefell*, 135 S. Ct. at 2600–01; Joslin, *supra* note 89, at 470–72.

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

94 Joslin, *supra* note 89, at 472–75.

95 Blumenthal v. Brewer, 69 N.E.3d 834, 855–56 (Ill. 2016).

96 Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 809 (2015) (noting most states do not protect nonmarital cohabitants from discrimination in employment or housing).

these debates. It does not offer clear guidance, much less determine their outcomes. *Obergefell* is the latest in a line of unenumerated family rights cases, but it will not be the last. Of course, the future course of unenumerated rights rests on the Court's membership. Justice Kennedy's replacement by Justice Kavanaugh reduces the likelihood the Court will carry forward his vision of substantive due process methodology.

2. Equal Protection Marital Status Claims

Obergefell's marriage rhetoric does undoubtedly make one class of constitutional claims more difficult: equal protection claims for marital status discrimination. For example, an unmarried couple might challenge the provisions of the Family and Medical Leave Act (FMLA) that protect caretaking leave for only an employee's spouse, child, or parent.[97] Suppose Ann and Ben have a cohabitation contract with rights identical to marriage, but they chose not to marry to avoid gendered social norms. When Ann contracts an illness, Ben's employer denies him unpaid leave, and Ben brings an equal protection claim. Under the classic tiers of scrutiny approach, unmarried persons are not a suspect class, so Ben's claim is subject to rational basis review.[98] He may argue that treating their relationship differently from marriage is irrational, because their contract is functionally identical to marriage and allowing him leave to care for Ann would equally serve the FMLA's purpose to enable private caretaking.

Obergefell offers the government an easy response. The Court's marriage rhetoric authorizes states to promote marriage at the cost of other goals. Even if ignoring cohabitants contradicts the goals of the FMLA, Congress might also have intended spousal leave to support marriage as the "keystone" of society. One could conceive of this state interest in two ways. First, the state may use marriage as an instrumental tool. The FMLA may encourage marriage because it provides stability that will benefit adults and children who need care. Alternatively, the state's end might be promoting marriage itself. If officials believe marriage is a superior way of life, they might use the FMLA to create an incentive for citizens adopt the legislator's preferred ethical ideal. In

[97] 29 U.S.C. § 2612(a)(1)(C) (2018).

[98] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 617–23 (2d ed. 2005).

either case, *Obergefell*'s valorization of marriage makes claims for marital status discrimination harder.

On the other hand, marital status discrimination claims were near impossible to win before *Obergefell*.[99] Most marital status distinctions survive rational basis review for independent reasons. Ben's argument, for example, does not prove it is irrational to limit family leave to spouses. It proves only that the FMLA overlooks additional ways to pursue its end. Cohabitants, siblings, distant relatives, and friends *also* undertake caretaking roles.[100] It is black letter law that statutes may be under-inclusive without failing rational basis review.[101] Moreover, the government could easily cite reasons for the FMLA's chosen categories. Most unpaid care is given by spouses, children, or parents, so these categories are well-tailored proxies. These categories are also determinate and easily administrable, unlike a standard that might hinge on the depth of an employee's relationship with the sick person. The FMLA might have given employees the power to choose their dependents, but that might invite strategic use of caretaking leave. The FMLA's differential treatment of married and unmarried couples easily survives rational basis review. Most marital status equal protection claims will fail for similar reasons.

I hasten to add that I agree these are often bad policies. As Professor Martha Fineman and others have long argued, welfare statutes would be improved if they switched from marriage to more accurate

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[99] *Contra* Widiss, *supra* note 35, at 553. Widiss argues same-sex couples prior to *United States v. Windsor*, 570 U.S. 744 (2013), successfully challenged the use of marriage to distribute benefits by arguing marriage is an "insufficiently precise proxy." *Id.* at 562. The opinions she cites invalidate statutes that disproportionately affected same-sex couples unable to marry, but none leverage marital inequality to challenge marital status discrimination in general. For example, in *Bassett v. Snyder*, 951 F. Supp. 2d 939, 967–68 (E.D. Mich. 2013), the court concluded the state's administrative cost justification was "so insubstantial that animus against same-sex couples remains the only genuine justification." *Id.* at 968. Other cases assert that a state may use public benefits to incentivize marriage, but find that those reasons could not apply to same-sex couples that were unable to marry. Alaska Civil Liberties Union v. State, 122 P.3d 781, 793–94 (Alaska 2005).

[100] *See, e.g.*, Smith v. Women's Healthcare Assocs., 813 F. Supp. 2d 1224, 1226 (D. Or. 2011) (dismissing FMLA retaliation claim because employee took leave to care for a sibling); Rutgers Council of AAUP Chapters v. Rutgers, 689 A.2d 828, 833–34, 837–38 (N.J. Super Ct. App. Div. 1997) (dismissing claim of discrimination for not providing healthcare benefits to employee's domestic partners).

[101] Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 414–16 (2016).

categories.[102] It is both unfair and inefficient to give spouses additional resources rather than distribute those resources directly based on the relevant category of need. *Obergefell*'s pro-marriage rhetoric makes it more difficult to elevate these debates into constitutional discourse, but why should we be surprised by that result? These arguments are, at heart, distributive justice claims. This is one more instance in the interminable debate about whether distributive justice claims should be cognizable in constitutional law.[103] The tiers of scrutiny doctrine pushes distributive justice claims to the political branches on the assumption that legislatures make better decisions about social welfare than life-tenured, unelected Supreme Court justices without investigatory powers.[104] It is unsurprising that *Obergefell* does not upend this classic constitutional settlement.

Despite all of this, it is still possible that *Obergefell* will help elevate marital status claims to the constitutional level. Joslin argues nonmarital rights may benefit from *Obergefell*'s "hybrid" or "synergistic" approach to due process and equal protection.[105] Professors Deborah Widiss and Nelson Tebbe developed one such hybrid theory. They argue courts should apply greater scrutiny if a law limits important liberties of a distinct group, even if classic doctrine would not deem the liberty "fundamental" or the group "suspect."[106] *Obergefell* endorses a synergistic approach, claiming that liberty and equality are "interlocking" and mutually illuminating.[107] Some laws, such as anti-miscegenation statutes, deny a specific right to a group we recognize as oppressed. This targeted deprivation helps us appreciate the importance

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102 *See* FINEMAN, THE NEUTERED MOTHER, *supra* note 84; Widiss, *supra* note 35, at 571–72 (recommending states "reconsider the extent to which a large number of government policies and programs rely on marriage as the exclusive mechanism of recognizing family structures").

103 *See generally* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001).

104 Chemerinsky, *supra* note 101, at 406–07.

105 Joslin, *supra* note 89, at 468–69.

106 Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010). Similarly, Professors Kerry Abrams and Brandon Garrett argue *Obergefell* is best understood as treating the right to marry as an "intersectional" right in which denial of substantial government benefits on an unequal basis implicates both liberty and equality and justifies greater scrutiny of the alleged interests than either might individually. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1333–35 (2017); *see also* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083–84 (2005); Yoshino, *supra* note 87, at 173–76.

107 Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

of the targeted liberty, even if the liberty may not seem fundamental in isolation.[108] Other laws, such as homosexual sodomy laws, target a specific group to deny them a liberty whose import we appreciate. The importance of the liberty helps us recognize that the law demeans its targeted group, even if that class might not seem oppressed in other areas of life.[109]

Joslin uses a hybrid claim to argue for applying some heightened scrutiny to laws that use marital status. Cohabitants do not qualify for suspect class status and most marriage "benefits" are not fundamental liberty interests. However, the law denies cohabitants substantial material benefits, the states have a history of punishing nonmarital cohabitation, and officials continue to defend marriage laws by insisting cohabitation is immoral or inferior.[110] This argument, however, is still missing an essential normative premise. Hybrid claims must still explain why it is illegitimate for the law to target specific conduct. Joslin, like many critics of *Obergefell*, assumes the state should neither encourage marriage nor discourage non-marriage, either for its own sake or as an instrumental means to a social welfare ends. If states have legitimate reasons to praise or promote marriage, then laws that favor marriage do not insult nonmarital families or deny them benefits to which they are entitled.

America is in the midst of a political debate about the proper legal treatment of nonmarital families, a debate mired in normative disagreements about what types of life are most valuable and empirical disagreements about the consequences of social policy. Elevating that debate into constitutional law will not resolve it. I agree with critics who think the Court's endorsement of marriage crossed the line, but we need a normative theory to explain why and when state endorsement of marriage is wrong. Part III aims to provide this normative framework.

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108 *Id.* at 2603 (describing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

109 *Id.* at 2603–04.

