

THE ONCE AND FUTURE QUEER RELATIONSHIP

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I. INTRODUCTION

2025 marks the 10th anniversary of the Supreme Court acknowledging the right of people to enter into same-sex marriages.¹ The right to marry has long been acknowledged as a fundamental right.² But at the same time, marriage equality has been hard fought in the courts.³ Initially, it appeared that *Obergefell* would supply some relief and that marriage equality was settled.

Despite the victory in *Obergefell*, people in same-sex relationships have continued to experience discrimination. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,⁴ the United States Supreme Court sided with a baker who refused to make a cake for a gay couple due to the baker's religious beliefs. A few years later, in *303 Creative v. Elenis*,⁵ the Supreme Court sided with a website designer who argued that Colorado's Civil Rights statute would impermissibly compel her speech by requiring that she offer her services (creating websites for weddings) to same-sex couples.

But these adverse rulings do not necessarily mean that things are bad for queer romantic partnerships. In May 2024, the City of Berkeley, California, became the latest municipality to pass an ordinance barring discrimination on family structure.⁶ An earlier, similar ordinance in Somerville, Massachusetts, has effectively changed the nature of the domestic partnership by granting marital rights to people in polyamorous relationships.⁷ It is clear that, ten years after *Obergefell*, queer relationships continue to evolve. This Article seeks to review that evolution and attempts to define its future.

This Article uses terminology that may have different meanings to different people inside and outside of the LGBTQ community. As a result, some definitions may be useful. The word “queer” is used throughout this Article and simply means “anyone who identifies as something other than

¹ See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”).

³ There is apparently some confusion about whether “equal protection of the law” actually means “equal protection of the law.”

⁴ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018).

⁵ *303 Creative v. Elenis*, 600 U.S. 570 (2023).

⁶ Ally Markovich, *Berkeley Law Extends Legal Protections to Polyamorous People and Non-Nuclear Families*, BERKELEYSIDE (May 22, 2024, 4:39 PM) <https://www.berkeleyside.org/2024/05/22/berkeley-law-antidiscrimination-relationship-family-structure-polyamory>.

⁷ Somerville, Mass. Mun. Code §2-501 (2020).

heterosexual and/or cisgender.”⁸ For some members of the LGBTQ community, “queer” is a slur and its use may cause distress.⁹ For others, “queer” is a reclaimed term, and it is used here in that sense.¹⁰

“Polyamory” is another term used in this Article that might cause confusion. Typically, the term “polyamory” and its derivatives are used to refer to “the practice of having multiple intimate relationships at once with consent from all individuals involved.”¹¹ It should not be confused with “polygamy,” which is similar but involves one partner having multiple spouses.¹² Polyamory itself is not inherently queer, however the form discussed here, which for lack of a better term I call “polyamorous domestic partnership,” takes on a queer aspect because the relationship structure includes a third (or more) person.

Finally, this Article uses several different terms to describe sexual orientations. Here, “gay” is used to describe a homosexual person who identifies as male.¹³ Similarly, “lesbian” is used to describe an individual who identifies as a woman and has a sexual or emotional attraction to other women.¹⁴

Section II discusses early queer relationship structures.¹⁵ It begins by discussing different methods that queer partners have used to establish and protect rights when marriage was not a legal option, including domestic partnerships and civil unions.¹⁶ It then examines the internal struggle within the queer community to determine whether marriage was even a proper goal for the community.¹⁷

Section III looks at the cases leading up to and including the *Obergefell* decision.¹⁸ First, it reviews the early same-sex marriage cases, and the federal backlash resulting in the Defense of Marriage Act (DOMA).¹⁹ It then discusses the *Obergefell* decision and its reasoning.²⁰ It then looks at

⁸ CHLOE O. DAVIS, *THE QUEENS’ ENGLISH: THE LGBTQIA+ DICTIONARY OF LINGO AND COLLOQUIAL PHRASES*, 256 (2021).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 243.

¹² *Polygamy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/polygamy> (last visited Mar. 24, 2025).

¹³ DAVIS, *supra* note 8, at 134.

¹⁴ *Id.* at 193.

¹⁵ *See infra* Part II.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See infra* Part III.

¹⁹ *Id.*

²⁰ *Id.*

the aftermath of *Obergefell*, including subsequent decisions allowing people to deny services to same-sex couples.²¹

Section IV asks, and attempts to answer, the question: “What comes next for queer relationships?”²² It does so by examining the recent decisions of multiple municipalities to expand protections for individuals in polyamorous domestic relationships, effectively reinventing the domestic partnership.²³

II. EARLY QUEER RELATIONSHIPS

A. *Non-Marriage*

Before *Obergefell*, same-sex couples sought ways to obtain legal rights similar to marital rights, but outside of the marriage laws. Some of those rights and benefits include the right to spousal shares of marital property upon a partner’s death, tax benefits (joint income tax returns, certain exemptions, dependency deductions, etc.), privilege in criminal prosecutions, and visitation rights at hospitals.²⁴ A variety of approaches materialized, ranging from the simple (wills and trusts) to the complicated (such as adult adoption).²⁵ These contract-based approaches did not always have good results.

One example involves the dispute between Donnis Whorton and Benjamin Dillingham III.²⁶ When the two began their relationship, Whorton was a student pursuing an associate’s degree.²⁷ Together, Whorton and Dillingham reached an oral agreement that:

Whorton's exclusive, full-time occupation was to be Dillingham's chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on his behalf when requested. Whorton was to render labor, skills, and personal services for the benefit of Dillingham's business and investment endeavors. Additionally, Whorton was to be Dillingham's constant companion, confidant, traveling and social companion, and lover, to terminate his schooling upon obtaining his Associate in Arts degree, and to

²¹ *Id.*

²² *See infra* Part IV.

²³ *Id.*

²⁴ CARLOS A. BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW 449 (7th ed. 2022).

²⁵ *Id.*

²⁶ *Whorton v. Dillingham*, 248 Cal.Rptr. 405 (Ct. App. 1988).

²⁷ *Id.* at 406.

make no investment without first consulting Dillingham.²⁸

In return, Dillingham agreed to give Whorton a one-half equity interest in all real estate acquired in their joint names, as well as in all property subsequently acquired by Dillingham. Dillingham also agreed to financially support Whorton for life.²⁹ After about seven years, Dillingham refused to perform his end of the contract.³⁰

In analyzing the dispute, the California Court of Appeals wrote that “[t]he contract cannot be enforced to the extent it is dependent on sexual services for consideration, and the complaint does not state a cause of action to the extent it asks for damages from the termination of the sexual relationship.”³¹ Ultimately, the court found that Whorton’s services—chauffer, bodyguard, etc.—were of monetary value and sufficient to sustain the complaint and reversed a lower court’s ruling in favor of Dillingham.³² As a result, the court acknowledged the ability of same-sex partners to engage in contracts for mutual provision of services, even if some of those services were sexual in nature.

Other couples adopted a strategy of seeking specific rights and benefits. In *Braschi v. Stahl Associates and Co.*,³³ the surviving partner in a same-sex relationship sought protection from eviction in the City of New York. Miguel Braschi was in a long-term relationship with Leslie Blanchard, and the two shared an apartment until Blanchard died in 1986.³⁴

After Blanchard’s death, the landlord, Stahl and Associates, sent Braschi a notice of eviction.³⁵ This notice was premised on the fact that Blanchard was the only tenant of record for the unit.³⁶ Braschi commenced an action seeking a permanent injunction and a declaratory judgment that he was entitled to occupy the unit as a member of Blanchard’s family.³⁷ The court sided with Braschi, but was reversed on appeal where the appellate court held that protection from eviction was only available to “family members within traditional, legally recognized familial relationships.”³⁸ Because Braschi’s and Blanchard’s relationship was not given formal recognition by law, Braschi could not seek the protection of the non-

²⁸ *Id.* at 406-07.

