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On Marriage Equality and Transformation Through Preservation

Courtney Cahill
Florida State University College of Law

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Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 **Harv. L. Rev.** 1185 (2016).

Courtney Cahill

For nearly as long as same-sex couples have been pressing for marriage equality, progressive legal commentators have been engaged in a robust debate over the desirability of making marriage the main focus—indeed, a focus—of the gay rights movement. Some in this conversation view same-sex marriage as radical, an institution capable of disrupting the links between biology and gender that have long structured marital parenthood.1 Others view it as regressivist, an institution bound to co-opt individuals who choose to organize their lives outside of marriage and one that betrays earlier family law advocacy on behalf of nontraditional parents by valorizing the link between marriage and parentage.2 For many in this latter camp, same-sex marriage is a normatively repressive "straight"-jacket (pun intended).

In *Marriage Equality and the New Parenthood*, Douglas NeJaime aims to unsettle the second of these views, but in the process destabilizes them both. He does so by foregrounding the legal relationship between marriage and parenthood before, during, and after the nationwide push for marriage equality. Neither completely radical nor completely reactionary, marriage equality, NeJaime shows, is the product of progressive family law pluralism, which itself was the product of a vision of marriage that was in some respects traditional. Even more, NeJaime argues that marriage equality will produce—and already has produced—the pluralistic family law from which it springs, and will likely reverberate well beyond the confines of outlying groups like sexual minorities given its potential to erode the legal priority of marriage, an institution that is already in decline for many. On this masterful telling, marriage equality is at once radical margin and less-radical center.

To disrupt the binaries—like margin/center and non-marriage/marriage—on which scholars often rely when conceptualizing the family and its legal regulation, NeJaime turns to history—specifically, to national legal developments surrounding the heterosexual family in the 1960s and 1970s and to a case study of nontraditional parenting cases and advocacy in California from 1984-2005. His aim in so doing is refreshingly simple, though by no means simplistic: to show that traditional paradigms like the heterosexual family have long been deployed to facilitate more, not just less, inclusive parentage principles.

Representing in many ways the heart of NeJaime's article, the California case study illuminates the delicate *pas de deux*that existed between marriage and non-marriage in that state's family law advocacy from 1984 to 2005. Here, NeJaime expertly weaves together myriad historical sources to show that advocates—including some of the same LGBT advocates who would later spearhead marriage equality on the national stage—and courts argued for and solidified, respectively, the rights of non-biological and non-marital families by appraising their similarities to a marital ideal characterized by relational commitment and interdependence. Crucially, these legal

actors used marriage—whether actual, as in the case of heterosexual couples who created family through surrogacy, or symbolic, as in the case of same-sex couples for whom legal marriage was not an option but who nonetheless created non-biological kinship through vehicles like adoption and alternative insemination—in order to generate *new* family forms grounded in *novel* legal indicia like intent, conduct, and function. Marriage, in other words, was deployed during this period as a proxy for the very principles—intent, conduct, and, function—that would ultimately displace the law's traditional markers of kinship: biology, gender, sexual orientation, and even marriage itself.

As if creating a historical counter-narrative that persuasively challenges the progressive critique of marriage equality were not by itself a notable feat, NeJaime then uses that narrative to highlight marriage equality's progressive dimensions and radical potential. Far from abandoning family law pluralism, NeJaime argues, marriage equality solidifies it as a constitutional norm—with potentially universal application. He shows that marriage equality jurisprudence, including *United States v. Windsor* and *Obergefell v. Hodges*, embodies the inclusive parentage principles that emerged from alternative family law advocacy decades earlier; those same principles, NeJaime suggests, will continue to alter the landscape of American family law for years to come. A direct descendant of family law pluralism, marriage equality, on NeJaime's account, has the capacity to further instantiate intentional, functional kinship—by, for instance, decentering biology's primacy in shoring up common law doctrines like the marital presumption—and even to erode the supremacy of marriage (and its traditional correlate, dyadic parenthood) in ways that potentially touch everyone, not just same-sex couples.

While an absorbing analysis of the dynamic synergies between presumed opposites in the marriage equality movement and the critical conversation surrounding it, *Marriage Equality and the New Parenthood*is also a fascinating study of the evolution of law and social movements. Far from a simple clash of binaries, law is better described as a feedback loop that changes ever so slightly with each progression. The margin changes the center even as it is absorbed by it, though on close inspection the margin was never completely isolated from the center at all. According to the particular feedback loop (and margin/center relationship) that NeJaime identifies, the expansion of heterosexual parentage (eventually)*led to* the recognition of LGBT family formation, which (eventually)*led to* marriage equality for same-sex couples, which *might (eventually) lead to* the further expansion of heterosexual and LGBT parenthood and even to the diminishment of marriage as the dominant relational form in American law and culture—for everyone. Put in margin/center terms, a traditional or central relationship (marriage) stimulated the expansion of a marginal one (non-marriage), which in turn facilitated the development of a central relationship (same-sex marriage) that might over time multiply marginal practices—practices that transform the very relationship that gave rise to them. And so the wheel turns.3

In some ways, in fact, NeJaime's analysis of marriage equality's evolution and, in his words, its "transformative aspects" represents an intriguing example of the inverse of Reva Siegel's theory of "preservation through transformation."4 Where Siegel holds that, in some contexts, legal justifications transform over time in order to preserve the status quo,5 NeJaime shows us that sometimes, at least, legal justifications (here, family law pluralism) are *preserved* over time in order to *transform* the status quo (here, traditional marriage). His, then, is an example of "transformation through preservation." The comparison is not perfect, but that should not prevent us from thinking about the larger implications and applications of NeJaime's important contribution, a compelling meditation of how law is made—both within the marriage equality context and well beyond it.

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1. *See, e.g.*, Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 **Geo. L.J.** 1855, 1864 (2012); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 **L. & Sexuality** 9, 16–17 (1991). [?]
2. *See, e.g.*, Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 **Va. L. Rev.** 1535 (1993). [?]
3. NeJaime identified a similar dynamic in an earlier article, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*

, 102 **Calif. L. Rev.** 87 (2014). There, NeJaime uses a case study similar to the one employed here to demonstrate that formal marriage was an organizing principle for LGBT advocates who pressed for same-sex domestic partnership recognition in California in the 1980s and 1990s. NeJaime's *Before Marriage* uncovers a feedback loop similar to the one he uncovers here: marriage helped to generate non-marriage recognition, which, in turn, helped to generate a new vision of marriage capable of accommodating a formerly marginalized group (sexual minorities). *See* NeJaime, *supra*, at 165 (stating that "[e]ven as LGBT advocacy on domestic partnership in some ways—and counterintuitively—furthered the centrality of marriage, it elaborated the content of marriage and consequently contributed to a model of marriage capable of including same-sex relationships"). [?]

4. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 **Yale L.J.** 2117, 2119 (1996). [?]
5. *See* Siegel, *supra*note 4, at 2119 (using the theory of "preservation through transformation" to explain the evolution of domestic assault law during the nineteenth century); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 **Stan. L. Rev.** 1111, 1119 (1997) (using the theory of "preservation through transformation" to explain "the evolution of racial status law during the Reconstruction era"). [?]

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