

***Obergefell v. Hodges*: Kinship Formation, Interest Convergence, and the Future of LGBTQ Rights**



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ABSTRACT

This Comment seeks to reframe *Obergefell v. Hodges* as a product of kinship formation and interest convergence. *Obergefell v. Hodges* is not merely a case about LGBTQ and marriage equality, or the moral triumph of oppressed sexual minorities over the majority. It is through marriage that unrelated people come together and form a legal relationship that surpasses any other in terms of state-guaranteed benefits and rights. At its core, *Obergefell* represents societal affirmation of marriage as the dominant site of kinship formation. It is precisely because same-sex marriage strengthens the institution of marriage as the only site of legal kinship formation that marriage equality was such a successful political project. This Comment turns to interest-convergence theory to explain this success and to show how marriage equality institutionally, economically, and ideologically affirms marital supremacy and made *Obergefell* possible. In doing so, this Comment hopes to contribute to the political discourse of the next LGBTQ rights project.

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INTRODUCTION

Broadly speaking, kinship¹ concerns not only what forms of relationships are cognizable and what rights are afforded, but it is a matter of identity, personhood, and justice.² This is a central, but often overlooked, aspect of *Obergefell v. Hodges*, which recognizes same-sex marriage as a constitutional right.³ This Comment seeks to explore this hidden terrain. Before *Obergefell* and marriage equality became the principal battle cry for the LGBTQ⁴ people, there was an intracommunity debate among LGBTQ advocates over whether to pursue marriage equality or a more pluralist form of kinship.⁵ Now that same-sex marriage is constitutionally recognized, it is critical to take a fresh look at this original debate in order to better understand the hidden and often-overlooked racial, gender, and class implications of marriage equality and the extent to which it guarantees equality for the LGBTQ community. Importantly, this work will help unravel our presumption and current understanding of kinship and explain how same-sex marriage has been so successful despite a decline in marriage overall. This effort will, in turn, better the LGBTQ community's effort in formulating its next political project to be more inclusive and effective.

The LGBTQ intracommunity debate was a clash between the marital advocates, on one hand, and the pluralist advocates, on the other. The marital

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1. Defined here as a legally cognizable familial relationship in which rights and obligations are attached. Importantly, the type of kinship this Comment is concerned with is the legal and social construction aspects of kinship between individuals, as opposed to the consanguinity aspect of kinship, such as that between parents and children. See *Kinship*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/kinship> [<https://perma.cc/8Q7T-HM3C>] (defining kinship as “the quality or state of being kin”); see also THE ROUTLEDGE ENCYCLOPEDIA OF SOCIAL AND CULTURAL ANTHROPOLOGY 397 (Alan Barnard & Jonathan Spencer eds., 2d ed. 2010) (distinguishing between the social and biological aspects of kinship).
 2. See THE ROUTLEDGE ENCYCLOPEDIA OF SOCIAL AND CULTURAL ANTHROPOLOGY, *supra* note 1, at 396.
 3. 135 S. Ct. 2584, 2595 (2015).
 4. I employ the “Q,” Queer, in LGBTQ as recognition of some within our community who seek not to be affiliated with or forced into being identified as Lesbian, Gay, Bisexual, or Transgender. They seek a recognition of sexuality that is not normative, one that may be altered and evolve.
 5. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 96, 104–05 (2014) (pointing out that, contrary to popular belief, LGBTQ advocates did not initially embrace marriage equality as the movement's priority).

advocates insisted that marriage equality—that is, the inclusion of LGBTQ people in the institution of marriage—should be the centerpiece of the LGBTQ movement.⁶ In contrast, the pluralist advocates insisted that the movement should strive to deinstitutionalize marriage and create a new kinship regime where various forms of relationships⁷ are valued and recognized.⁸ Ultimately, the marital advocates triumphed, and the LGBTQ community shifted its attention and resources toward advancing marriage equality.

This debate over kinship has raged on for millennia, however, and it implicates many important social values we hold dear: justice, equality, and liberty. For Plato, the purpose of marriage was to serve the state, namely, to produce and educate children to be productive citizens of the state and the public interest, and to discourage private interests.⁹ Aristotle, on the other hand, reversed the order and put families before state, framing the state as being made up of and dependent on

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6. See, e.g., Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK 9 (1989), reprinted in WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 678, 679 (3d ed. 2008) (“Nevertheless, despite the oppressive nature of marriage historically, and in spite of the general absence of edifying examples of modern heterosexual marriage, I believe very strongly that every lesbian and gay man should have the right to marry the same-sex partner of his or her choice, and that the gay rights movement should aggressively seek full legal recognition for same-sex marriages.”).
 7. What types of relationships that regime would recognize ranges from domestic partnership to civil union to “valuing all families” to individual contract to a “menu of regulatory options.” See, e.g., NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 5 (2008) (envisioning forms of kinship that are not based on a rigid division of who is in and out (marriage), but one in which all families are recognized, wherein rights and obligations are allocated accordingly based on the type of family). Scholars have slightly different conceptions of the “menu of options.” Compare WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 17 (2006) (revealing that in certain countries, individuals are given options in which to organize their relationship based on the lowest to the highest level of commitment), with Katherine M. Franke, Opinion, *Marriage Is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/opinion/24franke.html> [<https://perma.cc/T26L-A3ZM>] (“[W]e think marriage ought to be one choice in a menu of options by which relationships can be recognized and gain security.”).
 8. See Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK 9 (1989), reprinted in RUBENSTEIN, *supra* note 6, at 685, 687 (arguing that “marriage will not liberate us as lesbian and gay men,” and it “will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity”). To be clear, Ettelbrick also expressed support for the domestic partnership movement as a means to achieve this pluralist kinship order. But the issue of what are the proper means to achieve either a pluralist or marriage equality order is beyond the scope of this Comment. See also Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 60 (2012) (recognizing and respecting the right of LGBTQ individuals who seek to marry, but also yearning for a space and freedom outside of marriage for some to have a conjugal relationship).
 9. *Marriage and Domestic Partnership*, STAN. ENCYCLOPEDIA PHILOSOPHY (Aug. 8, 2012), <http://plato.stanford.edu/entries/marriage> [<http://perma.cc/58HT-G6N8>].

families.¹⁰ Over a millennium later, John Locke rejected the patriarchy inherent in the family structure and insisted that marriage is a voluntary contract between two free individuals.¹¹ Under this conception, compelling marriage, such as an arranged marriage, is a violation of their individual liberty. Georg Wilhelm Fredrich Hegel, however, repudiated Locke's conception of marriage as a contract and glorified marriage as ethical love—that is, a union of love, trust, and sharing of individual existence.¹² Hegel's conception of marriage as romanticized love is the primary argument liberals used against social conservatives today to justify same-sex marriage recognition. By contrast, Friedrich Engels proclaimed monogamous marriage as the “world historical defeat of the female sex,” allowing men to control women and reproduction.¹³ Here, Engels not only sought to deemphasize marriage, but to displace it altogether.

Fast forward to modern time. Feminist scholars like Susan Okin contend that the family is an important site for the distribution of social goods, where the gendered family reproduces and perpetuates the inequality between the sexes and classes.¹⁴ Okin challenges us to think of kinship in terms of justice—that is, kinship must represent and facilitate fairness in economic distribution and gender differences.¹⁵ Historians, sociologists, and anthropologists have characterized the notion of romantic love that we often triumphantly proclaim as an essential element of marriage as a recent Western invention, a social construct.¹⁶ Thus, we can understand the LGBTQ intracommunity debate and *Obergefell* as a continuation and culmination of this long debate over kinship, with profound implications for our conceptions of liberty, justice, and equality.

This Comment proceeds as follows. Part I traces the LGBTQ intracommunity debate over marriage equality by mapping out the core differences between the pluralist and marital advocates and the latter's victory over the former. Part II analyzes the implications and limits of marriage equality for the LGBTQ community today. It argues that we must honestly reflect and recognize both the drawbacks and benefits of marriage equality and avoid focusing solely on a triumphalist narrative. Part III employs interest-convergence theory from critical race theory as a new way of understanding the success of marriage equality. This explanation complicates the common belief that marriage equality

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (emphasis omitted) (quoting Friedrich Engels).

14. See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 134–35 (1989).

15. See *id.* at 135.

16. See STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 15 (2005).

succeeded because of changing morality and culture. It argues that the interest convergence of the sexual majority and minorities through same-sex marriage made the LGBTQ marriage movement such a success. Part IV uses interest convergence and the lessons from the intracommunity debate to provide a fresh reading of *Obergefell*. It shows that *Obergefell* is a culmination of the interest convergence between the sexual majority and minorities, and that *Obergefell* affirms the supremacy of marriage as the only site of kinship formation at the expense of other kinship alternatives.

I. THE LGBTQ INTRACOMMUNITY DEBATE: KINSHIP AS A POLITICAL PROJECT

The LGBTQ intracommunity debate between the marital advocates and pluralist advocates¹⁷ dates as far back as the 1970s.¹⁸ Revisiting this debate now will shed light on the desires and needs of the community—what it imagined itself to be and what it wanted to be. Marital advocates insisted that the inclusion of LGBTQ people in the institution of marriage should be the centerpiece of the LGBTQ movement.¹⁹ On the other hand, the pluralist

17. Rather than marital versus pluralist advocates, some scholars have referred to the distinction as: liberals versus radicals; marital versus nonmarital; marriage equality versus marriage skepticism; mainstreaming versus gay liberation's approaches; and assimilationist and privilege groups versus radicals. Implicit in these distinctions is that there is a rightful position from which others must justify their different position. For instance, in the marriage skeptical versus marriage equality distinction, the skeptic is presumed to be the outlier who must justify its opposition to the rightful position of marriage equality. Thus, I shall reference hereinafter the two groups as marital versus pluralistic advocates to maintain a more neutral description. See, e.g., ESKRIDGE & SPEDALE, *supra* note 7, at 17 (distinguishing between liberals versus radicals); URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION* 2, 60 (1995) (distinguishing between mainstreaming and the gay liberation's approaches); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240 (2006) (distinguishing between privilege and assimilationist versus radicals); Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 39 (2011) (distinguishing between marriage equality versus marriage equality skepticism); NeJaime, *supra* note 5 (distinguishing marital versus nonmarital).

18. See NeJaime, *supra* note 5.

19. See, e.g., Stoddard, *supra* note 6, at 679 (asserting a strong belief that gays and lesbians should have the same right to marry their same-sex partners as heterosexuals, and that the gay rights movement should "aggressively" pursue this objective). But see POLIKOFF, *supra* note 7 (urging the LGBTQ movement to pursue a pluralist form of kinship that "would honor all relationships"). Data from the Pew Research Center shows that in 2010, 39 percent of the LGBTQ community believed that the push for same-sex marriage had taken too much focus away from other important LGBTQ issues, compared to 58 percent who believed that same-sex marriage should be the top priority. This shows a serious division within the LGBTQ community on the pursuit of and focus on same-sex marriage even today. PEW RESEARCH CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES* 64, 64 (2013),

advocates insist that the movement should strive to deinstitutionalize marriage and create a new legal regime where various types of relationships are valued and recognized.²⁰ Scholars often present the seminal Stoddard-Ettelbrick debate in 1989 as symbolic of the LGBTQ intracommunity schism over whether to pursue marriage equality or pluralism.²¹ The following seeks to map out the political positions of the two sides. This will serve as a critical starting point in exploring the implications of the marriage equality movement in the next Part.

In his famous essay, *Why Gay People Should Seek the Right to Marry*, Tom Stoddard, Lambda Legal's executive director, confessed that he was not a fan of the "traditional form" of marriage and recognized the "oppressive" tendency of marriage, namely the gender division and hierarchy and the homophobic exclusion of LGBTQ individuals that is inherent in the traditional institution of marriage.²² Nevertheless, Stoddard insisted that the movement should "aggressively" pursue same-sex marriage recognition.²³ Stoddard believed that marriage equality would provide the marginalized LGBTQ community with "substantial economic and practical" benefits such as tax advantages, government benefits, inheritance rights, spousal immunity, and immigration rights.²⁴ Stoddard further argued that the deinstitutionalization²⁵ of marriage is politically unfeasible, and marriage equality for the LGBTQ community is the correct and practical path.²⁶

In response, Paula Ettelbrick, his colleague, Lambda Legal's legal director, wrote *Since When is Marriage a Path to Liberation?*²⁷ Ettelbrick contended that the turn to marriage equality is assimilationistic and narrow-minded.²⁸ Assimilation is problematic because it forces LGBTQ people to present, project, and perform the norms of married heterosexual couples (nuclear family, gendered division of labor, monogamous) in order to be accepted.²⁹ This reification of

<http://www.pewsocialtrends.org/2013/06/13/chapter-4-marriage-and-parenting>
[<https://perma.cc/3UJ3-ATCT>].

20. See sources cited *supra* note 8.

21. See, e.g., Carlos A. Ball, *Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage*, 61 RUTGERS L. REV. 493, 494–97 (2009); see also ESKRIDGE & SPEDALE, *supra* note 7, at 18; NeJaime, *supra* note 5, at 104.

22. See Stoddard, *supra* note 6, at 679–80.

23. *Id.* at 679.

24. *Id.* at 679–80.

25. It is unclear what Paula Ettelbrick, with whom Tom Stoddard was debating, meant by deinstitutionalization. Particularly, it is unclear whether deinstitutionalization means the abolition of marriage, as Stoddard claimed, or the legal recognition of other relationships alongside marriage.

26. See Stoddard, *supra* note 6, at 682.

27. See Ettelbrick, *supra* note 8.

28. See *id.* at 684.

29. See *id.* at 685.

the institution of marriage, in turn, would deny LGBTQ people the choice to form other types of kinship.³⁰ Further, Ettelbrick critiqued marriage equality as narrow-minded because the primary benefactors of the political endeavor would be those who are socioeconomically advantaged, namely middle- and upper-class gay white men.³¹ For instance, those working in low-paying jobs would not have the healthcare benefits from their employment to share with their spouse through marriage.³² Importantly, Ettelbrick warned that the marriage equality path would alienate and marginalize the most vulnerable segments of the LGBTQ community.³³ Ultimately, Ettelbrick favored a pluralist form of kinship in which LGBTQ individuals can choose how to organize their relationships.³⁴ In the end, Stoddard's view triumphed and Ettelbrick left Lambda Legal in 1993.³⁵

Since this monumental exchange between the two late giants of the LGBTQ community, the Stoddard-Ettelbrick debate has grown more sophisticated. Scholars from both the marital and pluralist camps have developed new critiques of each other based on class, race, and gender subordination and political strategies. This Part seeks to map this discursive development rooted in the Stoddard-Ettelbrick debate.