²⁹ *Id.* at 407.

³⁰ *Id.*

³¹ *Id.* at 408.

³² *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410-11 (Ct. App. 1988).

³³ *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989).

³⁴ *Id.* at 50-51.

³⁵ *Id.* at 51.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

eviction ordinance.³⁹ However, the court did certify the case for appeal on the question of whether their decision had been properly made.⁴⁰

The New York Court of Appeals reversed.⁴¹ In a lengthy passage the New York Court of Appeals wrote:

[W]e conclude that the term family, as used in 9 NYCRR 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.

. . . .

In fact, Webster's Dictionary defines "family" first as "a group of people united by certain convictions or common affiliation." Hence, it is reasonable to conclude that, in using the term "family," the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics

This definition of "family" is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood, or law who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death.⁴²

This definition eschewed formality in favor of functionality. On a practical level, it extended the protection of the non-eviction ordinance to surviving partners in same-sex relationships.

Braschi has since been regarded as a landmark victory for LGBTQ rights.⁴³ In the wake of *Braschi*, other courts have acknowledged familial relationships for same-sex partners. In Minnesota, for example, the Court

³⁹ *Braschi*, 543 N.E.2d at 51.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 53-55.

⁴³ BALL, *supra* note 24, at 450.

of Appeals granted a petition by a woman seeking guardianship of her same-sex partner after her partner was injured in a car accident.⁴⁴ While falling short of obtaining marriage equality, these cases helped pave the way for same-sex couples to be viewed by the law as complete family units, entitled to the same protections as couples whose relationships were formally recognized under the law.

B. The Marriage Debate

i. Loving and Marriage Equality

Nothing happens in a vacuum, and many landmark court decisions involve the tying together of multiple strains of precedent. Sometimes those strains are easy to trace. *Griswold v. Connecticut*,⁴⁵ and *Eisenstadt v. Baird*,⁴⁶ both contraception cases, led the way to *Lawrence v. Texas*⁴⁷ and the protection of sexual intimacy between consenting adults and struck down sodomy laws is a relevant example. Same-sex marriage is no exception. Even before *Braschi* and other plaintiffs sought the recognition of the courts for their family status, another line of cases was redefining the nature of marriage. Those cases also deserve attention.

Marriage equality has long been a topic of litigation in the United States. The most well-known battlefield for marriage equality before same-sex marriage involved the ability of individuals to marry outside of their race. In the late 1960s, several states banned interracial marriages. Virginia, for instance, had a statute stating:

If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.⁴⁸

Even going out of state to marry was criminalized, with another statute stating:

If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished . . . and the marriage shall be governed by the same law as if it

⁴⁴ See *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991).

⁴⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁶ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁴⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁸ *Loving v. Virginia*, 388 U.S. 1, 4 (1967).

had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.⁴⁹

It was against this statutory backdrop that marriage equality began to take shape in the United States.

In 1958, Mildred Jeter, a black woman, and Richard Loving, a white man, married in Washington D.C.⁵⁰ After their wedding, the Lovings returned to their home in Virginia and were indicted for violating the ban.⁵¹ The Lovings entered guilty pleas and were sentenced to a year in jail, although the sentence was suspended for 25 years on the condition that the Lovings leave Virginia and not return together for 25 years.⁵²

After moving back to Washington D.C., the Lovings filed a motion to vacate the judgment and set aside the sentence on the grounds that Virginia's ban on interracial marriage violated the Fourteenth Amendment.⁵³ The motion was denied, and the case eventually made its way to the United States Supreme Court.⁵⁴

At the Supreme Court the State made several arguments for upholding the ban on interracial marriage.⁵⁵ First, the state argued that the Equal Protection Clause merely required that penal violations for infringement of the interracial marriage ban be applied against both white and non-white defendants.⁵⁶ The Supreme Court characterized this argument as Virginia claiming that, "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race."⁵⁷ A second argument, which presumed the validity of the first argument, was framed as "if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages."⁵⁸

The Supreme Court rejected both of these arguments because the case dealt "with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of

⁴⁹ *Id.*

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.* at 3-4.

⁵⁴ *Loving*, 388 U.S. at 4.

⁵⁵ *Id.* at 7-8.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.*

⁵⁸ *Id.*

justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”⁵⁹ Going further, the Court found that because Virginia only banned interracial marriages involving white people, it was thus evidence of an intent to uphold White Supremacy.⁶⁰

Loving ends with one of the most important statements on marriage equality ever made by the Court: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁶¹ Intended, perhaps, as statement on the importance of marriage in our society, this statement serves as foreshadowing the direction that future cases involving marital rights would move.

Loving, of course, did not fully establish the right of individuals to marry. States still found ways to deny marriage to individuals for various purposes. *Zablocki v. Redhail*, for example, involved a Wisconsin statute stating that any “Wisconsin resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment” could not marry without a court order.⁶² The person aspiring to marry would need to show that they were in compliance with any court-ordered child support obligations.⁶³ The Supreme Court struck down the statute, relying heavily on *Loving*, as well as several other Equal Protection cases.⁶⁴

It should be clear that, beginning with *Loving*, the law began trending towards marriage equality. Case after case resulted in courts affirming marriage as a fundamental right and striking down statutes or regulations that placed roadblocks in the way of the right to marry. That same-sex marriage would eventually follow would seem like a natural conclusion. But first, the queer community would need to determine whether the right to marry was something worth fighting for. As it turned out, there were disagreements within the queer community over whether to pursue the right to marry.

ii. Should Marriage be the Endgame?

During the Fall of 1989, the magazine OUT/LOOK printed an interesting debate on whether marriage equality ought to be a priority. Featuring pieces written by advocates on both sides of the debate, the magazine presented arguments both for and against treating marriage equality as a goal of the LGBTQ rights movement. The debate itself merits

⁵⁹ *Id.*

⁶⁰ *Loving*, 388 U.S. at 11.

⁶¹ *Id.* at 12.

⁶² *Zablocki v. Redhail*, 434 U.S. 374, 375 (1975).

⁶³ *Id.*

⁶⁴ *Id.* at 383-86.

some discussion, if for no reason other than to show that the queer community has not always been in lockstep on the matter of marriage equality.

Thomas Stoddard, a lawyer and gay rights activist, wrote in favor of achieving same-sex marriage.⁶⁵ On a practical level, “marriage rewards the two individuals who travel to the altar (or its secular equivalent) with substantial economic and practical advantages.”⁶⁶ These advantages include reduced tax liability, government benefits for surviving spouses and dependents via Social Security, inheritance in the absence of a will, and residency rights for foreign-born spouses.⁶⁷ The law, Stoddard wrote, “presumes in favor of every marital relationship, and acts to preserve and foster it.”⁶⁸ Finally, Stoddard recognized that certain legal roadblocks simply cannot be bypassed without formal marriage, such as statutes that say “married” or insurance policies that say “spouse.”⁶⁹ For these reasons, seeking marriage equality is simply practical.

Politically, Stoddard wrote, marriage equality was the best issue to fully test the dedication of allies, and the issue most likely to “lead ultimately to a world free from discrimination against lesbians and gay men.”⁷⁰ He acknowledged that marriage is a central part of our social structure and our traditional idea of family.⁷¹ By denying gay and lesbian individuals the right to enter the “noble” and “sacred” institution of marriage, courts and policymakers were sending the message that same-sex relationships are less valuable or significant.⁷² While making clear that his intent was not to disparage institutions such as domestic partnerships, Stoddard argued that such institutions only partially protected gay couples.⁷³ Full equality, Stoddard argued, could only be achieved either through marriage equality or the outright abolition of marriage.⁷⁴ Because the latter is unlikely, the former is the better option.⁷⁵

Finally, Stoddard advocated a philosophical justification for marriage equality.⁷⁶ While he questioned the desirability of marriage and accepted

⁶⁵ Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, 9-13, reprinted in William B. Rubenstein, Carlos A. Ball & Jane S. Schacter, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW ch. 4, 462-67 (7th ed. 2022).

