Introduction

MARRIAGE EQUALITY—AN IMPORTANT BUT LIMITED VICTORY

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. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.

Supreme Court Justice Anthony M. Kennedy

There are almost as many kinds of relationships as there are people in combination. . . . The marriage issue . . . seems to be a way of denying recognition to [most] relations.

Michael Warner

What do adults in committed relationships need from government? This vital question has been submerged for far too long by the focus on marriage as the ideal—no, the only—form of adult relationship that deserves recognition. That’s not a healthy or realistic view, but there’s been little appetite at either the state or (especially) the federal level for sober consideration of how people in all sorts of interdependent relationships might be legally supported.

A moment’s reflection reveals some of the problems with elevating marriage to its unique and unchallenged status. First, marriage is too bossy. It comes with a strong set of default rules. Although couples can
modify the terms of marriage through prenuptial agreements, these are rarely executed and are often seen as antithetical to the promise and premise of marriage by the couples choosing to wed. By and large, then, married couples don’t actively select (and are often not even aware of) all of the terms and conditions of their union. Second, continuing with marriage as the unique status is willfully blind to the many millions of adults who are *in fact* in committed relationships other than marriage but nonetheless need and deserve support. Third, marriage is just the wrong status for many couples.

This book provides a foundation for creative thinking about how we might build something new and more capacious—perhaps even sprawling. The inspiration for this model is an institution called the designated beneficiary agreement. This legal creature is currently in effect only in Colorado, but it deserves to be expanded and exported to every state. Its unwieldy name notwithstanding, some version of this status stands to do immeasurable good for many—perhaps millions of—people. As we’ll see, a retooled designated beneficiary agreement law provides people with the greatest flexibility to organize their relationships and, if it is properly designed, to gain state support for them.¹

This reckoning with the deficiencies of marriage is long overdue and has been obscured for at least the past thirty years by the laser focus on a different but related legal disability: the exclusion of gay and lesbian couples from the institution of marriage. That spotlight diverted focus from the wider issues with the marriage-only concentration. Yet the step-by-step path to marriage equality led to an unintentional but providential spin-off. It has inspired the creation of several compromise legal statuses designed to provide same-sex couples with some of the rights and benefits of marriage. The debates that led to those statuses, as well as their content, have allowed for a clearer focus on how the law might better help all committed adults—not just gay and lesbian couples.

We begin at the end of the momentous battle for marriage equality.

On June 26, 2015, many Americans—gay and straight alike—celebrated victory in the decades-long struggle for marriage equality. On that day, the United States Supreme Court issued its seminal decision in *Obergefell v. Hodges.*² By a slim 5–4 vote, the justices held that same-sex couples have a constitutional right to cement their love and commitment
through marriage. The decision is rightly seen as one of the great triumphs in the perpetual movement toward ever greater civil rights, because marriage was the one place where members of the LGBTQ community were denied an important government benefit—and a coveted status—by virtue of their willingness to be open about their lives and their love.

As many predicted when Obergefell was decided, the conversation has now shifted to what might be considered questions collateral to marriage. Some of these should be easily answered. Married gay and lesbian couples must be entitled to the same government benefits as straight couples, for instance—even though the Texas Supreme Court has held otherwise. Other questions are more challenging, such as whether business owners can claim religious or “expressive” exemptions to their obligation to serve gay and lesbian people—often in connection with the very wedding ceremonies that cement the status that these couples are finally entitled to enjoy.

Despite these post-Obergefell skirmishes, most observers seem to take marriage equality itself as settled and not likely to be upended—even with a more conservative SCOTUS in place. There’s an understandable inclination to move on, and, for the most part, that’s happened. Victory has been achieved.

Yet the marriage equality movement is in an important sense incomplete. While successful on its own terms, it mostly avoided raising broader questions. Gay and lesbian couples were placed on equal footing with other marriage-eligible folks, but Obergefell—and the movement that led to it—ended up reinforcing the divide that separates married couples from everyone else. As Professor Melissa Murray has said, the Obergefell decision promoted “marriage—and only marriage—as the normative ideal for intimate life.” This insight concisely states one of the persistent criticisms of marriage equality: by emphasizing the rights of gay and lesbian couples to be granted the perquisites of marriage on the same basis as their straight counterparts, the marriage equality movement implicitly reinforced the strong legal fence that separates married couples from others in committed relationships.