110 Joslin, *supra* note 89, at 469 (citing Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 363 (2011)); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015).

Pragmatic criticisms of *Obergefell*'s rhetoric are unpersuasive. The opinion is neither a shield to resist progressive reforms nor a sword to push back marriage law. The likely overall effect on the welfare of nonmarital families is uncertain. More importantly, most of the arguments that *Obergefell*'s rhetoric will harm nonmarital families are, at heart, not really claims about harm at all. Critics assume family law distributes rights and benefits to spouses *for illegitimate reasons*, and they object to the way *Obergefell* endorses those reasons. That is where we should focus. Nonmarital families have good reason to object to *Obergefell*'s rhetoric, but the problem is not with the speculative practical consequences. The problem is with the rhetoric itself. The Court's glorification of marriage is inherently objectionable. But why?

C. *Does* Obergefell *Insult Nonmarital Families?*

Many claim *Obergefell*'s reasoning insults nonmarital families by implying their family lives are less valuable. It is undeniable that *Obergefell* compares marriage to cohabitation and to singlehood in ways that are hurtful, particularly when the Court imagines the single person calling out hopelessly into the night.[111] *Obergefell* invokes specious stereotypes about single people and cohabitants that reveal a startling lack of empathy. But is there more to the objection? It is unsurprising to see inflated rhetoric from a Supreme Court justice known for a hyperbolic style. I doubt these insults really capture the moral indignation many feel in response to the opinion.

Perhaps searching to deepen this objection, Carpenter and Cohen argue that *Obergefell*'s core reasoning—as opposed to incidental dicta—also shames single persons. They target the Court's first two arguments for regarding the right to marry as fundamental. The Court's first argument claims that marriage is a valuable exercise of autonomy because, for many, the choice to marry is "among life's momentous acts of self-definition."[112] The second argument asserts that the choice to marry is a choice to enter a "two-person union unlike any other in its importance *to the committed individuals*."[113]

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[111] *Obergefell*, 135 S. Ct. at 2600.
[112] *Id.* at 2599.
[113] *Id.* (emphasis added).

These arguments do not shame single people or nonmarital families. Neither argument implies marriage is the only valuable intimate relationship. The Court argues the choice to marry is a valuable exercise of autonomy, because many spouses regard marriage as "a union unlike any other." That is a claim about *spouses'* values. It is impossible to explain why it is unjust to exclude same-sex couples from marriage without describing why some people value marriage, as compared to alternatives like remaining single. Comparisons are inescapable. These comparisons do not, however, imply marriage is the only way to pursue values like commitment. Many couples commit to one another without marrying. Nor do these comparisons imply commitment is the only important value. Some people do not value dyadic commitment, preferring to define themselves as single people or in open relationships, extended families, or friendship networks. The Court's claim that some people value marriage does not imply that other types of family are less valuable. Nor does it imply that people should not be free to pursue these lives.

One might argue the Court's second argument goes a step further, endorsing exclusive commitment as objectively valuable. Even so, this premise does not necessarily denigrate nonmarital relationships. The Court is not setting out a comprehensive list of valuable human pursuits. Unless one assumes values are exhaustive and exclusive, then marriage, exclusive cohabitation, open relationships, extended families, and communal commitments can all be objectively valuable. State efforts to promote one set of values do not necessarily imply that others are inferior.

D. *Does* Obergefell *Invite Unnecessary Moral Controversy?*

This response, of course, invites a different challenge. Is it legitimate for a state to promote one type of relationship that facilitates values held only by some citizens? This is a difficult question, which I turn to in Part III. But first, given the public controversy over the nature and value of marriage, perhaps *Obergefell*'s mistake was tackling these issues at all. Maybe the Court should have skirted controversies about marriage by avoiding the right to marry and relying only on equal protection?

Arguments of this type have two crucial premises: (1) the Court should avoid controversies about the nature or value of marriage, and

(2) equality-based reasoning can avoid moral controversies that rights-based reasoning cannot. The first premise raises those same difficult questions about what reasons can justify civil marriage. The second premise is the subject of this Section. Would an equal protection opinion have been more neutral in the sense of avoiding substantive debates about the definition or value of marriage? I am doubtful. There are many ways to formulate equality arguments for same-sex marriage, but none avoid controversial questions about the reasons for marriage law.

First, many equality arguments are substantive claims dressed up in equality language, as Professor Peter Westen famously argued.[114] For example, one classic argument for same-sex marriage is that banning same-sex marriage treats homosexual persons unequally, because same-sex couples would like to marry for the same reasons as different-sex couples. This argument can be cleanly formalized:

(1) States should treat their citizens equally.

(2) States should offer civil marriage for reasons $\{x \ldots x_n\}$, where $\{x \ldots x_n\}$ includes all the reasons for and against civil marriage.

(3) Reasons $\{x \ldots x_n\}$ apply to both different- and same-sex couples.

(4) Offering civil marriage to different-sex couples while denying it to same-sex couples treats the latter unequally without justification.

(5) Therefore, states should offer civil marriage to same-sex couples.

In this type of argument, equality plays no independent role. The substantive premises (2 and 3) alone entail the conclusion (5). The equality premises (1 and 4) are redundant. Indeed, premise (4) is true only for substantive reasons: unequal treatment is *unjustified* only if the reasons for and against civil marriage apply equally to same and

[114] *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). I do not endorse Westen's claim that all equality claims are empty. I agree with theorists like Hellman, *infra*, who argue a state commits a special wrong by denying the basic equality of all persons, a wrong which is distinct from the wrong it commits by denying them benefits to which they are entitled.

different-sex couples.[115] The language of equality is an unnecessary detour in a thoroughly substantive argument.[116]

Professor Deborah Hellman offers a theory of comparative discrimination to distinguish substantive wrongs from denials of comparative equality.[117] She argues courts could use comparative equality analysis to resolve same-sex marriage cases without defining marriage or endorsing it as valuable.[118] Discrimination is a "substantive wrong" when it "denies someone something to which she is independently entitled."[119] Discrimination is a "comparative wrong" when it demeans a group by treating them as inferior.[120] Comparative discrimination can be intentional, procedural, or expressive. The state treats a group as inferior if it intends to discriminate against the group, ignores the group's interests in legislative procedures, or acts in ways that express the message that the group is inferior.[121]

How might comparative discrimination avoid controversies about "thick" values? As long as the public *perceives* marriage as valuable, then excluding same-sex couples from marriage sends the message that they are inferior.[122] When a state offers a *socially valued* good to one group but not another, this differential treatment itself implies inferiority, regardless of whether marriage is, in fact, valuable, for same-sex couples or anyone.[123] Thus, Hellman argues, a court can evaluate the anti-gay marriage amendments by answering only

> a factual question (What did the people who adopted the amendment actually intend?) or an interpretive question (What is the best way to understand what message [the amendment] sends?) rather than on a

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115 *Id.* at 547.

116 *See* Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 127 (arguing an equal protection challenge could not avoid moral judgment in deference to legislators, because the Court had to decide whether same- and different-sex marriages are "relevantly alike," and "it is impossible to decide which dimensions are relevant without making a contestable moral judgment about the institution of marriage").

117 *See* Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 902 (2016).

118 Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 65.

119 Hellman, *Two Concepts of Discrimination*, *supra* note 117, at 921.

120 *Id.* at 942; Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 59.

121 Hellman, *Two Concepts of Discrimination*, *supra* note 117, at 903–06.

122 *Id.*

123 *Id.* at 914.

> disagreement about a normative question (Are opposite-sex partners necessary for marriage, correctly conceived?).[124]

I believe Hellman identifies a sense in which discrimination can commit a distinctive wrong by failing to treat its people as equals. I doubt, however, that comparative equality avoids substantive controversies.

Before I turn to same-sex marriage, the role of substantive reasons is easier to see in racial discrimination. Suppose a city closes its pool the day after a desegregation order. The city claims a pump broke and could not be replaced. In intentional discrimination claims, heightened scrutiny offers a tool to pierce rationalizations.[125] If the city cannot prove its putative reasons or if the reasons are insufficient to justify its action, then a court can infer officials acted with discriminatory purpose. Heightened scrutiny serves this function only if the court evaluates the truth of the putative reasons.