⁶⁶ *Id.* at 463.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* It would be remiss not to point out the bisexual erasure rampant in Stoddard’s piece, regardless of whether or not such erasure was his intent.

⁷¹ Stoddard, *supra* note 65, at 679-81.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

that marriage may even be oppressive and unattractive, Stoddard argued that the *right* to marry was desirable.⁷⁷ Obtaining the right to marry did not mean that all gays and lesbians should seek marriage—Stoddard admitted he would likely not marry despite having a long-term partner—but for those who desired marriage, the option should exist.⁷⁸

On the other hand, lawyer Paula Ettelbrick wrote in opposition to seeking marriage equality.⁷⁹ In Ettelbrick's estimation, marriage is a patriarchal institution based on the dominance of men over women, which in turn elevates some relationships over others.⁸⁰ To Ettelbrick, gay and lesbian relationships sit at the bottom of social hierarchy.⁸¹

In fairness, Ettelbrick acknowledged that some lesbians and gay men might seek marriage as a form of self-affirmation.⁸² Indeed, she accepted that marriage might not only relieve some internalized homophobia within the LGBTQ community but would make it easier to obtain benefits guaranteed to married partners.⁸³ Why would one object to such things?

Ettelbrick gives two reasons for objecting to marriage equality as a goal. First, she argued that marriage would not lead to liberation for gay and lesbian individuals.⁸⁴ Instead, she wrote, marriage would force assimilation, resulting in further invisibility for gay men and lesbians.⁸⁵ Second, she argued that marriage equality would not transform our society into one that “respects and encourages choice of relationships and family diversity.”⁸⁶

Much of Ettelbrick's argument focused on celebrating the things that make her different. Justice, she wrote, “for gay men and lesbians will be achieved only when we are accepted and supported in this society despite our differences from the dominant culture.”⁸⁷ Queerness, she argued, is more than “setting up a house, sleeping with a person of the same gender, and seeking state approval for doing so.”⁸⁸ It is an identity, culture, and way

⁷⁷ Stoddard, *supra* note 65, at 679-81.

⁷⁸ *Id.*

⁷⁹ Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, 14-17.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Ettelbrick, *supra* 79, at 14-17. Like Stoddard, Ettelbrick apparently had no concerns about being complicit in bisexual erasure. Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, Out/Look, Fall 1989, 9-13, *reprinted in* William B. Rubenstein, Carlos A. Ball & Jane S. Schacter, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW ch. 6, 679-81 (3rd ed. 2008).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

of addressing the world.⁸⁹ For these reasons, Ettelbrick claimed that arguing that queer people are the same as straight people undermines the LGBTQ rights movement by taking away the things that make LGBTQ people unique.⁹⁰

Stoddard and Ettelbrick staked interesting positions. While both were skeptical of marriage as an institution, they nevertheless came to different conclusions as to whether same-sex marriage should be desirable. Ultimately, the position I think is best probably lies somewhere between the positions of Stoddard and Ettelbrick. Same-sex marriage should be available as an option and as a legal right. The option to marry means little to those who derive no utility from the institution, but it may mean much to those who desire marriage. Fortunately, enough people desired marriage to change the legal landscape.

III. *OBERGEFELL*

A. *Early Same-Sex Marriage Cases*

Only a few years after *Loving* was decided, same-sex couples made their first attempts at obtaining the right to marry. In 1969, the Stonewall Riots brought the national spotlight to the queer community and the quest for “gay liberation.”⁹¹ Several lawsuits challenged state laws prohibiting same-sex marriage.⁹² Three produced written opinions.⁹³ None ended well for the plaintiffs.

The first case, *Baker v. Nelson*,⁹⁴ was decided in Minnesota and dealt with two questions: (1) whether state law authorized marriage between two people of the same sex; and (2) whether the state constitution required same-sex marriage.⁹⁵ The Minnesota Supreme Court found that the statute governing marriage used “marriage” in the common way of meaning a union between persons of opposite sexes.⁹⁶ As a result, the state statute prohibited same-sex marriage.⁹⁷

In answering the second question, the Court leaned on the dubious rationale that “the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family,

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Michael Boucai, *Glorious Precedents: When Gay Marriage was Radical*, 27 YALE J.L. & HUMAN. 1, 1-2 (2015).

⁹² *Id.* at 2.

⁹³ *Id.*

⁹⁴ *Baker v. Nelson*, 191 N.W.2d 185 (1971).

⁹⁵ *Id.* at 185.

⁹⁶ *Id.* at 185-86.

⁹⁷ *Id.* at 186.

is as old as the book of Genesis.”⁹⁸ Going even further, the court invoked *Loving*, holding that the Supreme Court’s decision in that case indicates that “not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”⁹⁹ Unsurprisingly the court rejected the plaintiffs’ claims.

Singer v. Hara,¹⁰⁰ was litigated in the State of Washington. John Singer and Paul Barwick applied for a marriage license which was denied.¹⁰¹ The couple then filed a motion to show cause, which a trial court dismissed due to the lack of a *prima facie* showing that Washington allowed same-sex couples to marry.¹⁰² The case proceeded to the court of appeals on three questions (1) whether the trial court erred in concluding that Washington law prohibited same-sex marriage; (2) whether the trial court’s order violated the Washington Constitution’s Equal Rights Amendment; and (3) whether the trial court’s order violated the United States Constitution.¹⁰³

In answering the first question, the court determined that a plain reading of the state marriage statute did not authorize same-sex marriage.¹⁰⁴ Despite the statute making a non-gendered reference to “persons,” the court dismissed this as a simple amendment to remove age restrictions.¹⁰⁵ As a result, the court found that the trial court had correctly determined that same-sex marriage was prohibited.¹⁰⁶

On the second question, the court found that as long as marriage licenses were denied equally to both male and female pairs, there was no violation, even though the state’s Equal Rights Amendment stated that “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”¹⁰⁷ The court went so far as to hold that this ruling was consistent with *Loving*.¹⁰⁸ Ultimately, the court concluded that “a common-sense reading of the language of the ERA indicates that an individual is afforded no protection under the ERA unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual’s sex.”¹⁰⁹

⁹⁸ *Id.*

⁹⁹ *Id.* at 187.

¹⁰⁰ *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

¹⁰¹ *Id.* at 1188.

¹⁰² *Id.*

¹⁰³ *Id.* at 1188-89.

¹⁰⁴ *Id.* at 1189.

¹⁰⁵ *Id.*

¹⁰⁶ *Singer*, 522 P.2d at 1189.

¹⁰⁷ *Id.* at 1190.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1194.

On the final issue, the court adopted the state's argument that "to define marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification requiring strict judicial scrutiny to determine a compelling state interest."¹¹⁰ Applying rational basis review, the court opined:

There can be no doubt that there exists a rational basis for the state to limit the definition of marriage to exclude same-sex relationships. Although, as appellants contend, other cultures may have fostered differing definitions of marriage, marriage in this state, as elsewhere in the nation, has been deemed a private relationship of a man and a woman (husband and wife) which involves 'interests of basic importance in our society.'¹¹¹

The court refused to define exactly what those "interests of basic importance" were, however, and it ruled against the plaintiffs.

Baker, Singer, and other cases all ultimately failed to achieve their goals of obtaining same-sex marriage. But as Professor Michael Boucai points out, these cases were the first to take the offensive in support of same-sex marriage and, more importantly, the first to use the United States Constitution as an argument in favor of equal rights for same-sex couples.¹¹² These cases were not—strictly speaking—precursors to the cases that successfully challenged prohibitions against recognizing same-sex marriage, but the influence of their arguments is plain to see in the following generation of same-sex marriage cases.

i. Baehr v. Lewin

The push towards legalizing same-sex marriage began in Hawaii with the case of *Baehr v. Lewin*.¹¹³ In 1991, a group of plaintiffs filed a complaint seeking a declaratory judgment that Hawaii's statute providing the requirements for marriage was unconstitutionally applied when used to deny marriage licenses to same-sex couples.¹¹⁴ A trial court granted the state's motion for judgment on the pleadings and a timely appeal was taken.¹¹⁵

On appeal, the Hawaii Supreme Court, interpreting the privacy provision of the Hawaii Constitution, found that

[A]t a minimum, article I, section 6 of the Hawaii Constitution

¹¹⁰ *Id.* at 1196.

