THE YALE LAW JOURNAL ONLINE

DOUGLAS NEJAIME

Windsor's Right to Marry

In this Essay, Professor Douglas NeJaime reads United States v. Windsor, *which technically rested on equal protection grounds, through the lens of the fundamental right to marry. The* Windsor *Court absorbed decades of LGBT rights advocacy by situating same-sex couples within a contemporary model of marriage in which marriage's private welfare function and public recognition dimensions are mutually reinforcing. NeJaime argues that this specific understanding of the right to marry will likely guide the Court's equal protection, rather than substantive due process, analysis when it one day determines the constitutionality of state marriage prohibitions.*

In *United States v. Windsor*,[1] plaintiff Edie Windsor did not assert a claim based on the fundamental right to marry.[2] Instead, her complaint raised one cause of action—an equal protection claim.[3] And though the U.S. Supreme Court's decision in Windsor's favor is sprinkled with elements of federalism and due process, it ultimately rests on equal protection grounds.[4] The majority,

1. 133 S. Ct. 2675 (2013).

2. Windsor did not assert a fundamental-right-to-marry claim because she was already married under New York law.

3. First Amended Complaint at ¶¶ 82-85, Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012) (No. 10 Civ. 8435); *see also Windsor*, 833 F. Supp. 2d at 399 ("Windsor does not argue that DOMA affects the fundamental right to marry.").

4. Justice Kennedy's analysis resonates with the "hybrid equality/liberty claims" that Professor Kenji Yoshino labels "'dignity' claims." Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011). In fact, Justice Kennedy's 2003 opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down criminal prohibitions on same-sex sex, demonstrates that due process and equal protection are entwined in what Professor Laurence Tribe identified as "a legal double helix." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1894, 1898 (2004). Yet while Yoshino and Tribe point toward the way in which the Court does equality work through liberty analysis, I am attending in *Windsor* to the substantive due process dimensions of an equality analysis.

led by Justice Kennedy, struck down Section 3 of the Defense of Marriage Act (DOMA)[5] because it discriminated against same-sex couples in valid state-law marriages, in violation of the equality principles embodied in the Fifth Amendment's Due Process Clause.[6] At first blush, *Windsor* is not a decision that one would situate in the Court's jurisprudence on the fundamental right to marry.

In *Hollingsworth v. Perry*,[7] which the Court considered alongside *Windsor*, same-sex couples argued that Proposition 8, California's marriage ban, constituted both an equal protection violation and a deprivation of the fundamental right to marry.[8] The district court had credited both claims.[9] The Supreme Court, however, engaged neither the equal protection nor the substantive due process theories. Instead, the Court resolved the case on standing grounds, holding that the proponents of Proposition 8 lacked standing to appeal.[10] By vacating the Ninth Circuit's ruling, the Court effectively restored the district court's 2010 decision. While same-sex couples hailed the ruling as a victory, the Court's opinion in *Perry* revealed nothing about whether state marriage bans, like Proposition 8, infringe upon the constitutional right to marry.

While *Perry*, not *Windsor*, directly implicated the fundamental right to marry, we must look to *Windsor*, not *Perry*, to better understand how the Court conceptualizes that right. Indeed, if we look more closely at *Windsor*, we see that it is conceptually, if not doctrinally, a right-to-marry case. Justice Kennedy, writing for the majority, repeatedly sketches the contours of the right to marry in relation to same-sex couples. Even though he does not explicitly invoke the fundamental right to marry, the dissenting justices engage him on this ground, dismissing any notion that same-sex couples can lay claim to that

---

On the liberty implications of equality decisions, see Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1506-11 (2002). For a critical perspective on the role of federalism in Justice Kennedy's opinion, see Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. L. REV. COLL. (forthcoming 2013) (manuscript at 22-23).

5. 1 U.S.C. § 7 (1996).

6. *Windsor*, 133 S. Ct. at 2695.

7. 133 S. Ct. 2652 (2013).

8. Complaint, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292).

9. *See Perry*, 704 F. Supp. 2d 921. The Ninth Circuit Court of Appeals, in a decision vacated by the Supreme Court, relied only on equal protection grounds to find Proposition 8 unconstitutional. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds*, *Perry*, 133 S. Ct. 2652.

10. *Perry*, 133 S. Ct. at 2668.

right. And Justice Alito in particular devotes significant attention to the contested meaning of marriage.

Reading *Windsor* as a right-to-marry case has important implications for fundamental rights jurisprudence. The view of marriage that Justice Kennedy embraces suggests that the fundamental right to marry as presently understood safeguards a right that applies with equal force to same-sex couples. In this sense, we see the coherence of same-sex couples' fundamental rights claims as leveled against state marriage prohibitions. And we gain insight into how the Court should—and perhaps would—approach the substantive due process claim raised in *Perry* when a similar challenge, void of standing issues, arrives at its door.

Yet this particular doctrinal window is less important than the broader implications it has for the future of marriage challenges, particularly since courts in same-sex marriage cases have hesitated to venture down the fundamental rights path.[11] Examining *Windsor* as a right-to-marry case reveals why LGBT advocates' claims to marriage have resonated so strongly over the past several years. The view of marriage that we observe in constitutional doctrine reflects the contemporary legal and cultural consciousness around marriage, revealing a model of marriage that is defined by norms capable of encompassing same-sex couples. And LGBT advocates have successfully shown that same-sex couples already enact the norms of marriage and desire entrance into the institution of marriage as currently constructed.

This Essay relates *Windsor* to a model of marriage ascendant over the course of the last several decades and to LGBT advocacy that has mapped same-sex couples onto that model. Part I briefly traces the Court's conceptualization of the right to marry, showing a shift from a marriage model rooted in procreation and gender differentiation to one characterized by mutual emotional support, economic interdependence, and community recognition. It then shows how Justice Kennedy's treatment of marriage in *Windsor* fits within this trajectory. For him, marriage both functions as a private welfare system capable of accommodating the dependence of spouses and as a mode of public recognition conferring status and respect on the couple. These private and public dimensions are mutually reinforcing; private commitment renders the couple worthy of public recognition, and public recognition cements and supports the couple's private commitment.

Of course, the Court is not conceptualizing marriage and its relationship to same-sex couples in a vacuum. Instead, it is responding to legal, cultural, and demographic shifts relating to marriage, as well as to LGBT advocates' appeal

11. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1392–94 (2010).

to those shifts to claim rights for constituents. To show this, Section II.A situates same-sex couples' claims to marriage in two key phases of LGBT advocacy that contextualized the lives of same-sex couples within contemporary understandings of marriage. Beginning in the 1980s, LGBT advocates mapped same-sex couples onto ascendant marital norms that stressed adult romantic affiliation and emotional and financial interdependence—marriage's private dimensions.[12] Resisting claims to marriage per se, advocates deployed marital norms to achieve and define *nonmarital* recognition, namely domestic partnership.[13] Eventually, though, advocates made the case for marriage itself, and in doing so forcefully seized on marriage's unique public elements. To reject domestic partnerships and civil unions as inadequate—indeed, unconstitutional—advocates pointed to the public recognition, legitimacy, and dignity that only marriage could bestow.[14]

Justice Kennedy's rendering of marriage in *Windsor* is responsive to LGBT advocates' contextualization of same-sex couples within extant marital norms. In this sense, LGBT advocacy has contributed in significant ways to the constitutional dimensions of marriage. *Windsor*, in turn, provides advocates with authoritative declarations that aid their work going forward. As Section II.B shows, in *Windsor*'s wake, LGBT movement lawyers are deploying and developing Justice Kennedy's articulation of marriage—and particularly the connection between the private and public dimensions of marriage—to make the case for full marriage equality.

Ultimately, the meaning of marriage has shifted, and LGBT advocates, both before and after *Windsor*, have grafted same-sex couples onto that shifting meaning. Understanding these two related developments furnishes insights into how the Court will likely approach the constitutionality of state marriage bans when it eventually decides the issue. These insights may be less important for the fundamental-right-to-marry claim than for the equal protection claim, which constitutes the more likely basis on which the Court will eventually find state marriage bans unconstitutional.[15] As Section II.C argues, the model of

---

12. Of course, when it began, domestic partnership functioned in part as recognition for same-sex couples. Nonetheless, the early push for domestic partnership, especially as articulated in the private employment context, relied extensively on marriage's distributive function.

