

Regulating Equality, Unequal Regulation: Life after *Obergefell*

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This Essay examines the interplay between state statutes that created and regulate civil unions for same-sex couples and the landmark ruling in Obergefell v. Hodges. It observes Obergefell was silent on how to treat civil unions, and argues that Obergefell presents two competing definitions of marriage. These competing definitions expose the costs and legal complications queer Americans continue to bear in both family-formation and dissolution. The Essay contends these costs are mediated by the formal disjunction between substantive equality in Obergefell and the regulatory processes which incepted and proceeded it. The Essay concludes with a survey of developments in post-Obergefell litigation around civil unions.

Introduction

For all its lofty evocations of equality, the Constitution's most historically contested guarantee, Justice Kennedy's discourse in *Obergefell v. Hodges* is interrupted by a telling aside: "[S]ociety pledge[s] to support the couple, offering . . . *material benefits* to protect and nourish the union."¹ The materiality and

[†] I am grateful to Luke Boso, Visiting Professor, University of San Francisco School of Law, for reading and offering comments on initial drafts of this Essay, and for his continued feedback and support. Additionally, to Brian Mikulak, Assistant Professor, University of San Francisco School of Law, and Lee Ryan, Co-Director of University of San Francisco's Dorriane Zief Law Library, for their research assistance. I would further like to thank the editors of the *Yale Journal on Regulation* for their hard work and incisive edits, which greatly improved this Essay.

1. 135 S. Ct. 2584, 2601 (2015) (emphasis added). The Court affirmatively answered the central question presented by the case: "Does the Fourteenth Amendment require a state to license marriage between two people of the same sex?" The Court's emphasis on "the entwined emphasis of liberty and equality" became a "game changer for substantive due process jurisprudence." See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015). It is outside the scope of this Essay to consider the growing and urgent analyses of *Obergefell* as differently experienced along lines of class, race and citizenship. For more, please see: R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORHAM L. REV. 53 (2015); Elvia Rosales Arriola, *Queer, Undocumented, and Sitting in an Immigrant Detention Center: A Post-Obergefell Reflection*, 84 UMKC L. REV. 617 (2016).

immateriality of same-sex² marriage is framed throughout Kennedy’s opinion by a surprisingly heteronormative anxiety: what damage have we done to America’s children, allowing them to suffer the “significant material costs” of living with unmarried same-sex parents?³

If the undergirding logic of *Obergefell* is—in a way that marriage equality demonstrates rather than refutes—the maintenance of marriage as the embodiment of “the highest ideals,” is there any way its holding could even allow two non-married queer Americans to become “something greater than once they were”?⁴ *Obergefell* is simultaneously (and paradoxically) valuable for its definitions of marriage, as well as for the possibilities it presents for exploding the legal differentiations between “spouse” and “non-spouse.” To the extent that the *Obergefell* decision has not explicitly indicated a societal acceptance of radical queer politics, the decision nonetheless presents opportunities for these politics to re-emerge in lower court proceedings.⁵ The following analyses consider lower court interpretations of *Obergefell*, and how these court proceedings have resisted or deepened Kennedy’s conceptualization of queer bodies and their configuration into “one of civilization’s oldest institutions.”⁶ The heteronormative anxieties of *Obergefell* extend beyond the wellbeing of American children and work additionally to situate new material parameters of queer intimacy within the institutional framework of marriage. This Essay examines how these anxieties drive lower court proceedings.⁷

Part I of this Essay opens with a case concerned with the regulatory problems *Obergefell* leaves unresolved.⁸ In the struggle for and legal history of marriage equality, state legislatures and statutes have been primarily focused on developing alternative forms of union for same-sex couples. As praxis, regulation has both distributed and integrated common law approaches to equality. I also argue in Part I that *Obergefell* presents two distinct definitions of “marriage.” These competing definitions afford a reconsideration of how alternative forms of union and marriage’s enhanced liberties can open new avenues toward material benefits for queer Americans. Part II examines a case involving a same-sex partnership’s dissolution and custody dispute. This analysis exposes the material costs queer couples continue to bear in family-

2. Textually, *Obergefell* refers only to “same-sex” marriages and couplings. This Essay adopts this limiting language only as necessary for references and citations. Its usage is meant to distinguish the queer activism and theory which includes bisexual, transgender, and gender non-conforming individuals from the opinion’s language. See Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1120 (2017).