¹¹¹ *Id.* at 1197.

¹¹² Boucai, *supra* note 91, at 2.

¹¹³ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹¹⁴ *Id.* at 48-49.

¹¹⁵ *Id.* at 54.

encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”¹¹⁶

The issue, then, was whether the right to marry extended to same-sex couples.¹¹⁷ At the time, no Hawaii cases touched on the right to marry, so the court deferred to federal precedent.¹¹⁸

After reviewing several federal marriage cases, the court determined that under federal law, marriage was limited to a union between a man and a woman.¹¹⁹ The court acknowledged that it was being asked to recognize a new right, but declined to do so, citing the “traditions and collective conscience of our people.”¹²⁰ Ultimately, the claim under the Hawaii Constitution failed.

The Equal Protection Clause argument presented by the plaintiffs had a different outcome, however. The court accepted that “marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship.”¹²¹ In addition, the court also found that the plaintiffs were correct in arguing that the state’s denial of marriage licenses to same-sex couples deprived those couples of access to certain rights and benefits.¹²²

After an exhaustive examination of cases including *Loving*, *Baker*, and *Singer*—the latter of which the court described as an “exercise in tortured and conclusory sophistry”¹²³—the court found that strict scrutiny ought to apply to a review of Hawaii’s marriage law prohibiting same-sex marriage.¹²⁴ The court also made clear, however, that it was not finding that the statute unconstitutionally discriminated against same-sex couples, nor was there a right to marriage for same-sex couples under the Hawaii Constitution.¹²⁵ Instead, the case was simply remanded with the

¹¹⁶ *Id.* at 55.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Baehr*, 852 P.2d at 56.

¹²⁰ *Id.* at 56-57.

¹²¹ *Id.* at 58.

¹²² *Id.* at 59.

¹²³ *Id.* at 63.

¹²⁴ *Id.* at 67.

¹²⁵ *Baehr*, 852 P.2d at 67.

presumption that the statute was unconstitutional with the burden resting on the state to show otherwise.¹²⁶

While *Baehr* did not find a constitutional right to same-sex marriage, it did set the pieces in motion leading towards the legalization of same-sex marriage. Unfortunately, the people of Hawaii responded to the decision in *Baehr* by adopting a constitutional amendment allowing the legislature to limit marriage to different-sex couples.¹²⁷ Even so, the bell could not be unrung, and the move towards same-sex marriage continued.

ii. DOMA and *Windsor*

Public response to *Baehr* was such that Congress stepped in to oppose same-sex marriage. In one of the most explicitly discriminatory acts in recent Congressional history, Congress passed the Defense of Marriage Act (DOMA).¹²⁸ DOMA contained two operative clauses. The first, Section 2(a), stated:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹²⁹

This section effectively relieved states of the requirement to recognize same-sex marriages performed in other jurisdictions.

The second operative section, Section 3, amended the federal definition of marriage. Under DOMA, marriage meant “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹³⁰ The result was that federal law effectively barred recognition of same-sex marriages in the provision of federal benefits.

DOMA’s restrictions on same-sex marriage came to an end in *United States v. Windsor*.¹³¹ Edith Windsor and Thea Spyer married in Ontario, Canada in 2007, and then returned to their home in New York.¹³² Spyer died

¹²⁶ *Id.* at 68.

¹²⁷ David Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 Akron L Rev. 621, 651 (2011).

¹²⁸ Defense of Marriage Act, H.R. 3396, 104th Cong. (1996) (repealed).

¹²⁹ *Id.* §2(a).

¹³⁰ *Id.* §3(a).

¹³¹ *United States v. Windsor*, 570 U.S. 744 (2013).

¹³² *Id.* at 749-50.

in 2009, leaving her entire estate to Windsor.¹³³ When Windsor sought the federal estate tax exemption given to surviving spouses, she was barred by DOMA.¹³⁴ Windsor paid the tax, but filed suit challenging the constitutionality of the DOMA provision excluding same-sex couples from the definition of marriage.¹³⁵ Both a trial court and the Second Circuit Court of Appeals found in favor of Windsor, and the United States Supreme Court granted certiorari.¹³⁶

The Supreme Court focused its analysis on Section 3 of DOMA, the provision defining marriage as being between a man and woman.¹³⁷ The Court acknowledged the role of states in setting marriage policy, but also noted that Congress may make decisions affecting marital rights and privileges.¹³⁸ DOMA, however, was not merely an act affecting a discrete set of benefits, but rather an act affecting over 1,000 federal statutes and the entirety of federal regulatory law.¹³⁹ DOMA, the Court wrote, “rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”¹⁴⁰

New York recognized the right of same-sex couples to marry, yet DOMA sought to undermine the state’s decision to protect same-sex couples.¹⁴¹ In doing so, the Court found that DOMA violated the basic due process and equal protection rules that apply to the federal government.¹⁴² Going further, Justice Kennedy wrote that “The Constitution’s guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.”¹⁴³ Accordingly, Section 3 of DOMA was struck down.

iii. Goodridge v. Department of Health

In 2003, Massachusetts became the first state to find that the denial of same-sex marriage violated its state constitution.¹⁴⁴ Fourteen plaintiffs sought marriage licenses, and each was denied.¹⁴⁵ In denying the licenses,

¹³³ *Id.* at 750.

¹³⁴ *Id.* at 750-51.

¹³⁵ *Id.* at 751.

¹³⁶ *Id.* at 751-752.

¹³⁷ *Windsor*, 570 U.S. at 752.

¹³⁸ *Id.* at 764.

¹³⁹ *Id.* at 765.

¹⁴⁰ *Id.* at 768.

¹⁴¹ *Id.* at 769.

¹⁴² *Id.*

¹⁴³ *Windsor*, 570 U.S. at 769.

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

¹⁴⁵ *Id.* at 949.

the trial court held that the wording of the marriage statute precluded same-sex marriage, that the exclusion of same-sex couples did not offend the Massachusetts Constitution, and that the Massachusetts Constitution did not confer a fundamental right to marry.¹⁴⁶ Finally, the trial court resurrected old arguments—and now discredited ones—tying marriage to the ability to procreate.¹⁴⁷ The plaintiffs appealed.¹⁴⁸

The Supreme Judicial Court of Massachusetts, holding in favor of the plaintiffs, framed the issue before it as “whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State’s authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution.”¹⁴⁹ The plaintiffs’ claim could further be divided into two questions: “Does it offend the Constitution’s guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs’ right to marry their chosen partner?”¹⁵⁰ The court found that these questions frequently overlap, just as they did in this case.¹⁵¹

In its argument to the court, the Department of Public Health argued three rationales for prohibiting same-sex marriage: (1) providing what it called a “favorable setting for procreation”; (2) ensuring an optimal setting for raising children, which required one parent of each sex; and (3) preserving state and financial resources.¹⁵² The trial court judge accepted the first premise, writing that “the state’s interest in regulating marriage is based on the traditional concept that marriage’s primary purpose is procreation.”¹⁵³ The court rejected this position outright, noting that the laws of Massachusetts did not:

[P]rivilege procreative heterosexual intercourse between married people above every other form of adult intimacy” and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their

¹⁴⁶ *Id.* at 951.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Goodridge*, 798 N.E.2d at 953.

¹⁵¹ *Id.*

¹⁵² *Id.* at 961.