13. *See* Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Impact on Marriage*, 102 CALIF. L. REV. (forthcoming 2014).

14. *See* Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 299-300 (2012); Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISC. 184, 192-99 (2013).

15. As Justice Scalia pointed out in dissent, Justice Kennedy's equality analysis in *Windsor* seems equally applicable to state marriage bans. *See United States v. Windsor*, 133 S. Ct. 2675, 2709-11 (2013) (Scalia, J., dissenting). Courts that have ruled in favor of same-sex couples in

marriage that Justice Kennedy describes in *Windsor* has implications at three crucial points in the equal protection analysis. First, it supports the argument that same-sex couples are similarly situated to different-sex couples *specifically with regard to marriage*. Next, it suggests that governmental interests rooted in biological procreation and dual-gender parenting are inconsistent with marriage's primary purpose and consequently illegitimate grounds on which to exclude same-sex couples. Finally, it points toward the constitutional inadequacy of separate nonmarital regimes such as domestic partnerships and civil unions, which fail to offer same-sex couples the respect and standing that marriage provides. Ultimately, even if the Court adopts the cramped vision of the fundamental right to marry advanced by the dissenting justices in *Windsor*, the competing, more capacious doctrinal understanding of the right to marry reveals the power of same-sex couples' complementary equality claims.

In briefly concluding, this Essay suggests that the contemporary model of marriage is not simply a progressive move away from its more restrictive predecessor. Instead, while it promises much freedom to the extent it provides equal treatment to same-sex couples, it also sends a powerful message about how relationships *should* look and function, and how the community *should* respond. Marriage retains a strong regulatory power, creating independent family units that privatize care and dependence, and sends a powerful normative message, conferring status and recognition on some while excluding others. Understanding the model of marriage espoused in *Windsor* in these terms disrupts the progress narrative that often characterizes treatments of both marriage and LGBT rights.

I. *WINDSOR* AND THE FUNDAMENTAL RIGHT TO MARRY

A. The Fundamental Right to Marry

The constitutional dimensions of the right to marry have shifted over time, as the Court has internalized the changing meaning and content of marriage. Although the protection of the right remains grounded in history and tradition, the contours of that right have been molded by contemporary circumstances. If

---

marriage cases have more frequently grounded their decisions in equal protection than in substantive due process. *See, e.g.*, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). And at least one pending federal lawsuit challenging a state marriage restriction raises only equal protection claims. *See* Complaint for Declaratory and Injunctive Relief, Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 2:12-cv-00578). For decisions crediting the fundamental-right-to-marry claim, see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

we trace the Court's fundamental-right-to-marry jurisprudence—as well as related jurisprudence concerning sex, reproduction, and parenting—we see a shift from a procreative, gender-differentiated model of marriage toward one rooted more in adult romantic affiliation, emotional and economic interdependence, and public recognition.

To capture the trajectory of the Court's understanding of the right to marry, many scholars begin not with a substantive due process decision but with an equal protection ruling: the Court's 1942 *Skinner v. Oklahoma*[16] decision striking down a forced sterilization law.[17] The Court declared that "[m]arriage *and procreation* are fundamental to the very existence and survival of the race."[18] Under this view, marriage seemed instrumental, such that marriage and procreative sex went hand in hand.[19] This pairing also reflected legal and cultural norms that made marriage the only site for legitimate, noncriminal sex.[20] And, as Professor Ariela Dubler has shown, the Court's decision revealed anxiety regarding sterilization's potential to unhinge sex from procreation and thereby unleash its hedonic potential.[21] Indeed, in lowering the costs of extramarital sex by removing its procreative potential, sterilization also threatened to weaken marriage itself.[22]

This procreative conceptualization of marriage endured in the Court's landmark 1967 decision in *Loving v. Virginia*,[23] which ended interracial marriage bans. After conducting an equal protection analysis that independently invalidated Virginia's anti-miscegenation law, the Court separately analyzed the law's intrusion into individuals' fundamental right to

16. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

17. Professor Rebecca Brown notes that even as the Court recast the claim in *Skinner* as an equal protection claim, it is "often cited as one in the line of cases establishing a constitutionally protected right to liberty." Brown, *supra* note 4, at 1507. Professor Erwin Chemerinsky explains that the Court "declared the law unconstitutional as violating equal protection because it discriminated among people in their ability to exercise a fundamental liberty." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.2, at 691 (4th ed. 2011).

18. *Skinner*, 316 U.S. at 541 (emphasis added).

19. *See* Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1367 (2010). Given that the case concerned a right to procreate, not a right to marry, the reference to marriage can be treated as dicta.

20. *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1267-69 (2009).

21. *See* Dubler, *supra* note 19, at 1359-69.

22. *See id.* at 1368 (explaining the concern that "[s]terilization . . . could lower the costs of marital infidelity, thereby weakening marriages").

23. 388 U.S. 1 (1967).

marry. Quoting *Skinner*, the Court explained that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[24]

Just over a decade later in *Zablocki v. Redhail*,[25] the Court struck down a Wisconsin law that required noncustodial parents with outstanding child support obligations to seek court approval before marrying.[26] Drawing on *Skinner*, the Court again described marriage as "fundamental to the very existence and survival of the race."[27] It also characterized marriage as "the most important relation in life" and "the foundation of the family and of society."[28] The Court's language continued to reflect a generally procreative view of marriage.[29] In fact, the Court explained that "if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."[30] Since marriage remained the only legitimate site under Wisconsin law for sex (the state criminalized fornication at the time), legally exercising one's right to procreate required exercising one's right to marry.[31] As Professor Melissa Murray's work demonstrates, the lack of formal legal space between marriage and crime rendered marriage essential to sex, and thus essential to procreation.[32] Interestingly, Redhail sought to marry because his girlfriend was pregnant,[33] and in this way his claim complicated the clear distinction between

---

24. *Id.* at 12 (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)). While I am pointing to the endurance of the procreative understanding of marriage in *Loving*, the reference here may say less about the Court's view of marriage and more about the simple use of precedent. That is, the Court may have deployed *Skinner* merely to support the conclusion that marriage is a fundamental right.

25. 434 U.S. 374 (1978).

26. The *Zablocki* Court approached the case through the fundamental rights branch of equal protection, rather than substantive due process. The Court has alternated between these two doctrinal locations. *See* CHEMERINSKY, *supra* note 17, § 10.2.1, at 819-20; Tebbe & Widiss, *supra* note 11, at 1389. For an argument that "the right to marry should be seen as part of the fundamental rights branch of equal protection doctrine, rather than as substantive due process," see Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2097 (2005). For an "equal access" argument specifically in the context of marriage for same-sex couples, see Tebbe & Widiss, *supra* note 11, at 1377.

27. *Zablocki*, 434 U.S. at 384 (quoting *Skinner*, 316 U.S. at 541).

28. *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)).

29. Given that the law at issue in *Zablocki* involved marriage in the context of child support obligations, the linkage between marriage and procreation may have seemed more central to the Court.

30. *Zablocki*, 434 U.S. at 386.

31. *See* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 46 (2012).

32. *See id.*; Murray, *supra* note 20, at 1268-69.

33. *See* Murray, *supra* note 31, at 46.

lawful, marital sex and unlawful, nonmarital sex. Yet even as Redhail called into question the Court's linkage between sex and marriage, his desire to get married shored up the connection between procreation and marriage. Marriage, for Redhail, remained the appropriate site for procreative sex and childrearing.[34]

Over the second half of the twentieth century, the connection between marriage, procreation, and sex had been unraveling.[35] In *Griswold v. Connecticut*[36] and *Eisenstadt v. Baird*,[37] the Court struck down prohibitions on contraception, first for married couples and then for unmarried individuals. The first move untethered sex from procreation in the context of marriage, and the second loosened marriage's grip on state-sanctioned sex.[38] These legal developments responded to the widespread availability and use of contraception, and they reflected broader demographic shifts shaped by the commercialization of birth control.[39] Rates of nonmarital sex rose,[40] and married women enjoyed greater control over the decision of whether and when to have children.