A. State Discipline and Benefits

Despite the legal benefits afforded to married couples, pluralist advocates contend that marriage equality has not been all beneficial, but carried with it the costs of liberty, autonomy, and dignity for LGBTQ individuals having to organize their lives around the institution of marriage. In particular, they insist that marriage is a mechanism through which the state³⁶ disciplines and cultivates the normative sexual subject.³⁷ For instance, marital advocates, in both the media

30. *Id.*

31. *See id.* at 686.

32. *See id.*

33. *See id.*

34. *See id.* at 687.

35. *See Ball, supra* note 21, at 500.

36. The use of "state" in this Comment entails the government in general. When a matter signifies the individual state in our federalist government (California, Nevada, etc.), I will use the terms "state jurisdiction" or "jurisdiction."

37. Murray, *supra* note 8, at 50–51 ("[M]arriage socialized and disciplined individuals, requiring them to think in terms of the collective good of the marital family unit. And in so doing, it created conditions conducive to the rehabilitation and reintegration of the prisoner, while also suppressing recidivist impulses."). To be sure, marital advocates do not contest this disciplinary nature of marriage. Rather, the heart of the dispute is whether the cost-benefit analysis yields a net positive or net negative result. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 186 (1986) (upholding

and litigation, project same-sex couples as the normative perfect couples, the “model homo families.”³⁸ That is, same-sex couples are monogamous, industrious, employed, and tax-paying citizens.³⁹ This construction of LGBTQ couples,⁴⁰ pluralist advocates conclude, necessarily limits LGBTQ individuals from choosing a life different from the model homo families.⁴¹ Some LGBTQ couples, for example, want to live a sexual life that is not necessarily monogamous or wish to choose from a “menu” of state-recognized relationship options that do not exclusively involve marriage.⁴²

Pluralist advocates also argue that those who enter into the institution of marriage are disciplined. When couples legally marry each other, they are also wed to the state.⁴³ As a result, the state dictates various relational interactions between the couple. For example, the state imposes a duty that spouses must pay for each other’s “necessary expenses” owed to a third party, and may, through adultery laws, criminally prohibit either partner from engaging in sex with a third person. In addition, the state can modify the rules of marriages, like changing the entrance or exit requirements by removing no-fault divorce rules,

Georgia’s statute criminalizing consensual sodomy, thereby maintaining and cultivating a sexual subject and their sex act as only heterosexual); see also *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“[T]he state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power . . .”). For a brief summary of the disciplinary and regulatory arguments, see William N. Eskridge, Jr., *The Ideological Structure of the Same-Sex Marriage Debate (and Some Postmodern Arguments for Same-Sex Marriage)*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 115, 123, 129 (Robert Wintemute & Mads Andenas eds., 2004).

38. Franke, *supra* note 17, at 239.

39. Murray, *supra* note 8, at 59.

40. The marriage equality movement places primacy on same-sex marriage equality as the most important issue (though not the only one) for the entire LGBTQ community. It has become the dominant metric on which the public measures and understands LGBTQ rights, resulting in the public’s neglect and ignorance of other important LGBTQ issues, such as transgender youth’s access to non-disciplinary and protected spaces in education, LGBTQ hate crimes, and LGBTQ youth homelessness. See *Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1722–23 (2014); *America’s Shame: 40% of Homeless Youth Are LGBT Kids*, WILLIAMS INST. (July 13, 2012), <http://williamsinstitute.law.ucla.edu/press/americas-shame-40-of-homeless-youth-are-lgbt-kids> [<http://perma.cc/KMF9-2Q3X>] (data available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>) (“LGBTQ youth make up no more than 10% of the population segment, yet total 40% of homeless youth.”); *Latest Hate Crime Statistics Report Released*, FBI (Dec. 8, 2014), <http://www.fbi.gov/news/stories/2014/december/latest-hate-crime-statistics-report-released/latest-hate-crime-statistics-report-released> [<http://perma.cc/ZE9Z-KWU3>] (revealing that sexual orientation discrimination makes up about 21 percent of reported hate crime incidents).

41. Murray, *supra* note 8, at 60.

42. *Id.*

43. See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 307 (1999).

without ever seeking consent from married couples.⁴⁴ Simply put, the conditions of marriage are imposed, not chosen by the couples. The point of the pluralist advocates here is not whether these marital conditions are best for everyone, or whether the political process is adequate in selecting these conditions for everyone. Rather, the point is that the pursuit of marriage equality robs individuals of a certain liberty to select and organize their relationships.⁴⁵

By contrast, marital advocates insist that the disciplinary effect of marriage, as claimed by the pluralist advocates, is overstated.⁴⁶ More clearly, the reach of the state into the lives of married same-sex couples is no greater than unmarried same-sex couples.⁴⁷ The state, for instance, arbitrates disputes within households, protects the rights of biological family members to make decisions for incapacitated family members and to receive an inheritance from deceased family members, and regulates couples' sexual behaviors through rape and sexual harassment laws.⁴⁸ Thus, even unmarried cohabitating couples can no more escape the regulatory ambit of the state than married couples. Marital advocates also claim that, on balance, the benefits yielded by marriage equality outweigh the costs that pluralist advocates identify.⁴⁹ David Chambers, for instance, asserts that taken together, the cost-benefit calculation compels him to conclude that the benefits of marriage equality significantly outweigh the disciplinary costs.⁵⁰ These benefits for same-sex couples entail allowing spouses from different countries to live together in the United States through immigration law, affording them the right to raise their children under parenting laws, and providing the right to file a joint tax return.⁵¹ Furthermore, Chambers insists that same-sex couples "need the same choices" as heterosexual couples to decide on whether to marry.⁵² From this perspective, marriage equality not only affords

44. See Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 37, at 97, 106.

45. *Id.* at 99–100, 111 (pointing out that "marriage is not merely *a* but *the* paradigm of intimate adult commitment").

46. See, e.g., Eskridge, *supra* note 37, at 123; see also Brenda Cossman, *Marriage As? A Reply to Marriage as Punishment*, 112 COLUM. L. REV. SIDEBAR 220, 225–26 (2012) ("Professor Murray may be slightly and unnecessarily overstating the case of the totality . . . of legal regulation [of marriage] . . .").

47. See Eskridge, *supra* note 37, at 123.

48. See *id.* at 123–24.

49. See *id.* at 126.

50. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 485 (1996).

51. *Id.*

52. *Id.* at 486.

formal statutory benefits, but also the liberty to choose whether to marry. More succinctly, marriage equality actually enhances liberty.

Some pluralist advocates, such as Janet Halley, contend that Chambers overestimates the liberty and benefits flowing from marriage equality.⁵³ First, liberty is lacking because many marriage conditions imposed by the state are “*utterly unalterable*.”⁵⁴ Same-sex couples cannot choose to live in a polyandrous or polygamous relationship nor a renewable contractual relationship, such as a five-year renewable marriage.⁵⁵ Second, the benefits are overstated because many of the rights encapsulated in marriage are not “of the couple,” but rather for spouses to exercise against each other.⁵⁶ For instance, a spouse can make the other spouse divide shared property, or introduce evidence of marital fault in order to tilt a divorce proceeding or judge’s discretion in one’s favor.⁵⁷ Ultimately, Halley does not share Chambers’s conviction that the benefits of marriage equality outweigh its costs. Halley observes that the existing cost-benefit calculus does not yield a clear result.⁵⁸ Instead, she urges the LGBTQ community to have an honest and deeper dialogue about the cost of marriage equality.⁵⁹

To be sure, pluralist advocates also recognize the predicament of their venture: Even in a regime of legally recognized pluralistic kinships, the state’s disciplinary apparatus would still affect all couples.⁶⁰ Thus, the actual disagreement between the pluralist and marital advocates is not between state involvement and no state involvement. Instead, one can properly read the tension between the pluralist and marital advocates, as represented by Halley and Chambers, as the following: Halley, on one hand, believes that the cost of losing the liberty to choose from a menu of kinship options is greater than the legal benefits afforded by marriage. On the other hand, Chambers thinks the benefits of equal liberty and rights with heterosexual couples exceed the disciplinary cost of inhabiting the marital domain controlled by the state. Quoting Sally Falk Moore, Katherine Franke aptly describes the space that the pluralist advocates seek to make possible

53. Halley, *supra* note 44, at 108.

54. *Id.*

55. *Id.*

56. *Id.* at 109. Halley also sarcastically notes that “it is charming to call these elements of marriage ‘duties’ [and] ‘obligations.’” *Id.*

57. *Id.*

58. *See id.* at 111.

59. *Id.*

60. Franke, *supra* note 43, at 308 (citing WENDY BROWN, STATES OF INJURY 121 n.41 (1995)).

as “semi-autonomous social fields”—neither fully outside nor inside of the law, but in the interstices.⁶¹

B. A Historical Break or Continuity?

Pluralist advocates assert that the rise of the marriage equality movement represents a political break from the original radical political commitment rooted in the Stonewall riots of 1969,⁶² which are generally understood as the dawn of the gay rights movement.⁶³ Particularly, pluralist advocates maintain that the early gay and lesbian movement was politically committed to a broader LGBTQ community—gay, lesbian, transgender, and bisexual persons of all colors, religions, and ethnicities—and broader objectives, namely “human rights, sexual and gender equality, social and economic justice, and faith in a multicultural society.”⁶⁴ This was framed as a commitment to liberation.⁶⁵ Undergirding the politics of liberation is the recognition of social dominance and subordination of identities, whose aspiration yearns for the emancipation of all subordinated identities—where LGBTQ identity is one among a constellation of subordinated identities (gender, race, disability, etc.).⁶⁶ Importantly, the pluralist advocates critique the marriage equality movement for markedly shifting away from this political origin, dedicating itself instead to a narrow subgroup of the

61. Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2688 (2008) (citing Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *L. & SOC'Y REV.* 719, 721 (1973)).

62. Stonewall was a bar riot led by gays and lesbians against the perpetual police brutality against LGBTQ people in New York. The riot started at the Stonewall Inn in Greenwich Village and lasted from June 27 to 29, 1969. One month after Stonewall, the Gay Liberation Front was founded, and within a year, gay liberation groups had formed on college campuses and in cities across the country. POLIKOFF, *supra* note 7, at 35–36.

63. See VAID, *supra* note 17, at 54–57, 60 (characterizing the marriage equality movement as a “single-issue” movement, as oppose to the “multi-issues” movement of the gay liberation era); Nancy D. Polikoff, *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) (“I believe 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.”).

64. VAID, *supra* note 17, at 57, 60, 180.

65. See Steven Seidman, *Identity and Politics in a “Postmodern” Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 105, 129 (Michael Warner ed., 1993).

66. *Id.*

LGBTQ community, namely the white, male, and economically privileged.⁶⁷ This strategy, by contrast, is framed as an assimilationist strategy.

A month after Stonewall, the Gay Liberation Front (GLF) was founded.⁶⁸ Pluralist advocates cite the diverse commitment of GLF and the diverse makeup of the early LGBTQ activists in sharp contrast to the current marriage equality movement. Specifically, the GLF was committed to the liberation of all gays by eliminating the institutions of capitalism, imperialism, racism, and male supremacy.⁶⁹ The organizing leadership of the National March on Washington for Lesbian and Gay Rights in 1979, for instance, was 50 percent female and at least 20 percent people of color.⁷⁰ The pluralist advocates further insist that the early LGBTQ advocacy, dating as far back as the 1960s and 1970s, was committed to a pluralist vision of kinship.⁷¹ In direct contrast to the marriage equality movement today, the early LGBTQ advocates saw marriage as a problem, rather than a solution to their subordinated identities.⁷² In effect, pluralist advocates characterize the marriage equality movement today as a normative break from the political and ideological commitment of the early LGBTQ advocates.

The shift to marriage equality and the mainstreaming of LGBTQ politics today, the pluralist advocates point out, is the result of the dominance of the “[w]ealthy white males” in LGBTQ political activism.⁷³ The pluralist advocates critique this LGBTQ rights agenda as narrow-minded and exclusive. That is, the focus on marriage equality results in the prioritization of the interests of middle- and upper-class white gay men, the rejection of other forms of kinship, and the marginalization of other pressing issues facing more vulnerable

67. See URVASHI VAID, *IRRESISTIBLE REVOLUTION: CONFRONTING RACE, CLASS AND THE ASSUMPTIONS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POLITICS* xii–xv, 26 (2012).

68. POLIKOFF, *supra* note 7, at 36.

69. *See id.* at 37.

70. *Id.* at 44.

71. *See, e.g.*, Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 530 (2009); *see also* Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: J. LESBIAN & GAY STUD. 119, 122–23 (1999) (providing a list of political commitments of early LGBTQ advocacy that pursued relational pluralism).

72. *See* Polikoff, *supra* note 71, at 530. Polikoff also raises the fact that in the 1970s, lesbian and heterosexual feminists worked together to develop and advance a political platform that valued all forms of kinship. *Id.* at 531.

73. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1038–39 & n.138 (2014). Today, the LGBTQ community is equally divided over this mainstreaming path. Data from 2013 by the Pew Research Center reveals that LGBTQ individuals are equally divided, 49 percent to 49 percent, over whether the movement should maintain its distinct approach or become part of the mainstream culture through institutions like marriage. PEW RESEARCH CTR., *supra* note 19, at 75, 88 tbl.