Similar substantive inquiry is necessary to evaluate expressive discrimination, where the court must interpret a state's action to decide if it expresses a message that a group is inferior.[126] The context surrounding state actions allows them to express meanings beyond their explicit content or the officials' intentions. The community will interpret the pool closure as demeaning minorities. Citizens will perceive this message even if the pump did break and even if the lifeguards closed the pool without knowing about the order. Intentions and reasons are not irrelevant, however. They are a vital part of the interpretive context. A demeaning message can be diminished or cancelled if officials publicize valid reasons. Suppose the city took great pains to prove the pump broke. If citizens believe the pump did break and that is why lifeguards closed the pool, then the legitimate reason and intent diminish the demeaning message sent by the pool closure.[127]

We can now return to same-sex marriage. The Court must decide whether laws against same-sex marriage express a message that

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124 Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 68.

125 Hellman, *Two Concepts of Discrimination*, *supra* note 117, at 907 (using tiers of scrutiny as a tool to identify comparative discrimination).

126 *Id.* at 906.

127 The message sent by the closure may be powerful enough that the city is obligated to take positive steps to counteract it, even shouldering significant expense. The stronger the expressive act, the harder it is to cancel. For example, flying a Confederate flag sends such a powerfully demeaning message that it is difficult to imagine reasons capable of canceling it, short of moving it to a historical museum.

homosexuals are inferior. To do this, the Court must evaluate the states' reasons for offering civil marriage and limiting it to different-sex couples. If the states had articulated persuasive reasons for civil marriage that did not apply to same-sex couples, then those reasons would diminish the demeaning message. (Of course, direct evidence of discriminatory intent by legislators and referenda supporters would remain.)[128] Comparative equality analysis cannot avoid interrogating arguments about the nature of legal marriage. Admittedly, the Court need not evaluate anyone's ethical or social vision of marriage, but the Court did not need to make those arguments to justify the right to *civil* marriage either.[129]

The problem with *Obergefell*'s rhetoric is not that the Court's emphasis on the right to marry required it to engage substantive debates about marriage. Switching from due process to equal protection would not have avoided controversial debates about the nature and value of civil marriage. Even if the Court had limited itself to equality reasoning, it would still have had to ask why the states offer civil marriage and whether that rationale offers a valid (rational, important, compelling) reason to exclude same-sex couples.

Nevertheless, there is something to this idea that the Court insulted nonmarital families by making controversial statements about marriage. This brings us to the critics' second premise, that courts should avoid controversial issues about the value or nature of marriage. What reasons may states legitimately use to justify family law? This is the fundamental question behind the progressive criticisms of *Obergefell*'s rhetoric. It is time to tackle it.

III. Glorifying Marriage Violates the Ideal of Public Reason

Why should the Court avoid controversial questions about the nature or value of marriage? One might worry that entering unnecessary moral disputes increases the likelihood of political backlash. Whatever the merits of this prediction in the marriage context, this strategic

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128 *E.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002–03 (N.D. Cal. 2010).

129 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1741–56 (arguing for a positive right to legal marriage that is agnostic about why couples or society value marriage); *see infra* Section III.C (identifying reasons in *Obergefell* for a right to legal marriage that do not presume one theory of valuable relationships).

objection cannot justify the moralistic tone of progressive critics. They accuse the Court of something worse than a tactical blunder. They sense it mistreats nonmarital families.

Huntington contends the Court's definition of marriage disrespects nonmarital families (and social conservatives) by relying on values they reject.[130] The problem with this argument is that every difficult constitutional issue invokes moral values, and someone always loses. Constitutional courts cannot avoid moral controversies. Hellman argues courts should limit themselves to "thinner" moral values because "the principles that establish the basic structures of government and rights of individuals . . . should, as far as possible, be comprised of commitments that people with diverse views could be expected to be able to accept."[131]

Did *Obergefell* delve too deeply into the nature of marriage in a way that disrespected American family pluralism? If so, does that mean all substantive moral reasoning about marriage violates liberal constitutional commitments? The simple answers are yes and no, but things are not so simple. Some moral reasoning about the family is inappropriate, but not all. *Obergefell*'s moral reasoning is a mixed bag. It offers some reasons for civil marriage that respect family pluralism. The opinion claims marriage protects intimate autonomy and child welfare. Unfortunately, it does not stop there. The opinion endorses marriage as an ideal way of life and implies states may support marriage because citizens value it as a moral ideal. The latter moral arguments are illegitimate in ways that disrespect nonmarital citizens. To explain why the former "thinner" values are legitimate while latter "thicker" values are not, we need to dive through the foundations of political liberalism.

A. *Political Liberalism*

Political liberalism is part of a family of political theories that demand the state justify its actions with "public reason." The seminal work is John Rawls's *Political Liberalism*, but similar ideas are articulated by Charles Larmore, Jurgen Habermas, and Gerald Gaus.[132]

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130 Huntington, *supra* note 32, at 30.

131 Hellman, *Equality and Unconstitutional Discrimination*, *supra* note 8, at 60.

132 *See generally* CHARLES LARMORE, THE MORALS OF MODERNITY (1996); JURGEN HABERMAS, BETWEEN FACTS AND NORMS (1996); GERALD GAUS, THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD (2011).

This is not the place for a full defense of political liberalism. I want to sketch enough of its moral foundations to illustrate why political liberalism is morally attractive and how it can justify the intuition that *Obergefell*'s rhetoric wrongs nonmarital citizens.[133]

The core moral vision of political liberalism is that the right kind of state can enable people with fundamental moral and religious disagreements to live together in a community of free and equal citizens.[134] To realize this vision, the state must comply with two normative standards. A state may rightfully hold coercive authority only if its exercise of power is just *and* legitimate.[135]

The requirements of liberal justice are familiar: respect for rights and a fair distribution of resources. Each person should be free to pursue her own vision of the good life, insofar as that pursuit is consistent with equal liberty for everyone else. Accordingly, a just state must protect a scheme of basic rights that includes freedom of thought, expression, religion, association and travel, as well as some right to property and contract. The correct principle of distributive justice is more controversial, but all citizens must at least have sufficient resources to give them a fair chance to achieve their ideas of a good life. Few, if any, existing states satisfy the demands of justice. Nevertheless, being just is insufficient. Officials cannot claim authority simply because they would enact just laws.

Imagine King Arthur wants to set up New Camelot. His laws would, by hypothesis, be perfectly just. Yet, Arthur cannot expect everyone to agree his laws are just. As long as New Camelot respects freedom of thought, its citizens will reach different theories about the nature of the world and about what is valuable. Religious and moral

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133 The following account is an amalgam of the political philosophies of Immanuel Kant and John Rawls and is not meant as an exegesis of either's philosophy. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY 363 (Mary J. Gregor ed. & trans., 1996); RAWLS, *supra* note 14. The moral arguments I describe resonate with the work of Gerald Gaus, particularly his concern for the problem of unequal moral authority, although Gaus develops a theory for all social relations with a less restrictive theory of public reason. GAUS, *supra* note 132, at 22.

134 RAWLS, *supra* note 14, at 8–9, 202–04.

135 John Simmons, a libertarian rather than a public reason liberal, drew this distinction and used it to accuse Rawls of blurring the two criteria. *See* John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 752–53 (1999). Public reason theorists disagree about the relationship between these two normative standards, including whether they are genuinely distinct or whether one is derivative.

pluralism is inevitable, not because some citizens are ignorant, self-interested, or wicked, but because they face a complex world with limited information and potentially conflicting values.[136] Suppose Arthur decides to enforce the rules he concludes are just, even if his citizens cannot appreciate the justice of his rulings. Suppose he even defines and adjudicates all their rights and duties correctly. Nevertheless, Arthur disrespects his fellow citizens. He assumes they must submit to his moral judgment even if they conclude he is violating their rights. Moreover, he claims the right to enforce his judgment with coercion. Arthur treats his subjects as moral inferiors. One cannot treat others as equals while claiming a unilateral power to define their rights and duties, much less a unilateral liberty to enforce those duties. Arthur's rule would be just, but that is not sufficient to justify his right to rule.

Yet, most states claim precisely this authority. And no real states are perfectly just. Why is this permissible? Normative theories of *legitimacy* seek to justify (and limit) the right to define and enforce citizens' duties. One might contend political authority is legitimate only if citizens actually consent.[137] Others might argue it is legitimate only if it is exercised according to majoritarian democratic procedures.[138]

The criticisms of consent and democratic theories are well known. Few people genuinely assent to a political authority. Most have no viable opportunity to leave their birth nation. No one can avoid all political authority. Against a backdrop of worldwide coercion, the choice to join one state looks more like prudent acquiescence than meaningful assent. Submission, unlike consent, carries little moral freight. Majoritarian democracy does give each person an equal share of voting power. However, it also enables the majority to impose its judgment on the minority. If citizens believe the laws are unjust, it matters little whether they were selected by the many or the few. A majority that simply imposes its vision of justice on society disrespects dissenting citizens in the same way that Arthur disrespected his subjects.

