

*The Unfinished Business of LGBTQ+ Equality*  
*Five Years After Obergefell v. Hodges*



The Supreme Court of the United States Announces the Opinion in *Obergefell v. Hodges*, June 26, 2015<sup>i</sup>

William N. Eskridge, Jr., John A. Garver Professor of Jurisprudence at Yale Law School

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Christopher R. Riano, Lecturer in Constitutional Law and Government at Columbia University

Eskridge and Riano are co-authors of *Marriage Equality: From Outlaws to In-Laws*, which offers the definitive account of one of the most important social movements in American history: the fight for marriage equality. It is forthcoming from Yale University Press in August 2020.

On June 26, 2015, the United States Supreme Court issued its decision in *Obergefell v. Hodges*, holding that the Fourteenth Amendment's due process and equal protection clauses required all states to recognize marriage equality for LGBTQ+ people. Justice Anthony Kennedy's opinion for the Court rested upon the principle that everyone is presumptively entitled to state support for his/her/their choice of spouse, to whom that person commits for life and, often, for joint childrearing responsibilities. Moments after the decision was issued, President Barack Obama called Jim Obergefell on live television and told him, "Not only have you been a great example for people, but you're also going to bring about a lasting change in this country."<sup>ii</sup>

While national marriage equality was the culmination of over 50 years of changes in constitutional law, the family, and religion, it will hardly be the final chapter written about the rights of LGBTQ+ people and their historic role in advancing our understanding of pluralism and equality. In the midst of grappling with the societal shockwaves resulting from the COVID-19 crisis, it is important to take a closer look at what challenges the LGBTQ+ community currently faces, especially since marginalized communities are disproportionately vulnerable to the impacts of the illness. We want to present some of the larger, more surprising sequels to marriage equality nationwide. Five years after *Obergefell*, the status and recognition of same-sex marriages remains in question, even as marriage as an institution has become stronger and alternative institutions have survived. Institutions of commitment serve to bind and protect individuals and families during crises like the current COVID-19 pandemic.

### **The Ongoing Struggle for Marriage Recognition**

Even after *Obergefell*, LGBTQ+ persons have faced obstacles to equal treatment on matters of matrimony. When a married woman gives birth, the law in most states

requires that the name of the mother's spouse appear on the birth certificate, whatever the biological relationship to the child. Arkansas officials declined to include the names of both lesbian spouses. On the second anniversary of *Obergefell*, the Supreme Court in *Pavan v. Smith* (2017) ruled that Arkansas's practice violated *Obergefell*'s commitment to give same-sex couples the same "constellation of benefits that the States have linked to marriage." This was an easy case, for *Obergefell* explicitly held that Ohio (one of the four states defending their discriminatory laws) had to include both male spouses on the birth certificate of the son they were adopting. That three justices (Thomas, Alito, and Gorsuch) dissented from a ruling in *Pavan*, a result required by the narrowest understanding of stare decisis, suggests that there were in 2017 already three votes to narrow, ignore, or overrule *Obergefell*.

In *Pidgeon v. Turner*, a state district judge ruled that Houston had to provide regular spousal benefits to its employees in valid same-sex marriages. In the wake of local GOP outrage, the state supreme court vacated the district court's ruling, and remanded for a reconsideration of how seriously to read *Obergefell*. Notwithstanding *Pavan*, the court said that *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." This issue is still being litigated in Texas.

For a federal example, the immigration code provides that a child of a married couple is an American citizen if either spouse is a citizen and has resided for a period of time in the United States. Like Arkansas, the Trump Administration has rewritten the statute and denies citizenship to the child of a married same-sex couple where the citizen is not the biological parent. Like the Texas statute, this interpretation is being litigated—five years after *Obergefell*. It is not far-fetched to say that the next few appointments to the Supreme Court will determine whether *Obergefell* remains good law.

### **Continued Workplace Discrimination Against LGBTQ+ Persons**

In about half the states, an LGBTQ+ person can get married on Sunday and be legally fired from her/his/their job the next day. Notwithstanding pervasive prejudice or stereotyping, many state anti-discrimination laws do not prohibit discrimination against sexual and gender minorities. Even in New York, it was not until 2019 that the Legislature passed the Gender Expression Non-Discrimination Act (“GENDA”), prohibiting private as well as public discrimination against people based upon their gender identity or gender expression. (A 2002 law barred discrimination because of sexual orientation.)