It makes sense that when the *Griswold* Court identified a constitutional right for married couples to engage in non-procreative sex, it articulated a view of marriage that did not turn on its connection to procreation. Instead, marriage represented "a coming together for better or for worse" in which the couple's commitment to each other, rather than to potential children, appeared central.[41] Marriage, the Court explained, "is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty."[42] The terrain on which marriage operated was shifting. Even if the Court would later reaffirm a

---

34. *See id*.

35. *See* Murray, *supra* note 20, at 1293-1301; Tebbe & Widiss, *supra* note 11, at 1397-1401.

36. 381 U.S. 479 (1965).

37. 405 U.S. 438 (1972).

38. *See* Murray, *supra* note 20, at 1298 ("Although the Court does not declare criminal fornication statutes beyond constitutional bounds, . . . *Eisenstadt* gestures towards a space between marriage and crime where sex may take place without the legal imprimatur of marriage, but also without the threat of criminal sanction.").

39. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 254 (2005); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 202 (2000).

40. *See* KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 87-88 (1996). Abortion rights were also linked to growing sexual freedom. *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2041 (2011).

41. *Griswold*, 381 U.S. at 486.

42. *Id*.

generally procreative understanding of marriage in *Zablocki*, it suggested marital norms rooted in mutuality, commitment, and the relationship between adult partners in *Griswold*. At this point, largely in response to broader societal changes regarding sex and marriage, one can see a contest over the meaning of marriage taking shape in the Court's fundamental rights jurisprudence.

In the late 1960s and early 1970s, the Court also began to chip away at the legal differentiation between marital and nonmarital parents and children.[43] This, too, responded to changing patterns of heterosexual family formation. Over the course of the second half of the twentieth century, marriage and birth rates declined while the nonmarital birth rate rose.[44] More children were born to unmarried parents, and more different-sex couples cohabited outside of marriage.[45]

Furthermore, throughout the 1970s, the Court developed the robust sex-equality jurisprudence that eliminated many sex-based classifications in marriage and the family.[46] This development reflected the influence of feminist activists, as well as their opponents, in articulating the meaning of sex equality during the battle over the Equal Rights Amendment.[47] At the same time, the emergence of no-fault divorce prioritized romantic and emotional affiliation in marriage.[48] And rules governing divorce offered additional opportunities for courts to reject family roles and responsibilities based on gender stereotypes.[49] If the rights and obligations of spouses (and ex-spouses) were now applied evenhandedly, gender appeared less central to the legal content of marriage.

---

43. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). Nonetheless, this line of cases continues in some ways to reflect what Professor Murray calls a "pro-marital-family impulse" that privileges marriage as a vehicle to capture and regulate procreation and childrearing. *See* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 393-99 (2012).

44. *See* COTT, *supra* note 39, at 202-04.

45. *See* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1128-30 (1981).

46. *See* Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1404-07 (2006) (explaining how equal protection jurisprudence, built in the context of the battle over the Equal Rights Amendment, invalidated family law distinctions rooted in outmoded gender stereotypes). Of course, legal reform beginning in the 1800s had worked to dismantle the system of coverture. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 113-61 (1982).

47. *See* Siegel, *supra* note 46, at 1377-1409.

48. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 852 (2004).

49. *See, e.g.*, *Orr*, 440 U.S. 268.

Against this backdrop, marriage could gain definition apart from sex, procreation, parenting, and gender difference. The Court could point to—perhaps it had to point to—other attributes to differentiate marriage as a foundational constitutional and cultural category.

By 1987, when the Court approached the prison regulations challenged in *Turner v. Safley*,[50] it could supply an understanding of marriage that accounted for the many legal and social developments that had occurred over the past several years. The Missouri prison in *Turner* required inmates to seek permission to marry, and such permission was frequently withheld, particularly for female prisoners. In fact, the prison's approach to inmate requests evidenced a largely procreative notion of marriage, generally granting permission in situations involving pregnancy or childbirth.[51] The Court ruled the prison regulation unconstitutional as violative of the inmates' fundamental right to marry. In doing so, it set forth a view of marriage that made sex, procreation, and gender peripheral.[52]

Instead, the Court described the content of the right to marry in the language of material benefits, mutual support, and public recognition. It explained that marriage constitutes "a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits."[53] In this sense, the Court emphasized marriage's distributive function; marriage served as a gateway to rights and benefits that provided stability and support. Yet marriage was not simply about the receipt of tangible goods. Rather, the Court observed "important attributes of marriage" that included "expressions of emotional support and public commitment."[54] Marriage, through this lens, is "an expression of personal dedication" made in front of family, friends, and the entire community.[55]

---

50. 482 U.S. 78 (1987). In *Turner*, the Court appeared to return to the *Loving*-style treatment of the right to marry as firmly rooted in substantive due process, rather than equal protection. *Id.*

51. Nonetheless, whereas *Zablocki* involved a law that clearly highlighted the connection between marriage and procreation, *Turner* arose in a context in which sex and procreation were more peripheral. In this sense, it is important to keep in mind that the specific laws and the contexts for those laws may have contributed to the Court's description of marriage.

52. *See Turner*, 482 U.S. at 95-97. In his 2003 *Lawrence* opinion, Justice Kennedy remarked, "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Lawrence v. Texas, 539 U.S. 558, 567 (2003). As Professor Tribe argues, "[t]he obvious implication of this blunt statement is that marriage is not (only) about sex, but also about intimacy, companionship, and love—phenomena that have a public no less than a private face." Tribe, *supra* note 4, at 1950-51.

53. *Turner*, 482 U.S. at 96.

54. *Id.* at 95.

55. *Id.* at 96.

In *Turner*, we see a different core set of attributes defining the right to marry. While continuing to be safeguarded as a fundamental right, marriage primarily functioned not as the state-sanctioned site for sex, procreation, and gender differentiation, but instead as a route to rights and benefits and as a means of bestowing state-sanctioned recognition. As Professor William Eskridge argues, *Turner* changed "the nature of the right [to marry] itself" by "stress[ing] the social, or unitive goal of marriage, where marriage is an institution of commitment."[56] And Professor Cass Sunstein sees in *Turner*'s right to marry something "*expressive*—a kind of official endorsement or recognition of the marital relationship."[57] Ultimately, *Turner* combines both the private, material aspects of marriage and its public, expressive components.

B. Same-Sex Couples' Fundamental Right to Marry

With this background on the fundamental right to marry, I now turn to *Windsor*. The majority opinion, which technically does not conduct a substantive due process analysis, nevertheless fits comfortably within the Court's existing right-to-marry jurisprudence. In fact, although Justice Kennedy claims he is not addressing the question, the majority and dissenting opinions are engaged in a fight about the contours of the fundamental right to marry and its relationship to same-sex couples. At the purely doctrinal level, this fight is important because it could determine the level of scrutiny applied to same-sex couples' claims against state marriage bans. If the Court credits same-sex couples' argument that marriage prohibitions deprive them of the fundamental right to marry, it would presumably apply strict scrutiny.[58] Laws restricting marriage for same-sex couples have yet to survive this exacting standard, while courts have upheld such laws under more deferential rational-basis review.[59] And given that the Court has not decided whether sexual-

56. William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 309 (1998); *see also* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 130 (1996) ("The shift in emphasis from *Skinner* (procreation) to *Turner* (commitment) reflects the evolution of American society from an agrarian one, where procreation was important for survival and economic progress, to an urban one, where procreation takes a back seat to personal and interpersonal fulfillment."). *But see* Tebbe & Widiss, *supra* note 11, at 1396-97 (situating *Turner* more comfortably within the right-to-marry cases that prioritize sex and procreation).

57. Sunstein, *supra* note 26, at 2093.

58. *See* CHEMERINSKY, *supra* note 17, § 10.1.2, at 814.

59. *Compare In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (adopting strict scrutiny and invalidating California's statutory ban on same-sex marriage), *with* Hernandez v. Robles,

orientation-based classifications merit heightened scrutiny for equal protection purposes, the fundamental rights claim may represent a clearer path to a more demanding constitutional standard.

1. Justice Kennedy's Right to Marry

Though Justice Kennedy's opinion ultimately rests on equal protection grounds,[60] it tells us much about the fundamental right to marry that same-sex couples seek. His descriptions of marriage throughout the majority opinion reflect both the private, material aspects and the public, dignitary dimensions of marriage.