¹⁵³ *Id.*

marriage, and never plan to, may be and stay married.¹⁵⁴

In addition, Massachusetts law allowed, even facilitated, bringing children into families regardless of whether through assisted reproductive methods, adoption, or other means, regardless of whether the parents were single, married gay, lesbian, bisexual, or straight.¹⁵⁵

In regard to the second rationale, the court acknowledged that protecting the welfare of children is an important state policy.¹⁵⁶ The court rejected as implausible the notion that restricting same-sex marriage furthered this policy.¹⁵⁷ Because the Department of Health failed to introduce any evidence that restricting same-sex marriage would somehow increase the number of heterosexual couples having children, the court found no basis for the argument that restricting same-sex marriage created an optimal child-raising environment.¹⁵⁸

The third argument, that restricting same-sex marriage somehow served to protect scarce state resources, also failed. The state's rationale that "same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage[,]” was not, in the court's estimation, rationally related to the goal of economy.¹⁵⁹ Two facts undermined the state's argument. First, the state's rationale was conclusory and ignored that many same-sex couples did in fact have dependents in their care.¹⁶⁰ Second, Massachusetts did not condition the eligibility for benefits to heterosexual couples upon demonstrations of financial dependence.¹⁶¹

Apart from the analysis of Massachusetts law, *Goodridge* provides some important commentary on the nature of civil marriage. The court wrote civil marriage is created through the exercise of the state's police power.¹⁶² Civil marriage, being created by the government, is therefore a wholly secular institution.¹⁶³ The court noted that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that “hundreds of statutes” are related to marriage and to “marital benefits.”¹⁶⁴ Finally, the court noted

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 962.

¹⁵⁶ *Goodridge*, 798 N.E.2d at 962.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 964.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Goodridge*, 798 N.E.2d at 954.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 955.

that it is these very civil benefits that cause marriage to be referred to as a “civil right.”¹⁶⁵ While largely dicta, the court’s holding was important for extending the civil institution of marriage to same-sex individuals, regardless of whether religious objections exist.

B. Obergefell

As mentioned earlier, landmark Constitutional law cases often involve tying together multiple threads of cases. *Obergefell v. Hodges*¹⁶⁶ is no different. One can see the influence of state and federal marriage cases such as *Loving*, *Baehr*, *Goodridge*, and *Windsor*, as well as the federal line of privacy cases such as *Griswold*, *Eisenstadt*, and *Lawrence*. To the lay observer, it may well seem that the outcome in *Obergefell* was inevitable when the case arrived at the United States Supreme Court.

Obergefell was an amalgamation of cases from several jurisdictions including Michigan, Kentucky, Ohio, and Tennessee.¹⁶⁷ Each of these states statutorily defined marriage as a union between one man and one woman.¹⁶⁸ The plaintiffs included fourteen same-sex couples and two men whose same-sex partners were deceased.¹⁶⁹ The various suits alleged that the plaintiffs’ Fourteenth Amendment rights were violated as a result of a state’s denial of the right to marry, or refusal to recognize marriages performed in other jurisdictions.¹⁷⁰

Each of the plaintiffs filed suit in their home state, and each was successful at the trial court level.¹⁷¹ The United States Court of Appeals for the Sixth Circuit consolidated the cases and reversed the trial courts, finding that states had no constitutional obligation to license same-sex couples or recognize same-sex marriages.¹⁷² The Supreme Court granted certiorari on two questions: (1) whether the Fourteenth Amendment requires states to license same-sex marriages; and (2) whether the Fourteenth Amendment requires states to recognize same-sex marriages performed in other states.¹⁷³

In answering the first question, Justice Kennedy identified four principles that required a finding that marriage is a fundamental right, and which the Equal Protection Clause required to be extended to same-sex

¹⁶⁵ *Id.* at 957.

¹⁶⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁶⁷ *Id.* at 653.

¹⁶⁸ *Id.* at 654 (citing Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01; Tenn. Const., Art. XI, § 18.)

¹⁶⁹ *Id.* at 654-55.

¹⁷⁰ *Id.* at 655.

¹⁷¹ *Id.* at 646.

¹⁷² *Obergefell*, 576 U.S. at 646.

¹⁷³ *Id.*

couples.¹⁷⁴ The first principle Kennedy discussed was that the right to a personal choice regarding marriage is an inherent part of personal autonomy.¹⁷⁵ Relying on *Windsor* and *Loving*, Kennedy found that the “nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”¹⁷⁶

The second principle Kennedy identified was that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”¹⁷⁷ In particular, Kennedy relied on *Safely*, *Griswold*, and *Lawrence*, which enshrine the constitutional right of individuals to engage in intimate association.¹⁷⁸ The freedom to engage in intimate association did not, in Kennedy’s estimation, end with *Lawrence*’s prohibition on sodomy laws.¹⁷⁹

The third principle favoring recognition of the right to same-sex marriage is that “it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”¹⁸⁰ Kennedy’s rationale focused on the evidence that many children were being raised by same-sex couples in *Loving* and nurturing homes.¹⁸¹ “Without the recognition, stability, and predictability marriage offers,” Kennedy wrote, “children suffer the stigma of knowing their families are somehow lesser.”¹⁸²

The fourth, and final, principle is that both the Court’s jurisprudence and the traditions of the United States “make clear that marriage is a keystone of our social order.”¹⁸³ For that very reason, Kennedy wrote:

[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence;

¹⁷⁴ *Id.* at 665.

¹⁷⁵ *Id.* at 665.

¹⁷⁶ *Id.* at 666.

¹⁷⁷ *Id.*

¹⁷⁸ *Obergefell*, 576 U.S. at 667.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 667.

¹⁸¹ *Id.* at 668.

¹⁸² *Id.*

¹⁸³ *Id.* at 669.

hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.¹⁸⁴

Kennedy found no distinction between heterosexual couples and same-sex couples in this regard.¹⁸⁵ Ultimately, the majority found that the Equal Protection and Due Process Clauses of the Fourteenth Amendment required the extension of the right to marry to same-sex couples.¹⁸⁶

In addressing the second question, Kennedy acknowledged the respondent's argument that "if States are required by the Constitution to issue marriage licenses to same-sex couples, the justifications for refusing to recognize those marriages performed elsewhere are undermined."¹⁸⁷ The Court agreed, stating that no lawful basis exists for one state to refuse to recognize a lawful marriage performed in another state on the grounds that it is a same-sex marriage.¹⁸⁸ In closing, Kennedy wrote one of the most moving passages in Constitution law:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.¹⁸⁹

¹⁸⁴ *Obergefell*, 576 U.S. at 669-70.

¹⁸⁵ *Id.* at 670.

¹⁸⁶ *Id.* at 675.

¹⁸⁷ *Id.* at 680-81.

¹⁸⁸ *Id.* at 681.

¹⁸⁹ *Id.*

Accordingly, the Supreme Court reversed in favor of the plaintiffs.¹⁹⁰

The recognition of same-sex marriage was not unanimous. Chief Justice Roberts, for one, dissented from the majority decision, arguing that it was at odds with the Constitution.¹⁹¹ In one passage, Roberts wrote:

It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage. If “[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,” why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry? If a same-sex couple has the constitutional right to marry because their children would otherwise “suffer the stigma of knowing their families are somehow lesser,” why wouldn't the same reasoning apply to a family of three or more persons raising children? If not having the opportunity to marry “serves to disrespect and subordinate” gay and lesbian couples, why wouldn't the same “imposition of this disability,” serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?¹⁹²

Roberts portrayed validating same-sex marriage as beginning the demise of the institution of marriage, yet as will be discussed later in this article, his hypothetical scenario may not have been so off the mark.