New York State Congressional Representative Bella Abzug shakes hands with President Jimmy Carter in New York on July 11, 1976<sup>iii</sup>

Federal legislation was introduced as early as 1974 by New York Congresswoman Bella Abzug that would have amended Title VII of the Civil Rights Act of 1964 to include marital status and sexual orientation among its workplace anti-discrimination prohibitions. The bill died in committee.<sup>iv</sup>

After the failure of similar bills in almost every Congress for the last 45 years, the House of Representatives passed an ambitious Equality Act on May 17, 2019. However, the Senate has, as yet, failed to act on this legislation, which would bar sexual orientation and gender identity (“SOGI”) discrimination in employment, public accommodations, housing, and credit. In the meantime, while marriage equality is the law of the land, it remains legal for someone who is part of the LGBTQ+ community to be discriminated against in numerous ways in most states, and Congress has continually failed to act on those forms of potential discrimination with federal legislation.<sup>v</sup>

On October 8, 2019 the United States Supreme Court heard arguments in the combined cases of *Altitude Express v. Zarda* and *Bostock v. Clayton County*, as well as *R.G. & G.R. Harris Funeral Homes v. EEOC*. In *Zarda/Bostock*, the Court is considering whether discrimination against an employee based on the sex of his/her/their preferred partner or spouse is prohibited by Title VII’s bar to job discrimination motivated in any way “because of sex.” In *Harris Funeral Homes v. EEOC*, the Court is considering whether Title VII prohibits discrimination against an employee because of her/his/their sex identity. In both matters, which are expected to be decided within the October 2019 term, the Court is examining a set of questions around a right that many believe is as fundamental as the right to marry, specifically the right to be free from discrimination in the workplace based upon your sexual orientation or gender identity.

### **Equal Liberty for Transgender Persons?**

By removing sex-based classifications from marriage law, *Obergefell* liberated transgender persons to marry the spouses of their choice. Yet, today, transgender persons face unique challenges to their free gender expression. Gay-bashing has given way to trans-bashing all over America.

The year after *Obergefell*, North Carolina governor Pat McCrory signed into law the Public Facilities Privacy & Security Act, commonly called “HB2.” The statute changed North Carolina law to preempt local SOGI anti-discrimination ordinances, and to limit public facilities to the people whose birth certificates match the gender signage on the door. This statute generated controversy as the nation’s most notorious “bathroom bill,” and numerous states as well as companies banned funded travel to North Carolina as a result. Following a federal lawsuit, and a disciplinary threat by the National Collegiate Athletic Association, some parts of the statute were changed in 2017. Even after a settlement approved by Judge Thomas Schroeder, however, the portion of the law preempting local SOGI anti-discrimination ordinances remains enforceable law in the Tarheel State.<sup>vi</sup>

At the same time it has been representing wedding vendors who refuse their services for same-sex weddings, the Alliance Defending Freedom (“ADF”) this year filed suit against the Connecticut Association of Schools. Under the slogans of “Fair Play” and “Protect Women’s Sports,” the ADF seeks to prevent two transgender girls of color from competing in high school sports. Many lawsuits and proposed legislation have likewise targeted transgender athletes, some of which would require those teenagers to submit to invasive investigations into their chromosomes and/or reproductive organs.

## **A Newfound Prominence of Nonbinary Persons**

In 2019, the word of the year, according to Merriam-Webster Dictionary, was “they,” defined as “a single person whose gender is intentionally not revealed” or “whose gender identity is nonbinary.” According to Merriam-Webster, searches for the word increased 313% in 2019 over the previous year, and because the English language fails to have a gender-neutral pronoun to correspond neatly with other singular pronouns, “they” has been used for this important purpose for over 600 years.<sup>vii</sup>

In the post-*Obergefell* world, public figures such as Academy Award-winning vocalist Sam Smith and chart-topping singer Miley Cyrus have embraced the idea of gender as a spectrum, rather than a binary choice, and in doing so have sometimes preferred to use neutral pronouns such as “they.” The ways in which an individual can identify as nonbinary are incredibly diverse and varied. Those individuals who identify as nonbinary are now more often expressing themselves openly and in public, as opposed to hiding in the shadows. In part, the successful nationalization of marriage equality between those who identify as either male or female in same-sex pairs has opened the door to further liberation of those who do not identify with a single sex or gender.<sup>viii</sup>