As Edie Windsor's claim to a substantial tax refund demonstrated, and as Justice Kennedy emphasized, marriage is the vehicle through which the state distributes rights and benefits to committed couples and their families. Yet for Justice Kennedy, marriage is "more than a routine classification for purposes of certain statutory benefits."[61] Instead, it imposes obligations. By assigning both rights and responsibilities, the state incentivizes marriage and ensures that marital partners provide care and support for one another. In *Windsor*, same-sex couples appear willing—indeed, eager—to take on both the rights and obligations of marriage. As Justice Kennedy explains, they "would be honored to accept" "the duties and responsibilities that are an essential part of married life."[62]

Of course, for Justice Kennedy, marriage is not simply a private welfare mechanism. Instead, it is an elaborate form of state recognition, acknowledging the couple's commitment to each other and communicating the strength of that commitment to the broader community. In granting same-sex couples "the right to marry," New York allowed those couples to "live with pride in themselves and their union and in a status of equality with all other married persons."[63] To be clear, this is not merely an acknowledgment of New York's sovereignty with regard to its citizens. It is a declaration that same-sex couples "aspire[] to occupy the same status and dignity as that of a man and woman in lawful marriage."[64]

---

855 N.E.2d 1 (N.Y. 2006) (adopting rational basis review and upholding New York's statutory ban on same-sex marriage).

60. United States v. Windsor, 133 S. Ct. 2675, 2695-96 (2013).

61. *Id.* at 2692.

62. *Id.* at 2695.

63. *Id.* at 2689.

64. *Id.* at 2694.

On this account, marriage bestows dignity not only on adult partners but also on their children. Without marriage, children struggle "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[65] In some ways, Justice Kennedy's reference to children suggests the continued resonance of the procreative dimensions of marriage. Parent-child relationships remain an important aspect of marriage, but the relevant category of parent-child relationships has expanded to include same-sex-couple-headed families.[66] For Justice Kennedy, marriage bestows social recognition on parents and children, regardless of the mode of conception and regardless of the gender composition of the parental unit. It is striking that even though the Court had decades earlier rejected significant legal distinctions between marital and nonmarital children, Justice Kennedy situates the social legitimacy conferred on children as central to marriage's constitutional import.[67] Marriage, under this view, has a meaning for both parents and children that cannot be replicated.

Ultimately, Justice Kennedy concludes, "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."[68] In denying recognition, the federal government both locates same-sex spouses outside of marriage's private welfare function and denigrates the public standing of their marriages. The government effectively tells same-sex spouses that they are unsuited for the federal rights and obligations of marriage and unworthy of the federal recognition of that status.

In stressing the private and public dimensions of marriage, Justice Kennedy elaborates a model consistent with the Court's fundamental rights jurisprudence. The *Windsor* Court's focus on rights and responsibilities and private commitment, on one hand, and social legitimacy and public recognition, on the other hand, echoes the *Turner* Court's specific disaggregation of marriage's core attributes. Yet in *Windsor*, Justice Kennedy makes more explicit the connection between the private and public dimensions of marriage described in *Turner*. Marriage uniquely provides the language to communicate to those outside of one's family the seriousness that characterizes

---

65. *Id*. at 2694-95.

66. In future work, I plan to explore the way in which LGBT advocates and courts have reconceived procreation to include children raised by same-sex couples.

67. As Professor Solangel Maldonado has shown, despite a common progress narrative regarding the removal of distinctions based on nonmarital birth, legal and social distinctions remain pervasive. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350-78 (2011).

68. *Windsor*, 133 S. Ct. at 2694.

one's private relationships, and the ensuing community recognition solidifies and strengthens the couple's commitment. In other words, the public, expressive dimensions of marriage reinforce its private attributes, and both sets of features contribute to the constitutional meaning of the right to marry.

2. Justice Alito's Right to Marry

While Justice Kennedy's analysis does much to specify the content and meaning of marriage, it does not speak in the register of the fundamental right to marry. For their part, the dissenting justices take up the right to marry more explicitly. Justice Alito straightforwardly asserts that "[t]he Constitution does not guarantee the right to enter into a same-sex marriage."[69] Using the language of fundamental rights analysis, he declares that "the right to same-sex marriage is not deeply rooted in this Nation's history and tradition."[70] Indeed, Justice Scalia announces that such a claim "would of course be quite absurd."[71] For the dissenting justices, what same-sex couples seek "is not the protection of a deeply rooted right but the recognition of a very new right."[72]

This view both defines the right in relation to the excluded group ("the right to *same-sex* marriage") and adheres to a view of marriage inconsistent with same-sex couples (a sex-differentiated, biologically procreative view). Even as Justice Alito acknowledges that "[p]ast changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences,"[73] these changes do little to shape his understanding of the constitutionally protected right to marry.[74] To the contrary, Justice Alito puts forward an outmoded understanding of marriage—one that runs counter to the past changes he just observed—to define same-sex couples outside of marriage's constitutional protection.

---

69. *Id*. at 2714 (Alito, J., dissenting).

70. *Id*. at 2715.

71. *Id*. at 2707 (Scalia, J., dissenting).

72. *Id*. at 2715 (Alito, J., dissenting). Of course, the Constitution nowhere mentions a right to marry.

73. *Id*.

74. For analysis of another context in which Justice Alito's historically grounded doctrinal analysis neglects more recent developments, see Jack M. Balkin, *The New Originalism and the Uses of History*, FORDHAM L. REV. (forthcoming 2013) (manuscript at 34), http://ssrn.com/abstract=2303980, which explains how in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), Justice Alito "does not carry his story forward into the twentieth century" and instead "stops his historical inquiry."

Justice Alito only briefly attends specifically to the fundamental right to marry, quickly dismissing the notion that same-sex couples have any reasonable claim to such a right. Yet in another portion of his opinion, he recognizes that the view of marriage he implicitly adopts in analyzing the constitutional right to marry is deeply contested. He acknowledges that the parties are engaged in "a debate between two competing views of marriage."[75] What he terms the "traditional" or "conjugal" view "sees marriage as an intrinsically opposite-sex institution."[76] Under this view, "the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing."[77] That structure is defined by biological, dual-gender parenting. Justice Alito contrasts this with a "newer view" he labels the "'consent-based' vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons."[78] "Proponents of same-sex marriage," he explains, "argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution is rank discrimination."[79]

Justice Alito contends that in pursuing her claims, Edie Windsor sought "a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference."[80] He rejects this bid by explaining that, as between the "traditional" and "consent-based" views of marriage, "[t]he Constitution does not codify either."[81] Yet in conceptualizing the scope of the constitutional right to marry earlier in his opinion—easily dismissing any claim by same-sex couples to a fundamental right—Justice Alito writes into the Constitution the "traditional" view of marriage.[82] Rather than understand the constitutional right to marry in relation to the evolving contours of marriage, he cements the meaning of marriage for constitutional purposes. Ultimately, even as Justice Alito asserts that he "would not presume to enshrine either vision of marriage in our

---

75. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

76. *Id*.

77. *Id*. For an explication of and response to the arguments that inform Justice Alito's view of marriage and its relationship to same-sex couples, see Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. (forthcoming 2014), http://ssrn.com/abstract=2257557.

78. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

79. *Id*.

80. *Id*. at 2711.

81. *Id*. at 2718.

82. While Justice Alito *may* have defended his position from an originalist perspective, he does not explicitly elaborate this argument.

constitutional jurisprudence," he does just that—and in a way inconsistent with *Turner*, the Court's most recent precedent on the fundamental right to marry.[83]

3. Applying the Fundamental Right to Marry to Same-Sex Couples

For a competing view that explicitly takes up the relationship between marriage as understood today and the contours of the fundamental right to marry, we can look to the district court's analysis in *Perry*. After hearing substantial expert testimony, including from Harvard marriage historian Nancy Cott,[84] the district court in *Perry* found: "Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."[85] This, of course, emphasizes both the public recognition conferred by marriage and the private welfare function marriage serves. Sex differentiation is absent, and procreation has been reconfigured into—and largely made peripheral by—the more general reference to "any dependents."