LGBTQ individuals—such as poverty, mass incarceration, and immigration.⁷⁴ Pluralist advocates attribute this current political status quo to the hugely disproportional funding contribution to the marriage equality movement by affluent white gay men.⁷⁵ As a remedy, pluralist advocates insist that the mainstream LGBTQ movement, which supports marriage equality, should shift gears in support of recognition for all families in order to return to its roots.⁷⁶

Not surprisingly, the marital advocates disagree with this narration of LGBTQ history. They insist that the shift toward marriage equality, as opposed to continuing to advocate for domestic partnerships or other pluralist solutions, was not normative, but rather strategic.⁷⁷ From the 1970s to the 1990s, LGBTQ advocates were dismissive of marriage equality because the U.S. Supreme Court upheld sodomy laws in *Bowers v. Hardwick*,⁷⁸ which convinced them that the possibility of achieving marriage equality was miniscule.⁷⁹ Consequently, early LGBTQ advocates instead pursued nonmarital recognition, such as domestic partnership.⁸⁰ And by the end of the 1980s, the same-sex marriage discussion returned in the form of the spirited debate between Stoddard and Ettelbrick.⁸¹

That strategic consideration, argue marital advocates, all changed in 1993. In *Baehr v. Lewin* (1993), the Hawaii Supreme Court declared the state's prohibition of same-sex marriage unconstitutional.⁸² *Baehr* unleashed internal and external sociopolitical forces that altered America's cultural landscape and brought most LGBTQ advocates together in support of marriage equality and against the social conservatives.⁸³ Externally, social conservatives from various ethnicities, religions, and political orientations united together in framing both the marital and pluralist movements within the LGBTQ community as one and the same,

74. See Robinson, *supra* note 73, at 1038–39.

75. See VAID, *supra* note 67, at 26–27; John Wildermuth, *Wealthy Gay Men Backed Anti-Prop. 8 Effort*, SFGATE (Nov. 16, 2008, 4:00 AM), <http://www.sfgate.com/bayarea/article/Wealthy-gay-men-backed-anti-Prop-8-effort-3261864.php> [<https://perma.cc/45UU-42XN>].

76. See, e.g., POLIKOFF, *supra* note 7, at 5–6. The LGBTQ progressives, of which the pluralist advocates are a part, also urge the mainstream movement to target other critical issues outside of marital recognition, such as poverty, transgender discrimination, and homeless youth. This issue, however, is beyond the scope of this Comment. Instead, this Comment is primarily concerned with the political fissure over which form of kinship to pursue.

77. See NeJaime, *supra* note 5, at 104, 111–12.

78. 478 U.S. 186 (1986).

79. See David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in *CREATING CHANGE™: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 281, 288 (John D'Emilio, William B. Turner & Urvashi Vaid eds., 2000).

80. See NeJaime, *supra* note 5, at 104.

81. See Chambers, *supra* note 79, at 288–89.

82. 852 P.2d 44, 48 (Haw. 1993), *as clarified on reconsideration* (May 27, 1993), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

83. See NeJaime, *supra* note 5, at 112.

threatening their cherished traditional institution of marriage.⁸⁴ Thus, both the marital and pluralist advocates within the LGBTQ movement were collapsed together by virtue of an outside perception.⁸⁵

Internally, the consequences were two-fold. First, *Baehr* made it clear that marriage equality was a real possibility, which resulted in the LGBTQ community, including those on the fence about marriage equality, consolidating together with the marital advocates in pursuit of same-sex marriage recognition.⁸⁶ Second, some pluralist advocates and many on the fence toned down their opposition to or simply joined the marriage equality movement, for fear that their opposition would reinforce the homophobia and heteronormativity⁸⁷ that inhered in the social conservative movement against same-sex marriage.⁸⁸ Simply put, between the two bad choices, the LGBTQ movement chose to coalesce together to promote marriage equality rather than giving any ammunition to their adversary, the anti-same-sex marriage establishment. In sum, the marital advocates argue that the shift toward marriage equality was not only a change in desire, as the pluralist advocates incorrectly assume, but primarily a strategic consequence spurred by the aftermath of *Baehr*.

These are two contradictory descriptive accounts of LGBTQ history: One perspective is based on majority support, while the other is based on shifting power relations. On one hand, the marital advocates suggest that *Baehr* generated a majority in the LGBTQ community in favor of same-sex marriage. This majority support, in turn, legitimizes and justifies the shift toward marriage equality over kinship pluralism. By contrast, pluralist advocates expose how the flip from minority to majority support of marriage equality was a product of upper-class gay white men using their dominant position and money to mold the priorities of the LGBTQ movement. From this perspective, the marriage equality shift was a result of a power relationship rather than of pragmatism.

84. *Id.* at 112–13; ESKRIDGE & SPEDALE, *supra* note 7, at 20.

85. *See* Murray, *supra* note 8; Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 398–99 (2009).

86. ESKRIDGE & SPEDALE, *supra* note 7, at 20; NeJaime, *supra* note 5, at 104.

87. The use of “heteronormativity” in this Comment means the presumption and acceptance that the gender binary and heterosexuality are natural, normal, timeless, and desirable. As a result, disconformities, such as transgender, homosexuality, bisexuality, intersexuality, and skoliosexuality, are marginalized and erased, and individuals who identify with such categories are routinely ridiculed, harassed, and even killed. Heteronormativity underpins all social phenomena—identity performance, social interaction, production of symbols and culture, and practices of institutions.

88. *See* ESKRIDGE & SPEDALE, *supra* note 7, at 20; Schacter, *supra* note 85, at 394 (recounting the post-*Baehr* reflection of Julie Shapiro, a pluralist advocate, in which she states “feminist anti-assimilationists’ like herself became boxed in once marriage became ‘the primary battleground between pro-lesbian and gay and anti-lesbian and gay forces’ because ‘[t]o align oneself with the vitriolic forces of anti-lesbian fundamentalism is unthinkable”).

C. A Race, Gender, and Class Critique⁸⁹

Pluralist advocates and race-studies scholars have critiqued and exposed the reproduction of racial subordination through a illegitimacy/legitimacy distinction that is inherent in marriage equality litigation.⁹⁰ Illegitimacy is defined here as the pathologization of three interrelated deeds—sex out of wedlock, nonmarital birth, and, consequently, single parenting—as immoral, irresponsible, and contributing to poverty; thus, each is in need of rectification by government policies or otherwise.⁹¹ Pluralist advocates maintain that this distinction between illegitimate and legitimate (normative nuclear family) is arbitrary and serves no justifiable interest.⁹² Further, the logic of illegitimacy deprives individuals of the choice to organize around a type of family they believe is most appropriate for them.⁹³ For example, a mother may choose to raise her child in a single-parent

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89. Recently, race-studies scholars, such as Professor Devon W. Carbado, Adele M. Morrison, and Russell K. Robinson, have critiqued the gay rights movement and marriage equality litigation for its racial exclusivity to whiteness. See, e.g., Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1505–08 (2000) (uncovering the use of the “respectable . . . white” as the public face and victim of the Don’t Ask, Don’t Tell policy, overlooking and erasing, for example, Perry Watkins, a black openly gay army sergeant); Adele M. Morrison, *It’s [Not] a Black Thing: The Black/Gay Split Over Same-Sex Marriage—A Critical [Race] Perspective*, 22 TUL. J.L. & SEXUALITY 1, 11, 14, 41–43 (2013) (unmasking how the white organizational leadership failed to see how race and gender privileges and advantages overlap with LGBTQ identity in the context of California Prop. 8 and the gay rights movement in general); Robinson, *supra* note 73 (arguing that the use of postracial narratives in the marriage equality litigation undermines black-gay relations and inadvertently constricts the equality of both groups).
90. Feminist scholars have also critiqued the marital family unit versus the nonmarital family unit of kinship. See Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 217 (2007) (arguing that family law’s focus on distinguishing between and privileging marriage and domesticity over friendship has led women living outside of marriage to feel stigmatized, lonely, and even fearful).
91. See Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, in SEXUAL IDENTITIES, QUEER POLITICS 200, 217 (Mark Blasius ed., 2001); Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 J. GENDER SOC. POL’Y & L. 387, 415 & nn.154 & 156 (2012); see also Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 284 (2004) (noting the reality is that single women are increasingly having children on their own and that having an “unmarried status is not a transient phenomenon,” but instead that an “American woman today can expect to be single for substantial portions of her adult life”). Recent data by the Pew Research Center show that 34 percent of children in 2013 were living with unmarried parents, compared to 9 percent in 1960. Gretchen Livingston, *Fewer Than Half of U.S. Kids Today Live in a ‘Traditional’ Family*, PEW RES. CTR. (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family> [https://perma.cc/HR3C-FVKS].
92. See, e.g., ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 234 (2007).
93. See Murray, *supra* note 91, at 421, 431 (pointing to the fact that those who can legally marry, but choose not to, would suffer injuries for themselves and their children, so they are required by this sociolegal context to marry); see also Russell K. Robinson, *Structural Dimensions of Romantic*

family in order to protect herself and her child from the physical or drug abuse of the biological father.⁹⁴ Instead, kinship should be broadly defined and accepted beyond the limited formulation of the legitimate nuclear family.

Melissa Murray contends that marriage equality litigation, by analogizing same-sex couples to the model nuclear and heterosexual family, reproduces and reinscribes the pathological and illegitimate logic of single parenthood.⁹⁵ For instance, in a recent decision by the Fourth Circuit, *Bostic v. Schaefer*, the court held that the promotion of same-sex marriage is the same as heterosexual marriage for the purpose of diminishing the significant risk of children born out of wedlock and being raised in unstable and unmarried families, which is supposedly harmful to their development.⁹⁶ Similarly, in the amicus briefs for *Conaway v. Deane* in a New Jersey trial court, the American Psychological Association and the American Academy of Matrimonial Lawyers argued that recognition of same-sex marriage would ensure that illegitimacy would not harm children growing up with same-sex parents.⁹⁷

This stigmatic illegitimacy, asserts Murray, necessarily has a racial impact.⁹⁸ She argues that the archetype of single parenthood is a young African American mother receiving public assistance—the so-called “welfare queen.”⁹⁹ But data demonstrate that the effect of illegitimacy is not limited to African American mothers. Pew Research Center’s data from 2011 reveals that black mothers represent approximately 12 percent of all mothers, but disproportionately represent

Preferences, 76 *FORDHAM L. REV.* 2787, 2788 (2008) (asserting that “[l]aw and social norms create structures that channel and limit” our romantic, sexual, and relational interactions).

94. Cf. SHARMILA LAWRENCE, NAT’L CTR. FOR CHILDREN IN POVERTY, *DOMESTIC VIOLENCE AND WELFARE POLICY: RESEARCH FINDINGS THAT CAN INFORM POLICIES ON MARRIAGE AND CHILD WELL-BEING 2* (2002) (finding higher rates of domestic violence experienced by women receiving welfare than among the general population).
95. See Murray, *supra* note 91, at 414–16; see also Moran, *supra* note 91, at 225–26 (explaining that the second-wave feminism movement forgot the single and non-white women because it emerged from a white, middle class, and mostly married constituency).
96. *Bostic v. Schaefer*, 760 F.3d 352, 381–83 (4th Cir. 2014). Conversely, in *Hernandez v. Robles*, the New York Court of Appeals, in upholding a same-sex marriage ban, declared that heterosexual couples provide a stable and long-term commitment to each other, an ideal circumstance for children to be born. 855 N.E.2d 1, 7 (N.Y. 2006). By contrast, same-sex couples present a greater danger for children to be born into unstable homes. See *id.* at 7. Important here is that whether the court is analogizing or distinguishing between same-sex or heterosexual couples, the logic of illegitimacy is upheld in these marriage equality litigations.
97. Murray, *supra* note 91, at 420–21 (citing Brief of American Psychological Association et al. as Amici Curiae in Support of Plaintiffs-Appellees at 43, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), 2006 WL 3096521, at *43; and Brief of Amici Curiae in Support of Appellees at 11, *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (No. 44), 2006 WL 3096521, at *11); see also *infra* Part III about reducing the economic cost of public assistance.
98. See Murray, *supra* note 91, at 414, 424–25.
99. *Id.*

about 40 percent of never-married mothers and about 28 percent of all single mothers.¹⁰⁰ Similarly, Hispanic mothers represent approximately 19 percent of all mothers but about 24 percent of all never-married mothers and about 22 percent of all single mothers.¹⁰¹ The data here demonstrate that the stigmatic logic of illegitimacy disproportionately affects African American single mothers, as well as Hispanic single mothers, albeit to a lesser extent.

Beyond the stigmatic fallout, there are also disciplinary and regulatory repercussions, according to Anna Marie Smith.¹⁰² This affects not only the racialized subjects (African and Hispanic Americans), but the entire economic class of poor single mothers.¹⁰³ For instance, the government promotes marriage and the legitimate nuclear family through Temporary Assistance for Needy Families (TANF),¹⁰⁴ a federal assistance program that is run on a state-by-state basis and can provide services such as pre- and post-marital counseling, marriage educational activities, divorce counseling and mediation services for couples, and programs to assist low-income fathers to find work.¹⁰⁵ Pursuant to TANF rules and policies, illegitimate families (such as single mother families) are subject to intense governmental discipline and regulation.¹⁰⁶ For instance, in Virginia, Washington, and Utah, single-parent-headed families applying for TANF are subject to policies encouraging them to relinquish their children for adoption without

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100. WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS 17, 19 tbl. (2013), <http://www.pewsocialtrends.org/2013/05/29/chapter-4-single-mothers> [<https://perma.cc/52L4-XLCC>].
 101. *Id.* The same cannot be said of white mothers, who represent approximately 60 percent of all mothers but only around 32 percent of never-married mothers and around 45 percent of single mothers. *Id.*
 102. See SMITH, *supra* note 92, at 3 (pointing out that the Temporary Assistance for Needy Families' (TANF) rules require single mothers to conform to a one-size-fits-all heteropatriarchal model of kinship relations and intensify the moral policing of poor single mothers); cf. Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531, 533 (2000) ("Marriage becomes more than a legal category. It is reconfigured into public policy and presented as the path to personal and family salvation.").
 103. See SMITH, *supra* note 92, at 4, 15, 16.
 104. See *id.* at 4–5 (stating that TANF is a rehabilitative mechanism through which marriage and teen pregnancy are promoted).
 105. See *id.* at 175 (providing examples of the types of services provided through TANF in states like Oklahoma and Utah).
 106. See Teresa Kominos, Note, *What Do Marriage and Welfare Reform Really Have in Common? A Look Into TANF Marriage Promotion Programs*, 21 ST. JOHN'S J. LEGAL COMMENT. 915, 942 (2007) ("Marriage promotion programs attempt to coerce TANF recipients to make 'better' decisions in their personal relationships by threatening financial consequences, the area where welfare recipients are most vulnerable."); Aly Parker, Note, *Can't Buy Me Love: Funding Marriage Promotion Versus Listening to Real Needs in Breaking the Cycle of Poverty*, 18 S. CAL. REV. L. & SOC. JUST. 493, 507 (2009) ("Offering a family an additional third of their base monthly stipend is a form of government coercion to marry.").

any allegations of neglect or child abuse.¹⁰⁷ In effect, TANF rules presuppose that illegitimate single mothers are unfit for parenthood without any proof of wrongdoing.¹⁰⁸ Moreover, the fundamental choices and daily lives of single mother recipients in TANF are subject to state regulation in numerous ways, including diminished privacy rights¹⁰⁹ and probing questions from caseworkers.¹¹⁰ They also face an increased risk of domestic abuse from the fathers whom they sought to escape and hide from.¹¹¹ Kaaryn Gustafson contends that these initiatives not only exacerbate poverty, but further stigmatize single-parent kinship.¹¹²

The pluralist advocates insist that under a pluralistic regime of kinship, this illegitimacy/legitimacy distinction, and the discipline and regulation arising therefrom, can be avoided.¹¹³ Instead, under such a regime, many forms of kinship are legally recognized and socially accepted.¹¹⁴ Various scholars have proposed different ways in which this regime could arise. Polikoff, for instance, advocates for a “valuing-all-families” approach in which different legal status would be afforded to different types of families—as opposed to exclusively marital couples.¹¹⁵ Alternatively, Eskridge suggests a “menu of options” approach, where couples can choose the duties, rights, and benefits associated with their relationship.¹¹⁶ Marital advocates, however, do not seem to have a response to the racial and class critique of the illegitimacy/legitimacy distinction that has arisen out of marriage equality.