Indeed, *Obergefell*’s reasoning speaks to the freedom sought by nonbinary persons. Rather than attack marriage restrictions based on their arbitrary sex- and sexual orientation-based exclusions, Justice Kennedy’s opinion rested upon the Constitution’s protection of “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” The next year, a federal district judge followed this principle to free a nonbinary person from passport sex identification in *Zzyym v. Kerry*. As the nation responds to the identity-based claims of nonbinary persons, *Obergefell*—assuming it survives partisan attacks on its result and reasoning—should be a beacon.

## **Alternatives to Marriage Are Still with Us, But Not as Prominent**

As the struggle for marriage equality crossed the nation state by state, in a number of states litigation or legislation resulted in a number of different alternate institutions for same-sex and also opposite-sex partners. In most of these states, the menu of these alternate institutions, like domestic partnerships, civil unions, or domestic beneficiaries, has survived the recognition of marriage for LGBTQ+ couples. In practice, thus far, most cohabiting couples are taking advantage of the full benefits afforded by marriage equality, and few are opting for one of the other institutions still available for structuring their relationships.

For example, in New York City, you can still enter into a registered domestic partnership instead of a marriage. This makes you eligible for a number of benefits, from something as simple as the right for the surviving domestic partner to purchase the chair occupied by the New York City council member (NYC Ad. Code § 3-204.2), to something as critical as providing “for the right to health insurance coverage for a domestic partner of a member of the uniformed forces of the police or fire departments who was killed as a natural and proximate result of an accident or injury sustained while in the performance of duty.” (NYC Ad. Code § 12-126(b)(2)(i).) At the same time, registered domestic partnerships do not necessarily confer other benefits, and the termination of a domestic partnership is done by a filing with the City Clerk, as opposed to the complex divorce procedure in front of a New York judge. While same-sex and opposite-sex couples can take advantage of this “marriage-lite” structure, people now tend to choose “regular” marriage.<sup>ix</sup>

Yet some states are not only preserving but are expanding their domestic partnership laws. For example, in July 2019 California governor Gavin Newsom signed SB 30 into law, which eliminated the requirement that state domestic partnerships were only permissible when both parties “are members of the same sex or one or both is eligible for social security benefits and over the age of 62.”<sup>x</sup> One



reason couples would opt for domestic partnership rather than marriage is that the IRS does not treat the former as marriages that would trigger higher taxes for some two-income couples.

### **Conservative Faith Traditions Have Moved Toward Tolerance and Even Acceptance**

Just a little over a year after *Obergefell*, the Church of Jesus Christ of Latter-Day Saints launched a new public relations campaign that was intended to soften the Church's tone towards the LGBTQ+ community. Furthermore, the Church's website renounced "conversion therapy" and insisted upon "Kindness, Inclusion, and Respect for All of God's Children," including His LGBTQ+ children. The site offers advice and counsel to individuals, families, church leaders, and others in an attempt to move towards a tolerance of the LGBTQ+ community not only outside of the Church, but within.<sup>xi</sup>

On April 4, 2019, reversing a 2015 policy, President Dallin Oaks announced that children of parents who identify as LGBTQ+ could now be blessed and baptized within the Church. The Church further stopped their characterizing of same-sex marriage as an "apostasy." For a faith tradition that played such a central role in historically opposing marriage equality to make such an important doctrinal shift shows the continuing evolution of faith that LGBTQ+ individuals and families are bringing to faith-based communities.<sup>xii</sup>

Other traditional faith institutions are finding greater tolerance themselves as more LGBTQ+ families become familiar to them, embracing The Golden Rule: "Do unto others as you would have them do unto you." During our work on our book, we found a spirit of tolerance, and often acceptance, in exchanges with leading Catholics, Episcopalians, Lutherans, Latter-day Saints, Presbyterians, Reform and Conservative Jews, and Methodists. What same-sex marriage has done to open the

door to these conversations has strengthened, as opposed to weakened, these faith communities, because they will continue to face internal pressure from colleagues who plead for a warmer welcome for their own LGBTQ+ friends and relatives. Same-sex marriage may be changing religion, but it is happening as a result of pressure from the inside rather than from outside faith communities.

