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Obergefell's Liberties: All in the Family

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This Article, part of a colloquium on the Supreme Court's 2015 case Obergefell v. Hodges*, which guaranteed a right of same-sex couples to marry, makes two principal contributions to our understanding of constitutional "liberty," both with significance for family law. The first contribution is analytic. This Article joins the debate among the* Obergefell *Justices, including the four dissenters, about whether Fourteenth Amendment liberty only protects against interference by the state or whether it can also compel affirmative support or government action. On close inspection, this debate not only obscures complexities that defy a clear-cut binary but also camouflages diverse conceptions of liberty found in the majority opinion itself. Analysis of four different readings of "liberty" in* Obergefell*'s majority opinion reveals that marriage—the substantive issue in the case—and its distinctive features account for much of this messiness and multiplicity.*

This Article also makes a theoretical contribution by exploring the relationship between constitutional law and family law that the Court's liberty rulings have forged. The usual approach emphasizes the impact of constitutional doctrine on family law, specifically how the Court's liberty rulings have required substantive changes in laws governing the family. By contrast, this Article turns to the unexamined mirror image, exposing and theorizing how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine, including doctrine disputed in Obergefell*. A survey of the constitutional case law limiting obligations owed by the state reveals that these precedents are "all in the family," in the sense that they all raise issues of concern to family law. These cases, along with those applying the Constitution to expand access to marriage and divorce, suggest the influence of family law's policy of identifying private sources of support for dependent members of society. Had the* Obergefell *majority explicitly acknowledged and embraced this family law policy in recognizing a constitutional right to marry for same-sex*

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couples, it could have avoided some of the criticism and confusion that the opinion has sparked.

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"The right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment . . . ."[1]

[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

I. INTRODUCTION

Family law and constitutional law stand firmly joined at the hip. A principal ingredient now binding these two domains is "the liberty promised by the Fourteenth Amendment," the basis for the Supreme Court's storied ruling in *Obergefell v. Hodges*, which guaranteed access to marriage for same-sex couples nationwide.[2] *Obergefell* stands out as one of the most recent illustrations of the Court's repeated reliance on liberty since the 1920s to review state regulation of family life.[3] Over the years, the Court's liberty rulings have come to protect childrearing decisions,[4] reproductive choices,[5] sexual activities,[6] and intimate relationships, including those officially recognized and some created privately and informally.[7]

This application of liberty to family matters has not developed free from controversy. Especially in recent years, forceful dissents have accompanied the

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[2] *Id.* The U.S. Supreme Court has also applied the Fourteenth Amendment's Equal Protection Clause to overturn discrimination based on gender, "illegitimacy," and marital status, creating another intersection of family law and constitutional law. I have explored such developments elsewhere. *See* Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEMINISM 1, 1–9 (2016) [hereinafter Appleton, *Forgotten Family Law*]; Susan Frelich Appleton, *Gender and Parentage: Family Law's Equality Project in Our Empirical Age*, *in* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY 237, 240–42 (Linda C. McClain & Daniel Cere eds., 2013); Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 354–60 (2012) [hereinafter Appleton, *Illegitimacy and Sex*]; Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 110–20 (2005) [hereinafter Appleton, *Missing in Action?*].

[3] *Obergefell*'s status as the most recent of such rulings was eclipsed a year later by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–18 (2016), which clarified the standard of review applicable to abortion restrictions and struck down two measures enacted by Texas.

[4] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Troxel v. Granville, 530 U.S. 57, 65–67 (2000) (plurality opinion).

[5] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invoking right of privacy); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (same); Roe v. Wade, 410 U.S. 113, 153 (1973) (locating privacy right in Fourteenth Amendment's protection of liberty); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851–52 (1992) (plurality opinion) (explaining how liberty protects personal decisions like abortion); *Whole Woman's Health*, 136 S. Ct. at 2309 (applying heightened scrutiny to regulation of abortion, "a constitutionally protected personal liberty").

[6] *See Eisenstadt*, 405 U.S. at 453–55; Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[7] *See Griswold*, 381 U.S. at 485–86; Loving v. Virginia, 388 U.S. 1, 12 (1967); Moore v. City of East Cleveland, 431 U.S. 494, 501–06 (1977) (plurality opinion); Zablocki v. Redhail, 434 U.S. 374, 383–84 (1978); *Lawrence*, 539 U.S. at 574; United States v. Windsor, 133 S. Ct. 2675, 2692–93 (2013).

opinions for the Court,[8] voicing an array of disagreements, often in particularly provocative terms. For example, in *Obergefell* Justice Alito condemned the majority for giving liberty "a distinctively postmodern meaning"[9]—a dig about uncertain meanings that itself evokes multiple interpretations.[10] Three other members of the *Obergefell* Court also issued dissenting opinions contesting the majority's use of liberty.[11]

This Article on *Obergefell* makes two principal contributions to our understanding of constitutional "liberty," both with significance for family law. The first contribution is analytic. This Article joins the debate among the *Obergefell* Justices, including the four dissenters, about whether Fourteenth Amendment liberty only protects against interference by the state or whether it can also compel affirmative support or government action. On close inspection, this debate—mired in longstanding efforts to maintain distinctions between negative/positive, private/public, and natural/legally constructed—obscures complexities that defy a clear-cut binary. Indeed, careful reading and analysis uncover diverse conceptions of liberty not only when comparing the *Obergefell* majority opinion to the dissents but also within the majority opinion itself. Marriage, the substantive issue in *Obergefell*, and its distinctive features account for much of this messiness and multiplicity.

This Article also makes a theoretical contribution by exploring the relationship between constitutional law and family law that the Court's liberty rulings have forged. The usual approach emphasizes the impact of constitutional doctrine on family law, specifically how the Court's liberty rulings have required substantive changes in laws governing the family and have challenged the abiding claim that this realm belongs to the states.[12] By contrast, this Article turns to the unexamined mirror image, exposing and theorizing how family law principles, assumptions, and values have infiltrated and shaped constitutional doctrine, including doctrine disputed in *Obergefell*. Again, marriage and its peculiar properties play a central role in this investigation, which ultimately leads to a focus on the policy of identifying private sources of support for dependent members of society.

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[8] To list just a few recent examples, the Court produced no majority opinion on most of the issues presented in *Casey*, 505 U.S. at 843–44, and *Troxel*, 530 U.S. at 60; three Justices dissented in *Lawrence*, 539 U.S. at 586, 605; and four did so in both *Windsor*, 133 S. Ct. at 2696, 2697, 2711, and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611, 2626, 2631, 2640 (2015). Three of the eight Justices deciding the case dissented in *Whole Woman's Health*, 136 S. Ct. at 2321, 2330.

[9] *Obergefell*, 135 S. Ct. at 2640 (Alito, J., dissenting).

[10] *See infra* notes 187–200, 286–300 and accompanying text.

[11] *See Obergefell*, 135 S. Ct. at 2616–23 (Roberts, C.J., dissenting, joined by Scalia and Thomas, JJ.); *id.* at 2627–30 (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 2631–40 (Thomas, J., dissenting, joined by Scalia, J.).

[12] For the traditional claim that family law is state law, see, e.g., *Windsor*, 133 S. Ct. at 2689–92. *But see* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 17–20 (2014) (rejecting as a myth the "canonical story" that family law is local).

Part II of this Article introduces *Obergefell*, first setting out the Court's choice of a ruling mainly grounded in liberty rather than equality and then noting the important divisions among the Justices that this particular choice provoked.[13] Part III contextualizes these divisions, with Part III.A presenting the distinction assumed by the dissenters and Part III.B providing background from selected precedents to explain their challenges to the majority's reliance on liberty. Part III.C takes a closer look at the majority opinion in *Obergefell*, invoking the frameworks that the Court has traditionally followed to identify four readings of Justice Kennedy's majority opinion, each based on a different conception of liberty. Part IV adopts a wider lens. Part IV.A considers the implications of the assorted liberties identified in the foregoing analysis, examining both the promise and the limits of each reading while showing why such insights fail to yield meaningful forecasts of doctrinal developments to come. Part IV.B illuminates the dynamic relationship between family law and constitutional law, looking beyond the ways constitutional rulings have affected family law to hypothesize, through patterns in the case law, the ways that family law might well have guided constitutional law. These patterns help make sense of the tension in *Obergefell* about negative versus positive liberty (or private versus public rights) by establishing that the critical constitutional precedents are all family law cases—or "all in the family." In turn, these patterns afford purchase for thinking about the future in a different way, based on family law's core—albeit contested—policy of maintaining dependency as a private responsibility. The Conclusion speculates, consistent with this policy, that the Court might continue to rely on liberty to expand required recognition of personal relationships, notwithstanding *Obergefell*'s exaltation of marriage.

II. *OBERGEFELL* AND ITS DIVIDED FOUNDATIONS

In *Obergefell*, a fractured Supreme Court resolved a circuit split about whether states can exclude same-sex couples from their marriage regimes.[14] In doing so, the Court confronted other divisions, most notably to what extent to rely on due process versus equal protection and how to interpret the constitutional prohibition on "State depriv[ations] . . . of . . . liberty . . . without due process of law."[15] The following Parts examine these underlying fissures.

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[13] In emphasizing the Justices' specific disagreements about liberty, I do not suggest that an equality-based rationale would have produced unanimity. In fact, I feel confident that, no matter what the ground the majority might have used to strike down bans against marriage for same-sex couples, the four Justices in the minority still would have dissented. *See* Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 117–30 (critiquing the various ways in which the dissenters invoke constitutional limits to support their preferred outcome).

[14] The Court split 5–4. *See supra* notes 9, 11 and accompanying text.

[15] U.S. CONST. amend. XIV, § 1.

A. *From Marriage Equality to Marriage Liberty*

By the time the Supreme Court granted certiorari in the cases that became *Obergefell v. Hodges*,[16] the social movement challenging traditional heteronormative marriage laws had undergone both a conceptual and a terminological evolution. Michael Boucai has called attention to the radical impulses animating the initial cases of the 1970s, in which he has found evidence of litigants' efforts to advance sexual liberty and queer culture and to disrupt the very idea of marriage.[17] In the ensuing years, however, gay rights advocacy pursued a more assimilationist strategy, making "like-straight"[18] arguments against discriminatory laws and relying on narratives to "highlight the similarities between the human qualities inherent in childrearing in stable marriage relationships and the comparable human qualities—such as 'friendship, play, knowledge'—inherent in stable homosexual relationships."[19]

As goals and strategies evolved, so too did vocabulary. One-time references to "same-sex marriage"[20] later often became "gay marriage," in part to emphasize the central role of homophobia in marriage restrictions and other discriminatory laws.[21] Yet, by the time *Obergefell* reached the Supreme Court, common parlance, at least among the politically sensitive, if not the politically correct, exhibited a preference for the term "marriage equality,"[22] more often

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[16] In *Obergefell*, the Court decided cases that came from Michigan, Kentucky, Ohio, and Tennessee. *Obergefell*, 135 S. Ct. at 2593.

[17] *See generally* Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015) (surveying the goals and litigation tactics of early same-sex marriage plaintiffs).

[18] Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1619 (2004).

[19] Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 104 (1996) (footnote omitted) (quoting STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 211 (1990)). Of course, several gay rights activists challenged the assimilationist approach. *E.g.*, Nancy D. Polikoff, Commentary, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) (summarizing opposing positions and contending that "the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism").

[20] *See, e.g.*, Pamela S. Karlan, *Introduction: Same-Sex Marriage as a Moving Story*, 16 STAN. L. & POL'Y REV. 1, 2 (2005).

[21] *See, e.g.*, Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 499–502 (2001).

[22] *See, e.g.*, Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (using California litigation as a case study of the marriage-equality movement and its effects).

even than "freedom to marry," the name of a prominent advocacy organization with a leadership role in the movement.[23]

Obergefell's historic ruling intervenes in both trajectories. First, it marks the triumph of the assimilationist approach, shown by the majority opinion's rhetoric about the universality of marriage[24] and its stories of the named plaintiffs' shared lives, in sickness and in health and through the difficulties of chosen commitments, from parenting to military service.[25]

Second, despite the contemporary emphasis on "marriage equality," *Obergefell* relies on the protection of liberty in the Due Process Clause to perform the heavy lifting in the case, relegating the Equal Protection Clause to a secondary, supporting role. The Court begins its opinion by explicitly identifying liberty as the central issue posed—indeed, using the word three times—with only an indirect allusion to equality:

> The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.[26]

The majority goes on to hold, as quoted in this Article's epigraph, that "[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment."[27] The opinion devotes over 3,000 words to its analysis of liberty, compared to less than half that many to explain the synergy between liberty and equality.[28] Further, the opinion leaves unaddressed a

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[23] *See generally* FREEDOM TO MARRY, http://www.freedomtomarry.org/ [https://perma.cc/7WEC-LN87].

[24] *E.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together.").

[25] *See id.* at 2594–95.

[26] *Id.* at 2593.

[27] *See supra* note 1 and accompanying text.

[28] After stating why excluding same-sex couples from marriage violates liberty, the Court continues:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.

Obergefell, 135 S. Ct. at 2602–03. The Court cites various precedents exemplifying the relationship between the two provisions, concluding that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality." *Id.* at 2604. Further, in discussing equality, the Court makes a point of mentioning, albeit briefly, how marriage

number of important questions that an application of the Equal Protection Clause might well have elicited, including whether the problematic classification rests on gender[29] or sexual-orientation and what standard of review governs sexual-orientation discrimination.[30]

The four dissenting opinions voice an array of objections. In one prominent refrain that echoes the "[w]ho decides?" approach used below by the U.S. Court of Appeals for the Sixth Circuit,[31] the dissents decry the majority's judicial usurpation of a legislative or political matter.[32] Another recurring theme sounds an alarm about the threat to religious liberty posed by the ruling.[33] For purposes of this Article, however, the most salient difference between the majority and each of the dissents can be found in the multiple understandings of liberty that emerge.

B. *Contested Liberty*

Justice Alito's *Obergefell* dissent pointedly raises one familiar controversy about liberty: the term's uncertain content. According to Justice Alito:

> The Constitution says nothing about a right to same-sex marriage, but the Court holds that the term "liberty" in the Due Process Clause of the Fourteenth Amendment encompasses this right. Our Nation was founded upon the principle that every person has the unalienable right to liberty, but liberty is a term of many meanings. For classical liberals, it may include economic rights now limited by government regulation. For social democrats, it may include the right to a variety of government benefits. For today's majority, it has a distinctively postmodern meaning.[34]

In a subsequent interview, Justice Alito elaborated, explaining that the majority's notion of liberty is "the freedom to define your understanding of the meaning of life. Your—it's the right to self-expression. So if all of this is on the table now, where are the legal limits on it?"[35]

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has changed, given the invalidation of "invidious sex-based classifications" historically marking the institution. *Id.* at 2603.

[29] *See* Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 UMKC L. REV. 675, 675, 677 (2016).

[30] *See* Peter Nicolas, Obergefell*'s Squandered Potential*, 6 CALIF. L. REV. CIR. 137, 138 (2015).

[31] DeBoer v. Snyder, 772 F.3d 388, 395–96 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[32] *See Obergefell*, 135 S. Ct. at 2611–12, 2626 (Roberts, C.J., dissenting); *id.* at 2627 (Scalia, J., dissenting); *id.* at 2642 (Alito, J., dissenting).

[33] *Id.* at 2625–26 (Roberts, C.J., dissenting); *id.* at 2638–39 (Thomas, J., dissenting).

[34] *Id.* at 2640 (Alito, J., dissenting).

[35] Russell Berman, *Samuel Alito and the Slippery Slope of Liberty*, ATLANTIC (July 21, 2015), http://www.theatlantic.com/politics/archive/2015/07/samuel-alito-supreme-court-gay-marriage-ruling-liberty/399008/ [https://perma.cc/C3RJ-8EW5] (quoting Justice Samuel Alito in an interview with Bill Kristol).

This critique captures longstanding pushback against judicial rulings that purportedly "invent" new constitutional rights based on value judgments or popular opinion,[36] with "judicial activism" as an oft-used, if imprecise, shorthand among opponents of such jurisprudence.[37] A famous variation on this theme appears in Justice Scalia's dissent in *Lawrence v. Texas*, where he attacked the Court's evocative but elusive definition of liberty borrowed from an earlier abortion case—"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."—and dismissively dubbed it the "sweet-mystery-of-life passage."[38] At bottom, for Justice Alito in *Obergefell*, just as for Justice Scalia before him in *Lawrence*, "liberty," as used by the majority, has different meanings for different people even when it comes to intimate life and family matters, so this crucial term could encompass anything and everything.[39]

This critique is neither novel nor unexpected. Indeed, from its earliest applications of the Due Process Clause to family and personal matters, the Court itself has conceded such indeterminacy, confessing a reluctance to define "liberty" with "exactness"—even while providing at least a partial list

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[36] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328–30 (2016) (Thomas, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 507–26 (1965) (Black, J., dissenting); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–49 (1973).

[37] *See, e.g.*, Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1217–20 (2009).

[38] Lawrence v. Texas, 539 U.S. 558, 574, 588 (2003) (Scalia, J., dissenting) (first quoting and then citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion)).

[39] *See supra* note 35 and accompanying text. Chief Justice Roberts echoes this criticism in his *Obergefell* dissent, recalling the infamous precedents of *Lochner v. New York*, 198 U.S. 45 (1905), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). *Obergefell*, 135 S. Ct. at 2612, 2616–17 (Roberts, C.J., dissenting).

of included elements.[40] If constitutional liberty is to have some substantive content, who else but the Justices would have the burden of supplying it?[41]

I bracket this general and frequently noted problem to focus on a more particularized, and ultimately more productive, difficulty centered on the meaning of "liberty" in *Obergefell*. The dissents of Chief Justice Roberts and Justice Thomas articulate this difficulty most explicitly. The former challenges the majority for erroneously "convert[ing] the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[42] Echoing this objection, Justice Thomas claims that the majority departs from the established understanding of liberty "as freedom from government action, not entitlement to government benefits."[43] The two other dissents (by Justices Scalia and Alito) appear to agree, while making the point less directly.[44]

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[40] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code."). For judicial efforts over the years to formulate "tests" for applying liberty, compared to *Obergefell*'s approach, see Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 168–69 (2015).