C. Aftermath

The ruling in *Obergefell* did not end discrimination against same-sex couples. In Kentucky, for example, a county clerk made national headlines when she refused to grant a marriage license to same-sex couples.¹⁹³ She claimed that issuing the licenses infringed on her constitutional rights.¹⁹⁴ Ultimately, the Kentucky legislature stepped in, rendering the case against Davis moot—although the Sixth Circuit declined to vacate a finding of contempt against Davis—and the action was dismissed.¹⁹⁵

Davis's actions, while ultimately unsuccessful, served as an indication of the direction opponents of same-sex marriage would go. With the right

¹⁹⁰ *Obergefell*, 576 U.S. at 681.

¹⁹¹ *Id.* at 686-87 (Roberts, C.J., dissenting).

¹⁹² *Id.* at 705.

¹⁹³ *Miller v. Davis*, No. 15-5880, 2015 WL 10692640 (6th Cir. Aug. 26, 2015).

¹⁹⁴ *Id.* at *1.

¹⁹⁵ *Miller v. Davis*, 667 F. App'x. 537 (6th Cir. 2016) (Mem.).

to marry protected under the Fourteenth Amendment, anti-queer advocates turned to the First Amendment as a way to continue to restrict the rights of same-sex couples. So far, they have achieved success at the Supreme Court.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,¹⁹⁶ a baker refused to make a wedding cake for a couple because his religious beliefs caused him to oppose same-sex marriage.¹⁹⁷ The Supreme Court, in another opinion by Justice Kennedy, wrote:

[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”¹⁹⁸ At the same time, the Court acknowledged that “such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”¹⁹⁹

Instead of addressing the conflict between religious freedom and Equal Protection, the Court found a way to wriggle free from a difficult decision. The Court found that during the Colorado Civil Rights Commission’s investigation, there had been instances of “clear and impermissible hostility” towards the baker and his religious beliefs.²⁰⁰ As a result, the Court found that the baker’s rights had been violated and ruled in his favor.²⁰¹

In 2023, The Supreme Court revisited the issue of First Amendment protections in *303 Creative v. Elenis*.²⁰² Unlike *Masterpiece Cakeshop*, which dealt with free exercise, *303 Creative* involved free speech.²⁰³ The petitioner, an aspiring wedding website designer, filed suit, despite having never actually designed a website for a wedding nor having ever been asked to design a website for a same-sex couple.²⁰⁴ Nevertheless, the designer Lorie Smith, argued that she was afraid that she would be compelled to design a wedding website for a same sex couple by a state civil rights law.²⁰⁵

In an opinion by Justice Gorsuch, the Supreme Court found that the website designs would qualify as “pure speech.”²⁰⁶ Furthermore, rather than

¹⁹⁶ *Masterpiece Cakeshop v. Colo. C. R. Comm’n*, 584 U.S. 617 (2018).

¹⁹⁷ *Id.* at 621.

¹⁹⁸ *Id.* at 631.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 634.

²⁰¹ *Id.* at 640.

²⁰² *See generally* *303 Creative v. Elenis*, 600 U.S. 570 (2023).

²⁰³ *Id.* at 578.

²⁰⁴ *Id.* at 579-80.

²⁰⁵ *Id.* at 580.

²⁰⁶ *Id.* at 587.

reflecting the speech of the couple seeking to have a website for their wedding, Gorsuch determined that the websites would constitute Smith's speech.²⁰⁷ The state statute at issue (Colorado, just as in *Masterpiece Cakeshop*) would, according to Justice Gorsuch, compel Smith to engage in speech that she did not wish to provide.²⁰⁸ The Court ultimately sided with Smith.²⁰⁹

Despite the occasional unilateral actions by individuals like Kim Davis or the rulings in cases such as *Masterpiece Cakeshop* and *303 Creative, Obergefell* still stands. Despite Justice Thomas's calls for the court to reexamine *Obergefell* in a concurrence written for *Dobbs v. Jackson County Women's Health Organization*,²¹⁰ currently, it remains free from any serious legal threat. So, the question remains: what comes next for queer relationships?

IV. FUTURE QUEER RELATIONSHIPS

Now that marriage equality exists for same-sex couples, are there any legal protections left for the queer community to pursue when it comes to relationships? One area ripe for discussion involves relationships based on consensual non-monogamy (CNM). CNM is a diverse community, including polyamory, open relationships, swinging, and other types of ethical non-monogamy.²¹¹ It has been estimated that as much as four to five percent of the U.S. population has experience with CNM.²¹²

One of the challenges of being "different" is that some people will inevitably be upset by the attributes that cause that difference. CNM is no exception. A majority of people involved in CNM have experienced some type of discrimination.²¹³ One disturbing example involves custody disputes where one parent's experience with CNM is used as a weapon to prove his or her lack of fitness to parent.²¹⁴ Despite the discrimination experienced by

²⁰⁷ *Id.* at 588.

²⁰⁸ *303 Creative*, 600 U.S. at 588.

²⁰⁹ *Id.* at 603.

²¹⁰ *Dobbs v. Jackson County Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J. concurring).

²¹¹ Heath Schechinger & Amy Moors, *Committee on Consensual Non-monogamy Task Force*, SOC'Y FOR PSYCH. OF SEXUAL ORIENTATION & GENDER DIVERSITY, <https://www.apadivisions.org/division-44/publications/newsletters/division/2021/07/non-monogamy> [<https://perma.cc/N2GP-E9HY>] (last visited March 27, 2025).

²¹² Zachary Zane, *Who Really Practices Polyamory?*, ROLLING STONE (Nov. 12, 2018, 3:55 PM), <https://www.rollingstone.com/culture/culture-features/polyamory-bisexual-study-pansexual-754696> [<https://perma.cc/62HT-MGQQ>] (according to estimates, one-fifth of the U.S. population has engaged in CNM relationships).

²¹³ See *Frequently Asked Questions*, POLYGAMY LEGAL ADVOC. COAL., <https://polyamorylegal.org/faqs> [<https://perma.cc/QD4L-UQY8>] (last visited March 27, 2025).

²¹⁴ Christian Klesse, *Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance*, 24 SOCIO. RSCH. ONLINE 625, 625 (2019).

people involved in CNM, it took the specter of death to move the law forward for legal protection.

A. The New Domestic Partnership

In 2020, as the COVID-19 pandemic swept through the world, the City of Somerville, Massachusetts became the first jurisdiction in the country to enact an ordinance protecting romantic partnerships involving more than two people.²¹⁵ Prompted by the effects of the pandemic, the Somerville city council took into account the inability of some residents to access each of their partner's health insurance without legal recognition of their relationships.²¹⁶ Indeed, the ordinance begins by stating:

The City of Somerville recognizes the diverse composition of its citizenry and values its people. The city acknowledges that many laws governing family relationships were enacted in a time when not all families were properly recognized. The city, recognizing its commitment to nondiscrimination and fair treatment of its citizens and employees, adopts this ordinance acknowledging domestic partnerships. The ordinance allows persons in committed relationships who meet the criteria established by the city as constituting domestic partnerships to register at the office of the city clerk and obtain a certificate attesting to their status.²¹⁷

This statement's emphasis on non-discrimination sends a clear message on legislative intent.

The Somerville ordinance sets a definition of "domestic partnerships":

i) . . . a domestic partnership legally recognized as such in another jurisdiction or (ii) the entity formed by people who meet the following criteria and jointly file a registration statement proclaiming that:

They are in a relationship of mutual support, caring, and

²¹⁵ Jeremy C. Fox, *Somerville Recognizes Polyamorous Relationships in New Domestic Partnership Ordinance*, BOS. GLOBE (July 1, 2020, 11:21 PM), <https://www.bostonglobe.com/2020/07/01/metro/somerville-recognizes-polyamorous-relationships-newdomestic-partnership-ordinance> [https://perma.cc/D6BM-F4RM].

²¹⁶ STATE OF MASS., CITY COUNCIL OF SOMERVILLE, MATTERS OF BUSINESS OF THE CITY COUNCIL: REGULAR MEETING MINUTES at 5 (Apr. 7, 2020, 7:00 PM), <http://somervillecityma.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=2450&Inline=True> [https://perma.cc/6UKN-7XGT].