3. 135 S. Ct. at 2590.

4. *Id.* at 2608.

5. This Essay opens with the historicized assumption that any Supreme Court decision—despite its posturing to the contrary—initiates the social change it alleges to ratify.

6. *Id.* at 2608.

7. See Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 851 (2014) (noting the historical relationship between anti-gay discrimination and constitutional equality norms).

8. *Solomon v. Guidry*, 155 A.3d 1218 (Vt. 2016).

formation, and how post-*Obergefell* union dissolution litigation requires distinguishing between categories such as “partner” and “spouse.” These costs and requirements destabilize the foundation of equality on which *Obergefell* was trumpeted. Part III concludes this Essay with a brief consideration of how civil union litigation can anchor strategies for activism after marriage equality.

I. Sexuality, Equality, and Legislative Histories

Same-sex couplings have a storied history beyond twenty-first century American legal proceedings.⁹ Sexuality as a primary concern of and arguable cause for psychoanalysis opened what Michel Foucault calls a substantial shift in tactics, consisting of “reinterpreting the deployment of sexuality in terms of a generalized repression [and] tying this repression to general mechanisms of domination and exploitation.”¹⁰ This analysis of sexuality as historical foils the forked possibilities queer activists faced in presenting a national campaign for marriage equality in the wake of the Hawaii Supreme Court’s 1993 decision in *Baehr v. Lewin*¹¹ and more recently in *United States v. Windsor*.¹²

As the possibility of marriage equality slowly became a legal reality, queer scholars remained divided. Was marriage valuable as a generative framework for this newly allowed participation in federal civil liberty, or simply the continued and well-costumed regulation of queer sexuality?¹³ The former position—that marriage equality fundamentally improves the standing and lives of queer Americans—is held by many laypeople and activists.¹⁴ The latter, in which queer sexuality is hardly “advanced” by the formalization of equality through marriage, has been articulated variously by many scholars.¹⁵ The tension between these conceptualizations of equality reasserts the relevance of Foucault’s analyses of how, and by whom, sexuality is “deployed.”¹⁶

Out of both shrewdness and necessity, same-sex litigants have begun deploying their own sexuality within a latticework of regulations to achieve

9. *Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that an anti-sodomy statute did not violate fundamental rights of homosexuals), *overruled by Lawrence*, 539 U.S. 558.

10. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I*, 130-31 (1980).

11. 852 P.2d 44 (Haw. 1993).

12. 570 U.S. 744 (2013).

13. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 2014 CALIF. L. REV. 87, 102.

14. *See id.* at 90-91.

15. *See, e.g.*, Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC., POL’Y & L. 387, 433 (2012); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003); Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006).

16. It is outside the scope of this Essay to consider the ways in which non-married heterosexual partnerships during this period were simultaneously enduring discriminatory holdings against their access to state resources like unemployment benefits, or how queer activists responded to these holdings directed at their hetero-counterparts. For more, *see Norman v. Unemployment Insurance Appeals Board*, 663 P.2d 904 (Cal. 1983).

otherwise commonplace legal outcomes. *Solomon v. Guidry* presents a series of complications to the otherwise straightforward problem of how a same-sex couple might divorce.¹⁷ This process is complicated by the failure of *Obergefell* to consider civil unions as distinct from formal marriages and how same-sex couples can dissolve them. In *Solomon*, the plaintiff and defendant entered in 2001 into a civil union in Vermont. In 2015, after returning to Vermont from North Carolina, the couple sought to dissolve their civil union. The Vermont Legislature created the civil union in 2000, which extended “the benefits and protections of marriage to same-sex couples” through a system entirely separate from civil marriages.¹⁸ “While a system of civil unions [did] not bestow the status of civil marriage, it [did] satisfy the legal relationships of the Common Benefits Clause.”¹⁹

While Vermont legalized same-sex marriage in 2009, its legislature ensured that civil marriages would not dissolve civil unions. Any same-sex civil union would continue to be recognized in Vermont regardless of whether the couple chose to marry.²⁰ Between the passage of this legislation and *Obergefell*, Vermont revised its statutory parameters for nonresident civil union dissolution. Because couples joined by civil unions or marriages in Vermont did not have access to divorce proceedings in states that refused to recognize same-sex unions or marriage, Vermont codified means by which its once-residents could dissolve unions or marriages.²¹