[41] Of course, some of the Justices have tried to eschew substantive due process altogether, reading the clause to afford only procedural protections. *See Obergefell*, 135 S. Ct. at 2631–32 (Thomas, J., dissenting).

[42] *Id.* at 2620 (Roberts, C.J., dissenting); *cf.* Kari E. Hong, Obergefell*'s Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1439 (contending that state intervention in the name of liberty and privacy can serve as a powerful tool to obtain benefits and protections); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 72 (2015) (contending that *Obergefell* "conflates, on the one hand, the negative duty of the state not to interfere in individual rights to exercise the freedom to marry (or not), and, on the other hand, any positive obligation of the state to support affirmatively individual rights to marry and the institution of marriage"). For an entirely different take on this language in the Chief Justice's dissent, see Marc Spindelman, Obergefell*'s Dreams*, 77 OHIO ST. L.J. 1039 (2016).

[43] *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting).

[44] *See id.* at 2630 (Scalia, J., dissenting) ("What possible 'essence' does substantive due process 'capture' in an 'accurate and comprehensive way'? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes."); *id.* at 2640 (Alito, J., dissenting) ("For social democrats, [liberty] may include the right to a variety of government benefits.").

The binary animating the *Obergefell* dissents has tenacious roots. First, the dissents' limited conception of liberty, as exclusively a barrier against state interference, recalls family law's well-worn public/private divide, which has a long history, from the separate-spheres era[45] to more recent feminist critiques debunking this dichotomy as altogether illusory.[46] Under the traditional formulation, there is a "private realm of family life which the state cannot enter;"[47] this sphere exists apart from the market and the state (both deemed public);[48] and this private sphere belongs to women.[49] Yet, one powerful feminist attack shows how the state is inextricably part of the private sphere simply by "determin[ing] what counts as private and what forms of intimacy are entitled to public recognition."[50] Other critics emphasize that family law has both private and public dimensions, with middle and upper class families enjoying the former's deference to family decisionmaking[51] and poor families subjected to the latter's routine disrespect,[52] including oppression by the child welfare system.[53]

Second, we can connect the divide asserted by the *Obergefell* dissents with efforts in constitutional jurisprudence to distinguish "negative rights" from "positive rights," with the former encompassing only freedom from state interference and the latter referring to guarantees of affirmative support from the state.[54] Again, critical analysis has exposed the distinction as specious, given the state's role in creating the "natural" or the "status quo"[55] and the

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[45] *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

[46] *E.g.*, Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994); *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 10–43 (1992) (reviewing and critiquing feminist critiques of the public/private distinction).

[47] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[48] Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983).

[49] *See id.*

[50] *See* Rhode, *supra* note 46, at 1187; *see also* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 54 (2010) ("At the most basic level, the very determination of whether a particular group of citizens constitutes a family is determined by state action."); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836–37 (1985) (explaining why nonintervention in the family is an incoherent idea).

[51] *See, e.g.*, Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 116 (2013).

[52] *See, e.g.*, Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 117 (2011).

[53] *See, e.g.*, Godsoe, *supra* note 51, at 116.

[54] *See, e.g.*, Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750–51 (2001).

[55] *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2292–93 (1990); Olsen, *supra* note 48, at 1506.

myriad forms of state support so taken for granted that they have become invisible.[56]

Although the private/public distinction often surfaces in family law and the negative/positive distinction is more familiar in constitutional law, the two binaries (contested as they may be) share much in common even if the concepts they purport to identify do not match exactly. "Private" suggests a realm protected from state interference, similar to the notion of negative constitutional rights; by contrast, "public" suggests a realm in which the state plays a role, thus overlapping with the claim to state assistance inherent in the idea of positive constitutional rights.[57] Moreover, both areas have elicited what I find to be persuasive critiques that operate principally in one direction, expanding what we should consider public and narrowing the private (perhaps to nonexistence). That is, these critiques reveal the public features of the nominally private realm or the state-constructed aspects of negative rights.[58] Thus, although the two pairs are not entirely interchangeable, they share common features emphasized in the analysis that follows.

III. THE TRADITIONAL FRAMEWORK: DEVELOPMENT AND APPLICATION

The negative/positive or private/public distinction that the *Obergefell* dissents assume derives from frameworks that the Court established in earlier cases. This Part first sets out key features of these frameworks and their development and then shows, based on a close look at the majority opinion, how they explain—and also how they fail to explain—the tension in *Obergefell*.

A. *Private Liberty and Public Marriage*

The "conventional wisdom," as Susan Bandes has called it, depicts constitutional liberty as a negative right or protection from active state

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[56] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 32–33 (2004). *See generally* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (revealing coercive restrictions imposed by law even within a laissez-faire regime). For a different repudiation of the distinction between positive and negative rights, see HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 30, 35–64 (2d ed. 1996), which posits that security and subsistence are basic rights necessary for the enjoyment of other rights.

[57] *See supra* note 54 and accompanying text. Isaiah Berlin's notion of "'negative' freedom" tracks the conception of negative liberty or negative rights followed in constitutional law, although Berlin's notion of "positive freedom" differs from the constitutional law counterpart. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 122–34 (1969).

[58] *See supra* notes 50–53, 55–56 and accompanying text; *cf.* Gavison, *supra* note 46, at 14–21.

interference.[59] According to some accounts, this understanding derives from the language of the Fourteenth Amendment, which says that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."[60] The Court has found such deprivations of liberty in laws restricting sex, reproduction, and childrearing, calling these activities "private" and thus signaling that they take place outside the public sphere and purportedly require no state action for individuals to undertake.[61] Indeed, over the years liberty and privacy became connected in this line of cases, which initially used the language of "liberty,"[62] then invoked a "right of privacy,"[63] later explained that the Fourteenth Amendment's protection of liberty in the Due Process Clause provides the constitutional source for this right of privacy,[64] and ultimately abandoned the "privacy" terminology altogether in favor of exclusive reliance on "liberty."[65] Interpreted against this background, liberty limits government intrusion in private domains, but it does not compel government to do anything.

This notion of liberty under the U.S. Constitution contrasts with guarantees in other bills of rights. For example, the "right to life" protected by Article 2 of the European Convention on Human Rights entails a government duty to prevent foreseeable loss of life in some circumstances.[66] Similarly, the United Nations Convention on the Rights of the Child (UNCRC) includes several rights that assume affirmative support from the state, such as Article 6, which provides: "States Parties shall ensure to the maximum extent possible the survival and development of the child,"[67] and Article 7, which provides: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible,

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[59] Bandes, *supra* note 55, at 2273.

[60] U.S. CONST. amend. XIV, § 1; *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1973); Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 733, 747 (1981); Bandes, *supra* note 55, at 2310.

[61] *E.g.*, Lawrence v. Texas, 539 U.S. 558, 564 (2003); Roe v. Wade, 410 U.S. 113, 153 (1973); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *cf.* Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, 124 YALE L.J. F. 332, 333–35 (2015) (theorizing *Griswold* as an anti-poverty case, given the access to contraception clinics that it protected).

[62] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[63] *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[64] *See Roe*, 410 U.S. at 153.

[65] Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 33–34 (noting the switch from "privacy" to "liberty" in Justice Kennedy's opinion in *Lawrence*).

[66] *See* ROBIN C.A. WHITE & CLARE OVEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 152–56 (5th ed. 2010) (describing this provision as imposing "the positive obligation to protect life").

[67] United Nations Convention on the Rights of the Child art. 6, § 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

the right to know and be cared for by his or her parents."[68] Indeed, the UNCRC's protection of such positive rights might well help explain why the United States remains one of only a handful of countries refusing to adopt this convention.[69]

On its face, a constitutional right to marry looks more akin to these guarantees recognized in other countries than to the ordinarily private conceptualization of liberty in the United States. Civil marriage requires active participation of the state. The state issues marriage licenses, recognizes couples as married after they have complied with applicable legal regulations, and provides a host of legal benefits based on the status of marriage.[70] Indeed, Nelson Tebbe and Deborah Widiss call civil marriage "a government program."[71] Civil marriage takes a couple's personal relationship and makes it official, adding the state itself as a third "partner[]."[72] So, even if the

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[68] *Id.* art. 7, § 1. Article 7 goes on to say: "States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless." *Id.* art. 7, § 2.

[69] *See* Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525, 541–42 (2014).

[70] *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 123 (2008). Courts in marriage-equality cases routinely cite the many legal consequences that accompany marital status. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (noting that the "expanding list of governmental rights, benefits, and responsibilities" tied to "marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules"); United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) ("Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits."); Varnum v. Brien, 763 N.W.2d 862, 902 n.28 (Iowa 2009) ("Plaintiffs identify over two hundred Iowa statutes affected by civil-marriage status."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003) (noting that "hundreds of statutes are related to marriage and to marital benefits" and listing examples (internal quotation marks omitted)).

[71] Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1378 (2010) ("[C]ivil marriage is a government program that provides certain benefits and imposes certain obligations."). *See generally* Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691 (2016).

[72] *Goodridge*, 798 N.E.2d at 954 ("In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State."); *cf. Obergefell*, 135 S. Ct. at 2635 (Thomas, J., dissenting) ("Petitioners do not ask this Court to order the States to stop restricting their ability to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children. The States have imposed no such restrictions. . . . Instead, the States have refused to grant them governmental entitlements.").

distinction between public and private is fuzzy and uncertain, marriage has many attributes that should place it on the public side of the line.

Family law's famous "channeling function"[73] helps explain why the state would make the policy decision to offer material marital benefits when nothing in the Constitution compels such privileged treatment: By rewarding marriage, the state incentivizes individuals to choose this official format for their sexual and intimate relationships, in turn providing a structure that assigns care and support duties to family members and manages consequences upon dissolution, relieving the state from the need to meet resulting dependencies.[74] Some theorists conceptualize privatizing dependency as family law's animating purpose.[75] Indeed, the state's very interest in imposing private obligations and its control of marriage to advance this interest bolster the *Obergefell* dissenters' position that marriage is public, not private. Considerable authority reinforces this conclusion, with classic statements in past cases asserting that marriage results from "public ordination"[76] and describing marriage as "a great public institution."[77] The *Obergefell* majority quotes with approval this latter observation.[78]

In short, the contrasting roles of the state in private family matters and in public marriage undergird the *Obergefell* dissenters' claims that the majority improperly invoked liberty to overturn laws that limit marriage to cross-sex couples. As the dissenters see it, to say that same-sex couples have a right to marry compels state action, erroneously making liberty "a sword"[79] and improperly conferring "entitlements."[80]

B. *The Demise of the Welfare-Rights Thesis*

The distinction that the *Obergefell* dissenters assume is not as clear-cut as they suggest, however. First, *Obergefell* is not the first "right to marry" case in which the Court relied, at least in part, on liberty. Notable predecessors

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[73] *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 523 (1992); *see also* RICHARD A. POSNER, SEX AND REASON 243–66 (1992); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2133 (2007).

[74] *See, e.g.*, Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866–67 (2014).

[75] *See, e.g.*, FINEMAN, *supra* note 56, at 44, 108–09, 208; *see also* Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 311 (1994) (arguing that "dependency" is "an ideological term" carrying "strong emotive and visual associations and a powerful pejorative charge").

[76] Maynard v. Hill, 125 U.S. 190, 213 (1888) (quoting Noel v. Ewing, 9 Ind. 37, 50 (1857)).

[77] *Id.* (quoting *Noel*, 9 Ind. at 50).

[78] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (quoting *Maynard*, 125 U.S. at 211).

[79] *Id.* at 2620 (Roberts, C.J., dissenting).

[80] *Id.*; *see also id.* at 2631 (Thomas, J., dissenting).

include *Loving v. Virginia*, holding unconstitutional anti-miscegenation laws,[81] and *Zablocki v. Redhail*, invalidating obstacles to marriage imposed on prospective spouses with outstanding support obligations.[82] If marriage is public but liberty protects only negative or private rights, how would we explain these earlier cases? They go beyond keeping the state out of one's personal choice of an intimate or sexual partner, by affording access to civil marriage and its state-conferred consequences based on such choice.[83]

Second, until the 1970s or so, Supreme Court opinions protecting individual interests under the Fourteenth Amendment reflected sufficient ambiguity to invite speculation about the possible recognition of a constitutional right to minimum welfare or "minimum protection"[84]—a right to have subsistence and other basic needs met even when active state support would be necessary to realize this right.[85] Cases ensuring access to counsel and a transcript in a criminal appeal,[86] mandating procedural safeguards before the denial of welfare benefits,[87] and requiring for new arrivals in the state public assistance like that provided to long-term residents[88] all suggested that—at least in some situations—the Constitution might confer affirmative entitlements from the state.[89] This welfare-rights thesis was strengthened by case law of the era developing or affirming doctrines of unconstitutional conditions,[90] irrebuttable presumptions,[91] and public fora,[92] all of which assumed a role for the state in the protection of constitutional liberties. Still, additional blurring of sharp lines between public and private arose from

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[81] Loving v. Virginia, 388 U.S. 1, 2 (1967).

[82] Zablocki v. Redhail, 434 U.S. 374, 383, 388–91 (1978).

[83] Before *Loving*, the Court had invalidated under the Equal Protection Clause anti-miscegenation laws that criminalized sex and cohabitation between unmarried interracial couples. McLaughlin v. Florida, 379 U.S. 184, 184 (1964).

[84] *See* Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–10, 35 (1969). In this article, Michelman based his analysis on cases decided under the Equal Protection Clause. *Id.* at 10.

[85] *See* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 663 (noting cases both supporting and contradicting the welfare-rights thesis). *See generally* CARL WELLMAN, WELFARE RIGHTS (1982) (exploring various conceptions of welfare rights).

[86] Douglas v. California, 372 U.S. 353, 355–58 (1963); Griffin v. Illinois, 351 U.S. 12, 17–19 (1956).

[87] Goldberg v. Kelly, 397 U.S. 254, 261–64 (1970).

[88] Shapiro v. Thompson, 394 U.S. 618, 627 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

[89] *See* Michelman, *supra* note 84, at 12–13.

[90] *E.g.*, Sherbert v. Verner, 374 U.S. 398, 404–06 (1963); *see* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428–42 (1989).

[91] *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647–51 (1974); *see* Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 392–93 (2010).

[92] *E.g.*, Carey v. Brown, 447 U.S. 455, 460–63 (1980); *see* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 10–21.

precedents that embraced a generous notion of the state action required for a violation of the Fourteenth Amendment[93] and arguments of the day that would look beyond de jure school segregation to require constitutional remedies for de facto segregation as well.[94]

Nonetheless, the welfare-rights thesis remained just that: a thesis. It arose from inferences based on case outcomes, rather than a definitive articulation by the Court[95] during an era that also produced rulings that could be read to undermine the thesis.[96] We might see the process of developing this thesis as one resembling the legal-realist approach in which "decisions fall into patterns correlated with the underlying factual scenarios of the disputes" (rather than according to "the existing legal rules").[97]

Although I consider a more comprehensive list of such cases later,[98] at this juncture I use just a few selections to recount how the Court settled the ambiguity, in turn providing traction for the conventional wisdom about a strictly "negative Constitution"[99] that drives the claims of the *Obergefell* dissents. In my examination of the Court's opinions, the demise of the welfare rights thesis came in three key phases: two sets of abortion-funding cases, one from 1977[100] and another from 1980,[101] and—for anyone who failed to grasp their message or dismissed these cases as simply reflections of abortion exceptionalism[102]—a reinforcement thereof in a 1989 decision about child

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[93] *E.g.*, Reitman v. Mulkey, 387 U.S. 369, 375–81 (1967); *see* Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 275–79 (2010).

[94] For discussion of such arguments, see Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 298–374 (1972).

[95] *See* Michelman, *supra* note 85, at 662–64; *see also* Michelman, *supra* note 84, at 10.

[96] *E.g.*, James v. Valtierra, 402 U.S. 137, 141–43 (1971); Dandridge v. Williams, 397 U.S. 471, 483–87 (1970). For discussion of these and other cases, see *infra* notes 360–405 and accompanying text.

[97] Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 281 (2001). For example, Brainerd Currie followed this school of thought in presenting governmental interests analysis as a choice of law theory. *See* BRAINERD CURRIE, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 128, 132–40 (1963).

[98] *See infra* notes 360–405 and accompanying text.

[99] *See* Bandes, *supra* note 55, at 2273–78.

[100] *See* Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

[101] Harris v. McRae, 448 U.S. 297 (1980); Williams v. Zbaraz, 448 U.S. 358 (1980).

[102] Objections to abortion invoked as a reason not to provide government support (via the enduring "Hyde Amendment") or to avoid other types of "complicity" with the provision of such services have become an abiding feature of the legislative and judicial landscape. *See* Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 768–81; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–21 (2015).

abuse.[103] The following summary details why these precedents prove so important.

Four years after the Court had held, in *Roe v. Wade*, that the Due Process Clause protects a liberty-grounded right to privacy, which includes the right to decide whether to terminate a pregnancy within certain time limits,[104] the Court rejected the argument that the Constitution requires government subsidies for women too poor to exercise the abortion right independently—even when the government in question is putting its financial thumb on the scale by subsidizing prenatal care and childbirth for such women.[105] Although the criminal abortion prohibitions challenged in *Roe* evoked strict scrutiny because they infringed a right that the Court deemed fundamental, the selective funding scheme required only rational basis review, which the Court deemed satisfied by a state's value judgment favoring childbirth over abortion.[106] According to the Court, elective abortion, like other protected family liberties, is—in effect—a negative right that state inaction (here failure to subsidize) cannot infringe,[107] even when the inaction impairs one's ability to exercise the right.[108] Put differently, the Court's reliance on privacy in *Roe*[109] foreclosed constitutional claims to public assistance.

The Court supported its conclusion by invoking other constitutionally protected rights rooted in liberty and emphasizing their purely negative character. For example, the majority noted that the parental right to choose private schooling for one's children does not entail a right to government-provided tuition.[110]

The 1980 abortion-funding cases explained that this analysis applies even to therapeutic abortions.[111] In doing so, the Court made clear that an individual is not entitled to government assistance even when it is necessary to preserve her life or health. The Court categorized both poverty and any dangerous health conditions as "natural" situations that the state had not created and thus had no constitutional duty to remedy.[112] With no fundamental right infringed,

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[103] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[104] Roe v. Wade, 410 U.S. 113, 152–54 (1973).

