Expanding Liberty to Privatize Dependency: How the Evolution of Marriage Has Shaped Constitutional Law

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Susan Frelich Appleton, Obergefell*'s Liberties: All in the Family*, 77 **Ohio St. L.J.** 919 (2016), available at SSRN.

The Supreme Court's ruling in *Obergefell v. Hodges*[1] was a watershed moment not only in the history of the LGBT movement, but also in the relationship between family law and constitutional law. In the two years since it was decided, the ruling has become the subject of insightful commentaries from many of the legal academy's leading scholars. This jot highlights one such article by Susan Frelich Appleton that merits special attention from scholars working in the fields of family law and constitutional law.

Appleton's article makes two significant contributions to our understanding of the relationship between family law and constitutional law.

First, Appleton explains how marriage operates as an illuminating exception to the traditional binaries between public/private spheres and positive/negative rights. As she explains, the Court's treatment of marriage in *Obergefell* reveals several ways in which that institution violates two closely related and widely shared paradigms: (1) that the Constitution protects a "private realm of family life which the state cannot enter," and (2) that the Constitution guarantees only "negative rights"—"freedom from government action, not entitlement to government benefits." Through a brief summary of the Court's abortion funding and child abuse cases, Appleton demonstrates how both paradigms won over a majority of the Court and became part of constitutional law's "conventional wisdom," during the 1980s.

In *Obergefell* itself, the dissenting Justices took the majority to task for disrupting these paradigms—for "convert[ing] the shield provided by constitutional liberties into a sword to demand positive entitlements from the State." (P. 928). But as Appleton shows, these criticisms obscure a much wider, more diverse set of meanings than the majority gives to the term "liberty" in *Obergefell*. In particular, she shows that the majority's opinion in *Obergefell* relies upon four discrete meanings of the "liberty" protected by the Due Process Clause, each of which was sharply criticized by the dissenting Justices: (1) a "public liberty," which "impose[s] an affirmative obligation on government" (P. 939-940.); (2) a private and "naturalized liberty," which protects "sex, reproduction, and childrearing" as "inherently natural" activities (P. 941-944.); (3) a private and "equal liberty," which "protects against the discriminatory distribution of state benefits, without making such benefits . . . constitutionally required" (P. 944-946.); and (4) what Appleton refers to as a potentially "feminist," "critical," or even "queer" liberty, which casts the activities of marriage, sex, reproduction, and childrearing as "a unified whole," thereby blurring the traditional boundaries between public and private institutions and positive and negative rights. (P. 946-948.)

In contrast to Professor Kenji Yoshino, Appleton expresses skepticism that *Obergefell* might augur a new era in which the Court will once again become more willing to recognize and protect the existence of new positive rights. As she explains:

Marriage and its unique properties . . . can help reconcile wishful thinking about welfare rights with the modern neoliberal turn. Even if we understand the constitutional right to marry as public and hence as a positive right, entry into marriage functions as a major gateway for private support obligations, explaining why the state incentivizes marriage. . . . Marriage locates the primary source of support for dependents in the 'private sphere,' consistent with neoliberalism's deference to laissez-faire markets and the minimal state. . . . Guaranteeing same-sex couples a right

to marry entails yet additional expansion of these private obligations, in line with neoliberal values. (P. 951-952.)

Although this skepticism was expressed while Justice Kennedy remained on the Court, it seems all the more plausible in light of his subsequent retirement. With a clear majority of five conservative Justices, it is difficult to imagine the Court supporting the recognition of any new positive rights as "fundamental." And the majority's opinion offers ample reasons for future Justices to limit or distinguish it, based on the ruling's extensive reliance on the unique history and significance of marriage itself.

Rather than falling victim to the temptation "to mine the analysis and rhetoric of *Obergefell* for messages" about future rulings, Appleton takes a more theoretical turn toward the article's end. "Looking beyond *Obergefell*'s text," she contextualizes the majority's opinion within "a wider exploration of the interaction of family law and constitutional law."

This section begins by recounting the conventional wisdom of the relationship between family law and constitutional law. In this traditional story, set forth by the majority in *United States v. Windsor*,[2] constitutional law shapes family law by establishing boundaries on how states can define families, thereby marking "the outer limits for permissible family laws." (P. 963). In contrast, Appleton analyzes a long line of Supreme Court cases to illustrate how family law's policy of identifying private sources of support for dependents has shaped various aspects of constitutional law. In particular, she claims that even as privatized dependency has led the Court to expand the definition of "marriage" in cases from *Loving* to *Obergefell*, it has simultaneously led the Court to restrict the scope of equal protection, procedural due process, and substantive due process. And it has consistently done so, she observes, in cases that either directly or indirectly involve issues of family law.

In reviewing *Obergefell*, most commentators (including myself, among many others) have expressed concern that the majority's opinion seems to invite discrimination against unmarried persons by effusively praising the institution of marriage, while describing unmarried people as "condemned to live in loneliness."[3] By contrast, Appleton worries about a different scenario, in which the institution of marriage increasingly serves as a neoliberal template for imposing private dependency on more and more non-marital relationships. If this prediction pans out, Appleton's article presents progressives with a challenging conundrum: If neoliberalism produces more inclusive definitions of "family," should we embrace this inclusivity and the vision of privatized provision that it underwrites? Or should we be willing to accept a narrower definition of "family," in exchange for a more "supportive state"?

In the current landscape, it does not seem likely that either of these options is available, as a political matter. Instead, the Trump Administration and the post-Kennedy Court seem more likely to narrow legal definitions of "family" while dismantling the few systems of public welfare that have managed to survive into the neoliberal era. But even in the longer term, Appleton suggests, it seems unlikely that progressives will be able to advance one goal (i.e., the expansion of "family") without sacrificing the other (i.e., the expansion of governmental support). As Appleton shows, the tensions in the Court's understanding of "liberty" and "marriage" are the product of deeper tensions in American politics, which are likely to endure long after the Court's legalization of same-sex marriage becomes a banal aspect of the relationship between family law and constitutional law.

1. 135 S. Ct. 2584, 2608 (2015).
2. 570 U.S. 744 (2013).
3. Clifford Rosky, *Same-Sex Marriage Litigation and Children's Right to Be Queer*, 22 **GLQ** 541, 543 (2016) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015)); see also Courtney Joslin, *Discrimination In* and *Out of Marriage*, 98 **B.U. L. Rev.** 1 (2018); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 **Cal. L. Rev.** 1207 (2016); Michael Cobb, *The Supreme Court's Lonely Hearts Club*, **N.Y. Times** (June 30, 2015).

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