In articulating this gender-neutral understanding of marriage, the district court in *Perry* recognized significant shifts in the content of marriage. The court explained that coverture—and the gendered system of authority it entailed—once formed "a central component of the civil institution of marriage."[86] But over time marriage "transformed from a male-dominated institution into an institution recognizing men and women as equals."[87] In fact, as the court noted, by the late twentieth century, courts and legislatures had removed formal sex-based distinctions in marriage, except of course the sex-based eligibility requirement.[88] Yet, the court explained, "the right to marry . . . did not become different simply because the institution of marriage became

83. *Windsor*, 133 S. Ct. at 2719 (Alito, J., dissenting).

84. For Professor Cott's work on the history of marriage, see COTT, *supra* note 39. Along with several prominent historians, Professor Cott joined a Supreme Court amicus brief, describing the historical purposes and regulation of marriage, in *Windsor*. *See* Brief on the Merits for Amici Curiae Historians, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

85. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010).

86. *Id*. at 958.

87. *Id*. at 992-93.

88. *See id*. at 960.

compatible with gender equality."[89] Under this view, even as marriage changes in profound ways, its constitutional importance and protection persists.

Accordingly, the court's conceptualization of marriage, which in many ways is consistent with the contemporary view of marriage expressed in *Turner*, assisted it in answering the key doctrinal question—"whether plaintiffs seek to exercise the fundamental right to marry; or, because they are couples of the same sex, whether they seek recognition of a new right."[90] The court concluded that the plaintiffs legitimately invoked the existing fundamental right to marry. As Matt Coles, the director of the ACLU's Center for Equality, explains, the district court's analysis "suggests that contemporary understanding of the rights we have can help us understand the essential contours of a protected implicit right."[91] What the district court described as "a union of equals"[92] *is* the constitutionally protected marriage today.[93]

Yet in *Windsor*, Justice Alito seems to mock the district court's finding in *Perry*, rejecting the idea that one can discern the meaning of marriage for constitutional purposes.[94] For him, the struggle over marriage equality implicates a cultural fight over the purpose of marriage, but has no relationship to the constitutional parameters of the right to marry. It is as if same-sex couples are asking to change marriage so that they might be admitted. Instead, same-sex couples' claims to marriage are cognizable precisely because marriage has changed in ways that make it more hospitable to same-sex couples—a shift the district court in *Perry* examined and ultimately integrated into its doctrinal analysis.

In the end, same-sex couples seek the right to marry as it is understood today. The contours of that right have changed over time, even as the right's existence remains rooted in a historical acknowledgment of the importance of the institution.[95] As the district court in *Perry* explained, same-sex couples ask

---

89. *Id*. at 993.

90. *Id*. at 992.

91. Matt Coles, *Due Process and the Fundamental Right to Marry*, BALKINIZATION (Jan. 11, 2013, 1:40 PM), http://balkin.blogspot.com/2013/01/due-process-and-fundamental-right-to.html.

92. 704 F. Supp. 2d at 993.

93. *See* Coles, *supra* note 91.

94. In *Windsor*, Justice Alito refers to the *Perry* trial, derisively, as a "spectacle." United States v. Windsor, 133 S. Ct. 2675, 2718 n.7 (2013) (Alito, J., dissenting).

95. *See* Coles, *supra* note 91 ("[T]he law about a protected right today can help us discern what we understand a venerable idea to mean today."). On the flexible and contested nature of tradition in constitutional reasoning, see Balkin, *supra* note 74 (manuscript at 79) (arguing that "[c]laims about tradition are often contestable (1) because past practices are variegated and not uniform, (2) because the meaning and lessons of tradition are often both described through generalization (and there is often more than one way to do this), and (3) because

the state "to recognize their relationships for what they are: marriages."[96] Accordingly, they legitimately claim the fundamental right to marry.

II. BEYOND THE FUNDAMENTAL RIGHT TO MARRY

Reading *Windsor* as a right-to-marry case suggests that eventually the Court may accept same-sex couples' fundamental rights claim in a challenge to a state marriage prohibition. Yet even if the Court ultimately does not credit this claim—as sympathetic lower courts frequently have refused to do—understanding the right to marry at stake in *Windsor* brings to light the strength of same-sex couples' claims to marriage on a more general level. As marriage has become less grounded in procreation and sex-differentiation and more rooted in mutual support and public recognition, LGBT advocates have seized on this modern concept of marriage and have located same-sex couples within it. More specifically, we can relate *Windsor* to two important phases of LGBT advocacy. First, advocates leveraged the private welfare function of marriage, focusing on emotional and economic interdependence, to make the case for domestic partnership beginning in the early 1980s. Second, advocates more recently drew on the public recognition function of marriage, stressing marriage's unique dignitary and expressive dimensions, to challenge domestic partnership (and other nonmarital statuses).

Today, same-sex couples' demands for marriage resonate, regardless of the doctrinal viability of the fundamental rights claim, because marriage appears consistent with the lives of same-sex couples, *and* the lives of same-sex couples appear consistent with the norms of marriage. In *Windsor*, Justice Kennedy's reasoning reflects the impact of advocates' work to situate same-sex couples within the private and public norms of marriage. Understanding how the shifting contours of marriage have shaped both the movement for marriage equality and the Court's reception of that movement has important doctrinal implications outside the fundamental rights inquiry. In particular, the meaning of the right to marry will likely guide the Court's equal protection, rather than substantive due process, analysis when it one day considers the constitutionality of state marriage prohibitions.

---

traditions evolve by discarding or rejecting previous elements of tradition and absorbing new ones"); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990) (noting that "there are many different ways of describing a liberty, and many different ways of characterizing a tradition"); and William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1200-01 (2000) (arguing that "'tradition' is neither a stable nor an entirely backward-looking concept").

96. 704 F. Supp. 2d at 993.

A. Before Windsor

In the early 1970s, when same-sex couples first leveled legal challenges to restrictive marriage laws, courts quickly rejected their claims. Same-sex couples could not be asking for marriage, judges reasoned, because marriage was a sex-differentiated institution rooted in procreation. In *Singer v. Hara*, the Washington appellate court explained that "[t]he operative distinction lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."[97] Therefore, as the Kentucky court baldly stated in *Jones v. Hallahan*, "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."[98]

At that time, the Court's extant fundamental rights jurisprudence could lend support to these conclusions. For instance, in *Baker v. Nelson*, the Minnesota Supreme Court rejected a same-sex couple's marriage claim by citing *Skinner* to explain that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[99] The U.S. Supreme Court subsequently dismissed the plaintiffs' appeal for "want of a substantial federal question"[100]—a conclusion that seems outlandish today. At this earlier moment, the claim to include same-sex couples in marriage appeared radical—seeking to upend and transform an institution defined by procreation and sex difference.[101]

But as the meaning of marriage itself shifted, LGBT advocates leveraged and advanced that shift. As I have shown in other work, when the organized movement turned to relationship rights in the 1980s, they seized on emerging marital norms to achieve *nonmarital* recognition.[102] Avoiding claims to marriage per se for a combination of strategic and ideological reasons,[103]

---

97. 522 P.2d 1187, 1191 (Wash. Ct. App. 1977).

98. 501 S.W.2d 588, 590 (Ky. Ct. App. 1973).

99. 191 N.W.2d 185, 186 (Minn. 1971).

100. 409 U.S. 810 (1972).

101. *See* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1769-71 (2005); Michael Boucai, *When Gay Marriage Was Radical*, HUFF. POST BLOG (July 23, 2013, 4:17 PM), http://www.huffingtonpost.com/michael-boucai/when-gay-marriage-was-radical_b_3636437.html.

102. *See* NeJaime, *supra* note 14. The HIV/AIDS epidemic and the increase in same-sex parenting both highlighted the need for rights and benefits for families headed by same-sex couples.