[105] *See Maher*, 432 U.S. at 470.

[106] *Id.* at 478–79.

[107] *Id.* at 475–77.

[108] *Id.* at 471–74; *see also* Appleton, *supra* note 60, at 733–35.

[109] *Roe*, 410 U.S. at 153.

[110] *See Maher*, 432 U.S. at 476–77 (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); and then citing Norwood v. Harrison, 413 U.S. 455, 462 (1973)).

[111] Harris v. McRae, 448 U.S. 297, 316–18, 324–25 (1980). Although Congress has allowed various exceptions over the years to its ban on abortion funding, such as when a pregnancy endangers the woman's life, the Court's reasoning makes clear that the Constitution does not require any such exceptions. *See id.* at 316–18. In explaining this conclusion, the Court again made the analogy to parental rights to choose private schooling, which does not entail a guarantee of subsidized tuition. *Id.* at 318 (citing *Pierce*, 268 U.S. at 510).

[112] *Id.* at 316–17.

the Court applied rational basis review and again found this standard satisfied by an official policy preference for childbirth over abortion.[113]

Particularly because of the Court's repudiation of a right to subsidized abortion even when needed for a woman's survival, these cases sounded a death knell for the notion of a constitutional welfare right and thus any more general jurisprudence of positive guarantees.[114] The abortion-funding cases thereby resolved any conflicting signals in earlier opinions,[115] rebuffing more expansive suggestions about government's obligations and solidifying more miserly approaches.

The abortion-funding cases' explicit distinction between negative and positive rights reverberated in other doctrinal developments. The abortion-funding cases contracted the understanding of unconstitutional conditions, claiming to limit that principle to situations in which the state "penalizes the exercise of [a] right."[116] In the meantime, the Court's reliance on irrebuttable presumptions as means to a conclusion of unconstitutionality collapsed.[117] And although the Court continues to invoke the public forum doctrine,[118] critics interpret its narrowed reach as evidence of its demise.[119] Finally, the once generous conceptualization of "state action" encountered retrenchments,[120] consistent with the Court's rejection of arguments for requiring remedies for de facto school segregation.[121]

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[113] *Id.* at 324–26.

[114] *See* Appleton, *supra* note 60, at 731–37; *see also* Susan Frelich Appleton, Commentary, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U. L.Q. 715, 726–29 (noting the challenges that 1977 abortion-funding cases present for the welfare-rights thesis).

[115] *See supra* notes 84–85 and accompanying text.

[116] *See* Maher v. Roe, 432 U.S. 464, 474 n.8 (1977); Sullivan, *supra* note 90, at 1439–42.

[117] *See, e.g.*, Jonathon B. Chase, *The Premature Demise of Irrebuttable Presumptions*, 47 U. COLO. L. REV. 653, 653 (1976).

[118] *E.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015); Christian Legal Soc'y of the Univ. of Cal. v. Martinez, 561 U.S. 661, 678–83 (2010).

[119] *See* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1170–77 (2015).

[120] *E.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 838, 840–43 (1982); *see* Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1591–92 (2005) ("For a time, academic commentary looked forward to a lowering of the state action barrier, but the Supreme Court soon put an end to such speculations." (footnote omitted)); Peretti, *supra* note 93, at 273–74 (noting the shift from the earlier expansive approach, with more recent opinions "signifying a greater reluctance on the part of the Court to find state action"); *see also* Don Herzog, *The* Kerr *Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 2 (2006) ("[S]tate action is about responsibility, not any kind of causation.").

[121] *See* Milliken v. Bradley, 418 U.S. 717, 744–45 (1974); *see also* Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (emphasizing the importance of placing "the responsibility for solutions to the problems of segregation upon those who have themselves created the problems").

Any lingering possibility that, the abortion-funding cases notwithstanding, the Constitution might guarantee support for basic needs evaporated in 1989, with the Court's decision in *DeShaney v. Winnebago County Department of Social Services*.[122] In *DeShaney*, the majority determined that the state did not violate young Joshua DeShaney's due process rights when it failed to protect him from severe injuries inflicted by his father—even though state child welfare officials knew or should have known of risks faced by Joshua and returned him to his father's custody after previously removing him on grounds of child abuse.[123] Simply put, state inaction cannot be a deprivation of liberty, and liberty cannot encompass a right to affirmative protection by the state—even when the results are life-threatening injuries.[124]

DeShaney's distressing facts included brutal beatings of a four-year-old, his potentially fatal coma, and resulting severe brain damage,[125] along with the previous involvement of child welfare officials. Against that background, the Court's clear rejection of the claim for state protection sent an unmistakable message purporting to limit liberty to negative rights, although the abortion-funding cases had established the same basic principle earlier. More than a decade after *DeShaney*, the Court adhered to the view that the state has no affirmative obligation to protect individuals from family violence in a case with equally hideous facts—including the death of three children at the hands of their father and the police's inaction despite the mandatory restraining order obtained by their mother.[126]

I revisit these precedents and consider related cases below.[127] For now, however, I note that one way to make sense of these precedents turns on the verb describing the state's role, rather than the individual interest at stake.[128] Although the abortion-funding cases and *DeShaney* put health and life at stake, they presented no due process violations because, according to the majorities, the state inaction in those cases could not "depriv[e]" a person of liberty or of anything else for that matter.[129] Under this analysis, embodied in the

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[122] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[123] *Id.* at 192–94.

[124] *Id.* at 195–97, 201. The Court has acknowledged that states owe affirmative duties to those in state custody. *See id.* at 199–200.

[125] *Id.* at 193; Linda Greenhouse, *The Supreme Court and a Life Barely Lived*, N.Y. TIMES (Jan. 7, 2016), http://www.nytimes.com/2016/01/07/opinion/the-supreme-court-and-a-life-barely-lived.html [https://perma.cc/4W2P-58KW].

[126] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 751, 754, 766 (2005).

[127] *See infra* notes 360–405 and accompanying text.

[128] *See* Appleton, *supra* note 60, at 731–37.

[129] *See* Michelman, *supra* note 84, at 17 ("The due process clause inveighs only against certain 'deprivations' by the 'state,' occurrences which seemingly cannot occur by mere default."). In the abortion-funding cases, the Court drew an apparently bright line between state action and inaction and stated that the latter does not constitute the "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." Harris v. McRae, 448 U.S. 297, 314 (1980) (quoting Maher v. Roe, 432 U.S. 464, 473–74 (1977)). But the Court later abandoned that bright line, transforming the

Obergefell dissents, it would follow that the state's failure to grant to same-sex couples a marriage license and the host of material benefits contingent on marriage cannot constitute a deprivation of liberty.

C. *Reading* Obergefell

Despite the *Obergefell* dissenters' characterization of the majority's improper treatment of the right to marry, the majority opinion in fact lends itself to multiple readings, each ascribing a different meaning to the key term "liberty." This Part uses the opinion's language, reasoning, and citations of authority, against the background of the Court's traditional categorization, to examine each of four possible readings, demonstrating within this one case the instability and plasticity of the public/private or positive/negative divide. This analysis brings to the fore insights about marriage as a unique legal construct and thus about family law, marriage's "home," more generally.

1. *A Public Liberty Reading of* Obergefell

Let's begin with the reading of the majority opinion that would concede the points made by the dissenters. Under this reading, Justice Kennedy (with presumably the other four members of the Court who join him) flatly disagrees with the conventional wisdom and the dissenters' claims to the extent they purport to assert a universal rule that the liberty protected by the Due Process Clause must necessarily be private—that is, that liberty offers no support for claims that require state assistance. If Justice Kennedy rejects the conventional wisdom, then we can read his majority opinion to say that constitutionally protected liberty includes at least marriage (with the affirmative state action that institution contemplates) and perhaps other positive rights as well.

Six precedents invoked in the majority opinion could support this reading. One is *Maynard v. Hill*, the late nineteenth century divorce-property case cited with approval for the description of marriage as "a great public institution."[130] Four are modern cases relying on the Constitution to compel expanded access to marriage or marriage recognition: *Loving v. Virginia*, striking down Virginia's antimiscegenation law;[131] *Zablocki v. Redhail*, invalidating Wisconsin's obstacles to marriage for those with outstanding support

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language into a test applicable even to active state restrictions on abortion. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–77 (1992) (plurality opinion); *see also Whole Woman's Health*, 136 S. Ct. at 2321, 2323–25 (Thomas, J., dissenting) (criticizing the abortion-specific standard and its interpretation here).

[130] Maynard v. Hill, 125 U.S. 190, 213 (1888) (cited in Obergefell v. Hodges, 135 S. Ct. 2584, 2590, 2601 (2015)).

[131] Loving v. Virginia, 388 U.S. 1, 12 (1967) (cited in *Obergefell*, 135 S. Ct. at 2598, 2599, 2602, 2603, 2604).

obligations;[132] *Turner v. Safley*, overturning marriage restrictions for inmates;[133] and *United States v. Windsor*, rejecting the gendered definitional requirements for federal recognition of marriage in the Defense of Marriage Act.[134] The sixth precedent used, *M.L.B. v. S.J.L.*, held unconstitutional a statute requiring indigent mothers to pay a fee to appeal the termination of their parental rights (TPR).[135] While *Maynard* assumes government involvement, the others all impose an affirmative obligation on government, whether granting a marriage license with all attendant privileges, recognizing for purposes of federal benefits a marriage valid under state law, or enabling a TPR appeal without cost.

The approach evident in these cases tracks the analysis in a precedent that the Court does not cite. In *Boddie v. Connecticut*, the Court ruled that due process liberty guarantees indigent individuals access to divorce courts without paying a required filing fee.[136] The Court explained:

> [G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.[137]

Boddie's observations transfer well from the divorce context to the context of civil marriage, where "the basic position of the marriage relationship in this society's hierarchy of values" merits repeating and the state again wields a monopoly—given that *civil marriage* is attainable only with state participation. Divorce and civil marriage are two sides of the same coin, and divorce's public features together with the applicability of *Boddie*'s language to civil marriage strengthen the *Obergefell* majority's suggestion of liberty's public dimension, protecting some number of positive rights, contrary to the conventional wisdom and the dissenters' position.

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[132] Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (cited in *Obergefell*, 135 S. Ct. at 2598, 2599, 2600, 2602, 2603, 2604).

[133] Turner v. Safley, 482 U.S. 78, 95–96 (1987) (cited in *Obergefell*, 135 S. Ct. at 2598, 2599, 2600, 2602).

[134] United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013) (cited *in Obergefell*, 135 S. Ct. at 2597, 2599, 2600, 2601). *Windsor* strikes down federal legislation, based on the Due Process Clause of the Fifth Amendment, in which the Court finds an equal protection guarantee. *Id.* at 2695.

[135] M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996) (cited in *Obergefell*, 135 S. Ct. at 2598, 2603, 2604).

[136] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[137] *Id.*

2. *Private Liberty Readings of* Obergefell

We can read Justice Kennedy's majority opinion in very different ways, however. Under these alternatives, Justice Kennedy (and, again, presumably the Justices who join him) might well agree with the dissenters that liberty protects only freedom from deprivations by the state or negative rights. Certainly, a significant number of precedents invoked by the majority for more than a cursory citation, six cases, all fit this classic mold. They all rule unconstitutional criminal laws interfering with arguably private or autonomous action in matters of sex, reproduction, or childrearing,[138] consistent with the libertarian approach sometimes associated with Justice Kennedy.[139] Put differently, these particular liberty cases all exemplify negative rights that form the conventional wisdom and provide common ground for the majority Justices and dissenters, notwithstanding their disagreements about which particular freedoms ought to be so recognized[140] and notwithstanding scholarly insights about the often overlooked public aspects of such private rights.[141]

a. *Naturalizing Marriage*

Under one reading, Justice Kennedy embraces the conventional wisdom, but includes marriage within the constellation of negative rights. That is, his opinion lends itself to an interpretation relying on a concept of liberty that, like the one articulated by the dissenters, is quintessentially private, not public, despite the "great public institution" quotation from *Maynard v. Hill*.[142] Some

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[138] The following cases make up this group: Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (invalidating criminal same-sex sodomy statute); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (invalidating prohibition on distribution of contraceptives to unmarried persons); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating prohibition on the use of contraception, even by married couples); Skinner v. Oklahoma, 316 U.S. 535, 538, 541 (1942) (invalidating law imposing sterilization as punishment for certain crimes); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925) (invalidating law restricting parental choice of private, instead of public, school); Meyer v. Nebraska, 262 U.S. 390, 399–403 (1923) (invalidating law prohibiting the teaching of German to children).

[139] *See, e.g.*, Barnett, *supra* note 65, at 33–37.

[140] For example, although he would agree that liberty, as applied in *Lawrence v. Texas*, protected a negative right, Justice Thomas dissented in that case. *Lawrence*, 539 U.S. at 605–06; *see also supra* notes 38–39 and accompanying text.

[141] *See, e.g.*, Franklin, *supra* note 61, at 336–37 (highlighting the public features of *Griswold*'s right to privacy); Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1450–58 (2004) (arguing that *Lawrence*, by invalidating the gay sodomy ban, confers respect).

[142] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (quoting Maynard v. Hill, 125 U.S. 190, 213 (1888)).

scholars espouse this position, treating the right to marry as a "negative liberty" and failing to acknowledge the state's active role.[143]

Justice Kennedy invites this reading with rhetoric that naturalizes marriage by describing it as an inevitable practice among all humans from the beginning of time. For example, in *Obergefell* Justice Kennedy describes marriage as an "institution [that] has existed for millennia and across civilizations,"[144] a "timeless institution,"[145] and "one of civilization's oldest institutions"[146] that is "central[] . . . to the human condition"[147] and "*always* has promised nobility and dignity to all persons, without regard to their station in life."[148]

This rhetoric situates marriage in human nature, making the state's role invisible. Under this reading, Justice Kennedy's opinion sees marriage as something people instinctively do and have always done.[149] In other words, while *Loving*'s brief invocation of liberty emphasized "the freedom of choice to marry,"[150] in *Obergefell* the focus becomes the marital status or relationship itself, with all its "natural" obligations and benefits. According to this view, the marital union predates the state and exists independently of the state, even if contemporary marriage practices accord the state a role.

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[143] Anne Alstott takes this position, writing that "[e]very major constitutional right in family law that has been recognized by the Supreme Court sounds in negative liberty" and citing all the pre-*Obergefell* marriage cases among the examples. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 27 (2014). Kenji Yoshino sees in marriage a negative right, in addition to a positive right:

> [M]arriage is a negative right in that it creates a zone of privacy into which the state cannot intrude, as we see in privacy cases such as *Griswold*, which spoke of the "sacred precincts of the marital bedroom," or in the testimonial privileges that permit spouses to refuse to testify against each other.

Yoshino, *supra* note 40, at 168–69 (footnote omitted) (quoting *Griswold*, 381 U.S. at 485). I disagree with both Alstott and Yoshino. For reasons stated above, the state's active involvement in marriage necessarily distinguishes it from those constitutional family rights that "sound in negative liberty." *See supra* notes 70–80 and accompanying text. Further, I see the protection accorded by the right to privacy or the recognition of testimonial privileges as positive—part of the package of benefits triggered by marital status. Put differently, state-granted marriage licenses provide the gateway to these benefits. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 951 (Mass. 2003) (discussing the "gatekeeping" function of the marriage-license statute).

[144] *Obergefell*, 135 S. Ct. at 2594.

[145] *Id.*

[146] *Id.* at 2608. Several of the dissenting opinions share this view. *See, e.g.*, *id.* at 2612 (Roberts, C.J., dissenting); *id.* at 2636 (Thomas, J., dissenting).

[147] *Id.* at 2594 (majority opinion).

[148] *Id.* (emphasis added).

[149] For support for this view, see Joel A. Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV. 195, 197–201, which asserts that marriage is pre-political.

[150] Loving v. Virginia, 388 U.S. 1, 12 (1967).

So read, *Obergefell* evokes references to natural law,[151] ecclesiastical (as opposed to civil) jurisdiction over marriage in medieval England,[152] or even common law marriage[153]—which, despite the use of the word "law" and the criteria for legal recognition—still provides in some states a route to marital status without state participation.[154] Even today, when the state role in marriage looms large, marriage reflects an amalgam of what the conventional wisdom would classify as public and private elements.[155] As the majority asserts in *Obergefell*, "Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm."[156] Indeed, marriage itself serves as both a religious practice and the means to a civil status.[157] Illustrating this dual character, a legal marriage may be performed by either religious clergy or a state official.[158]

Given Justice Kennedy's rhetoric, however, perhaps the most apt reference would be to biologists' and social scientists' claims about pair bonding as an observable human activity.[159] Justice Kennedy suggests that, left to their own devices, people marry. Accordingly, by portraying marriage as inherently "natural," like—say—sex,[160] the *Obergefell* majority opinion can conclude

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[151] *See* R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 2 (2015) ("Natural law theory . . . begins, with an assumption of congruence between law and basic features of man's nature as they are thought to have existed from the beginning of time. God himself was natural law's source.").

[152] *See* R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 25 (D.E.C. Yale ed., 1974).

[153] *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1842 (1987) (identifying common law marriage as "the legal doctrine historically used to impose a traditional framework on informal [cohabitation] arrangements").

[154] Of course, the state becomes involved and its criteria for legal recognition become determinative in disputes about whether a couple had a common law marriage or not. *See, e.g.*, Winfield v. Renfro, 821 S.W.2d 640, 645 (Tex. Ct. App. 1991). Although such disputes mostly occur today at the time of the relationship's dissolution, suits to establish the relationship in ecclesiastical courts were a frequent feature of the medieval English regime of clandestine or "private marriage." HELMHOLZ, *supra* note 152, at 30–31.

[155] *See supra* note 59 and accompanying text.

[156] Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

[157] *See id.* at 2604–05 (identifying "civil marriage" as a fundamental constitutional right). *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[158] For a typical statute, see, e.g., CONN. GEN. STAT. ANN. § 46b–22 (West 2016).