²¹⁷ SOMERVILLE, MASS. MUN. CODE §2-501 (2020).

commitment and intend to remain in such a relationship; and

(1) They are not related by blood closer than would bar marriage in the Commonwealth of Massachusetts; and

(2) They are competent to contract; and

(3) They consider themselves to be a family.²¹⁸

Mutual support simply means that each partner contributes something to the maintenance and support of the domestic partnership.²¹⁹

If all of the parties to the partnership meet these criteria, then they must register the domestic partnership with the City. To do so, all of the partners submit a domestic partnership registration form declaring that each partner meets the criteria set forth in the ordinance.²²⁰ The form must also include the name and birth date of each partner and must be signed by all partners together in person at the office of the city clerk or before a notary public.²²¹ Additional partners may be added or removed by amending the registration.²²² If one of the partners is married or in another domestic partnership, a notarized statement of consent from the spouse or other domestic partners must be filed.²²³

In the event that the relationship fails, as relationships sometimes do, the domestic partnership may be terminated in one of several ways. The death of one of the partners functions as an automatic withdrawal from the partnership, effective immediately upon the partner's death.²²⁴ A partner may also withdraw by filing a withdrawal statement with the city clerk.²²⁵ The statement must declare that the partner is withdrawing from the domestic partnership and that a copy of the withdrawal statement has been delivered—by hand or certified mail—to each member of the domestic partnership.²²⁶ Alternatively, the collective members of the partnership may choose to terminate the domestic partnership by filing a termination statement signed by all of the domestic partners with the city clerk.²²⁷

²¹⁸ *Id.* at §2-502(c).

²¹⁹ *Id.* at §2-502(d).

²²⁰ *Id.* at §2-503(a).

²²¹ *Id.*

²²² *Id.* at §2-503(b).

²²³ SOMERVILLE, MASS. MUN. CODE §2-503(c) (2020).

²²⁴ *Id.* at §2-503(d)(4).

²²⁵ *Id.* at §2-503(d)(1).

²²⁶ *Id.*

²²⁷ *Id.* at §2-503(d)(5).

Finally, if there are only two partners left in the domestic partnership, the withdrawal of one partner serves to terminate the domestic partnership.²²⁸

When the domestic partnership has been created, several rights become available. This extension of rights comes from two provisions in the ordinance:

(a) When the term “spouse” or “marriage” is used in other city ordinances, city policies, rules, or any other form having legal effect, it shall be interpreted to include a domestic partner or partnership, except to the extent that doing so would conflict with federal or state law. When the term “family” is used in other city ordinances, city policies, rules, or any other form having legal effect, it shall be interpreted to include domestic partnerships, except to the extent that doing so would conflict with federal or state law.

(b) The City of Somerville shall afford persons in domestic partnerships all the same rights and privileges afforded to those who are married, except to the extent that doing so would conflict with federal or state law.²²⁹

Together these ordinances not only directly extend marital rights and privileges to domestic partners, but also include domestic partnerships in additional ordinances that may not be directly related to marriage. The rights and privileges are, however, limited to the extent that they are consistent with Massachusetts law.²³⁰

In 2021, Cambridge Massachusetts joined Somerville as the second city to enact such an ordinance.²³¹ Soon afterwards, Arlington, Massachusetts passed a similar ordinance.²³² Finally, in 2024, protections for polyamorous domestic partnerships extended to Berkeley, California.²³³

²²⁸ *Id.* at §2-503(d)(3).

²²⁹ SOMERVILLE, MASS. MUN. CODE §2-505 (2020).

²³⁰ *Id.* at §2-506.

²³¹ *Cambridge Becomes 2nd US City to Legalize Polyamorous Domestic Partnerships*, POLYGAMY LEGAL ADVOC. COAL. (Mar. 9, 2021), <https://polyamorylegal.org/press/d5ydlvtmb8su74osh2wj0jsujfro2y> [<https://perma.cc/UD8N-NNWW>].

²³² Arlington, MA., Town Bylaws, Title I: General Government, art. 23 (2022), <https://www.arlingtonma.gov/town-governance/laws-and-regulations/town-bylaws/title-i-general-government#A23>.

²³³ Berkeley, CA., Discrimination on the Basis of Family or Relationship Structure Prohibited, Ord. No. 7905-M.S., ch. 13.22 (2024),

B. Why not plural relationships?

As discussed above, Chief Justice Roberts, in his dissent in *Obergefell*, voiced a slippery slope argument suggesting that same-sex marriage could ultimately lead to the recognition of polygamy. That hasn't quite happened, and polygamy still remains unlawful. Perhaps the legalization of polygamy will be revisited in the future, but that is a different matter. Here we consider rights for polyamorous partners.

This Article makes two arguments in favor of expanding legal recognition of polyamorous domestic partnerships. The first involves the extension of marital benefits to polyamorous partners. The second involves the welfare of children and the benefits experienced by children surrounded by polyamorous adults. Both find support in the principles enumerated in *Obergefell*.

It is worth mentioning the scope of this Article's proposed recognition. While polyamorous domestic partnerships have only received recognition on the local level to date, state-level recognition should be seen as a desirable goal. The reasons for this are that state-level recognition would provide access to all of the state benefits available by law individuals in domestic partnerships or marriages, while also laying the foundations for protection under the Full Faith and Credit Clause.

i. Partner's Benefits

Marriage comes with certain benefits. Initially, many of those benefits were economic in nature such as meeting the financial needs of couples and helping with the parenting needs of families.²³⁴ At the same time, marriage has been idealized as sacred, with Justice Kennedy writing that:

From their beginnings to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for marriage becomes greater than just two persons. Rising from the most basic human needs, marriage

<https://berkeleyca.gov/sites/default/files/documents/2024-05-21%20Item%2002%20Ordinance%207%2C905-N.S.pdf>.

²³⁴ Deborah Zalesne & Adam Dexter, *From Marriage to Households: Towards Equal Treatment of Intimate Forms of Life*, 66 BUFF. L. REV. 909, 931 (2018).

is essential to our most profound hopes and aspirations.²³⁵

Such is the lofty rhetoric employed to describe marriage.

Dignity and nobility aside, there are other, more tangible benefits to state recognition of a relationship. As Kennedy himself noted:

[W]hile the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.²³⁶

It is these rights and benefits which ordinances like the one in Somerville aim to protect.

While emphasis is placed on the unique nature of a marital relationship, there appears to be no better legal reason to favor two-partner relationships other than tradition. Indeed, Kennedy wrote:

[T]he centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." . . . It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.²³⁷

And yet, in the same opinion, the institution was expanded beyond consisting of a union between a man and a woman, demonstrating that

²³⁵ *Obergefell v. Hodges*, 576 U.S. 644, 656-57 (2015).

²³⁶ *Id.* at 669-70.

²³⁷ *Id.* at 657.

“millennia” of understanding about the nature of marriage was insufficient to prevent the evolution of civil marriage.

The exclusion of polyamorous families from obtaining government benefits merely because of the number of partners is little more than discrimination dressed as reliance on tradition. It is true that some benefits like inheritance and transfers of property rights could be obtained through legal methods such as contracts, but other essential rights, such as hospital visitation, could remain denied merely because a person was the third (or fourth, etc.) person to join a relationship. If marriage is an institution for those who choose to spend their lives together, it makes little sense to condition the provision of benefits upon the number of adult partners.

The second principle in *Obergefell* states that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”²³⁸ It then claims that marriage “dignifies couples ‘who wish to define themselves by their commitment to each other.’” Of course, the Somerville ordinance does the same thing, dignifying polyamorous domestic partnerships by granting them the same rights as married couples.