107. SMITH, *supra* note 92, at 57, 164, 166.

108. *See id.* at 166.

109. *See id.* at 48.

110. *Id.* at 57, 130–36; cf. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat From Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 295–96 (2009) (showing that the Healthy Family Initiative and Fatherhood Initiative, which was designed to increase marriage rate, effectively expands government reach into the private sphere and stigmatizes non-marital childbearing and single-parent households).

111. SMITH, *supra* note 92, at 130–36.

112. Gustafson, *supra* note 110, at 294–95.

113. *See, e.g.*, SMITH, *supra* note 92, at 234–35; Murray, *supra* note 91, at 433–38 (pointing out that the state disciplines people by compelling them to live “moral” lives and adhere to norms associated with the “marital family”).

114. *See* SMITH, *supra* note 92, at 234–35; Murray, *supra* note 91, at 433–35.

115. POLIKOFF, *supra* note 7, at 132–33.

116. William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1955, 1959, 1979–80 (pointing out the “repeal of mandatory rules that rendered marriage the only legal situs for sexual intercourse and the invalidation of pervasive discriminations against nonmarital children”).

D. Ending Gender Norms?

Marital advocates assert that same-sex marriage would destabilize gender norms.¹¹⁷ Nan Hunter illustrates that courts often invoke the “natur[al]” gender boundaries in marriage as a justification for the exclusion of same-sex couples from marriage equality.¹¹⁸ Therefore, the legal recognition of same-sex marriage would denaturalize this fundamental husband-wife category in traditional marriage that facilitates and prescribes gender hierarchy.¹¹⁹ William Eskridge clarifies and specifies how this would occur.¹²⁰ Eskridge first sounds a note of qualification, maintaining that the gender-destabilizing argument does not depend on same-sex married couples abandoning the traditional division of labor, such as breadwinner and homemaker.¹²¹ He then argues that in a woman-woman marriage, at least one woman will take on the customary male gender role of breadwinner; and in a man-man marriage, at least one man will take on the customary female gender role of homemaker.¹²² This symbolic exchange of gender roles would destabilize the compulsory nature of gender performance and anti-gay, perhaps even anti-queer, attitudes as well.¹²³ Eskridge further

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117. See, e.g., Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 12 (1991) (arguing that “legalizing lesbian and gay marriage would have enormous potential to destabilize the gendered definition of marriage to everyone”); see also Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219 (1998) (arguing that the honest consideration of transgender people and their marital relationships would disrupt the gender patriarchy on which traditional marriage rests, thereby liberating transgender people as well as gays, lesbians, and heterosexual women); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1486–87 (1993) (stating that feminist and queer scholars agree that marriage is a “rotten institution” because it has systematically subordinated women’s personal, economic, and social interests).
118. See Hunter, *supra* note 117, at 13, 15; see also, e.g., *Singer v. Hara*, 522 P.2d 1187, 1191–92 (Wash. Ct. App. 1974) (stating that “the definition of marriage as the legal union of one man and one woman” is so clearly implied that it does not require recitation).
119. See Hunter, *supra* note 117, at 16, 17. Hunter also recalls that feminist litigation in the past decades has not significantly transformed the power relations between man and woman inside or outside of marriage. Same-sex marriage, however, will do so.
120. Nan Hunter provides a very abstract account of this gender denaturalization, mostly centered around the concept of same-sex couples’ inclusion into traditional marriage. See *id.* at 13–19. She wrote her article in 1991, however, while William Eskridge wrote his in 2001, having the privilege of hindsight.
121. Eskridge, *supra* note 37, at 127.
122. *Id.* at 127–28.
123. *Id.* at 128. Notably, Eskridge is attempting to employ postmodernist theories to defend marriage equality in light of postmodernist scholars’ critique of marriage equality—effectively trying to turn postmodern theory against itself. His attempt, however, misplaces the critique of postmodernist scholars such as Judith Butler. It is not merely symbolic thinking that postmodernist scholars seek to alter, but the entire engine of subordination. Thus, to the extent that same-sex marriage leaves the engine of subordination unscathed, the postmodernist scholars would demand more transformation.

qualifies that gender roles and attitudes are so embedded in our social fabric that the mere introduction of a new marital institution (same-sex marriage) would not necessarily change the gender norms substantially.¹²⁴

It is precisely on the inability to transform the root of gender subordination through same-sex marriage that the pluralist advocates pounce against the marital advocates. Nancy Polikoff argues that marriage equality not only leaves the institution of gender hierarchy in marriage untouched, but it accepts and silences any outside critiques of gender hierarchy.¹²⁵ Particularly, Polikoff stresses that marriage equality litigation essentially accepts the entire institution of marriage by emphasizing the similarities between same-sex and heterosexual couples (for example, their long-term, interdependent, monogamous relationships).¹²⁶ This necessarily denies any possibility of critique and advocacy to transform the highly gendered institution of marriage.¹²⁷

II. RETHINKING THE IMPLICATIONS OF THE LGBTQ INTRACOMMUNITY DEBATE

Some LGBTQ scholars have questioned the contradictory division between the pluralist and marital advocates. They contend that the either/or alignment is a false choice. Instead, they insist that there is a reinforcing and dialogical relationship between the two sides that results in both their goals being achieved through the marriage equality movement. Edward Stein, for example, argues that the LGBTQ movement has successfully pursued both Ettelbrick's pluralist approach and Stoddard's marital approach.¹²⁸ As a result, Stein notes that states have offered both recognition of same-sex marriage and nonmarital legal relationships.¹²⁹

This Part contests this position, arguing first that Stein misunderstands the root of contention between the pluralist and marital advocates and overstates how

124. Eskridge, *supra* note 117, at 1488. Some authors misread and overstate the gender argument by Eskridge and Hunter, proclaiming that same-sex marriage has the “radical[]” potential to dismantle the gender hierarchy within the family. See Kim, *supra* note 17, at 55, 74. I would argue transgender politics—not marriage equality—holds the greatest potential to denaturalize and de-essentialize gender norms. Cf. Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 590–92 (2000) (critiquing the gay rights movement for denying transgender people a place of belonging in the politics of gay rights and the community of gays and lesbians).

125. See Polikoff, *supra* note 63, at 1541, 1543, 1546.

126. See *id.* at 1549.

127. *Id.*

128. Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 574 (2009).

129. *Id.* at 584.

the goals of the pluralist advocates have been achieved through marriage equality. Second, it urges scholars and advocates to reflect honestly about the negative and positive consequences of marriage equality. The pluralist advocates must recognize the benefits that have arisen from marriage equality litigation. Concurrently, the marital advocates must also accept drawbacks and problems inherent in the marriage equality movement. This reflective endeavor is important now because it will help the LGBTQ community contemplate and coalesce around the next political project with a broader and more inclusive base.

A. Recognizing the Benefits Brought by Marriage Equality

Whatever drawbacks lie within the marriage equality movement, it is important to recognize and appreciate the hard-fought gains the LGBTQ community has made. This will help determine where the LGBTQ community stands in comparison to the past and where we presently stand in the long arch of equality.

The first and most obvious achievement is the social and legal recognition of same-sex relationships. Only a few decades ago, it was inconceivable that same-sex individuals could hold themselves out as a couple without social ridicule and sanctions.¹³⁰ Indeed, the Pew Research Center's data shows public support for same-sex marriage has risen from 35 percent in 2001 to 55 percent in 2016.¹³¹ Compared to the general public, LGBTQ people are more likely to say they want to marry, 52 percent to 46 percent.¹³²

The success of marriage equality culminated in *Obergefell*¹³³ with the national recognition of same-sex marriage. This legal and social recognition has

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130. See, e.g., Sharon Ardalo, *Gay Couple Claims Attack in Newark Was Bias Related*, NJ (Mar. 17, 2009, 8:23 PM), http://www.nj.com/news/index.ssf/2009/03/gay_couple_claim_that_brtiney.html [<https://perma.cc/KWC6-RBA4>] (reporting fifteen to twenty teenagers attacked a gay couple as the couple was leaving a Britney Spears concert while yelling anti-gay slurs); Charles Burrell, *Confessed Stockton Slayer Tells Motive / He Changes Story, Implies He Killed 2 Women Because They Were Lesbians*, SFGATE (Aug. 22, 1996, 4:00 AM), <http://www.sfgate.com/news/article/Confessed-Stockton-Slayer-Tells-Motive-He-2968882.php> [<https://perma.cc/QT4L-ASYB>] (reporting that a man intended to rob a lesbian couple, but once he realized their sexual orientation, he felt it was "easier to kill them").
 131. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage> [<https://perma.cc/VP2X-5FUZ>].
 132. Jens Manuel Krogstad, *What LGBT Americans Think of Same-Sex Marriage*, PEW RESEARCH CTR. (Jan. 27, 2015), <http://www.pewresearch.org/fact-tank/2015/01/27/what-lgbt-americans-think-of-same-sex-marriage> [<https://perma.cc/N66A-YQ8Z>].
 133. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

provided LGBTQ individuals the freedom to marry the person they desire.¹³⁴ Importantly, the legal recognition of same-sex marriage has provided same-sex couples equal access to a host of tangible rights and benefits—or formal equality. A survey by the General Accounting Office reported that there are a total of 1138 federal statutory provisions relating to marriage.¹³⁵ Among others, these rights and benefits include: social security, Medicaid, and Medicare benefits;¹³⁶ tax benefits, such as deductions and the ability to transfer property as gifts between spouses without incurring taxes;¹³⁷ statutorily guaranteed benefits, such as health and retirement, through spousal employment;¹³⁸ priority in immigration application;¹³⁹ first priority in being appointed guardian when a spouse is incapacitated;¹⁴⁰ right to invoke evidentiary privilege over marital communication;¹⁴¹ adoption and recognition as the legal parents of the child.¹⁴² Formal equality, however, does not necessarily translate into substantive equality—that is, the equal access to opportunities, life chances, and social treatment.

Further, dovetailed in the success of same-sex marriage is greater societal tolerance and acceptance of the LGBTQ community.¹⁴³ Just a few decades ago, LGBTQ individuals were faced with a Sophie's choice: Either they must stay in their closet and carry on a straight life with a normative nuclear family, or live an authentic life, but face societal sanction and perhaps familial disownment.¹⁴⁴ By

134. Nevertheless, the level of same-sex relationship acceptance varies across the country, and not all same-sex couples feel the same level of safety and reception.

135. GLBTQ LEGAL ADVOCATES & DEFS., SUMMARY OF THE GENERAL ACCOUNTING OFFICE REPORTS ON SECTION 3 OF THE FEDERAL DEFENSE OF MARRIAGE ACT 1, <https://www.glad.org/uploads/docs/publications/doma-gao-summary.pdf> [<https://perma.cc/Z4Y5-MNQR>] (last visited June 4, 2016).

136. *Id.* at 2–4.

137. *Id.* at 5–6.

138. *Id.* at 7–11.

139. *Id.* at 11–12.

140. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 66 (1996).

141. *Id.*

142. Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1870–71 (2012).

143. Indeed, a successful pluralist movement may also result in greater social tolerance and acceptance of the LGBTQ community. However, one can argue that it is far more difficult to succeed under a pluralist vision than a same-sex marriage vision. This is because the former is premised on the deinstitutionalization of marriage, whereas the latter is premised on the inclusion of same-sex couples in the existing institution of marriage. Society is likely more resistant to dramatic social change, like a pluralist movement, than a marriage equality movement. Be that as it may, we cannot know for sure because a pluralist movement has never succeeded.

144. See STEVEN SEIDMAN, BEYOND THE CLOSET: THE TRANSFORMATION OF GAY AND LESBIAN LIFE 86–88 (2002) (“In the heyday of the era of the closet, the choices confronting individuals were often stark: to stay in or step out of the closet. . . . Today, the choices are not as stark.”). In a statement by a fifty-six-year-old lesbian gathered by the Pew Research Center in its recent study on the LGBTQ community, “[g]rowing up in the 60s and 70s, being open wasn’t very

contrast, that decision today is far less agonizing for many LGBTQ individuals. Pew Research Center reported that 92 percent of LGBTQ individuals agree that, compared to ten years ago, society is more accepting of their sexual identity.¹⁴⁵ In addition, 34 percent of LGBTQ individuals report their sexuality¹⁴⁶ is a positive factor in their lives today, compared to only 7 percent who think it is a negative factor (58 percent report that their sexuality makes no difference in their lives).¹⁴⁷ Likewise, 86 percent of LGBTQ people reported they have told one or more close friends about their sexual orientation or gender identity, and 54 percent reported all or most of their family and close friends know.¹⁴⁸

These changes in societal acceptance have real mental and physical health effects on LGBTQ individuals. A study shows that the success of marriage equality has reduced the effect of a phenomenon known as “minority stress” and has improved the mental and physical health of LGBTQ individuals.¹⁴⁹ Similarly, another study suggests that homonegativity harms the quality of relationship between same-sex couples.¹⁵⁰ Thus, improvement in the acceptance and tolerance of LGBTQ relationships directly and positively affects the physical and mental health of LGBTQ individuals.

acceptable, so it was hard telling people at first, and then I met gay friends through my job and after that, I was always and still am very open about it. Being gay is much more acceptable today, and there is more support out there than when I grew up.” *LGBT Voices: The Coming Out Experience*, PEW RESEARCH CTR. (June 13, 2013), <http://www.pewresearch.org/2013/06/13/lgbt-voices> [<https://perma.cc/BT4C-X5HU>]. Another quotation from a twenty-four-year-old lesbian states, “Initially, it was hell. My mother disowned me. Many of those I thought were close friends walked away. In high school, I was mostly left alone, but in college on several occasions, I was approached by guys saying they could ‘turn’ me straight. . . . It has been rough, but I learned a great deal about myself, and over time I did finally get my mum back and we are closer now than we were before.”