The movement also mostly sidestepped questions about what marriage is. What does it mean, and how should it be supported in the twenty-first century? And what other types of adult relationships—intimate and otherwise—should the law recognize?
These questions are more vital than ever today. Misty-eyed paeans to marriage can’t disguise the fact that an ever-increasing number of people are choosing not to wed. A watershed moment was reached in 2013, when, for the first time, the number of unmarried adults exceeded the number of married adults in the United States. Of perhaps greater significance is the uneven distribution of marriage within society. While marriage rates were once relatively even across socioeconomic classes, over the past forty years or so those with higher levels of education and greater wealth have married at significantly higher rates than the less well educated and the poor. There is also now a sharp distinction between marriage rates between races—Black men and women are far less likely to marry than white men and women, for instance. Laws and policies that ignore such large and diverse parts of the population need serious rethinking.

A useful way to begin thinking about the place of marriage and the limitations of focusing too narrowly on that singular status is to consider United States v. Windsor, decided just two years before Obergefell. The litigation involved a challenge to the Defense of Marriage Act (DOMA), a federal law that applied to same-sex couples who were legally married in their home state. Through DOMA, their rights faded at the state border, because the act fenced them out of the many, many federal goodies that are showered on their different-sex counterparts. These include income tax benefits, preferential immigration status, and certain social security benefits, as well as a host of other advantages that come to a spouse under a variety of social programs. In Windsor, the Supreme Court declared DOMA unconstitutional and held that the federal government had to recognize marriages that were legal at the state level.

The case was powerful precisely because of the side-by-side contrast between the plaintiff, Edie Windsor, and other surviving spouses. When her wife, Thea Spyer, died, in 2009, Windsor didn’t qualify for an exemption from the federal estate tax, even though she would have had she been married to a man. The story was made more compelling by the sheer length of the two women’s relationship. Although they had been legally married for only six years, they had been together for almost four decades. For all that, Windsor and Spyer were legal strangers under federal law—and Windsor was slapped with an estate tax bill of $363,000.
So the fact that the two women were married under state law didn’t do them much good—especially financially, and especially after Spyer’s death. During oral argument on the case, the late justice Ruth Bader Ginsburg memorably referred to the women’s union as a “skim milk” (federal-benefit-free!) marriage. The comparison was devastating. How could Congress get away with creating such rank inequality? A purer denial of basic justice would be harder to imagine, so striking down DOMA was an easy call. Windsor got her tax exemption, and all gay and lesbian married couples were able to share in the victory—their marriages were now just as good as everyone else’s.

But are everyone else’s marriages too good? Perhaps Justice Ginsburg’s metaphor was more apt than she realized. If straight marriages are “whole milk,” as she implied, then they contain an unhealthy amount of fat. Maybe the solution should be skim-milk marriages for all.

What ingredients would such fat-free marriages contain? We can start thinking about that question by acknowledging that marriage contains too many benefits (fat), some of which aren’t closely related to why the state supports the institution. During the litigation over whether same-sex couples should be allowed to marry, the Government Accountability Office estimated that marital status was a factor in determining rights, benefits, and obligations in some 1,138(!) statutory provisions. The best known and most significant among these are federal income tax and estate tax rules that treat married and unmarried couples differently, eligibility for Social Security survivor and retirement benefits, and the allowance in immigration law for US citizens to sponsor their spouses into the country as permanent residents. Marriage is also the trigger for many benefits at the state level, including inheritance rights, economic protection at divorce, the right to sue for wrongful death under tort law, and the right to hold property in a privileged legal form. And it’s not just the government that privileges marriage either—as anyone who receives spousal health or life insurance benefits from a private employer will attest.