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136 Rawls calls this "the fact of reasonable pluralism," which he argues persists even in ideal circumstances because everyone faces the "burdens of judgment." RAWLS, *supra* note 14, at 36–37, 55–56.

137 Simmons, *supra* note 135, 744–45 (discussing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 95 (1690)).

138 JEREMY WALDRON, LAW AND DISAGREEMENT 117–18, 249–54 (1999).

Political liberalism offers a different moral vision in which political legitimacy depends on public justification. Legitimate states do not simply impose a just regime as judged by one person or group. They seek to justify their decisions to all citizens. They pursue a vision of justice all citizens can accept is reasonable, even if mistaken.[139] According to the *principle of liberal legitimacy*, political authority is legitimate only if exercised according to a constitution that is justified publicly by reasons that all citizens can accept as reasonable.[140] Officials need not convince citizens the constitution is fully just. Citizens need only conclude that the state's constitutional decisions are reasonable, even if mistaken.

Legitimacy, on this conception, comes in degrees. Each citizen may judge the constitution as more or less reasonable, and the constitution may be appreciated as reasonable by a larger or smaller share of citizens. Admittedly, liberal legitimacy is difficult to achieve in pluralistic societies.[141] Yet, for a moment, suppose that a state did succeed. Liberal legitimacy would transform the moral relationship among citizens and between citizens and the state.

First, in a legitimate state, mutual respect gives each citizen a reason to regard the law as morally binding.[142] Suppose, for example, a

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139 RAWLS, *supra* note 14, at 143–44.

140 *Id.* at 137 ("[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which are all citizens as free and equal may reasonably be expected to endorse in light of principles and ideals acceptable to their common human reason.").

141 According to Rawls, one task of political philosophy is "the defense of reasonable faith in the possibility of a just constitutional regime." *Id.* at 172.

142 This is only a prima facie reason. Morality requires us to treat one another as equals, but respect is an absolute value. Sometimes we justifiably coerce others to conform to justice because morality does not demand we sacrifice ourselves to accommodate persons who would deny moral equality, such as racist or religious fanatics. *See* JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 290–91 (2011). Each person must judge the point at which private coercion is justified to secure justice. This is the classic dilemma of the revolutionary, but individuals face similar judgments in otherwise just and legitimate states. Anti-abortion and pro-choice advocates face this question, as do advocates for animal rights or extreme environmentalists. Political liberalism cannot define this threshold; it must be defined within each person's comprehensive view of justice. *See* RAWLS, *supra* note 14, at 386. Even when justice justifies private coercion, the values underlying legitimacy nevertheless leave their "moral residue." When we abandon the quest for universal rules backed by shared public reason, we treat our fellow citizens as moral inferiors who are at most "strategic partners, patients to be helped, or dangers to be contained—but not as fellow participants in a moralized social life." GAUS, *supra* note 132, at 282–83.

state prohibits demonstrations within 100 yards of a religious sanctuary. Officials argue this small restriction on where some citizens may speak protects other citizens' liberty to practice religion. Many citizens accept that argument as reasonable yet still conclude it violates freedom of speech. Dissenters have good reason to seek legal change, but they also have a strong moral reason to comply. If they proceed to demonstrate outside churches, then they coercively impose their own theory about the correct balance of free expression and religion. Like King Arthur, they claim for themselves a power to define everyone's liberty. By demanding other citizens comply with their vision of justice, they treat them as moral inferiors. Once citizens recognize the constitution protects a reasonable scheme of rights, they cannot insist on their own private judgment without treating others as less than equal.[143] Mutual respect demands citizens comply with reasonable constitutional law.

Liberal legitimacy also transforms the relationship between a state and its citizens. From a citizen's perspective, legitimacy reconciles compliance with self-respect. Sometimes it is rational to comply with unjust political authorities out of fear or prudence, but this kind of submission compromises one's status as a free and equal person. Compliance with legitimate authority is different. Citizens must still follow laws they believe violate their rights, but if they recognize the laws are reasonable, they can also judge that these laws enable them to live with their fellow citizens as equals.[144] Compliance is no longer an instrumental tradeoff. By complying with reasonable constitutional decisions, citizens abide by the moral limits on their authority over others. It is the only way for them to respect one another as equals.

From the state's perspective, legitimacy enables officials to exercise authority without treating citizens as inferior. Unlike Arthur in New Camelot, legitimate officials do not merely demand others submit to their judgment. They justify the law using reasons each citizen can accept as reasonable from his or her own perspective. In so doing, they respect each citizen as a person entitled to act on his or her own moral judgment.

143 *See* Helga Varden, *Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature*, 13 KANTIAN REV. 1 (2008) (reconstructing Kant's argument that citizens can treat one another as free and equal only in a system of legitimate legal authority).

144 RAWLS, *supra* note 14, at 143, 147–48.

Liberal legitimacy enables citizens to live together as equals, and it enables citizens to accept political authority without becoming mere subjects. The liberal principle of legitimacy rests on this moral vision of a community of free and equal citizens. What is necessary to sustain this moral vision?

That brings us to the *ideal of public reason*: those who wield legal authority should justify their decisions with reasons all citizens can accept as reasonable. This ideal demands "publicity" in two senses. Officials must justify their decisions publicly, and they must limit themselves to public reasons that each citizen can accept as reasonable.[145] The ideal applies, in the first instance and in its strictest form, to deliberation about constitutional essentials by public officials, such as judges, legislators, and executive officers.[146]

This is an ideal. It is an archetype that should guide behavior but can never be fully realized. Officials fulfill it to a greater or lesser extent. We misunderstand the ideal of public reason if we imagine it as a test of right or wrong action. There is no exhaustive list of reasons that officials can simply check off to ensure the law is legitimate.[147] Rather, the ideal of public reason is a commitment to a process. The state should have procedures of public deliberation that allow citizens to articulate their objections and require officials to respond with justifications citizens can see as reasonable. Procedures like this embody the relationship of mutual respect between a state and its citizens. Hopefully, this iterative

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145 *Id.* at 222. Adherence to public reason is necessary but not sufficient for legitimacy. Citizens must also be objective and empathetic enough to recognize public reason. The share of citizens who will judge correctly that officials complied with the liberal principle of legitimacy depends on contingent factors, such as the community's level of education, trust, tolerance and apathy, as well as competing social forces.

146 *Id.* at 215; Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1476–78 (2006). Public reason theorists disagree about what ideal citizens should follow when voting in referenda or engaging in public constitutional debate, whether they should use public reason exclusively or may use comprehensive reasons as long as they are also willing and able to offer sufficient public reasons. *See* Christie Hartley & Lori Watson, *Feminism, Religion, and Shared Reasons: A Defense of Exclusive Public Reason*, 28 LAW & PHIL. 493 (2009) (offering a useful summary and intercession in this debate).

147 Here I depart from Rawls, who thought each person must have a "test" to specify what counts as a public reason and the list of reasons must be "complete," in the sense that "those [public] values alone give a reasonable public answer to all, or nearly all, questions involving the constitutional essentials." RAWLS, *supra* note 14, at 225–26. *But see* SAMUEL FREEMAN, RAWLS 406 (2007) (arguing Rawls assumes only that a complete conception of public reason will emerge from political processes).

process produces a constitution and a citizenry that can satisfy the liberal principle of legitimacy. How successful the process will be depends on the empathy, insight, and creativity of public officials, as well as the objectivity and tolerance of dissenting citizens.

What moral conclusions follow when officials fall short of this ideal of public reason? Whom does it wrong and how? If officials rely on reasons that some citizens cannot accept as reasonable, then these dissenting citizens can only see these officials as using power to impose their beliefs on society. The dissenters might acknowledge the officials acted conscientiously to do what they judged best, but righteousness does not give anyone a claim to authority. By proclaiming themselves a moral authority, these officials reject everyone's equal right to follow their own moral judgment.[148] Officials who disregard the ideal of public reason treat dissenting citizens as inferior citizens.

Since the law no longer represents itself as resting on shared reasons, the dissenters can only respond in kind. They must judge the social situation from their own moral or religious perspectives. If the injustice is great, they may resist. If the injustice is modest, they may go along to preserve other rights, stability, or democracy. When dissenters relent to laws supported only by non-public reasons, we should not confuse the resulting détente with legitimacy. These dissenters acquiesce to authority as the lesser evil. They do not assent in a way that carries moral weight.