Id.

145. PEW RESEARCH CTR., *supra* note 19, at 1.
146. Throughout this Comment, I use the term sexuality in place of sexual orientation. Using the term sexual orientation not only signifies, but reproduces the binary conception of sexuality, that is, homosexuality and heterosexuality. Using instead the term sexuality, I want to raise the recognition of the range of sexuality that one can possess: skoliosexual, bisexual, transsexual, intersexual, pansexual, homosexual, and heterosexual.
147. PEW RESEARCH CTR., *supra* note 19, at 6 tbl.
148. PEW RESEARCH CTR., *supra* note 19, at 44, 44.
149. See William C. Buffie, Commentary, *Public Health Implications of Same-Sex Marriage*, 101 AM. J. PUB. HEALTH 986, 986 (2011).
150. See Jonathan J. Mohr & Ruth E. Fassinger, *Sexual Orientation Identity and Romantic Relationship Quality in Same-Sex Couples*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1085, 1085, 1094–95 (2006) (“In this article, we propose that the ways individuals come to understand and relate to their membership in a stigmatized social category [(heteronormativity)] also may have implications for romantic relationship functioning.”); see also Sharon S. Rostosky & Ellen D.B. Riggle, *Marriage Equality for Same-Sex Couples: Counseling Psychologists as Social Change Agents*, 39 COUNSELING PSYCHOLOGIST 956, 956 (2011) (finding that denial of same-sex marriage has a negative effect on the psychological well-being of LGBTQ individuals).

Lastly, among same-sex couples, there is a lesser adherence to gender norms—though gender performance is not eliminated altogether.¹⁵¹ A study reveals that in comparison to heterosexual couples, same-sex couples are more likely to divide their paid and unpaid labor evenly—heterosexual couples, by contrast, adheres more closely to the traditional division of labor.¹⁵² Certainly, the normalization of same-sex couples has not, and probably will not, single-handedly obliterate gender normativity. Same-sex couples still perform their gender role—albeit that they perform to a lesser extent and may change their men/women roles throughout their relationship. The clearest example of a same-sex couple’s gender performance is Ellen DeGeneres and Portia de Rossi. Ellen is the more masculine performer, and Portia is the more feminine performer, as evidenced by their dress code and behaviors.¹⁵³

B. Recognizing the Negative Repercussions of Marriage Equality

Some scholars have overstated the benefits and understated the negative repercussions of marriage equality. Edward Stein argues that over the past decades, the marriage equality movement has pursued and achieved, to some extent, Ettelbrick’s domestic partnership approach and Stoddard’s marriage equality approach.¹⁵⁴ This resulted in states that recognize both domestic partnership and same-sex marriage.¹⁵⁵ There are two problems with Stein’s reading of the marriage equality movement and the pluralists’ dissent. First, Stein misunderstands the actual objective of the marriage equality movement, which is the legal

151. Cf. FAMILY RESEARCH COUNCIL, TEN FACTS ABOUT COUNTERFEIT MARRIAGE 1, <http://downloads.frc.org/EF/EF11B07.pdf> [https://perma.cc/98SK-QDS4] (stating that “[h]omosexual sexual marriage is an empty pretense that lacks the fundamental sexual complementarity of male and female”).

152. See Raymond W. Chan et al., *Division of Labor Among Lesbian and Heterosexual Parents: Associations With Children’s Adjustment*, 12 J. FAM. PSYCHOL. 402, 402 (1998), <http://people.virginia.edu/~cjp/articles/cbrp98.pdf> [https://perma.cc/N96R-BHJ5] (finding that lesbian couples, compared to heterosexual couples, divide their child-care tasks more evenly); Charlotte J. Patterson et al., *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179, 179 (2004), <http://people.virginia.edu/~cjp/articles/psf04.pdf> [https://perma.cc/Z7GP-E6RB].

153. See Lauren Turner, *Ellen DeGeneres and Portia de Rossi Have the Look of Love Down*, POPSUGAR (Aug. 20, 2016), <http://www.popsugar.com/celebrity/Cute-Portia-de-Rossi-Ellen-DeGeneres-Pictures-24440466#photo-24440998> (showing their gender performance through images of their outfits, how they pose for photos, and how they interact with each other).

154. See, e.g., Stein, *supra* note 128, at 572, 574, 584; *Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [https://perma.cc/5A9P-GP2P] (last updated Nov. 18, 2014) (showing a map of states with domestic partnership or civil union statutes in 2014).

155. See Stein, *supra* note 128, at 584.

recognition of same-sex marriage. Domestic partnership or civil union only serves as a stepping-stone to same-sex marriage.¹⁵⁶ Moreover, the culmination of marriage equality in *Obergefell* has displaced relational pluralism as an alternative regime of kinship.

Marriage equality litigation often characterizes alternative kinship, such as domestic partnership, as an injury to the right to same-sex marriage.¹⁵⁷ In two recent federal district court cases in states, Alaska and Nevada, where same-sex marriage was prohibited but same-sex domestic partnership was available, the plaintiffs argued that domestic partnership constituted an injury to their marital rights. In *Hamby v. Parnell*, the Alaska case, the same-sex couple plaintiffs argued that without marital rights, domestic partnership “stigmatize[d]” them and their children, relegated them to “second class status,” undermined their ability to achieve their aspirations, disadvantaged them financially, and denied them the “dignity and status of immense import.”¹⁵⁸ The district court agreed, holding that singling out and denying same-sex couples the right to marry is a denial of equal protection under the law.¹⁵⁹ In the same vein, the plaintiffs in *Sevcik v. Sandoval*, the Nevada case, insisted that the differences inherent in marriage and domestic partnership stigmatized same-sex couples, imposed upon them an inferior status, and caused “tangible and dignitary harms” on them and their children.¹⁶⁰ On appeal, the Ninth Circuit upheld the plaintiffs’ claims.¹⁶¹

Together, these cases demonstrate that the arguments for same-sex marriage rest on attacking domestic partnership. Domestic partnership

156. See Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 296 (2013). Elsewhere, Murray argues that domestic partnership was “[i]nitially understood as an innovative way to recognize all unmarried couples . . . [and] as an attempt to provide equal access to public and private benefits [but] had morphed into a separate but equal status that underscored the unequal legal treatment of same-sex couples.” *Id.* at 298–99 (emphasis omitted).

157. See Angela Bolte, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 SOC. THEORY & PRAC. 111, 127 (1998) (rejecting domestic partnership as an alternative to marriage, insisting instead that marriage is the only avenue to full rights and equality for the LGBTQ community).

158. *Hamby v. Parnell*, 56 F. Supp. 3d 1056, 1060 (D. Alaska 2014); see also *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) (“To the contrary, we emphasize the extraordinary significance of the official designation of ‘marriage.’ That designation is important because ‘marriage’ is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of ‘registered domestic partnership’ does not.”).

159. *Hamby*, 56 F. Supp. 3d at 1073. The Ninth Circuit denied an appeal in this case.

160. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012); see also *In re Ops. of the Justices of the Senate*, 802 N.E.2d 565, 569–71 (Mass. 2004) (concluding that allowing same-sex couples only civil union is a “status discrimination” and imposes a “different status,” “second-class status,” or “stigma” that is constitutionally impermissible).

161. *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014).

represents one alternative kinship formation. To this extent, marriage equality affirms marriage as the only site of kinship formation to the negation of other kinship alternatives. Melissa Murray goes as far as to proclaim this to be injurious because it denies individuals, gay or straight, the freedom to form alternative, legally cognizable relationships and denies them equal access to public and private benefits.¹⁶²

Nancy Polikoff aptly puts these injurious effects in context. She first provides the following real life examples:

[Larry Courtney's] partner of fourteen years, Eugene Clark, did not come home from his job on the 102nd floor of the south tower of the World Trade Center on September 11, 2001. When Larry filed a workers' compensation claim, the reviewing agency replied that he did not qualify for benefits, which might instead be paid to Eugene's father, from whom Eugene had been estranged for twenty years.

. . . [Lisa Stewart a]t thirty-three, and with a five-year-old daughter, Emily . . . was diagnosed with breast cancer, which became terminal. She was unable to continue working as a real estate appraiser and lost her income and her health insurance. Her partner of ten years, Lynn, had insurance through her job, but it did not cover Lisa and Emily. Lisa and Lynn live in South Carolina, which does not allow "second-parent" adoption, so Lisa is Emily's only legally recognized parent. When Lisa dies, Emily will receive Social Security survivors' benefits, but Lynn will not.¹⁶³

One might read these stories and think: Marriage is the solution. Had they been married, their rights would have been protected. However, this is precisely the problem many pluralist advocates seek to escape.¹⁶⁴ That is, the notion that only cognizable kinship is marriage, and only through marriage are these families' rights considered worthy of protection. Never mind the fact that these couples share a committed and loving relationship and are economically interdependent; some may not wish to marry nor be forced into the institution of marriage. The

162. Murray, *supra* note 156, at 293, 304 (pointing out that domestic partnerships and civil unions are not thought to be "ends into themselves," but rather as "interim measures," and that the marriage equality movement has undermined the opportunity for a pluralistic model of relationship recognition).

163. POLIKOFF, *supra* note 7, at 1–2.

164. See, e.g., *id.* at 3 ("Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have to* marry to reap specific and unique legal benefits. I support the right to marry for same-sex couples . . . [b]ut I oppose discrimination against couples who do not marry . . .").

denial of alternative kinship formation here is accompanied by the denial of public and private benefits similarly afforded to marital couples.¹⁶⁵

The consequence of this incognizability is the reproduction of a system of privileges and disciplinary norms for those inside and outside of marriage.¹⁶⁶ Only those occupying the marital space are economically privileged through tax deductions, tax-free transfer of property, and social acceptability as “normal.” Paradoxically, these benefits serve as a disciplinary tool to conform families into the normative nuclear kinship desired by the state. Similarly, those outside, like single-mother families (who are often blacks and Hispanics),¹⁶⁷ are intensely disciplined through federal assistance programs to form a nuclear family.¹⁶⁸ Their form of kinship is considered illegitimate, abnormal, or almost a societal disease that needs to be remedied. Through marriage equality litigation, their illegitimacy is further reaffirmed and perpetuated. These facts raise issues of fairness and justice, which the marriage equality movement has not properly dealt with.

Consequently, the pursuit of marriage has not made domestic partnership as safe a site for the formation of relational pluralism as Stein suggests. Rather, it has foreclosed this possibility. Whether the benefits of marriage equality outweigh the detriment to relational pluralism or whether relational pluralism can ever be revived might be too speculative to consider at this historical juncture. Critical, however, is that the LGBTQ community must recognize this detrimental effect.¹⁶⁹

Perhaps implicit in Stein’s position is an attempt to reconcile and unify the two opposing camps. This Comment shares this aspiration, but true reconciliation cannot occur without an honest assessment not only of what the LGBTQ community has gained, but also of what it has lost through the marriage equality campaign. Only then can the LGBTQ community understand each other, reconcile our differences, and move toward political unity.

165. Polikoff expands her argument for recognition and rights beyond same-sex couples to nonmarital heterosexual couples, to sisters who have lived with each other all their lives, and to single parent and child. *See id.* at 3–4.

166. *See Warner, supra* note 71, at 123.

167. *See supra* text accompanying notes 94, 97–100.

168. *See, e.g., supra* Part I.C.

169. Murray suggests that reflection on this lost paradigm might enable advocates, legislators, and judges to regain this paradigm and rethink the notion of legible kinship. *See Murray, supra* note 156, at 305.

C. Rethinking the History and Political Commitment to Marriage Equality

Indeed, as the marital advocates point out, the *Baehr*¹⁷⁰ decision created external and internal forces that compelled the majority of the LGBTQ community, including some pluralist advocates, to support the marriage equality movement.¹⁷¹ But one should not deploy this historical fact as a legitimating tool for marriage equality—as some marital advocates seem to do. These supporters do not necessarily defend marriage equality because of the substantial promise of rights, but as a matter of symbolic gesture. That is to say, one must distinguish between various reasons why many in the LGBTQ community support marriage equality.

On one side, many in the LGBTQ community support marriage equality because of the civil rights (such as tax deductions, decisional and visitation rights, and rights to adopt and maintain custody of children) and constitutional rights (for instance, equal protection) it affords. Plus, marriage equality represents the symbolic societal acceptance of their homosexual identity as equal and as valid a human identity as any other identity, be it race, gender, or religion. But there are other LGBTQ individuals who support marriage equality only because of its symbolic representation because they do not wish to lend weight to the homophobic, anti-same-sex marriage establishment. Others support marriage equality even though they never make use of marital rights for themselves (perhaps because some do not wish to marry or bring their partnership into the institution of marriage).¹⁷²

Julie Shapiro, for example, who identifies herself as a pluralist advocate, points out that as marriage became the primary battleground between the pro-LGBTQ force and the anti-LGBTQ force, the position of the pluralist advocates to oppose marriage equality within the LGBTQ movement necessarily became untenable.¹⁷³ Such opposition would align oneself with the animus forces of the anti-LGBTQ establishment seeking to discriminate against and denigrate the LGBTQ community.¹⁷⁴ Many LGBTQ advocates identify the

170. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

171. See *supra* text accompanying note 64.

172. See Judith Butler, *Is Kinship Always Already Heterosexual?*, in *LEFT LEGALISM/LEFT CRITIQUE* 229, 235 (Wendy Brown & Janet Halley eds., 2002).