103. Some advocates viewed marriage claims as simply premature, and therefore understood nonmarital recognition as a necessary precursor to the eventual achievement of marriage.

advocates nonetheless deployed norms rooted in marriage's private welfare function to define and achieve domestic partnership. Drawing on adult romantic affiliation, mutual emotional support, and financial interdependence—attributes articulated by the Court around the same time in *Turner*—advocates demonstrated that same-sex couples lived out these norms in their unrecognized relationships. These couples, therefore, deserved certain rights and benefits, which had been exclusively attached to marriage, as a way to both acknowledge their committed relationships and ensure those relationships' continued viability. While the *Turner* Court had articulated a doctrinal right to marry that could theoretically include same-sex couples, LGBT advocates had to convince the courts and the public that same-sex couples fit within that articulation. The push for domestic partnership achieved much in this regard, without invoking a claim to marriage itself. Accordingly, by the time advocates began to make the affirmative case for marriage, they had already shown that same-sex couples were enacting and affirming key marital norms.

Eventually, in response, courts conceptualized same-sex couples within marriage's private welfare function, and they situated that function as central to marriage's content. Indeed, the notion of marriage that Justice Kennedy adopts in *Windsor*—and that the district court in *Perry* used to analyze the right to marry—looks much like the concept of domestic partnership developed in the 1980s and 1990s.[104] In California, for instance, early domestic partnership regulations focused on the mutual support and obligations of partners, requiring same-sex couples to declare that they "share the common necessities of life" and "are responsible for each other's common welfare."[105] And the first state-level domestic partnership law applied to "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[106] In securing domestic partnership rights, LGBT advocates showed that same-sex couples assumed the same obligations of emotional and financial support as different-sex married couples and therefore merited the same rights

Others, however, viewed marriage claims as normatively undesirable, and accordingly viewed nonmarital recognition as a way to avoid and reject marriage. *See id.*

104. *See id*.

105. West Hollywood, Cal., Ordinance No. 22 (Feb. 21, 1985) (on file with author); Memorandum from Berkeley Human Relations and Welfare Comm'n, to Hon. Mayor and Members of the City Council 20 (July 17, 1984) (on file with author). On domestic partnership advocacy in California in the 1980s and 1990s, see NeJaime, *supra* note 14.

106. Act of Oct. 2, 1999, § 2, 1999 Cal. Legis. Serv. ch. 588 (West) (codified at CAL. FAM. CODE § 297(a) (West 2012)). On domestic partnership advocacy in California after 1999, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1251-74 (2010).

and benefits.[107] The same qualities that rendered same-sex couples eligible for recognition outside of marriage ultimately rendered them eligible for marriage itself. As Justice Kennedy noted in *Windsor*, same-sex couples are "honored to accept" not merely the rights but the obligations of marriage.[108]

Despite some same-sex couples' attempts to impose the cultural symbolism of marriage onto domestic partnership, nonmarital statuses lacked marriage's unique public recognition and related community endorsement. Accordingly, over roughly the past decade, LGBT advocates recast domestic partnerships and civil unions, successfully transforming them from remedies to injuries.[109] Carefully celebrating the conferral of material rights and benefits, advocates nonetheless emphasized the unique social and cultural status associated with marriage. Through this lens, only equal inclusion in marriage could furnish same-sex couples with all of the goods that marriage provides. The harm, of course, was not merely expressive; instead, the lack of public recognition threatened to undermine the private welfare function that marriage—and nonmarital recognition—valued. The separate, nonmarital designation communicated to the couple and their community that their relationship was less serious, significant, and valued than those of married couples.

Once again, courts eventually credited this framing in rejecting nonmarital recognition as an adequate substitute for marriage. The district court in *Perry*, for instance, heard extensive expert testimony on the social distinction between marriage and domestic partnership.[110] Indeed, the court noted that one expert linked the unique "social meanings of marriage" to the "enforceable trust" that the couple enjoys.[111] Under this reasoning, because domestic partnership lacked marriage's social recognition, it undermined the couple's commitment and stability. In response, the district court found that domestic partnership could not furnish "the cultural meaning of marriage and its associated benefits."[112] This conclusion ultimately shaped the doctrinal analysis. The court reasoned that because domestic partnerships "do not provide the same social meaning as marriage," they "do not fulfill California's due process obligation to [the]

---

107. *See* Cummings & NeJaime, *supra* note 106, at 1262-69.

108. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

109. *See* NeJaime, *supra* note 14, at 192-99. *Cf.* Murray, *supra* note 14, at 299-300 (explaining how key judicial decisions reconfigured domestic partnerships and civil unions as injuries).

110. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 971-72 (N.D. Cal. 2010).

111. *Id.* at 971 (citing the testimony of Letitia Anne Peplau, a UCLA professor of psychology).

112. *Id.*

plaintiffs."[113] That is, domestic partnership was no substitute for the fundamental right to marry.[114]

Windsor, of course, did not implicate the constitutionality of nonmarital recognition. Yet Justice Kennedy's focus on the dignity-enhancing dimensions of marriage and its unique social status reflects LGBT advocates' arguments against state-law regimes that provide same-sex couples only nonmarital recognition. Justice Kennedy concluded that in creating two classes of marriages—one that the federal government recognized and one that it did not—DOMA imposed "a separate status, and so a stigma."[115] Like laws that confine same-sex couples to domestic partnerships and civil unions, DOMA deliberately withheld marriage's public recognition from same-sex couples. And aside from the tangible harms it inflicted, it produced a constitutionally significant "stigma." The "separate status" itself contributed in key ways to the constitutional violation. In this sense, Justice Kennedy's opinion both credits same-sex couples' claim that marriage uniquely bestows social validation and locates public recognition as a central dimension of marriage.

B. After Windsor

Understanding the trajectory of same-sex couples' claims in this way shows the dialogical relationship between the changing constitutional dimensions of marriage and same-sex couples' demands for marriage. For decades, LGBT advocates have seized on shifts in the meaning of marriage to achieve rights for same-sex couples, and *Windsor* demonstrates that the Court itself is responding to LGBT advocacy that contextualizes same-sex couples within extant marital norms. Now, LGBT movement lawyers are drawing on the *Windsor* Court's description of marriage to make the case for full marriage equality.

Whitewood v. Corbett,[116] which challenges Pennsylvania's marriage ban, represents the first federal marriage lawsuit filed in *Windsor*'s wake. The complaint asserts a fundamental rights claim, yet it draws on the Court's right-to-marry jurisprudence not to specifically bolster the doctrinal substantive due process theory but to more broadly capture same-sex couples' demand for marriage. The complaint refers to marriage as "the most important relation in

---

113. *Id*. at 994.

114. *See id*. at 993.

115. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

116. Complaint, Whitewood v. Corbett, No. 1:13-cv-1861 (M.D. Pa. filed July 9, 2013), http://www.aclupa.org/downloads/Whitewoodcomplaint.pdf [hereinafter *Whitewood* Complaint].

life" and an "expression[] of emotional support and commitment," quoting *Zablocki* and *Turner*, respectively.[117] It situates *Windsor* in this line of cases, deploying Justice Kennedy's reference to marriage as "a far-reaching legal acknowledgment of the intimate relationship between two people."[118] Having described marriage in this way, the complaint concludes that marriage has come to be defined by a set of norms that are "as true for same-sex couples as for opposite-sex couples."[119]

The *Whitewood* complaint shows not only that marriage is capable of including same-sex couples, but also that same-sex couples themselves have embraced marital norms. They "support one another emotionally and financially and take care of one another physically when faced with injury or illness."[120] Same-sex couples, in other words, carry out marriage's private welfare function even when they are excluded from marriage. Just as Justice Kennedy explained in *Windsor*, same-sex couples "recognize that marriage entails both benefits and obligations on the partners and they welcome both."[121] Under this view, it makes sense to include them within the framework that marriage establishes for privatizing care and support.

Yet, the *Whitewood* complaint continues, marriage involves not only rights and obligations that accrue to the couple but also recognition and status that relate the couple to "the family, friends and community that surround them."[122] In this sense, marriage's "profound social significance" is key.[123] Again drawing on *Windsor*, the complaint asserts that the exclusion from marriage "demeans and stigmatizes lesbian and gay couples and their children by sending the message that they are less worthy and valued than families headed by opposite-sex couples."[124] Accordingly, same-sex couples do not simply deserve the material rights and benefits of marriage, but also the public recognition that marriage bestows. In fact, the public recognition contributes to the preservation of the private support function of marriage. Marriage, the complaint asserts, "is *both a personal and a public commitment of two people to one another*, licensed by the state."[125] Through marriage—and only through

---

117. *Id*. at 33 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978) and Turner v. Safley, 482 U.S. 78, 95 (1987)).