[159] *See, e.g.*, Daniel Cere, *Toward an Integrative Account of Parenthood*, *in* WHAT IS PARENTHOOD? CONTEMPORARY DEBATES ABOUT THE FAMILY, *supra* note 2, at 19, 29 (presenting "durable male-female pair-bonding" as an abiding characteristic of human society, in contrast to "promiscuous patterns of mating characteristic of primate species like the bonobos or macaques"). Of course, to the extent that *Obergefell* relies on this concept, it applies it to same-sex pairs, not just male-female pairs.

[160] Of course, many modern theorists understand sex and sexualities not as products of an inner drive but rather as performances of socially constructed scripts. *See, e.g.*, JEFFREY WEEKS, SEXUALITY 18–23 (3d ed. 2010); Ken Plummer, *Symbolic Interactionism and*

that barriers to access violate this negative right.[161] So understood, marriage restrictions operate like the sodomy restriction in *Lawrence v. Texas*, because they deprive individuals of liberty and interfere with their personal choices and conduct.[162] *M.L.B.*, the TPR-transcript case, does not undermine this rationale, given that state intervention in the private family triggers the procedural protection and thus makes this precedent distinguishable.[163]

Just in case an understanding of marriage by itself as private presents too much of a conceptual stretch, however, the *Obergefell* majority opinion uses an additional maneuver to support this reading. The opinion proceeds to merge marriage with the protected rights to be free from unwarranted state intrusion in matters of sex, reproduction, and childrearing, calling all these interests together "a unified whole."[164] With this fusion, the private character of the rights protected in cases about sexual and family autonomy overshadows the public attributes of marriage, perhaps making them less distinctive and noticeable.

b. *Equalizing Liberty or Liberating Equality*

A second path arrives at the same result, that is, a reading of the *Obergefell* majority opinion based on a conception of liberty that would ordinarily be described as "private" or "negative." This reading returns to the past marriage cases but then veers in a different direction, given how the *Obergefell* majority emphasizes that two of them—*Loving* and *Zablocki*—along with *M.L.B.*, the TPR case,[165] rest on *both* due process (liberty) and equal protection (equality).[166] (The majority similarly describes *Eisenstadt v. Baird*,[167] *Skinner v. Oklahoma*,[168] and *Lawrence*[169]—all traditionally considered negative liberty cases—and could have included *Windsor* here, too,

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Sexual Conduct: An Emergent Perspective, *in* SEXUALITY AND GENDER 20, 23–24 (Christine L. Williams & Arlene Stein eds., 2002).

[161] *See* Powell, *supra* note 42, at 72 (distinguishing right to marry from right to marriage).

[162] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[163] M.L.B. v. S.L.J., 519 U.S. 102, 120–21 (1996). In this way, *M.L.B.* resembles cases relying on the Due Process Clause to require counsel and a transcript for indigent criminal defendants. *See* Douglas v. California, 372 U.S. 353, 355 (1963) (requiring counsel); Griffin v. Illinois, 351 U.S. 12, 17–19 (1956) (requiring transcripts for criminal appeals).

[164] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015). Perhaps Yoshino suggests a similar fusion when he discerns in marriage both a negative right and a positive right. *See supra* note 143 (discussing Yoshino's view).

[165] *See supra* note 135 and accompanying text.

[166] *Obergefell*, 135 S. Ct. at 2602–04.

[167] Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972) (invalidating law prohibiting the distribution of contraceptives to unmarried persons).

[168] Skinner v. Oklahoma, 316 U.S. 535, 538, 541 (1942) (invalidating mandatory sterilization for those convicted of certain crimes).

[169] *Obergefell*, 135 S. Ct. at 2604.

which is a marriage case that rests on liberty as well as equality grounds.[170]) The majority proceeds to reason that both due process and equal protection provide the basis for a constitutional right to same-sex marriage,[171] an approach that Cary Franklin named in earlier work "marrying liberty and equality"[172] and that Kerry Abrams and Brandon Garrett use to illustrate their concept of "intersectional rights."[173]

Reliance on equal protection is significant because this guarantee protects against discriminatory distribution of state benefits, without making such benefits themselves constitutionally required as a matter of liberty.[174] Thus, for example, if a state provided private school tuition for poor white children but not poor children of color, the scheme would violate equal protection even though the Constitution does not guarantee subsidized private schooling.[175] To remedy such violations of equal protection, the state could either halt the subsidies for white children or extend them to all children.

That leaves *Turner v. Safley*,[176] the inmate right-to-marry case, which—unlike the other marriage precedents—did not rely on equality along with liberty. Yet, the incarceration of the challengers in *Turner* would trigger the special duties that the state owes to individuals in its custody, a principle reaffirmed in dicta in *DeShaney*.[177] *Turner*'s custodial context distinguishes this precedent factually (and thus legally) from the pure private liberty cases[178] and means that equality was unnecessary to activate affirmative government obligations.

Setting *Turner* aside because of its distinctive prison context, then, we might understand *Obergefell* to confine liberty simpliciter to the protection of negative rights, while looking to equal protection to compel a more even distribution of benefits once the state has made them available only to some.[179]

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[170] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013); *see* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 886 (2014); *see also supra* note 134. For further elaboration of how liberty and equality work together in *Obergefell*, see Yoshino, *supra* note 40, at 171–79.

[171] *Obergefell*, 135 S. Ct. at 2604.

[172] Franklin, *supra* note 170, at 817.

[173] Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642640 [https://perma.cc/9WBL-GXYW].

[174] *See* Sullivan, *supra* note 90, at 1425 ("Of course, government may not distribute even 'gratuitous' benefits completely arbitrarily or at its discretion. Such gratuities, like all government action, must satisfy at least a requirement of minimal rationality.").

[175] *See supra* note 110 and accompanying text.

[176] Turner v. Safley, 482 U.S. 78, 94–96 (1987).

[177] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 198–201 (1989).

[178] *See, e.g.*, Roe v. Crawford, 514 F.3d 789, 793–98 (8th Cir. 2008) (applying *Turner* to a challenge of a prison policy refusing to transport inmates for elective abortions).

[179] For a pre-*Obergefell* argument embracing this approach, see Tebbe & Widiss, *supra* note 71, at 1377.

In *Obergefell*, the Court was responding to a regime that denied to same-sex couples the benefits of marriage made available to cross-sex couples, in turn damaging the dignity of the former.[180]

Of course, one might well ask why the Equal Protection Clause *alone* could not have done all the work necessary to reach the *Obergefell* result. Certainly, this was a route open to the Court—whether based on sexual-orientation discrimination[181] or sex discrimination.[182] Indeed, the Solicitor General's Brief for the United States made a forceful case for the unconstitutionality of gay marriage bans based exclusively on the Equal Protection Clause.[183] Yet, the equal protection route was open as well in *Lawrence v. Texas*,[184] where Justice Kennedy previously displayed his preference for liberty over equality (although—as we have seen—that case struck down state action, instead of requiring it). Despite this contrast between the two cases, called out by the *Obergefell* dissents,[185] in both Justice Kennedy assigns liberty the starring role even while also giving equality a secondary part to play.[186]

3. *Feminist—or Critical—or "Queer" Liberty?*

Instead of wondering whether to classify the *Obergefell* majority's notion of liberty as private or public, negative or positive, we might see the opinion as a direct challenge to the dominant categorical approach altogether. The opinion defies standard legal binaries when it fuses into "a unified whole"[187] positive and negative rights (or marriage, on one hand, and freedoms related to sex, reproduction, and childrearing, on the other). Blurring such boundaries evokes moves that often characterize feminist, critical, and queer theory,[188] so

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[180] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[181] *See* Nicolas, *supra* note 30, at 138.

[182] *See, e.g.*, Appleton, *Missing in Action?*, *supra* note 2, at 116; *cf.* Lawrence v. Texas, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (noting how traditional marriage laws rest on sex-based classifications).

[183] Brief for the United States as Amicus Curiae Supporting Petitioners at 11, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710, at *11. The brief argued that sexual-orientation discrimination evokes heightened scrutiny, which the States' asserted justifications for gay marriage bans failed to satisfy.

[184] Justice O'Connor wrote a separate concurring opinion in *Lawrence* because she would have invalidated the Texas sodomy prohibition on the basis of equal protection, instead of relying on liberty, which Justice Kennedy's majority opinion used. *Lawrence*, 539 U.S. at 579–85 (O'Connor, J., concurring). Commentators nonetheless saw equality values at work in the majority opinion in *Lawrence*. *E.g.*, Karlan, *supra* note 141, at 1449; Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 101–02 (2007).

[185] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

[186] *See* Yoshino, *supra* note 40, at 168.

[187] *Obergefell*, 135 S. Ct. at 2600.

[188] *See, e.g.*, Adam P. Romero, *Methodological Descriptions: "Feminist" and "Queer" Legal Theories*, 19 YALE J.L. & FEMINISM 227, 246–48 (2007) (book review).

such adjectives might serve as descriptors for this version of *Obergefell*'s liberty.

Under this reading, *Obergefell*'s liberty need be neither public nor private—or, it can be both—because any distinction is purely artificial, as feminists, among others, long have told us.[189] Indeed, in delineating and maintaining a divide between public and private or positive and negative, the state performs substantial regulatory work.[190] This is so in part because the legal discourse that expresses the conventional wisdom about liberty helps to construct the very categories it purports to describe.[191] Upon close inspection, no law-free baseline exists from which the purely natural springs.[192]

Critiques of the abortion-funding cases made a similar point when they emphasized that the failure to subsidize abortion did not take place in isolation but, instead, formed part of a program in which the state actively provided funding for prenatal care and delivery for poor pregnant women.[193] Similarly, the state acted in returning Joshua DeShaney to his father's custody, and he was made worse off by the initial intervention of child welfare officials, whose participation might well have discouraged others from rescuing this child.[194] Indeed, that such child welfare systems exist across the states refutes any suggestion that family law focuses only on private matters.[195] And even axioms such as statements of a child's "natural[]" dependence on parents for subsistence belie the role of law—that is, the state—in producing such realities.[196]

Even if Justice Kennedy's opinion is methodologically transgressive, its glorification of marriage is deeply conservative and thus hardly queer on the merits. *See supra* notes 144–48 and accompanying text.

189 *See, e.g.*, FINEMAN, *supra* note 56, at 150–55.

190 *See, e.g.*, Olsen, *supra* note 50, at 862 n.73.

191 *See, e.g.*, Mary Joe Frug, Commentary, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1046 (1992); Laura A. Rosenbury, *Postmodern Feminist Legal Theory: A Contingent, Contextual Account*, *in* FEMINIST LEGAL THEORY IN THE UNITED STATES AND ASIA: A DIALOGUE (Cynthia Grant Bowman ed., forthcoming 2016) (manuscript at 2–7), http://ssrn.com/abstract=2834664 [https://perma.cc/P64R-4G7V].

192 Olsen, *supra* note 48, at 1506 ("The status quo itself [regarding families] is treated as something natural and not as the responsibility of the state."); *see also* Hale, *supra* note 56, at 475–76.

193 *See, e.g.*, Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1121–24 (1980).

194 *See* Bandes, *supra* note 55, at 2286–97.

195 *See, e.g.*, CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 75–76 (2014). *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (criticizing how the child welfare system undervalues minority families).

196 *See* Olsen, *supra* note 50, at 851–52 n.46 (showing how children's dependency is based on law); *see also* Hale, *supra* note 56, at 471 ("What is the government doing when it 'protects a property right'?").

From this perspective, we might see the *Obergefell* majority's admixture of public and private liberty precedents to create "a unified whole" as a refreshing departure from the conventional wisdom and the public/private and positive/negative distinctions themselves. Likewise, by blending liberty and equality and eschewing the traditional tiers of constitutional scrutiny,[197] as *Lawrence* did as well,[198] the majority frees itself from the confining analysis required by categories. With the categories themselves as contingent and contested terrain, we might even have a potentially postmodern version of liberty,[199] but not in the way that Justice Alito has explained that label and without the derogatory implications of his remark.[200]

IV. UNLOCKING LIBERTY AND PRIVACY: THE MARRIAGE KEY

Although I find that each of the readings of "liberty" presented above plausibly derives from *Obergefell*'s language and the precedents invoked, some strike me as more compelling than others. In this Part, I explain why by taking a more evaluative and forward-looking stance. Part A shifts the focus from close analysis to the doctrinal and normative implications of each of the readings of "liberty." Part B then "connects the dots" to develop a more expansive view of the interlocking trajectories of family law and constitutional law. Here, we see that family law and its core policies, including the special role of marriage, offer important cues about constitutional law, past, present, and future.

A. *Whither* Obergefell*'s Liberties?*

It is tempting to mine the analysis and rhetoric of *Obergefell* for messages about doctrinal developments and decisions yet to come. For example, Kenji Yoshino, who embraces what I have called the "public liberty reading,"[201] draws expansive conclusions from the majority opinion. Yoshino argues that Justice Kennedy might well have relied principally on liberty, instead of equality, "deliberately eliding the negative/positive liberty distinction" in order "to revamp the substantive due process inquiry *tout court*" and yielding "radical implications," including a different outcome in *DeShaney*.[202]

I am inclined to take a more skeptical and cautious view, however. Despite the fun of making big-picture predictions, *Obergefell*'s text and its multiple

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[197] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5 (5th ed. 2015) (describing "the levels of scrutiny").

[198] *See, e.g.*, Eric Berger, Lawrence*'s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 767 (2013).

[199] *See, e.g.*, MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 121–22 (3d ed. 2013).

[200] *See supra* notes 34–35 and accompanying text.

[201] *See supra* notes 130–37 and accompanying text.

[202] *See* Yoshino, *supra* note 40, at 168.

readings leave uncertain what the case means beyond the immediate issue of same-sex marriage bans.[203] Indeed, although Justice Kennedy often writes for a majority, several observers see his opinions as idiosyncratic[204] and unlikely to have staying power beyond his time as the Court's "swing justice."[205] Whatever force such critiques might have had at the time *Obergefell* was announced, it acquired new salience with the unexpected death of Justice Scalia just months later,[206] the political firestorm sparked by the effort to bring the Court back to full strength,[207] and the inability of an eight-Justice Court to decide some important cases of the 2015–2016 Term.[208] All this "breaking

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[203] *Obergefell* did not resolve a variety of LGBTQ family law issues that have arisen in its wake. For example, a divided Michigan Supreme Court refused to review a holding below that a nonbiological parent cannot invoke the doctrine of equitable parentage in order to obtain standing in a custody case, although the dissenting judge would have reached a different result, given that the adults in question were prohibited from marrying before *Obergefell*. Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016). The U.S. Supreme Court found a *per curiam* opinion necessary to compel Alabama to give full faith and credit to an adoption decree issued to a same-sex couple by a Georgia court. V.L. v. E.L., 136 S. Ct. 1017 (2016). Commentators are grappling with what marriage equality means for legal parentage and access thereto. *See* Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155 (2014); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); *see also* Megan Jula, *4 Lesbians Sue over New Jersey Rules on Fertility Treatments*, N.Y. TIMES (Aug. 8, 2016), http://www.nytimes.com/2016/08/09/nyregion/lesbian-couple-sues-over-new-jersey-rules-for-fertility-treatment.html [https://perma.cc/53XY-523C] (reporting challenge to insurance coverage requirement of two years of unprotected sexual intercourse to establish infertility).

[204] *See, e.g.*, Robert C. Farrell, *Justice Kennedy's Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 439–40 (2014).

[205] The popular press has often referred to Justice Kennedy as the Court's "swing justice." *See* Dahlia Lithwick, *Anthony Kennedy's Right to Choose*, SLATE (Nov. 17, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/kennedy_and_supreme_court_should_vote_against_texas_abortion_law_in_cole.html [https://perma.cc/HL2T-PPW8]; *see also* Wilson Andrews et al., *How Scalia Compared with Other Justices*, N.Y. TIMES (Feb. 14, 2016), http://www.nytimes.com/interactive/2016/02/14/us/supreme-court-justice-ideology-scalia.html [https://perma.cc/3XR7-FWSE] (stating, upon the death of Justice Scalia and with eight Justices remaining, "Justice Anthony M. Kennedy is likely to be the swing vote in most cases").

[206] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html [https://perma.cc/Z5YU-2RYU].

[207] *See, e.g.*, Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. TIMES (June 13, 2016), http://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html [https://perma.cc/ NY8S-YV52].

[208] *E.g.*, United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.) (equally divided Court affirms decision below blocking executive actions on immigration); Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (equally divided Court affirms decision below permitting compulsory dues for public sector employees); *see* Linda Greenhouse, *The Supreme Court's Post-Scalia Term*, N.Y. TIMES (June 23, 2016),

news," followed by the 2016 presidential election, coming so soon after *Obergefell*, recalls the lessons of legal realism,[209] which highlight the difficulties of assessing the long-term doctrinal impact of even landmark opinions.

With these disclaimers, however, we can consider the provocative, and sometimes paradoxical, implications of each of the different readings presented above. This Part revisits each in turn.

1. *The Public Liberty Reading*

The public conception of liberty revives the possibility of a minimum welfare right or other affirmative obligations of government as a matter of constitutional law. Under this reading, one could argue that marriage creates a wedge that might open the door to additional positive rights.[210] This is precisely Yoshino's position, as noted above.[211] I would certainly welcome such developments, not only because of my disagreement with the reasoning and outcomes in the abortion-funding cases and *DeShaney*. In addition, given the rise of neoliberalism,[212] the diminishing safety net accomplished through welfare reform,[213] and growing economic inequality,[214] a constitutional right to minimum subsistence becomes perhaps even more meaningful and urgent today than it was during the heyday of the welfare-rights thesis.[215]

For these reasons, I wish I could share Yoshino's optimism. As I see it, however, the very "neoliberal political culture"[216] that accentuates the need for

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http://www.nytimes.com/2016/06/23/opinion/the-supreme-courts-post-scalia-term.html [https://perma.cc/R4E9-Q2MF]; Adam Liptak, *A Supreme Court Not So Much Deadlocked as Diminished*, N.Y. TIMES (May 17, 2016), http://www.nytimes.com/2016/05/18/us/politics/consensus-supreme-court-roberts.html [https://perma.cc/WW5R-6C7A].

[209] As Brian Leiter has explained, legal realism has embraced several different approaches, with some emphasizing that facts rather than law determine how judges decide cases and others contending that the judges' own personalities are the dominant factor. Leiter, *supra* note 97, at 280–81. At least for the former, case outcomes fall into discernable patterns. *Id.* at 281.