But while these benefits are showered, indiscriminately, on those who are married, others have no access to them at all—no matter the depth or length of their commitment to another person. The marriage laws are problematic, then, and neither Windsor nor Obergefell addressed this divide. The decisions added gay and lesbian couples to the privileged side
of the ledger but left untouched the disparity the law has erected between the married and the unmarried. Because the inclusion of these newly eligible pairs into the marriage club was in one sense radical, it was easy to miss that the movement was, in another sense, quite conservative. The velvet rope was unclasped for gay and lesbian couples but not for others. While the voices of the more creative opponents of this formal equality were hard to hear over the celebrations, the seeds of a more expansive view of relationship recognition and state support had already been planted. We’ll take a close look at some of these efforts over the course of this book.

None of this should detract from recognizing the extraordinary, and swift, accomplishment of marriage equality. In the earliest cases challenging the exclusion of gay and lesbian couples from marriage, courts were uncomprehending and unsympathetic. But as the LGBTQ community became more visible over the past thirty years, so too did its members’ relationships. Courts and then lawmakers began to take notice.\textsuperscript{18} \textit{Windsor} isn’t the only case where a profile of the law’s effect on actual people insinuated itself into a judicial opinion. The Massachusetts Supreme Court foregrounded its pathbreaking 2003 marriage equality decision, \textit{Goodridge v. Department of Public Health}, by telling the stories of the fourteen couples seeking marriage licenses—a committed, responsible, and in some cases child-rearing group of unfairly treated citizens.\textsuperscript{19} Justice Anthony Kennedy’s majority decision in \textit{Obergefell} followed a similar path, revealing heartbreaking details about James Obergefell’s marriage in Maryland to a dying man and the state of Ohio’s subsequent refusal to acknowledge that union by placing his name on his deceased partner’s death certificate. Also featured was a lesbian couple who had not been able to jointly adopt two seriously ill babies, so that each child had only one legal parent.\textsuperscript{20}

This book follows this narrative approach, presenting profiles of people in adult relationships that the law does not consistently recognize or support. For instance, the lifelong bond between two elderly sisters from Philadelphia underscores the dichotomy between Edie Windsor and Thea Spyer and other adults in committed relationships. These siblings, who appear in chapter 4, have lived together all their lives. They are emotionally and financially interdependent, no less than were Windsor and Spyer. But since they are sisters, they of course remain ineligible for marriage—
meaning that the survivor will not enjoy the estate tax exemption that Windsor ultimately received. Is that fair? Why or why not? And is the estate tax exemption fair in the first place? More broadly, how should the law support couples in relationships of different kinds?

Although the marriage equality movement achieved victory without answering these questions, it did not quite manage to avoid raising them—in two different but related ways. First, in tackling the issue of whether government had a valid reason for excluding same-sex couples from marriage, courts and legislatures were occasionally drawn into a broader discussion of what marriage means—what is it for, and why does the state support it? I address these crucial questions and make suggests for reforming the institution. Second, the growing realization among gay and lesbian couples that they were being treated unfairly in their relationships led them to advocate for “consolation prizes”: other legal statuses that conferred benefits on them (and sometimes on other unmarried couples) short of marriage. These statuses began to appear in the 1980s and now flourish in cities, counties, and states. They carry several names and varying legal incidents, with attendant uncertainty and confusion. But they have the potential to serve as auguries of a more comprehensive alternative to marriage—one for which I enthusiastically make the case in this book.

In searching for real, defensible reasons for barring same-sex couples from marriage, defenders of traditional marriage could not avoid delving into existential issues about marriage itself. For instance, Supreme Court Justice Samuel Alito, in dissenting from the ruling in Obergefell, identified two competing views of marriage. The traditional view (which, he argued, states had a right to maintain) is that marriage is to encourage procreation in a stable setting—and since only different-sex couples can procreate without assistance, states can limit marriage rights to those couples. He went on to express a concern that once the marriage-procreation link was sundered, over time the institution might be “seriously undermine[d].”

The other side of the debate, for Alito, was the modern view that marriage is mostly about “promot[ing] the well-being of those who choose to marry.” This, he acknowledged, results in good things for society too: by providing “emotional fulfillment and the promise of support in times of need . . . marriage indirectly benefits society because persons who live in stable, fulfilling, and supportive relationships make better citizens.” That’s