118. *Id*. (quoting *Windsor*, 133 S. Ct. at 2692).

119. *Id*.

120. *Id*.

121. *Id*. at 38.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*. at 5 (emphasis added).

marriage—the state publicly "recognizes" a couple's private commitment "to establish a family unit together and support one another."[126]

Whitewood is representative of other pending lawsuits across the country. For instance, in *Harris v. McDonnell*,[127] a recently filed challenge to Virginia's marriage ban, LGBT movement lawyers echo Justice Kennedy's reasoning in *Windsor* to stress the private and public dimensions of marriage. The plaintiff couples, the *Harris* complaint asserts, "wish to marry . . . to publicly declare their love and commitment before their family, friends, and community, and to give one another and their [children] the security and protections that only marriage provides."[128] Excluding same-sex couples from marriage deprives them of "critically important rights and responsibilities" that not only would "safeguard their families" but also would "secure their commitment to each other."[129] Without "the unique social recognition that marriage conveys," these same-sex couples struggle "to communicate to others the depth and permanence of their commitment, or to obtain respect for that commitment."[130] The rights and obligations of marriage support the couple's commitment, but only the "legal label of marriage" can elicit the community recognition that both communicates and secures that commitment.[131]

While *Whitewood* and *Harris* involve challenges in states that offer no relationship recognition to same-sex couples, lawsuits in states with nonmarital recognition regimes more pointedly muster Justice Kennedy's focus on the distinctive, dignity-enhancing aspects of marriage. In suits filed in state courts in New Jersey and Illinois well before the Court's decision in *Windsor*, LGBT movement lawyers quickly filed motions for summary judgment based on *Windsor*.[132] Of course, *Windsor* changed the complexion of challenges

---

126. *Id.*

127. Complaint, Harris v. McDonnell, No. 5:13-cv-77 (W.D. Va. filed Aug. 1, 2013), https://www.aclu.org/files/assets/complaintwithfilinginfo.pdf [hereinafter *Harris* Complaint].

128. *Id.* at 2.

129. *Id.* at 19.

130. *Id.* at 22.

131. *Id.*

132. Plaintiffs' Brief in Support of Motion for Summary Judgment at 16, Garden State Equality v. Dow, No. MER L-1729-11 (N.J. Super. filed July 3, 2013) [hereinafter *Garden State Equality* Brief]; Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 5, Darby v. Orr, No. 12 CH 19718 (Ill. Cir. Ct. filed July 10, 2013) [hereinafter *Darby* Memorandum]. While the plaintiffs in the Illinois litigation devote attention to both substantive due process and equal protection claims, the New Jersey plaintiffs focus exclusively on state and federal equal protection claims. This makes sense in light of the New Jersey Supreme Court's earlier decision in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), which relied on state equal protection grounds and led to the enactment of civil unions.

involving nonmarital relationship recognition. No longer does the difference hinge purely on the recognition function of marriage; now the state, in limiting same-sex couples to a nonmarital status, keeps those couples from significant federal rights and benefits.[133] Accordingly, the private welfare function that Justice Kennedy highlights in *Windsor* takes on a new importance in states with domestic partnerships and civil unions.

Yet the New Jersey plaintiffs more centrally rely on marriage's unique expressive dimensions, drawing a direct parallel to Justice Kennedy's reasoning about DOMA in *Windsor*: "As with DOMA, having 'two contradictory . . . regimes within the same state . . . tells those couples and all the world that their [civil unions] are unworthy of federal protection.'"[134] "And just like with DOMA," the plaintiffs continue, "'[t]he differentiation' effected by the New Jersey scheme 'demeans the couple.'"[135] Similarly, the Illinois plaintiffs rely on *Windsor* to argue that rather than ensure equality, the state's "civil union status brands [the plaintiffs] as members of inferior families."[136] *Windsor* provides the language and reasoning to attack civil union regimes for depriving same-sex couples of marriage's unique recognition function. Of course, advocates continue to relate this recognition back to marriage's power to promote secure relationships. As the lawyers in Illinois contend, "Marriage would provide . . . same-sex couples with a well-understood social network of in-laws, friends, and others who can provide emotional support and tangible assistance, and allow them to draw upon shared cultural expectations and respect."[137] In other words, through both state recognition and community acknowledgment, the public meaning of marriage would bolster and support the couple's private commitment and stability.

As these various lawsuits demonstrate, to achieve full marriage equality in *Windsor*'s wake, LGBT advocates are seizing on Justice Kennedy's descriptions of marriage to contextualize same-sex couples within the private and public norms that have come to define marriage for everyone. And, following *Windsor*'s cues, they are situating those private and public goods as inextricably tied together, such that the state cannot legitimately extend one and not the other.

---

133. *See Garden State Equality* Brief, *supra* note 132, at 27-34.

134. *Id*. at 44 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)).

135. *Id*. (quoting *Windsor*, 133 S. Ct. at 2694).

136. *Darby* Brief, *supra* note 132, at 27.

137. *Id*. at 5.

C. Marriage and Equal Protection

Eventually, a case challenging a state marriage prohibition will find its way to the Supreme Court. When it does, same-sex couples' claims are likely to succeed even if the Court speaks entirely outside the register of fundamental rights. In particular, the contemporary model of marriage articulated in *Windsor* and the relationship of that model to same-sex couples may shape the Court's equal protection analysis—the more likely basis for its decision.

First, with marriage now defined by adult romantic affiliation, emotional and economic interdependence, and public recognition, LGBT advocates credibly argue that, as the *Whitewood* plaintiffs allege, "[s]ame-sex couples and opposite-sex couples are similarly situated for purposes of marriage."[138] This move is crucial to the success of same-sex couples' equal protection claims. If procreative sex is deemed a defining feature of marriage, then courts can more easily regard discriminatory marriage laws as merely legislative determinations to treat differently situated groups differently. For instance, New York's highest court took a procreative, sex-differentiated view of marriage when it determined in 2006 that same-sex couples "are simply not similarly situated to opposite-sex couples . . . given the intrinsic differences in the assisted reproduction or adoption processes that most homosexual couples rely on to have children."[139] Under this view, the exclusion of same-sex couples from marriage reflected legitimate differences.

Yet under the contemporary understanding of marriage that centers private support obligations and public dignity—the view espoused by Justice Kennedy in *Windsor*—the exclusion of same-sex couples becomes the differential treatment of two similarly situated groups. If, as the *Harris* complaint emphasizes, same-sex couples "seek to marry for the same emotional, romantic, and dignitary reasons, and to provide the same legal shelter to their families, as different-sex spouses," then they appear "identical to different-sex couples in all of the characteristics relevant to marriage."[140] Therefore, same-sex couples' exclusion from marriage appears to reflect, in Justice Alito's terms, "rank discrimination" rather than legitimate differentiation.[141]

---

138. *Whitewood* Complaint, *supra* note 116, at 46.

139. Hernandez v. Robles, 855 N.E.2d 1, 21-22 (N.Y. 2006).

140. *Harris* Complaint, *supra* note 127, at 33-34.

141. *See supra* note 79 and accompanying text. Moreover, the equal application of marital norms to same-sex and different-sex couples strengthens arguments for heightened scrutiny in the equal protection context by underscoring the irrelevance of sexual orientation to marriage. In particular, it rebuts the argument that while heightened scrutiny may apply "in some cases," it does not with regard to "legislation governing marriage and family relationships." *Hernandez*, 855 N.E.2d at 11.

Next, the relationship between same-sex couples and contemporary notions of marriage make potential governmental interests justifying marriage bans appear both inaccurate and pretextual. As Justice Scalia pointed out in dissent in *Windsor*, Justice Kennedy said practically nothing about the arguments asserted in defense of DOMA. Yet the central substantive interests advanced to support DOMA—and those used to justify state marriage bans—appear inconsistent with marriage's function as articulated by the *Windsor* majority.[142] If procreation, biological parenting, and sex differentiation do not define marriage, then arguments based on "responsible procreation" and dual-gender parenting become unintelligible.[143] Indeed, as the Massachusetts Supreme Judicial Court reasoned when it first ruled in favor of marriage equality a decade ago, arguments based on procreation cannot form even a rational basis for the state's marriage restriction since "the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, . . . is the sine qua non of civil marriage."[144] The *Goodridge* court's understanding of the meaning of marriage, which proved dispositive, was not mustered for a fundamental rights analysis. Instead, it guided the court's equality analysis. Similarly, arguments based on sex-differentiated childrearing appear both inconsistent with marriage's gender-neutral rights and obligations and antithetical to sex-equality principles.[145] As we have shifted toward a less procreative and gendered model of marriage, the rationales for same-sex marriage bans look neither relevant to what we understand marriage to be nor legitimate in light of same-sex couples' performance of contemporary marital norms. Instead, they look merely like excuses for discrimination based on sexual orientation.