B. *Nonpublic Reasons*

Obergefell violates the ideal of public reason in two ways. It glorifies marriage as an ideal relationship for realizing secular values. It also authorizes states to use law to encourage marriage for its own sake. Each argument disrespects single people, cohabitants, kinship families, and other nonmarital families, because they cannot accept these reasons as a reasonable basis for governing the family.[149]

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148 QUONG, *supra* note 142, at 316 (arguing the state "cannot consistently accord citizens the moral status of responsible agents, and yet also claim the moral right to direct the lives of citizens in ways that cannot be justified to them").

149 I am, of course, not the first person to discuss whether public reasons can be given against same-sex marriage, *see, e.g.*, Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1320 (2009); or for marriage law in general, *see, e.g.*, Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302 (2010);

1. Glorifying Marriage as a Way of Life

Not all marriage promotion is illegitimate. It depends on what one means by "promotion." Many laws create an incentive to marry rather than maintain other types of families. Liberal legitimacy does not require outcome neutrality.[150] No state, however, may legitimately declare marriage an ideal personal or social relationship. Similarly, no state may legitimately channel couples into civil marriage simply because officials believe marriage is an ideal relationship. These kinds of marriage promotion assume the truth of one theory of the good life. Citizens who value different relationships cannot accept this premise as reasonable. Moral "establishment," no less than religious establishment, abandons the goal to treat all citizens as free and equal. Any law justified only as a means to encourage ideal relationships is illegitimate. For much of Western history, civil marriage was illegitimate for this reason. (Of course, that moral failing paled in comparison to the gender oppression it inflicted.)

The portions of *Obergefell* that endorse marriage as a superior relationship flout the ideal of public reason. This ideal should apply in its strictest form to decisions of the highest court about constitutional essentials.[151] The point is not that the Court should avoid controversial issues of political morality. That is impossible in a pluralistic society—as in any free society. Nevertheless, one function of constitutional courts is to ensure officials exercise power according to terms all citizens can accept as reasonable. Constitutional adjudication empowers citizens to demand officials justify their actions in reasons consistent with shared constitutional values. Ultimately, the Supreme Court decides which reasons suffice for that purpose. The Justices articulate the state's vision of public reason.[152] Consequently, the Court has a special responsibility to limit itself strictly to reasons all citizens can accept as reasonable.

Christie Hartley & Lori Watson, *Political Liberalism, Marriage, and the Family*, 31 L. & PHIL. 185 (2011).

150 RAWLS, *supra* note 14, at 195.

151 RAWLS, *supra* note 14, at 235–36 ("[P]ublic reason is the sole reason the court exercises. . . . The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. . . . Equally, they cannot invoke their or other people's religious or philosophical views.").

152 *Id.* at 235 (the Supreme Court is public reason's "institutional exemplar" because it "is visibly on its face the creature of that reason and of that reason alone").

Instead of honoring this ideal, the Court in *Obergefell* wrote an homage to marriage as a moral and spiritual ideal. The Court proclaims, "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."[153] Later, the Court declares, "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[154] These values—love, fidelity, devotion, and personal sacrifice—are not public values. Only a comprehensive theory of the good life can determine what relationships embody an ideal of love or fidelity. Many people deny marriage captures this ideal. These citizens cannot accept the Court's rhetoric as a reasonable basis for social cooperation because its premises conflict with their fundamental values. The secular glorification of marriage is not merely offensive to single people or cohabitants—it disrespects them as equal citizens.

Political liberals need not deny that values like love and devotion are vital to human flourishing or that marriage enables some couples to realize these values. What political liberals must deny is that the state may endorse *any* transcendent values. The constraints of public reason apply equally to religious and secular values. *Obergefell* recognizes some citizens' religious values cannot be the basis to restrict other citizens' access to marriage. It is a shame the Court did not apply this constraint to its own reasoning.

Moreover, the Court does not stop at telling nonmarital families that their lifestyle is less valuable. *Obergefell* appears to endorse laws that limit family benefits to spouses in order to encourage couples to choose marriage as the state's preferred lifestyle.[155] This reasoning licenses states to abandon commitment to reciprocal justification.

By showing utter disregard for whether citizens in nonmarital families could accept its opinion as reasonable, the Court treats them as mere subjects of power, rather than persons whose moral judgment is entitled to equal respect. The valorization of marriage by public officials slights the equal dignity of nonmarital families.

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153 Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

154 *Id.* at 2602.

155 *See, e.g.*, *id.* at 2601 ("[S]ociety pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.").

2. Using Law to Benefit Spouses

Obergefell also violates the ideal of public reason in a more subtle fashion. The Court argues "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[156] The states "pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[157] These passages echo a common family law theme. The states offer civil marriage and provide spouses with benefits to support the marital relationships that many citizens value.

This argument also violates public reason. The problem with this argument is not that it assumes marital supremacy. One can acknowledge marriage is valuable without implying other relationships are less valuable, assuming there is more than one kind of valuable relationship. Nor does this argument assume the truth of one theory of the good. Spouses value their relationship for many reasons. Some of those reasons are acceptable to any conception of a good life, such as protecting their children or enabling a long-term relationship.

The problem with this rationale is that it deliberately gives a relative advantage to one theory of valuable relationships. The states would be required to offer legal marriage because some citizens believe matrimony is the ideal relationship.[158] States *must* give spouses special symbolic and material goods *because* some citizens value marital relationships more than other forms of family life. This argument authorizes states to preference the moral, social, or religious values of one group. Such legal interventions designed to favor one theory of valuable relationships cannot be justified to those with different and reasonable views of the good life that value different relationships.

Not all liberal theorists agree such interventions are illegitimate. Some "perfectionist" liberals argue a state may help citizens pursue their vision of the good life, as long as it does not hinder others' ability to pursue different values. As long as the state avoids endorsing one theory of social marriage and prohibits marital status discrimination, it may

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156 *Id.* at 2599.

157 *Id.* at 2601.

158 This reasoning could be a public reason in support of a negative liberty right. The fact that citizens value social marriage is a reason to avoid interfering with their decisions to marry for moral, social, or religious purposes. It is quite another matter to argue states must offer civil marriage because some citizens value social marriage.

use law to help spouses achieve ends they happen to value. Professors Ralph Wedgwood and Stephen Macedo each defend this kind of liberal perfectionist argument for marriage law.[159]

Wedgwood, for example, argues legal marriage is justified as a means to help citizens pursue their "fundamental life-aspirations."[160] It is a sociological fact that many citizens value marriage. Laws "helping members of the community to achieve such central aspects of their fundamental life-aspirations promotes the common good."[161] But why is civil marriage necessary for citizens to marry in the personal or social sense? Wedgwood agues law is necessary to sustain the shared social meaning of marriage.[162] Every society has common expectations about how spouses should treat one another and be treated by others. This shared social meaning allows marriage to serve sorting and signaling functions that spouses rely on to reach a mutual understanding and reinforce it over time.[163] Wedgwood worries excessive pluralism will fracture this shared social meaning. Some people might claim to marry temporarily (think serial monogamists), to marry oneself (think egoists), or to marry another person without the other's knowledge or consent (think celebrity super fans).[164] Licensing "insulates" the cultural meaning of marriage from these pressures.[165] Legal marriage helps limit social marriage to couples willing to accept default legal rights that mirror current social norms. Licensing "underpin[s]" current social norms so marriage remains "understood throughout the whole of society."[166]

Wedgwood's precision helps illuminate the flaw in this type of argument. It sounds innocent to say that law can help some citizens

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159 Ralph Wedgwood, *Is Civil Marriage Illiberal*?, *in* AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS 29 (Elizabeth Brake ed., 2016); STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY & THE FUTURE OF MARRIAGE 88–98 (2015).

160 Wedgwood, *supra* note 159, at 39.

161 *Id.* at 45.

162 *Id.* at 35–36. Macedo blends public and non-public reasons. He argues law offers a structure of enforceable duties to protect the trust of spouses who make long-term commitments, which is neutral among competing theories of the good, but he blends this with claims that law may set default rules to preserve "social expectations and bases for moral evaluation" that encourage "conjugal love," which empowers law to support a specific ideal of valuable relationships. MACEDO, *supra* note 159, at 91–94.

163 Wedgwood, *supra* note 159, at 34–35.

164 *Id.* at 36.

165 *Id.* at 37.

166 *Id.* at 36.

achieve intimacy, love, and fidelity because people with vastly different worldviews share these values.[167] In fact, this is preference laundering. Instead of openly advocating one theory of the good life, the state supports values that just "happen" to be held by most citizens through an institution that just "happens" to embody a specific vision about the right balance of those values. It is not, however, an innocent coincidence that social norms channel people who value love, sex, and children into marriage. Centuries of social and legal engineering shaped these norms to favor one relationship: heterosexual monogamy with gendered role divisions. Officials are also not agnostic. They believe marriage is the best realization of love, intimacy, and family and encourage it for that reason. Finally, even if the connection were contingent and officials were agnostic, the justification is still fundamentally illegitimate. The state is deliberately using law to advantage one vision of ideal relationships. Officials let the people choose by ballot which relationship is ideal, but the establishment of moral values chosen by polling is still establishment.