### **The Profound Impact of COVID-19 on Marriage and Society**

In many ways, COVID-19 and the crisis created by this pandemic reinforce the importance of institutions like marriage that commit to people to each other “in sickness and in health.” As we see every day, spouses are the people supporting our health and medical professionals who are on the frontlines. When someone becomes ill, it is often her/his/their spouse that is able to provide care, especially since the vast majority of people who are afflicted with COVID-19 rest and recover within their homes. It is spouses and domestic partners, both same-sex and opposite-sex, who are trading off the responsibilities to ensure that health and household needs are met and that someone is handling the groceries.

It is at times like this, where the institution of marriage becomes a bulwark against the tragedy of disease, when we see most visibly the crucial role that marriage equality has played to strengthen the institution of marriage for all Americans. Furthermore, the alternative institutions of relationships we discuss above help provide societal bonds that make it possible for people to manage acute stresses and long-term disruptions. For example, the Colorado legislature in 2009 created a new institution, “designated beneficiaries,” for all couples who did not (or could not) get married but who wanted to take responsibility for one another’s well-being, health, and welfare. Although most Colorado couples of all orientations and gender identities have preferred marriage or civil unions, the availability of this institution is important in times of pandemic, and we urge more states to consider adoption of a designated beneficiaries law.

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<sup>i</sup> The Supreme Court of the United States Announces the Opinion in *Obergefell v. Hodges*, June 26, 2015, photo by Ted Eytan, retrieved from Wikimedia Commons at: [https://commons.wikimedia.org/wiki/File:SCOTUS\\_Marriage\\_Equality\\_2015\\_\(Obergefell\\_v.\\_Hodges\)\\_-\\_26\\_June\\_2015.jpg](https://commons.wikimedia.org/wiki/File:SCOTUS_Marriage_Equality_2015_(Obergefell_v._Hodges)_-_26_June_2015.jpg) (accessed on March 11, 2020).

<sup>ii</sup> See <https://www.cnn.com/2015/06/26/politics/obama-calls-gay-marriage-ruling-plaintiff-jim-obergefell/index.html> (accessed on March 19, 2020)

<sup>iii</sup> President Jimmy Carter shakes hands with U.S. Rep. Bella Abzug of New York after speaking to a woman's caucus of the Democratic Party at a New York Hotel Sunday, July 11, 1976, retrieved from <http://thebullelephant.com/wp-content/uploads/2018/12/Bella-Abzug-and-Jimmy-Carter.jpg> (accessed April 23, 2020).

<sup>iv</sup> See <https://www.congress.gov/bill/93rd-congress/house-bill/15692?q=%7B%22search%22%3A%5B%22%5C%22equality+act%5C%22%22%5D%7D> (accessed March 12, 2020).

<sup>v</sup> See <https://www.congress.gov/bill/116th-congress/house-bill/5> (accessed March 19, 2020).

<sup>vi</sup> See <https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf> (accessed April 1, 2020).

<sup>vii</sup> The Merriam-Webster Dictionary Word of the Year for 2019, retrieved from <https://www.merriam-webster.com/words-at-play/word-of-the-year/they> (accessed on March 14, 2020). See also "They," retrieved from <https://www.merriam-webster.com/dictionary/they> (accessed on March 14, 2020).

<sup>viii</sup> The LGBT Foundation on Non-Binary People, retrieved from <https://lgbt.foundation/who-we-help/trans-people/non-binary> (accessed on March 11, 2020).

<sup>ix</sup> See <https://www.cityclerk.nyc.gov/content/domestic-partnership-registration> (accessed April 12, 2020).

<sup>x</sup> See <https://www.maplesfamilylaw.com/divorce/senate-bill-30-in-california-new-law-on-domestic-partnerships/> (accessed April 13, 2020).

<sup>xi</sup> See <https://www.churchofjesuschrist.org/topics/gay/?lang=eng> (accessed April 2, 2020)

<sup>xii</sup> See <https://www.churchofjesuschrist.org/church/news/policy-changes-announced-for-members-in-gay-marriages-children-of-lgbt-parents?lang=eng> (accessed April 3, 2020)