[210] *See* Hong, *supra* note 42, at 1438–39.

[211] *See supra* note 202 and accompanying text (summarizing Yoshino's position).

[212] *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (defining neoliberalism as "a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade," with the state's role operating "to create and preserve an institutional framework appropriate to such practices").

[213] *E.g.*, Alstott, *supra* note 143, at 28–29.

[214] *See, e.g.*, Drew DeSilver, *The Many Ways to Measure Economic Inequality*, PEW RES. CTR. (Sept. 22, 2015), http://www.pewresearch.org/fact-tank/2015/09/22/the-many-ways-to-measure-economic-inequality/ [https://perma.cc/3P56-CF54].

[215] *See supra* notes 85–92 and accompanying text.

[216] ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 400 (2012).

government support today makes recognition of such a constitutional right even less likely now than it was before, notwithstanding this reading of *Obergefell*. Indeed, the Court's limitations on remedies for constitutional wrongs would present significant difficulties for enforcing a minimum-substance right, even if one were recognized.[217]

Marriage and its unique properties, however, can help reconcile wishful thinking about welfare rights with the modern neoliberal turn. Even if we understand the constitutional right to marry as public and hence as a positive right, entry into marriage functions as a major gateway for private support obligations, explaining why the state incentivizes marriage.[218] As the *Obergefell* majority points out: "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[219] Courtney Joslin, among others, has called attention to the government-granted privileges and subsidies that marriage provides.[220] To the extent a cost-benefit analysis is at work, the state gains (or assumes it gains) more than it loses from its investment in and support of marriage. Although marriage long predates contemporary talk of neoliberalism,[221] neoliberals would have invented marriage had it not already existed! Marriage locates the primary source of support for dependents in the "private sphere," consistent with neoliberalism's deference to laissez-faire markets and the minimal state.[222] If anything, our modern era has witnessed—consistent with neoliberalism—the extension of the private obligations once associated only with marriage to other relationships, most notably support duties for nonmarital children.[223] Guaranteeing same-sex couples a right to

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[217] *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 51 (1990) (calling for a causation-based approach that places "the responsibility for solutions to the problems of segregation upon those who have themselves created the problems").

[218] *See supra* notes 73–74 and accompanying text.

[219] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

[220] Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 156 (2015); *see also, e.g.*, POLIKOFF, *supra* note 70, at 126, 129 (calling marriage "[t]he [w]rong [d]ividing [l]ine" and concluding that "[g]iving privileges to those who make the unenforceable promise of commitment over those who have carried out that commitment is the triumph of formalism over function"); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 361–62 (2004) (explaining problems in laws privileging marital families).

[221] Scholars have described neoliberalism as an ideology—in economics, politics, and law—that recalls classic laissez-faire doctrines and that has advanced "over the past few decades" or "post-postwar." David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 1, 4–5 (2014).

[222] *See* Alstott, *supra* note 143, at 27; *see also* Fraser & Gordon, *supra* note 75, at 332 ("The genealogy of dependency also expresses the modern emphasis on individual personality.").

[223] For the legal developments that replaced discrimination against children born out of marriage, including the absence of paternal support obligations, with a doctrine of "personal responsibility" that imposes such obligations and relentlessly enforces them through both federal and state law, see Appleton, *Illegitimacy and Sex*, *supra* note 2, at

marry entails yet additional expansion of these private obligations, in line with neoliberal values,[224] even if, to achieve this end, states must now offer marriage-based benefits to a larger segment of the population.[225]

These considerations counsel against imagining that *Obergefell* heralds a new dawn of enforceable positive or welfare rights. In fact, Justice Kennedy goes out of his way to describe marriage in exceptional terms,[226] apart from the private support duties it triggers, suggesting that he regards the issue in *Obergefell* as distinctive. That, in turn, might well lessen the likelihood that *Obergefell* will function as an important precedent to secure other state benefits as a matter of constitutional law.

2. *The Private Liberty Readings*

a. *Naturalizing Marriage*

Turning next to the first private conception of liberty, we can discern in the majority opinion a depiction of marriage as a "natural," even inevitable, feature of human existence. Justice Thomas's dissent articulates this view even more explicitly and forcefully (but for a different result).[227] Given Justice

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360–64. *See also* Elisa B. v. Superior Court, 117 P.3d 660, 669–70 (Cal. 2005) (recognizing mother's former partner as the twins' second mother so that the state may collect reimbursement for child support from her).

[224] Before *Obergefell*, when states were considering domestic partnership laws, empirical studies showed that such reforms would have beneficial effects on state budgets by reducing the number of people eligible for means-tested public assistance. *See, e.g.*, M.V. LEE BADGETT ET AL., WILLIAMS INST., THE IMPACT OF THE COLORADO DOMESTIC PARTNERSHIP ACT ON COLORADO'S STATE BUDGET 4–7 (Oct. 2006), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lee-MacCartney-CO-DP-Benefits-Econ-Report-Oct-2006.pdf [https://perma.cc/BA7S-VRE7]. We can presume that the availability of marriage for same-sex couples would produce similar economic consequences.

[225] Suppose a state or the federal government claims that it cannot afford to extend the material benefits of marriage to same-sex couples. In attempting to defend its ban on same-sex marriage, Massachusetts unsuccessfully argued that it had an interest, *inter alia*, in "preserving scarce State and private financial resources." Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). I presume that the governmental entity in question could distribute the available pool of benefits fairly among all married couples, even if that resulted in a reduction for those who previously enjoyed marriage before the inclusion of same-sex couples. In other words, if need be, the same pool of funds would be distributed among a larger number of married couples. *See also infra* notes 343–44 and accompanying text (noting how some marital benefits cost the state nothing).

[226] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593–94 (2015).

[227] Not only does Justice Thomas double down on a limited interpretation of "liberty" that protects only negative rights, but he also ascribes to the Framers' understanding

> a natural right to marriage that fell within the broader definition of liberty . . . [and] would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have

Kennedy's outcome, however, this reading raises intriguing questions about the precise relationship of the state to marriage. On the one hand, a view of marriage as natural lends support to proposals for "taking marriage private,"[228] that is, proposals that would remove the state from the marriage business while leaving marrying as a purely religious or personal celebration, say, like a bar mitzvah or a first communion. Under such proposals, civil marriage, as we know it, would cease to exist, along with all the rewards and benefits the state attaches to the status of being married. We can find models for this approach in other countries, such as Israel, where marriage is strictly a religious institution open only to a narrow class of individuals who meet specified sectarian requirements, with various civil remedies available when relationships dissolve, regardless of marriage.[229] In the United States, such proposals have come from those who want the state to wash its hands of a patriarchal institution that denigrates families who do not conform.[230] Such proposals have also come from those resisting constitutional protection for same-sex marriage—for example, an Alabama legislator who would prefer for the state to license no marriages at all than to include same-sex couples.[231]

Certainly, abolishing civil marriage altogether would be a plausible remedy if the constitutional violation found in *Obergefell* had sounded exclusively or even primarily in inequality. Cross-sex couples would no longer have access to benefits denied to same-sex couples, eliminating the discrimination, unless the animus-driven motive for the abolition itself would run afoul of the Equal Protection Clause.[232] Yet, as we have seen, *Obergefell* invokes liberty, not equality, as the principal foundation of its holding.

> been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference.

Id. at 2636 (Thomas, J., dissenting); *see also* Nichols, *supra* note 149, at 197–201 (emphasizing pre-political and religious aspects of marriage).

[228] Stephanie Coontz, *Taking Marriage Private*, N.Y. TIMES (Nov. 26, 2007), http://www.nytimes.com/2007/11/26/opinion/26coontz.html [https://perma.cc/TR98-SNZY].

[229] *See, e.g.*, Zvi Triger, *"A Jewish and Democratic State:" Reflections on the Fragility of Israeli Secularism*, 41 PEPP. L. REV. 1091, 1092 (2014) (setting out elements and "roots of the religious monopoly over personal status issues in Israel"); Ayelet Blecher-Prigat, "Divorcing" Marriage from the Law: The Case of Israel (unpublished working draft) (on file with author) (contending that Israel's unique religious monopoly over marriage makes it an apt setting to explore proposals to abolish legal marriage).

[230] *See, e.g.*, POLIKOFF, *supra* note 70, at 126 (criticizing marriage as the wrong "dividing line" for the distribution of rights and responsibilities); Patricia A. Cain, *Imagine There's No Marriage*, 16 QLR 27, 29 (1996).

[231] *See* Shane Trejo, *Alabama Senate Passes Bill to Effectively Nullify All Sides on Marriage*, TENTH AMEND. CTR. (May 23, 2015), http://blog.tenthamendmentcenter.com/2015/05/alabama-senate-passes-bill-to-effectively-nullify-all-sides-on-marriage/ [https://perma.cc/Y3NE-24XM].

[232] *See* Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 702–04 (2010).

Further, the opinion's encomia to marriage make it hard to imagine that the majority, or at least Justice Kennedy, would countenance the state's extricating itself from marriage at this point in history. State-operated, state-supported marriage now constitutes the status quo—the current baseline for this "natural" practice. As Pamela Karlan has written, "the government's unbroken historical practice of providing official recognition and protection to family relationships has hardened into a liberty interest."[233] That would seem to be especially true of marriage.[234] Against this background and with *Obergefell*'s treatment of restrictions on marrying portrayed as a deprivation of liberty, state withdrawal from marriage becomes constitutionally problematic. So, by naturalizing marriage and portraying it as protected activity comparable to sex, reproduction, and childrearing, *Obergefell* might paradoxically entrench, even require, state involvement—as a matter of liberty.[235]

The majority's naturalizing rhetoric has additional perverse effects. First, it embeds "civil marriage,"[236] a "public institution,"[237] in our intimate lives, notwithstanding judicial language celebrating personal freedom of choice in such matters.[238] Second, it camouflages the disciplinary purpose and role of marriage. When the state seeks to guide sexual and domestic activities into marriage,[239] it embraces marital norms (and laws) of exclusivity, fidelity, and

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[233] *Id.* at 705–06. As Karlan explains,

> Particularly in contemporary society, where a passel of benefits and obligations depends on official recognition of family relationships, it is hard to imagine a government stepping out of the arena altogether and leaving individuals to negotiate their obligations to support children, their rights to employee benefits, and their divisions of property without any default rules set by the state.

Id. at 705. Yet, I read that explanation as rooted in practical concerns, rather than constitutional mandate. In contrast to Karlan, Patricia Cain has concluded that due process does not prevent a state from abolishing marriage. Cain, *supra* note 230, at 42–43. Likewise, Nelson Tebbe and Deborah Widiss contend that, under a liberty approach, "states could almost certainly get out of the marriage business altogether, leaving marriage to religious groups or other private institutions" without violating any constitutional rights. Tebbe & Widiss, *supra* note 71, at 1378–79.

[234] Karlan continues: "Whether the state was required to create marriage in the first place, marriage has since become a privilege essential to happiness." Karlan, *supra* note 232, at 706.

[235] *See also* Yoshino, *supra* note 40, at 173 (opining that an equality-based ruling would have allowed the state to level down by refusing to grant marriage licenses to all couples—an option foreclosed by a liberty-based ruling).

[236] 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)).

[237] *Id.* at 2601 (quoting Maynard v. Hill, 125 U.S. 190, 213 (1888)).

[238] *See* Appleton, *Forgotten Family Law*, *supra* note 2, at 41–46 (examining how family law rests on conflicting values, autonomy and regulation).

[239] *See supra* notes 73–74 and accompanying text.

obligation.[240] Marriage domesticates and tames, a truism that prompted some political conservatives eventually to support same-sex marriage.[241] Whether or not marriage is "punishment,"[242] its disciplinary purpose and role seem beyond dispute[243]—a point emphasized in Justice Scalia's *Obergefell* dissent.[244] Yet, by presenting marriage as an inherent aspect of human nature, disconnected from the state, *Obergefell* masks such constraints.[245]

Finally, by conjoining marriage with sex, reproduction, and childrearing (making them "a unified whole"),[246] this first private-liberty reading of *Obergefell* leaves *nonmarital* sex, reproduction, and childrearing as marginal practices.[247] *Obergefell*'s glorification of marriage, its history, and its

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[240] With respect to exclusivity, despite liberalization of marriage and divorce laws, still a person can have only one spouse at a time and, despite contemporary activism, bigamy prohibitions have escaped successful challenge. *See, e.g.*, Brown v. Buhman, 822 F.3d 1151, 1155 (10th Cir. 2016). With respect to fidelity, as I have pointed out before, the emergence of unilateral no-fault divorce has made clear that this marital value is optional and that a marriage can continue with it or without it depending on personal choice. *See* Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER, L. & JUST. 267, 294–95 (2008) (noting how "in the prevailing no-fault divorce regime, adultery provides neither a necessary nor a sufficient condition for divorce, so marriages marked by adultery may or may not survive"). Finally, the expectation of obligation is concretized in the rise of the partnership theory of marriage with equitable division of marital property taking effect at divorce, the persistence of alimony (or maintenance) as a separate remedy for some, and robust efforts to regularize and enforce child support duties. *See, e.g.*, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 196–205, 223–31 (2011).

[241] *See generally* JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004) (addressing concerns from across the political spectrum to explain why gay marriage will benefit society); Jason Lee Steorts, *An Equal Chance at Love: Why We Should Recognize Same-Sex Marriage*, NAT'L REV. (May 19, 2015), http://www.nationalreview.com/article/418515/yes-same-sex-marriage-about-equality-courts-should-not-decide [https://perma.cc/4JXV-G2E2] (invoking fairness concerns to argue that same-sex couples should have the same access to marriage as cross-sex couples).

[242] Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 5–6 (2012).

[243] *See id.* at 51–52.

[244] *See id.* at 39–64; *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) ("[O]ne would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.").

[245] *See, e.g.*, Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 107–08 (2015).

[246] Although I suggested earlier that this fusion allows rights traditionally classified as "negative" to overshadow the "positive right" characteristics of marriage, see *supra* note 164 and accompanying text, here I suggest that—through this fusion—*Obergefell*'s emphasis on marriage might well diminish how some of the precedents about negative rights once directly challenged marital supremacy. *See* Appleton, *Forgotten Family Law*, *supra* note 2, at 53–54.

[247] Conversely, this joinder could be read to marginalize marriages that do not include reproduction and childrearing. *Cf.* Cynthia Godsoe, *Marriage Equality and the "New" Maternalism*, 6 CALIF. L. REV. CIR. 145, 147 (2015) (criticizing "the maternalism infusing

rewards[248] reinforces this message,[249] for example, providing a new rationale for lower courts to reject financial and parentage claims after a nonmarital relationship ends.[250] Indeed, *Obegefell*'s elevation of marriage might itself reflect a "channeling" move,[251] that is, an effort to encourage marriage and discourage other family forms and intimate associations, thus perhaps making certain negative rights less attractive to exercise[252] and effectively working the very humiliation of children (and adults) living outside marriage that the majority condemns in restrictive marriage laws.[253] As I have observed elsewhere, the opinion reads like "a public-service announcement designed to persuade the uncommitted to join the marital ranks,"[254] possibly in an effort to counter the growing percentage of nonmarital families—a trend often called the "retreat from marriage."[255]

Even with its paradoxical and perverse implications, I find this reading well supported by the majority opinion's language and its use of precedent. It assumes a special role for marriage but therefore leaves open *Obergefell*'s

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the *Obergefell* opinion" and its "traditional view of women's place in the family and in the public sphere").

[248] *Obergefell*, 135 S. Ct. at 2593–94.

[249] *See also* Hunter, *supra* note 245, at 107–08.

[250] *See* Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, at *20 (Ill. Aug. 18, 2016) ("Indeed, now that the centrality of the marriage has been recognized as a fundamental right for all, it is perhaps more imperative than before that we leave it to the legislative branch to determine whether and under what circumstances a change in the public policy governing the rights of parties in nonmarital relationships is necessary."); *In re* Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) (pre-*Obergefell* case holding that a biological mother's former partner cannot obtain a declaration of parentage unless she can show the couple would have chosen to marry if they could have).

[251] *See supra* note 73 and accompanying text.

[252] Here, I have in mind sexual liberty outside marriage, for example. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[253] *Obergefell*, 135 S. Ct. at 2600–01; *see Blumenthal*, 2016 WL 6235511, at *20 (emphasizing *Obergefell*'s protection of marriage and stating that "nothing in that holding can fairly be construed as requiring states to confer on non-married, same-sex couples common-law rights or remedies not shared by similarly situated non-married couples of the opposite sex"). *But see* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. (forthcoming 2017); Laurence H. Tribe, Response, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 31–32 (2015) (arguing the "equal dignity" approach used in *Obergefell* extends to those who choose alternatives to marriage).

[254] Appleton, *Forgotten Family Law*, *supra* note 2, at 24.

[255] *See* Shelly Lundberg & Robert A. Pollak, *Cohabitation and the Uneven Retreat from Marriage in the United States, 1950–2010*, *in* HUMAN CAPITAL IN HISTORY: THE AMERICAN RECORD 241, 241–50 (Leah Platt Boustan et al. eds., 2014). For other examinations of the phenomenon, see, e.g., JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014).

impact on other controversies, including those about parentage and nonmarital families that we can expect to follow in the case's wake.[256]

b. *Equalizing Liberty or Liberating Equality*

The second private-liberty reading, synthesizing liberty and equality, holds promise because it can help dismantle biased stereotypes about LGBTQ persons.[257] In addition, like the public liberty reading, it can provide a foothold for positive rights, particularly a right to minimum welfare. Welfare rights acquire a more substantial constitutional basis when inequality becomes part of the analysis. As we have seen, an uneven distribution of benefits can present unconstitutional discrimination even if the underlying benefit is not itself guaranteed.[258] Indeed, given the difficulty that some would have in classifying as a *deprivation* of liberty a state's failure to take action or provide a particular benefit, it should come as no surprise that the key cases once interpreted to suggest the possibility of a minimum welfare right were decided on equal protection grounds.[259] Today, with the clash between neoliberal values and the idea of a welfare right,[260] incorporating equal protection into the analysis could prove even more significant. The remedy for the constitutional violation might well entail the extension of benefits to a larger population, as in *Obergefell*.[261]

Nonetheless, *Obergefell*'s methodology, so read, could present risks for equal protection doctrine. Will the abandonment of tiers of scrutiny[262] in the

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[256] *See supra* note 203.