Imagine a similar argument for religious establishment. Suppose, as a sociological fact, most citizens aspire to enjoy religious community. Pluralism threatens to fracture the shared meaning of religion, because anyone can found a new "religion" by calling their leader a "savior" and their storefront a "church." Diluting the shared cultural interpretation of religion will make it harder for citizens to realize their aspiration for religious community. The state could prevent this confusion by licensing religious leaders and communities. The program would not interfere with the rights of citizens who are denied licenses, because they remain free to speak, practice, and associate freely. Licensing does not endorse the value of licensed religions. It simply helps some citizens achieve their aspiration for religious community by insulating our shared public meaning of religion from social competition.

This argument, of course, violates the ideal of public reason. No state may legitimately insulate existing religions from religious competition. Similarly, no state may legitimately insulate a theory of valuable relationships from social competition. Just as a state may not declare matrimony the ideal intimate relationship, it may not deliberately favor social norms that declare matrimony an ideal

[167] JAMES E. FLEMMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 190 (2013).

relationship. If we respect our fellow citizens as free and equal persons, then we cannot use law to prevent the majority's vision of valuable adult relationships from losing ground in the marketplace of ideas. It is illegitimate to design the basic political structure in ways that disfavor nonmarital families simply because other people believe marriage is a superior form of intimate relationship. Disadvantaging nonmarital families for this reason treats people in nonmarital families as less than equal citizens.

C. *Public Reasons*

If *Obergefell*'s glorification of marriage violates the ideal of public reason, does that mean the opinion is illegitimate? No. The Court offers three public reasons for extending the right to marry to same-sex couples. These arguments are far from ideal, and I criticize them at length elsewhere,[168] but they are reasons that all citizens can accept as reasonable despite disagreement about the value of marriage.

1. Autonomy in Relationships

The Court's first argument for the right to marry is that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[169] This argument, while inadequately developed, rests on public reasons. Anyone who denies the value of marital choice must assume one person has authority to dictate another's intimate decisions. This kind of claim is common in non-liberal societies. Some parents choose their children's spouses, and some religions prohibit interfaith marriage. In a liberal society, this kind of authority can never be a legitimate basis for coercion. Anyone who claims authority to dictate another's intimate choices fails to treat them as an agent entitled to act on their own judgment. Of course, adults may choose to follow the preferences of their parents or religious authorities.[170] They may even believe parents or priests have a right to decide. What matters is that such practical authority can never provide a public reason to justify

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168 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1717–24.

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

170 RAWLS, *supra* note 14, at 221–22.

coercion. From the political or legal perspective, each person has liberty to make intimate choices for themselves. Anyone who denies this liberty of intimate choice steps outside the bounds of reasonable disagreement, because they assume one person can dictate the terms of another's life.

This liberty to marry, however, is merely a right to choose without interference. The argument is incomplete. The Court needs additional reasons to explain why protecting intimate autonomy requires a positive right to marriage law.[171] Elsewhere, I have argued that intimate liberty requires civil marriage.[172] Everyone should be free to choose their own intimate relationships, as long as they are consistent with equal liberty for both parties. One core exercise of this intimate liberty is the choice to form committed and indefinite relationships. Yet, such marriage-like relationships threaten both partners with subordination. When a person commits to supporting his partner's chosen pursuits, his duties now become defined by the other's choices. Only something like marriage law can reconcile such commitments with equality. Its entry rules empower couples to create the flexible duties, while its divorce remedies ensure any inequalities caused by the relationship fall equally on both parties. Civil marriage is a valuable *option* for all citizens, even if some individuals choose to pursue other valuable relationships.

2. Child Welfare

The Court also argues the right to marry is fundamental, because civil marriage promotes the welfare of children and caregivers by increasing family stability.[173] Similar arguments shape state law. For example, Tennessee's divorce statute states that one goal of alimony is to protect caregivers in role-divided marriages because "[i]t is the public policy of this state . . . to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state."[174]

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171 Strauss, *The Positive Right to Marry*, *supra* note 9, at 1717–24.

172 *Id.* at 1741–60. *See generally* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (arguing marriage law offers majoritarian default rules any rational couple in trust-based relations would choose on efficiency grounds).

173 *Obergefell*, 135 S. Ct. at 2600–01.

174 TENN. CODE ANN. § 36-5-121 (2018).

Many liberals make similar welfare arguments for marriage law.[175] Professor Simon Cabela May recently laid out the argument in a rigorous fashion.[176] Following Rawls, he assumes the state may legitimately help citizens obtain "primary goods," which are the kind of goods needed under any reasonable conception of the good life. Social marriage is a "presumptively permanent relationship,"[177] and such permanence norms are "especially beneficial" under any theory of valuable child and adult relationships because they improve stability, facilitate mutual trust, and increase investment in the relationship.[178] Liberal states may use law to amplify these primary goods. This instrumental use of marriage law is not outcome neutral. It creates incentives to enter social marriage. It even alters incentives to adopt particular marital roles, making role-divided marriage more attractive. Yet, as long as the states' goal is to provide primary goods, it does not violate the ideal of public reason by endorsing any deep moral or religious premises about ideal families.

Of course, child welfare arguments for marriage are imperfect. The empirical premise that marriage improves child welfare is uncertain.[179] In any case, the argument is over- and under-inclusive. Permanence norms that sustain high-conflict marriages are bad for spouses and children. A large percentage of children are raised in nonmarital families, so the state might achieve its goals better by supporting all caregivers. But again, despite its flaws, the child welfare argument does offer public reasons for the right to marry.

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175 *See, e.g.*, FLEMMING & MCCLAIN, *supra* note 167, at 177–206; MACEDO, *supra* note 159, at 110–11, 116; Hartley & Watson, *supra* note 149, at 211.

176 Simon Căbulea May, *Liberal Neutrality and Civil Marriage*, *in* AFTER MARRIAGE, *supra* note 159, at 9–28 (articulating the argument but remaining agnostic about the truth of its premises).

177 *Id.* at 15.

178 *Id.* at 19–21; *see also* FLEMMING & MCCLAIN, *supra* note 167, at 189 (arguing the public reasons for marriage also include cultivation of civic virtues necessary for a stable liberal democracy).

179 HUNTINGTON, *supra* note 33, at 28–44 (surveying the social science literature to conclude family structure may be an independent causal determinant). *See generally* Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

3. Equal Access to a Political Institution

The Court also argues that the right to marry is fundamental, because "[m]arriage remains a building block of our national community," and "[f]or that reason . . . society pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[180] After reviewing numerous benefits the law offers married couples, the Court concludes that denying these benefits to same-sex couples makes their relationships unstable and "teach[es] that gays and lesbians are unequal."[181]

On one interpretation, this passage argues states support marriage because it enhances overall social welfare. This argument is missing key premises. The Court never explains why marriage is necessary for social welfare or why *law* is necessary to help marriage play this role. Child-rearing is the only plausible basis, but then this argument is redundant. Moreover, this interpretation has a bigger problem. It does not support individual rights; it supports state power to regulate marriage.[182]

A more charitable interpretation reads this passage in light of the Court's comments about the "synergy" between due process and equal protection.[183] One might draw on Professors Nelson Tebbe and Deborah Widiss's "equal access" rights,[184] supplemented by the work of feminists like Susan Miller Okin and Professor Martha Fineman.[185] Even if states are not required to offer civil marriage in the first place, once they do, legal marriage becomes sufficiently important that the state cannot deny access to it without compelling reasons.

Marriage is not just a private relationship. It is central to our scheme of distributive justice. Any just society must meet the basic

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180 Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

181 *Id.* at 2602.

182 Ironically, Justice Kennedy quotes a passage that Justice Field used to justify plenary legislative power over marriage law, upholding a state's power to grant an ex parte legislative divorce. *Id.* at 2601 (citing Maynard v. Hill, 125 U.S. 190, 211 (1888)); *see* Kerry Abrams, *The Rights of Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 527 (2018).

183 *Obergefell*, 135 S. Ct. at 2603. *But see* Abrams, *supra* note 182, at 547–49 (arguing that reading *Obergefell* in light of *Din* suggests Justice Kennedy views the marital interest in self-expression as a subordinate means to the state's interest in fostering "responsible" citizens).