Solomon introduces a regulatory concern within the debated strength of Justice Kennedy’s Equal Protection guarantee. The problem animating the case is the Supreme Court’s failure to mandate that states recognize lawful same-sex civil unions alongside same-sex marriages. *Obergefell* is silent regarding how states must treat extant civil unions.²² The legislative purpose of civil unions was the provision of the same material benefits otherwise afforded by marriage.²³ Underpinning *Solomon* is how civil unions paradoxically disrupt the regulatory scheme through which marriage equality in *Obergefell* is realized. Because *Obergefell* did not account for civil unions, the statutory infrastructure governing them, particularly with respect to custody disputes and dissolutions, is still

17. 155 A.3d 1218 (2016). Plaintiff filed a petition to dissolve his nonresident same-sex civil union and appealed to the Vermont Supreme Court.

18. *Id.* at 1219; 15 VT. STAT. ANN. Tit. 15, § 23 (1999).

19. *Id.* (citation omitted). The Common Benefits Clause provides “[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and inalienable right, to reform or alter government, in such a manner as shall be, by that community, judged most conducive to the public weal.” VT. CONST. art. VII.

20. 2009 Vt. Acts & Resolves 33. This language comes from a summary provided along with the status of the bill.

21. 15 VT. STAT. ANN. tit. 15, § 1206 (2018). This measure was, of course, mooted by *Obergefell*’s holding that states must recognize lawful same-sex marriages in other states.

22. *See* 135 S. Ct. 2584, 2603 (2015).

23. 15 VT. STAT. ANN. tit. 15, § 1204 (1999).

required even after *Obergefell*. While no new same-sex civil unions have been formed post-*Obergefell*, the impact and necessity of union-oriented statutes remain for same-sex couples still bound by civil unions. Accordingly, Vermont statutes governing disputes and dissolutions between union-bound couples remain intact and have not been revised since *Obergefell*.²⁴

Glaringly, Justice Kennedy's analysis excludes bisexual and transgender citizens and their configuration into the new equality schema.²⁵ This exclusion correlates to the disregard for civil unions in post-*Obergefell* marriage equality. Rather than foreclose the possibility of "queering" marriage as an institution,²⁶ this disregard preserves possibilities for how lower courts can reconcile the complexities of queer theory excluded from the Constitutional considerations dominating the holding *through regulatory mechanisms*. This preserves the possibility for advancing queer politics in a post-*Obergefell* society.

The history of queer radical resistance is intertwined with the history of legal victories for LGBT Americans. Through a series of decisions that disentangled LGBT bodies from criminal penalties or found those regulations altogether unconstitutional,²⁷ queer sexuality was incrementally legitimated and normalized into society. As *Solomon* forecasts, the consequence of welcoming queer bodies into the mainstream was realizing the inevitably expanded role that they would play in the nation's political economy. This role moved beyond a consumers/consumed dyad of cultural-commodity exchange.²⁸ With a sudden "explosion" of visible gay and lesbian bodies in the workplace and in media representations, emancipatory de-regulation became the symptom of inequality early-stage radical activists feared and against which they imagined a resistance.²⁹ This backdrop of social history is crucial for reading the definitions marriage offered in *Obergefell*.

The opinion presents two definitions of marriage. Kennedy's first definition of marriage is as a "lifelong union" that is "sacred" and "essential to our most profound hopes and aspirations."³⁰ *Obergefell* generates no new liberties; it only introduces same sex couples into the central premises and federal rights of

24. 15 VT. STAT. ANN. Tit. 15, § 23 (2018).

25. See Boso, *supra* note 2, at 1120.

26. See Ajnesh Prasad, *On the Potential and Perils of Same-Sex Marriage: A Perspective from Queer Theory*, 7 J. BISEXUALITY 191 (2008).