[257] Cary Franklin makes this point. Franklin, *supra* note 170, at 885–86.

[258] *See* text accompanying *supra* notes 174–75.

[259] As Frank Michelman theorized in his classic 1969 article, citing a series of cases decided on equal protection grounds:

> Let me then suggest that the judicial "equality" explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called "minimum welfare." In the recent judicial handiwork which has been hailed (and reviled) as an "egalitarian revolution," a particularly striking and propitious note has been sounded through those acts whereby the Court has directly shielded poor persons from the most elemental consequence of poverty: lack of funds to exchange for needed goods, services, or privileges of access.

Michelman, *supra* note 84, at 9 (footnotes omitted); *see also id.* at 13. In later work, however, Michelman considered a broader range of cases. *See* Michelman, *supra* note 85, at 663 & n.21.

[260] *See supra* notes 212–15 and accompanying text.

[261] *See supra* notes 174–75 and accompanying text.

[262] Justice Thomas claims that, even when it uses distinct tiers of scrutiny, the Court manipulates them to achieve a preferred result. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting). Thus, he writes, "[t]hese labels now mean little." *Id.* at 2328.

LGBTQ cases (even if valuable in that context)[263] dilute the review of other sorts of discriminatory classifications? Does subsuming equal protection into liberty make the former so dependent on the latter that it has no force of its own? Recall how Justice Kennedy's first gay rights opinion, in *Romer v. Evans*, rested on the Equal Protection Clause,[264] but it did not identify an applicable standard of review. Rather, it condemned unequal treatment that "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,"[265] a conclusion applied in later gay rights cases as well.[266] But not every inequality that we might think should be ruled unconstitutional will be recognized as a deprivation of liberty or a reflection of animosity against the class affected—even by Justice Kennedy.

Indeed, Justice Kennedy's own opinions reflect a fluidity that complicates assessments of his approach to discrimination outside the gay rights context. For example, although his recent opinions on affirmative action[267] and housing[268] suggest a still evolving position, we can discern in Justice Kennedy's earlier opinions a narrow understanding of both racial subordination and the continuing effects of past race-based discrimination—even if the views of some of his colleagues are narrower still.[269] In addition, Justice Kennedy, who has at best a mixed record in sex discrimination cases,[270] embraced paternalism and reinforced gender-based inequalities in his majority opinion in *Gonzales v. Carhart*, which upheld the federal ban on

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[263] *See* Franklin, *supra* note 170, at 857; *cf.* Hunter, *supra* note 245, at 113; Nicolas, *supra* note 30, at 138.

[264] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[265] *Id.* at 634.

[266] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (finding anti-gay animus and moral disapproval in DOMA).

[267] Writing for the majority in an equal protection challenge to an affirmative action plan at the University of Texas, Justice Kennedy did not take the opportunity to invalidate all consideration of race in efforts to achieve diversity in higher education, despite signals in past cases that he was heading in that direction. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2215 (2016). *But see infra* note 269 (citing past cases).

[268] Writing for the majority, Justice Kennedy concluded that challenges to housing decisions with a disparate impact are cognizable under the Federal Housing Act. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project Inc., 135 S. Ct. 2507, 2513, 2525 (2015). As the opinion explains, "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Id.* at 2518.

[269] *See Fisher*, 133 S. Ct. at 2421; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790–91 (2007) (Kennedy, J., concurring); *see also* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating part of the Voting Rights Act by the majority, including Justice Kennedy).

[270] *See* David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 694 (2008) (analyzing Justice Kennedy's gender cases to find that he relies on stereotypes in family life, but rejects them in civic life).

"partial-birth abortion," in large part based on the assumption that women later regret their pregnancy terminations.[271] True, this opinion rested on liberty, not equality, but it has obvious ramifications for the legal treatment of women and their position in society, as Justice Ginsburg's dissent pointed out.[272] More recently, however, Justice Kennedy joined Justice Breyer's majority opinion striking down burdensome and unnecessary abortion restrictions enacted under the guise of protecting women's health.[273] In fact, as the senior member of the majority in this new case, *Whole Woman's Health v. Hellerstedt*, Justice Kennedy must have assigned the opinion to Justice Breyer, with whom he has stood at odds in earlier abortion cases.[274]

Taken together, Justice Kennedy's opinions about racial and gender inequality defy easy synthesis and forecasts. These opinions leave open the question whether equal protection will survive its incorporation into liberty in *Obergefell* to win other battles for social justice.[275] Perhaps we can see *Obergefell*'s less than fully developed concept of constitutional equality as a first step toward a more robust understanding that Justice Kennedy is gradually embracing—but we cannot know for sure.

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[271] Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007). For example, one basis cited for upholding the statute, which included no health exception, is anxiety about abortion regret: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Id.* at 159. Although abortion jurisprudence has rested on liberty, not equal protection, Justice Ginsburg's dissent emphasizes the importance of reproductive self-determination for gender equality and the many ways the statute and the majority opinion demean women, endanger them, and perpetuate their unequal treatment. *Id.* at 169–91 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.).

[272] *Id.* at 170–72, 183–86; *see also* Godsoe, *supra* note 247, at 151–55 (noting similarities in Justice Kennedy's opinions in *Obergefell* and *Gonzales*).

[273] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2292 (2016).

[274] In an earlier case challenging a statute similar to that in *Gonzales*, Justice Breyer wrote the majority opinion striking down the statute, and Justice Kennedy dissented. Stenberg v. Carhart, 530 U.S. 914, 920–22, 956 (2000). With personnel changes on the Court, Justice Kennedy was able to include his view that such statutes are constitutional seven years later in *Gonzales*, 550 U.S. 124, and Justice Breyer joined Justice Ginsburg's dissent, *id.* at 169 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.). That background makes especially interesting not only Justice Kennedy's vote in *Whole Woman's Health*, but also the fact that he chose Justice Breyer to write the opinion. *Whole Woman's Health*, 136 S. Ct. at 2292; *cf.* Linda Greenhouse, *The Not-So-Liberal Roberts Court*, N.Y. TIMES (July 7, 2016), http://www.nytimes.com/2016/07/07/opinion/the-not-so-liberal-roberts-court.html [https://perma.cc/J99D-9HME] (analyzing Justice Kennedy's position in *Whole Woman's Health*).

[275] For commentary on Justice Kennedy's jurisprudence of racial equality, see Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007). On his jurisprudence of gender equality, see Cohen, *supra* note 270, at 694. In the meantime, Yoshino sees in *Obergefell* a principle of "antisubordination liberty," which he theorizes should help members of all subordinated groups. *See* Yoshino, *supra* note 40, at 174–75.

In addition to general concerns about equality doctrine, however, "marriage equality" as a more particular focus should give us pause, even while we celebrate *Obergefell* as a win for social justice. As Michael Warner emphasizes, marriage "is selective legitimacy."[276] Affording same-sex couples access to marriage still leaves the institution inherently exclusive.[277] Further, marriage equality does little to address widening inequalities among families.[278] To the extent such inequalities are economic, they stand as an unsurprising effect of keeping dependency private.[279] To the extent the inequalities result from the marital/nonmarital "dividing line," as Nancy Polikoff calls it,[280] they highlight family law's failure to pay attention to those outside marriage's cover.[281]

Highlighting such problems does not rule out the possibility of a sunnier outlook, however. *Obergefell*'s express concerns about the dignitary harm of excluding same-sex couples from a vaunted institution that has been open to others[282] could suggest important work for the opinion's equality thread, despite the more prominent role assigned to liberty.[283] So understood, *Obergefell*'s impact might transcend marriage, paving the way for more equitable treatment of other nontraditional families[284] and compelling an equal-dignity approach in the myriad disputes that can ensnare those who become parents as a same-sex couple.[285] The critical question is whether marriage is and will be the sine qua non of *Obergefell*.

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[276] Michael Warner, *Beyond Gay Marriage*, *in* LEFT LEGALISM/LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley eds., 2002); *see also* Seidman, *supra* note 13, at 137 ("The valorization of marriage and attack on the unmarried is also deeply reactionary. It comes at a moment when, as just noted, a huge percentage of marriages end in divorce—often acrimonious and wrenching—and when fewer and fewer Americans are choosing marriage in the first place.").

[277] As Warner explains, "Marriage sanctifies some couples at the expense of others. . . . This is a necessary implication of the institution . . . ." Warner, *supra* note 276, at 260.

[278] *See supra* notes 214, 255 (citing authorities).

[279] *See, e.g.*, Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 4 (2008); *see also* JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 4 (1983) ("Once the role of the family is taken into account, the apparently moderate aspiration of equal opportunity produces conflicts with the private sphere of liberty—with autonomous family relations—that are nothing short of intractable.").

[280] *See* POLIKOFF, *supra* note 70, at 126.

[281] *See* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 170 (2015).

[282] *E.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[283] *See supra* notes 26–30 and accompanying text.

[284] Joslin, *supra* note 253, at 7; Tribe, *supra* note 253, at 30–32.

[285] *See supra* note 203 (citing authorities); *see also* Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 338–39 (2016); Douglas NeJaime, The Nature of Parenthood (unpublished manuscript) (on file with author).

3. *The Feminist—or Critical—or "Queer" Reading*

What I have called the feminist, critical, or "queer" reading shows promise in its defiance of the public/private and positive/negative binaries—and its methodological challenge to other categories as well. Using "postmodern" in a more approving way than Justice Alito did,[286] we can say that this reading helps expose the work performed by legal language and the categories it creates.[287] In turn, this reading takes an important step consistent with the insight that the state is inextricably part of family and sexual life,[288] constructing our human experience and very identity,[289] regardless of the convenience of the "private sphere" label. Yet, *Obergefell*'s naturalization of marriage, discussed above,[290] could portend just the reverse, given how it disguises the state's role in this "public institution." Moreover, the categories created by marriage itself (marital and nonmarital) retain their prominence, perhaps newly magnified, after *Obergefell*.

What are the possibilities for *Obergefell*'s unconventional approach, as interpreted in this reading, to serve as a durable reformist tool? Attacking Justice Kennedy's opinions for sloppiness and lack of rigor had become a cottage industry even before *Obergefell*.[291] Accordingly, one could understand the *Obergefell* dissents' censure of the conflation of positive and negative rights as a judicial version of this trope about sloppiness and lack of rigor. At the same time, these particular critiques might simply signal resistance to or discomfort with Justice Kennedy's liberation from rigid categorical analysis (which, of course, the Fourteenth Amendment's own words do not require). Moreover, these critiques of Justice Kennedy's jurisprudence intimate that he writes alone, when—in fact—*Obergefell* and his other category-defying gay rights opinions all commanded a majority.[292] Finally, we should note the

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[286] *See supra* notes 34–35 and accompanying text.

[287] *See, e.g.*, Frug, *supra* note 191, at 1046.

[288] *See, e.g.*, WEEKS, *supra* note 160, at 99 ("[Q]uestions of sexuality are inevitably, inescapably, political questions.").

[289] *See* Rosenbury, *supra* note 191.

[290] *See supra* notes 144–64 and accompanying text.

[291] *See, e.g.*, *Against Redefining Marriage—and the Republic*, NAT'L REV. (June 26, 2015), http://www.nationalreview.com/article/420405/against-redefinition-marriage-supreme-court-democracy [https://perma.cc/664F-4FSN]; David Azerrad, *Justice Kennedy and the Lonely Promethean Man of Liberalism*, PUB. DISCOURSE (July 9, 2015), http://www.thepublicdiscourse.com/2015/07/15286/ [https://perma.cc/X2TF-C8KT]; Timothy Sandefur, *Gay Marriage Decision: Right for the Wrong Reasons. Dissents: Wrong for Worse Reasons*., FOUND. FOR ECON. EDUC. (June 26, 2015), http://fee.org/anythingpeaceful/gay-marriage-decision-right-for-the-wrong-reasons-dissents-wrong-for-worse-reasons [https://perma.cc/8BPB-ET4N]. *But see* FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 5, 35–37, 123 (2009); Tribe, *supra* note 253, at 31–32.

[292] *E.g.*, Lawrence v. Texas, 539 U.S. 558, 561 (2003). Several commentators have written favorably about Justice Kennedy's approach in these cases. *See generally* Abrams

possibility that Justice Kennedy deliberately chose obfuscation in *Obergefell* as a means of securing a majority without committing to what will happen next.

A darker view of such uncertainties emerges from the critique by Louis Michael Seidman, who finds the majority opinion riddled with hypocrisy, deception, and manipulation,[293] despite his support for the outcome. He finds particular fault with "lack of empathy and understanding" for those who are not married, whether by choice or necessity,[294] and condemns the Court's treatment of marriage as "deeply reactionary."[295] He asks the reader to take the position of a like-minded Justice:

> Constitutionalism helped produce a victory in this case, but it did so through mechanisms we should be ashamed of. Should we embrace constitutionalism and use its tools so as to preserve this victory and, perhaps, win others as well? Put differently, if you or I were a Justice on the Supreme Court, should we sign Justice Kennedy's opinion? What if our vote was necessary to secure a majority?[296]

Ultimately, "the real and daily human suffering"[297] inflicted by gay marriage bans and the likelihood that our flawed constitutionalism[298] will persist anyhow tip the balance for Seidman, who decides "yes, I would be tempted to join Justice Kennedy's dreadful opinion."[299]

With the death of one of the most caustic detractors of Justice Kennedy's jurisprudence, Justice Scalia, and the Court's new composition still up for grabs even in the immediate aftermath of the 2016 election, we do not know who will actually face questions like Seidman's and what each Justice's inclinations will be. Open issues abound: How will the Court approach rights and interests other than marriage? How will it analyze classifications based on criteria other than sexual orientation, including race, gender, and class? What might be the consequences—both intended and unintended—of *Obergefell*'s

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& Garrett, *supra* note 173 (endorsing Justice Kennedy's approach in *Obergefell* and offering a framework for future cases); Franklin, *supra* note 170 (endorsing the combined use of liberty and equal protection); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002) (examining how an approach that interweaves liberty and equality can produce better results); Yoshino, *supra* note 40 (analyzing how Justice Kennedy's opinion in *Obergefell* might have shifted substantive due process jurisprudence).

[293] Seidman, *supra* note 13, at 145–46.

[294] *Id.* at 137.

[295] *Id.*

[296] *Id.* at 143.

[297] *Id.* at 145.

[298] Seidman dismisses as fallacious the assumptions that "the Constitution provides a just basis for resolving disputes among people who would otherwise disagree" and "that we can discern the meaning of the Constitution without presupposing an extra-constitutional resolution of that disagreement." *Id.* at 130.

[299] Seidman, *supra* note 13, at 145.

reasoning and rhetoric? A postmodern lens foregrounds the contingencies and thus accentuates the uncertainties. Yet, while Justice Alito worries that the result will be too much constitutional protection,[300] my take-away from *Obergefell* is the concern that there could be too little, based on *Obergefell*'s expressed reverence for marriage, Justice Kennedy's past positions on race and gender inequalities, and deep divisions on the Court.

B. *Synergistic Liberties: Constitutional Law and Family Law*

Although the multiple readings of "liberty" yield precious little about what each will mean and how each will apply going forward, they do showcase marriage as a pressure point that presents paradoxes, raises contradictions, and confounds traditional distinctions. Accordingly, this Part takes a different tack, looking beyond *Obergefell*'s text to contextualize this case in a wider exploration of the intersection of family law and constitutional law. This exploration not only addresses the expected impact of constitutional law on family law but also considers the less expected impact of family law on constitutional law. For the latter, patterns emerging from the constitutional case law along with family law policies offer a new way to theorize *Obergefell*—in turn suggesting possibilities for future directions, with marriage serving as a guide.

1. *Constitutional Law's Shaping Function*

Just as there is a conventional wisdom about liberty as a negative right, there is a standard story about the relationship between constitutional law and family law. According to this standard story, constitutional law establishes boundaries or outer limits for permissible family laws, which are typically, but of course not always, state-made laws. For example, when the Supreme Court holds unconstitutional state restrictions on use of and access to birth control,[301] the availability of abortion,[302] or entry into marriage,[303] states must follow, conforming their rules to the announced limits. Constitutional cases striking down gender-based and "illegitimacy" discrimination perform a similar function, disallowing certain family laws that once marked the field.[304] Within the constitutional confines, however, states largely may govern families as they see fit. Because this understanding reflects the basic principle of

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[300] *See supra* note 35 and accompanying text.

[301] Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972).

[302] Roe v. Wade, 410 U.S. 113, 164 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion).

[303] Loving v. Virginia, 388 U.S. 1, 2 (1967); Zablocki v. Redhail, 434 U.S. 374, 376–77 (1978); Turner v. Safley, 482 U.S. 78, 81 (1987).

[304] For analysis of such equal protection cases and their impact on family law, see *supra* note 2 (citing authorities).

constitutional supremacy,[305] it should come as no surprise notwithstanding the oft-invoked maxim that family law belongs to the states.[306] The process works the same way in those instances in which Congress makes federal family law, as it did when enacting the Defense of Marriage Act, which the Court invalidated in *United States v. Windsor*.[307]

Certainly, the process might unfold in a contentious and disorderly way, but the basic generalization still holds true. For example, consider *Roe v. Wade*[308] and its aftermath. Once *Roe* struck down all abortion laws exceeding the limits of the trimester timetable that emerged from the Court's application of strict judicial scrutiny,[309] some states followed with new laws that fit the constitutional framework[310] while others tried to weaken the announced limits or find untested loopholes.[311] Some jurisdictions even enacted statutes directly challenging the constitutional limits in an effort to spur a Court with changed personnel to reconsider protection for abortion altogether.[312] And, in fact, a Court majority subsequently revised the standard governing abortion laws when it moved from *Roe*'s strict scrutiny to the less demanding "undue burden" formulation, articulated by a plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[313] and later applied by a majority in *Gonzales v. Carhart* to uphold what happened to be a federal ban on a particular abortion procedure.[314] The Court's latest encounter with abortion law only reinforces the obvious point: *Whole Woman's Health v. Hellerstedt* is important precisely because it clarifies the undue burden standard, limiting states' ability to impede access to abortion by means of onerous and medically unnecessary regulations of providers and clinics.[315]

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[305] U.S. CONST. art. VI, § 2.