184 Tebbe & Widiss, *supra* note 106, at 1421.

185 SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); FINEMAN, THE AUTONOMY MYTH, *supra* note 84; Hartley & Watson, *supra* note 149, at 197–202.

needs of dependent citizens, including children and the elderly.[186] These distributive justice claims are public responsibilities. Yet, our society delegates these duties to the family. The family is the primary site for care work. Consequently, states are not only permitted to regulate family life; they have a duty to do so.[187] This includes a duty to provide financial support for needy families and legal protection for dependents. The state also has a duty to aid caretakers. As Martha Fineman has argued so persuasively, caring for families is one way people contribute *as citizens* to fulfilling public duties of distributive justice.[188] Society owes caretakers support both to compensate them for their public contribution and to prevent their sacrifices from causing distributive injustice. Marriage is the primary tool that states have used to ameliorate the risks of privatized caretaking.

Because we made marriage part of our basic structure, it is unjust to deny same-sex couples equal access to civil marriage. It is unjust for three related, but distinct reasons. First, it interferes with their liberty as persons, because it hinders their ability to form and sustain their families. State licensing is a de facto condition for being socially recognized as married, which offers vital support for couples.[189] States also provide material benefits directly to married couples, and this kind of state intervention to support one kind of family can make life harder for others.[190] Second, it denies same-sex families support that society owes them. They fulfill the same caretaking functions that justify symbolic and material support of any family—as such, they are entitled to support.[191] Last, it sends a demeaning message that gay and lesbian persons are not equally worthy of participating in a fundamental duty of our political community. The family is not merely a private association. It is a political institution, and marriage is its central legal structure. Exclusion from civil marriage denies them equality *as citizens*.[192]

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186 *The Idea of Public Reason Revisited*, *in* RAWLS, *supra* note 14, at 466–74; EICHNER, *supra* note 84, at 77–79.

187 *The Idea of Public Reason Revisited*, *in* RAWLS, *supra* note 14, at 469–72.

188 FINEMAN, THE AUTONOMY MYTH, *supra* note 84, at 285–86.

189 Tebbe & Widiss, *supra* note 106, at 1420–23.

190 David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 913–14 (2006).

191 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

192 *Id.* at 2601–02 ("As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock

The equal access argument, like the autonomy and child welfare arguments, is imperfect. It assumes states may shift the duty to ensure distributive justice onto families. It also assumes states may continue to use marriage as a proxy to alleviate this burden of privatized care, although many children are raised in nonmarital families. Indeed, the argument can easily be turned against marital status. Laws that aid only spouses hinder the ability of nonmarital families to participate in the political institution of the family, thereby treating them as less than equal citizens. Despite these infelicities, equal access is a recognizably public reason for marriage equality.

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Obergefell articulates public reasons for its right to marry. States may legitimately offer civil marriage to protect intimate liberty. They may even encourage legal marriage to promote child welfare. And, once the states offer marriage, equal access to marriage is required to avoid demeaning same-sex couples. However, *Obergefell* also relies on two non-public reasons. When it valorizes marriage as an ideal of love and devotion, the Court shows it is indifferent to whether citizens in nonmarital families can assent to the basic terms of our social compact. When it endorses laws that aid spouses simply to encourage marital relationships, the Court authorizes states to arrange the basic social structure in ways that deliberately disadvantage nonmarital families. In both cases, *Obergefell* violates the ideal of public reason in ways that slander the equal dignity of citizens in nonmarital families. This, I believe, offers the best moral justification for the progressive intuition that *Obergefell*'s excessive rhetoric wrongs nonmarital families.

D. *Threatens the Trust Underlying Liberalism*

In addition to disrespecting nonmarital families, the Court's violation of public reason has another, more systemic, moral

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them out of a central institution of the Nation's society."); *see also* Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 351 (2016) (arguing once marriage is made "a precursor to a sufficiently large array of rights, then denial of the government-created 'gateway' right is tantamount to denying a class of persons what is in effect a cornerstone of modern citizenship, effectively relegating them to a second-class status").

consequence. It weakens the justification for liberal political society. Political liberalism seeks to realize a valuable political good: a community of people with vastly different views living together as equals.[193]

The ideal political society transcends a mere truce between righteous moral and religious communities.[194] A truce rests on a temporary balance of power. Each side believes his cause is just, but the fight is too costly. If the balance of power shifts, either side may resume the fight to force their judgment on the other. The powerful side may estimate the costs of resuming the fight are acceptable, or the weaker side may conclude a preemptive strike is necessary to avoid being overrun. Political liberalism demands citizens abandon this goal to impose their ideal of justice on society.[195] No polity can satisfy every citizen's ideal conception of justice. The only achievable ideal is justice on terms all accept as reasonable.

This demand for forbearance is not based on skepticism or a second-best theory of justice.[196] Justice is a virtue of society. Any just society protects freedom of thought, which generates reasonable pluralism. Members of such a free, pluralist society have a powerful moral reason to accept the constitution once we recognize it enables us to live together as equals despite our disagreements. Liberal legitimacy is not a strategic calculation; it is a moral commitment to treat one another as equals.

Yet, mutual respect is not an absolute value. This moral commitment is contingent on reciprocal trust. I should limit my rights claims to reasons my neighbors can accept as reasonable only if I have sufficient assurance that they will reciprocate.[197] If I agree to share power with people who I do not trust to limit themselves to reasons that I can accept, then I have subjected myself to their judgment. I am treating myself as an inferior. No one can be obligated to accept such a position of inferiority. If we do not trust one another's commitment to

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193 RAWLS, *supra* note 14, at 202–04, 253.

194 *Id.* at 146–47 (describing a *modus vivendi*).

195 *The Idea of Public Reason Revisited*, *in* RAWLS, *supra* note 14, at 460.

196 RAWLS, *supra* note 14, at 63, 150–52.

197 *Id.* at 49.

mutual reciprocity, then it is impossible for us to live together as free and equal.[198]

This trust is fragile. Pluralism continually pushes us back toward a mere truce. We know our fellow citizens hold different theories of the good and the right. Each of them must decide whether the law is reasonable by comparing "the gap" between the actual law and what she believes is the optimally just law.[199] There is always a "gap," and this creates a motivational tension. Moreover, we know public reason is porous. Comprehensive beliefs sometimes affect our reasoning. Deep moral commitments can lead even conscientious citizens to political conclusions that cannot be justified with public reason. This is an inevitable feature of human psychology. Another troubling possibility is some citizens or officials will manipulate public reason. Even the best public arguments have play in the joints. Deceptive officials can use this space as plausible cover, feigning commitment to govern on terms all can accept, all the while using public power to impose their comprehensive beliefs on others.

To maintain the trust necessary for legitimacy, we need a vibrant culture of public deliberation to display our mutual commitment to reciprocity. We also need dedicated political institutions that hold public officials accountable for relying on public reasons.[200] This trust is most important for the basic principles of our constitutional structure. Yet, cynicism and distrust are rampant in modern constitutional discourse. Any time the Supreme Court relies on non-public reason, it damages the public's trust in mutual reciprocity.

Obergefell's marriage rhetoric damages this trust. The Court relies on non-public reason and expressly disrespects values held by nonmarital families, either by obliviousness or utter disregard. Our obligation to accept the law rests on justified faith that officials follow a reasonable conception of basic rights that we can all judge reasonable,

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198 This is what I think Rawls meant when he said "stability for the right reasons" is not merely a practical concern for maintaining a community but a moral precondition for political liberalism. *See Reply to Habermas*, *in* RAWLS, *supra* note 14, at 390.

199 Gerald Gaus, Respect for Persons and Public Justification 19–20 (unpublished manuscript), http://www.gaus.biz/RespectAndPublicJustification.pdf [https://perma.cc/997G-6JKM].

200 This is certainly the deeper and more troubling problem in our current political climate where public rhetoric continues to violate norms of basic decency, much less principles of mutual respect.

even if mistaken. Even opinions with just results—like *Obergefell*—can undermine that trust and threaten the justification of liberal society.

E. Obergefell*'s Doctrinal Inconsistency*

Obergefell's disregard for the ideal of public reason is also inconsistent with the opinion's own *legal* reasoning. The Court held the ban on same-sex marriage violates equal protection because it "serves to disrespect and subordinate" gay and lesbian citizens.[201] This equal protection reasoning rejects religious arguments against same-sex marriage because these arguments rely on principles that belong to religious morality but not public reason. Yet, the Court's glorification of marriage disrespects and subordinates citizens in nonmarital families in a similar way. Both presume the state may proclaim an ideal family form and disadvantage other families it declares less intrinsically valuable.