173. See Julie Shapiro, *Reflections on Complicity*, 8 N.Y.C. L. REV. 657, 657–58, 665 (2005) (explaining that she is aligned with the anti-assimilationist critique of marriage, but because the anti-same-sex marriage campaign questions the very humanity of lesbian and gay people, her position has become unthinkable, nearly impossible).

174. See *id.* at 665; see also Franke, *supra* note 61, at 2698 (describing the pluralist advocates' support for marriage equality as "carrying a brief for marriage whether or not we so wish" (quoting JANET

fear of aligning with the anti-LGBTQ establishment as not only how the LGBTQ community coalesced together for marriage equality, but a justification that marriage equality was and is a path rightly tread.¹⁷⁵ As we rethink post-marriage equality, we must recognize how the movement has not afforded many LGBTQ individuals the rights and liberties they desire and has left many vulnerable segments of the LGBTQ community behind.¹⁷⁶

Importantly, recent Pew Research Center studies show 39 percent of the LGBTQ community believe that “[t]he push for same-sex marriage has taken too much focus away from other issues important to LGBT people.”¹⁷⁷ This is a significant portion of the LGBTQ community that cannot and must not be ignored. This also raises issues about the extent to which marriage equality advocacy has served the entire LGBTQ community.

Further, while marriage equality has extended the choice to marry to same-sex couples, it has not afforded others the similar choice to be part of other legally cognizable forms of kinship.¹⁷⁸ To be fair to the pluralist advocates, their position is neither novel nor implausible. South Africa and Canada provide two iterations of their vision. Enshrined in the South African Constitution is the guaranteed recognition of both civil partnership and marriage.¹⁷⁹ In the landmark case, *Minister of Home Affairs v. Fourie*, the South African Supreme Court overruled a South African statute that limited marriage to only heterosexual couples, and declared that its Constitution was designed to allow “for a degree of legal pluralism under which particular consequences of such marriages would be accepted as part of the law of the land.”¹⁸⁰

HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 17 (2006)).

175. See, e.g., ESKRIDGE & SPEDALE, *supra* note 7, at 20 (stating that the *Baehr* backlash “imposed a united front upon LGBT leaders in support of the gay-liberal demand for formal equality”); NeJaime, *supra* note 5, at 104, 111–12 (proclaiming that *Baehr* cut off the intracommunity marriage debate and forced the LGBTQ community to devote attention and resources to marriage equality); Schacter, *supra* note 85, at 394 (stating that after *Baehr*, the option to continue critiquing marriage equality became “distinctly unpalatable”).

176. To be sure, this argument is not to neglect the actual effect of *Baehr* on the LGBTQ community.

177. PEW RESEARCH CTR., *supra* note 19, at 67 tbl. To be fair, 58 percent affirm that marriage equality should be the top priority. *Id.*

178. See Franke, *supra* note 61, at 2689 (stating that the marriage equality movement has reaffirmed marriage as the central and only institution “by which all other forms of kinship, family, friendship, temporary alliance, and love” are rendered legible and assigned value, thereby crowding out the possibility of other legible and alternative forms of kinship).

179. S. AFR. CONST., 1996; *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) at 66–69 (S. Afr.).

180. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) at 68 (S. Afr.).

Likewise, in Canada, in recommending reform to the institution of marriage, the Law Commission of Canada suggested further recognition of caring and interdependent nonconjugal relationships because “[t]he freedom to choose whether and with whom to form close personal relationships is a fundamental value in free and democratic societies.”¹⁸¹ The Commission further developed a method for determining when a relationship would be legally cognizable by law.¹⁸² And their method has been applied to many Canadian laws.¹⁸³

To be sure, Canada’s approach should not be read as an attempt to minimize the importance of the marriage equality movement. Rather, it is a call for cautious jubilation in the aftermath of *Obergefell*¹⁸⁴ and a realization of the incompleteness of marriage equality. This recognition will help the LGBTQ community write the next chapter in its quest for full rights and equality with a broader and more inclusive base of political support. Nor should this recognition be read as an articulation of a specific pluralist vision. Instead, this Comment seeks to examine closely the promises and misses of marriage equality—a step necessary before the LGBTQ community can debate and contemplate its next political advocacy.

III. INTEREST CONVERGENCE AND THE TRIUMPH OF MARRIAGE EQUALITY

This Part argues that the triumph of marital advocates over the pluralist advocates explains the success of the LGBTQ movement and the result in *Obergefell*.¹⁸⁵ In particular, this Part argues that marriage equality created a space in which the interests of the sexual minorities¹⁸⁶ and majority converged to make same-sex marriage possible. This argument adds another dimension to the common belief that it was cultural shift and the moral weight of equality that catalyzed the success of marriage equality and *Obergefell*. This Part argues as follows.

181. LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 17 (2001), http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf [<https://perma.cc/UNQ7-NFUM>]. In the United States, in an influential article Grace Ganz Blumberg suggested that same-sex couples would be better served in a legal regime that “recognizes both registered cohabitation and stable unregistered cohabitation.” Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1555 (2004).

182. POLIKOFF, *supra* note 7, at 125.

183. *Id.* at 126.

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

185. *Id.*

186. The purpose is to better juxtapose and illuminate the minority-majority relationship that the interest-convergence theory seeks to show.

Part III.A outlines Derrick Bell's interest-convergence theory. Parts III.B, C, and D explain the three registers at which the sexual minorities' and majority's interests converge: institutional, economical, and ideological. Finally, Part IV demonstrates how *Obergefell* is illustrative of the interest convergence between the sexual minorities and majority.

A. Derrick Bell's Interest-Convergence Theory

In his seminal piece, *Brown v. Board of Education and the Interest-Convergence Dilemma*, Derrick Bell underscores that there is more to *Brown* than meets the eye, that is, the court was not merely taking a moral position ahead of the mainstream against segregation.¹⁸⁷ He provides the interest-convergence theory as a framework for understanding the ascendance of *Brown*.¹⁸⁸ Bell's interest convergence principle provides:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks . . . Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.¹⁸⁹

Here, Bell emphasizes two points. First, the interests of the white majority and racial minorities in desegregation converged because of the benefits attached thereto. Second, at the very least, the interest of racial minorities in desegregation did not harm the white majority's interest. Applying this principle, Bell goes on to catalog three points of whites' interest convergence with racial minorities that made *Brown* possible. First, the decision provided an immediate international credibility for America's freedom and democracy in a titanic struggle against communism and totalitarianism, especially among the Third World peoples.¹⁹⁰ Second, *Brown* authenticated and afforded real meaning for (African) Americans of the maxims of equality and freedom that were fought for so fiercely abroad

187. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 533 (1980).

188. *Id.*

189. *Id.* at 523.

190. *Id.* at 524.

during World War II.¹⁹¹ Third, for many whites, desegregation was necessary to propel the South from a rural, plantation society toward industrialization.¹⁹²

To be clear, I am relying on Bell's theory to make a descriptive argument here, not a prescriptive one.¹⁹³ That is to say, I am merely explaining how and why the marriage equality movement has been so successful and so quickly. Importantly, I am not suggesting that interest convergence is a strategy with which subordinated groups pursue liberation and equality. Such a strategy would leave the hierarchical structure unquestioned and unscathed, while further fortifying and consolidating social privileges. Nor am I suggesting that the effect of interest convergence should be omitted from the strategic thinking of civil rights advocates. As to that argument, this Comment is agnostic.

B. Interest Convergence I: Reinforcing and Affirming the Institution of Marriage

The erosion of marriage in the past decades provides a logical impetus for some heterosexual conservatives to back marriage equality as a means to reorient marriage as a central site of social relation—as the foundation of society. According to the Pew Research Center, Americans are more likely than ever to cohabitate, divorce, marry late, or not marry at all.¹⁹⁴ In 1970, 84 percent of U.S.-born individuals ages thirty to forty-four were married, compared to only 60 percent in 2007.¹⁹⁵ Moreover, the most recent data in 2011 shows that the rate of people marrying is 6.8 per 1000, while the rate of divorce is 3.6 per 1000: a roughly 50 percent divorce rate.¹⁹⁶

Against this backdrop, many heterosexual conservatives coalesced around marriage equality as a means to reinvigorate and reaffirm the centrality of marriage in society.¹⁹⁷ For instance, in 2010, Theodore Olson, a lifelong straight

191. *Id.*

192. *Id.* at 525.

193. *But see* Kenji Yoshino, *Marriage Partners*, N.Y. TIMES (June 1, 2008), <http://www.nytimes.com/2008/06/01/magazine/01wwln-idealab-t.html> [<https://perma.cc/8X5Y-7SYZ>] (arguing that the gay marriage movement should employ Bell's interest-convergence principle to show heterosexuals that "marriage [is] a universal right that belongs to all human beings, that would, indeed, be a convergence of interest").

194. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 5 (2010), <http://www.pewsocialtrends.org/2010/01/19/women-men-and-the-new-economics-of-marriage> [<https://perma.cc/4S2L-C4CT>].

195. *Id.* at 19.

196. *Marriage and Divorce*, CTRS. DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> [<https://perma.cc/4LEE-5DQC>] (last updated June 19, 2014).

197. *See, e.g.*, David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>

Republican and one of the chief lawyers in *Hollingsworth v. Perry*,¹⁹⁸ wrote an article, *The Conservative Case for Gay Marriage*, in *Newsweek*.¹⁹⁹ Olson's arguments for gay marriage exemplify the interest convergence of heterosexuals with homosexuals: namely, the promotion of the normative nuclear family inside marriage as the only legally cognizable form of kinship. In the article, Olson insists that the values the gay marriage movement promotes align with the "values conservatives prize."²⁰⁰ In particular, marriage, whether gay or straight, metamorphoses one beyond one's selfish needs into a model citizen who provides, shares, and promotes benefits for his/her family and society.²⁰¹ Further, gay marriage, like traditional straight marriage, shares the values of "strong families" and "lasting bond[s]" that are the foundation of society.²⁰² In effect, same-sex marriage re-sanctifies and re-centers marriage as the epitome of kinship—to the negation of other forms of kinship—and the supposed foundation that binds society together.

A recent amicus brief, signed by over three hundred Republicans, to the Sixth Circuit in *DeBoer v. Snyder*²⁰³ supporting same-sex marriage demonstrates the significance of this institutional commitment to marriage and the interest convergence between marriage equality advocates and heterosexual conservatives.²⁰⁴ Prominent among the signatories include: Senators Susan Collins and Mark Kirk, Massachusetts Governor Charlie Baker, former Utah Governor Jon Huntsman, former New York City Mayor Rudy Giuliani, retired General Stanley McChrystal, and billionaire GOP mega-donor David Koch.²⁰⁵ Similar to Olson, the amicus brief argues that "equal access to civil marriage promotes the conservative values of stability, mutual support, and mutual obligation."²⁰⁶

[<https://perma.cc/FTQ9-K724>]. David Blankenhorn, founder and president of the Institute for American Values, states that he hopes same-sex marriage will "help to lead heterosexual America to a broader and more positive recommitment to marriage as an institution."

198. 133 S. Ct. 2652 (2013).

199. Theodore B. Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK (Jan. 8, 2010, 7:00 PM), <http://www.newsweek.com/conservative-case-gay-marriage-70923> [<https://perma.cc/JW7N-5FLA>].

200. *Id.*

201. *Id.*

202. *Id.*

203. 772 F.3d 388 (6th Cir. 2014).

204. See Zeke J. Miller, *More Than 300 Republicans Call on Supreme Court to Recognize Gay Marriage Nationally*, TIME (Mar. 5, 2015, 8:16 PM), <http://time.com/3734626/gay-marriage-supreme-court-republicans> [<https://perma.cc/555G-PM46>].

205. *Id.*

206. Brief of Amici Curiae Kenneth B. Mehlman et al. Supporting Petitioners at 6–7, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (No. 14–556), <https://www.scribd.com/doc/257815641/Kenneth-B-Mehlman-Et-Al> [<https://perma.cc/225L-Y9EU>] (capitalization modified).

Indeed, data by the Pew Research Center show that over the past ten years, conservatives' support for same-sex marriage has grown from 18 percent in 2001 to 29 percent in 2016.²⁰⁷ To be sure, the scope of this argument encompasses only those heterosexual conservatives who are supporting marriage equality—not every heterosexual conservative.

Furthermore, even if some conservatives within the sexual majority reject any interest convergence with the marriage equality movement, many at least grant that same-sex marriage will not harm their cherished institution of marriage.²⁰⁸ As John Yoo and Jesse Choper, both conservative scholars, argue, they are not aware of any empirical studies demonstrating “any tangible, direct harm to anyone either in the [opposite sex] marriage or outside of it.”²⁰⁹ They also look to Massachusetts and Connecticut, both of which ratified same-sex marriage in 2003, and assert that they are unaware of any showing that the rate of marriage has declined in either state because of marriage equality.²¹⁰ Similarly, numerous recent court cases plainly reject any legally cognizable harm marriage equality has on heterosexual couples.²¹¹ In sum, the lack of demonstrable harms against heterosexuals' interests enables them to, if not support, at least not oppose the realization of marriage equality.

Recent data supports this institutional interest convergence to the extent that same-sex married couples have a lower divorce rate. The Williams Institute found that same-sex couples dissolve their legal relationships (marriage, civil union, domestic partnership) at an average of 1.1 percent annually, which is lower

207. *Changing Attitudes on Gay Marriage: Attitudes on Same-Sex Marriage by Political Ideology*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage> [<https://perma.cc/KD2H-C4F5>].

208. See Jesse H. Choper & John C. Yoo, *Can the Government Prohibit Gay Marriage?*, 50 S. TEX. L. REV. 15, 34 (2008); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1197 (2005) (“Channeling sex and romantic love into long-term monogamous relationships is good for society. It reduces sexually transmitted disease. It provides a more stable home for children Almost all the reasons to value opposite-sex marriage seem to me to apply to same-sex marriage”); Olson, *supra* note 199 (“Another argument, vaguer and even less persuasive, is that gay marriage somehow does harm to heterosexual marriage. I have yet to meet anyone who can explain to me what this means. In what way would allowing same-sex partners to marry diminish the marriages of heterosexual couples?”).