27. E.g., *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

28. Richard R. Cornwell, *Queer Political Economy: The Social Articulation of Desire*, in *HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE* 89, 103 (Amy Gluckman & Betsy Reed, eds. (1997)). (The extent to which queer social codes, and the experiences that produce them, get used depend on whether they sweep "in a wave, like an epidemic, through society." Queer political economy, through increasing social and legal acceptance of homosexuality, created a kind of "social epidemic" in which queers were not only consumers but "introduce[d] a possible new type of externality among all actors' actions/voices.")

29. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL COMMUNITY IN THE UNITED STATES, 1940-1970* (1983).

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

marriage.³¹ The ideology of access as achieved by “regulating” equality *into* marriage (as typified more by Kennedy’s introductory language) ensures queer participation in an essentially unchanged system.³² This fails to change social conceptions of what “sacred” and “essential” marriage is or could be, despite the religious resistance to same-sex marriage in the opinion’s wake.³³

This definition conceals the opinion’s other ideological function. If read through the lens of Kennedy’s later definition of marriage as a guarantee of “material benefits” that preserve the union,³⁴ I further argue *Obergefell* succeeds on a second plank. Before *Obergefell*, queer Americans gradually accumulated rights and visibility while many before 2015 (and many after) remained unmarried.³⁵ After *Obergefell*, not only do unmarried couples have no alternative to marriage for securing specific rights and “material benefits,” but higher rates of marriage increase *married* queer participation in a political economy for which marriage is a threshold barrier.³⁶ Pre-*Obergefell* state-recognized marriage was not the only way for same-sex couples to gain rights.³⁷ However, state-recognized marriage is the guaranteed way for same-sex couples to have their shared lives regulated by the state.³⁸ A tension emerges between the “much needed clarity” *Obergefell* affords by locating gay rights cases within the Court’s “fundamental rights line of cases”³⁹ and a question exposed by Chief Justice Robert’s dissenting remark: “[t]he equal protection analysis might be different . . . if we were confronted with a more focused challenge to the denial of certain tangible benefits.”⁴⁰ How has marriage under *Obergefell* left open the possibility for developments or challenges to certain tangible and material benefits, and for whom?

II. Partners and Spouses: The Possibilities of Substantive Equality and Regulation

The lingering question of what to do with civil unions after *Obergefell* goes beyond a disregard for the complicated lived and legal experiences of some same-sex couples’ frustrations with divorce or custody proceedings. The emergence of cases seeking to resolve seemingly ordinary complaints (divorces,

31. *Id.* at 2600.

32. Yoshino, *supra* note 2, at 163.

33. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. Rev. 1, 2 (2015).

34. *Obergefell*, 135 S. Ct. at 2601.

35. *Id.* at 2596-97.

36. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 7 CALIF. L. REV. 1207, 1251 (2016).

37. *Id.*

38. See Peter Nicolas, *Fundamental Rights in a Post-Obergefell World*, 27 YALE J.L. & FEMINISM 331, 361 (2016).

39. *Id.*

40. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting); see also Murray, *supra* note 36, at 1251.

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custody disputes) between same-sex couples bound by civil unions destabilizes the foundations of equality on which *Obergefell* is opined. *Gardenour v. Bondelie*, unlike *Solomon*, is premised on the idea that a registered domestic partnership (RDP) is not a surrogate for marriage or the legal rights it confers.⁴¹

In *Gardenour*, the Indiana Court of Appeals applied California law to determine if an RDP issued in California could be terminated in Indiana and how this termination could be applied to plaintiff's child custody claim.⁴² This RDP was one of many issued since 2003 from California.⁴³ From 2003 to 2015, Californians bound under RDPs did not enjoy any of the approximate 1,100 federal rights accorded married couples. This was the key feature distinguishing California's RDPs from the rights and protections accorded married couples at the federal level.⁴⁴ Despite their progressive tones, many equality advocates criticized RDP bills and regulations as pacifying efforts for LGB citizens by conferring rights that were visually appealing but substantively hollow.⁴⁵

The *Gardenour* court applied relevant California law in its opinion. *Gardenour*'s argument at the trial level was that, assuming the RDP agreement in question did establish a relationship identical to marriage, the trial court erred in recognizing such a relationship in Indiana.⁴⁶ *Gardenour* argued that recognizing a same-sex relationship is counter to Indiana public policy, which the court found "outdated."⁴⁷ The court wrote that "this court and the [Indiana Supreme Court] previously acknowledged a public policy against recognizing same-sex marriage" because of state legislation which stated same-sex marriage was void even if lawful in the state where it was celebrated.⁴⁸ However, the court cited *Obergefell* in explanation for how this legislation has been struck down as unconstitutional.⁴⁹ There is an obvious tension between the argument of