This equivalence is supported by the Court's equal protection methodology. To conclude gay marriage bans impose an "*unjustified* inequality,"[202] the Court had to find there were no legitimate reasons to treat same- and different-sex relationships differently. Yet, *Obergefell* ignored the most widely accepted arguments against same-sex marriage. The arguments made by defendants in *Obergefell* were obviously contrived because the precedents precluded the arguments they would have preferred to make.[203] The sincere arguments against same-sex marriage were religious. State marriage law reflected a vision of valuable familial relationships grounded in religious traditions that consider same-sex marriage immoral. *Obergefell* acknowledges some people object to same-sex marriage on religious grounds, but it never engages those arguments.[204] It never so much as describes them. Instead, the Court notes that the First Amendment protects the right of religious citizens "to advocate with utmost, sincere conviction that, by divine

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[201] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[202] *Id.* at 2603 (emphasis added).

[203] *See* Baskin v. Bogan, 766 F.3d 648, 662–63 (7th Cir. 2014) (describing with incredulity Indiana's argument that marriage benefits children, because heterosexual sex can lead to unplanned children, who need the state to entice parents to stay together, while gay couples can have only planned children, so they are more likely to be responsible without incentives); Courtney Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1510–15 (2013); Seidman, *supra* note 116, at 133–34.

[204] *Obergefell*, 135 S. Ct. at 2607.

precepts, same-sex marriage should not be condoned."[205] They may "teach the principles that are so fulfilling and so central to their lives and faiths."[206] Nevertheless, it would demean same-sex couples to exclude them from marriage on the basis of those reasons.

Why exclude the leading arguments against same-sex marriage? Because *Obergefell*'s legal analysis assumes an ideal of public reason.[207] The Court assumes marriage law cannot legitimately be justified by a religious vision of the ideal family. Citizens may live by their own religious ideal of the family and advocate for others to follow similar ideals, but they may not give their ideal the force of law. Public debate about what kinds of lifestyles are valuable is not denigrating, even if the debate is unabashedly religious. It is denigrating if the law stakes an official position about which relationships fulfill familial values, whether those values are religious or secular. It did not matter whether marriage laws "happen[] to coincide or harmonize with the tenets of some or all religions."[208] The problem was that these laws could be justified only by a comprehensive vision of the ideal family.

Other opinions authored by Justice Kennedy assume a similar conception of public reason. In *United States v. Windsor*, the Court wrote that the Defense of Marriage Act "demeans"[209] same-sex spouses by telling the world "their marriage is less worthy than the marriages of others."[210] It did not matter that the legislative history indicated Congress wanted to express "moral disapproval of homosexuality" and

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205 *Id.*

206 *Id.*

207 *See* Katz, *supra* note 19, at 184 ("Kennedy's remarks here . . . suggest a reproof to ordinary citizens who support SSM bans on the basis of their religious beliefs. . . . Kennedy suggests, there is something independently troubling about pushing for a law that denies a basic civil right on grounds that one's creed countenances or even demands such advocacy or enactments. This reproof presupposes the breach of some duty—perhaps a duty to refrain from advocating and voting for laws that cannot be justified on grounds that are intelligible or potentially acceptable to fellow citizens who do not share one's creed."). Unlike Professor Katz, however, I do not think Justice Kennedy was patronizing religious citizens by instructing them about how they should live their religious beliefs. *Id.* at 185. Rather, he is setting out a rule of public reason that restricts reasons for *state* action.

208 *See generally* Brief for United States Conference of Catholic Bishops as Amicus Curiae in Support of Respondents and Supporting Affirmance at 19, Obergefell, 135 S. Ct. 2548 (2015), (No. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519042 (quoting Harris v. McRae, 448 U.S. 297, 319 (1980)).

209 United States v. Windsor, 570 U.S. 744, 772 (2013).

210 *Id.* at 775.

preserve "traditional moral teachings reflected in heterosexual-only marriage laws."[211] Similarly, in *Lawrence v. Texas*, the Court wrote that religious or moral opposition to gay sex cannot justify sodomy laws because "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[212]

Justice Kennedy did not invent this line of constitutional reasoning. In *U.S. Department of Agriculture v. Moreno*, the Court invalidated a federal statute that prohibited adults from receiving food stamps if they were living with more than one unrelated person.[213] The Court concluded that Congress's purpose was to restrict welfare payments to hippie communes that flouted traditional morality.[214] It rejected this rationale as a viable reason for law, because "if . . . 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[215]

Although *Windsor* and *Moreno* might be described as "animus" cases, it is misleading to assert that these laws reflect "a bare . . . desire to harm."[216] Laws motivated by spite are repugnant, but these legislators did not simply hate hippies or LGBT persons. They believed the laws were justified by traditionalist morality that proscribes drug use, cohabitation, non-monogamy, and homosexuality.[217] This moral opposition is not the same as a mere desire to harm hippies or LGBT people any more than moral opposition to cruel slaughter is a mere desire to harm ranchers. Congress, state legislators, and voters were reasoning about what constitutes a good life. I disagree with their conclusions about what is morally permissible, but that does not mean they were motivated by spite.

That does not, however, justify these laws. The law may not legitimately be used to support one vision of valuable life, religious or secular. The constitution sets the basic rules that allow us all to pursue

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211 *Id.* at 771 (quotation marks omitted).

212 Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).

213 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973).

214 *Id.* at 534.

215 *Id.*

216 *Windsor*, 570 U.S. at 770. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 925–26 (2012).

217 This argument was raised at trial but dropped on appeal. *Moreno*, 413 U.S. at 535 n.7.

our lives as free and equal citizens. If it reflects a comprehensive secular or religious theory of the good, then the law forces some to live according to others' values. It treats those citizens as inferior, less entitled to live by their own moral judgment. Family law cannot rest on the notion that one conception of family is intrinsically more valuable, whether that conception is religious or secular.

This symmetry explains why *Obergefell* does not disrespect religious citizens. Professor Michael Seidman has argued religious conservatives were one "disfavored group victimized by *Obergefell*" because the Court "rigs" the game by simply disregarding religious arguments against same-sex marriage.[218] "Truly respecting the losers" requires the Court not to "trivialize their objections"[219] by insisting it is "outside the bounds of reasonable discourse."[220] Instead of telling "governors, clerks, attorney generals, and justices of the peace who resist *Obergefell*" that "they have a constitutional duty to comply regardless of their moral rightness of the decision," we should tell them that "their perspective is wrong."[221]

On the contrary, there are no religious victims here. In a moral debate, respect for another person requires confronting their argument on its merits. In a constitutional decision, respect for fellow citizens requires abstaining from deep moral premises. Ignoring religious arguments is neither deceitful nor disrespectful. Laws affecting basic liberties cannot be justified by comprehensive theory of the good life. Religious arguments against homosexuality are not outside the bounds of *all* reasonable discourse, only outside the bounds of public reason. Citizens as individuals may debate intimate morality. Citizens in their official capacity may not. Obstructionist county clerks have no right to insist others follow their beliefs. This problem is not that the Court disrespects religious conservatives. The problem is that the Court ignores the logic of its own equal protection reasoning. Public officials—county clerks and Supreme Court justices alike—may not endorse or encourage one family ideal.

Obergefell recognizes that the law denigrates same-sex couples if it limits marriage according to religious ideals of heterosexuality.

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[218] Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 134–36.

[219] *Id.* at 142.

[220] *Id.* at 135.

[221] *Id.* at 142.

Unfortunately, *Obergefell* denigrates nonmarital families by allowing states to promote a secular ideal of love, intimacy, and family. *Obergefell*'s rhetoric glorifying marriage is not just flowery dicta. It is inconsistent with *Obergefell*'s doctrinal reasoning.

CONCLUSION

Obergefell's rhetoric of marital supremacy should have little direct impact on the legal rights of nonmarital couples. It does not create a sword to strike down marital status discrimination, but neither does it herald the retreat of constitutional protections for nonmarital families. Nevertheless, we have good reason to regard *Obergefell*'s homage to marriage as troubling. The Court is the expositor of our fundamental constitutional values. Constitutional decisions cannot avoid moral controversy, but the Court should strive to find public reasons that all citizens can recognize as reasonable. Justifying constitutional law in public reasons allows all citizens, even those who disagree, to accept the law as equals. Instead, *Obergefell* glorifies marriage as an ideal intimate relationship and authorizes states to promote marriage as an ideal way of life. The decision is still legitimate because the right to marry can be justified by public reasons. Yet, *Obergefell*'s breach of the ideal of public reason treats nonmarital families as less than equal citizens.