209. Choper & Yoo, *supra* note 208.

210. *Id.*

211. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 667–68 (7th Cir. 2014) (determining that being offended by same-sex marriage is not a legally cognizable consideration to justify its prohibition); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014) (“Those who enter opposite-sex marriages are harmed not at all when others, including these plaintiffs, are given the liberty to choose their own life partners and are shown the respect that comes with formal marriage.”).

compared to opposite-sex couples' rate of 2 percent.²¹² But the data are incomplete because they are limited to only a few states and were collected prior to 2014.²¹³ Nonetheless, these early data buttresses the heterosexual conservatives' position that same-sex marriage does indeed reify and affirm the institution of marriage.

C. Interest Convergence II: The Economic Benefits

The economic benefits of same-sex marriage are also a major impetus behind its widespread acceptance by the sexual majority. In a news conference in 2012, New York City Mayor, Michael Bloomberg, a heterosexual Republican-turned-Independent, declared that “[m]arriage equality . . . has also helped to create jobs and support our [New York City] economy.”²¹⁴ Specifically, “New York City reaped \$259 million of economic benefits from same-sex marriages in the first year of the law allowing the practice”²¹⁵ The economic benefits not only align with heterosexuals' economic interests, but incentivize them to support marriage equality.

The economic benefits of same-sex marriage played a key role in the debate between supporters and opponents in the past decades.²¹⁶ In the mid-1990s, when the same-sex marriage issue was debated in Hawaii—which was the first state to have access to same-sex marriage by a state supreme court's ruling²¹⁷—supporters predicted that legalizing same-sex marriage would add \$440 million in additional state and county tax revenues.²¹⁸ On the other side, the sexual majority

212. M.V. LEE BADGETT & CHRISTY MALLORY, WILLIAMS INST., PATTERNS OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES: DIVORCE AND TERMINATIONS (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Mallory-Divorce-Terminations-Dec-2014.pdf> [<https://perma.cc/EUM8-RJPT>].

213. *Id.*

214. Henry Goldman, *Gay Marriage Produced \$259 Million for New York City Economy*, BLOOMBERG (July 24, 2012, 11:02 AM), <http://www.bloomberg.com/news/articles/2012-07-24/gay-marriage-produced-259-million-for-new-york-city-economy-1> [<https://perma.cc/YNY7-A7CL>].

215. *Id.*

216. Whether the economic data might be inconsistent is not relevant to the argument here. What is relevant is that the economic argument continues to be made in favor of supporting the marriage equality movement.

217. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1252 (2010).

218. See M.V. Lee Badgett et al., *Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-Sex Couples in New Jersey*, 4 RUTGERS J.L. & PUB. POL'Y 8, 9 (2006) (citing Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 771 (1995)); see also *How Will Same-Sex Marriage Affect Hawaii's Tourism Industry?: Hearing Before the Commission on Sexual Orientation and the Law*, 1995 Leg., 18th Sess. (Haw. 1995) (testimony of Sumner Lacroix & James Mak) (predicting that same-sex couples would travel to Hawaii to wed and bring in roughly \$200 million in the state's annual revenues).

was concerned over the potential cost of legalizing same-sex marriage. During the debate over the Defense of Marriage Act (DOMA), Senator Robert Byrd of West Virginia forcefully pointed to the potential adverse effect of same-sex marriage on the federal budget.²¹⁹ Likewise, when California was considering Assembly Bill (AB) 205 in 2003, a bill that would give domestic partnership to same-sex couples, Republicans and moderate Democrats were concerned that the fiscal cost would be “too much.”²²⁰ As a result, Governor Gray Davis signed AB 205 into law with the stipulation that domestic partners could not file state income tax returns together, and that their earned income would not be considered community property of the couple.²²¹

In response, pro-marriage equality groups, such as the Williams Institute, launched studies to demonstrate how same-sex marriage legalization would produce net positive economic benefits for their heterosexual counterparts.²²² For instance, one study shows that same-sex marriage recognition would reduce public benefit expenditures by \$50 million in California.²²³

Moreover, the mainstream news media has consistently promoted the economic benefits of legalizing same-sex marriage. For instance, in 2004, *Forbes* published an article touting the \$16.8 billion in lucrative financial gains from same-sex marriage weddings.²²⁴ Likewise, other major news outlets have

219. Senator Robert Byrd stated:

Moreover, I urge my colleagues to think of the potential cost involved here. How much is it going to cost the Federal Government if the definition of “spouse” is changed? It is not a matter of irrelevancy at all. It is not a matter of attacking anyone’s personal beliefs or personal activity. That is not my purpose here. What is the added cost in Medicare and Medicaid benefits if a new meaning is suddenly given to these terms?

142 CONG. REC. 22,448 (1996) (statement of Sen. Byrd).

220. Editorial, *No More Fiscal Excuse to Cheat Gay Couples*, GAY & LESBIAN TIMES (May 29, 2003).

221. See M.V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California’s Budget*, 16 STAN. L. & POL’Y REV. 197, 200 (2005).

222. See *id.* at 201. But see *supra* note 216 and accompanying text.

223. Badgett & Sears, *supra* note 221, at 209–10.

224. Aude Lagorce, *The Gay-Marriage Windfall: \$16.8 Billion*, FORBES (Apr. 5, 2004, 6:00 AM), http://www.forbes.com/2004/04/05/cx_al_0405gaymarriage.html [https://perma.cc/4FSG-HY Y5]. *Forbes* similarly made the argument again in 2009 when the California Supreme Court struck down Proposition 8 as unconstitutional, arguing same-sex marriage weddings would generate \$9.5 billion in economic activities. Miriam Marcus, *The \$9.5 Billion Gay Marriage Windfall*, FORBES (June 6, 2009, 6:00 AM), <http://www.forbes.com/2009/06/15/same-sex-marriage-entrepreneurs-finance-windfall.html> [https://perma.cc/8DDL-JNRM]. Recent data show that in 2013, *Forbes.com* had 50 million unique online visitors and 10 million mobile visitors per month. This demonstrates the reach and readership of *Forbes.com*. Lewis DVorkin, *Inside Forbes: With 50 Million Visitors, Here’s What’s Next for Our Editorial and Ad Models*, FORBES (Aug. 5, 2013, 10:07 AM), <http://www.forbes.com/sites/lewisdvorkin/2013/08/05/inside-forbes-with-50-million-visitors-heres-whats-next-for-our-editorial-and-ad-models>.

proclaimed, and still proclaim, these economic benefits. In 2014, *U.S. News and World Report* acknowledged that same-sex weddings would generate additional millions or billions to the \$51 billion wedding industry that employs nearly 800,000 people.²²⁵ In 2013, *Bloomberg Business* similarly reported that same-sex marriage initiatives have been a “great business strategy” for wedding-related businesses.²²⁶ In 2008, *CBS News* estimated that same-sex weddings would generate \$684 million in economic activities.²²⁷

The widespread circulation of the economic benefit argument in favor of same-sex marriage is likely to have persuaded the sexual majority to support same-sex marriage or at least not oppose it.²²⁸ In short, heterosexuals

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225. Katherine Peralta, *Open for Business: Expanded Gay Marriage Hits Wedding Industry*, U.S. NEWS & WORLD REP. (Oct. 10, 2014, 5:23 PM), <http://www.usnews.com/news/articles/2014/10/10/open-for-business-expanded-gay-marriage-hits-wedding-industry> [https://perma.cc/S5UP-UDVN].
226. Jessica Grose, *The \$51 Billion Wedding Industry Toasts a Post-DOMA Bump*, BLOOMBERG (June 28, 2013, 11:41 AM), <http://www.bloomberg.com/bw/articles/2013-06-28/the-51-billion-wedding-industry-toasts-a-post-doma-bump> [https://perma.cc/F3XT-HRZS].
227. *Study: Gay Marriage Good for Economy*, CBS NEWS (June 9, 2008, 6:53 PM), <http://www.usnews.com/news/articles/2014/10/10/open-for-business-expanded-gay-marriage-hits-wedding-industry> [https://perma.cc/Z8EY-WAJG]. The number of news reports on the economic benefits of same-sex marriage is extensive and goes beyond the nonexhaustive list noted here.
228. See, e.g., Associated Press, *Study: Gay Marriages Could Help Arkansas Economy*, WASH. TIMES (Nov. 28, 2014), <http://www.washingtontimes.com/news/2014/nov/28/study-gay-marriages-could-help-arkansas-economy> [https://perma.cc/FJ4R-W25M] (stating that the legalization of same-sex marriage could benefit Arkansas’s economy by \$24 million and Oklahoma’s by \$32.8 million); Diane Cardwell, *Manhattan: Economic Benefits of Same-Sex Marriage*, N.Y. TIMES (June 6, 2007), <http://www.nytimes.com/2007/06/06/nyregion/06mbrfs-gay.html> [https://perma.cc/8JPB-WML7] (claiming the legalization of same-sex marriage would result in \$142 million in economic benefits for New York City over three years); Peter Henderson, *Economics, Civil Rights Mix in Gay Marriage Trial*, REUTERS (Jan. 14, 2010, 6:15 PM), <http://www.reuters.com/article/2010/01/14/us-gaymarriage-idUSTRE60D5O720100114> [https://perma.cc/LU4P-NYTC] (detailing nearly \$38 million in financial gains to San Francisco due to the legalization of same-sex marriage); Christopher Palmeri & William Selway, *New York’s Same-Sex Marriage Law May Provide Economic Boon*, BLOOMBERG (June 28, 2011, 6:24 AM), <http://www.bloomberg.com/news/articles/2011-06-28/new-york-readies-for-same-sex-wedding-surge-as-state-makes-unions-legal> [https://perma.cc/8XKJ-STYY] (forwarding the claim that there is a causal link between legal recognition of same-sex marriage and the economic boon that arises afterward in the wedding industry); Mollie Reilly, *Marriage Equality Boosted Iowa Economy by \$12 Million*, HUFFINGTON POST: QUEER VOICES (Dec. 7, 2011, 2:10 PM), http://www.huffingtonpost.com/2011/12/07/marriage-equality-iowa-economy-12-million_n_1133966.html [https://perma.cc/D657-3KH4] (finding that same-sex weddings added between \$12 and \$13 million to the Iowa economy in 2009 and 2010); Justin Wolfers & Betsey Stevenson, *The Economic Case for Same-Sex Marriage*, BLOOMBERG (May 14, 2012, 7:00 PM), <http://www.bloomberg.com/news/articles/2012-05-14/the-economic-case-for-same-sex-marriage> [https://perma.cc/539R-K8PQ]. Some contest the use of economic language in favor of same-sex marriage, however, for fear of the inverse proportional harm of such argument to the moral integrity of the equity argument inherent in the same-sex marriage movement. See also Karin Klein, Opinion, *Stop*

believe that same-sex marriage would benefit them by increasing tax revenues and business activities and decreasing public spending; even if the heterosexual majority deems the economic benefits claim hyperbolic or unreliable, it at least concedes that same-sex marriage would not induce economic harms to heterosexuals.

D. Interest Convergence III: The Ideological Reification of Functionalism in Family Law

For the liberal sexual majority, the marriage equality movement not only aligns with but also furthers the move toward a more functional conception of marriage and away from a formal and status-based conception of marriage.²²⁹ By formal, I mean the recognition of marriage only by legal documentation, never mind the fact that people may love each other, share a residence together, and support each other economically.²³⁰ By status-based, I mean marital recognition by the state only when the couple satisfies the strict definition of spouse or family, such as one man and one woman,²³¹ whose purpose is procreation.²³² By contrast,

Cheapening the Gay-Marriage Debate With Talk of the Financial Up Sides, L.A. TIMES (July 25, 2014, 1:40 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-texas-economy-gay-marriage-20140725-story.html> [<https://perma.cc/5EZT-85Z4>] (criticizing the economic argument and instead favoring a refocusing on the moral argument); Chris Welch, *Economy Enters Same-Sex Marriage Debate*, CNN (Mar. 6, 2009, 7:53 AM), http://www.cnn.com/2009/POLITICS/03/06/same.sex.marriage.economy/index.html?eref=rss_us [<https://perma.cc/4KT8-D38Y>] (emphasizing the significance of the economic benefit debate of same-sex marriage at the height of the Great Recession).

229. Grace Blumberg suggests that this formal conception of family law and slowness in recognizing same-sex relationships can be attributed to “American Puritanism or resurgent religious fundamentalism.” Blumberg, *supra* note 181, at 1557.
230. *See id.* at 1577–78 (pointing out that the legal recognition of conjugal relationships in a highly formal manner requires the necessary legal documentation); *see also, e.g.*, *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 893, 901, 902 (Ct. App. 1993) (rejecting plaintiff’s spousal support claim against her partner, even though they lived together for twenty-one years, had two children together, and held themselves out as husband and wife to the Internal Revenue Service, their insurers, their bankers, and in numerous real estate transactions, only because they were unmarried cohabitants under state law).
231. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 34, 41 (2011) (pointing out that marriage has a civil status of one man and one woman and was founded on the distinction of sex); *see also* *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2021–22 (2003) (pointing to the fact that “courts in many jurisdictions have embraced a functional definition of family that looks to the roles individuals have assumed rather than to whether those individuals conform to strict legal definitions of ‘spouse’ or ‘family member’”).
232. *See* Blumberg, *supra* note 181, at 1556, 1577, 1600–01 (arguing that marriage in the United States has historically been exclusive to the status of one man and one woman because they are inherently procreative, as compared to same-sex couples); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 7 (2010).

functionalism emphasizes the roles family members play, the extent of their familial association, and economic and emotional interdependence.²³³

In the past decades, the liberal sexual majority has assaulted and successfully transfigured marriage and family law, from formal and status-based into a more functional body of law.²³⁴ This effectively paved the way for the marriage equality movement to pursue same-sex recognition and further functionalize the institution of marriage.²³⁵ Beginning in the 1970s, legal feminists²³⁶ successfully launched an insurgency against the “male domination and female subordination” inherent in family law.²³⁷ By the 1990s, family law had embraced “many (rather than single) functions.”²³⁸

This functionalist conception is reflected in *Marvin v. Marvin*, a California Supreme Court case in 1976. In *Marvin*, the court rejected the unmarried status of two cohabitants as a bar against enforcing their contract to divide their properties, and instead held that the parties were entitled to “reasonable expectations . . . [of their] nonmarital relationship.”²³⁹ The court further declared that absent a

233. See Blumberg, *supra* note 181, at 1595.

234. See *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888) (stating that marriage is “more than a mere contract” but an institution in which “the public is deeply interested,” and that “it is the foundation of the family and of society, without which there would be neither civilization nor progress”); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 190–91, 193, 261–62, 281 (2011) (“The feminists launched an assault on FLE [(‘family law exceptionalism’)] that was as cogent, as intense, and as serious as the one waged by the social-purpose functionalists and real realists; and like them, they successfully reoriented the field.”).