41. 60 N.E.3d 1109 (Ind. Ct. App. 2016). Biological mother Kristy Gardenour filed an action to terminate her RDP with partner Denise Bondelie, which was issued in California while living in Indiana. On appeal, Gardenour argued that the couple's RDP was never intended to confer equal rights as married couples or a spousal relationship for determining child custody or support in termination proceedings.

42. *Id.*

43. CAL. FAM. CODE § 297.5(a) (West 2018) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under [California state] law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

44. The California Code later confirms this twelve-year distinction: *See id.* § 297.5(e) ("To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.").

45. *See, e.g.,* William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV 961 (2001).

46. 60 N.E.3d at 1116.

47. *Id.* at 1117.

48. *Id.* at 1118.

49. *Id.*

Gardenour and the original, conservative reasoning of the Indiana legislature's policy against same-sex marriage.

RDPs are equivalent to same-sex marriages only insofar as marriages offered a model for regulating RDPs. *Gardenour*'s first argument to the Indiana court that recognizing an out-of-state RDP is counter to state policy interests signals (perhaps in a way supported by the court's lengthy citations) precisely the fractious social realities and federalist discrepancies regarding same-sex marriage that *Obergefell* failed to unify. This argument concludes that the experience of bounded partnership for same-sex couples has, and will continue to have, legal complications that cannot be experienced by their heterosexual counterparts. The *Gardenour* opinion raises a question about how and by whom *Obergefell* may be used as a piece of discursive strategy for either conservative or radical ideologies.

Gardenour's attempted differentiation between "partner" and "spouse," and the *Gardenour* Court's reliance on contract theory to reconcile the statutory strictures of the RDP and custody proceeding, undercuts *Obergefell* in another sly way. Implicit here is the idea that partners and spouses *are* distinct, as demonstrated by the litany of California Code requirements cited by the *Gardenour* Court. Statutes structuring domestic partnerships, as the *Gardenour* court unpacks, impose specific concrete terms with financial and affective requirements.⁵⁰ While scholars like Mary Ann Case argue marriage offers more, not less, flexibility than domestic partnerships, *Gardenour*'s point as a litigant remains clear: the processes and experiences of a partner, defined under California statute, *are* distinguishable from those of spouses.⁵¹ This differentiated experience of partnership is expressed at both the substantive level of law, in terms of requirements to secure a RDP versus a marriage, as well as how the material realities of these two legal and relational structures persist as lived experiences for same-sex and queer couples even after *Obergefell*.

The *Gardenour* court's application of its legal authority and newly acknowledged, post-*Obergefell* policy interests in same-sex domestic life are immediately presented in its following paragraph:

Here, California law makes clear a RDP is identical to marriage. If we did not recognize California RDPs as the equivalent of marriage, it would seem to allow individuals to escape the obligations California imposes upon domestic partners, *namely with respect to children* . . . In addition, not recognizing their status would ultimately harm [their child] because *a child's welfare is promoted by ensuring she has two parents to provide financial support*.⁵²

50. Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664-65 (1993).

51. *Gardenour*, 60 N.E.3d at 1115-16; *see also* CAL. FAM. CODE § 297.5(e) (West 2018).

52. *Gardenour*, 60 N.E.3d at 1118 (emphasis added).

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The court's conditional framework is necessary to effectively recycle Justice Kennedy's language: the *Gardenour* court's concern for "a child's welfare" and its promotion with "two parents to provide financial support" is not far removed from minimizing the "significant material costs" against America's children under their unmarried queer parents.⁵³ The recognition of a same-sex spousal relationship as "not go[ing] against Indiana public policy" flows from the court's concern over a child's welfare.⁵⁴ The court also recognized Bondelie, the child's non-biological parent, as a legal parent.⁵⁵ *Gardenour* echoes Justice Kennedy's concerns for children.⁵⁶ The court's concerns and recognitions illuminate the "significant material costs" borne by many queer parents to simply have children.⁵⁷ These costs are borne in attempts to participate in legal processes (dissolutions, custody disputes) that are continually mediated by the formal disjunction between substantive equality in *Obergefell* and the regulatory processes which incepted and necessarily preceded it.⁵⁸

III. Beyond *Obergefell* and Marriage Equality

In a continued study of case law and legislative responses to activism for bisexual, transgender, and domestic partnerships or arrangements after marriage equality, the task is twofold. First, understanding how the "contemporary legal imagination"⁵⁹ of lower courts variously interpret the competing definitions of

53. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

54. *Gardenour*, 60 N.E.3d at 1118.