[306] *See supra* note 12 and accompanying text.

[307] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[308] Roe v. Wade, 410 U.S. 113, 164–65 (1973).

[309] *Roe*'s trimester timetable reflected the Court's application of strict scrutiny, requiring a compelling state interest and narrow tailoring. *See id.* at 155–56, 163–64.

[310] *See, e.g.*, MD. CODE ANN. § 20-209 (West 2015).

[311] The Missouri statute challenged in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 56, 58 (1976), provides an early illustration of such efforts, with its requirements of, *inter alia*, written informed consent, spousal consent, and parental consent.

[312] *See, e.g.*, Ada v. Guam Soc'y of Obstetricians & Gynecologists, 506 U.S. 1011, 1012–13 (1992) (Scalia, J., dissenting).

[313] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–77 (1992) (plurality opinion).

[314] Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

[315] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016); *see also* Mitch Smith & Erik Eckholm, *Federal Judge Blocks Indiana Abortion Law*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/us/federal-judge-blocks-indiana-abortion-law.html [https://perma.cc/4YNW-79JC] (discussing injunction against law banning abortion based on race, gender, or genetic anomaly in the wake of the Supreme Court's ruling in *Whole Woman's Health*).

Similarly, consider the Court's shift over time on gay sex and relationships. Per *Bowers v. Hardwick*, decided in 1986, states could criminalize same-sex sodomy without violating the Constitution.[316] States lost that authority in 2003, when the Court overturned *Bowers* in *Lawrence v. Texas*, determining that such criminal prohibitions infringe the liberty protected by the Fourteenth Amendment and thus disabling states from making or enforcing such laws.[317] In *Windsor*, the Court held unconstitutional Congress's exclusion of same-sex couples, who were married under state law, from all federal marital benefits.[318] Of course, *Obergefell* operates in a parallel fashion, disallowing states from rejecting same-sex couples from their official marriage regime.[319] Across these cases, the Constitution (as interpreted by the Court) defines the parameters of permissible family laws.

This generalization leaves ample room for state family laws to influence constitutional interpretation. States may permit abortions beyond constitutional protection or recognize relationships beyond those constitutionally required, in time prompting the Court to revise earlier decisions. No doubt, the "'laboratory' of the States"[320] allowed important state-level experimentation with marriage equality before the Supreme Court was ready to depart from its cursory conclusion in 1972 to the effect that the denial of marriage licenses to same-sex couples presented no constitutional issue.[321] Despite approaches that might percolate up from the states into the Supreme Court's constitutional analysis,[322] the standard story still portrays the Court's application of the Constitution as the determinative exercise of authority, however.

Writing about what she describes as the underexplored relationship between constitutional law and state family law,[323] Anne Alstott succinctly captures this standard story when she observes that the state family law "pursues a limited mission *shaped by* the contours of constitutional law."[324] According to Alstott, at the same time that negative liberty performs this

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[316] Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[317] *Lawrence*, 539 U.S. at 578.

[318] United States v. Windsor, 133 S. Ct. 2675, 2693–96 (2013). Because it was ruling on a federal statute, the Court applied the Due Process Clause of the Fifth Amendment, while noting that that provision contains a "prohibition against denying to any person the equal protection of the laws." *Id.* at 2695.

[319] Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[320] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

[321] Baker v. Nelson, 409 U.S. 810 (1972) (dismissing appeal "for want of a substantial federal question"), *overruled by Obergefell*, 135 S. Ct. at 2584. *See generally* Boucai, *supra* note 17 (presenting history of *Baker* and other early cases).

[322] *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 13–15 (2004) (deferring to state custody law to reject father's asserted standing), *abrogated in part by* Lexmark Int'l v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

[323] *See* Alstott, *supra* note 143, at 41–42.

[324] *Id.* at 25–26 (emphasis added).

limiting or shaping function with respect to state family law, "[c]onstitutional law forecloses any legal claim to positive rights—to the resources needed to marry, to procreate, and to grow and develop."[325] As a result, states (and Congress) are free, as they see fit, to offer affirmative support or not for familial decisions and activities.

This summary gets it right, as far as it goes. Indeed, precisely because I share Alstott's conceptualization, I have long begun my family law course with a study of constitutional outer limits, establishing the boundaries within which family law may operate.[326] Only once we have recognized these outer limits can the class begin to explore the choices that states might make in regulating family life.

Yet, the tension in *Obergefell* about negative versus positive liberty and private versus public matters has also exposed how this standard story remains incomplete. In emphasizing how constitutional law shapes family law, this standard story fails to acknowledge how family law shapes constitutional law.

2. *Family Law's Influence on Constitutional Doctrine*

a. *Family Law's Contested Core: Maintaining Dependency as a Private Responsibility*

As scholars have noted when writing about particular family law topics and as this Article has pointed out,[327] a goal of keeping dependency private carries much explanatory force even while evoking critical responses. For example, Alstott herself sees the privatization of dependency as a reflection of contemporary neoliberalism,[328] while Laura Rosenbury describes it as the premier value in a hierarchy of general legal values, including equality, dignity, and federalism.[329] Yet, I would pinpoint a more specific source for the privatization of dependency. I would identify this notion as the essence of family law—a goal that animates the field and runs through its different elements. This is the position taken by Martha Fineman dating back to her early critiques of the usual understanding and performance of family law.[330]

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[325] *Id.* at 36.

[326] All six editions of the family law casebook that I co-author begin with a chapter on the constitutional parameters of family law. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1–114 (1998); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1–103 (6th ed. 2016).

[327] *See supra* notes 73–75 and accompanying text.

[328] *See* Alstott, *supra* note 143, at 36.

[329] Rosenbury, *supra* note 74, at 1860.

[330] *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 8–9, 227–28 (1995); *see also* FINEMAN, *supra* note 56, at 228 ("It is the family, not the state or the market, that assumes responsibility for both the inevitable dependent—the child or other biologically or developmentally dependent person—and the derivative dependent—the caretaker. The

Put differently, the privatization of dependency stands out as a guiding principle of family law even if this principle also coincides with neoliberalism (per Alstott) and sometimes interacts with principles from other legal domains (per Rosenbury).

Many facets of family law exemplify this principle. Today's aggressive child support policies and enforcement tools provide especially telling illustrations.[331] The larger picture, however, also includes, *inter alia*, the public benefits that incentivize (or "channel") pairs to marry,[332] the legal recognition accorded to the family unit,[333] the shield of privacy or autonomy that encapsulates it,[334] the refusal to accord economic value to domestic labor,[335] and the exclusion from the fold of those who provide caregiving services for compensation.[336]

Among the various family law measures and constructs, marriage emerges as an ideal vehicle for operationalizing the principle that the needs of dependents must be met through private sources of support. In binding men to

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institution of the family operates structurally and ideologically to free markets from considering or accommodating dependency.").

[331] *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 443 (2011) (acknowledging "a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children"); State v. Oakley, 629 N.W.2d 200, 214 (Wis. 2001) (upholding, as a condition of probation, a requirement that the defendant can have no more children unless he shows that he can support all his children). *See generally* CHILD SUPPORT: THE NEXT FRONTIER (J. Thomas Oldham & Marygold S. Melli eds., 2000); FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT (Irwin Garfinkel et al. eds., 1998).

[332] *See supra* notes 73–75 and accompanying text.

[333] We can see the idea of the family unit in both the doctrine of coverture and the treatment of children, in addition to wives, as the property of the husband-father. *See, e.g*, STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 186 (2006); MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN AMERICA, at xii (1994). Ongoing debates about "what is a family?" reveal the contemporary relevance of recognition as a family unit. *See, e.g.*, Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 283 (1991).

[334] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing "the private realm of family life which the state cannot enter"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.").

[335] *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3–6 (1996). This principle certainly holds true while the family unit remains intact. Upon dissolution of marriage, however, courts recognize at least some of the value of domestic services. *See* GROSSMAN & FRIEDMAN, *supra* note 240, at 196–200.

[336] *See, e.g.*, Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 28–29 (2009).

their wives and their wives' children,[337] traditional marriage creates legal obligations designed to address what Fineman calls inevitable dependency and derivative dependency.[338] As the court of appeals explained in the case that became *Obergefell*, "[G]overnments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse."[339] Even marriage for same-sex couples can perform similar functions despite the absence of "accidental procreation" and diminished gender norms.[340] Indeed, the couples depicted in *Obergefell* exemplify the private caregiving and support expected in marriage.[341]

Against this background, the challenge that *Obergefell* poses for the conventional wisdom of negative liberty takes on new meaning. True, limiting liberty to exclusively negative rights advances the core policy of privatizing dependency, relieving the state from the cost of any *constitutional* "welfare right"—whether in the form of health care, subsistence, or protection from violence. Nonetheless, making an exception to this general rule for the "public institution" of marriage goes even further in promoting such objectives by firmly locating legal obligations for care and support outside the government.[342]

Extending many of marriage's material benefits to same-sex couples imposes no direct cost on the government, for example, the spousal share of an intestate's estate, which would otherwise go to listed relatives,[343] or

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[337] The traditional marital presumption, or presumption of legitimacy, performed this function of connecting mothers' husbands to mothers' children. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124–25 (1989) (plurality opinion).

[338] For definitions of these terms, see FINEMAN, *supra* note 56, at 34–37.

[339] DeBoer v. Snyder, 772 F.3d 388, 404 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015). Of course, traditional marriage was inseparable from gender. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2000) (describing marriage as "the vehicle through which the apparatus of state can shape the gender order"); *see also id.* ("The whole system of attribution and meaning that we call *gender* relies on and to a great extent derives from the structuring provided by marriage.").

[340] *See, e.g.*, Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. F. 219, 228 (2013); Rosenbury, *supra* note 74, at 1868–69; *cf.* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 20–21 (2009) (summarizing argument).

[341] *See supra* notes 24–25 and accompanying text.

[342] Alstott refers to state family law as "subconstitutional" law, asserts that constitutional law shapes it, and describes its content as follows: "State family law nominally prescribes the duties associated with marriage, divorce, and parenthood. But a closer look reveals that the law privileges private ordering and deploys state power only to resolve private disputes." Alstott, *supra* note 143, at 32–33; *see also* Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 4 (2010) ("[F]amily law rules that establish financial relationships and liability between individuals constitute a form of social insurance . . . .").

[343] *See, e.g.*, Baker v. State, 744 A.2d 864, 883–84 (Vt. 1999).

designation as a surviving spouse on a death certificate, as sought by James Obergefell.[344] By contrast, others come at a cost, including the federal estate tax exemption for surviving spouses won by Edie Windsor.[345] Collectively, such material marital benefits, offered at the government's option, played a key role in the developing legal recognition of the unfairness of barring same-sex couples from marrying.[346] The channeling theory conceptualizes them all as incentives to marry,[347] while the goal of keeping dependency private helps to explain why government would elect to provide such rewards.

b. *An Expanded Shaping Story: All in the Family*

Viewed through this lens, *Obergefell* offers a new story about the relationship between constitutional law and family law. It complements the standard shaping story with its mirror image. Under this mirror-image story, family law's aim to keep dependency private shapes constitutional law—producing a regime that mostly consists of what the conventional wisdom would call negative liberty but that also includes marriage, despite characteristics that lead the *Obergefell* dissenters and others (including possibly the majority) to see it as a positive right. Earlier "right to marry" cases strengthen this argument, and so does the "right to divorce" recognized in *Boddie v. Connecticut*,[348] because the financial responsibilities assigned by the state upon dissolution are even more readily enforceable than those arising within an intact union.[349]

The development of the constitutional doctrine is consistent with this new account. As I have noted, at one time case outcomes indicated movement toward recognition of a right to minimum welfare even when affirmative government support would be necessary to realize this right. Cases about abortion funding and intimate violence brought such movement to a full stop.[350] The welfare-rights thesis thus gave way to a modern conventional wisdom limiting constitutionally protected liberty to private, negative rights,[351] notwithstanding marriage cases which, like *Obergefell*, defy this

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[344] *Obergefell*, 135 S. Ct. at 2594–95.

[345] *See* United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

[346] *See supra* note 70 (citing authorities).

[347] *See supra* notes 73–75 and accompanying text.

[348] Boddie v. Connecticut, 401 U.S. 371, 374 (1971); *see also supra* notes 136–37 and accompanying text. This rationale for *Boddie* differs from that of Kenneth Karst, who explains the constitutionalization of divorce in that case as serving the right to remarry and thus intimate association more generally. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980).

[349] The classic case demonstrating that marital duties cannot be enforced while the union remains intact but only upon separation or divorce is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

[350] *See supra* note 114 and accompanying text.

[351] *See supra* notes 59–61 and accompanying text.

generalization. But this very defiance helps reveal new patterns in case outcomes.[352]

Abortion funding and intimate violence share a common feature. Both belong in the domain of family law. As a result, the judicial repudiations of government responsibilities in both contexts embody—and thus constitutionalize—family law's core policy of privatizing dependency. The abortion-funding cases make reproductive choice a private matter of "personal responsibility,"[353] while also validating the expenditure of government resources to influence intimate choices—here childbirth instead of abortion.[354]

DeShaney and other cases that reject any state obligation to protect against intra-family deprivations of life and liberty also maintain dependency as a private problem. As Linda Greenhouse wrote in a poignant column marking Joshua DeShaney's death in 2015, "Chief Justice Rehnquist couldn't get past the fact that the actual injuries were inflicted not by government agents but by a private person."[355] I would add that the actor was not just any "private person," but a private person in the private family (a parent). The Court saw the custodial relationship exercised by Joshua's father as a "natural" and private situation that the state did not create and thus had no duty to prevent or remedy.

Drawing on these precedents, we might conclude that, upon confronting issues clearly situated in family law, the Court definitively resolved the previously open question—based on conflicting signals extracted from precedents[356]—whether the Constitution protects a right to minimum welfare. The Court rejected the welfare-rights thesis.[357] Perhaps the understanding of family as a site of privatized dependency proved so powerful that it stifled alternative conceptualizations, or perhaps the Court simply refused to challenge a fundamental tenet of family law. In turn, the rejection of the

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[352] *See supra* note 97 and accompanying text.

[353] This is a term used in federal statutes pertaining to child support and comprehensive sex education. For example, the 1996 welfare reform measures, which emphasized child support, were enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code). One type of sex education qualifying for federal funding is called "personal responsibility education." 42 U.S.C. § 713 (2012). The term reflects a broader ideology, however, communicating that sex and its consequences create private obligations. I have argued that this ideology accounts for some of the resistance against the mandate under the Affordable Care Act requiring employers to cover, through their health insurance plans, their employees' prescription contraceptives without cost to the latter. *See* Appleton, *Forgotten Family Law*, *supra* note 2, at 49–51.

[354] *See* Harris v. McRae, 448 U.S. 297, 314–15 (1980).

[355] Greenhouse, *supra* note 125.

[356] *See supra* notes 84–89 and accompanying text.

[357] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989); *Harris*, 448 U.S. at 316–18, 324; Maher v. Roe, 432 U.S. 464, 474–77 (1977).

welfare-rights thesis cemented a more general conventional wisdom of the "negative Constitution."[358]

A more extensive review of the case law fleshes out this story. Although I have emphasized precedents about abortion funding and family violence because they offer the most explicit rejections of positive constitutional rights and because their place in family law seems obvious, other decisions supporting the conventional wisdom also turn out to concern family matters. Put differently, if we search for discernable patterns based on situational factors (rather than legal doctrine), as legal realists did,[359] we can see that the most pertinent constitutional cases limiting liberty to negative rights are family law cases, too, even if they might belong in other fields as well.

First, consider *Dandridge v. Williams*, decided in 1970.[360] The Court rejected an equal protection challenge to a Maryland regulation that capped welfare benefits at $250 or $240 per month, regardless of family size, thus affording each member of a large needy family less assistance than that received by members of smaller needy families.[361] The State successfully argued the regulation encouraged employment outside the home.[362] The case easily fits within family law because it raises questions of family size and what we now call "work-family conflicts,"[363] which are closely related to the reproductive and childrearing choices implicated in iconic family liberty cases.[364] Consistent with keeping dependency private, the Court leaves large families on their own to find a way to support adequately all their members.[365]

Second, consider *James v. Valtierra*, decided in 1971,[366] in which the Court rejected an equal protection challenge to a California law subjecting the development of low-rent housing projects to the will of the voters. Justice Marshall, joined by two other dissenters, highlighted the law's discrimination against the poor, given that the referendum requirement did not apply to

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[358] *See* Bandes, *supra* note 55, at 2272–73.

[359] *See* Leiter, *supra* note 97, at 281.

[360] Dandridge v. Williams, 397 U.S. 471 (1970).

[361] *Id.* at 486–87.

[362] *See* Alstott, *supra* note 143, at 28–29.

[363] *See generally* JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010) (using both gender and class to examine American work-family conflicts).

[364] *See supra* notes 4–5 and accompanying text.

[365] This case and its rationale provided support years later for "family caps" imposed by some states pursuant to federal welfare reform in 1996. Family caps provide no additional funds upon the birth of a new child to a family already receiving temporary assistance. *See* C.K. v. N.J. Dep't of Health & Human Servs., 92 F.3d 171, 194–95 (3d Cir. 1996); Sojourner A. v. N.J. Dep't of Human Servs., 828 A.2d 306, 317 (N.J. 2003). *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 202–45 (1997); Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 160–62 (1996).

[366] James v. Valtierra, 402 U.S. 137, 142–43 (1971).