Similarly, the first principle in *Obergefell* states that the “right to personal choice regarding marriage is inherent in the concept of individual autonomy.”²³⁹ This necessarily includes the autonomy involved in deciding with whom a person wants to spend their life. An individual would be exercising the same autonomy in making the decision to spend their life as part of a polyamorous domestic partnership.

ii. Welfare of the Children

There’s an old saying that when it comes to raising children “it takes a village.” The “village” may often consist of friends, aunts, uncles, and grandparents, but for anyone familiar with the experience of queer individuals the “village” may only consist of one’s chosen family.²⁴⁰ But does the makeup of the “family” unit really influence the welfare of the children? One way to raise this question is by applying the Best Interest of the Child (BIOC) factors to analyze the potential impact of polyamorous families on children.

²³⁸ *Id.* at 666 (citing *United States v. Windsor*, 570 U.S. 744, 770 -72 (2013)).

²³⁹ *Id.* at 665.

²⁴⁰ A chosen family is “a group of individuals who are not biologically or legally related who deliberately choose to support and nurture each other like family.” DAVIS, *supra* note 8, at 66.

Every state has adopted some version of the BIOC factors, although the factors may differ to some degree from state to state.²⁴¹ Elisabeth Sheff, Kimberly Rhoten, and Jonathan Lane have reviewed the different state standards and found eight BIOC factors common to most states:

- 1) the child's wishes; 2) the parent's preferences and agreements
- 3) the resources or capacities of the parents to provide materially, emotionally, and physically to the child; 4) the presence of domestic violence or sexual abuse; 5) the moral fitness of the parents; 6) the stability of the child's schooling, community network, and residence; 7) the parent's emotional,

²⁴¹ *Compare* MINN. STAT. §518.17(a) (1996) ((1) a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development; (2) any special medical, mental health, developmental disability, or educational needs that the child may have that may require special parenting arrangements or access to recommended services; (3) the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference; (4) whether domestic abuse, as defined in section 518B.01, has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs; (5) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs; (6) the history and nature of each parent's participation in providing care for the child; (7) the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time; (8) the effect on the child's well-being and development of changes to home, school, and community; (9) the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life; (10) the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent; (11) except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent; and (12) the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.), *with* TEX. FAM. CODE ANN. §263.307 (2023) ((1) the child's age and physical and mental vulnerabilities; (2) the frequency and nature of out-of-home placements; (3) the magnitude, frequency, and circumstances of the harm to the child; (4) whether the child has been the victim of repeated harm after the initial report and intervention by the department; (5) whether the child is fearful of living in or returning to the child's home; (6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home; (7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home; (8) whether there is a history of substance abuse by the child's family or others who have access to the child's home; (9) whether the perpetrator of the harm to the child is identified; (10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision; (11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time; (12) whether the child's family demonstrates adequate parenting skills.)

loving relationship to the child, and 8) the child's relationship to any other adult (not primary care givers nor parents alone) who may significantly impact the child's best interest.²⁴²

The study conducted by Sheff and colleagues excluded two factors: (1) the parent's preferences and agreements, because it is fact-specific; and (2) the parent's emotional, loving relationship to the child, because of a lack of evidence to indicate any difference in how polyamorous parents love their children when compared to conventional families.²⁴³

When it came to the first of the remaining factors—the wishes of the child—Sheff and colleagues found that every single child interviewed stated that they would not change the structure of their polyamorous families.²⁴⁴ While different respondents provided different levels of endorsement for their family lives, all articulated a preference for polyamorous families to other alternatives.²⁴⁵ Taken collectively, Sheff and colleagues determined that the evidence shows that, if reviewed by a judge considering the best interest factors, none of the children would choose to grow up without their parents despite the parents' polyamorous lifestyle.²⁴⁶

The study also found that another advantage for children in polyamorous families was the “significant material, emotional, and financial resources these polyamorous families provided through the active involvement of multiple adults in their lives.”²⁴⁷ These advantages included things like help with transportation and assistance with homework.²⁴⁸ A number of participants also reported that having an increased number of adults resulted in more time and attention being given to the children.²⁴⁹ The participants also reported the importance of their relationships with adult care-givers who were not their biological parents, and the benefits that come with having a larger adult care-giver network.²⁵⁰

The study conducted by Sheff and colleagues describes four specific benefits provided by polyamorous families. First is the fact that the children had abundant financial and material resources.²⁵¹ Second, the collaborative nature of polyamorous families increases the availability of multiple adults

²⁴² Elizabeth Sheff, Kimberly Rhoten, & Jonathan Lane, *A Whole Village: Polyamorous Families and the Best Interest of the Child Standard*, 31 CORNELL J. L. & PUB. POL'Y 287, 303 (2021).

²⁴³ *Id.*

²⁴⁴ *Id.* at 310.

²⁴⁵ *Id.* at 311.

²⁴⁶ *Id.* at 312.

²⁴⁷ *Id.*

²⁴⁸ Sheff, Rhoten & Lane, *supra* note 242, at 312.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 316-17.

²⁵¹ *Id.* at 322.

to care for children.²⁵² Third, polyamorous parents have open and honest relationships with each other and their children, resulting in strong emotional and communicative capabilities.²⁵³ Fourth, polyamorous families have large family and supportive networks composed of multiple adults.²⁵⁴ Taken together, a judge analyzing the impact of polyamorous relationships on children would be hard-pressed to find that polyamory in and of itself is harmful to children.

A final, common BIOC factor involves the morality of the parents. In some ways, this is the factor most dangerous to polyamorous families due to social and judicial presumptions that polyamory is immoral.²⁵⁵ It is worth noting that CNM, and polyamory specifically, provides children with the opportunity to view relationships based on a strong ethical framework whose fundamental elements include honesty, self-responsibility, and treating others as they themselves would desire to be treated.²⁵⁶ From a moral standpoint then, polyamory teaches many desirable values, and the morality of the parents should not be considered to weigh against the best interests of children.

The third principle of *Obergefell* is relevant here. That principle states that a basis for protecting the right to marry is that it “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”²⁵⁷ The evidence provided by Sheff and colleagues shows that many of those benefits and protections that marriage provides for children are present, perhaps even to a greater degree, in romantic relationships featuring more than two adults. It seems, then, that the third principle favors the recognition of polyamorous domestic partnerships as much as it favored the extension of marriage to same-sex couples.

V. CONCLUSION

Beginning with *Loving* in 1967 and culminating in *Obergefell* in 2015, marriage equality has been litigated passionately, and victories have been hard won. Despite the sanction of the courts and growing public approval, discrimination is still present in the experience of same-sex couples. Now, as marriage equality for same-sex couples celebrates its tenth anniversary, it is only natural to ask what comes next. Consensual non-monogamy and

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Sheff, Rhoten & Lane, *supra* note 242, at 322.

²⁵⁵ *Id.* at 323.

²⁵⁶ *Id.*

²⁵⁷ *Obergefell v. Hodges*, 576 U.S. 644, 667(2015).

legal protection for CNM families may be the next battlefield in LGBTQ relationship rights.

The COVID-19 pandemic brought into sharp relief the ongoing problems faced by queer people in CNM relationships. While loved ones suffered in hospitals, their partners were unable to visit because they were not married. Against this backdrop, communities like Somerville, Arlington, and Cambridge, Massachusetts enacted ordinances recognizing the rights of individuals in polyamorous relationships. Since then, local recognition of polyamorous families has continued to expand. At this time, however, no state recognizes rights for polyamorous families.

Yet reasons exist for states to do so. Two significant reasons for states to recognize legal protections for polyamorous families include the availability of state-backed benefits to married couples and the welfare of the children of adults involved in polyamorous families. If the only reasons standing between recognizing polyamorous families are traditional notions of marriage being between two people—and note, polyamory is not marriage but rather has taken the legal structure of a domestic partnership—and the fact that these relationships have more than two adults, then there is no real legal reason to delay acknowledging the legitimacy of CNM family structures.