55. "That said, the evidence establishes Kristy [Gardenour] and Denise [Bondelie] agreed to co-parent a child conceived via artificial insemination with Kristy being the birth parent Denise and Kristy still considered C.G. to be Denise's son We therefore conclude Kristy and Denise, as spouses, knowingly and voluntarily consented to artificial insemination. Denise is C.G.'s legal parent." *Id.*

56. "[N]ot recognizing their status would ultimately harm [their child] because a child's welfare is promoted by ensuring she has two parents to provide financial support." *Id.*

57. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1253 (2016) ("Family-based LGBT equality may be particularly significant to the status of assisted reproduction, which is central to same-sex family formation."). Arguably, for courts concerned with children's welfare the costs and process of family-formation through assisted reproduction make certain same-sex couples *more* invested (literally and figuratively) in the welfare of their children.

58. For some illustrative cases emergent post-*Obergefell*, see *Marie v. Mosier*, 196 F. Supp. 3d 1202 (D. Kan. 2016), in which same-sex couples brought action against state officials declaring Kansas state law violated due process and equal protection rights in its failure to recognize previous and out-of-state same-sex marriages and unions, and *Mabry v. Mabry*, 882 N.W.2d 539 (Mich. 2016) (McCormack, J. dissenting), arguing that the appeal should be granted to determine whether *Obergefell* compels the application of equitable-parent doctrine to custody disputes between same-sex couples previously and unconstitutionally barred from legal marriage. The *Mabry* dissent signals the vibrancy with which *Obergefell* may (and must) be debated not merely on ideological terms, but also within doctrinal and statutory frameworks for the continued pursuit of truly equal protection. See also *Blumenthal v. Brewer*, 69 N.E.3d 834 (2016) (holding, against litigant's argument that despite affective and financial near similarity, the prohibition of unmarried cohabitants bringing common-law claims based on marriage-like relationship did not violate due process or equal protection, essentially barring a former same-sex domestic partner, who sought restitution from use of funds in previously joint account, by the public policy implicit in a statutory prohibition disfavoring grant of property rights to unmarried cohabitants.)

59. See Murray, *supra* note 36 at 1250.

“marriage” from *Obergefell*. Second, asking how do these interpretations foreclose or preserve possibilities for persons outside the framework of *Obergefell*? Perhaps an initial answer to this question is a formal one. Litigation surrounding pre-*Obergefell* civil unions and RDPs affords a place from which both scholars and practitioners may begin to address these questions. Where, again, scholars like Case make a compelling argument for the comparative flexibility of marriage-as-institution versus the statutory domestic partnership, the legal victories and disputes for queer couples, married and unmarried, before and after *Obergefell* are consequences of the same goal. This goal is to extract a radical alternative to our (still existing) marginalized world from the lineaments of its own description of itself.⁶⁰

The paradox put before queer Americans, married and unmarried, in the wake of *Obergefell* is dialectical. The struggle for how to reassert a positionality from which a more “radical” conceptualization of sexuality and intimacy can be deployed—if such a position, per scholars like Case, was or in the statutory framework ever asserted—is not suppressed by *Obergefell*. Rather, *Solomon* and *Gardenour* are initial glimpses or openings of the space for the relative autonomy of a potentially new “struggle”: the struggle for equality, for example, is made newly possible through the still-pliant regulatory passages through which queer life must pass.

60. “Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life . . . have devoted substantial attention to the question.” *Obergefell*, 135 S. Ct. at 2605. While Justice Kennedy summarizes a century of discourse on the topic, this acknowledgment makes clear how equality, *qua* *Obergefell*, is constructed—or contoured by—this discursive context.