"[p]ublicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor."[367] Housing and shelter are typical concerns of family law, as we can see in the field's predecessor, the "law of domestic relations,"[368] in family law's continuing consideration of homemaking and domestic services,[369] and even in its treatment of the "family home" upon dissolution of marriage.[370]

Third, we have *San Antonio Independent School District v. Rodriguez*, decided in 1973.[371] The Court declined to rule that Texas's school financing system, which rests on property taxes in each district, violates equal protection despite the lesser educational opportunities it provides to children living in poor districts compared to their counterparts in more affluent districts.[372] Without deciding whether an absolute denial of education would violate the Constitution,[373] the Court found the Texas system rational, given the minimally adequate education afforded to each child and the merits of local control.[374]

However tempted we might feel to consider public education a quintessentially state function, it maintains strong links to family law. Like families, schools help develop the next generation of citizens.[375] Several cases about the "negative right" of parental autonomy focus on schooling choices and regularly appear in family law casebooks.[376] More significantly, public schooling represents the default position for parents who do not exercise the option of private education or home schooling, which every state permits.[377] As such, despite compulsory schooling laws, public education might be seen as a delegation of responsibilities that parents, at least in theory, could exercise themselves. For all these reasons, *Rodriguez* lies at least within the "penumbras"[378] of family law even if not at its center. And, thus, by leaving

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[367] *Id.* at 144 (Marshall, J., dissenting).

[368] *See* Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1464–69 (2014).

[369] *See, e.g.*, Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 262–64 (2013).

[370] *E.g.*, CAL. FAM. CODE § 3802 (West 2004).

[371] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[372] *Id.* at 23–25.

[373] *See id.* at 36–37.

[374] *See id.* at 24–25.

[375] *E.g.*, Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 452 (2006).

[376] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972).

[377] For a survey of the minimal state regulation of home schooling, see generally Carmen Green, Note, *Educational Empowerment: A Child's Right to Attend Public School*, 103 GEO. L.J. 1089 (2015). *See also* Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008) (examining the constitutional implications of states' failure to regulate homeschooling).

[378] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

families in poor districts without constitutional recourse in their quest for equal educational opportunities, the case provides additional evidence that the Court proved particularly resistant to the welfare-rights thesis when confronting family matters.[379]

Lyng v. Castillo, decided in 1986, is a fourth case that fits the pattern.[380] The Court upheld, against constitutional challenge, changes to the food stamp program that treated parents, children, and siblings living together as a single household and thus disadvantaged them in the receipt of benefits, in comparison to groups of unrelated persons and more distant relatives.[381] Espousing a notion of negative liberty in its equal protection analysis, the majority saw no interference with family autonomy: "The 'household' definition does not order or prevent any group of persons from dining together."[382] Thus, applying the rational-basis test, the majority turned to "natural" family behavior: "Congress could reasonably determine that close relatives sharing a home—almost by definition—tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined."[383] In other words, Congress and the Court assumed that coresident family members care for one another by sharing meals and thus need less government support than unrelated persons living together. These assumptions initiate a circular process by incentivizing the very family care that the law assumes.

In contrast to the *Lyng* majority, Justice Marshall's dissent saw the different rules for close relatives versus others in the distribution of benefits necessary for survival as an intrusion into family privacy because of its impact: "The importance of that benefit belies any suggestion that the Government is not directly and substantially influencing the living arrangements of families whose resources are so low that they must rely on their relatives for shelter."[384]

Jill Hasday discusses *Lyng* as one of several welfare cases constituting "family law for the poor."[385] She argues that the "family law canon" unjustifiably omits these cases[386] and, regarding *Lyng* in particular, she exposes the "middle-class norms of family life" assumed by the statute and the

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[379] Yoshino invokes *Rodriguez* as an example of the limitation of liberty to negative rights, but he does not mention any connection to family law. Yoshino, *supra* note 40, at 160.

[380] Lyng v. Castillo, 477 U.S. 635 (1986).

[381] *Id.* at 638–39.

[382] *Id.* at 638.

[383] *Id.* at 642.

[384] *Id.* at 645 (Marshall, J., dissenting).

[385] HASDAY, *supra* note 12, at 195, 198, 203–05. Hasday also includes in this category the following cases: *Dandridge v. Williams*, 397 U.S. 471 (1970); *Wyman v. James*, 400 U.S. 309 (1971); and *Bowen v. Gilliard*, 483 U.S. 587 (1987). *See* HASDAY, *supra* note 12, at 197–208. I have already discussed *Dandridge* in *supra* notes 360–65 and accompanying text, and the other two cases could be invoked to support my analysis as well.

[386] HASDAY, *supra* note 12, at 196.

majority opinion upholding it.[387] I accept Hasday's contentions, but I make a different point. Indeed, I include these cases in my conception of family law, and I appreciate how they show the tenuous and conditional nature of family privacy for poor (or "public") families, as other scholars have noted.[388] More significantly, however, I simultaneously emphasize these cases are part of constitutional law, too. As such, they help demonstrate how family law values, norms, and principles have contributed to that field—in particular the modern understanding of the "negative Constitution."[389]

Lest one think that all of these cases eschewing positive rights are "poverty cases" or exclusively "family law for the poor,"[390] consider as a fifth illustration *Washington v. Glucksberg*[391] and *Vacco v. Quill*.[392] In this pair of cases, decided in 1997, the Court refused to interpret constitutional liberty to include legal access to physician-assisted suicide,[393] notwithstanding a constitutionally protected right to refuse lifesaving medical treatment, nutrition, and hydration that the Court at least assumed existed a few years before in *Cruzan v. Director, Missouri Department of Health*.[394] Although the Court recognized the commonalities between autonomy in the dying process and life-altering family decisions like the choice to have an abortion,[395] the distinction between letting die and assisting suicide—or negative and positive liberty—proved decisive, as *Glucksberg* suggests[396] and *Quill* expressly elaborates.[397] Despite the absence of claims for government financial support for assisted suicide, the Court recalled traditional negative/positive rights binary in distinguishing "the freedom *from* being forced to stay alive . . . from the freedom *to* choose death."[398]

Reminiscent of the abortion-funding cases,[399] these cases portray illness as a "natural" situation that the state did not create and thus has no constitutional obligation to address. And they are cases that often involve heart-wrenching family dramas requiring excruciating decisions with an impact on all family

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[387] *Id.* at 203.

[388] *See e.g.*, Bridges, *supra* note 52, at 116–17.

[389] *See* Bandes, *supra* note 55, at 2272–73.

[390] *See supra* note 385 and accompanying text.

[391] Washington v. Glucksberg, 521 U.S. 702 (1997).

[392] Vacco v. Quill, 521 U.S. 793 (1997).

[393] *Glucksberg*, 521 U.S. at 705–06; *Quill*, 521 U.S. at 796–97.

[394] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

[395] *Glucksberg*, 521 U.S. at 726–28.

[396] Yoshino invokes *Glucksberg* as a precedent eschewing constitutional protection of positive rights that *Obergefell* could challenge. Yoshino, *supra* note 40, at 159, 168.

[397] The Court rejected the argument that allowing patients to refuse treatment, thereby causing death, and prohibiting assisted suicide violates equal protection. *Quill*, 521 U.S. at 807–08.

[398] *See* Yoshino, *supra* note 40, at 159.

[399] *See supra* notes 100–20 and accompanying text.

members, as *Cruzan* so poignantly illustrates.[400] *Glucksberg* and *Quill* thus easily fit within a larger framework that leaves families and their members constitutionally on their own to solve their personal problems, from financial difficulties to health crises.

Finally, consider *DeShaney*'s sequel some fifteen years later, *Town of Castle Rock v. Gonzales*, decided in 2005.[401] *Castle Rock* refused to recognize any constitutional duty to enforce a mandatory restraining order issued against a violent husband-father, who murdered his children and killed himself while local officials and police did nothing to respond to the wife-mother's pleas for help.[402] Citing *DeShaney*[403] and using language reminiscent of the abortion-funding cases, the majority concluded that even a mandatory restraining order confers no "entitlement" to state action.[404] Certainly, *Castle Rock* is a family law case. And like *Glucksberg* and *Quill*, the issues raised by *DeShaney* and *Castle Rock* have relevance to a broad range of families, not just those fighting poverty.[405]

Should we dismiss as mere coincidence that such constitutional decisions happen to be "all in the family?"[406] I think not. Nor should we read these cases

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[400] Nancy Cruzan's parents challenged Missouri's refusal to let them withdraw nutrition and hydration from their daughter whose injuries in an auto accident had left her in a persistent vegetative state. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 265–67 (1990). The legal battle to honor what Nancy's parents believed were her wishes took its toll, with her father subsequently committing suicide. *See* William Robbins, *Parents Fight for Right to Let a Daughter Die*, N.Y. TIMES (Nov. 27, 1989), http://www.nytimes.com/1989/11/27/us/parents-fight-for-right-to-let-a-daughter-die.html [https://perma.cc/62E5-887X]; *see also* Eric Pace, *Lester Cruzan Is Dead at 62; Fought to Let His Daughter Die*, N.Y. TIMES (Aug. 19, 1996), http://www.nytimes.com/1996/08/19/us/lester-cruzan-is-dead-at-62-fought-to-let-his-daughter-die.html [https://perma.cc/PR9Y-E45T]. Physicians (among others) challenged the law in *Glucksberg* and *Quill*. *Glucksberg*, 521 U.S. at 707–08; *Quill*, 521 U.S. at 797.

[401] Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).

[402] *Id.* at 750–54, 768.

[403] *Id.* at 755, 768–69.

[404] *Id.* at 763–66. The Court repeatedly uses the term "entitlement" in explaining what the Constitution does not give Gonzales and her children. *See generally id.*

[405] Although domestic violence occurs among all socioeconomic classes, various factors make some families more susceptible than others. *See* HILLARY POTTER, BATTLE CRIES: BLACK WOMEN AND INTIMATE PARTNER ABUSE 8 (2008) (citing "multiple marginalization factors").

[406] In arguing for an affirmative "right to law" (tort law, in particular), John Goldberg writes:

> Apart from *DeShaney*, the decisions most often taken to establish the no-affirmative-rights principle are those declining to recognize a fundamental right to the provision by government of housing, education, and welfare payments. But to cite them for a general principle is to avoid asking whether there is something special about the rights claimed in those cases that distinguishes them from other kinds of affirmative rights.

exclusively as exemplars of constitutional doctrine writ large, disconnected from family law. Rather, one can see the family-law setting as integral to the present-day articulation of both the "negative Constitution"[407] and the negative/positive rights distinction undergirding it. From this perspective, assumptions about duties within the private family, including personal responsibility for sex and its consequences and the dependency of family members, helped produce the outcomes and rationales in these cases. Put more modestly, the ambiguity that had allowed some theorists to infer a constitutional right to minimum welfare ultimately got fought out and rejected in the family law arena.[408] Indeed, the family law arena might well have provided an especially apt setting for addressing such uncertainty, given the series of "negative rights" recognized there, including protection of contraception, abortion, and childrearing.[409]

According to this story, family law policy has helped shape our contemporary understanding of a generalized constitutional principle and a "conventional wisdom."[410] Such policy also provides an explanation for the blatant exceptions to the general principle: the marriage and divorce cases. Despite all the family law precedents I have listed, the Court has protected (indeed, often expanded) access to marriage and, to a lesser degree, divorce—notwithstanding the essential and active role of the state in these "public institution[s]."[411] Because marriage and divorce advance the project of privatized dependency, *Obergefell* and its predecessors offer additional evidence of family law's influence on modern constitutional law.[412] Indeed,

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John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 593 (2005) (footnotes omitted). Although Goldberg then proceeds to make his case for "structural due process" rights, *id.* at 594, I would answer his "something special" query by noting the family-law context of the decisions in question.

[407] *See* Bandes, *supra* note 55, at 2272–73.

[408] *See supra* notes 84–129 and accompanying text.

[409] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972); Roe v. Wade, 410 U.S. 113, 152–54 (1973).

[410] *See supra* note 59 and accompanying text.

[411] *See supra* notes 130–37 and accompanying text.

[412] I do not advance here a parallel hypothesis with respect to equal protection cases. Despite the fact that official gender-based roles long marked family law, constitutional rulings invalidating reliance on stereotyping reformed the field. *See supra* note 2 (citing authorities). Here, I do not discern patterns suggesting an expanded shaping story, in which the importance of gender discrimination in traditional family law has infiltrated and influenced constitutional law. Nonetheless, some vestiges of patriarchy persist, such as the presumption of legitimacy, *see* Huntington, *supra* note 281, at 178, while the line between "real differences" and stereotypes remains contested, *see* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 73 (2001). Similarly, some critics challenge as overstated the "progress narrative" of a gender-neutral family law, *see* HASDAY, *supra* note 12, at 97–132, and others lament the missed opportunity to decide *Obergefell* as a gender-discrimination case, *see generally* Case, *supra* note 29. Despite these shortcomings, we can

had such marriage and divorce cases been decided exclusively under the Equal Protection Clause, they could have permitted total abolition of marriage as the equalizing remedy,[413] in turn, undermining rather than supporting the privatization of dependency. *Obergefell*'s liberty rationale thwarts such possibilities.

Had the *Obergefell* majority explicitly acknowledged and embraced such family law policies as part of constitutional doctrine, it could have avoided some of the more problematic aspects of the opinion. It could have jettisoned the multiple understandings of "liberty" in favor of a more focused and coherent analysis. It could have avoided the overbreadth of the "public liberty" reading,[414] the paradox of "naturalizing" civil marriage,[415] and perhaps even the confusion engendered by blending liberty and equality[416] and departing from standard categorical analysis.[417] It could have eliminated the encomia to marriage and resulting denigration of other family forms[418] by articulating marriage's instrumental value in securing private sources of support. And it could have answered some of the dissenters' critiques about "swords" and "entitlements"[419] by explaining why marriage, along with divorce, have long stood out as exceptions to the "negative Constitution."[420]

V. CONCLUSION

In the wake of *Obergefell*, several scholars predicted retrenchment in the gradual embrace of "relationship pluralism" that family law had witnessed in recent decades.[421] These scholars—and I count myself among them—read *Obergefell*'s glorification of marriage to authorize legal favoritism for marriage and marginalization of other family forms.[422] Put differently, in touting so many valuable and wonderful aspects of marriage, *Obergefell* could be interpreted to invite discrimination against nonmarital relationships,

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conclude that gender roles have proven much less tenacious than the privatization of dependency—or that, perhaps, eliminating gender roles actually advances the privatization of dependency. *See* Susan Frelich Appleton, Gender Neutrality, Dependency, and Family Law (unpublished working draft) (on file with author).

413 *See supra* notes 231–35 and accompanying text.

414 *See supra* notes 210–26 and accompanying text.

415 *See supra* notes 227–56 and accompanying text.

416 *See supra* notes 257–85 and accompanying text.

417 *See supra* notes 286–300 and accompanying text.

418 *See supra* notes 251–55 and accompanying text.

419 *See supra* notes 42, 79–80 and accompanying text.

420 *See* Bandes, *supra* note 55, at 2272–73.

421 *E.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209 (2016). Courtney Joslin has catalogued these commentaries. *See generally* Joslin, *supra* note 253. Scholars use the term "relationship pluralism" to refer to legal recognition of a variety of family forms. *See, e.g.*, Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 56 (2011).

422 *See* Appleton, *Forgotten Family Law*, *supra* note 2, at 10, 53.

perhaps even opening the way for a "new 'illegitimacy.'"[423] Certainly, recent interpretations of *Obergefell* by the highest courts in Illinois and Michigan bear out these predictions.[424]

Nonetheless, based on the analysis in this Article, I can now imagine an alternative scenario taking shape, perhaps all the more given the changes portended by the 2016 presidential election. In this reconsideration, marriage still looms large but perhaps merely as a template for other relationships that could have private support obligations attached. If family law norms and values continue to shape constitutional law and if affirmative recognition of other familial relationships, beyond marriage, would advance the project of keeping dependency private, new "positive rights" under the banner of constitutional liberty should not come as a surprise. Constitutional protection of the relationship between nonmarital fathers and their children,[425] once vulnerable (or even unacknowledged) under the "old illegitimacy,"[426] shows how such expansion can occur and how such developments can facilitate neoliberal objectives.[427] A more recent illustration can be found in some state courts that have extended parental status, including support duties, to partners of parents in the absence of biological, marital, or adoptive ties[428] and have recognized both the financial and constitutional considerations at work in such situations.[429] If this trajectory continues, those who have pushed for

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[423] Nancy Polikoff coined this term. *See* Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 721, 722 (2012).

[424] Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, at *20 (Ill. Aug. 18, 2016) (declining to allow equitable remedies in postdissolution financial dispute between unmarried partners); Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016) (mem.) (declining to review denial of standing for custody by biological parent's former unmarried partner); *see also* McGaw v. McGaw, 468 S.W.3d 435, 438 (Mo. Ct. App. 2015). *But see* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) (holding "that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody").

[425] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651–52 (1972); Gomez v. Perez, 409 U.S. 535, 538 (1973).

[426] *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

[427] For example, federal welfare reform, enacted in 1996, emphasized the relationship between unmarried fathers and their children as a means for securing child support. *See* Appleton, *Illegitimacy and Sex*, *supra* note 2, at 360–64.

[428] *E.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 669–70 (Cal. 2005) (recognizing mother's former partner as the twins' second mother so that the state could collect reimbursement for child support from her).

[429] *E.g.*, *Brooke S.B.*, 61 N.E.3d at 498 (observing that "a non-biological, non-adoptive 'parent' may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding," in deciding that a mother's former partner should have standing to seek custody and visitation); Chatterjee v. King, 280 P.3d 283, 286, 288 (N.M. 2012) (recognizing adoptive mother's former partner as the child's second parent, based on "strong public policy favoring child support, which is important to both the child and the state" and interpreting the statute in a way that avoids equal protection concerns). For an

affirmative legal recognition of polygamy,[430] of friendship,[431] and of other intimate connections[432] that could supply new private obligations just might succeed in their efforts.

As a normative matter, these emerging possibilities could present unsettling choices. If neoliberalism will produce more inclusive legal notions of family, do we want to pursue that path? Or would we be willing to let go of expanding family recognition in the hopes of achieving a more generally "supportive state"?[433] *Obergefell* certainly does not mark the beginning of conversations about these questions, nor should it signal the end.

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argument for full constitutional protection of the liberty interests of non-biological parents, see NeJaime, *supra* note 285.

[430] *See, e.g.*, Brown v. Buhman, 822 F.3d 1151, 1156–57 (10th Cir. 2016); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1959–62 (2010); Hong, *supra* note 42, at 1441–42.

[431] *See, e.g.*, Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 190–93 (2007).

[432] *See generally* Murray, *supra* note 421.

[433] I borrow this phrase from Maxine Eichner. EICHNER, *supra* note 50, at 53–62.