235. See NeJaime, *supra* note 5, 94–96, 126, 165 (showing that the argument that same-sex couples are functionally the same as opposite-sex couples arose against the backdrop of broader, multiple movements from the 1960s and 1970s); Halley, *supra* note 234, at 254–61, 289, 292–93 (“At the moment, though, my strong hunch is that conservative trends coursing through both feminist and same-sex-marriage culture-wars struggles over the field suggest that attacking FLE is a good leftist move and can produce significant advances in progressive/leftist analyses of the roles of the family and its law in the distribution of human welfare.”).

236. This should not be read as an unjustified and depreciatory exclusion of the contribution of queer theorists and other scholars to the functionalist movement. Rather, for the purposes of this Part, it is economical and simpler to narrate only around the legal feminists, who were the vanguards of this movement.

237. See Halley, *supra* note 234, at 264–65.

238. See *id.* at 281 & n.360.

239. *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). The court also noted that the parties, Janet and Paul Cary, had lived together for more than eight years; held themselves out to be husband and wife to friends and family; and together reared four children, purchased a home and other property, obtained credit, and filed joint income tax returns. *Id.* at 110. Further, Justice Torbriner cited that at that time (1970s), eight times more couples were cohabitating together unmarried than ten years prior. *Id.* at 109 n.1; see also *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (holding that it was unconstitutional for Louisiana to deny equal recovery rights for workmen’s compensation to dependent children born from a nonmarital relationship); *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994) (holding that unmarried cohabitating couples “should be afforded the protections of bystander liability for the negligent infliction of emotional injury”).

formal expressed agreement, courts may inquire into the conduct of the parties in order to determine an implied agreement or their tacit understanding.²⁴⁰ Thus, in one fell swoop, the court dispensed with the necessary requirements of status and formality and proclaimed a new, more functional analysis of conjugal relationships. *Marvin* marked a critical juncture in the development of family law. The case has been cited by approximately two hundred court decisions and three hundred law review articles.²⁴¹ As a result of *Marvin*'s persuasive authority, Washington and Nevada courts have treated some nonmarital relationships as marital for the purpose of property claims.²⁴² Moreover, most states' courts enforce express agreements outside of marriage and recognize some equitable claims between unmarried couples.²⁴³

The marriage equality movement not only adopted, but furthered this functional conception of marriage. Particularly, the marriage equality movement argues that same-sex couples are the functional equivalent of heterosexual couples; therefore, same-sex couples should be afforded the same marital right. For instance, in *Hollingsworth v. Perry*, the respondents contested the procreation prerequisite of the traditional status conception of marriage.²⁴⁴ Instead, they insisted that same-sex couples, like their heterosexual counterparts, form a household based on their emotional commitment to each other and join in an economic partnership in support of one another and any dependents.²⁴⁵ Likewise, Lambda Legal,²⁴⁶ in *Lewis v. Harris*, and Gay & Lesbian Advocates & Defenders (GLAD),²⁴⁷ in *Goodridge v. Department of Public Health*, argued that same-sex couples are functionally equivalent to their straight counterparts in their mutual love and commitment to a long-term relationship and obligation to be faithful. Thus, marriage equality advocates' justification for same-sex marriage furthers heterosexual liberals' ideological conception of family law.

240. *Marvin*, 557 P.2d at 110.

241. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1382–83 (2001).

242. *Id.* at 1383.

243. *Id.*

244. See Brief of Respondent at 40–41, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (arguing that marriage is more than procreation, that denying same-sex couples the right to marry hurts their children, and that it is an untenable rationale that denying same-sex marriage would make opposite-sex couples more responsible in their procreative activity).

245. See *id.* at 42–43.

246. See Reply Brief of Plaintiffs-Appellants at 2–3, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-2244-03T5) (claiming that committed same-sex couples are equivalent to heterosexual couples in essential respects, such as love and commitment).

247. See Plaintiffs' Motion for Summary Judgment at 22–23, 24–25, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. 01-1647-A) (emphasizing the mutual emotional support, obligation of faithfulness, long-term relationship—the same functional equivalents—the same-sex couples share with other heterosexual couples).

IV. A NEW READING OF *OBERGEFELL*

There are two ways of reading *Obergefell*.²⁴⁸ A common reading of *Obergefell* is that it is a triumph of morality and equality.²⁴⁹ This Part seeks to complicate this reading by introducing an alternative reading. In making marriage equally accessible to same-sex couples as straight couples, the Court essentially reaffirms the supremacy of marriage as the only legal kind of kinship formation. As shown by the pluralist advocates, this has real gender, race, and class implications.²⁵⁰ Correspondingly, *Obergefell* is not merely a result of changing morality, but a recognition of the interest convergence between the sexual minorities and majority.

A. *Obergefell* as Marital Supremacy

It could not be clearer that the Court views marriage as the supreme form of kinship-making. Justice Anthony Kennedy's opinion in *Obergefell* is replete with the romanticized ideal of marriage and its centrality to society. The Court proclaims that "this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order," that "[n]o union is more profound than marriage," and that "[r]ising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."²⁵¹ Aristotle's conception of marriage as the foundation upon which society is built is clearly reflected here, as distinct from Engels or Okin.²⁵²

248. *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

249. Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER SOC. POL'Y & L. 1, 2 (2015) (arguing that *Obergefell*, in a proper context, is "journey for greater inclusion of and protection for gay and lesbian persons"); *Our Victories: Marriage Equality Sweeps the Nation*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/hrc-story/our-victories> [https://perma.cc/MEQ5-GYSZ] (referring to *Obergefell*, the HRC declares, "love won, and the Supreme Court of the United States ruled to stand on the right side of history"); *Victory! In Landmark Ruling Supreme Court Strikes Down Bans on Marriage for Same-Sex Couples*, LAMBDA LEGAL (June 26, 2015), http://www.lambdalegal.org/blog/20150626_henry-victory [https://perma.cc/2J7A-V2E5] ("What a glorious day for equality, justice and love. For the first time, LGBT people in America will live in a nation that respects their love and their families.").

250. *See supra* Part I.C.

251. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 2608, 2594 (2015).

252. *See supra* Introduction. Echoing Alexis de Tocqueville, the U.S. Supreme Court in *Manyard v. Hill*, 125 U.S. 190, 211, 213 (1888), says marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress" and "a great public institution, giving character to our whole civil polity." *Obergefell*, 135 S. Ct. at 2601. *But see* Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 134 (2015) ("The extension of marriage rights to same-sex couples reinforces and entrenches the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry.").

The Court further asserts that children of unmarried couples face “the stigma of knowing their families are somehow lesser” and risk growing up in “a more difficult and uncertain family life.”²⁵³ By implication, children growing up with a single parent or other types of kinship, such as with grandparents, would suffer, stigmatically, far worse. The Court also finds that same-sex couples seeking to marry are entitled to “equal dignity in the eyes of the law.”²⁵⁴ This naturally raises the question: How much dignity is afforded to couples who wish to form a non-marital, alternative form of kinship?²⁵⁵ Importantly, it is one thing to justify same-sex marriage on the basis of equal access and liberty to be with another. Here, however, the Court is employing the logic of kinship hierarchy and marital supremacy to justify marriage equality. As explained in Part I.C, this hierarchy of kinship, particularly between illegitimate and legitimate family, is arbitrary and serves to perpetuate racial, gender, and class inequality.²⁵⁶

The privileges inherent in marriage are not lost to the Court, but rather confirmed by it. The Court recognized that the exclusion of same-sex couples from the institution of marriage denied them a “constellation of benefits that the States have linked to marriage.”²⁵⁷ As the *Windsor* Court made clear, there are over one thousand state and federal statutes and regulations endowing marital couples with government benefits relating to social security, housing, taxes, criminal sanctions, copyright, and veterans’ benefits.²⁵⁸ *Obergefell* recognizes that same-sex couples seek to join the institution of marriage in order to enjoy the privileges and responsibilities it affords.²⁵⁹ Thus, in reinforcing marriage as the only space in which government privileges are accessible, the Court ensures that alternative forms of kinship are excluded, even if they are functionally the same as marriage.

B. *Obergefell* as a Culmination of Interest Convergence

In reading *Obergefell*, it is important to see it not only as a moral triumph, but also as a culmination of an interest convergence between the sexual majority

253. *Obergefell*, 135 S. Ct. at 2590.

254. *Id.* at 2608.

255. See Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 111 (2015) (positing that *Obergefell* Court’s logic “raises the obvious question of how much dignity should attach to individuals who choose not to marry”).

256. See Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 5 CALIF. L. REV. 1277, 1283 (2015) (“In a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage’s ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy.”).

257. *Obergefell*, 135 S. Ct. at 2590.

258. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

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

and minorities. In light of the decline in marriage over the past decades,²⁶⁰ *Obergefell* serves to reinvigorate and strengthen a waning institution of marriage. The Court asserts that same-sex couples are not seeking to denigrate marriage, but rather join it.²⁶¹ In the same way marital coverture was extinguished and women were given equal rights and dignity in marriage, the inclusion of same-sex couples in the institution of marriage would strengthen, not weaken, it.²⁶² Members of the conservative majority who support marriage equality, like Ted Olson, share this reasoning. At the very least, the Court here accepts that same-sex marriage does not harm the institution of marriage.

Underlying the dissent's reasoning in *Obergefell* is a status-based conception of marriage—that is, between a man and a woman.²⁶³ In response, Justice Kennedy employs the liberal majority's functional conception to justify the Court's position. The Court declares: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. . . . [Marriage] offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."²⁶⁴ Here, Justice Kennedy is pointing to how same-sex couples are functionally equivalent to straight couples in that they seek companionship, reciprocal support, and freedom to express their love.²⁶⁵ Thus, *Obergefell* was made possible by the aligned interests of both the liberal majority and sexual minorities in expanding and affirming the functional conception of marriage.

CONCLUSION

Indeed, *Obergefell*²⁶⁶ is a watershed moment in U.S. civil rights history and LGBTQ history in particular. It is critical, however, to fit *Obergefell* into a long historical debate over the legal formation of kinship, stretching back to Aristotle, Locke, Engels, and Okin. A turning point in this long debate was the emergence of the marital advocates as the victors in the LGBTQ intracommunity debate, which paved the way for the inclusion of same-sex couples into the institution of

260. In 2014, only 46 percent of households are from the first marriage, as compared to 73 percent in 1960. PEW RESEARCH CTR., PARENTING IN AMERICA 15, 15 tbl. (2015), <http://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today> [<https://perma.cc/QX89-4RV2>].

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

262. *Id.* at 2595–96.

263. *Id.* at 2613–14 (Roberts, C.J., dissenting).

264. *Id.* at 2599–600.

265. Similarly, in the Petitioners' Brief, the *Obergefell* plaintiffs assert that they seek marriage in order to "reflect their life-long commitment essential to their 'pursuit of happiness.'" Brief for Petitioners at 34, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (No. 14-556).

266. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 2608, 2594 (2015).

marriage. *Obergefell* is another turning point that cemented the supremacy of marriage as the central site of legal kinship formation through the incorporation of same-sex couples into the institution of marriage. *Obergefell* was made possible by the interest convergence of the sexual majority and minorities in reifying the waning institution of marriage, the economic benefits same-sex marriage carries, and the ideological expansion of a functional conception of marriage.

Now that marriage equality is realized, the LGBTQ community may enter a post-gay era. Similar to post-racialism,²⁶⁷ post-gay is a retreat of the recognition of LGBTQ subordination. This post-gay era raises concerns as to whether the LGBTQ community can succeed in its next political project to achieve greater equality. If reflecting on marriage equality taught us anything, it is that the endeavor is neither inclusive nor considerate of other marginalized groups within the LGBTQ community.²⁶⁸

Professor Kimberlé Crenshaw's theory of intersectionality may provide some guidance. Professor Crenshaw uses intersectionality to critique minority groups' politics for being entrenched in the narrative of the most privileged subgroup members, thereby distorting and erasing the struggles of others with intersectional identities.²⁶⁹ She urges scholars and advocates to conceptualize minorities' struggles and politics through intersectionality in order to avoid erasure and enable group unity.²⁷⁰ Therefore, it is critical now to conceptualize the LGBTQ political struggle not merely through the context of employment discrimination and religious accommodation, but also through

267. Post-racialism is the retreat from the recognition of racial identity as a central site of racial subordination. It is a transfiguration of colorblind ideology in light of the Obama presidency. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1592 (2009). The theory is far more complex, but for the purposes of this Comment, it is not necessary to provide an expansive description of it. See DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 525–27 (1995) (“Racism undoubtedly exists, but it no longer has the power to thwart blacks or any other group in achieving their economic, political, and social aspirations. . . . Racism cannot explain most of the contemporary hardships faced by African Americans, even if some of them had their historical roots in oppression. . . . Even if racism were to disappear overnight, the worst problems facing black America would persist.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN. L. REV. 1, 2–3 (1991) (arguing that the constitutional doctrine that “our Constitution is color-blind” perpetuates and fosters racial hierarchy).

268. See *supra* Part II.

269. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989) (critiquing feminist theory for ignoring race and antiracist politics for ignoring women, thereby resulting in both neglecting the struggles of black women).

270. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1299 (1991) (“Rather, intersectionality provides a basis for reconceptualizing race as a coalition between men and women of color.”).

the suffering of transgender people, LGBTQ people of color, and LGBTQ youth who are disproportionately facing homelessness,²⁷¹ to name a few. How effectively the LGBTQ community can come together and conceptualize an inclusive political project is more critical now than ever.

271. Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings From a National Survey of Services Providers Working With Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or at Risk of Becoming Homeless* 3 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf> [<https://perma.cc/F8AE-JGT7>] (finding that approximately 40 percent of youth served by agencies identify as LGBT).