---

142. On the changing meaning of marriage and its relationship to arguments against same-sex marriage, see Koppelman, *supra* note 4.

143. The New York Court of Appeals articulated the "responsible procreation" argument in upholding same-sex couples' exclusion from marriage: "[F]or the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships [because] [h]eterosexual intercourse has a natural tendency to lead to the birth of children [but] homosexual intercourse does not." *Hernandez*, 855 N.E.2d at 7. As Professor Courtney Joslin explains, the "responsible procreation" argument is based on the premise "that the government's historic interest in supporting marriage and marital couples is to isolate and specially support families with biologically related children." Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1471 (2013).

144. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

145. *Id*. at 965 n.28. *See also* Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 95 (2013) (claiming that arguments based on biological parenting, which are in fact arguments based on dual-gender parenting, should be rejected based on sex-equality principles in both constitutional and family law).

Finally, while the focus on the gender-neutral private rights and obligations of marriage discredits governmental interests based on procreation and dual-gender childrearing, the focus on marriage's recognition-based dimensions undermines arguments that seek to deploy nonmarital designations as constitutionally adequate substitutes. As Justice Kennedy conceptualizes it, marriage includes not simply access to tangible rights and benefits—all Edie Windsor was formally asking for—but also dignity, respect, and status. For Justice Kennedy, Windsor must be treated as married by the federal government not simply because she deserved a tax refund and not simply because she was in fact married under state law, but rather because she and her relationship deserved to be treated as equal and as worthy of respect.

With dignity as a core attribute of marital recognition—and, conversely, with stigma as the constitutive element of non-recognition—the expressive elements of marriage seem at their apex in *Windsor*. For Justice Kennedy, DOMA's differential treatment placed "same-sex couples in an unstable position of being in a second-tier marriage."[146] Their separate status itself, regardless of the denial of material benefits, seemed to produce an injury with constitutional implications.[147] Under this logic, domestic partnership and civil union regimes that purport to provide a marriage substitute for same-sex couples seem poised to fall. This appears true even if federal rights attached to marriage were extended to same-sex couples in civil unions and domestic partnerships.[148] Attention to the public standing conferred by marriage and its impact on the couple's dignity, rather than receipt of governmental benefits, would guide the equal protection analysis of nonmarital recognition. Indeed, *Windsor* suggests that the stability of the couple's private commitment depends on the public standing and social meaning that marriage uniquely furnishes.

It is only a matter of time before the Court determines whether state laws excluding same-sex couples from marriage are unconstitutional. When it does, the Court's conceptualization of marriage will, as it did in *Windsor*, guide the ultimate resolution of same-sex couples' claims, even if that resolution says nothing about the fundamental right to marry. That is, when the Court ultimately includes same-sex couples in marriage, it may again articulate the

---

146. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

147. For a compelling argument regarding the unconstitutionality of the nominal separation of same-sex relationships, see Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why "Separate" Nomenclature for Gay and Straight Relationships Will Never be "Equal,"* 97 GEO. L.J. 1155, 1201-03 (2009).

148. *See* Courtney G. Joslin, Windsor*, Federalism, and Family Equality*, COLUM. L. REV. SIDEBAR (forthcoming 2013); Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. (forthcoming 2014).

contours of the right to marry yet speak entirely outside the register of fundamental rights.

CONCLUSION — MARRIAGE AT WHAT COST?

Reading *Windsor* as a right-to-marry case not only suggests the strength of same-sex couples' claims to marriage, but also highlights the strength of marriage itself. Even as *Windsor* moves marriage further away from procreative sex and dual-gender childrearing, it does not advance, as Justice Alito would have us believe, a laissez-faire notion of marriage. Marriage, through the lens of *Windsor*, is not merely or primarily about emotional attachment, sexual attraction, and personal fulfillment. Instead, it is grounded in norms of commitment, support, and obligation. And this private commitment is buttressed by community knowledge—surveillance of sorts. In recognizing the couple as married, the community ensures that the couple fulfills their obligations to each other and their children. Furthermore, if marriage confers dignity and respect—and if a lack of marriage "humiliates" children[149]—then Justice Kennedy's opinion sends a message that same-sex couples not only deserve inclusion but also should desire inclusion.

Accordingly, as scholars have long warned, marriage equality may come at a price.[150] To obtain tangible rights and benefits, couples may have to marry.[151] To receive respect for their sexual relationships, couples may have to marry.[152] To communicate the strength of their commitment to their children, couples may have to marry.[153] And in marrying, the couple submits to the watchful eye of the state and the community, both of which seek to ensure that the couple adheres to the sexual and familial norms thought to define marriage.[154] Even as

---

149. *Windsor*, 133 S. Ct. at 2694.

150. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 7-8 (2008); Katherine Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2701 (2008); Murray, *supra* note 43, at 423-35.

151. *See, e.g.*, POLIKOFF, *supra* note 150, at 107; Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003).

152. *See, e.g.*, Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414 (2004); Murray, *supra* note 31, at 59.

153. *See, e.g.*, Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006); Murray, *supra* note 43, at 433.

154. On the other hand, as Professor Mary Anne Case argues, marriage may offer more freedom than nonmarital recognition regimes to the extent that it lacks the explicit, formal requirements of domestic partnership laws. *See* Case, *supra* note 101, at 1772.

the contours of marriage have shifted in ways that accommodate same-sex couples, its regulatory function persists.[155]

Indeed, from this vantage point, *Windsor* and *Turner* may have more in common with the fundamental rights cases that preceded them than appears at first glance. In offering a compelling rereading of right-to-marry jurisprudence, Professor Murray observes across the cases "an essential, but unarticulated, aspect of the marriage right—the disciplinary nature of marriage."[156] Through this lens, *Windsor* to some degree makes explicit the regulatory role of marriage that Murray unearths. Justice Kennedy's description of same-sex couples and their desire for marriage makes clear that these couples already use marriage's social and, where available, legal norms to create family units that are self-sufficient and independent of the state. The couples commit to each other but desire both the state's recognition and the acknowledgment from the community that such recognition promises. They are already disciplined subjects asking—indeed, pressing—for regulation from the state and the community.

A decision that constitutional principles require the state to offer marriage to same-sex couples need not mean that the receipt of government benefits should attach solely to marriage or that nonmarital designations should cease. In fact, the Court could open marriage to same-sex couples simply because the denial of marriage is intended to treat same-sex relationships as inferior to different-sex relationships. Such a decision could reject the constitutional adequacy of domestic partnerships and civil unions not because they are inherently inferior to marriage but because they are meant to discriminate against lesbians and gay men. *Windsor* suggests that these paths are unlikely. If future decisions on same-sex couples' right to marry continue in *Windsor*'s vein, they will send a strong message about marriage itself. Under this view, marriage, rather than sexual orientation equality, bestows dignity and respect on lesbians and gay men. At that point, we may stop asking what the right to marry means and start asking whether there is a meaningful right *not* to marry, and to maintain relationships outside the legal and cultural strictures of marriage.

Douglas NeJaime is a Professor at the UC Irvine School of Law. He thanks Erwin Chemerinsky, Courtney Joslin, Andy Koppelman, Melissa Murray, and Deborah Widiss for helpful comments and suggestions. He also thanks the editors of the Yale Law Journal*, especially Ben Eidelson, Anjali Motgi, and Ryan Thoreson,*

155. Murray, *supra* note 31, at 7.

156. *Id.* at 40.

for their careful work on this essay. And he is grateful to the UC Irvine law librarians for their valuable research support.

Preferred citation: Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013), http://yalelawjournal.org/2013/9/15/nejaime.html.